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February 3, 2012

Via Federal Express

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: *Request for Review from Decision and Direction of Election in Case 17-RC-071485*

Dear Mr. Heltzer:

Please find attached the Employer's Request for Review in the above-captioned matter. Pursuant to the Board's regulations, enclosed is the original request with seven copies.

Very truly yours,

FOULSTON SIEFKIN LLP

Donald D. Berner

DDB/sw
Enclosures

Dean E. Norris, Inc. Professional Mechanical Contractors, Inc., and DEN Management Company, Inc. as a single employer
Sheet Metal Workers' International Association, Local No. 29, affiliated with Sheet Metal Workers' International Association, AFL-CIO

Employer's Request for Review from Decision and Direction of Election in Case No. 17-RC-071485

Pursuant to Section 102.67 of the Board's Rules and Regulations, and on behalf of Dean E. Norris, Inc. ("Dean"), Professional Mechanical Contractors, Inc. ("PMC"), and DEN Management Company, Inc. ("DEN"), we are requesting the Board review the Decision and Direction of Election ("Decision") issued by the Regional Director for Region 17 in Case 17-RC-071485.

As set forth in more detail below, review is appropriate because the analysis through which the Regional Director determined that Dean, PMC, and DEN constitute a single employer reflects a substantial departure from established Board precedent. 29 C.F.R. § 102.67(c)(1). In particular, the Regional Director's Decision reflects a complete discounting of the clear lack of centralized labor relations control exercised with respect to the employees of Dean and PMC. This factor has previously been well-understood as the most critical to the single-employer analysis.

The Regional Director's decision with respect to the supervisory status of Dean's Field Foreman is also worthy of review.[1] As an initial matter, the Decision is clearly erroneous because it fails to account for uncontroverted testimony with respect to the authority possessed by the foremen in the area of discipline. Review is also justified because leading up to and

[1] PMC does not seek review of the Regional Director's Decision regarding the supervisory status of its foremen.

throughout the hearing, the hearing officer pushed the parties to limit the number of witnesses as much as possible so as to expedite the completion of the hearing. On the heels of this guidance the Regional Director then cites the failure of Respondents to call each individual foreman to testify. This is a classic Catch-22 and it should not be condoned. Whether viewed under the clearly erroneous or prejudicial error standard, Board review is appropriate. *Id.* § 102.67(c)(2), (3).

A. Board Review Is Appropriate Because the Regional Director's Single Employer Decision Reflects a Departure from Established Board Law.

In assessing potential single-employer situations, the Board looks at four factors, but the centralized control of labor relations is by-far the most important. *Advanced Architectural Metals, Inc.*, 351 N.L.R.B. 1208, 1214 (2007) (affirming ALJ, who stated that centralized control of labor relations was "of particular importance"); *Mercy Hospital*, 336 N.L.R.B. 1282, 1283-84 (2001) (stating centralized control of labor relations is the "most critical" factor to the single-employer analysis). The ALJ in *Avanti Health Sys., LLC*, 357 N.L.R.B. No. 129, 2011 NLRB Lexis 715 (Dec. 12, 2011), summed it up best. "Centralized control of labor relations is 'critical' and 'a single employer relationship will be found only if one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other." *Avanti Health Sys.*, 2011 NLRB Lexis 715, *12 (quoting *Dow Chemical Co.*, 326 N.L.R.B. 288 (1998)).

Where the Board has distinguished the importance of this factor is in the unique situation where centralized control of labor relations cannot possibly exist because one of the entities at issue has no statutory employees. *Cimato Bros., Inc.*, 352 N.L.R.B. 797, 799 (2008) (2-member decision); *see also A.D. Connor, Inc.*, 357 N.L.R.B. No. 154, *113 n. 53 (Dec. 28, 2011) (ALJ decision quoting from previous Board decisions that stated "where some companies have no employees, the factor of centralized control of labor relations becomes less important"). Apart

from this limited context, which is inapplicable to the present case, Respondents are unaware of any case in which the Board found a single-employer relationship to exist without a finding of centralized labor relations control.

Despite the wealth of authority that centralized control of labor relations is the most important factor to the analysis, the Regional Director's decision paved new ground by, in effect, dismissing the significant decentralization of labor relations functions as between Dean and PMC. The Regional Director glosses over the fact that decisions with respect to hiring, firing or lay-offs, disciplining, determining staffing levels, making job assignments, supervising the day-to-day work, and approving leave requests all occurred separately as to each entity, and this authority was vested at levels beneath any common ownership. For example, Steve Luce, the HVAC Manager for PMC had this authority for PMC sheet metal workers, while Dusty Meyer, the Sheet Metal General Manager for Dean, had this authority for Dean. Neither of these individuals had any management interest in the other, or in DEN. [Decision, pp. 5-7.] Likewise, there was no evidence that these individual's decision-making as to any of these critical labor relations areas was limited or constrained by the other or DEN. Authority as to these decisions goes to the heart of whether centralized control of labor relations exists and the Regional Director dismissed it with virtually no discussion. *San Luis Trucking, Inc.*, 352 N.L.R.B. 211, 226-27 (2008) (discussing factors relevant to labor relations inquiry).

Acknowledging that some labor relations differences exist, the Regional Director rationalized these differences away by citing to the fact that Dean operates under a collective bargaining agreement and PMC does not. [Decision, p. 22.] This fact only addresses a handful of the relevant points of inquiry to assess labor relations. More importantly, taken to its logical end, the Regional Director's position would effectively write the labor relations factor out of the

single-employer analysis whenever one of the purported joint entities is unionized and the other is not. Under that view, there will always be a collective bargaining agreement upon which the differences in labor relations treatment can be explained away. In addition, the Regional Director's citation to the Board's recent decision in *Naperville Jeep/Dodge*, 357 N.L.R.B. No. 183 (Jan. 3, 2012), to support this position is significantly misplaced.

Naperville involved two Chrysler dealerships in different suburban Chicago cities that were owned by the same parent. In one of the dealerships the service mechanics were unionized, but not in the other. As a result of the Chrysler Corporation bankruptcy, the dealership with the unionized mechanics closed and it appears that most of the mechanics applied and were hired at the other dealership. When the mechanics began working at the other dealership, the employer unilaterally stopped applying the terms of the bargaining agreement without any effects bargaining, which drew a variety of unfair labor practice charges. In assessing whether the two dealerships could be held to be a single-employer, the ALJ aptly noted that the "most important" timeframe for assessing the facts relevant to this question was the period after the mechanics moved to the other dealership and the unfair labor practices were alleged to have occurred. During this timeframe, the mechanics from both dealerships worked side-by-side, performing the same general functions, under the same supervision and in the ALJ's view, the labor relations were "clearly centralized." This factual scenario is nothing like the relationship between Dean and PMC. Moreover, the over-riding legal issue in this case was not the single-employer question, but rather whether the employer had a continuing obligation to bargain with the employees from the closed dealership, and not whether a bargaining obligation existed with respect to the combined unit of mechanics. This further distinguishes this case from the context at issue with Dean and PMC.

Because the Regional Director's Decision fails to accord the weight and deference required by established Board law to the significant differences in how labor relations issues are handled between Dean and PMC, the Board should review the Decision.

B. The Regional Director's Determination that the Dean E. Norris Foremen Are not Statutory Supervisors Is Contrary to the Evidence in the Record and Fundamentally Unfair in Light of the Pressure Imposed on the Parties to Limit the Number of Witnesses Offered at the Hearing.

Review of the supervisory decision with respect to the Dean E. Norris foremen is appropriate because the Regional Director's Decision is clearly erroneous in that he did not consider all the relevant testimony in the record. In rejecting the contention that the Dean foremen were statutory supervisors, the Regional Director found that "the record testimony supports that all discipline is handled by General Manager Meyer." Decision, p. 27. Simply put, this finding is manifestly inaccurate. Mr. Meyer testified that he wanted to be kept apprised of discipline issues within his Division, but this is not inconsistent with the fact that he had vested authority in each of his foreman to initiate discipline within their crew. That vesting of authority is the issue most relevant to the analysis, and the one the Regional Director ignores in his Decision. The undisputed testimony from Mr. Meyer is that the foremen had authority to administer discipline and that each was aware of this authority because Mr. Meyer had expressly told them that they were authorized to handle disciplinary matters on their crew, up to issuing a de facto suspension by sending an employee home without pay, even if the foreman was unable to reach him first. [Testimony of Dusty Meyer, Record Transcript at p. 452:14-23, 471-72, 74-75.]

The Regional Director notes that the record contains no specific examples of the exercise of this authority, but this also misses the relevant point. The Act requires only the possession of authority in any of the areas enumerated in Section 2(11), it does not require the actual exercise

of such authority. *Sheraton Universal Hotel*, 350 N.L.R.B. 1114, 1118 (2007); *Mountaineer Park, Inc.*, 343 N.L.R.B. 1473, 1476 (2004). Thus, the Regional Director's requirement that disciplinary authority be exercised imposes a requirement that is inconsistent with the Act.

Although it should not be relevant to the outcome, the Regional Director's reliance on the lack of testimony from each of the individual foremen is troubling. First, and most important, the record contains undisputed testimony as to the authority of the foremen in the area of discipline. Once this testimony came in and was not refuted or challenged by any other witness, Respondent Dean had enough evidence to support its position with respect to this issue. Given the fact-finding nature of the proceeding, if the Petitioner wanted to refute this evidence, it could certainly have called its own witnesses, including any or all of the Dean foremen to testify individually, but it chose not to do so.[2]

More troubling, however, is the fact that prior to the hearing, and during breaks in the proceedings, the hearing officer made her views clear that she wanted to expedite the hearing process and tacitly discouraged the parties from calling witnesses who might be viewed as "unnecessary." Recognizing the hearing officer's significant input into the Regional Director's eventual decision, this put Respondents in a precarious position. To call additional witnesses to make absolutely certain that the record is complete would risk drawing the ire of the hearing officer who may view such witnesses as unnecessary. Heeding the hearing officer's urgings, and in light of the fact that Mr. Meyer's testimony was not challenged, Dean elected to rest its case

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[2] That Petitioner did not call any of the individual foremen to testify is telling. For years, Dean and the Petitioner have been parties to a collective bargaining agreement pursuant to Section 8(f). Under these agreements, the parties have agreed to include foremen in the bargaining unit; thus, each foreman at issue has been a union member for all of his employment with Dean. Through this relationship, Petitioner was well aware of the disciplinary authority possessed by each of the foreman. No doubt this knowledge significantly influenced Petitioner's decision to not call these individuals as witnesses in response to Mr. Meyer's testimony.

with Mr. Meyer. For the Regional Director to then take Dean to task for not calling the individual supervisors (*see* Decision, p. 26) is manifestly unfair.[3]

Finally, the Regional Director's comment about supervisory ratio misstates the relevant evidence. [Decision, p. 26 (noting ratio of supervisors to employees of 2:3). First, supervisory ratio is not a determinative factor for supervisory status. At most, it is secondary indicia and the Regional Director's Decision makes clear that secondary indicia are insufficient to establish (or disestablish) supervisory status as he dismissed the undisputed evidence that each Dean foreman receives a higher wage rate, and is provided with a company cellular phone and truck. [Decision, p. 27.] Additionally, even assuming supervisory ratio should be considered to some extent, logic dictates that the appropriate ratio should be based on the potential voters in the bargaining unit. In the construction industry, where laid-off employees get to vote because of the likelihood that they will be recalled to work, it defies logic to exclude these employees when calculating a supervisory ratio. In fact, as specifically discussed with the hearing officer after the close of the hearing with respect to the stipulated employee lists, Dean has since hired additional employees to bring its current complement of bargaining unit employees up to 16, which includes only four foremen. This is substantially greater than the 3:2 ratio as calculated by the Regional Director, and hardly unusual in the construction industry.

In summary, the analysis under which the Regional Director determined that Respondents constitute a single-employer is inconsistent with the Board's well-established authority. The Regional Director also failed to account for the uncontroverted record testimony as to the disciplinary authority possessed by the Dean foremen that justifies a finding that each is a statutory supervisor. Furthermore, it is fundamentally unfair for the hearing officer to have

[3] If, as the Decision would indicate, the Board believes that putative supervisors must testify in order to justify their supervisory status, Dean would urge the Board to grant review and reopen the hearing so that these individuals may be called to provide their own testimony.

pressured the parties to limit the testimony at the hearing, to then have the Regional Director cite the lack of such testimony as a basis for finding the Dean foremen were not supervisors. Each of these bases provides a compelling reason, as set forth in 29 C.F.R. § 102.67, to justify further review by the Board with respect to the Regional Director's Decision and Direction of Election.

Respectfully submitted,

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