

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

JOHN LUCAS TREE EXPERTS	:	NLRB CASE NO. 01-RC-097504
AND	:	
IBEW, LOCAL 42	:	March 29, 2013

REQUEST FOR REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, John Lucas Tree Experts Co. ("Lucas Tree" or the "Company") hereby requests review of Regional Director Jonathan B. Kreisberg's March 19, 2013 decision. Compelling reasons for review exist because: (1) a substantial question of law and policy is raised because the decision departs from officially reported Board precedent; and (2) the decision is clearly erroneous on the record and such error prejudicially affects the rights of the Company. Section 102.67(c)(1)(ii), (c)(2).

I. Background and Procedural History

John Lucas Tree Experts Co. ("Lucas Tree" or the "Company") operates a tree trimming and vegetation management service in several different states within the U.S. and in Canada. While Lucas Tree has been in business since 1926, the Company began operations in Connecticut in February, 2012 with an initial one year contract to perform services for Connecticut Light & Power Co. ("CL&P"). It operated in Connecticut throughout 2012 with a combination of locally hired employees and "travel crews" from its other locations, operating on the same structure and business model that the Company uses in other locations. In late January, 2012, Lucas Tree entered into a much larger contract with CL&P for work in 2013 and 2014. As of the date of the

hearing in this case (and continuing on) Lucas Tree is recruiting and hiring employees to handle this increased, longer term work.

The Petitioner seeks to represent an amended unit consisting both of Foremen and Laborers working for Lucas Tree in Connecticut (but specifically excluding Travel Crews). The Company sought dismissal of the petition because the unit was expanding rapidly, and therefore there was not currently a substantial and representative complement of employees. The Company argued that the petition should be dismissed until such time as there does exist a substantial and representative complement of employees and a sufficient showing of interest is expressed from among those employees. The Company also argued that the inclusion of the Foremen in the bargaining unit was inappropriate because the Foremen employed by Lucas Tree are supervisors within the meaning of the Act.

A hearing was held on Tuesday, February 12, 2013. Two witnesses testified at the hearing – Gary Fournier, the Company’s Manager, and Tom Griswold, the Supervisor for the Connecticut operations. Five weeks later, on March 19, 2013, the Regional Director issued his decision finding that: (1) a substantial and representative component of employees were employed in the petitioned-for unit and an immediate election was warranted; and (2) the Company failed to satisfy its burden that the working foremen are supervisors under Section 2(11) of the Act and should therefore be included in the petitioned-for unit. As detailed below, compelling reasons for review exist because the decision departs from officially reported Board precedent and is clearly erroneous and prejudicial. Section 102.67(c)(1)(ii), (c)(2).

II. Compelling Reasons Exist For Review

A. The Regional Director Erred Because There Was Not a Representative Complement of Employees in the Bargaining Unit at the Time of the Hearing.

The Company seeks review because the Regional Director erroneously made his determination regarding the complement of employees based on a workforce that was projected to exist at the time of the decision, rather than at the time of hearing as required by Board precedent.

Lucas Tree organizes its workers into “crews”, which consist of a Foreman and between 1 and 5 Laborers. Because of the type of work done in Connecticut under the 2012 CL&P agreement, Lucas Tree has used primarily two person crews, consisting of a Foreman and a Laborer, with an occasional crew having more than one Laborer. As of the date of the hearing, Lucas Tree had 6 crews in Connecticut, consisting of 6 foremen and 7 laborers. Transcript p. 137. The evidence at the hearing established that the Company intends to substantially grow its workforce in Connecticut in the next several months.

An election for a bargaining representative should not be held where the workforce is expanding at a substantial rate and there does not yet exist a substantial and representative complement of employees. Endicott Johnson de Puerto Rico, Inc., 172 NLRB 1676 (1968). This is to ensure that any union selected through election actually represents a majority of the workforce, and is not simply chosen by a minority of the workforce that existed at the beginning stages of an expansion. If the petitioned-for unit is expanding in size such that the complement at the time of the hearing is not substantial and representative in relation to that projected for the reasonably

foreseeable future, the petition should be dismissed as untimely filed. See K-P Hydraulics Co., Inc., 219 NLRB 138 (1975); Trailmobile, 221 NLRB 954 (1975).

There is no definitive, bright line, rule as to what constitutes a substantial and representative complement, but the Board has taken several factors into account. An important issue is what proportion of the employer's expected workforce currently exists. "In general, the Board finds an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications." Yellowstone International Mailing, Inc., 332 NLRB 386 (2000) (citing Custom Deliveries, 315 NLRB 1018, 1019 fn. 8 (1994)). By that measure, the evidence at the hearing established that at the time of the hearing, the current complement fell short of being representative. As explained further below, the complement of employees at the time of the hearing was somewhere between 21% and 28% of the ultimately anticipated workforce. Thus, the workforce was not big enough to be substantial and representative.

Lucas Tree intends to have between 20 and 25 crews to handle the work under the new CL&P contract. Transcript pp. 48, 51, 59. Mr. Fournier estimated that 65% of those crews would consist of 2 person crews – a Foreman and a Laborer – while approximately 35% would consist of crews of 3 or more persons – one Foreman with 2 or more Laborers. Transcript pp. 44-45. He testified that the mix of work under the 2013-2014 CL&P agreement would require more larger crews than the 2012 CL&P work. Transcript pp. 44-45. While initially these crews would consist of both local and

travel crews, Mr. Fournier testified that he expected these crews to consist of purely local employees within 6 to 8 months. Transcript p. 59.

Moreover, testimony and documents also show the scope and certainty of the expansion. The Company and CL&P expect at least 20 crews to be used for the 2013 work. Employer Exhibits 8 and 9. There is a minimum, 7 day per week availability needed for 16 crews. Employer Exhibit 11. Transcript p. 58. Mr. Fournier explained that he intends more than 20 crews, as is the Company's practice in other locations, because he expects that there will be additional emergency work and to get the standard work done in a timely manner and in a way that best uses the customer's budget cycles. Transcript p. 51.

If the lower end of that estimate came to pass, then there would be 20 Foremen and 27 Laborers¹, for a total of 47 individuals. If the bargaining unit consisted of both Foremen and Laborers, then the unit would be going from its current 13 individuals to 47 individuals. In other words, the current population of the unit is 28% of the minimum unit size expected in 6 to 8 months. If the Foremen were excluded from the unit, then the current population of 7 Laborers is only 26% of the ultimate 27 Laborers.

If the mid point of Mr. Fournier's estimate were the case, then one would expect 22 crews, consisting of 22 Foremen and 29 Laborers. That would mean that the current 13 individuals would be 25% of an ultimate unit of both Foremen and Laborers, while the current 7 Laborers would be 24% of the ultimate groups of Connecticut based Laborers.

¹ If 35% of the 20 crews have 2 laborers rather than 1, then 7 crews will have 2 laborers and 13 crews will have 1 laborer. 14 laborers will be on the larger crews and 13 will be on the smaller crews, for a total of 27 laborers.

If the Company succeeds in getting 25 Connecticut crews on board in the next 6 to 8 months, there would be 25 Foremen and 33 Laborers. In that case, the current combined Foreman/Laborer population would be 22% of the ultimate combined population, and the current Laborer population would be just 21% of the ultimate Connecticut Laborer population.

Thus, at the time of the hearing the workforce in the petitioned-for bargaining unit was between 22% and 28% of the workforce that the Company expects to be in the bargaining unit in 6 to 8 months. If the Foremen are excluded from the unit, then the current population is between 21% and 26% of the expected workforce. However, the Regional Director made his calculations based upon the theory that at the time of the decision, the Company would have between 24 to 32 employees occupying positions in the petitioned-for unit, and within six to eight months there would be an additional 24 to 32 employees. Decision, p. 3. The Regional Director did not solicit any additional information from the Company before making that decision.

The proper snapshot for determining the complement of employees was at the time of the hearing, not the time of the decision. Because at the time of the hearing there was not a substantial and representative complement of employees in the petitioned-for unit, and an even less substantial and representative complement in the unit requested by the Employer – which would exclude foremen as statutory supervisors – the petition should have been dismissed. See K-P Hydraulics Co., Inc., 219 NLRB 138 (1975); Trailmobile, 221 NLRB 954 (1975). Accordingly, the Company requests that the Board review the Regional Director's decision and stay the ordered election until it completes its review.

B. The Regional Director Erred When He Found That Lucas Tree Foremen Were Not Supervisors Under the Act.

The Regional Director found that the Company had not met its burden to establish that the foremen should be classified as supervisors, specifically on the basis of: (1) assigning; (2) directing; (3) disciplining; (4) hiring; (5) and promoting and rewarding employees. Decision, p. 7-11. As detailed below, this finding was clearly erroneous and prejudicially affects the rights of the Company.

The Act excludes from coverage “supervisors” who are individuals:

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.

29 U.S.C. 152(11). This involves three basic questions:

1. Does the employee have the authority to engage in one or more of the activities listed?
2. Does the exercise of that authority require the use of independent discretion and judgment?
3. Does the employee hold the authority to act in the interest of the employer?

NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994). Moreover, “it is well settled that it is the authority to act independently that is determinative of supervisory status rather than the exercise of that authority.” Groves Truck & Trailer, 281 NLRB 1194, n. 1 (1986) (emphasis added).

Lucas Tree has been in business for decades. The job descriptions and job duties for its Connecticut operations are the same as those for its operations in other parts of the country. Transcript pp. 24-25, 34-36. Many of the foremen who worked in

Connecticut in 2012 were part of "travel crews" from other areas of Lucas Tree's business. Tom Griswold, to whom all the foremen in Connecticut report, was trained as a foreman himself by Lucas Tree and expects that the foremen under him exercise the authority that he used when he worked as a foreman. Transcript p. 126.

1. The Job Descriptions of Foreman Convey Supervisory Power.

Every employee of Lucas Tree is provided with a copy of the Company's "Operations Training Manual", which is Employer's Exhibit 6. Transcript pp. 37-38. This manual, among many other things, contains a detailed job description for the position of foreman. At the page Bates Stamped LTE00215 in Employers Exhibit 6, the manual lays out the job description of the foreman, and provides as follows:

Each foreman is responsible for directing the work of the crew, which may vary in size between two and five or more employees, some of whom may be seasonal or part time workers. Foremen work alongside other employees, performing tree trimming and tree removal functions. They are responsible for organizing and scheduling jobs assigned to their crew by the Regional Supervisors and for directing the on-the-job work of the other crew members. On their own authority, the foremen discharge and/or discipline employees, grant time off, adjust grievances, effectively recommend pay increases, and sign time cards. Foremen also hire new crew members.

Employer Exhibit 6. In addition, Lucas Tree has stand alone job descriptions, which are reviewed with employees each Spring in connection with their performance evaluations. Transcript, p. 37. The Foreman job description is Employer's Exhibit 4. That document provides that Foremen "Supervises assigned crews by:

- A. Making routine employment decisions, reviewing performance and making salary recommendations;
- B. Assigning work, providing training and guiding and advising subordinates as necessary;
- C. Hiring personnel when necessary and resolving routine personnel problems;
- D. Insuring compliance with established safety policies and procedures;

- E. Insuring good public relations at all times;
- F. Completing paperwork which pertains to assigned job;
- G. Maintaining adequate supply of tools and materials;
- H. Maintaining and servicing trucks and equipment;
- I. Insuring that work is performed according to specifications.

Employer Exhibit 4.

The employee handbook, excepts from which the Petitioner introduced, supports the supervisory status of Foremen. Employer Exhibit 13 is a page from the employee handbook that makes clear that the foremen are first line supervisors. It notes that employees are “encouraged to raise responsible questions, suggestions and complaints” and that “this is best done through traditional channels of management and we encourage you to follow that line of authority.” Employer Exhibit 13. The chain of management begins explicitly with the Foreman. Id.

2. Assigning and Responsibly Directing Other Employees.

The Foreman runs the crew. The single Supervisor for Connecticut is not on the ground day to day with the crew, and instead relies on the Foreman to assign and direct the crew to get the work done. The Supervisor assigns to the Foreman a geographic area that will take approximately a month to do. Transcript pp. 30, 118-19, 125. The Foreman is then responsible for the day to day operations of the crew. The foreman delegates tasks to the crew and decides what work will get done in a particular day. Transcript p. 30.

Mr. Griswold, who is the sole person for Lucas Tree in Connecticut with the job title “Supervisor”, detailed the many independent decisions made by the Foreman to run

the job on a day to day basis. Transcript pp. 120-122. These decisions – ranging from who was capable of doing what type of work, when in the work day to do particular types of work, to which sections to start working on first and which to do later – require consistent independent judgment, taking into account things like weather, traffic patterns, sun location, evaluation of trees and wires and other factors. Despite the Regional Director’s finding, a Foreman’s direction of a laborer is not limited to the “routine tasks” which the laborers perform on a daily basis, see Decision, p. 9, he also decides whether a laborer has attained certain skills listed on the requisite skillset and based on those skills which tasks the laborers can perform, whether it be using a chain saw, the bucket truck, etc. Transcript pp. 97, 99, 103, 122. The Foreman also decides where the crew will meet each day. Transcript p. 135-36.

3. Discharge and Discipline.

Mr. Fournier testified that the Company allows foremen to fire employees. Transcript p. 40, 105. Mr. Griswold testified that he disciplined employees during his 4 years as a foreman for Lucas Tree. Transcript p. 116.

The testimony and evidence at the hearing established that there had been only a single laborer in Connecticut who has been terminated since Lucas Tree began performing work in Connecticut, and that employee had been terminated by the foreman. Mr. Griswold testified that in that case the Foreman, Rob Whitney, terminated the Laborer, Christopher Brines, for repeatedly violating safety rules. Transcript 126-27, 137-38. Mr. Fournier testified about the same matter. Transcript p. 83. The Regional Director found that Mr. Griswold terminated the employee, see Decision, p. 10, despite the fact that the Hearing Officer elicited testimony from Mr. Griswold that the foreman

had already informed the employee that he was terminated and that Mr. Griswold was “just repeating it.” Transcript, p. 138.

4. Promotion and Reward.

Mr. Fournier testified that Foremen are the individuals who “really makes the ultimate decision as far as if he’s [laborer] ready to take over the foreman responsibilities.” Transcript p. 41. He testified that he has personally experienced promotions that were the result of the Foreman’s recommendations. Transcript p. 42.

Mr. Griswold testified that when he was a Foreman with Lucas Tree, he personally recommended individuals for promotion and his recommendations were accepted. Transcript p. 115. He also testified that while he was a Lucas Tree Foreman he recommended pay increases for employees that were in fact given. Transcript p. 117.

The testimony and evidence at the hearing also established that there has only been a single Laborer in Connecticut promoted to Foreman since the Company started Connecticut operations, and that that promotion was the result of the recommendation of the Foreman. Mr. Griswold testified that foreman Matt Marble told him that laborer Terence Ragston was ready to be a foreman, and that the Company accepted that recommendation. Transcript p. 128. Mr. Fournier testified about the same promotion. Transcript pp. 82-83.

5. Foremen Should be Excluded From the Unit.

The evidence at the hearing established that Lucas Tree provides its Foremen with authority to discipline, discharge, and reward employees, with the power and responsibility to assign employees work and to responsibly direct them in performing that work. Such authority and responsibility is used in the interests of the employer

Lucas Tree. Moreover, the evidence shows that in fulfilling their role, the Foremen exercise a wide degree of discretion and independent judgment. They are not acting on a routine or clerical basis, but are making genuine and significant decisions requiring independent judgment and discretion. Accordingly, the Regional Director's decision is clearly erroneous on the record and prejudicially affects the rights of the Company.

C. The Bargaining Unit Definition Is Erroneous.

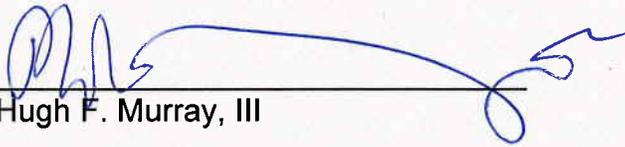
At the hearing, the parties stipulated to the fact that the Company's travel crews should be excluded from the bargaining unit. Transcript, p. 163. Despite noting this in his decision, see Decision p. 3 n. 3, the travel crews were not explicitly excluded from the description of the bargaining unit. See Decision, p. 12. To ensure clarity of the record, the Company also requests that the Board amend the scope of the bargaining unit.

III. CONCLUSION

For the foregoing reasons and pursuant to Section 102.67, the Company request the Board review the Regional Director's decision, stay the election pending its determination, and find that:

1. The complement of employees at the time of the hearing was not substantial and representative and the petition should have been dismissed;
2. The Foremen are supervisors and therefore excluded from the Bargaining Unit; and
3. The Bargaining Unit should be amended to specifically exclude the Company's travel crews.

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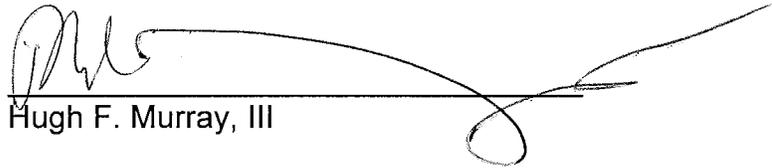
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request For Review was served by email and by overnight mail on March 29, 2013 to:

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