



United States Government

NATIONAL LABOR RELATIONS BOARD

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March 19, 2015

By Electronic Filing

Mr. Gary W. Shinnars, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-001

Re: Benjamin H. Realty Corp. and
Residential Construction and General
Service Workers, Laborers, Local 55
Case 22-RC-087792

Dear Mr. Shinnars:

Please accept this letter as the Region's opposition to the Employer's Motion to Reopen the Record and its Motion for Reconsideration in Case 22-RC-087792.¹

1. Procedural Background

A representation election was conducted in Case 22-RC-087792 on November 8, 2012. Subsequently, a hearing was held concerning the determinative challenged ballot of Justo Pastor Perea. During the hearing, the Employer asserted that Perea was employed as a statutory supervisor at the time of the November 8, 2012 election and that therefore, the Employer claimed, Perea's determinative ballot should not be counted. On January 25, 2013, the *Hearing Officer's Report on Challenged Ballot* issued finding that the Employer had not met its burden of

¹ This matter is related to *Benjamin H. Realty Corp.*, Case 22-CA-110689.

establishing that Perea was a supervisor under Section 2(11) of the Act, recommending that the challenge to Perea's ballot be overruled and that the ballot be opened and counted. The Employer filed *Exceptions* to the Hearing Officer's report. On June 19, 2013, the Board issued its *Decision and Direction* adopting the Hearing Officer's findings and recommendations and ordering that Perea's ballot be opened and counted. A *Certification of Representative* issued on July 2, 2013.

On October 15, 2014², the Employer filed with the Board its *Motion to Reopen the Record* in Case 22-RC-087792. On November 3, the Board issued a *Notice to Show Cause* and on November 17 the Petitioner, Residential Construction and General Service Workers, Laborers, Local 55, timely filed its *Opposition to the Employer's Motion*. On November 13, 2014, the Board issued its *Decision, Certification of Representative, and Notice to Show Cause* in related Cases 22-CA-110689 and 22-RC-087792.³ The Employer subsequently filed a November 21 *Reply to the Petitioner's Opposition to the Motion to Reopen the Record*. The Employer filed a December 10 *Motion for Reconsideration* in Cases 22-CA-110689 and 2-RC-087792, asserting that the Board's November 13, 2014 Decision and Certification of Representative and Notice to Show Cause issued without the Board having had the opportunity to consider the Employer's Motion to Reopen the Record in Case 22-RC-087792.

2. The Board's 2014 Adoption of the Hearing Officer's Findings and Recommendations

At the hearing concerning Perea's challenged ballot, the parties stipulated that prior to the Employer's March 2012 hire of "Manager" Moshe Weiss, Perea was a statutory supervisor. The dispute to be resolved by the Hearing Officer was whether Perea continued to possess any supervisory indicia following the arrival of Weiss. In his report, the Hearing Officer credited the testimony of three employee witnesses over that of the Employer's witnesses and found that "...the hiring of Weiss clearly [had] an impact on the duties of Perea"⁴ and that "[b]y no later than May 2012, [prior to the November 8, 2012 election] Perea's work duties and responsibilities were exclusively those of a nonsupervisory superintendent..."⁵ The hearing officer relied on a complete record, including the testimony of witnesses in addition to that of Perea, in finding that Perea was not a statutory supervisor at the time of the November 8, 2012 election.

In its November 13, 2014 Decision and Certification of Representative and Notice to Show Cause,⁶ the Board considered anew the Employer's arguments raised during the representation case, including its assertion that at the time of the November 8, 2012 election, Perea was a statutory supervisor under the Act. In this regard, the Board stated that it

² All dates are in 2014 unless otherwise specified.

³ *Benjamin H. Realty Corp. and Residential Construction and General Service Workers, Laborers Local 55*, 361 NLRB No. 103.

⁴ *Hearing Officer's Report on Challenged Ballot*, 22-RC-087792, p. 8.

⁵ *Hearing Officer's Report on Challenged Ballot*, 22-RC-087792, p. 12.

⁶ 361 NLRB No. 103.

“...considered the challenge and the hearing officer’s report recommending disposition of it, and reviewed the record in light of the [Employer’s] exceptions and brief.” 361 NLRB No. 103 at p. 2. The Board adopted the hearing officer’s findings and recommendations “...that the challenge to the [Perea’s] ballot be overruled” and specifically noted that the Employer “...failed to carry its burden of proving that Perea was a supervisor.” 361 NLRB No. 103 at p. 2, fn. 3.

3. The Employer’s Motion to Reopen the Record and Motion for Reconsideration in Case 22-RC-087792⁷ Must be Dismissed as Both are Based Wholly on Speculation

The Employer contends that its Motion to Reopen the Record and its Motion for Reconsideration are supported by newly discovered facts which undermine the 2013 certification of the Petitioner and which would change the outcome of the Board’s November 13, 2014 Decision and Certification of Representative.⁸ Specifically, the Employer asserts that a discrepancy exists between Justo Pastor Perea’s testimony proffered during the 2013 hearing concerning Perea’s determinative challenged ballot and information alleged in a 2014 complaint filed by Perea’s personal attorney in a New Jersey State civil action. The Employer contends that while Perea testified during the post-election hearing that he was *not* a statutory supervisor at the time of the November 8, 2012 representation election, Perea’s civil complaint alleges that he *did* hold that position until at least January 2013 and therefore, the Employer argues, had its Motion to Reopen the Record been addressed by the Board, the challenge to Perea’s ballot should have been sustained.

In support of its argument that Perea was a statutory supervisor at the time of the November 8, 2012 election, the Employer cites language in Perea’s civil complaint that:

“3. The plaintiff, Justo Pastor Perea, had been the general property manager for the defendant at several rental properties, which were owned by the defendant, since March 1, 2000.

4. However, in September, 2012, the plaintiff experienced some back problems and was unable to work from September, 2012 to December, 2012.

5. After the plaintiff resumed working for the defendant in January, 2013, the defendant demoted plaintiff, Justo Pastor Perea, to the position of superintendent for three of the defendant’s buildings.”⁹

Contrary to the Employer’s assertion, absent factual evidence, these civil complaint allegations alone do not establish that at the time of the election Perea either possessed or independently exercised supervisory authority, exhibited any supervisory indicia or could in any way be considered a statutory supervisor under Section 2(11) of the Act. *NLRB v. Kentucky River*

⁷ In the interest of brevity, Counsel for the General Counsel will not reiterate the arguments made by Petitioner in its November 17 *Opposition to the Employer’s Motion to Reopen the Record*.

⁸ *Benjamin H. Realty Corp. et. al.*, 361 NLRB No. 103.

⁹ *Motion to Reopen the Record*, p.4

Community Care, 532 U.S. 706, 713 (2001). Thus, the Employer's argument fails because it requires one to speculate that as Perea is *alleged* to have been a property manager commencing in 2001 and he is *alleged* to have been demoted to the position of superintendent in 2013, that he must have been the property manager during the November 2012 election *and* that he must have continued to exercise at least one of the supervisory indicia he earlier possessed as property manager through the date of that election.¹⁰ No evidence supporting such a conclusion is contained in the civil complaint on which the Employer relies or in either of the Employer's Motions. Therefore, the Employer's argument upon which its Motions rely has no basis in fact.¹¹

Further, the Hearing Officer found that following Weiss' hire, the Employer's President, Benjamin Herbst, told Perea that everything would stay the same, [impliedly including Perea's title]¹² and that Perea testified that he was not told by Herbst whether he remained a supervisor.¹³ Thus, there was no factual dispute over the change in Perea's title or whether he was "demoted." Even *assuming arguendo* that Perea continued to hold the title of "Property Manager" during the election, merely holding a title is insufficient under Board law to establish that an individual is a statutory supervisor. In this regard, the Board has held that purely conclusionary evidence is not sufficient to establish supervisory status. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). Thus, it is immaterial whether or when the Employer demoted Perea or changed Perea's title from that of property manager to superintendent. As noted above, the Hearing Officer credited the testimony of Perea and two other employee witnesses and found that following Weiss' arrival prior to the election, Perea no longer possessed any of the supervisory indicia he once held as property manager. Here, the Employer has presented no new evidence regarding whether Perea exhibited any supervisory indicia at the time of the election.

While the Board did not specifically reference the Employer's Motion to Reopen the Record in its Decision and Certification of Representative and Notice to Show Cause in 361 NLRB No. 103, this is not, by itself, sufficient grounds to grant the Employer's Motion for Reconsideration. As stated above, the Board considered anew all of the Employer's arguments raised during the proceedings in Case 22-RC-089972 and fully considered the record upon which the Hearing Officer's Report on Challenged Ballot is based. Upon such review, the Board found that the Employer had failed to carry its burden of proving that Perea was a Section 2(11)

¹⁰ *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) (individuals are statutory supervisors if they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11) of the Act).

¹¹ The party asserting supervisory status bears the burden of proof. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999).

¹² *Hearing Officer's Report on Challenged Ballot*, 22-RC-087792, p. 8

¹³ *Hearing Officer's Report on Challenged Ballot*, 22-RC-087792, p. 6.

supervisor. 361 NLRB No. 103, at p. 2. The Board therefore, adopted the hearing officer's recommendation that the challenge to Perea's ballot be overruled. 361 NLRB No. 103, at p. 2.

As the Employer has failed to present any new evidence in support of either of its Motions which would change the Board's November 2014 Decision and Certification of Representative and Notice to Show Cause, the Employer's Motion for Reconsideration, as well as its Motion to Reopen the Record must be denied.

Respectfully submitted,

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

BENJAMIN H REALTY CORP

and

Case 22-RC-087792

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

CERTIFICATE OF SERVICE OF: Region's Opposition to Employer's Motion to Reopen the Record and Motion for Reconsideration

This is to certify that on **March 19, 2015**, copies of the **Region's Opposition to Employer's Motion to Reopen the Record and Motion for Reconsideration** were served by email and regular mail upon the following individuals:

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Dated at Newark, New Jersey this 19th day of March, 2015.

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