

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

In the Matter of

Virgo Medical Services, Inc.,

Employer,

and

Teamsters Union, Local 105,

Petitioner.

Case No. 4-RC-104485

**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

Pursuant to the Board's Rules and Regulations, 29 CFR §102.67(b), (c), (d), the Employer hereby files this Request for Review of the Regional Director's Decision and Direction of Election issued on June 20, 2013.

As set forth below in more detail, the Employer requests review on all issues that were at issue before the Regional Director namely, (a) the determination that the petitioned for unit was appropriate and (b) that the dispatchers and on-site coordinators should be part of the bargaining unit and not excluded as supervisors. With respect to the unit determination issue, the Employer requests review on the basis that as a matter of law the decision is inconsistent with Board precedent¹ and the Regional Director's

¹ See Board's Rules and Regulations, §102.67(c)(1).

Decision on a variety of factual issues is “clearly erroneous.”² On the issue of supervisory status, the Employer contends that the Regional Director’s decision on a variety of factual issues was “clearly erroneous.”³

The Employer also contends that the Regional Director lacked jurisdiction to issue its Decision and Direction of Election due to the absence of a quorum of the Board itself thus depriving any of the Board’s delegates, including the Regional Director, of the authority to act.

Summary of Evidence⁴

The Company is engaged in the business of transporting veterans back and forth for medical treatment. In Philadelphia, the Company has a contract with the Philadelphia VA to transport veterans serviced by that facility to medical appointments throughout the area. In New Jersey, the Company has contracts with VA hospitals in East Orange and Lyons, New Jersey and Coatesville, Pennsylvania. It also transports private patients and patients in nursing homes unaffiliated with the VA (Tr. 11-15).

The Union filed a petition seeking a unit of drivers and dispatchers at the Philadelphia location only (Board Exh. 1). The Philadelphia location employs 21 drivers plus one dispatcher. The New Jersey-based drivers which were not included with the

² *Id.* at §102.67(c)(2).

³*Id.*

⁴ This summary is included pursuant to the requirements set forth in the Board’s Rules and Regulations, §102.67(d).

petition number 81 drivers (Tr. 33).⁵ The Company considers the workforce to be a single integrated operation (Tr. 20, 31).

At the hearing, the parties agreed that there were two outstanding issues. The Employer contended that due to the extensive amount of functional integration within the Company that the only appropriate unit was a multi-facility unit composed of all the Company's drivers. The Union claimed that the drivers performing work under the Philadelphia VA contract constituted an appropriate unit.

The second issue related to the supervisory status of dispatchers and on-site coordinators --- the latter then currently vacant in Philadelphia. The Union contended that these classifications should be part of the unit while the Company contended that they were supervisors as defined under §2(11) of the Act.

The Employer presented Glen Bielic, Director of Operations as a witness. Additionally, the Hearing Officer called three additional managerial/supervisory witnesses: Tony Agosto, Chief Operating Officer; Rodney Arrington, supervisor; and Tarig Ali, Field Supervisor. The Union presented no evidence either through witnesses or exhibits.

The evidence demonstrated that the Company's operations are substantially integrated. The Company engages in the transportation of patients from a hospital or

⁵ There are also on-call per diem drivers. The parties agreed to include any per diem driver that regularly worked on average more than twenty hours per week and to exclude those that drove less than twenty hours per week.

residence to a medical appointment. The vast majority of work is through contracts with VA Hospitals. Drivers, whether operating pursuant to a contract with the Philadelphia VA or another VA, perform the same tasks and perform them in the same manner. The twenty or so Philadelphia drivers receive the same benefits as the eighty-one East Orange-based drivers and are within the same general hourly salary range except that drivers operating under the Philadelphia VA contract receive on average a slightly higher wage because the employees of the previous contractor had a slightly higher wage scale than is on average employed in New Jersey (Tr. 28-39, 94-97).

The operations of the Company are highly centralized. No records are kept in Philadelphia. All employees are hired only after they travel to East Orange, New Jersey for substantive interviews. The Company's only physical location in Philadelphia is currently a trailer. A building is being built, but records will continue to be maintained in East Orange. Furthermore, all maintenance of vehicles is done in East Orange. Similarly, all training including specialized certification MAVT and other training (CPR, blood pathogen) are conducted only in East Orange. Except for verbal and written warnings, management at corporate headquarters in East Orange effectuates suspensions and terminations. Consistent with these facts, upper management spends substantial time physically in Philadelphia (Tr. 29, 37-41, 155, 199).

Finally, there is a substantial amount of interchange: two drivers have permanently transferred to Philadelphia although they commute from residences closer

to the East Orange facility. Two other drivers spend half of their time driving under the Philadelphia manifest and the other half of the time from other Company schedules. Still other East Orange-based drivers supplement the regular Philadelphia drivers on a continuing basis so that the Philadelphia VA manifest can be met. Philadelphia drivers take vehicles for repair in East Orange and while waiting for the repair to be made will regularly be scheduled for a local transport under a New Jersey VA or private patient schedule. All of these vehicles are registered in New Jersey (Tr. 22, 23, 32, 37-38, 71, 90, 140-143).

The Regional Director's Decision and Direction of Election

The Regional Director ruled in favor of the Union on all issues. On the unit issue, the Regional Director concluded that the Employer had failed to meet its burden overcoming the presumption favoring a single site location. The Regional Director concluded that there was sufficient autonomy at the local level and insufficient evidence of interchange of employees and overall functional integration. The Regional Director alternatively relied upon the Board's decision in *Speciality Healthcare and Rehab. Ctr. of Mobile*, 357 NLRB No. 83 slip. op. at 10-13 (2011) which ostensibly increased the burden upon a party seeking a broader unit than a smaller unit "consisting of employees readily identifiable as a group who share a community of interest." Decision and Direction of Election, p. 3 (hereinafter "Regional Director's Decision").

As for the supervisory issue, the Regional Director concluded that neither the dispatchers nor the on-site coordinator exercised sufficient indicia of supervisory authority to be classified as supervisory.

Reasons for Granting the Request for Review

The Scope of the Unit Issue

In reaching his decision that the Employer failed to meet its burden that the presumption forming a single site of employment was not overcome, the Regional Director vastly overstated the authority vested with the Operations Manager in Philadelphia. Otherwise, the Regional Director failed to reference other facts demonstrating the extensive functional integration within the Company.

The Decision stated that “there is considerable local autonomy at the Philadelphia facility, which has its own Operations Manager, On-Site Coordinator, and Dispatcher” (Regional Director’s Decision, p. 7). This conclusory statement is largely unaccompanied by any detailed factual support in the decision and, ironically, while relaying the impact upon the dispatcher and the on-site coordinator to uphold the Union’s position on the scope of the unit, the Regional Director, in the very next breath, concluded that these positions were not supervisory, thereby suggesting elsewhere that the authority vested in these positions which it had just relied upon to support the conclusion that the Philadelphia operation was an independent operation -- was not so substantial.

Contrary to the Regional Director's conclusory findings, the record evidence demonstrates that the local manager has limited and nearly non-existent authority. Thus, there are no records maintained in Philadelphia (Tr. 231). Indeed, there is presently no building housing the Philadelphia work (Tr. 52). The Company operates out of a trailer (Tr. 94). The local manager, Rodney Arrington, is not given any funds of any real amount to operate – a hundred dollars or less. All supplies come from East Orange, NJ headquarters (Tr. 232). The local manager has no knowledge what employees make as such decisions are made in East Orange (Tr. 238). While there are drivers that serve the Philadelphia VA, there is no separate list of drivers. All drivers are capable of being sent anywhere to transport a patient. This makes abundant sense since all drivers – regardless of the particular VA they serve --- have essentially the same skills (Tr. 230, 245).

The limitations upon the local manager are virtually endless. In addition to the above, he is not to schedule overtime unless there is an extreme emergency (Tr. 250). Furthermore, the local manager only interview applicants – all applicants travel for up to several hours to East Orange for interviews and are hired only after the managers in East Orange are satisfied that the applicants meet Company standards (Tr. 29). In this same respect, the local manager's and on-site coordinator's extent of disciplinary authority is to issue verbal and written warnings (Tr. 53).

The Regional Director also vastly understated the level of functional integration among all uniformed drivers – both the approximately eighty-one drivers that operate out of East Orange and the twenty or so that report to Philadelphia. Thus, aside from the issue of transfer and interchange discussed below, the Regional Director omitted several facts indicating centralization of control and then concluded that there was an insufficient amount of interchange (Regional Director’s Decision at p. 8). Yet in reaching that conclusion, the Regional Director failed to even mention that on average at least a driver a day from Philadelphia is in East Orange for repairs to the Company vans out of the sole garage that is in East Orange. While those drivers are waiting for their vehicles, they frequently drive local New Jersey VA or private patient routes (Tr. 37-38, 127-128). All of the Company’s extensive training, including licensed Mobility Assistance Vehicle Technician (MAVT) training which has a two-year certification and, CPR and blood pathogen training with a one-year certification takes place in New Jersey. All drivers must attend these training sessions (Tr. 40, 75-76, 152).

As for interchange, the Regional Director downplayed or ignored the record evidence. Two employees had permanently transferred to working out of the Philadelphia VA schedule and four other employees were assigned out of that schedule even though they originated in East Orange. Two of them worked under the Philadelphia schedule 95% of the time and the other two 50% of the time. Counting all six, that represents thirty percent of the petitioned for unit. Perhaps, more significantly,

and something also downplayed, was the testimony of the local manager that even after seven or eight months in operation, there are still a large number of East Orange drivers needed to meet the Philadelphia VA schedule. This is consistent with the fact that there is only one driver list and it is used daily and regularly to service the Company's customers wherever they are (Tr. 32, 71-72, 115, 140-142, 146-147, 201-202). Taking these facts into account, the Regional Director's conclusion that there is a limited amount of interchange and functional integration is incompatible with the record evidence.

In support of its position below, the Company relied upon the cases of *Budget Rent A Car Systems*, 337 NLRB 884 (2002) and *Dattco*, 338 NLRB 49 (2002) where the Board found that the presumption favoring a single geographical site had been overcome by the amount of functional integration in the larger unit. The Regional Director concluded that the facts of this case were distinguishable. This case, in fact, mirrors the facts in those cases – cases where the similarity of skills, function, training, the centralization of operations and labor relations, common supervision, contact between employees, common benefits and terms and conditions of employment all serve to eradicate the single site presumption. Those factors were present in *Budget Rent A Car* and *Dattco* and they are present here.

The Regional Director's Decision reflects a result-oriented approach to decision-making. The Board should grant this review because the decision both emasculates Board precedent and is wholly unfaithful to the facts of this case.

The Board alternatively relied upon *Speciality Healthcare and Rehab. Ctr. of Mobile*, 357 NLRB No. 83, slip op. at 10-13 (2011). The case stands for the proposition espoused for the first time by this current Board that when a group of employees share an identifiable community of interest, the party seeking a broader unit must demonstrate “that employees in the larger unit share an overwhelming community of interest with those in the Petitioned for unit.” *Id.* at slip op. 12-13. The Regional Director indicated that the Board did not state in *Speciality Healthcare* that that recently enunciated standard was or should be applied in a so-called “multi-facility unit issue.” Regional Director’s Decision, p. 3-4. This Company does not believe that this standard should apply as it is a case of apples and oranges. Here, the analysis is whether there is a functional integration so substantial that the smaller unit is simply inappropriate as a matter of law. The issue is not whether the group petitioned for by the Union has a community of interest but whether that community of interest is, in this case, so significantly broader that it renders the smaller sized unit inappropriate. For this legal distinction and because the facts otherwise show that the petitioned for unit is plainly inappropriate, the application of *Speciality Healthcare* is improper or, if applied, does not serve to uphold the Regional Director’s decision.

The Supervisory Issues

The Regional Director's Decision and Direction of Election, with respect to the supervisory issue, represents a selective and inaccurate rendition of the record in this case. The Board is asked to consider the following:

Dispatchers

The Company submitted uncontroverted testimony that Dispatchers recommend discharge (Tr. 54-55, 59, 116-117, 176-180, 227, 239-240). The Regional Director rejected this uncontroverted testimony because no documentary evidence was produced.

Regional Director's Decision, p. 11. That ruling is improper. Board representation cases are not adversarial and the Board is not to make credibility findings, including the rejection of uncontroverted evidence merely because it is not supported by documents. The fact of the matter was this evidence was uncontroverted. Furthermore, it was not the only evidence of such conduct and even though the Philadelphia VA contract had been in effect for only about seven months, the Dispatcher also had effectively recommended discipline of another employee (Tr. 116, 176-180, 227, 239-241, 252). The Regional Director's decision to discount this evidence was wrong. It was uncontroverted and must be considered.

Additionally, the evidence was similarly uncontroverted that the Dispatchers determine the assignments --- that they have the authority and effectively exercise that authority to make all driving assignments --- choosing one driver over another and

exercising independent discretion in that function. This is not “routine” conduct unaccompanied by the use of independent judgment as baldly suggested by the Regional Director’s Decision (p. 12). In contrast to the cases cited by the Regional Director, the Dispatcher must match availability, location and timing of the patient’s schedule.

The Regional Director’s Decision finding Dispatchers not to be supervisors is not supported by the record. The Board should grant review of this issue.

On-Site Coordinator

The record evidence also is uncontroverted that On-Site Coordinators issue verbal and written warnings and forward them to the corporate headquarters to become part of the employee’s official record. These facts are distinguishable from *Alternate Concepts*, 1358 NLRB No. 38 at slip op. 5-6 (2012) cited in the Regional Director’s Decision (p. 12) because here actual discipline was meted out as evidenced by the fact that the record of the warnings were put in the employee’s personnel files. Whether *Alternate Concepts* is a fair interpretation of the statute or not, it clearly does not extend to actual discipline of the employee.

The Regional Director also rejected out of hand the uncontroverted evidence that the On-Site Coordinator is the person recommending the employee of the month which results in a \$50 gift certificate each month (Tr. 54). The Regional Director’s reasoning is suggestive of the result-oriented decision-making formula that was obviously

employed. Thus, the Regional Director opined, “However, Bielic did not indicate how many such recommendations the On-site Coordinators have made or provide any evidence as to how the recommendations are made or put into effect. Conceivably, these awards are based on a rotational system or on detailed objective standards set by the Employer rather than by use of independent judgment.” The Regional Director’s “logic” is either the product of a grasping for straws for anything to support his conclusions or at best someone whose thinking is totally foreign to the way business is undertaken. This conclusion is inescapable: What kind of US-based company would use a socialistic-styled rotational system to name an employee of the month that carries a monetary award? And what kind of company would have such objective standards as to exclude independent judgment from such a decision? To be sure it is theoretically possible, but in the absence of even a scintilla of evidence supporting such notions, what would lead this Regional Director to opine out of thin air that a relatively small business like this would have those types of structured standards for such an award? The answer is obvious.

Furthermore, there was uncontroverted evidence that On-Site Coordinator has effectively recommended pay raises for drivers and that this was based on his own independent judgment (Tr. 149). The Regional Director also ignored this evidence.

Based upon the above, the Request for Review should be granted on the Regional Director’s failure to designate the On-Site Coordinators as a statutory supervisors.

The Regional Director Lacked Jurisdiction to Issue The Decision and Direction of Election

Dennis Walsh was sworn in as Regional Director of Region 4 of the NLRB on April 19, 2013, pursuant to his selection by the Chairman of the Board acting on behalf of the Board. This appointment is invalid. The appointment of Regional Directors by the Board is required as a matter of law. See 29 U.S.C. §154(a).

Consistent with the recent decisions of the U. S. Court of Appeals for the District of Columbia Circuit and the Third Circuit Court of Appeals, the NLRB has lacked a lawful quorum of these constitutionally appointed members at least since January 3, 2012. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 4876 (U. S. June 24, 2013); *NLRB v. New Vista Nursing & Rehab.*, 2013 U. S. App. LEXIS 9860 (3rd Cir. May 16, 2013). See also *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010) and *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-476 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3498 (2010) (reaffirming that agents of the Board lack authority to act when principal's authority is suspended).

For the reasons stated in these cases, the Regional Director lacked authority and thus jurisdiction to issue the Decision and Direction of Election in this case.

Accordingly, the Decision must be set aside.

Conclusion

For the foregoing reasons, the Request for Review should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Employer's Request for Review of Regional Director's Decision and Direction of Election was served by first class United States mail, postage prepaid on July 9, 2013, and by email on July 9, 2013, on the following:

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