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February 8, 2012

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570-0001

Re: Dean E. Norris, Inc. et al.
Case 17-RC-071485

Dear Board Members:

Please find enclosed for your consideration eight (8) copies of the Petitioner's Statement in Opposition to the Employer's Request for Review in the above-referenced case.

Sincerely yours,

John P. Hurley

Encls.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Dean E. Norris, Inc., Professional Mechanical Contractors, Inc. and DEN Management Company, Inc. as a Single Employer

Employer

and Case 17-RC-071485

Sheet Metal Workers' International Association, Local No. 29

Petitioner

STATEMENT IN OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW OF DD&E

Single Employer Finding.

The Employer assails the analysis by the Regional Director only with respect to his finding that the "most critical" factor of centralized control of labor relations was met in reaching the determination of single employer status in this case.[1] The Employer, by implication, does not quarrel with the analysis of the other three factors by the Director: common ownership, common management and functional integration of operations.

The Employer places most of its emphasis in its argument on this particular factor on the fact that many of the day-to-day matters involving such things as hiring, firing, disciplining and supervision of the employees of the two

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[1] In many of the decisions which involve the analysis by the Board of the four controlling factors for a single employer determination, there has not always been such an emphasis placed upon the factor of centralized control of labor relations as being one of "critical" importance. See eg. *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994); *Al Bryant, Inc., et al.*, 260 NLRB 128, 141 (1982), enfd. 711 F.2d 543, 551 (3rd Cir. 1983); *Edward J. White, Inc.*, 237 NLRB 1020, 1025 (1978).

subsidiaries are left to the respective division managers in each subsidiary. The Regional Director recognized that point, but he also recognized the "overwhelming role" played by DEN Management in the operations of the two subsidiaries through its management agreements, which include DEN's project managers exercising a sufficient degree of supervision over the work that the employees of these two companies perform, and the fact that DEN itself handles a significant amount of labor relations matters directly affecting these employees such as creating and implementing employee handbooks and policies including substance abuse and safety.

There is also uncontroverted evidence in the record which revealed that DEN's co-chief operating officer, Shane Dick, got involved at least on one occasion in the investigation and disciplining of an employee of the union subsidiary, Dean E. Norris, Co., over work performance deficiencies. (Tr. pp. 190-191). Dick is not an officer in that subsidiary but yet took the lead in dealing with that disciplinary episode which reveals the extent of DEN's control over both subsidiaries. Moreover, to suggest, as the Employer appears to do, that Mike Porch, also a part-owner of DEN and the chief officer of its union subsidiary, has no involvement in or no oversight responsibility regarding what is proposed and what ends up in the collective bargaining agreement through negotiations with the Union is highly implausible.

As for the differences in some of the basic terms and conditions of employment between these two groups of employees, the Regional Director correctly pointed out that this variance which is due to one company being

Supervisory Status of the Dean E. Norris Foremen.

The Employer's exception to the Regional Director's failure to find supervisory status for the working foremen is limited, curiously, only to those foremen employed by the union subsidiary, Dean E. Norris. The evidence put forth at the hearing by the Employer attempting to establish supervisory status for the foremen at *both* subsidiaries was essentially identical in nature. In any event, the thrust of the Employer's attack on the failure to find supervisory status for the Dean E. Norris foremen appears to be two-fold. On the one hand, it argues that its evidence, largely focusing on supposed authority given to the field foremen to handle disciplinary matters over the crew members with whom they work alongside, was sufficient to establish 2(11) status. On the other hand, the Employer asserts the "troubling fact" that the Hearing Officer, because of her alleged rush to complete the hearing, so intimidated the Employer that it was dissuaded from calling additional witnesses that might have supported its position on the supervisory issues. Besides striking the Petitioner as being somewhat inconsistent, there is simply no basis for making this latter argument, because (1) nowhere in the record is this supported and (2) based upon the recollection of Petitioner's counsel, the Hearing Officer made it quite clear both on and off the record that she was prepared to stay as long as necessary in order to obtain a complete record on the issues raised.[2]

With respect to the first prong of the Employer's argument, that the foremen possess the *authority* to handle disciplinary matters affecting their crew

[2] Other than the duty to familiarize herself with all potential issues in the case and "the primary duty to see that a full record is developed," the hearing officer "may not participate in any phase of the decisional process." [NLRB Casehandling Manual (Part Two), 11184].

members even though they may not actually exercise it, the two cases cited in support thereof are both clearly distinguishable. The *Sheraton Universal Hotel* decision[3] first of all did not involve the construction industry and, thus, the "working foremen" typically found in that industry. Secondly, in that case there was ample evidence in the record of the *exercise* of several indicia of 2(11) authority, including the use of independent discretion involving hiring recommendations, discipline of employees and the direction of their work. Also, even though it bears on secondary indicia, there was no disproportionate ratio of supervisors to the number of employees allegedly being supervised, as was true in the instant case. The same distinguishing features are present in the *Mountaineer Park, Inc.* case.[4] It also did not involve the construction industry. The two "assistant supervisors" who were alleged to be 2(11) supervisors exercised some disciplinary authority on a regular basis as a part of their duties, and they regularly substituted for the section heads who were acknowledged supervisors and exercised significant 2(11) authority over numerous employees in each section. The Petitioner submits that these individuals employed by Dean E. Norris in the classification of field foremen should not be found to be supervisors based upon, as the Regional Director correctly pointed out, largely hypothetical evidence which did not establish with any certainty that they truly possessed and exercised the range of authority that the Board requires for such a finding.

[3] 350 NLRB 1114 (2007).
[4] 343 NLRB 1473 (2004).

Conclusion.

The Board is requested to deny the Employer's request for review in this case, because the Decision and Direction of Election issued herein fully comports with Board law in both of these areas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2012, I served a copy of the foregoing, via U.S. Mail, to the following:

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and

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