

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

<hr/> <b>Local 259, United Auto Workers, AFL-CIO,</b>	:	
<b>Petitioner,</b>	:	<b>Case No. 22-RC-071848</b>
	:	
<b>and</b>	:	
	:	
<b>Englewood Auto Group, LLC,</b>	:	
<b>Employer.</b>	:	
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**PETITIONER'S RESPONSE TO EMPLOYER'S EXCEPTIONS TO  
THE REGIONAL DIRECTOR'S REPORT ON CHALLENGED BALLOTS**

Petitioner, Local 259, United Auto Workers, AFL-CIO, by and through its counsel, hereby submits its Response to Employer's Exceptions to the Regional Director's Report on Challenged Ballots.

The Employer argues against the Regional Director's conclusion that Joseph Delgado was not employed in the bargaining unit on or before the January 10, 2012 payroll period cut-off date for voting eligibility. In support of that argument, the Employer submits two affidavits, one from Stephen Descalzi, owner and manager of the Employer, documenting the materials he submitted to Kristi Bean, the Board Agent investigating the ballot challenges, and the second an affidavit of John Chmielewski, Service Director which states that: (a) the Employer decided to hire Delgado in December 2011, (b) Delgado brought a tool box to the dealership, met personnel, and arranged for training in December 2011, (c) Delgado did his training course at home in December 2011 and also did some training at the Employer's facility on January 6, 2012, and (d) the Employer paid Delgado for 24 hours of training, which included both the January 6<sup>th</sup> on premises training, and the prior training he completed at home. The affidavits and accompanying

documents simply do not provide any evidence that Delgado performed bargaining unit work, or even that he was released to perform such work prior to January 11, 2012.

As the Regional Director noted in his Report on Challenged Ballots, the Board has consistently held that “working” for the purposes of the eligibility cut-off date means “actual performance of bargaining unit work” and does not include “training, orientation, and other preliminaries” on or before the cut-off date for eligibility is not considered to be working for the purposes of determining voter eligibility. *NLRB v. Tom Wood Datsun*, 767 F.2d 350, 352 (7<sup>th</sup> Cir. 1985); *Speedway Petroleum*, 269 NLRB 926, fn. 1 (1984); *F&M Importing Co.*, 237 NLRB 628, 632 (1978).

The Employer attempts to distinguish the above cases on their facts and claims that “other, more recent decisions by the Board, would uphold a determination of Delgado’s eligibility in this case[.]” (Exceptions at p. 7) Thus, the Employer suggests that the Board’s rule that “working” requires “actual performance of bargaining unit work” and does not include “training, orientation, and other preliminaries” has been overturned by subsequent decisions. In fact, that is not true. More recent cases of the Board all repeat the same standard relied upon by the Regional Director in this case. See e.g. *Grapetree Shores, Inc.*, 365 NLRB No. 60, 2010 WL 5399101 (N.L.R.B.), at \*13 (2010); *Dyncorp/Dynair Services, Inc.*, 320 NLRB 120 (1995); *CMW, Inc.*, 306 NLRB 495, 495 (1992).

The Employer claims that the instant case is similar to the situation in *CMW, supra*. In doing so, the Employer creates a misleading impression of that case. The Employer suggests that the Board in *CMW* found that the five days of orientation and training the challenged voters underwent prior to the payroll cut-off date rendered them eligible to vote in the union election. Instead, the Board overruled the election objections in that case because on June 14<sup>th</sup>, the day

prior to the payroll cut-off deadline the challenged voters completed their training and orientation and they:

were released to their supervisor, Dale Young, to begin their assigned jobs. The challenged voters, however, did not have all the protective clothing and equipment required for working in the waste processing areas of the plan. After consulting his supervisor, Maintenance Superintendent Dave Matthews, Young released the challenged voters for the balance of the day with instructions to report back on Monday, June 17.

306 NLRB at 495.

The Board then concluded that “the challenged voters were working in the unit and eligible to vote no later than the time they were released to their supervisor to begin working at their assigned jobs on Friday, June 14... By Friday afternoon the challenged voters had successfully completed the training and were released to their duties in the processing area of the facility. *At that point they were ‘working’ on the job.* They would have physically begun their job duties had it not been for their failure to have adequate protective equipment,” *Id.* at 496 (emphasis added). In other words, the five days of orientation and training was not the reason that these employees were deemed to be “working” in the bargaining unit. Rather, it was the fact that they were released to work before the cut-off date. The only reason they did not work was because the supervisor could not provide the proper equipment. When they were sent home on June 14<sup>th</sup>, the employees were sent home as workers who were ready and able to perform bargaining unit work, not as trainees.

Nothing analogous to that happened in this case. At no point was Delgado released to perform bargaining unit work prior to January 10, 2012. On the contrary, after he completed his training on January 6<sup>th</sup>, he was not assigned to work until January 11<sup>th</sup>. Indeed, paragraph 13 of

the Chmielewski affidavit states that the hours Delgado was paid for the January 4 through January 10 pay period was for the time he spent “training,” not for any bargaining unit work.

To bridge that gap, the Employer argues that Delgado’s on-the-computer training is equivalent to on-the-job training. The Employer correctly notes that the Board considers on-the-job training, that is training that involves the actual performance of bargaining unit work, to be “work” for the purposes of being deemed employed during the payroll period. See *Dyncorp/Dynair, supra*; *Pep Boys—Manny, Moe and Jack*, 339 NLRB 421 (2003) In both *Dyncorp* and *Pep Boys*, the challenged voter performed unit work during the relevant period even though that work was also considered to be part of the employee’s training. In *Dyncorp*, the challenged voter’s training activities during the pre-cut-off date period “consisted of his actually performing the duties of an A & P mechanic.” 320 NLRB at 121. In *Pep Boys*, the challenged voter “performed some unit work such as balancing, mounting, and dis-mounting customers’ tires.” 339 NLRB at 421.

The Employer cites no authority for its assertion that on-the-computer training should be considered equivalent to on-the-job training. Despite the Employer’s use of words like “today’s work environment” to suggest that GM’s training program is a recent innovation, computerized training programs have been around for approximately two decades and yet the Employer could cite no authority for its claim that computerized training is equivalent to on-the-job work.<sup>1</sup> As has been noted repeatedly, one of the reasons behind the Board’s “prework rule” that excludes training, orientation and other preliminary activities from the definition of “working” in the bargaining unit is that “it provides a simple and fair means of determining whether newly hired

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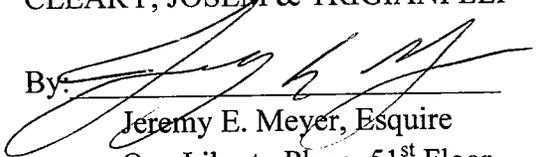
<sup>1</sup> Indeed, the 2003 *Pep Boys* case involved a unit of auto mechanics and technicians, like in the instant case. 339 NLRB 421 at fn. 3. Nevertheless, the Board ruled that the challenged employee should be considered working because of his actual performance of bargaining unit work, not any other training.

employees are part of the bargaining unit.” *CWM*, 306 NLRB at 495-96. By conflating on-the-computer work with on-the-job work, the Employer blurs the bright line established by the Board. There is a clear distinction between on-the-job training that results in productive work that benefits an employer’s customers, and on-the-computer training that benefits only the employee being trained. Only the former is productive work that would result in an employee’s inclusion in the bargaining unit. This is clearly not the case here and Delgado was properly found to be ineligible to vote in the February 10, 2012 election.

For the forgoing reasons, and for the reasons set forth in the Regional Director’s Report on Challenged Ballots, the Petitioner respectfully requests that the challenge to Delgado’s ballot be upheld and a Certification of Representative issue.

Respectfully submitted,

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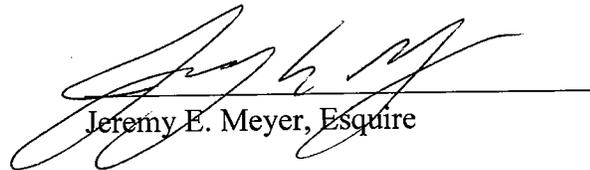
Dated: March 30, 2012

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the within Petitioner's Response to Employer's Exceptions to the Regional Director's Report on Challenged Ballots was sent on the date set forth below by electronic mail to the following:

J. Michael Lightner, Regional Director  
National Labor Relations Board  
Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, NJ 07102

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Jeremy E. Meyer, Esquire

Dated: March 30, 2012