

**R.D. # 01-13  
East Orange, New Jersey**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

**BENJAMIN H. REALTY CORPORATION<sup>1</sup>**

Employer

and

**CASE 22-RC-087792**

**RESIDENTIAL CONSTRUCTION AND GENERAL SERVICE WORKERS,  
LABORERS, LOCAL 55**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

The Petitioner filed a petition on August 21, 2012 under Section 9(c) of the National Labor Relations Act seeking to represent a unit of approximately twenty-one employees, consisting of all full-time and part-time superintendents, painters, maintenance and porter workers at the Employer's East Orange, New Jersey and Orange, New Jersey locations, excluding all engineers, inspectors, clerical, security, and management employees. The Employer contends that the election petition should be dismissed or, in the alternative, that an election should be postponed. The Employer asserts that the proposed unit is a "fluctuating workforce" that renders an immediate election inappropriate. I have considered the evidence and the arguments presented by the

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<sup>1</sup> The name of the Employer was amended at the hearing.

parties. I find that the petitioned-for unit is an appropriate unit in scope and, for the reasons discussed *infra*, that the petition should not be dismissed based on the Employer's contentions regarding anticipated changes to the unit workforce. Accordingly, I will order an election herein.

Under Section 3(b) of the Act, I have authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,<sup>2</sup> I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein;<sup>3</sup>
3. The labor organization involved claims to represent certain employees of the Employer;<sup>4</sup>
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act;<sup>5</sup>
5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

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<sup>2</sup> Briefs filed by the parties have been duly considered.

<sup>3</sup> The parties stipulated, and I find, that the Employer is a New Jersey corporation engaged in the maintenance of residential apartment buildings at its facilities located at multiple locations throughout East Orange and Orange, New Jersey. During the preceding 12 months, the Employer, in conducting its business operations, purchased and received at its New Jersey facilities, goods valued in excess of \$50,000 directly from suppliers located outside of the State of New Jersey.

<sup>4</sup> The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

<sup>5</sup> The record reveals that there is no contract or other bar to an election in this matter.

**All full-time and regular part-time superintendents, maintenance employees, porters and painters employed by the Employer at its facilities located at 370 Central Avenue, Orange, New Jersey; 245 Reynolds Terrace, Orange, New Jersey; 500 South Harrison Street, Orange, New Jersey; 466 Highland Avenue, Orange, New Jersey; 447-49 Prospect Street, East Orange, New Jersey; 36 South Munn Street, East Orange, New Jersey; 40 South Munn Street, East Orange, New Jersey; 46 North Arlington Avenue, East Orange, New Jersey, 52 North Arlington, East Orange, New Jersey; 50 South Arlington Avenue, East Orange, New Jersey; 52-54 South Arlington Avenue, East Orange, New Jersey; 67-76 Melmore Gardens, East Orange, New Jersey; 106 North Arlington, East Orange, New Jersey; 111 Halsted Street, East Orange, New Jersey; 83-85 Halsted Street, East Orange, New Jersey; 268 North Oraton Parkway, East Orange, New Jersey; 288 4<sup>th</sup> Avenue, East Orange, New Jersey; 161 Prospect Street, East Orange, New Jersey and 91 Prospect Street, East Orange, New Jersey, the only facilities involved herein excluding all clerical employees, security employees, engineering employees, inspectors and managerial employees.**

#### **STATEMENT OF FACTS**

The Employer is in the business of managing nineteen residential apartment buildings in East Orange and Orange, New Jersey. In order to conduct its business, the Employer maintains a workforce of superintendents, porters and maintenance workers at the various locations where it manages properties. According to the municipal housing codes regulating the Employer's business in both East Orange and Orange, any building with over 4 units must have a superintendent with a license issued by the municipality and any building with over 25 units must have a full-time superintendent that lives on the premises.

Benjamin Herbst is the president of Benjamin H. Realty Corp., and was the Employer's only witness at the hearing. Mr. Herbst testified that almost all of the buildings managed by Benjamin H. Realty Corp. have over 25 units. The Employer, at the time of the hearing, employed eighteen employees, consisting of ten superintendents,

five porters and three maintenance employees.<sup>6</sup> The superintendents and porters typically work in one building only, though some superintendents cover more than one building or work in other buildings when needed. Maintenance workers typically work throughout the different buildings the Employer manages and are not exclusively assigned to one building.

Mr. Herbst testified that he regularly receives notice from the City of East Orange with regard to the licensing requirements for superintendents.<sup>7</sup> Herbst testified that in January and February of this year, he was contacted by several inspectors and advised that the city was “cracking down” on buildings that had failed to comply with licensing requirements for superintendents. In March of 2012, in response to the warnings from these inspectors, Herbst issued checks to all of his superintendents to cover the application fees for obtaining a superintendent’s license. He also testified that around the time the checks were issued, he personally spoke to all of the superintendents and said, “We have to make sure to get this going because they’re cracking down on us.” (Tr. 34).

In July of 2012, the Employer received several summonses from the City of East Orange for employing unlicensed superintendents. At a municipal court hearing conducted on August 23, 2012, the City of East Orange determined that the Employer had failed to comply with the superintendent licensing requirements and issued fines in the amount of \$3,615. Herbst also asserted that, after the municipal court hearing, certain inspectors threatened to issue summonses on a daily basis if the problem was not

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<sup>6</sup> The record contains conflicting evidence as to whether the Employer currently employs any painters. As the Employer admitted that the job title of painter currently exists, I shall include painters in the unit requested by the Petitioner.

<sup>7</sup> As established by the records introduced at the hearing, the City of East Orange requires that each superintendent complete an application, obtain a Record Check/Letter of Good Conduct from the East Orange Police Department, provide a government issued photo identification and agree to be fingerprinted. In addition, all new superintendents are required to take a superintendent’s test.

rectified. Herbst testified that in response to the fines, he hand delivered a letter to each superintendent advising them that their failure to obtain a license from either the City of East Orange or the City of Orange by Friday, September 14, 2012, would result in the termination of their employment. (Employer Exhibit 7).

As of the date of the hearing, the Employer had not terminated any of the superintendents employed by the Company as a result of the fines issued by the City of East Orange. According to Herbst, the Employer expects to terminate up to six of the ten superintendents he currently employs by September 14, 2012 due to their failure to obtain a superintendent's license. However, on cross-examination, Herbst stated that no one would be terminated if they had actually completed the application process and were simply waiting for the paperwork to be returned.

In his testimony at the hearing, Herbst stated that he would create no new classifications if he terminates his current superintendents and that any replacements for terminated superintendents would be slotted into the position of superintendent. In response to the hearing officer's questions, Herbst testified that, as of the date of the hearing, he had not hired any new employees, had not advertised for any replacements and had not interviewed any prospective employees. He further testified that any replacement superintendents would work the same hours, in the same buildings with the same job duties, skills and qualifications as the current superintendents. Herbst also stated that any new superintendents would work under the same supervisor as the current superintendents.

## ANALYSIS

The Board's rule on expanding or contracting units is that "to warrant an immediate election... the present work complement must be substantial and representative of the ultimate complement as projected both as to number of employees and the number and kind of job classifications." *Douglas Motors Corp.*, 128 NLRB 307, 308 (1960). The Board has also held that certain fundamental changes in a company's business operations and/or significant changes to its employee complement can preclude the direction of a representation election. *Plum Creek Lumber Co., Inc.*, 214 NLRB 619 (1974); *Douglas Motors Corp.*, 128 NLRB 307 (1960). The Board has stated, as the general rule, that an existing complement will be substantial and representative where at least 30 percent of the employee complement is preserved, along with at least 50 percent of the job classifications. *Share's Inc.*, 343 NLRB 455 (2004) (citing *Yellowstone International Mailing Inc.*, 332 NLRB 386 (2000)).

The Board has found, in a number of cases, that not all changes in company operations and workforce numbers are substantial enough to bar an election. In *Share's Inc.*, for example, the Board found that the employer, when the petition was filed, had a substantial and representative complement of its workforce. There, the company argued that the changes to its workforce resulting from a relocation of its operation to a facility within the same city should preclude an election. However, the Board found that since the company, at the time of the petition, employed 61 percent of its eventual employee complement and 100 percent of the ultimate job classifications, the election should not be barred. *Share's Inc.*, 343 NLRB at 455.

Similarly, in *Yellowstone International Mailing Inc.*, the Board found an adequate employee complement where the company employed 38 percent of its projected workforce and 100 percent of its existing job classifications prior to a relocation of its business. The Board inferred that a substantial number of the company's current employees would likely remain employed after the relocation because the employer planned to offer continued employment to all of its current employees. Thus, it found a substantial and representative employee complement, in spite of the employer's claims that the relocation and expansion plans changed the workforce sufficiently to bar an election.

In contrast, the Board will not allow an election to proceed in cases involving an imminent and significant change in the employer's workforce. *Plum Creek Lumber Co., Inc.*, 214 NLRB 619 (1974); *Douglas Motors Corp.*, 128 NLRB 307 (1960). In *Plum Creek Lumber Co., Inc.*, *supra*, a lumber manufacturer hired a number of construction workers, including a group of electricians, to build a new facility. When a union petitioned to represent the electricians, there were 17 non-supervisory electricians working on the project, which was expected to reach about 60 percent completion by the time of the decision. The employer argued that when the construction of the building was complete, only 3 of the 17 non-supervisory electricians would be retained. Furthermore, the employer argued that the nature of the work will have substantially changed because the remaining electricians would be doing maintenance work instead of construction. On these facts, the Board found a workforce about to undergo an "imminent substantial contraction with a resultant change in the job classification" and dismissed the election petition. *Plum Creek Lumber Co., Inc.*, 214 NLRB at 620.

Upon the record here, I find the anticipated change to the unit (the replacement of a number of its unlicensed superintendents with licensed superintendents) does not constitute a fluctuating workforce as argued for by the Employer or as contemplated by the applicable case law. Notwithstanding the Employer's proposed personnel changes, the size of the unit will remain the same even if the existing superintendents are replaced. Accordingly, as both the size and composition of the workforce will remain the same, I conclude an immediate direction of an election is appropriate.

In the instant case, the Employer currently employs 10 superintendents to oversee the various properties it manages. While it currently may be facing penalties for violating certain municipal ordinances, the fact remains that the Employer is required by municipal law to maintain a certain number of superintendents to manage its properties. The Employer presented no evidence to establish that it intends to subcontract the superintendents' work, nor does it suggest a reorganization of any kind that would impact the number of superintendents required to meet its business needs. Thus, on the record here there are no facts to support the claim that any personnel changes the Employer contemplates would support a finding of a "fluctuating workforce." On the contrary, the facts suggest that, despite the Employer's contention that it plans to replace some or all of its current superintendents, the resulting workforce will consist of the same number of superintendents. Any different conclusion would simply run contrary to the record evidence showing that the Employer's operation now requires 10 superintendents and that its business needs, in this regard, are not presently expected to change.<sup>8</sup>

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<sup>8</sup> In reaching this conclusion, I also reject the Employer's assertion, as cited in its brief, that the superintendents who obtain their license will have a distinct "skill" that will change the current composition of the unit. To the contrary, the record evidence has established that the licensed superintendents will have the exact same job duties and required skills.

I also note that the Employer's plans in this case do not involve a fundamental change in the nature of its business. Unlike *Plum Creek Lumber Co., Inc., supra*, where an employer transitioned from 17 construction electricians to 3 maintenance electricians, and *Douglas Motors Corp., supra*, where the company changed from a production and maintenance business to a warehousing and distribution business, the Employer here is merely claiming that it intends to replace a certain number of its employees with an equal number of other individuals. There is no evidence that the Employer will not maintain the same workforce. It advances no plans to reorganize, relocate or fundamentally alter the manner in which it conducts its business. The facts here simply bear no arguable resemblance to situations like those described in *Plum Creek Lumber Co.*, and *Douglas Motors Corp.*, where the Board found that fundamental changes to an employer's business and employee complement must preclude the holding of an election.

I find the cases upon which the Employer relies inapposite. The Employer, in its brief, cites *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52 (U.S. 1987) in support of its claim that its need to obtain 10 new superintendents creates a fluctuating workforce. *Fall River Dyeing & Finishing Corp.*, however, involved a union's claim that a successor employer had failed to bargain. The issue in that case, with regards to "substantial and representative complement," was whether a successor employer, in the process of reorganizing the new business reached a full complement of employees, triggering its obligation to bargain with the Union. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 52. There, a new company was formed by a former employee, who had hired many of the previous company's employees and acquired most of the former employer's inventory. *Id.* at 32. However, the Employer here is not a successor to a company with a previous bargaining relationship and is not undergoing the transition to a

new management team and business structure. Accordingly, I find that the facts of *Fall River Dyeing & Furnishing* are clearly distinguishable from this case.

I also find the facts of *Witteman Steel Mills Inc.*, 253 NLRB 320 (1980), another case cited by the Employer in its brief to be easily distinguishable. In *Witteman, supra*, when the petition was filed, the new owner had an initial expansion plan to be operating at full capacity in 4 or 5 months and had further expansion plans, contingent upon the purchase of new equipment and the erection of a new building. The Board determined that the second phase of expansion was too speculative to rely upon in considering the present employee complement. As the Employer in the instant case has provided no evidence that it intends to expand its workforce, I conclude that the Board's analysis in *Witteman* clearly does apply here.

### CONCLUSION

Based on the record and the foregoing analysis, I find that the unit which the Petitioner seeks is an appropriate unit of superintendents, maintenance employees, porters and painters. I further find the employee complement, notwithstanding the Employer's proposed changes, is substantially representative of the appropriate unit and that the Company has not undergone any fundamental changes to its business operation sufficient to support the Employer's motion to dismiss. In sum, I find the Employer's arguments for dismissal of the petition or postponement of an election unconvincing, and accordingly, I direct an immediate election.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **RESIDENTIAL CONSTRUCTION AND GENERAL SERVICE WORKERS, LABORERS LOCAL 55.**

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list for the voting groups found appropriate above, containing the full names and addresses of all the eligible voters in each voting group, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5<sup>th</sup> Floor, Newark, New Jersey 07102, on or before **October 9, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by

**October 16, 2012.** The request may be filed electronically through E-Gov on the agency's website, [www.nlr.gov](http://www.nlr.gov), but may not be filed by facsimile.<sup>9</sup>

Signed at Newark, New Jersey this 2nd day of October, 2012.

/s/ Edward J. Peterson  
Edward J. Peterson  
Acting Regional Director  
National Labor Relations Board  
Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102-3110

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<sup>9</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlr.gov](http://www.nlr.gov).

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 22**

<p>BENJAMIN H. REALTY CORP Employer and RESIDENTIAL CONSTRUCTION AND GENERAL SERVICE WORKERS LABORERS LOCAL 55 Petitioner</p>	<p><b>Case 22-RC-087792</b></p>
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**AFFIDAVIT OF SERVICE OF: Decision and Direction of Election dated October 2, 2012**

I depose and say that on **October 2, 2012**, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

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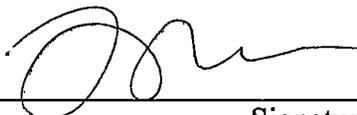
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October 2, 2012  
Date

Designated Agent of NLRB  
Name

  
Signature