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SONOMA DIRECT, INC. incorrectly named  
8 herein as WILLIAMS SONOMA

9 UNITED STATES OF AMERICA  
10 BEFORE THE NATIONAL LABOR RELATIONS BOARD

11  
12 In the Matter of:

13 WILLIAMS-SONOMA DIRECT, INC.,

14 Employer,

15 and

16 INTERNATIONAL BROTHERHOOD OF  
17 TEAMSTERS LOCAL 63,

18 Petitioner

Case No. 21-RC-176174

**WILLIAMS-SONOMA DIRECT,  
INC.'S STATEMENT OF  
OPPOSITION TO PETITIONER'S  
REQUEST FOR REVIEW OF  
REGIONAL DIRECTOR'S DECISION  
AND ORDER DISMISSING PETITION**

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1 **I. INTRODUCTION**

2 Pursuant to Section 102.67 of the Rules and Regulations of the National Labor  
3 Relations Board, Williams-Sonoma Direct, Inc. (“WSI” or the “Employer”) submits this  
4 Statement of Opposition to the International Brotherhood Of Teamsters Local 63’s (the  
5 “Union” or “Petitioner”) Request for Review of the Decision and Order Dismissing  
6 Petition (“Decision”) issued by the Regional Director, Region 21.

7 The Board grants review of a regional director’s decision “only where compelling  
8 reasons exist therefor.” (29 C.F.R. § 102.67(d).) No such “compelling reasons” exist here  
9 requiring review of the Decision. Dismissal of the Petition was not a substantial departure  
10 from Board precedent or based upon a clearly erroneous decision on a substantial factual  
11 issue. Dismissal was also not a result of any prejudicial conduct or important Board rules  
12 or policies that should be reconsidered. Accordingly, the Union’s Request for Review  
13 should be denied because it fails to demonstrate the existence of any ground upon which  
14 review might be granted.

15 The Regional Director correctly found that there was insufficient evidence to  
16 establish that the petitioned-for unit is an appropriate bargaining unit within the meaning  
17 of Section 9(c)(1) of the NLRA. In addition, there is no evidence in the record supporting  
18 any of the Union’s claims in its Request for Review. Specifically, there is no evidence the  
19 Regional Director found a community of interest existed among the petitioned-for unit.  
20 Similarly, there is no evidence the Union was told it only had to introduce evidence of  
21 union suitability and commerce issues because the Regional Director intended to rely on  
22 the record in the prior proceeding. Nor is there any evidence the Union was prevented  
23 from calling five of its six intended witnesses, as it claims. Finally, the Union’s claim that  
24 WSI manipulated its workforce to defeat certification is unsupported by any evidence in  
25 the record.

26 In fact, the Union began the hearing knowing that WSI was barred from litigating  
27 any unit issues and the Regional Director did not intend to take notice of the record of the  
28 prior proceeding. In the end, the Union chose to rely on a single witness to establish that

1 the approximately 160 employees in four job classifications across ten different  
2 departments shared a community of interest. The Union chose poorly.

3 Moreover, the Union did not behave at the hearing as if it were prejudiced by any of  
4 the Regional Director's now contested rulings (all of which were adverse to WSI). The  
5 Union refused WSI's offer to postpone the hearing to ameliorate any undue prejudice the  
6 Union might have suffered from WSI's inadvertent late service of the Statement of  
7 Position. The Union also refused to waive the preclusion bar that would have required  
8 WSI to present evidence and establish that the petitioned-for unit was not appropriate.

9 In spite of the Union's attempts to misstate both the correct legal standard and the  
10 Regional Director's findings, the Petition was correctly dismissed and the Union's Request  
11 for Review should be denied.

## 12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

### 13 **A. Prior Petition and Hearing**

14 On February 12, 2016, the Union filed a petition (the "First Petition"), Case No. 21-  
15 RC-169662, seeking to designate a unit of "Pickers and Runners Only" working at WSI's  
16 West Coast Distribution Center in Walnut, California (the "Facility"), and excluding "All  
17 other employees". (1. Bd. Ex. 1(a).)<sup>1</sup> WSI timely filed and served its Statement of  
18 Position, along with a fully compliant list of employees. (1. Bd. Ex. 1(d).) On February  
19 24, 25, and 26, 2016, a hearing was held to consider the First Petition. (1. Tr.) At that  
20 hearing, the parties stipulated to permit the Union to amend the First Petition to describe  
21 the unit as "the merchandise processors -- merchandise processors, forklift, and lead  
22 merchandise processors in Department [sic] 3208, 3234, 3236, and 3237." (1. Tr. 62:10-  
23 12.) On February 26, 2016, in the middle of the hearing and after hearing substantial  
24

25 <sup>1</sup> The entire record of proceedings, including the transcript and exhibits, related to the  
26 hearing on the First Petition (the "prior record") was placed by the Hearing Officer in the  
27 rejected exhibits file during the instant hearing as Employer Exhibit 5. (Decision, at 3 fn.  
28 5; 2. Tr. 205:23-204:3, 235:21-236:2.) For ease of reference, the transcript in the prior  
record contained in Employer Exhibit 5 is referred to herein as "1. Tr. \_\_\_" and Board  
exhibits in the prior record are referred to herein "1. Bd. Ex. \_\_\_".

1 evidence demonstrating that the only unit appropriate under Board precedent was one that  
2 included employees in all hourly, non-office clerical classifications throughout the Facility,  
3 the Union abruptly withdrew the First Petition. (1. Tr. 569:14.)

4 **B. Instant Petition and Hearing**

5 On May 12, 2016, the Union filed another petition for certification (the “Second  
6 Petition”), Case 21-RC-176174, to designate a unit consisting of “Merchandise Processors,  
7 merchandise processors – forklift, lead merchandise processors in Departments 3149,  
8 3205, 3206, 3212, 3234, 3236, 3237, 3238, 3239” working at the Facility and excluding all  
9 other employees.<sup>2</sup> (2. Bd. Ex. 1 [Second Petition].)<sup>3</sup>

10 WSI timely filed its Second Statement of Position, along with a fully compliant list  
11 of employees, with the Region on Friday, May 20, 2016. That same day, the Regional  
12 Director continued the hearing from Monday, May 23 to Tuesday, May 24. Due to an  
13 inadvertent secretarial error, the Second Statement of Position was not served on the Union  
14 until approximately 1:40 p.m. on Monday, May 23, 2016. Prior to the opening of the  
15 hearing, the Regional Director precluded WSI from offering witnesses and testimony, and  
16 from cross examining witnesses regarding the appropriateness of the unit pursuant to  
17 Section 102.66(d). (Decision, at 2.)<sup>4</sup>

18 *1. The First Day of the Hearing*

19 At the outset of the first day of the hearing on May 24, 2016, WSI argued that it  
20 should not be precluded from litigating unit issues because the Union was not prejudiced

21 \_\_\_\_\_  
22 <sup>2</sup> Essentially, the Union sought the exact same classifications of employees as in the First  
23 Petition (merchandise processors, merchandise processors – forklift, lead merchandise  
processors), in six additional departments (3149, 3205, 3206, 3212, 3238, and 3239).

24 <sup>3</sup> References to the transcript of the hearing on the Second Petition will be referred to as  
25 “2. Tr. \_\_\_”. Board exhibits in the Second Petition will be referred to as “2. Bd. Ex. \_\_\_”.  
Employer exhibits in the Second Petition will be referred to as “2. Er. Ex. \_\_\_”.

26 <sup>4</sup> WSI has submitted a Conditional Request for Review asking the Board to review the  
27 Regional Director’s decision precluding WSI from litigating the appropriateness of the  
28 petitioned-for unit, but for purposes of this Statement of Opposition, WSI acknowledges  
that it was precluded from offering witnesses and testimony, and from cross examining  
witnesses at hearing.

1 by the inadvertent late service. (2. Tr. 11:18-14:5.) The Union’s counsel refused to allow  
2 WSI to litigate unit issues and claimed that her ability to prepare her witnesses was  
3 prejudiced by the delayed service of the Second Statement of Position because she

4 had to spend the first 45-minutes of the witness preparation meeting  
5 determining whether the Statement of Position was different than the  
6 February 2014 [sic] Statement. Several of the witnesses who showed up to  
7 the preparation meeting had to leave the meeting to attend to family  
8 commitments before Petitioner’s counsel even got to go over testimony with  
9 them. Had Petitioner been able to spend an additional 45 minutes with them,  
10 that may not have been the case.

11 (Union Req. Rev., at 2-3 [citing 2. Tr. 18:4-20:4].) Although there was no witness  
12 testimony attesting to any such prejudice and it was unclear how Union’s counsel would  
13 have been able to effectively prepare “several” witnesses to testify in these 45 minutes, or  
14 why she waited so long to do so, WSI nevertheless offered to delay the hearing a day to  
15 ameliorate any possible prejudice. (2. Tr. 11:18-24.) The Union declined, stating that  
16 “this election needs to happen; it needs to happen as soon as possible.” (*Id.*, at 21:18-21.)  
17 Ultimately, the Regional Director upheld the preclusion ruling. (Decision, at 2.)

18 Next, WSI and the Union submitted a joint stipulation to take administrative notice  
19 of the prior record, but the Regional Director refused to consider the prior record.  
20 (Decision, at 3 fn. 5, *see also* 2. Tr. 41:19-24.) At no point in either the first or second day  
21 of the hearing did Union’s counsel object to the Regional Director’s refusal to take notice  
22 of the prior record, reference any impact on her litigation plans, or say anything indicating  
23 she had “told five of [the Union’s] six witnesses they did not need to attend” because she  
24 was planning to rely on the prior record. (Union Req. Rev., at 14.)<sup>5</sup> Further, the Union  
25 made no attempt to introduce any of the testimony or documents from the prior record into  
26 evidence, although it now claims a “Board Agent also told Petitioner that, at most, at the  
27 hearing, because the Board could rely upon the February 2014 [sic] hearing transcript,  
28 Petitioner may need to present testimony on union suitability and commerce issues only.”

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<sup>5</sup> In fact, it appears that Union’s counsel was unfamiliar with the prior record. (2. Tr. 31:9-10 [expressing uncertainty as to whether the record contained any stipulations].)

1 (*Id.*) Simply put, there is no indication in the record that the Union was planning to rely  
2 upon the prior hearing transcript as part of its presentation.<sup>6</sup>

3 2. *The Second Day of the Hearing*

4 On the second day of the hearing on May 25, 2016, the Hearing Officer solicited a  
5 “clarification” from the Union regarding its Petition. In response, the Union amended its  
6 Petition to: (1) eliminate Department 3238 (incorrect unused pay code) from the  
7 petitioned-for unit; (2) add Department 3210 (Cross Dock) into the petitioned-for unit; and  
8 (3) add the Merchandise Processor(s) classification to the employees sought. The Union  
9 then began its presentation. The Union’s only evidence consisted of calling Jesus Garcia  
10 as a witness.<sup>7</sup> Mr. Garcia is the lead employee-organizer at the Facility and was involved  
11 in selecting the petitioned-for unit for certification. (2. Tr. 105:5, 107:5-7.) According to  
12 Mr. Garcia, the employees in the petitioned-for unit were chosen because “[w]e all work  
13 side-by-side, talking about the unit. We work side-by-side. We all transport physically on  
14 machinery or I would say most, I’m sorry. Most of us transport merchandise physically on  
15 machinery and do work side-by-side.” (2. Tr. 157:1-9.)

16 Mr. Garcia is personally classified as a “merchandise processor(s)”, performs job  
17 duties as a “picker” in Department 3208, and works in the 950 Building on the first shift.  
18 (2. Tr. 102:17-20, 108:18-19, 130:14-15.) Mr. Garcia did not offer any testimony  
19 regarding the work performed by non-petitioned-for employees working in the petitioned-  
20 for departments. (2. Tr. 127:15-22.) Mr. Garcia testified in extremely broad terms about  
21 the work performed by other employees in the petitioned-for unit, including testifying  
22 about the terms, conditions, benefits, job duties, job functions, and supervisory structure of  
23 employees in the petitioned for unit that included four different job classifications across  
24 ten different departments, some in a different building than the one he worked in and  
25

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26 <sup>6</sup> Notably, Chris Cuyler, the Facility’s General Manager, and 6 other WSI employees were  
27 present in the hearing room. The Union chose not to call any of them.

28 <sup>7</sup> Mr. Garcia also testified under oath previously in the First Petition. The Union never  
attempted to put his prior testimony into evidence through him while he was on the stand.

1 others on a completely different shift. His testimony about employees in departments that  
2 were not petitioned for was even more general. (2. Tr. 109:12-20.)

3 WSI objected that Mr. Garcia's testimony was hearsay, lacked foundation and  
4 called for speculation, because Mr. Garcia was not qualified to testify about the work  
5 performed by other employees in a different building working on a different shift, or about  
6 the work performed by employees in a department different from his own. (*See, e.g.*, 2.  
7 Tr. 107:25-108:8, 113:5-9, 114:4-5, 114:22-115:1.)<sup>8</sup> The Hearing Officer prompted the  
8 Union on multiple occasions to build a foundation for Mr. Garcia's testimony or otherwise  
9 make it more clear for the Regional Director to review. (*See, e.g.*, 2. Tr. 163:16-20.) The  
10 union failed to do so.<sup>9</sup>

11 After Mr. Garcia finished testifying, the Union confirmed it had no further  
12 witnesses when asked by the Hearing Officer. (2. Tr. 181:23-25.) The Hearing Officer  
13 also confirmed he would not be calling any further witnesses. (2. Tr. 182:1-2.) At no  
14 point did the Union's counsel claim she was unable to call further witnesses or was  
15 otherwise prevented from introducing any other evidence.

16 **C. The Decision**

17 On June 7, 2016, the Regional Director issued her Decision and Order dismissing  
18 the Petition. The Regional Director specifically found "that the record evidence is  
19 insufficient to establish that the petitioned-for unit is an appropriate bargaining unit within  
20 the meaning of Section 9(c)(1) of the Act." (Decision, at 2.) Even though WSI was  
21 precluded from litigating the appropriateness of the unit, the Regional Director found she  
22 had an independent obligation to determine whether the petitioned-for unit was appropriate  
23  
24

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25 <sup>8</sup> WSI made a standing hearsay objection to this aspect of Mr. Garcia's testimony. (2. Tr.  
26 115:15-17.)

27 <sup>9</sup> Had WSI been permitted to cross-examine Mr. Garcia, it also would have confronted him  
28 with his inconsistent testimony in the prior record, as set forth in WSI's oral and written  
offer of proof. (2. Tr. 198:5-199:14, 2. Er. Ex. 4.)

1 pursuant to *Allen Health Care Services*, 332 NLRB 1308 (2000). (Decision, at 4-5.)<sup>10</sup> In  
2 examining the record, the Regional Director found that while the employees in the  
3 petitioned-for unit “share some community of interest with each other ... the record fails to  
4 establish whether they have, or do not have, conditions of employment in common with  
5 other employees who are not part of the petitioned-for unit.” (*Id.*, at 5.) Relying upon  
6 *Bergdorf Goodman*, 361 NLRB No. 11 (2014), the Regional Director found that “the  
7 record evidence is insufficient to establish whether the employees in the petitioned-for unit  
8 constitute an appropriate unit.” (*Id.*, at 6.)

### 9 **III. ARGUMENT**

#### 10 **A. Dismissal of the Petition for insufficient evidence was consistent with Board 11 precedent**

12 A proposed unit is appropriate if it consists of employees who are “readily  
13 identifiable as a group (based on job classifications, departments, functions, work  
14 locations, skills, or similar factors)” and who “share a community of interest after  
15 considering the traditional criteria.” (*FedEx Freight, Inc. v. NLRB*, 816 F. 3d 515, 522 (8th  
16 Cir. 2016) [citing *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934, 942].)  
17 Among the factors considered in determining whether a community of interest exists in a  
18 petitioned-for unit are “whether the employees are organized into a separate department;  
19 have distinct skills and training; have distinct job functions and perform distinct work; are  
20 functionally integrated with the Employer’s other employees; have frequent contact with  
21 other employees; interchange with other employees; have distinct terms and conditions of  
22 employment; and are separately supervised.” (*Bergdorf Goodman*, 361 NLRB No. 11

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23  
24 <sup>10</sup> The Board has unequivocally stated that the new Rules are “consistent with *Allen Health  
25 Care Services*, 332 NLRB 1308 (2000), in which the Board held that even when an  
26 employer refuses to take a position on the appropriateness of a proposed unit, the regional  
27 director must nevertheless take evidence on the issue unless the unit is presumptively  
28 appropriate. The final rule thus permits the petitioner to offer evidence in such  
circumstances and merely precludes non-petitioners, which have refused to take a position  
on the issue, from offering evidence or cross-examining witnesses.” (79 Fed. Reg. 74308,  
74366.)

1 (2014).) While some community of interest factors may weigh in one direction or another,  
2 the ultimate determination is whether a community of interest exists among employees in a  
3 proposed unit. (*FedEx Freight, Inc.*, 816 F. 3d at 522.) It is not enough that employees in  
4 a petitioned-for unit possess some community-of-interest factors. (*Bergdorf Goodman*, at  
5 11.) In sum, as the Board has previously explained “[i]t is highly significant that, except in  
6 situations where there is prior bargaining history, the community-of-interest test focuses  
7 almost exclusively on how the employer has chosen to structure its workplace.” (*Id.*  
8 [*quoting International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951)]).) Here, the Regional  
9 Director applied existing Board precedent to the record and found that there was  
10 insufficient evidence in the record to determine the appropriateness of the petitioned-for  
11 unit.

12 First, the Union does not actually point to an incorrect application of Board  
13 precedent but instead misrepresents the Regional Director’s actual findings. The Union  
14 claims “the Regional Director specifically found that the proposed bargaining unit shares *a*  
15 community of interest.” (Union Req. Rev., at 13 [emphasis added].) The Union goes on  
16 to claim “the Regional Director’s finding that there is both *a* community of interest and  
17 that the unit is inappropriate is illogical and a troubling departure from NLRB precedent.”  
18 (*Id.* [emphasis added].) These claims are blatant misrepresentations of the Decision. The  
19 Regional Director found that the employees in the petitioned-for unit have “*some*  
20 community of interest with each other.” (Decision, at 5 [emphasis added].) This alone is  
21 insufficient. The Board, in *Bergdorf Goodman* established that sharing “some community  
22 of interest factors” is not dispositive of whether a petitioned-for unit shares “a community  
23 of interest.” (*Bergdorf Goodman*, at 9 [“As an initial matter, we acknowledge that the  
24 record shows that the petitioned-for employees share some community-of-interest  
25 factors.”].)

26 Second, while the Union claims “all that is necessary to find an appropriate  
27 bargaining unit is a community of interest according to traditional criteria—job  
28 classifications, departments, functions, work locations, skills, or similar factors,” it makes

1 no effort to point to what evidence it contends establishes that the petitioned-for unit is  
2 appropriate. (Union Req. Rev., at 12-13.) Here, the petitioned-for unit only seeks some,  
3 but not all, job classifications in some, but not all, departments in two different buildings  
4 across two different shifts. There is nothing presumptively appropriate about the  
5 petitioned-for unit. Moreover, Mr. Garcia’s testimony regarding common job functions  
6 was generic, at best. (2. Tr. 157:3-9. [“We work side-by-side, talking about the unit. We  
7 work side-by-side. We all transport physically on machinery or I would say most, I’m  
8 sorry. Most of us transport merchandise physically on machinery and do work side-by-  
9 side.”].) Accordingly, the Regional Director correctly found that “[l]ike the proposed unit  
10 in Bergdorf Goodman, the petitioned-for unit does not seem to follow the Employer’s  
11 organizational structure.” (Decision, at 6.)

12 **B. The Regional Director correctly found that the Union’s evidence was**  
13 **insufficient**

14 The Union claims that “there was substantial evidence that other employees in the  
15 facility were distinct from the proposed bargaining unit” in support of its claim that the  
16 Regional Director’s finding here was “clearly erroneous.” The Union is incorrect for  
17 several reasons.

18 First, when the Union speaks of “evidence,” substantial or otherwise, it can only be  
19 referencing Mr. Garcia’s testimony, the only evidence the Union introduced. The  
20 testimony of Mr. Garcia which the Union cites in its Request for Review does not establish  
21 that “other employees in the facility were distinct from the proposed bargaining unit.”  
22 Foundationally, Mr. Garcia only testified as to the work performed by “employees” – not  
23 “merchandise processors” – he personally observed in his work area. (2. Tr. 165:23-25  
24 [“Can you, for example, tell me a little bit about what some of the employees in your work  
25 area who aren’t going to be part of the proposed bargaining unit do?”], 166:1-167:18.) As  
26 to whether any employees (merchandise processor or other classifications) in the excluded  
27 departments moved product, Mr. Garcia only testified that he did not consider physically  
28 moving product to be their primary job. (2. Tr. 167:18-21.) And, contrary to the Union’s

1 claims, Mr. Garcia in fact testified that employees in the excluded departments do operate  
2 machinery. (2. Tr. 167:27-168:3.)

3 Second, in its Request for Review, the Union does not address the Regional  
4 Director's findings that the record fails to establish:

- 5 • "how other employees at the facility are paid";
- 6 • "whether [other employees] are paid at the same rate";
- 7 • "whether the employees in the petitioned-for unit are the only employees  
8 who [pick orders and move product to trucks and back]"; and
- 9 • "what work is performed by the other employees in the ten departments  
10 included in the petitioned-for unit".

11 (Decision, at 5-6.) Mr. Garcia's testimony did not show that the merchandise processor,  
12 merchandise processor – forklift, lead merchandise processor, and merchandise  
13 processor(s) employees in the ten departments ultimately identified in the Petition were  
14 sufficiently distinct from either (1) the non-"merchandise processor" employees in the  
15 petitioned-for departments, or (2) the other merchandise processors in the non-petitioned  
16 for departments. None of Mr. Garcia's testimony cited by the Union in its Request for  
17 Review addresses any of the above shortfalls in the record identified by the Regional  
18 Director. This is unsurprising, since Mr. Garcia, as a merchandise processor(s) in  
19 Department 3208, could only testify competently as to the conditions of his own  
20 employment in his department. He cannot provide competent testimony as to the  
21 conditions of employment on different shifts, in different buildings, or in different  
22 departments. Instead of calling other witnesses or seeking to introduce evidence to cover  
23 this obvious shortcoming, the Union tried to just rely on Mr. Garcia's hearsay testimony.

24 Third, Mr. Garcia's hearsay testimony should not even have been admitted in any  
25 event because there was absolutely no other evidence in the record to corroborate it. (*cf.*  
26 *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994) ["The Board has long held that it will  
27 admit hearsay evidence 'if rationally probative in force and if corroborated by something  
28 more than the slightest amount of other evidence.' "] [*quoting RJR Communications*, 248

1 NLRB 920, 921 (1980)].) Mr. Garcia’s testimony, in and of itself, cannot constitute  
2 “substantial evidence”. Simply put, the Regional Director determined that Mr. Garcia’s  
3 testimony was insufficient to demonstrate that the petitioned-for unit was appropriate.

4 Based upon the Regional Director’s findings that the record contained insufficient  
5 evidence to determine whether the petitioned-for unit had a community of interest and/or  
6 was readily identifiable as a group, Board precedent is clear that the Petition was correctly  
7 dismissed.

8 **C. The conduct of the hearing did not result in any prejudicial error to the Union,  
9 and in any event, the Union made no effort to object, appeal or otherwise  
preserve its complaint**

10 The Union now claims prejudice because it was allegedly led to believe by the  
11 Board Agent that administrative notice would be taken of the prior record such that “at  
12 most ... Petitioner may need to present testimony on union suitability and commerce  
13 issues only.” (Union Req. Rev, at 14.) The Union now claims it was induced to tell “five  
14 of its six witnesses they did not need to appear.” (*Id.*) There is absolutely no witness  
15 testimony or other record evidence to support the Union’s claims. Even Union’s counsel  
16 never made such a claim on the record. The Union has no reasonable excuse for failing to  
17 introduce sufficient evidence regarding the petitioned-for unit’s appropriateness.

18 In fact, the Union’s own conduct at the hearing shows it was completely untroubled  
19 by the Regional Director’s refusal to take notice of the prior record. The Union chose to  
20 only have Mr. Garcia testify and turned down the opportunity to have other employees  
21 testify. (2. Tr. 181:23-25.) The Union’s claim that it told five of its six planned witnesses  
22 not to attend the hearing based on “being told” notice would be taken of the prior record is  
23 nonsensical and found nowhere in the record. However, as discussed below, the Union  
24 was wholly unconcerned at the hearing with the decision not to take administrative notice  
25 of the prior record.

26 Contrary to the Union’s representation in its Request for Review, the parties found  
27 out the day before the hearing that the Regional Director had determined she would not  
28 take administrative notice of the record of the prior proceedings. (2. Tr. 16:3-6 [WSI’s

1 counsel stating on the first day of the hearing that: “we found out – I believe it was  
2 yesterday – than [sic] the Region for some reason had changed its mind and was not going  
3 to make that prior record part of this proceeding”). The decision not to admit the prior  
4 record was subsequently confirmed by the Hearing Officer definitively early on the first  
5 day of the hearing on May 24, 2016 (2. Tr. 41:18-24.) At no point afterwards did Union’s  
6 counsel (1) object to the decision, (2) reference the general impact of this decision on her  
7 litigation plans, (3) specifically raise her alleged decision not to have five of her six  
8 witnesses not appear on the basis of her supposed reliance on the prior record coming into  
9 evidence, (4) attempt to independently introduce the record evidence she was planning to  
10 rely upon, or (5) claim that failure to accept the transcript as evidence prejudiced the  
11 Union’s position. The Union has thus waived its objection to the Regional Director’s  
12 ruling. (*Local 46, Metallic Lathers Union*, 320 NLRB 982, 982 n. 4 (1996) [citing *NLRB*  
13 *v. Cal-Maine Farms*, 998 F. 2d 1336, 1343 (5th Cir. 1993)].)

14 Moreover, Mr. Garcia was not put on the stand until the second day of the hearing.  
15 (2. Tr. 99:1) The Union had ample time to recall and prepare its five witnesses, ask for a  
16 short continuance of the hearing (already offered by WSI and refused by Union), or  
17 otherwise try to ameliorate the impact of the non-receipt of the prior record. It did nothing  
18 other than rest after Mr. Garcia’s testimony concluded.

19 Finally, the Regional Director’s refusal to take administrative notice of the prior  
20 record did not prevent the Union from introducing whatever evidence it felt necessary to  
21 establish the appropriateness of the petitioned-for unit.

22 Even if the hearing officer exercises the authority to limit an  
23 employer’s presentation of evidence when the employer fails to  
24 take a position regarding the appropriateness of a petitioned-for  
25 unit, the regional director will retain the discretion to direct the  
26 receipt of evidence needed to make the required determination  
27 concerning a petitioned-for unit which is not presumptively  
28 appropriate. *That evidence may include testimony adduced  
from the employer’s owners, managers, or supervisors as  
witnesses, called under subpoena or otherwise, and documents  
obtained from the employer.”*

1 (79 Fed. Reg. 74308, 74399 [emphasis added].) The Union could have subpoenaed Chris  
2 Cuyler, Jake Lowe, and/or Vincent Soriano, the WSI employees who testified in the prior  
3 proceeding. The Union could have asked for a brief continuance to recall the five  
4 witnesses the Union contends it was planning to have testify. The Union could have taken  
5 steps to introduce documentary evidence from the record in the prior proceeding. The  
6 Union could have done these or many other things because, unlike WSI, the Union was not  
7 precluded from introducing evidence or calling witnesses at the hearing. The Union chose  
8 instead to rest on Mr. Garcia’s testimony. Unsurprisingly, the Regional Director  
9 determined there was insufficient evidence from this lone employee to establish that the  
10 petitioned-for unit was appropriate.

11 **D. There are no compelling reasons for reconsideration of an important Board**  
12 **rule or policy, as applied to the Union’s petition**

13 The Union is grasping at straws when it claims WSI attempted to “defeat  
14 commonality by changing job titles, scrambling employees among departments, or doing  
15 away with organizational markers all together.” (Union Req. Rev. at 15.) Specifically, the  
16 Union alleges that “[t]here is evidence that the Employer manipulated its workforce to  
17 defeat the RC Petition. ... Not surprisingly, when Petitioner filed this RC Petition, the  
18 Employer argued that there was a new job description ‘Merchandise Processor (s).’ ” (*Id.*)  
19 The Union further claims that “[h]ad the February 2014 [sic] transcript been admitted to  
20 the record, that would be evident.” (*Id.*)

21 The Union’s claims are categorically false. The Union knew of the existence of the  
22 “merchandise processor(s)” job classification before the February 24, 2016 hearing on the  
23 First Petition. Had administrative notice been taken of the prior record, there would be  
24 evidence that the list of employees served on the Union by WSI on February 23, 2016  
25 pursuant to Rule 102.63(b)(1)(iii) showed employees by their name, location, shift, and job  
26 classification, including “Merchandise Processor(s)”. (1. Bd. Ex. 1(d).) Had  
27 administrative notice been taken of the prior record, there would also be evidence of  
28 testimony in the prior record regarding the existence of the “Merchandise Processor(s)”

1 classification. (1. Tr. 167:8-16.) Finally, had administrative notice been taken of the prior  
2 record, there would be evidence that the Union and WSI stipulated to permit the Union to  
3 amend its petition there to include merchandise processor, lead merchandise processor, and  
4 merchandise processor – forklift (but not to include merchandise processor(s)) in certain  
5 departments. (1. Tr. 62:10-12.)

6 Frankly, if the Union believed that important evidence existed supporting its claim  
7 of unit appropriateness, the only rational course of action would have been to attempt to  
8 introduce such evidence at the hearing. The record is clear that the Union made no such  
9 attempt. Likewise, if there was any evidence in the prior record to support its outrageous  
10 claims of malfeasance on the part of WSI, the Union should at least cite the Board to such  
11 evidence. The Union makes no such attempt in its Request for Review, and its allegations,  
12 like the rest of its Request for Review should be disregarded as unsupported and meritless.  
13 The Regional Director’s decision to dismiss the petition was not only correct, but did not  
14 implicate any important Board rules or policies justifying review.

15 There are no other important Board rules or policies implicated by the dismissal of  
16 the Petition. The Regional Director’s interpretation of Section 102.66(b) and (d) played  
17 out in the Union’s favor by completely precluding WSI from presenting any evidence, or  
18 calling or cross-examining any witnesses. The Regional Director exercised her discretion  
19 to allow WSI to present an offer of proof, which ultimately was not received into evidence.  
20 (Decision, at 3.) While the Union might be upset that the Regional Director followed her  
21 obligation to receive and examine evidence on the appropriateness of the petitioned-for  
22 unit under *Allen Healthcare*, there is no basis in this case to re-examine *Allen Healthcare*.  
23 The continuing vitality of *Allen Healthcare* was recently reiterated by the Board as part the  
24 rulemaking process in enacting the new Rules. (79 Fed. Reg. 74308, 74366.) Perhaps the  
25 Union in asking for a pass after it could not demonstrate that the petitioned-for unit was  
26 appropriate when WSI was completely precluded from litigating the issue of  
27 appropriateness, is essentially asking for a presumption that any petitioned-for unit is  
28 *prima facie* appropriate.

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**IV. CONCLUSION**

As discussed, the Board should not grant review of the Regional Director's Decision and Order Dismissing the Petition to reconsider the Regional Director's decision dismissing the Petition. The Union has not demonstrated that any viable ground exists justifying review, and Williams-Sonoma Direct, Inc. respectfully requests that the Board refuse to grant review of the dismissal of the Petition.

Dated: June 28, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By   
\_\_\_\_\_  
RONALD J. HOLLAND  
ELLEN M. BRONCHETTI

Attorneys for Employer WILLIAMS-SONOMA  
DIRECT, INC. incorrectly named herein as  
WILLIAMS SONOMA

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

3 At the time of service, I was over 18 years of age and **not a party to this action**. I  
4 am employed in the County of San Francisco, State of California. My business address is  
Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

5 On June 28, 2016, I served true copies of the following document(s) described as

6 **WILLIAMS-SONOMA DIRECT, INC.'S STATEMENT OF OPPOSITION**  
7 **TO PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S**  
**DECISION AND ORDER DISMISSING PETITION**

8 on the interested parties in this action as follows:

9  
10 Gary Shinnors  
11 Executive Secretary  
12 NLRB  
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**VIA ELECTRONIC FILING**

18  
19 **BY E-MAIL, E-FILING OR ELECTRONIC TRANSMISSION:** I caused a  
20 copy of the document(s) to be sent from e-mail address [kdavis@sheppardmullin.com](mailto:kdavis@sheppardmullin.com) to the  
21 persons at the e-mail addresses listed in the Service List. The document(s) were  
transmitted and I did not receive, within a reasonable time after the transmission, any  
electronic message or other indication that the transmission was unsuccessful.

22 I declare under penalty of perjury under the laws of the State of California that the  
23 foregoing is true and correct.

24 Executed on June 28, 2016, at San Francisco, California.

25   
26 \_\_\_\_\_  
Karen D. Davis