

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

In the Matter of:	X	
	:	CASE #22-RC-087792
Benjamin H. Realty Corp.	:	
	:	
Employer,	:	
	:	
And	:	
	:	
Residential Construction and General Service Workers, Laborers, Local 55,	:	
	:	
Petitioner.	X	

**EXCEPTIONS TO THE HEARING OFFICER'S
REPORT ON CHALLENGED BALLOT**

Steven B. Horowitz, Esq.
Horowitz Law Group, LLC
101 Eisenhower Parkway
4th Floor
Roseland, New Jersey 07068
973-226-1500
973-226-6888 (Facsimile)

Dated: February 15, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED ii

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS..... 4

ARGUMENT..... 8

I. THE HEARING OFFICER ERRED IN NOT HOLDING THAT PASTOR PEREA WAS EMPLOYED AS A SUPERVISOR WITHIN THE MEANING OF SECTION 2(11) OF THE ACT..... 8

II. THE HEARING OFFICER IMPROPERLY PLACED THE BURDEN OF PROOF OF PASTOR’S SUPERVISORY STATUS ON THE EMPLOYER..... 13

III. THE OCTOBER 18, 2012 DENIAL OF THE EMPLOYER’S REQUEST FOR REVIEW FILED ON OCTOBER 16, 2012, BY THIS BOARD SHOULD BE OVERRULED AND THE MATTER HELD IN ABEYANCE 14

IV. THE CURRENT BOARD SHOULD HOLD IN ABEYANCE THE DETERMINATION AS TO THE ISSUE OF PASTOR PEREA’S SUPERVISORY STATUS UNTIL SUCH TIME AS AT LEAST THREE (3) MEMBERS HAVE BEEN CONSTITUTIONALLY APPOINTED BY THE PRESIDENT OF THE UNITED STATES 14

CONCLUSION 15

TABLE OF AUTHORITIES CITED

CASES

Allstate Ins., 322 NLRB 759, 760 (2000)..... 9

Cherokee Heating and Air Conditioning Co., 280 NLRB 399 (1984) 10

Croft Metals, Inc., 348 NLRB 717 (2006)..... 8

Dean & Deluca New York, Inc., 338 NLRB 1046, 1048 (2003) 9

Donaldson Bros., 341 NLRB 958, 959 (2004) 9

Energy Mississippi, Inc., 357 NLRB No. 178 2011 12

Facchina Construction Co., Inc., 343 NLRB 886-886-887 (2004), enfd. 181 LRRM 3344 (D.C. Cir. 2006) 9

Fred Meyer Alaska, Inc., 334 NLRB 646 (2001) 10, 12

Golden Crest Healthcare Center, 348 NLRB 727 (2006)..... 8

Hook Drugs, Inc., 191 NLRB 189, 191 (1971) 10

Ken-Crest Services, 335 NLRB 777, 779 (2001) 9

New Process Steel, LP v. NLRB, 130 S.Ct. 2635 (2010)..... 14, 15

NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573, 574 (1994)..... 8

NLRB v. Kentucky River Community Care, 532 U.S. 706, 711-712 (2001)..... 13

NLRB v. Prime Energy LTd. P'ship., 244 F.3d 206, 212 (3d Cir. 2000) 9

Noel Canning v. NLRB, ___ F.3rd ____, Case Number 12-115 (D.C. CoA, 1/25/13)..... 3, 14 15

Oakwood Health Care, Inc., 348 NLRB 686 (2006) 8, 9

Sheet Metal Workers Local 85, 273 NLRB 523, 526 (1984) 10

U.S. Gypsum Company, 93 NLRB 91 (1951) 10, 12

Venture Industries, 327 NLRB 918, 919 (1999)..... 9

Wasath Oil Refining Company, 76 NLRB 417 (19484)..... 10, 12

STATEMENT OF THE CASE

Upon a Petition being filed by the Residential Construction and General Service Workers, Laborers, Local 55 (hereinafter referred to as “Union”) on August 21, 2012, an initial hearing was conducted before Hearing Officer Kristi Bean on September 5, 2012.

During this hearing, Benjamin H. Realty Corp. (hereinafter referred to as “Employer”) asserted that the Election Petition in the instant matter should be dismissed as untimely based on the Employer’s “fluctuating workforce”. The fluctuating workforce of the Employer is in turn based on the failure of any of the Employer’s ten (10) current Superintendents (as well as other miscellaneous employees) to obtain a valid Superintendent License from the cities of either Orange or East Orange, New Jersey, where their respective facilities are located, (or illegal alien status). Of these ten (10) superintendents, it was uncontroverted that approximately seven (7) would definitively be unable to obtain the proper licensing due to immigration issues.

The Regional Director issued a Decision and Direction of Election on October 2, 2012. The Employer filed a timely Request for Review of that Decision on or about October 16, 2012. That Request for Review was rejected by this Board on October 18, 2012. Thereafter, an election by secret ballot was conducted on November 8, 2012, among all full-time and regular part-time superintendents, maintenance employees, porters and painters employed by the Employer at its sixteen (16) apartment facilities in Orange and East Orange, New Jersey. The tally of ballots at the end of the voting showed that of the seventeen (17) eligible voters, thirteen (13) eligible employees voted, with six (6) votes being cast for the Petitioner and six (6) votes being cast against the Petitioner. Thus, the one (1) challenged ballot of Justo Pastor Perea (hereinafter referred to as “Pastor”) becomes determinative. Pastor’s ballot was challenged by

the Region based on his not being included on the Excelsior List, which was in turn based on the Employer's view that he was a Section 2(11) Supervisor.

On November 29, 2012, a Report on Challenged Ballot and Notice of Hearing was issued by the Regional Director of Region 22, with the sole issue being the receipt of evidence to resolve the issue related to the supervisory status of Pastor. The Hearing was conducted before Hearing Officer Joseph Calafut on December 19 and 27, 2012.

The Hearing Officer issued his Report on January 25, 2013. The Report found that, notwithstanding the testimony of the Union's own witnesses, and the extensive and overwhelming paperwork submitted into evidence showing that Pastor conducted himself at all times as a supervisory the Employer did not meet its burden of showing that Pastor has supervisory authority, and recommended that the challenge to his ballot be overruled and that the ballot be opened and counted.

WHEREFORE, under provisions of Section 102.69 of the Board's Rules and Regulations, counsel for the Employer respectfully files this, its Exceptions to the Hearing Officer's Report on the Challenged Ballot. Specifically, the Employer raises the following issues:

1. That the Hearing Officer erred in not holding that Pastor was employed as a supervisor within the meaning of Section 2(11) of the Act;
2. That by Petitioner admitting that Pastor was a supervisor until sometime in May of 2012, the Hearing Officer improperly asserted that the Employer had the burden of proof to prove Pastor's continuing supervisory status;

3. That the October 18, 2012 denial of the Employer's Request for Review filed on October 16, 2012, by this Board be held invalid based on the holding of Noel Canning v. NLRB, ___F.3rd ____, Case #12-115 (D.C. CoA, 1/25/13);

4. That this Board hold in abeyance any determination as to the issue of Pastor's supervisory status until such time as at least three (3) members have been constitutionally appointed by the President of the United States in furtherance of Noel Canning v. NLRB, ___F.3rd ____, Case #12-115 (D.C. CoA, 1/25/13).

STATEMENT OF FACTS

September 5, 2012 Hearing Transcript (Pre-Election): The Employer operates as a manager of approximately sixteen (16) residential apartments in exclusively the East Orange and Orange, New Jersey area. The employees consist of residential superintendents for each of the apartment buildings, plus porters and maintenance employees. (9/5/12 TR-17, 57).¹

At some time in late February, early March of 2012, the City of East Orange began to communicate with Benjamin Herbst, the President of Benjamin H. Realty, as well as the superintendents for each respective building above, with an eye towards enforcing a local ordinance requiring all superintendent's to be licensed by the City of East Orange. (TR-27). The inspectors from the City specifically stated to Benjamin Herbst, as well as the superintendents, that the City was cracking down on this ordinance, and urged the Employer to begin getting all superintendents properly licensed. (TR-29).

The penalty for violations of these ordinances could be up to \$1,000.00 per day, plus imprisonment for the apartment complex owner. (9/5/12 TR-20).

After receiving this verbal notification from the East Orange inspectors, the Employer issued checks to all superintendents to cover the cost of the licensing process, in March of 2012. ((9/5/12 TR-29, 31). Unfortunately, between March and July 2012, no employee submitted any application to become a licensed superintendent. (9/5/12 TR-29).

In the early part of July (prior to the Petition in the instant matter), five (5) of the apartment complexes received Summonses from the City of East Orange for not having a licensed superintendent. (9/5/12 TR-37 – 39). A hearing was conducted on August 23, 2012,

¹ "TR-" refers to pages in the transcript. "Employer's EX"- refers to Exhibit numbers in the transcript. All references to the September 5, 2012 transcript are referenced as "9/5/12 TR-" "HOR" refers to pages of the Hearing Officers Report.

during which time the Employer received fines in the total amount of \$3,615.00. (9/5/12 TR-40). At this hearing, the inspector again reiterated that the City of East Orange was prepared to issue Summonses and fines on a daily basis if the Employer did not act faster in securing licensed superintendents. (9/5/12 TR-41).

Benjamin Herbst also testified in this initial Hearing upon the filing of the instant Petition, that Pastor acted at all times in the capacity of a Supervisor. (TR-34, lines 2 and 3, 9/5/12 transcript).

December 19th and 27th Hearing Transcript (Post Election): The Petitioner admitted at the commencement of the Hearing that Pastor acted in the function of a Section 2(11) Supervisor up until February/March 2012, (TR-17, 18), as confirmed by Petitioner's witnesses Walter Velazco and Cesar Perea. However, Pastor specifically contradicted these dates by indicating that he remained as a Supervisor until sometime in May, when he was allegedly assigned to additional properties to be a "Superintendent". (TR-259). Pastor ultimately went on disability on or about September 2012, and was not certified to return to work until after the November 8th Election. (TR-192, 240).

Pastor also acknowledged that owner Benjamin Herbst told him in February/March of 2012 that he (Pastor) would have the same supervisory responsibilities notwithstanding Moshe Weiss's hire, and never advised Pastor or any other employee to the contrary. (TR-259, 260, 332). Additionally, Pastor confirmed that Benjamin Herbst said that Moshe was the new "boss", which Pastor (and therefore, by default, all other employees as Pastor by his own admission, acted as the "interpreter" for all Spanish speaking employees), understood to mean that Moshe Weiss was to have Benjamin Herbst's authority as "owner," but not diminish Pastor's authority as a Supervisor. (TR-259, 260, 332).

Pastor also assumed that being allegedly assigned to additional properties as a Superintendent equated to demotion. (TR-259, 260, 291 through 293). While Benjamin Herbst denied making Pastor a Superintendent at any additional building, nothing in the record supports Pastor's assumption, and the extensive Exhibits of the Employer directly contradict this assumption. Notwithstanding Pastor's comment that he is the Superintendent of three (3) buildings located at 370 Central Ave., 245 Reynolds Terrace and 500 South Harrison Street, and that the Notices to tenants of Managers/Superintendents/Supervisors were posted in all buildings to this effect, Petitioner produced absolutely no such notices from Pastor's own building that he lived in (370 Central) indicating his alleged demotion or superintendent status.

Pastor specifically admitted that he was never informed by Benjamin Herbst that he had ceased to be a Supervisor. (TR-289). In fact, the entire transcript of all of Petitioner's witnesses is devoid of any comment from Benjamin Herbst and/or Moshe Weiss that Pastor was no longer to be a Supervisor. Rather, all of the comments made by these witnesses corroborate that Moshe Weiss was assuming the responsibilities of only Benjamin Herbst as a "boss," as corroborated by Moshe Weiss. (TR-340, 345). Additionally, another co-worker (Hanam Casnan) corroborated that Pastor continued with his supervisory duties from March until Pastor's disability. (TR-371, 372). Petitioner's own witness, Avraham Cuevas, admitted on direct that the employees were never told by anyone that Pastor was no longer his Supervisor. (TR-166). This confirms and corroborates the testimony of Benjamin Herbst, Moshe Weiss and Hanam Casnan that Pastor retained his "Supervisor" status and continued to act as such.

Walter Velazco testified that since this alleged "demotion" of Pastor, he never received calls from Pastor between March and September (TR-208, 216); yet the telephone records submitted as Employer Exhibits "18", "19" and "20" each show daily cell phone conversations

in excess of approximately five (5) minutes per call and up to a minimum of three (3) to four (4) phone calls per day to Velazco. These multiple calls are consistent with receiving directions from Pastor, and not mere workplace “chatter” as Pastor maintained. If the calls from Pastor to all employees are “netted” out from Pastor’s work day, and were personal as Pastor maintains, then he was rarely doing any work during any given eight (8) hour week day. This also holds true for Cesar Perez (the son of Pastor) (TR-254), and Pastor himself who unbelievably, and in direct contradiction to these telephone records testified that he speaks very little to his co-workers since his alleged “demotion”. (TR-317 through 319).

Even after this alleged “demotion” in February/March or May, Pastor admitted that on the Sabbath (Friday at sundown through Saturday at sundown), employees and tenants will still reach out to him for any problems. (TR-284, 320).

Post-demotion, Pastor still continued to make deposits on behalf of the Employer (TR-320), and received excessive loans greater than any other employee totaling \$25,000.00 (TR-321).

Pastor also at all times maintained keys to all of the facilities of Benjamin H. Realty (TR-262). Pastor went so far as to admit that, despite this alleged “demotion,” he still is in possession of the keys, and was never asked to return them by Benjamin Herbst. (TR-262).

After May of 2012, Pastor denied that he continued to order supplies (TR-263), but the exhaustive evidence shows to the contrary (Employer Exhibit’s “3” and “7”). Pastor continued in his ability to place extensive orders for supplies in a unilateral and unchecked manner, and without any oversight from either Benjamin Herbst or Moshe Weiss. Pastor still possesses a company credit card for Home Depot (TR-2969). Pastor admitted that he did not fill out “Daily

Work Records” like other employees (TR-305, 307), and did not fill out “Work Orders” unlike other employees (TR-322).

Virtually all employees were hired by Pastor. (TR-32, 35 through 39). The Employer has not hired anyone in 2012 (besides Moshe Weiss). (TR-37). This lack of hiring was not due to a dilution of Pastor’s responsibilities, but rather flows from the economy and the Employer’s need to reduce costs. (TR-105, Employer’s Exhibit “15”). Pastor’s wages of \$2,000.00 per pay period far exceeded what was made by all other employees, including that of Benjamin Herbst (who only receives \$1,500.00 per pay period). See Employer Exhibit “2”. Finally, although other employees received additional pay for additional jobs (\$3.00 to \$5.00 per job), Pastor did not receive any such pay, nor did he ask for this pay from his Employer (TR-334).

ARGUMENT

I. THE HEARING OFFICER ERRED IN NOT HOLDING THAT PASTOR PEREA WAS EMPLOYED AS A SUPERVISOR WITHIN THE MEANING OF SECTION 2(11) OF THE ACT.

The Hearing Officer concluded that following the arrival of Moshe Weiss, Perea’s job responsibilities substantially changed, is unsupported by the record and extensive documentation as provided by the Employer. (HOR-12).

The traditional test for determining supervisory status is: (1) whether the employee has the authority to engage in, or effectively recommend, any of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573, 574 (1994). See also *Oakwood Health Care, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). The burden of proving supervisory status lies with

the party asserting that such status exists. Oakwood Health Care, Inc., *supra*, 348 NLRB at 686. (To be discussed in Section II, *infra*.)

Lack of evidence is construed against the party asserting supervisory status. Dean & Deluca New York, Inc., 338 NLRB 1046, 1048 (2003). Supervisory status cannot be established solely by secondary indicia, such as the perception of supervisory status, attendance at meetings, or participation in training classes. While the Board has examined secondary factors not set forth in Section 2(11) of the Act, these factors, in the absence of statutory indicia, are insufficient to establish supervisory status. Ken-Crest Services, 335 NLRB 777, 779 (2001). These principles are important, as this case presents the unique situation where an individual that was an admitted Supervisor by a Union Petitioner is now claimed by that Union to have lost that status. Therefore, much like an Employer has the burden of establishing supervisory status; Petitioner cannot simply assert conclusory statements in attempting to maintain that Pastor is no longer a Supervisor.

It is settled that an individual who exercises independent judgment in effectively recommending the hiring of employees is a statutory supervisor. *See, e.g., Donaldson Bros.*, 341 NLRB 958, 959 (2004); Venture Industries, 327 NLRB 918, 919 (1999). *See also NLRB v. Prime Energy Ltd. P'ship*, 244 F.3d 206, 212 (3d Cir. 2000) (individual who “had substantial influence in [a] hiring decision” was a supervisor). It is the *possession* of supervisory authority that is controlling. *See, e.g., Allstate Ins.*, 322 NLRB 759, 760 (2000). In Facchina Construction Co., Inc., 343 NLRB, 886, 886-87 (2004), *enfd.* 181 LRRM 3344 (D.C. Cir. 2006), the Board and D.C. Circuit found that foremen were agents with apparent authority where they served as conduits between employees and management, gave out work assignments and instructions, and were responsible for overseeing work. The title of the employee is not what is

important. Nor is it critical as to whether the supervising authority is actually used, so long as it is available. In construing Section 2(11), the Board has often noted that it is the possession of supervisory authority and not its exercise which is critical. See, e.g., Cherokee Heating and Air Conditioning Co., 280 NLRB 399 (1984); Sheet Metal Workers Local 85, 273 NLRB 523, 526 (1984); Hook Drugs, Inc., 191 NLRB 189, 191 (1971).

Notwithstanding his unsupported conclusion that Perea was not a supervisor, the Hearing Officer acknowledged the holding of Fred Meyer Alaska, Inc., 334 NLRB 646 (2001), U.S. Gypsum Company, 93 NLRB 91 (1951), and Wasath Oil Refining Company, 76 NLRB 417 (1948), which stand for the proposition that individuals who possess the authorities spelled out in the statutory definition contained in Section 2(11) are supervisors and can be held to be supervisors even if the authority has not been exercised. (HOR-9). In the present case, for reasons that are known only by Pastor (presumably because of his support for the Union and upon instruction by the Union in this obviously close election), Pastor ceased, of his own volition, to act as a supervisor. He made this conscious decision notwithstanding the fact that his employer had no such intent to remove his supervisory status. See testimony of Benjamin Herbst from September 5, 2012 (prior to the Election) and without even knowing of any issue concerning Pastor's supervisory status (TR-34, lines 2 and 3).

In the December 19th and 27th Hearing days, Benjamin Herbst testified directly as to the continuing nature of Pastor's supervisory status following the hiring of Moshe Weiss. (TR-25, 26). Moreover, the testimony of Petitioner's own witnesses belies any dilution in Pastor's duties. Pastor acknowledged that owner Benjamin Herbst told him that notwithstanding Moshe Weiss's hiring, that Pastor would have the same supervisory responsibilities, and never advised Pastor or any other employees to the contrary. (TR-259, 260, 332). In fact, the entire record of all of

Petitioner's witnesses is devoid of any comment from Benjamin Herbst and/or Moshe Weiss that Pastor was no longer to be a supervisor. All of the testimony of Petitioner's other witnesses (Avraham Cuevas, Jesus Walter Velazco, and Caesar Perea) each failed to specifically testify that either Benjamin Herbst and/or Moshe Weiss ever advised that Pastor was no longer a supervisor. While some of the employees did state that Moshe Weiss was a "new" or additional supervisor this statement, in and of itself, does not mean that Pastor's responsibilities were in any way diminished. In fact, Pastor continued to receive significantly greater wages (\$2,000.00 per pay period) that was far in excess of all other employees (see Employer Exhibit "2"), he continued to make substantial purchases/orders on behalf of his employer without any direction from Benjamin Herbst or Moshe Weiss (see Employer Exhibits "3" and "7"), he still continued to possess company credit cards from Home Depot (TR-2969), he did not fill out "Daily Work Records" like other employees (TR-305, 307), and he did not fill out any "work orders" like other employees (TR-322).

However, most determinative is the fact that Pastor admitted during his direct testimony that he was still in possession to the "keys" to all buildings. At no time did Pastor testify that Benjamin Herbst ever ordered Pastor to return these keys. (TR-262). In fact, Pastor admitted that the keys were hanging up in the "garage" at the "500 building," which is where he has continually maintained both tools and plumbing supplies for the entire company. (TR-262, 263). These actions clearly show that despite Pastor's own desire to not be a superintendent, his own actions are in direct contradistinction to this position, and his Employer's holding him out as a Section 2(11) Supervisor. If anything, the maintaining by Pastor of a tool and plumbing supply room, where no other employee/superintendent does so, is in and of itself convincing evidence of Section 2(11) supervisory status.

In applying the stated case law, this record lacks sufficient evidence by Petitioner, other than mere conclusions, as to Pastor being relieved of his supervisory status. The witnesses tendered by Petitioner have a clear bias in the outcome of this hearing. The only witness who is completely without bias was the Employer's witness, Hanam Casnan, who credibly testified that Pastor continued to act as a Supervisor following the hiring of Moshe Weiss. Moreover, Benjamin Herbst's position has remained unchanged from his testimony in the initial hearing on September 5, 2012, where it was initially asserted that Pastor was a Supervisor. This testimony is important because it occurred prior to the denial of supervisory status by Pastor, prior to Pastor's disability, and in the infancy of this proceeding.

The Fred Meyer Alaska, Inc., (*supra.*), U.S. Gypsum Company, (*supra.*), and Wasath Oil Refining Company, (*supra.*), cases are clearly controlling, as it was Pastor who did not exercise the "supervisory" authority that was granted to him, as opposed to Benjamin H. Realty having taken the authority away.

The Hearing Officer also cited Energy Mississippi, Inc., 357 NLRB No. 178 (2011) for the proposition that although Section 2(11) requires only possession of the authority to carry out enunciated supervisory function, not actual exercise, the evidence still must suffice to show that the authority exists. The clear and unequivocal testimony of each of the Employer's witnesses, clearly shows that Pastor had possession of the authority to carry out a supervisory function. The fact that he failed to exercise this authority after the involvement of the Union in organizing the employees of Benjamin H. Realty was his decision and his decision alone. The Employer should not be punished based on this supervisor's personal interest in being a Union member, thereby allowing him to dictate his own job duties.

Based on the foregoing, the Hearing Officer's Report should be set aside, and this Board should rule that Pastor Perea acted as a Section 2(11) Supervisor.

II. THE HEARING OFFICER IMPROPERLY PLACED THE BURDEN OF PROOF OF PASTOR'S SUPERVISORY STATUS ON THE EMPLOYER.

The Employer does not dispute the Hearing Officer's blanket assertion that the burden of proving supervisory status rests with the party asserting that status. (HOR-9). See NLRB v. Kentucky River Community Care, 532 U.S. 706, 711-712 (2001). However, this case presents the unique situation in which an admitted supervisor is now claimed by the Union to have lost his supervisory status. (TR-17, 18). The Employer maintains that in this unique situation, that the burden should not be on the Employer to prove supervisory status, but rather, that the Union should have the Union of proving that this supervisory status was withdrawn.

Taken a step further, if the Union is admitting that Pastor did satisfy the indicia of being a supervisor before, at the latest, May of 2012, the Employer has presented sufficient evidence to show that he continued to possess the majority of his powers/authority subsequent to that date. (See Argument I, *supra.*). Therefore, based on the Union's admission of Pastor's supervisory status, and the relatively lack of change in his daily functions as demonstrated in the previous section, there can be no doubt that he still retains his supervisory status, notwithstanding the addition by the Employer of Moshe Weiss. With the exception of Moshe Weiss now performing work on vacant apartments and his efforts to get them ready for new tenants, (TR-31, 347), Pastor continued to oversee all other aspects of the running of the sixteen (16) apartment buildings of Benjamin H. Realty, including, but not limited to, daily maintenance and repairs made by the superintendents and maintenance staff.

Therefore, because of the admission by Petitioner that Pastor possessed all of the necessary authority to be considered a Section 2(11) Supervisor prior to May of 2012, (including an overlapping period during which, by Petitioner's own admission, Pastor and Moshe Weiss continued to act as supervisors), the burden should be on the Union to show that in May this supervisory status was lost. The fact that this burden was inappropriately shifted to the Employer requires that the Hearing Officer's Report be reversed.

III. THE OCTOBER 18, 2012 DENIAL OF THE EMPLOYER'S REQUEST FOR REVIEW FILED ON OCTOBER 16, 2012, BY THIS BOARD SHOULD BE OVERRULED, AND THE MATTER HELD IN ABEYANCE.

In light of the holding of Noel Canning v. NLRB, ___F.3rd ___, Case #12-115 (D.C. CoA, 1/25/13), the United States Court of Appeals for the District of Columbia held unamously that President Obama's January 2012 recess appointments to the Board were constitutionally invalid. Inasmuch as the October 18, 2012 Decision of this Board denying the Employer's Request for Review filed on October 16, 2012 was decided by those same recess Board appointees, that denial should be overturned and the matter held in abeyance pending a review of that original Request for Review by properly appointed Board Members. See also New Process Steel, LP v. NLRB, 130 S.Ct. 2635 (2010).

IV. THIS CURRENT BOARD SHOULD HOLD IN ABEYANCE THE DETERMINATION AS TO THE ISSUE OF PASTOR PEREA'S SUPERVISORY STATUS UNTIL SUCH TIME AS AT LEAST THREE (3) MEMBERS HAVE BEEN CONSTITUTIONALLY APPOINTED BY THE PRESIDENT OF THE UNITED STATES.

In light of the holding of Noel Canning v. NLRB, ___F.3rd ___, Case #12-115 (D.C. CoA, 1/25/13), the United States Court of Appeals for the District of Columbia held unamously that President Obama's January 2012 recess appointments to the Board were constitutionally invalid. Inasmuch as any Decision of this current Board as to the Section 2(11) supervisory

status of Pastor Perea may be decided by those same recess Board appointees, that decision should be held in abeyance pending the proper appointment of Board Members. See also New Process Steel, LP v. NLRB, 130 S.Ct. 2635 (2010).

CONCLUSION

For the above stated reasons, the Employer respectfully requests that its Exceptions to the Hearing Officer's Report on Challenged Ballot be reversed, and that Pastor Perea be found to be a statutory supervisor in accordance with Section 2(11) of the Act. In the alternative, in light of the recent holding of Noel Canning v. NLRB, this Board should reverse the October 18, 2012 denial of the Employer's Request for Review filed on October 16, 2012 and concurrently hold the instant Request for Review in abeyance pending proper appointment of Board members by the President of the United States.

Dated: February 15, 2013

Respectfully submitted:

By: Steven B. Horowitz
Steven B. Horowitz, Esq.
Attorney for the Employer
Horowitz Law Group, LLC
101 Eisenhower Parkway
4th Floor
Roseland, New Jersey 07068
973-226-1500
973-226-6888 (Facsimile)