

employees since October 19, 2000. (Op. p. 3). The Kenneth Hall non-professional unit, the unit at-issue in this matter, included technical employees, service and maintenance employees, skilled maintenance employees, and business office clerical employees. (Op. p. 3). In contrast to the Kenneth Hall employees, the employees of Touchette were historically unrepresented. (Op. p. 3).

In around 2008, Touchette integrated with Kenneth Hall and the Kenneth Hall operations and employees were transferred to Touchette. (Op. p. 3). During the integration process, the Union continued to represent the Kenneth Hall employees, who were covered by a collective-bargaining agreement which was effective from April 2, 2006 to March 31, 2009. (Op. p. 3). On April 23, 2009, an election was conducted pursuant to a decertification petition and the decertification was unsuccessful. (Op. p. 4). Accordingly, a Certification of Representative was issued on May 1, 2009 in regard to only the former Kenneth Hall employees. (Op. p. 4).

The Employer recognized the Union as the exclusive collective bargaining representative for the two units of former Kenneth Hall employees. (Op. p. 4). Since recognizing the Union, the Employer has bargained with the Union and the Employer has implemented terms and conditions of employment for the employees represented by the Union that are effective September 1, 2012 through March 31, 2013. (Op. p. 4). The Employer has continued to employ Touchette employees in the same job titles encompassed by that unit, however the Touchette employees have remained unrepresented. (Op. p. 4).

II. Procedural History

The Union filed petitions with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act seeking to represent two separate units of non-professional employees employed by Employer. (Op. p. 1). A hearing officer of the Board held

a hearing and the Employer and the Union submitted briefs to the Regional Director on the issue of which employees should be allowed to vote in regard to the Union's petitions. The Employer and Union agreed that the employees in the petitioned for units share a community of interests with the other employees in their respective units and that the petitioned-for units are appropriate. (Op. p. 2). However, the Employer asserted that the employees currently represented by the Union ("Kenneth Hall Employees") should not be eligible to vote because those employees have previously voted to be represented by the Union. (Op. p. 2). As such, the Employer argued that only the unrepresented employees ("Touchette Employees") should be eligible to vote so that they can render their own decision in regard to whether they too wish to be represented by the Union.

The Regional Director held that both the Kenneth Hall Employees and the Touchette Employees were eligible to vote regarding the Union's petitions. (Op. p. 10). The Regional Director's holding departs from established Board precedent, and therefore, the Employer respectfully requests the Board's review.

III. The Decision of the Regional Director Departs From Board Precedent.

A. According to Board Precedent, the Touchette Employees Are Entitled to A Self-Determination Election.

The Regional Director failed to follow Board precedent by denying the Touchette Employee's an election regarding Union representation without inclusion of votes from the already represented Kenneth Hall Employees. The Board has held that when a Union representing most of an employer's employees seeks to represent some fringe employees, as is the case here (Op. p. 7), the Board begins a two-step process. *See NLRB v. Southern Indiana Gas and Electric Co.*, 853 F.2d 580, 582 (7th Cir. 1988) and *New Berlin Grading Co., Inc v. NLRB*, 946 F.2d 527, 531 (7th Cir. 1991). First, the Board conducts a representation proceeding

to determine whether the existing unit together with the fringe employees would constitute an appropriate unit. *Id.* Second, a self-determination election is held “to give the fringe employees their choice, whether they preferred to be represented by the existing unit...or whether they preferred to remain unrepresented.” *Southern Indiana Gas*, 853 F.2d at 582; *New Berlin*, 946 F.2d at 531.

In this instance, in regard to the first step, the parties agree that the petitioned for unit is appropriate. Accordingly, all that remains is the second step, which requires a self-determination election amongst the unrepresented “fringe group,” i.e. the Touchette employees, to determine whether they want to be represented. The Regional Director’s decision directing an election that will allow *both* the already represented Kenneth Hall employees and the Touchette Employees to vote denies the Touchette employees any opportunity for a self-determination election to assert whether they do or do not wish to be represented by the Union. As the Seventh Circuit explained in *New Berlin*:²

Where a question of representation exists only among the fringe group, it makes little sense to require a unit-wide election. Indeed, the Board has no authority to direct an election where no question of representation exists. See 29 U.S.C. § 159(c)(1). ***A self-determination election is the only way to allow the fringe employees any say as to their representation.*** 946 F.2d at 532 (emphasis added) citing *Photype*, 145 NLRB 1268, 1272 & n. 8 *1964.

As such, the Regional Director’s decision contravenes Board precedent by denying the Touchette Employees a self-determination election to allow the Touchette Employees the chance to have their say as to representation. See *Southern Indiana Gas*, 853 F.2d at 582; *Photype, Inc.*, 145 NLRB 1268, 1272 (1964), and *Chrysler Corp.*, 173 NLRB 1046, 1047 (1968).

² In *New Berlin*, the Seventh Circuit applied *D.V. Displays* to direct only one election for the entire unit because in that case there *was* an issue as to representation regarding the historical unit, unlike in this case. See *New Berlin*, 946 F.2d at 530-31 (“The Board found that questions of representation existed...”).

B. The Regional Director's Application of *D.V. Displays Corp.* is Flawed Because There is no Issue as To Representation with The Historical Unit.

The Regional Director applied *D.V. Displays* to hold that a single election including votes from both the represented Kenneth Hall Employees and unrepresented Touchette Employees was proper. (Op. p. 6-8). However, in *D.V. Displays*, the Board held that where “*there is a question of representation in the historical unit and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis, we shall direct only one election which will include all the employees in the unit found to be appropriate.*” 134 NLRB 568, 571 (1961) (emphasis added). Accordingly, *D.V. Displays* allows for an election combining the votes of the historical unit and unrepresented fringe group *only* when there is a question of representation in the historical unit. *Id.*

The limited reach of *D.V. Displays* was recognized by the Board in *Photype, Inc.* *Photype, Inc.*, 145 NLRB 1268, 1272 (1964). In *Photype, Inc.* there were employees employed at one plant called Willens who had been represented by a union for 7 years and there were employees employed at another plant called Photype who performed the same type of work but were unrepresented. *Id.* at 1269-72. Both the Willens employees and the Photype employees technically worked for the same employer. *Id.* at 1269. When the Union sought to represent all of the employees across the unit, i.e. the Willens employees and the Photype employees, the Board directed a self-determination election amongst only the unrepresented Photype employees. *Id.* at 1272. The Board distinguished *D.V. Displays* finding that while in *D.V. Displays* the Board “directed an election among all employees in the unit... in that case, the petitioning union raised a question concerning representation in the overall group, while here, the Employer-Petitioner raised a question concerning representation only among the Photype employees.” *Id.*

at 1272, n. 8. As such, the Board held that the Phototype employees were “entitled to a self-determination election before being added to the existing bargaining unit.” *Id.* at 1272.

Similarly, here, the Union’s petitions raise issues of representation in regard to the Touchette Employees only. There is no issue as to representation regarding the Kenneth Hall Employees because the Kenneth Hall Employees voted in favor of representation in October of 2000 and have been represented by the Union ever since. (Op. pp. 3-4). As such, the Regional Director’s application of *D.V. Displays* to direct an election that will allow the Kenneth Hall Employees to vote along with the Touchette Employees was improper because, as in *Phototype*, there is no question as to representation regarding the historical unit of Kenneth Hall Employees. As a result, the Touchette Employees, like the employees in *Phototype*, are “entitled to a self-determination election before being added to the existing bargaining unit.” *See Phototype, Inc.*, 145 NLRB at 1272.

IV. Conclusion

The Regional Director departed from the Board’s precedent by denying the Touchette Employees a self-determination election and instead directing an election in which the Touchette Employees will vote along with the Kenneth Hall Employees, who are members of a historical bargaining unit with which there is no issue as to representation. Therefore, Employer respectfully requests that the Board review the decision of the Regional Director.

The Board should also be aware of the Employer's willingness for an election to take place so long as the ballots of the Kenneth Hall Employees are impounded and subject to the condition that the Employer does not waive its legal position in these consolidated cases that only the Touchette Employees should vote in a self-determination election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that the attached Request for Review of Regional Director's Decision and Direction of Election Dated February 15, 2013 was served on March 1, 2013, upon the following named individuals by the method described below:

1. Via UPS Overnight
Mr. Daniel L. Hubbel, Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
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2. Via Hand-Delivery
Mr. Barry M. Bennett
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Dated: March 1, 2013

/s/ Leigh Bonsall
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