UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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| ALLIED AVIATION SERVICE COMPANY OF NEW JERSEY, Employer, | : | |
| and | : | Case No. 22-RC-077044 |
| LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner. | : | |

PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION

## INTRODUCTION

Petitioner Local 553, International Brotherhood of Teamsters ("Local 553" or the "Union") submits this statement, pursuant to Sec. 102.67(e) of the Board's Rules and Regulations ("R & R"), in opposition to Allied Aviation Service Company of New Jersey's ("Allied" or the "Employer") request for review, dated May 21, 2012 (the "Request").[1] The Board must deny the Request because the Employer fails to establish that compelling reasons exist to overturn Region 22's Decision and Direction of Election, dated May 7, 2012 (the "Decision"), in which the Regional Director held that the members of the Union's petitioned-for-unit do not possess the necessary indicia of supervisory status to qualify them as supervisors under the Act. (See p. 28 of the Decision.)

[1] The Union provides this statement in response to the Employer's lengthy Request, but reserves its right to file a more formal brief pursuant to Sec. 102.67(g) of the R & R should the Board grant the Request.

## DISCUSSION

The Request must be denied because the Employer has failed to support its allegation that the Decision contains any clear error concerning a substantial factual issue by which it was which prejudicially affected.

The Employer has the burden of proving that "compelling reasons" exist to overturn the Decision. (See Sec. 102.67(c) of the R & R.) The Board grants a request for review only upon the following grounds:

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and/or
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Id.

In the Request, the Employer alleges that "substantial factual issues provided for in the Regional Director's decision are erroneous and such errors prejudicially affect the rights of Allied." (See p. 1 of the Request.) The Employer does not allege any other grounds for review.[2] Accordingly, the issue here is limited to whether the Employer can prove that the Regional

[2] At times, the Employer alleges that the Regional Director misapplied certain Board cases. (See pp. 5, 6, 9 and 18 of the Request.) However, in each instance, the Employer simply argues that the facts in the instant case differ from those in the cited cases, and not that a "substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent."

Director made a "clear" error on a "substantial" factual issue which prejudiced the Employer. As discussed below, the Employer has failed to do so.

The bulk of the Request is simply a rehashing of the Employer's post-hearing brief. For the issue presented here, such discussions are irrelevant and must be dismissed.

As for allegations concerning factual errors committed by the Regional Director, the Employer fails to substantiate its claims with support from the record.

1. The Employer fails to establish that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to discipline.

In pages 2 to 7 of the Request, the Employer discusses the Regional Director's finding concerning the putative supervisors' lack of authority to discipline. (See pp. 2 to 7 of the Request.) The Employer appears to allege that the Regional Director made five factual errors concerning the authority to discipline.

First, the Employer alleges that "the Regional Director is inaccurate when he concludes that the Allied supervisors' role is reportorial" because the "Decision clearly disregarded th[e] significant responsibility" of the putative supervisors to complete irregularity reports. (See p. 3 of the Request.) The Employer refers the reader to pages 91, 92, 93, and 99 of the transcript to support its allegation that "[t]he supervisors have testified that . . . enough irregularity reports can and do result in termination [of the employee]" [sic]. (See p. 3 of the Request.) However, nothing in these pages supports the Employer's allegation that the putative supervisors testified that "enough irregularity reports can and do result in termination." Rather, the witness cited here, Duty Supervisor Muzikevicious, responded as follows to Employer's counsel's questions:

Q: What is your understanding of what happens when somebody gets too many irregularity reports?

A: Most likely they would be put back in the training.

Q: Okay. For the errors that they've made?

A: That is correct.

Q: If it continues what is your understanding of what happens with regards to the employee?

A: I'm not sure.

(See p. 97 of the transcript.) Hence, the Employer misleads the reader by making a statement that has no support in the record.

In any event, there is no allegation here that the Regional Director made a clear factual error, but simply that his conclusion was incorrect. Accordingly, the inquiry must end. Nonetheless, contrary to the Employer's allegation, the Regional Director did discuss the putative supervisors' duty to complete irregularity reports, as well as its significance, at length before concluding that such authority falls short of the statutory authority to discipline. (See pp. 14 to 17 of the Decision.)

Second, the Employer alleges that the Regional Director "wholly ignored" the testimony of Albert Banks, a rank-and-file employee belonging to the Machinist Union, who testified that "if an individual is permitted to write-up an employee, they are not union." (See pp. 3 to 4 of the Request.) The Regional Director's omission of Banks' view on whether putative supervisors have the authority to discipline is inconsequential and irrelevant in light of the Regional Director's thorough explanation of Allied's disciplinary process, which was based largely in part on the testimony of a half dozen witnesses at the management level. (See pp. 10 to 11, 14 to 17.)

Third, the Employer alleges that the Regional Director "without explanation, completely disregards Mr. Godaire's unrebutted testimony." (See p. 4 of the Request.) Every part of this sentence is false. In its Request, the Employer cites to page 241 of the transcript to support its allegation that "Mr. Godaire also testified that he has had employees terminated for poor performance without going through the entire five (5) step process." Id. However, page 241 of the transcript reveals the following exchange between Employer's counsel and Godaire:

Q: So let me ask you, have you ever written any mechanic up five times? Have you ever written them five times?

A: And gotten him terminated?

Q: Yeah.

A: Probably. I don't know.

Q: You don't know?

A: I – there's been people suspended and fired for other things. Like I said, you don't need to get all the way to the fifth step to get terminated.

(See p. 241 of the transcript.)

Here, the Employer again misleads the reader into believing that Godaire testified "that he has had employees terminated for poor performance without going through the entire five (5) step process." Godaire did not say this.

In any event, among other witnesses, Allied's General Manager Rory McCormack testified that he is the only person at Allied who has the authority to terminate another employee. (See pp. 76, 77, 139 of Board Exhibit 2 (transcript of Rory McCormack).) Hence, contrary to the Employer's assertion, the comment falsely attributed to Godaire is not "unrebutted."

Moreover, contrary to the Employer's assertion, the Regional Director did provide an explanation as to why he cannot rely on Godaire's testimony: "I cannot resolve the credibility differences between the Petitioner's and the Employer's witnesses regarding the Maintenance Department." (See p. 10 fn. 14 of the Decision.) Godaire is a Maintenance Supervisor at Allied. (See p. 200 of the transcript.) Other Maintenance Supervisors, Fenton and Celiksoy, provided testimony that conflicted with that given by Godaire. (Compare p. 234 with pp. 489 and 839 of the transcript.)

Fourth, the Employer alleges that the Regional Director is "clearly erroneous" when he "states that the irregularity reports do not lead to discipline that affects the job status or terms and conditions of the subordinate employees." (See p. 4 of the Request.) However, this allegation is baseless because the Regional Director never made such a claim in the Decision. Rather, the Decision states, "The reports initiate the Employer's disciplinary procedure and become part of an employee's file. However, a report does not constitute or convey a penalty in and of itself." (See p. 11 of the Decision.)

Finally, the Employer alleges that the "Regional Director incorrectly describes the role of Mr. Quintero as the 'decider' of the discipline" and goes on to claim, "[t]his conclusion is completely wrong and is not supported by the evidence." (See p. 6 of the Request.) Contrary to the Employer's assertion, ample evidence supports this conclusion. For one, General Manager McCormack testified as follows:

> Q: So who makes that determination to issue a suspension for example?
>
> A: The hearing officer
>
> . . .

Q: Okay. So just to be clear, the hearing officer makes the ultimate decision on what's going to happen to, in this case the fueler, and the hearing officer tells the supervisor what's going to happen to that fueler?

A: Correct.

(See p. 75 of Board Exhibit 2 (transcript of Rory McCormack).) Quintero is Allied's hearing officer. (See p. 668 of the transcript.) Clearly, the Regional Director's conclusion is not "completely wrong" or "not supported by evidence."

In short, the Employer fails to prove that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to discipline, or that it was prejudicially affected as a result.

2. The Employer fails to establish that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to adjust grievances.

In pages 7 to 8 of the Request, the Employer discusses the Regional Director's finding concerning the putative supervisors' lack of authority to adjust grievances. (See pp. 7 to 8 of the Request.) The Employer alleges here that the "Regional Director is incorrect when he describes the incident [concerning a grievance] as simply a conflict between a Supervisor and an employee" and that he "mischaracterizes events in this matter as trivial and insignificant." (See pp. 7 to 8 of the Request.) This allegation misconstrues the Regional Director's findings, and is nonetheless irrelevant as it concerns not a factual error, but an allegation that the Regional Director formed a conclusion that differs from the one desired by the Employer. This is not one of the grounds for review.

The Employer fails to prove that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to adjust grievances, or that it was prejudicially affected as a result.

3. The Employer fails to establish that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to recommend hiring or terminations.

In pages 8 to 12 of the Request, the Employer discusses the Regional Director's finding concerning the putative supervisors' lack of authority to recommend hiring or termination. (See pp. 8 to 12 of the Request.) Here, there is no allegation that the Regional Director made any factual errors, but merely that he failed to consider other factors that the Employer deems important like the functions of the business and the disciplinary process. This claim is also irrelevant to the inquiry at hand. Nonetheless, to be sure, the Regional Director has discussed each of these factors in detail in the Decision. (See pp. 4 to 5, 10 to 11, and 14 to 17.)

Here as well, the Employer fails to prove that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to recommend hiring or terminations, or that it was prejudicially affected as a result.

4. The Employer fails to establish that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to assign and responsibly direct work.

In pages 12 to 24 of the Request, the Employer discusses the Regional Director's finding concerning the putative supervisors' lack of authority to assign and responsibly direct work. (See pp. 12 to 24 of the Request.) This entire section is simply a regurgitation of the Employer's post-hearing brief, and is irrelevant to the question presented here. The Employer

does, however, manage to insert four allegations that the Regional Director committed some type of error in random parts of this section.

First, the Employer alleges that "[t]he Regional Director Decision incorrectly attributes this responsibility [i.e., moving fuelers to various terminals and aircrafts] to the Duty Manager alone." (See p. 14 of the Request.) However, this is simply not true. The Regional Director acknowledges that the putative supervisors have this responsibility: "It is clear that the Supervisors make frequent changes, shuffling fuelers from place to place and plane to plane." (See p. 21 of the Decision.)

Second, the Employer alleges that the Regional Director was "not accurate" when he concluded that the Union meant to stipulate only that the putative supervisors were known as "Supervisors," and not that they were statutory supervisors. (See pp. 14 and 15 of the Request.) The exchange concerning the stipulation went as follows:

> [BY EMPLOYER'S COUNSEL] Q: Would you consider him to be a supervisor?
>
> [BY WITNESS ALBERT BANKS] A: Yes.
>
> Q: How about Mr. D'Amico, Joe D'Amico?
>
> A: Big Joe, yes.
>
> Q: And Cesar Lozada.
>
> A: Lozada. Yes.
>
> Q: Mr. Filipe Carvalho.
>
> A: Absolutely.
>
> Q: And I think he goes by J. Cruz or German Cruz, Mr. Cruz, J.R. Cruz.
>
> A: Oh, J.R., oh, okay.
>
> MR. CHUN [UNION COUNSEL]: We'll stipulate to the fact these individuals are supervisors.

(See p. 762 of the transcript.)

Because the word "Supervisor" was not capitalized in the transcript, the Union filed a Motion to Correct Transcript concurrently with its Post-Hearing Brief to clarify that the usage of the word "supervisors" was meant to mean "Supervisors under Allied's job title." (See Motion to Correct Transcript, attached to the Union's Post-Hearing Brief.)

In its post-hearing brief, the Employer alleged in bold-type letters that "opposing counsel stipulated 'to the fact that these individuals are supervisors," even though the Union's position throughout the hearing was steadfastly that the putative supervisors are not statutory supervisors. (See p. 6 of the Employer's post-hearing brief.)

Responding to this, the Regional Director stated the following:

> The Employer asserts in its brief that the Petitioner stipulated to the supervisory status of some of the Fueling Supervisors. As the record shows, and as the Petitioner's unopposed Motion indicates, the Petitioner stipulated that the relevant individuals had the Employer's job title "Fueling Supervisor," not that they were statutory supervisors.

(See p. 4 fn 9 of the Decision.)

Incredibly, in the Request, the Employer alleges that the Regional Director commits a factual error because: "[i]t is clear that the opposing counsel was NOT stipulating to the Supervisors' title, as alleged by the Regional Director . . ." (See p. 27 of the Request.)

Simply put, no reasonable person can find that the Regional Director's conclusion concerning the Union's stipulation is clear error.

Third, on page 18, the Employer states, "To say Allied Supervisor do not assign and direct defies logic and requires reversal of the Regional Director's Decision." (See p. 18 of the Request.) Here, the Employer's idea of logic is incompatible with the Regional Director's

application of established Board law, which provides the legal definition of the terms "assign" and "responsibly direct."

Finally, the Employer alleges, "The Regional Director's Decision to ignore this evidence [i.e., that the airport is big and that the Supervisors hold an important role] constitutes reversible error." (See p. 23 of the Request.) However, the Regional Director addresses this very issue at the end of the Decision: "the Employer's assertions that it could not operate without the Petitioned-for individuals is a red herring. I make no suggestion that the Employer can function without these individuals; only that the Employer has not met its burden to show they are statutory supervisors." (See pp. 27 to 28 of the Decision.)

Clearly, the Employer fails to prove that the Regional Director committed any clear error concerning the putative supervisors' lack of authority to assign or responsibly direct, or that it was prejudicially affected as a result.

5. The Employer's attempt to introduce a new issue must be dismissed.

In pages 24 to 26 of the Request, the Employer simply repeats its meritless and irrelevant arguments from the prior pages, but also includes a new argument that was not part of the record: "It is also not appropriate for the Regional Director to make Decisions that create and impose upon Allied a new job or position that does not currently exist . . . If these individuals are deemed not to be supervisors, the Regional Director is either imposing the creation of a new position not authorized by the Airport Authority or they have made these individuals fuelers and possibly 'Leads' or which Allied already has a contractual obligation which exists from the previous NLRB Ruling dating back over 50 years." (See p. 27 of the Request.) The Employer re-introduces this vacuous argument even though the Regional Director already dismissed this same argument made earlier in his Order Denying Motion to Dismiss Representation Petition,

dated April 4, 2012. After the Regional Director dismissed this argument, but before the hearing began on April 5, 2012, the Employer attempted to introduce an amended motion with the same argument, but withdrew it after the Board Hearing Officer informed him that the amended motion would also be dismissed. Employer's counsel stated the following:

> Our second amendment is we had made the argument that if the NLRB decided that they were not 2(11) supervisors, that we would take the position that they would fall within the present collective bargaining arrangement or agreement between the [International Association of Machinist] and Allied Aviation. We withdraw that second position.

(See p. 9 of the transcript.)

Here, this irrational argument must be dismissed once again because it is irrelevant to the question at hand, and because it was not part of the record. (See Sec. 102.67(d) ("But such request may not raise any issue or allege any facts not timely presented to the Regional Director.")

6. The Employer's discussion of secondary indicia is irrelevant.

In pages 28 to 30 of the Request, the Employer does not allege any error committed by the Regional Director, but merely repeats its argument about secondary indicia. (See pp. 28 to 30 of the Request.) Since there is no allegation here concerning any errors committed by the Regional Director, this entire section must be dismissed. In any event, the Regional Director adequately addressed the issue of secondary indicia. (See p. 27 of the Decision.)

## CONCLUSION

As discussed above, the Request is fraught with misstatements and allegations that have no support in the record. The Employer has failed to establish that the Decision contains any clear error concerning any substantial factual issue.

Accordingly, Petitioner Local 553, I.B.T. respectfully requests that the Board deny the Employer's Request, and do so expeditiously so that the workers would be able to obtain the results of the election at the close of the voting period on June 7, 2012. We make this special request due to the following:

At the outset of the hearing, the Employer informed everyone in the hearing room – including all of the top managers at Allied but also a few courageous employee witnesses who appeared in support the Union – that it will do everything it can to prolong the election process. The Employer stated the following on record:

> Even if the NLRB takes the position – the Board takes the position that these are not 2(11) supervisors, and tries to certify this as an appropriate bargaining unit. We will not agree to that. We will take exceptions and take appeal to that decision should the Board make that ruling . . . The position of the Employer at this time is that they are 2(11) supervisors and if the Board rules that they are not 2(11) supervisors, again, we will then take exception and we will appeal that decision.

(See pp. 9 and 10 of the transcript.)

Needless to say, the employee witnesses became concerned, and asked the Union whether they would be able to exercise their Section 7 rights without undue delay. The Union explained that exceptions and appeals must be made in good-faith, and not simply to prolong the election.

However, the Employer's proclamation of its intent to file exceptions and appeals before it even had the opportunity to review the Regional Director's reasoning behind the Decision, coupled with the unusual plea made by the Employer at the end of the instant Request

(i.e., "The Employer in this regard is requesting at this time the maximum time allotted in conducting of the Representation Election which is presently set for June 7, 2012") (see p. 31 of the Request), seem to indicate that the Employer's aim for filing the Request is simply be to delay the election.

We respectfully request that the Board prevent the Employer from engaging in such frivolous conduct by giving this matter priority.

Dated: New York, New York
May 23, 2012

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## CERTIFICATE OF SERVICE

I, Jae W. Chun, do hereby certify under the penalties of perjury that on May 23, 2012, I caused a true and correct copy of the Petitioner's Statement in Opposition to Employer's Request for Review of Decision and Direction of Election to be served by e-mail upon the following persons:

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Dated: New York, New York
May 23, 2012

Jae W. Chun