

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TITO CONTRACTORS, INC.

Employer

and

Case 05-RC-117169

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 51,
AFL-CIO

Petitioner

**TITO CONTRACTORS, INC. REQUEST FOR REVIEW OF THE DECISION AND
DIRECTION OF ELECTION AND REQUEST TO REOPEN THE RECORD**

Dated: January 10, 2014

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INTRODUCTION

Tito Contractors, Inc. (“Tito”) submits this Request for Review of the Regional Director’s Decision and Direction of Election and also requests that the Board reopen the record for the submission of additional evidence. Compelling reasons exist for review of the Regional Director’s Decision and Direction of Election, not the least of which involve the Regional Director’s refusal to allow Tito to litigate the appropriateness of the petitioned-for bargaining unit and the unprecedented application of what amounts to a *per se* rule regarding employer-wide units. In this respect, the Decision is a significant departure from Board precedent and rules. Moreover, had the Regional Director allowed Tito to introduce record evidence on the appropriateness of the proposed bargaining unit, it would have overwhelmingly demonstrated that the employees within the proposed bargaining unit do not share a community of interest. To the contrary, the work they perform varies drastically, as do their job responsibilities, skills and experience, wages and benefits, supervisors and reporting structure, working conditions and job locations. The Regional Director failed to address any of these factors in its Decision and Direction of Election. Similarly, with respect to the supervisory status of several employees, the Decision is clearly erroneous and disregards testimony by the Petitioner’s witness which clearly establishes that he and other supervisors use their independent judgment to assign and responsibly direct other employees.

FACTUAL AND PROCEDURAL BACKGROUND

I. TITO CONTRACTORS, INC.’S OPERATIONS AND ORGANIZATIONAL STRUCTURE

Tito is a general contracting firm that provides a variety of services, including carpentry, painting, masonry, drywall installation and, during the winter months, snow removal. Tito also has 3 contracts with Maryland Environment Services (“MES”), a state agency to provide

primarily recycling-related and grounds-keeping services at 4 separate facilities throughout Maryland. Tito has approximately 105 employees. Its employees include managerial and clerical employees that work at Tito's Georgia Avenue office, 2 mechanics that perform routine maintenance work on company vehicles, project managers that prepare and submit bids for work and oversee a number of ongoing projects, supervisors and general laborers that perform carpentry and other work, and approximately 50-60 employees that work under the MES contracts. With the exception of managerial and clerical employees and the 2 mechanics, all of whom work at the Georgia Avenue office, Tito's employees report directly to jobsites.

The recycling employees report directly to the recycling facilities (the employees are assigned to a specific facility and do not transfer between facilities). For the most part, these employees sort recyclable materials on a conveyor belt or perform grounds-keeping services. The contracts between MES and Tito set forth the rates of pay, benefits, work hours and other conditions of employment at each particular recycling facility. Although Tito employs a supervisor at each location to oversee its employees and manage its operations, MES supervisors at each location retain the authority to dictate the work hours of Tito's recycling employees and to request that a Tito employee be removed from the facility or that Tito hire additional workers at a facility.

The carpentry crews, on the other hand, are generally made up of 2-4 skilled laborers, depending on the scope of the work to be performed. The crews are led by supervisors, who also perform work alongside the crewmembers. Generally, the crews report directly to jobsites located throughout Virginia, Maryland and the District of Columbia and work at the jobsite until the project is completed, at which point the crew will receive a new assignment. Some laborers

are assigned to permanent or longer-term contracts and report to the customer's location on a daily basis. These employees rarely come to Tito's Georgia Avenue office.

The recycling and carpentry sides of Tito's business are not integrated, the employees are not interchangeable and do not possess the same types of skills, nor do they share the same pay structure, benefits, work hours or work conditions.

II. THE PREELECTION HEARING AND THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

On December 2, 2013, a hearing officer of the Board conducted a hearing relating to a petition filed under Section 9(c) of the National Labor Relations Act ("Act"). Petitioner sought recognition of a proposed bargaining unit that encompassed all of Tito's employees, excluding all guards, professional employees, office clerical and supervisors.¹ Before the hearing (and again on the record at the commencement of the hearing) Tito succinctly stated its position that (1) the proposed bargaining unit was not appropriate because the employees did not share a community of interest; and (2) 10 individuals should be excluded from the proposed unit because they are supervisors within the meaning of Section 2(11) of the Act. Approximately four days before the hearing, the hearing officer notified Tito by email that the Regional Director was "not inclined to allow litigation on the unit issue, as the Petitioner seeks a wall-to-wall unit of all employees employed by the Employer, which, under Board law is a presumptively relevant unit." Consistent with this email, at the hearing, the hearing officer did not allow Tito to introduce any evidence on the issue of the appropriateness of the bargaining unit. Instead, the hearing officer allowed Tito to make an offer of proof. Counsel objected to this procedure and made a detailed offer of proof outlining the facts and circumstances which rendered the bargaining unit inappropriate. (Tr. 17:9 – 27:11). Approximately five minutes after the

¹ As noted in the Decision and Direction of Election, the original petition was amended at the December 2, 2013 hearing to clarify scope of the proposed bargaining unit.

Employer made its offer of proof, the hearing officer announced, “[a]fter consulting with Regional Management, I received your offer of proof. But the evidence proffered is rejected, and I will not permit testimony on this issue”. (Tr. 27)(emphasis added). In the Decision and Direction of Election, the Regional Director, without reference to any facts or other circumstances relating to Tito’s business organization or operations, concluded that an employer-wide bargaining unit is presumptively appropriate. The Decision states, “If the petitioned-for unit is appropriate, as the employer-wide unit is here, the inquiry into appropriate units ends.” (Decision at 7). The Regional Director did not allow Tito to present any evidence on this issue, nor did the Regional Director engage in any analysis to determine whether the employees’ shared a community of interest. In effect, the Regional Director created a *per se* rule that an employer-wide bargaining unit is appropriate.

The only evidence that Tito was allowed to present at the hearing related to the status of 10 employees that Tito contends are supervisors within the meaning of Section 2(11) of the Act. Tito elicited testimony from its General Manager, Kenneth Brown, about the responsibilities and duties of the 10 employees. Mauricio Bautista, one of the 10 employees at issue, testified on behalf of the Petitioner. The evidence clearly established that, although the 10 employees do not have authority to hire, discipline or discharge another employee, they use independent judgment derived from years of experience and familiarity with customers to assign and direct members of their crew; they provide constant oversight, mentoring and guidance to their crew members; and they are ultimately responsible and held accountable for the performance of their crews. The Decision disregards these facts and erroneously concludes that the 10 employees are not Section 2(11) supervisors.

ARGUMENT

I. THE DECISION NOT TO ALLOW TITO CONTRACTORS, INC. TO LITIGATE THE APPROPRIATENESS OF THE BARGAINING UNIT IS CONTRARY TO BOARD RULES AND PRECEDENT AND EFFECTIVELY ESTABLISHES A PER SE RULE OF APPROPRIATENESS FOR EMPLOYER-WIDE UNITS.

The Regional Director's Decision not to allow Tito to present any evidence on the appropriateness of an employer-wide bargaining unit warrants review by the Board because it represents a significant departure from Board rules and precedent and it resulted in prejudicial error. Before the hearing, Tito explained in detail to the hearing officer why an employer-wide bargaining unit was not appropriate. Tito also stated its position at the commencement of the December 2, 2013 hearing. However, the Regional Director did not allow Tito to introduce any evidence on this issue. Tito objected to this decision and proceeded to make a lengthy and detailed offer of proof, which demonstrated why the proposed bargaining unit was not appropriate. In its Decision, the Regional Director held that, because the employer-wide unit was presumptively appropriate², no further analysis was required.

A. The Regional Director's Actions Deprived Tito Contractors, Inc. of its Rights Under the Act and Disregarded Board Rules

Section 9(c)(1) of the Act provides for an appropriate pre-election proceeding when a petition is filed seeking a representation election. This procedure is set forth in Sections 101.20(c), 102.64(a) and 102.66(a) of the Board's Rules and Regulations. Section 101.20(a) provides, inter alia:

The parties are afforded full opportunity to present their respective positions and to provide significant facts in support of their contentions.

Section 102.64(a) provides, inter alia:

² As explained below, Tito disputes the Regional Director's application of an employer-wide presumption of appropriateness in this case as the facts and circumstances clearly demonstrated that it was a multi-facility unit involving several different crafts and trades.

It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.

Section 102.66(a) provides, in part:

Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross examine witnesses and to introduce into the record documentary and other evidence.

In Barre-National, Inc., 316 NLRB 877 (1993), the Board found that the Regional Director erred in refusing to allow the employer to introduce any evidence at the preelection hearing regarding the supervisory status of certain employees. The Regional Director in Barre, Inc. instructed the hearing officer that the supervisory status of line and group leaders would not be litigated at the hearing. The hearing officer in Barre, Inc. limited the employer to an offer of proof on the record. Given these facts - - which are clearly analogous to the instant case³ - - the Board held:

Under these circumstances, the preelection hearing held in this case did not meet the requirements of the Act and the Board's Rules and Statements of Procedure. The Regional Director therefore committed error in curtailing the hearing as he did.

Id., see also Angelica Healthcare Services Group, 315 NLRB No. 175 (1995). The instant case is no different. Tito was not allowed to present any witness or evidence to challenge the petitioned for unit, regardless of any supposed presumption. Should this procedure stand, the Act would

³ Arguably, the circumstances here are even more egregious than in Barre because there is no real dispute that the appropriateness and scope of the bargaining unit is a question concerning representation that must be decided at the preelection hearing and cannot be resolved after an election is conducted. In a 2012 Memorandum relating to the Board's amendments to procedures in representation cases, which have since been held invalid, the NLRB Office of the General Counsel indicated that "Where an employer operates at multiple locations, issues involving which facilities should be included in a unit must be litigated at the pre-election hearing." Memorandum at 11.

have to be amended to abolish an employer's right to a pre-election hearing to challenge the appropriateness of a unit. The Regional Director has no such power.

Moreover, the Regional Director's reliance on Mariah, Inc., 322 NLRB 586 (1996) is misplaced. Mariah, Inc. does not authorize a hearing officer to exclude all evidence on a relevant issue, as the hearing officer did here and in Barre, Inc.. Rather, in Mariah, Inc., the hearing officer excluded "certain testimony and documents" that did not go to relevant issues. 322 NLRB at 587. In fact, in Mariah, Inc., the Board distinguished Barre, Inc. and stated "Here, unlike Barre, the Employer was given an opportunity to present evidence on all relevant issues." 322 NLRB at 587. Moreover, in Mariah, Inc., the record contained "sufficient evidence to make a unit determination and the Employer was given an opportunity to state its position and present evidence on the unit issue." Id. Thus, Mariah, Inc. confirms a hearing officer's authority to exclude certain evidence that is not relevant. It does not authorize the hearing officer to altogether preclude an employer from litigating a relevant issue appropriate for a preelection hearing.

B. The Regional Director Effectively Established a New *Per Se* Rule of Appropriateness for Employer-Wide Units.

As an initial matter, the Regional Director's reliance on an employer-wide or wall-to-wall presumption of appropriateness is misplaced. A wall-to-wall presumption of appropriateness applies where the proposed unit involves a single-facility, but not where the employees work at various locations and facilities. See Capital Coors Co., 309 NLRB 322 (1992) ("[T]he presumptive appropriateness of a single-facility unit is inapplicable where, as here, the petitioner seeks to represent a multifacility unit."). Here, Tito's employees report to several different locations or jobsites. Moreover, the cases upon which the Regional Director rely with respect to the employer-wide presumption of appropriateness are not analogous. For example, in

Greenhorne & O'Mara, Inc., 326 NLRB 514, 516 (1998), the employees in the petitioned-for unit performed the same general type of work and, although they were located at various jobsites, the employer had a centralized labor management structure.⁴

However, unlike the Board's decision in Greenhorne, here the Regional Director engaged in no analysis whatsoever after concluding that an employer-wide presumption applies. The Decision states "If the petitioned-for unit is appropriate, as the employer-wide unit is here, the inquiry into appropriate units ends." Decision at 7. A presumption of appropriateness merely shifts the burden of proof, but may still be rebutted with evidence that the proposed unit is not appropriate. The Regional Director did not allow Tito to rebut the presumption of appropriateness, nor did he address the substance of Tito's offer of proof. In fact, The Regional Director summarily rejected the offer of proof approximately 5 minutes after it was made. The Decision contains no analysis or other indication that the Regional Director followed the well-established procedures for determining the appropriateness of a bargaining unit. The Regional Director effectively amended the Act by eliminating Tito's right to challenge the petitioned for unit in a preelection hearing and adopting a *per se* rule of appropriateness.

The Regional Director's decision also violates Section 9(c)(5) of the Act, which provides "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." The only factor that the Regional Director considered in this case was the request for an employer-wide unit set forth in

⁴ Unlike here, the employer in Greenhorne was given an opportunity to rebut the presumption of appropriateness. The Board cited the following record evidence in finding that the employer failed to rebut the presumption: "the majority of the petitioned-for employees are subject to the same wage rates, fringe benefits, work rules, and policies and procedures . . . There is no separate bargaining history for any of these employees. Also, although each jobsite is a separate project, there is no evidence that skills, duties, or working conditions of employees vary from project to project." 326 NLRB at 516.

the Petition for Recognition. By failing to consider any other factors, the extent of the employees' organization, as set forth in the petition, became the determinative factor in the Regional Director's Decision.

The Regional Director's actions are unprecedented and call out for Board review.

II. TITO CONTRACTORS, INC.'S OFFER OF PROOF FURTHER DEMONSTRATES THAT THE DECISION IS CLEARLY ERRONEOUS AND PREJUDICIAL

Setting aside the procedural and legal issues relating to the Regional Director's decision that an employer-wide unit is appropriate, the Decision also warrants Board review because it is clearly erroneous. Had Tito been allowed to introduce evidence on this issue, its offer of proof clearly establishes that the proposed bargaining unit was not appropriate because the employees do not share a community of interest. The facts overwhelmingly rebut the presumption of appropriateness invoked by the Regional Director.

Under Section 9(b) of the National Labor Relations Act ("NLRA" or the "Act"), the Board (or Regional Director) must determine whether a proposed bargaining unit is "appropriate." A single unit is inappropriate where employees do not share similar interests. Swift & Co., 129 NLRB 1391 (1961). The Board generally considers the following factors in determining whether employees share a community of interests: (1) the degree of functional integration of business operations; (2) whether employees perform similar types of work or have similar skills; (3) whether employees are interchangeable and have regular work contact; (4) whether employees are subject to similar working conditions; (5) whether employees the similar wage and benefits packages; (6) whether employees are subject to common supervision; (7) the geographic proximity of employees; (8) prior bargaining history; and (9) the extent and form of organization. NLRB v. Paper Manufacturers Co., 786 F.2d 163, 167 (3d Cir. 1986). As

described below, Tito Contractors, Inc.'s offer of proof addresses each of these factors.⁵ The Director erred in precluding Tito from introducing this evidence. Tito asks the Board reopen the record so that Tito can introduce record evidence to substantiate its assertion that the petitioned-for unit is not appropriate.

A. The Work Is Not Functionally Integrated

Tito provides a variety of construction services, including painting, carpentry, tile installation, and masonry work. During the winter months, Tito also provides snow removal services. Tito employs skilled workers as well as general laborers to perform these services. For the most part, the employees are organized into crews made up of 3-4 people. Generally, crews are assigned to work on a project and, unless additional help is required on a particular project, the crews work independently of each other. Tito also employs estimators, project managers and supervisors (all of whom are excluded from the proposed bargaining unit) to oversee this part of its business. Its customers are primarily local and state governments and large commercial enterprises.

In addition to these general contracting services, Tito has 3 separate contracts with Maryland Environmental Services ("MES") relating to 4 different recycling facilities. Under these contracts, Tito's employees perform distinct tasks depending on the facility.

The general contracting segment of Tito's business is entirely separate from the MES 'side' of its business. Those employees that perform painting, carpentry and other construction-related services do not interact with the recycling employees. Moreover, the recycling employees have little, if any, interaction with each other given the geographic distance between certain facilities, the different types of work performed at the facilities, the different supervision

⁵ Counsel for Tito Contractors, Inc. made an oral offer of proof, which can be found at pages 17-27 of the hearing transcript.

at each facility and the fact that the work performed at each facility is governed by a separate contract that prescribes the rates of pay, benefits and other conditions relating to the work being performed. There are no transfers among these employees. Similarly, there is no evidence that the construction crews interact with each other or are integrated in any way.

B. The Employees Perform Different Types of Work and Possess Different Skills

The proposed bargaining unit includes employees that perform a wide variety of tasks and possess different types of skills. In this regard, the employees clearly do not share a community of interests. Specifically, the proposed bargaining unit includes the following categories of employees:

a) Mechanics. Tito employs two mechanics who perform routine maintenance work on company vehicles. These employees are located at Tito's Georgia Avenue office and possess unique skills, knowledge and experience that differentiate them from other employees.

b) Skilled Carpenters. Tito employs several individuals with experience in certain trades, including masonry, tile installation, painting and general carpentry. These employees have several years of experience and, typically, hold supervisory positions.

c) General Labor. Tito also employs general laborers who have little to no experience in any specific trade. They often perform those tasks that do not require a high level of expertise or skill. In describing the relationship between supervisors and general laborers, Maurice Bautista (a supervisor) testified that he has trained and mentored employees who knew very little when they were hired.

d) Warehouse Employee. Tito employs one individual who works strictly at a leased warehouse facility in Kensington, Maryland and whose job is to receive deliveries and organize materials. This employee no longer performs carpentry or other work.

e) **Recycling Sorters.** Tito employs several individuals tasked with sorting recyclable materials, including glass, plastic, etc. These employees are located at 2 facilities in Derwood and Cockeysville.⁶ For the most part, they stand at a mechanized conveyor belt and sort materials consistent with the guidance and instruction of MES. These employees have no experience or skills in general construction or carpentry.

d) **Dickerson Facility General Laborers.** Pursuant to an October 2013 contract with MES, Tito provides “general labor services on an as needed basis” at the Montgomery County Yard Trip Compost Facility in Dickerson, Maryland. The employees are responsible for bagging compost, stacking bags on a palletizer, wrapping pallets, temperature monitoring, grounds keeping, including mowing, weed eating, and leaf blower usage, litter control, housekeeping, painting and other duties.

e) **Derwood Solid Waste Transfer Station Laborers.** Under the October 2013 contract with MES, Tito also provides traffic control, equipment cleaning, grounds keeping, temperature monitoring and other services at the Montgomery County Solid Waste Transfer Station in Derwood, Maryland.

C. The Employees Are Not Interchangeable

The employees within the proposed bargaining unit are not interchangeable. The recycling employees and laborers possess different skills that preclude them from performing each others’ jobs. Moreover, the distance between the two recycling ‘sorting’ facilities is approximately 60 miles, which means that these employees do not transfer or alternate between locations. With respect to the laborers, Tito has contracts with certain local governments, including Arlington and Fairfax Counties, which require that Tito’s employees pass background

⁶ As explained elsewhere in the brief, there are separate contracts that relate to the Derwood and Cockeysville facilities; the employees are subject to different supervisors; they receive different rates of pay and benefits packages; they are located approximately 60 miles apart; and the employees are not interchangeable.

checks. Tito employees that have not undergone or passed a background check necessarily cannot work on those projects. Similarly, certain customers request a specific crew of Tito employees. Tito cannot send another crew to those projects. Finally, given the specialized nature of their jobs, the mechanics are not interchangeable with the other employees.

D. The Employees Are Subject To Different Working Conditions

The employees within the proposed bargaining unit are subject to different working conditions depending on a variety of factors, including the nature of the work they perform, the location where the work is being performed and whether the work is performed pursuant to the terms of a contract.

The two mechanics work full-time and are responsible for repairing and maintaining company vehicles. They work onsite at the company's Georgia Avenue location and report directly to management, though they operate as a more-or-less independent unit on a day-to-day basis.

The warehouse employee works 40 hours/week indoors and must lift and organize materials. Although he coordinates shipments and deliveries with other employees, he is the only employee that works at the warehouse on a regular basis.

Employees that work at the Derwood and Cockeysville recycling facilities typically work indoors at mechanized conveyor belts. They are required to stand all day and sort recyclable materials. Their hours and work schedules are dictated by the MES contract or MES supervisory personnel. For example, the Derwood facility contract provides that Tito Contractor employees work 10 hour shifts with one ½ hour unpaid lunch break; MES personnel direct when relief breaks will be given; the normal schedule is Monday – Thursday. Moreover, because these employees work indoors, their work is not affected by weather conditions in the same way as the painters, carpenters and other laborers.

Employees at the Dickerson facility provide groundskeeping services, including mowing, weed-eating and leaf blower, as well as composting services, including bagging compost, stacking bags, and wrapping pallets. Weather conditions may affect these employees and MES has the right to adjust work hours based on the weather conditions.

For the most part, the work conditions of Tito's other employees are dictated by the jobs being performed and the mandates of the customer. For example, on any given day, Tito employees may be renovating apartments at a senior assisted-living facility, painting the exterior of a commercial office building, providing carpentry services at a public school or jail. In addition, during the winter months, Tito's employees provide snow removal services. Some tasks can be performed in a few hours, others require several weeks. Some tasks must be performed during normal business hours, others must be performed at night or, in the case of snow removal, around-the-clock.

E. The Employees Have Different Wage And Benefit Packages

The employees within the proposed bargaining unit receive different pay and benefit packages. There is no centralized labor relations function. In several cases, the rates of pay for Tito's employees are fixed by contracts between Tito and a third party.

For example, the 3 MES contracts fix the rate of pay for employees at the recycling facilities. Employees at the Derwood sorting facility are paid more than employees at the Cockeyville sorting facility. Overtime work must be authorized by MES. Similarly, under the terms of the MES contracts, employees at the Derwood and Dickerson facilities must be offered health and dental insurance; whereas employees at the Cockeyville location are not entitled to any insurance benefits.

Tito also has certain contracts with local governments that fix a minimum rate of pay based on the locality's 'living wage.' These contracts also set specific work hours depending on

when the facilities are open and/or accessible. In addition, supervisors and skilled carpenters are paid more than general laborers. However, the rate of pay among the supervisors and skilled carpenters varies depending upon experience, performance, skill level, etc. Supervisors also receive paid vacation leave and health and dental insurance. General laborers do not receive these benefits.

The two mechanics are full-time employees and receive paid vacation leave and health and dental insurance.

F. The Employees Are Not Subject To Common Supervision

Tito's employees are subject to different supervisors depending upon the nature of the work they perform, where they perform the work and whether the work is being performed pursuant to the terms of a fixed contract. For the most part, carpentry crews are led by a supervisor who assigns tasks, provides guidance and direction and tells workers when they can take breaks. Project managers also oversee supervisors and crews. Certain customers, including, for example, Arlington and Fairfax County, have the right to request that Tito remove an employee from a contract.

Similarly, MES management retains the right to dictate, for example, the number of employees needed and their work schedules. For example, the January 2011 contract relating to the Derwood facility provides that MES supervisory personnel will direct when relief breaks will be given. It also provides that MES has the right to request that Tito replace certain employees. The record would show that MES has exercised this right.

G. The Employees Do Not Work Within The Same Geographic Area

Tito's employees work at various locations throughout Maryland, the District of Columbia and Virginia. The recycling employees report to specific facilities in Derwood, Dickerson and Cockeysville, Maryland. The Derwood facility is approximately 60 miles from

the Cockeysville facility. Similarly, Tito Contractors has a handful of employees are that generally dedicated to a permanent contract with Arlington County, Virginia. These employees report to an Arlington County maintenance facility and work at different buildings owned or operated by the County. Tito also has contracts with Baltimore City and Fairfax County, in addition to projects in Prince George's County and throughout the metropolitan area. Tito communicates with supervisors and tells them where their crews should report for work (usually at a job site).

Based on the foregoing information, it is overwhelmingly clear that the employees in the proposed bargaining unit do not share a community of interests. The Regional Director's decision to certify an employer-wide bargaining unit is clearly erroneous.

III. THE DECISION WITH RESPECT TO THE SUPERVISORY STATUS OF THE EMPLOYEES AT ISSUE IS CLEARLY ERRONEOUS AND WARRANTS BOARD REVIEW.

The only issue that Tito was allowed to litigate at the December 2, 2013 hearing related to the status of 10 employees that Tito contends are supervisors within the meaning of Section 2(11) of the Act. Tito presented testimony from its General Manager, Kenny Brown, who testified about the role and responsibilities of these employees. The Petitioner also presented testimony from Mauricio Bautista, one of the 10 employees at issue. The Regional Director's decision that these employees are *not* Section 2(11) supervisors is clearly erroneous.

Pursuant to Section 2(11) of the Act:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Accordingly, “individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions . . . listed in Section 2(11); (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;’ and (3) their authority is held ‘in the interest of the employer.’” In re Oakwood Healthcare, Inc., 348 NLRB 686 (2006).

A. The Evidence Established That The Employees Use Their Independent Judgment to Assign and Responsibly Direct Their Crewmembers.

The employees at issue are referred to as “supervisors” by Tito and its employees. They lead crews that consist of up to 4-5 employees and occasionally include sub-contractors. They are generally the most senior and authoritative Tito employee on-site and are responsible for assigning work to crew members and overseeing completion of the project. In making assignments and directing the other crew members, the supervisors draw on their professional experience and knowledge of the work, the skills and capabilities of the crew members and other factors. Supervisors also train crew members and provide instruction in various areas of carpentry. Supervisors are ultimately held accountable for ensuring satisfactory and timely completion of the project and have authority to recommend corrective action if a crew member is not meeting expectations or has otherwise caused problems. Supervisors are also paid more money, are eligible for health and dental insurance, receive a company truck (which they use to transport their crew to jobsites), a company cell phone and fax machine and a company credit card to purchase materials for jobs.

1. The Employees “Assign” Work to Crew Members

The term “assign” refers to “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Id. at 689. Here, the

supervisors are provided with or informed of the job specifications. Within the confines of those specifications, the supervisor must decide how the job will be completed and assign his crew members to various tasks based on the nature of the work to be performed and the skills of his crew members. See Transcript at 47:1-10. In describing the role of the supervisor, the General Manager testified as follows:

Q: Does the supervisor provide any other sort of direction to his employees?

A: He provides all the direction for the employees. We expect him to understand based on his expertise how the job is being performed, when it is to be done, which is very critical. The time limits we have, even the issue of access to the properties we're working on, that's all transmitted from the supervisor to the workers.

Transcript 40:17-24. On cross-examination Mauricio Bautista, one of the 10 supervisors at issue, provided additional information about his job responsibilities. Mr. Bautista generally works under a contract between Tito Contractors and Arlington County and performs work at various facilities owned by Arlington County, including, for example, the County jail. He decides when he needs additional help on a project and calls Tito to request additional crew members.

Transcript at 89:23 – 90:12. As a supervisor, he is responsible for assigning crew members tasks to perform:

Q: So when these other individuals – employees showed up to help you, were you in charge of telling them what to do?

A: Yes.

Q: What sorts of things did you tell them to do?

A: We had to take all the units in the jail, the medical center, it depends on the, all the on the job order that I have to do and get.

Transcript 90:17-24. In response to questions from the Hearing Officer, Mr. Bautista testified as follows:

Q: Do you direct employees' work?

A: Yes. It depends on the capacity and capability of the worker. The three of us, we're a team. For example, one is good at plastering. The other one is good at framing for making walls. Because I know them, I assign them to the placing of the jobs that they are best fit to do.

Transcript at 99:19-25. After assigning crew members to tasks, Mr. Bautista continues to supervise the work being performed.

Q: Once the tasks are assigned to that person, do you need to give any further guidance?

A: Yes, all day, yes.

Q: Like what, for example?

A: For example, I am framing a wall at the court. And while I'm working framing the wall, I also see what he is doing. I'm always aware of what he's doing to make sure he's doing it well, based on what I've told him.

Transcript 100: 1-8. Mr. Bautista testified that he is also responsible for training his crew members and that he has "trained a number of workers in flooring, carpentry, painting, because when they started they knew nothing." Transcript 101:10-14. In response to the Hearing Officer's final questions, Mr. Bautista's testimony could not have established more clearly that, as a supervisor, he is responsible for assigning tasks to crew members and overseeing the completion of those tasks:

Q: So to be clear, it is my understanding that you will assign co-workers to do a task, i.e., paint, drywall, frame?

A: Yes.

Q: That's based on their knowledge of that skill?

A: Correct, yes.

Q: And after that assignment, will you provide further guidance if necessary?

A: Yes, I am working with them.

Transcript 101:17-102:1.

2. The Employees “Responsibly Direct” the Work of Crew Members And Are Held Accountable For Their Work

The phrase “responsibly to direct” was added to the statutory provision after the other 11 supervisory functions had already been enumerated in the proposed legislation. The inclusion of the phrase “responsibly to direct” was “designed to ensure that the statutory exemption of Section 2(11) encompassed those individuals who exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions (e.g., where promotional, disciplinary and similar functions are handled by a centralized human resources department).” In re Oakwood Healthcare, Inc., 348 NLRB 690. The phrase conveys an element of accountability for the individual directing other employees. For the direction to be “responsible,” “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” Id. at 691-92.

Here, the evidence established that supervisors are accountable for the work performed by their crew. Mr. Bautista testified that he constantly oversees the work his crew members are performing because he is responsible for the project:

Q: And, again, if that individual [referring to a crew member] is not doing it well, does anything happen to you? Are you held accountable?

A: Yes.

Q: How?

A: I am responsible for –

Q: How?

A: I am responsible if the job is done well; I am responsible because I am assigned to the job. So if there is a complaint about the job, the person who is assigned the job or the person who is the oldest or most responsible is held responsible.

Transcript 100: 9-20. Similarly, Mr. Brown, the General Manager testified that supervisors are responsible for ensuring that projects are completed in a workmanlike and timely manner:

Q: Does the supervisor have any role in making sure that the crew is meeting its progress goals?

A: Yes. He is held accountable for that, yes.

Q: How is he held accountable?

A: If I've given you a task to do and I'm telling you it should take 5 days to do it, and on Wednesday of that week, if he has 5 days and we're not even 50 percent complete, we hold that gentleman accountable and say what is your corrective plan, get back on schedule, and be finished by Friday.

Transcript 49:1-10. Mr. Brown also testified that supervisors are responsible for conducting and leading safety meetings at a job site, for providing safety instructions to crew members and for ensuring their compliance with those instructions. Transcript 39:25-40:13. He also testified as follows:

Q: And if a crew member isn't complying with the safety requirements, what happens?

A: It's up to the supervisor to remove him from the job.

Transcript 40:14-16. Similarly, if crew members are not performing as expected, supervisors can make recommendations to Tito for corrective action. For example, if a worker's slow or inadequate performance is affecting the crew's ability to complete the job, the supervisor is responsible for alerting Tito Contractors management. Transcript 48: 15-25.

3. The Employees Exercise Independent Judgment In Carrying Out Their Supervisory Functions

In carrying out these functions, a supervisor must also use his independent judgment. To exercise independent judgment "an individual must at a minimum act, or effectively recommend

action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” In re Oakwood Healthcare, Inc., 348 NLRB at 692-93. The exercise of judgment may not be of a “merely routine or clerical nature” and may not be dictated by detailed instructions or set forth in company policies. However, a supervisor relies on independent judgment when he makes “a personal judgment based on personal experience, training, and ability.” Id. at 693 (quotation omitted).

Here, supervisors draw on their experience and/or familiarity with a jobsite in carrying out their supervisory functions. The General Manager testified as follows:

Q: [W]hen he’s making these assignments, what sorts of factors does the supervisor consider or what is he supposed to consider?

A: Well, we’re hoping that on his experience he would understand what has to take place A through Z in setting up that job, because his job is to direct and use his own judgment in that regard.

Transcript 38:18-24. Similarly, Mauricio Bautista explained that, in making decisions about assignments and prioritizing tasks, he relies on his years of experience and his familiarity with the capabilities of his crew members. Transcript at 99:15-25. Although supervisors are provided with specifications and a scope of work which describe the nature of the work to be performed, they must constantly draw on their own experience, training and skills when deciding how a job should be performed within the confines of those specifications and which crew members are best suited to perform certain tasks.

B. The Regional Director’s Decision Ignores the Evidence

The Regional Director’s conclusion that the employees are not supervisors is premised on an overly narrow interpretation of the Act and is contrary to the weight of the evidence. The Regional Director mischaracterizes the Supervisor’s direction of crew members as routine or clerical. The Decision states, “All of the tasks for a job are given to the Supervisor by a project

manager, and the Supervisor simply tells each laborer which of the tasks to perform.” Decision at 12. While supervisors (and other employees) must follow a customer’s instructions or the job specifications, Mauricio Bautista’s testimony made it clear that there is still room for the supervisor to make decisions about how best to complete a job and which crew members are best suited to perform various tasks. The Regional Director’s decision fails to account for the characteristics and nature of the work being performed. Similarly, the Regional Director’s finding that “Supervisor Bautista testified that he gives little direction to laborers in completing their tasks,” Decision at 12, has no support in the record and is contradicted by Mr. Bautista’s testimony cited above. The Regional Director’s decision with respect to this substantial factual issue is clearly erroneous and warrants Board review.

CONCLUSION

For the reasons set forth above, Tito Contractors, Inc. submits that this case presents compelling reasons for the Board to review the Decision and Direction of Election and, at least with respect to the appropriateness of the bargaining unit, to reopen the record and allow Tito Contractors, Inc. to submit relevant evidence.

Dated: January 10, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2014 a copy of Tito Contractor Inc.'s Request for Review was sent by U.S. mail to the following:

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