

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR  
RELATIONS BOARD REGION 4**

**DIVERSCO, INC., a wholly-owned subsidiary of  
ABM ONSITE SERVICES, INC.**

**And**

**Case 04-CA-177909**

**BAKERY, CONFECTIONERY, TOBACCO  
WORKERS AND GRAIN MILLERS LOCAL 492**

**MOTION FOR BILL OF PARTICULARS**

Pursuant to Sections 102.20 and 102.24 of the Board's Rules and Regulations, Counsel for the General Counsel moves for a Bill of Particulars addressed to the Fourth Affirmative Defense in the Answer to Complaint (Answer) filed on November 3, 2016 by Diversco, Inc., a wholly owned subsidiary of ABM Onsite Services, Inc. (Respondent). Section 10292.2 of the NLRB Unfair Labor Practice Casehandling Manual provides for the filing of a Motion for a Bill of Particulars "where an affirmatively pleaded defense lacks sufficient details."

On October 17, 2016, the Regional Director issued a Complaint and Notice of Hearing in this case alleging that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging Angel Rivera because he supported and assisted the Union and engaged in concerted activities. In its Answer, Respondent pleads as follows:

**FOURTH AFFIRMATIVE DEFENSE**

Alternatively, Rivera was a statutory supervisor within the meaning of Section 2(11) of the Act and therefore was not protected from discipline or discharge under any provision of the Act alleged in the Complaint.

Until the filing of this Answer, Respondent had never previously claimed that Angel Rivera was a supervisor and accordingly lacking the protection of the Act. Respondent provided a position statement on July 27, 2016 during the Region's investigation of this case, in which

Respondent stated that it did not contend that Angel Rivera was a supervisor within the meaning of Section 2(11) of the National Labor Relations Act. On August 5, 2016, Respondent filed another position statement in which it explicitly stipulated that Angel Rivera was not a supervisor as that term is defined by the Act. Now, for the first time and in direct conflict with its previous assertions, Respondent contends that Angel Rivera was a supervisor during the relevant period.

Based merely on Respondent's general, unsupported and conclusory assertion, which does little more than state an affirmative defense, Counsel for the General Counsel is unable to determine the factual basis for Respondent's Affirmative Defense, which witnesses might have responsive information or what other evidence might bear on Respondent's alleged defense. Without more, the General Counsel will be substantially prejudiced in presenting its case.

Therefore, Counsel for the General Counsel requests that Respondent be ordered to set forth with specificity a clear and concise description of the acts, conduct, facts and evidence which are claimed to constitute the bases of the Fourth Affirmative Defense.

Ordering Respondent to provide such additional detail is proper. See NLRB Unfair Labor Practice Casehandling Manual § 10292.2; see also *Murcel Manufacturing Corp.*, 231 NLRB 623 (1977). In *Murcel Manufacturing Corp.*, the employer pleaded, as an affirmative defense to a refusal-to-bargain charge that the union engaged in race and sex discrimination, and the employer further served a subpoena seeking supporting evidence. The General Counsel moved for a bill of particulars and then, when the employer responded with unsupported, general allegations, moved to strike the affirmative defense. *Id.* at 625. The Board stated that the employer was "in effect, contending that this Agency is under a fundamental disability in the processing of this case" and that therefore it was incumbent upon the employer to "disclose the particular facts on which the disability is based so that an intelligent evaluation of the contention could be made." *Id.* at 625 fn.10. See also *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011) (ALJ granted Counsel for General Counsel's Motion for a Bill of Particulars regarding Employer's

affirmative defense; Board then partially granted General Counsel's Motion to Strike the affirmative defense.)

Here also, Respondent's affirmative defense calls into question the Agency's fundamental ability to process the instant case because supervisors lack the protections of the Act. It is appropriate for Respondent to provide particulars supporting its new defense that Rivera had no statutory protection for the concerted activity of speaking to his fellow workers about organizing for the Union. By asserting such a defense, just three weeks before trial, Respondent has essentially transferred investigation of the issue of Rivera's supervisory status to the hearing before the Administrative Law Judge, rather than submitting such defense to the Region for timely investigation prior to its determination on the merits of the charge. This is particularly disruptive where Respondent had ample opportunity to raise the issue during the Region's investigation, but instead stipulated that Rivera was not a supervisor as defined in the Act.

Because Respondent's newly raised Fourth Affirmative Defense lacks details sufficient to allow Counsel for the General Counsel to prepare and respond, thus prejudicing the General Counsel, the motion should be granted.

SIGNED at Philadelphia, PA, this 9<sup>th</sup> day of November, 2016.

Respectfully submitted,



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