

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

CROSS IMPLEMENT, INC.,)	
)	
)	
EMPLOYER,)	
and)	CASE 25-RC-100457
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS UNION, LOCAL 536,)	
)	
PETITIONER.)	
)	

Petitioner’s Statement in Opposition to Employer’s Request for Review

I. Background

The Petitioner, United Food and Commercial Workers Union, Local 536 (hereinafter, “Union”), by and through its attorney, Jairus M. Gilden, hereby files this Statement in Opposition to the Employer’s Request for Review pursuant to Section 102.67(e) of the National Labor Relations Board’s Rules and Regulations. This matter arose out of a petition filed by the Union on March 15, 2013, seeking to represent a bargaining unit of “Detailers” working at the Employer’s agricultural implements dealership. The Union sought a unit described as:

Included: Detailing Department located at 703 S. Minier Ave., Minier, Illinois 61759
Excluded: All other employees located at 703 S. Minier Ave., Minier, Illinois 61759 including all office clerical, guards and supervisors as defined in the Act.

(Bd. Ex. 1a)

A representation case Hearing was held in this matter on March 25, 2013, and the Regional Director issued his decision on April 23, 2013, directing election in a unit described as:

All full-time and regular part-time detailing employees employed by the Employer at his facility located at 703 S. Minier Ave., Minier, Illinois 61759 BUT EXCLUDING all other service department employees, sales department employees, parts department employees, office administration employees, guards and supervisors as defined in the Act.

Cross Implement, Inc., Decision and Direction of Election, 25-RC-100457 at 2 (attached to the Employer's Request for Review)

II. The Employer's Argument in Support of Review is Without Merit

In its Request for Review, the Employer raises two grounds. The first is a claim that the Regional Director's decision supposedly "... raises a substantial question of law by both the absence of and a departure from Board precedent." (Em. Br., 2) Secondly, the Employer claims that the decision "... is clearly erroneous on numerous substantial factual issues and such errors prejudicially affect the rights of the Employer and the affected employees." (Id.) Neither of these grounds has been demonstrated.

a. The Regional Director's Decision is Supported by Board Precedent

While the Employer claims that the Regional Director's decision is either not supported by or departs from Board precedent, its argument actually demonstrates exactly the opposite. In fact, the Employer's brief focuses on an attack on the Board's decision in Specialty Health Care and Rehabilitation Center, 357 LRB No. 83 (2011) and its progeny. The Employer claims that the Specialty Health Care decision was made without regard to rule-making procedure and is in conflict with the Administrative Procedure Act. Obviously, the Employer realizes that application of the Specialty Health Care decision to this case supports, rather than contradicts the Regional Director's decision. This can hardly constitute a basis for granting review. Moreover, as we show below, even without regard to Specialty Health Care, the Detailers in this matter constitute a separate appropriate unit.

The Employer also argues that the Regional Director improperly relied on the Detailers' so-called former "subcontractor" status in support of its decision. (Em. Br., p. 4) The fact of the matter is that the petitioned-for employees had worked at the Employer's location for a number of years. (Tr. 116, 134, 162) Prior to approximately 2009, they had been employed by an independent business that the Employer had retained in order to perform the detailing work. (Tr. 27) The work at that time, as now, consisted almost entirely of washing and reconditioning equipment that had been brought to the Employer's location by customers for either resale or repair. (Id.) In 2009 or 2010, the Employer severed its relationship with this contractor and, instead, directly retained the petitioned-for employees. (Id.) While the Employer continued to label the petitioned-for employees as "subcontractors," this was obviously a mischaracterization. The Detailers worked full-time for the Employer, their terms and conditions were dictated by the Employer, their equipment was provided by the Employer, and they were not allowed to work for any competing business. (Tr. 126, 153, 163, 165, 168, 170) Under these circumstances, the Board has rejected claims of subcontractor status, finding individuals working in such circumstances to be employees under the Act. The Standard Oil Co. of Ohio, 241 NLRB No. 190 (1979); Air Transit, Inc., 248 NLRB No. 140 (1980).

In any event, the Board has also held that the way an Employer organizes its work force, including its corporate structure, is relevant to establishing a community of interest. Fraser Engineering, ____ NLRB ____, Case No. 01-RC-080901, Fn. 2 (March 2013) Here, it was the Employer who chose to treat the employees as subcontractors, a decision which clearly reflected their distinctive role in the workforce. The fact that the Employer has recently now apparently changed its mind and eliminated the subcontractor label does not change this legal reality. As the petitioned-for employees were told at the time of the conversion, there was going to be no change in their duties or conditions of work. (Tr.

125, 152-153, 167-168)¹ The only exception was that the petitioned-for employees would now be treated as covered by, but not qualifying for, the Employer's profit-sharing and 401(k) programs, and would also be immediately eligible to receive vacations notwithstanding the one year vacation eligibility rule in the Employer's handbook. (E. Ex. 5, 124, Tr. 125-126, 128, 169) The fact that the Employer had the discretion to decide whether or not the qualification periods for these benefits would be waived, and indeed did waive them for the vacation benefit, demonstrates that the legacy of the employees' treatment as independent contractors lives on as a factor distinguishing them from other employees and contributing to their separate community of interest status.

b. The Regional Director's Decision Was Not Clearly Erroneous on Factual Issues

At the Hearing and in its Brief the Employer continues its attempt to perpetuate the fantasy that Detailers' work is identical to that of the rest of the workforce. As the Employer's attorney stated in his opening argument, the Employer claims that the employees were so intermingled that separating them out was like "trying to unscramble an egg." (Tr. 11) The plain facts of the matter belie this contention.

According to the undisputed facts, the Detailers spend the vast majority of their time on detailing functions, in particular sanding, washing and painting. (Pet. Ex. 3—Rick Doolin's Daily Work Diary)² According to testimony, this occupies between 95 and 100 percent of their time. (Tr. 120, 161, 162) The Detailers are hired with no experience or training requirements. (Tr. 117, 151, 162, 166) In contrast, according to the Employer's website the other service jobs require:

Proven knowledge of methods, materials, tools and techniques used in the repairs of outdoor power equipment, agricultural equipment. Outstanding knowledge of

¹ While the Employer complains in its Brief that the Regional Director relied on facts that occurred while the petitioned-for employees were treated as independent contractors, its statements to the Detailers informing them that their duties would not change establishes that these facts continue to apply.

² The Doolin diary covers essentially all of 2013 up to the Hearing and discloses that of the 239 tasks it reports on, over 96% of them are identified as involving washing, sanding, buffing, painting or removing decals or other surface appearance related tasks.

mechanical, electrical, and hydraulic systems. Excellent skills in operating vehicles and equipment used for diagnostic purposes.

(Pet. Ex. 7)

It was also undisputed that the Detailers have almost no contact with other employees. Five of the six work in a separate building and in a separately walled-off enclosure from any other employees.

(Pet. Ex. 4, Tr. 144) The sixth Detailer works in the Employer's main building, but also in a separately walled-off area and with only a painter in the same enclosed work room. (Tr. 145) Detailers do not eat lunch with other employees, they do not take breaks with other employees, there was no evidence of substantial contact during work with other employees, and they obviously do not perform the sophisticated mechanical repair tasks that other service department employees have to accomplish.

While the Employer claims in its Request for Review that the Detailers perform work repairing engines and hydraulic equipment (Em. Br., 8), there is absolutely no support in the record for this claim insofar as it concerns engines,³ and there is only one reference to hydraulic work in the Employer's witnesses' testimony. (Tr. 91) Significantly, the Employer provided no evidence about how much time the Detailers spent performing tasks other than washing, painting, sanding and similar detailing work.

The Employer's own records introduced at the Hearing also support the Union's point. The Employer introduced Employer's Exhibit 7, which was a computerized list identifying the amount of time spent by employees on various tasks. As the Employer's Service Coordinator, Tami Whiteman, testified, this list was kept for billing purposes in order to invoice customers. (Tr. 133) This document establishes that the Detailers' work was recorded as "Misc. Repairs as Instructed."⁴ For the other 25 service employees recorded in this Exhibit, with the exception of one item on one day, none of these records

³ Jim Priestley, the Employer's Service Department Supervisor, admitted he never observed any of the Detailers repairing engines. (Tr. 90) The Detailers denied ever doing so. (Tr. 125, 166) Here again, Rick Doolin's diary (Pet. Ex. 3) contradicts the Employer's contentions since it covers all of 2013 and records no instances of the Detailers working on engines, or hydraulics or any other power functions for that matter.

⁴ By comparing Employer's Exhibit 7 with Petitioner's Exhibit 3 (the Doolin Diary) we know that "Misc. Repairs as Instructed" means washing, sanding and painting and similar detailing duties.

documenting time spent reflects performance of these “Misc. Repairs as Instructed” duties. Instead they performed such duties as replacing fan bearings, installing sensors, diagnosing/repairing starting problems and the other kinds of mechanical repairs and diagnostic services one would expect skilled mechanics to perform. (Em. Ex. 7) The Detailers were recorded as performing none of these types of duties.

Thus, the Exhibits at the Hearing also establish that, contrary to the Employer’s claim that there is a “non-existent” detailing department (Em. Br. at 2), the Employer itself recognizes that the Detailers perform a separate work function. Moreover, the petitioned-for employees’ paychecks bear the identification “Detail” as do the work Tech Sheets submitted as Petitioner’s Exhibit 1 (Tr. 113), the Detailers’ assignment schedule (Pet. Ex. 6) , the Detailers’ work orders (Pet. Ex. 2) and the status report prepared by the Service Coordinator, Whiteman. (Pet. Ex. 5, Tr. 150)

In its Brief, the Employer also claims that the petitioned-for employees were integrated into the main body of the work force through access to training and promotion. (Em. Br. 6) Here again, the undisputed evidence was quite to the contrary. No Detailer has ever been promoted, and no Detailer has ever received any training in mechanic’s work. (Tr. 168, 171-172) As the Employer admitted, other service employees are required to attend extensive training programs. (Tr. 58) In fact, on its website, the Employer promotes itself by reference to its highly trained staff. (Pet. Ex. 9) Yet, when the petitioned-for employees have asked to be transferred into other departments in order to learn and perform more highly skilled jobs, those requests have been denied. (Tr. 171-172)

On its face, the claim that highly skilled mechanics, some of whom have taken 30 years to learn their craft (Tr. 63-64), and others of whom have gone to technical school and/or repeatedly attended skills training seminars, are performing the same job as Detailers is ludicrous. While the Employer introduced evidence that the mechanics also perform some washing work and/or painting, there was no

evidence of what percentage of the time they perform that work. Moreover, as the Employer's time/billing records establish, this must involve only the most negligible amount of time since there is only one minor reference in those records to anything that could possibly include such duties.

Finally, the distinctiveness of the Detailers' functions is further established by the unique safety and other protective gear with which they work. They are the only employees who wear so-called rain suits made up of chest waders and rain jackets. (Tr. 122-123, 147-148, 165-166) They, along with the Painters, are the only employees who wear respirators. (Tr. Id.) Similarly, their work area, along with the Painters, is the only one serviced by an exhaust system to ventilate fumes. (Tr. 121, 148) The Detailers also use tools characteristic of their work such as power spray equipment and power painting equipment and grinding equipment. (Tr. 126-127, 148)

Under the above circumstances, the petitioned-for group would have been found to be a separate appropriate unit under Board precedent even pre-dating Specialty Health Care. In Dodge City of Wauwatosa, 282 NLRB 459 (1986), the Board rejected an employer's claim that the only appropriate unit in an automobile dealership service department was all service employees. Instead, the mechanics constituted a separate appropriate unit because: 1) mechanics were a distinct and homogeneous group of highly trained and skilled craftsmen whose tasks required use of substantial craft skills as well as specialized tools and equipment; 2) mechanics had either extensive training or experience before being hired, and thereafter were required to attend periodic training on a regular basis; 3) mechanics shared a separate community of interest; 4) although functions performed by all department employees are similar to extent they relate to customer service and automotive repair, the training and skills possessed by mechanics set them apart. See also Country Ford Truck v. NLRB, 229 F3d 1784, 165 LRRM 2649 (D.C. Cir. 2002), affimn'g, Country Ford Trucks, Inc., 330 NLRB No. 42 (1999) (approving a unit consisting of

lube employees and mechanics at a car dealership even though other service employees (including detailers—165 LRRM at 2651) were not covered).

Thus, no matter whether the current Specialty Healthcare rule is applied, or Board law as it stood prior to Specialty Healthcare, the petitioned-for unit here is appropriate. There is no requirement that an overall service unit be established, as the Regional Director concluded. The employees in the petitioned-for unit here are distinct and separate and the Regional Director's conclusions should be upheld.

III. Conclusion

In short, the Regional Director's decision in this matter was well-supported by long-standing Board precedent and the factual record presented at the Hearing. The Detailers work in separate locations, perform distinctive work, possess a lower level of skills and have almost no contact with the rest of the workforce. Under Specialty Health Care, and even under preceding precedent, this would be more than enough to establish a separate community of interest. Therefore, the Employer's Request for Review in this matter should be denied.

Respectfully submitted,

s//Jairus Gilden
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CERTIFICATE OF SERVICE

The undersigned certifies that on this fourteenth day of May, 2013, he caused the foregoing Petitioner's Statement in Opposition to Employer's Request for Review to be filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by email upon the following counsel:

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