

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

In The Matter Of	:	
	:	
NOLL-FISHER, INC.,	:	
	:	CASE No. 8-RC-107099
Employer,	:	
	:	
and	:	EMPLOYER'S MOTION
	:	OPPOSING UNION'S
	:	REQUEST FOR BOARD
INTERNATIONAL BROTHERHOOD OF	:	REVIEW OF THE
	:	REGIONAL DIRECTOR'S
ELECTRICAL WORKERS, LOCAL 683,	:	SEPTEMBER 13, 2013
	:	DECISION AND DIRECTION
Petitioner.	:	OF ELECTION
	:	
	:	

Respectfully submitted,

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I. INTRODUCTION

In its Request for Review, the Union (International Union of Electrical Workers, Local 683) claims that compelling reasons exist for Board review of the Regional Director's Determination that certain Noll-Fisher electricians should be included in the bargaining unit. This Determination, however, correctly applied controlling Board precedent and did not make any clearly erroneous factual determinations that affected the Union's rights. Additionally, the Union has not identified any other circumstances that would justify Board review. Accordingly, the Union's Request should be denied.

II. ARGUMENT

The Board will grant requests for review only if one of the following "compelling reasons" exists:

1. That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, ***officially reported Board precedent***.
2. That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
3. That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
4. That there are compelling reasons for reconsideration of an important Board rule or policy.

NLRB Rules and Regulations, Section 102.67(c).

Here, the Union argues that compelling reasons # 1 and 2 are met in this case: (1) that the decision departs from controlling Board precedent and that, furthermore, the decision (2) is clearly erroneous on the record, to the prejudice of the Union, because the Regional Director allegedly ignored admissions that the disputed employees were not "full-time electricians." These arguments, however, are inconsistent with the law and are not supported by the evidence. Accordingly, the Union's request for review should be denied.

(a) The Regional Director Properly Applied Board Precedent by Including Dual-Function Employees in the Bargaining Unit

The Union's first argument is that the Regional Director misapplied controlling Board precedent. This is incorrect, for at least two reasons. The first is that the Union's Request fails to identify any "officially reported Board precedent" from which the Regional Director purportedly departs. Instead, the Union relies on a single court case from the D.C. Circuit, *Associated Milk Producers v. NLRB*¹. This decision is not "officially reported Board precedent," and accordingly—whether consistent with this Determination or not—it cannot properly form the

¹ 193 F.3d 539 (D.C. Cir. 1999)

basis for Board review. And even if it were controlling Board precedent, moreover, *Associated Milk Producers* would not apply to the facts of this case.²

In *Associated Milk Producers*, the parties entered into a stipulated election agreement, which included a unit description of “all full time and regular part time production and maintenance employees...” No specific individuals were alleged to be excluded from this definition by either party. Therefore, at the time the parties entered into the agreement, the plain language of the unit description arguably represented the mutual understanding of the parties. It was only after one party lost the election that it attempted to rely on a community-of-interest analysis to dictate otherwise.³

In analyzing this case, the D.C. Circuit applied Board precedent dealing with stipulated election agreements. These decisions essentially held that a stipulated unit description will govern the scope of the appropriate unit if, and only if, two requirements are met: (a) the parties entered into a stipulated election agreement; (b) the election agreement contained an unambiguous unit description. Because both requirements were met in *Associate Milk Producers*, the D.C. Circuit concluded that the stipulated unit description controlled.

In this case, however, the Regional Director properly concluded that neither of those requirements was met. First, the Regional Director expressly recognized that there was no stipulated election agreement. He also recognized that the Union’s interpretation of the stipulated bargaining unit did not represent that parties’ “unambiguous intent.” This is because the language was indeed ambiguous and, furthermore, when considering the surrounding circumstances, the Union’s interpretation is also incorrect.

To be sure, the parties did “stipulate” that the unit should include all “full-time electricians.” But as the Regional Director noted, this description is far from clear on its face. One interpretation, for example, is that the parties intended to include only the employees who were employed as electricians on a full-time basis. But another is that the parties intended to include all full-time employees whom the employer classifies as electricians. Thus, the language of the stipulation itself is ambiguous.

What is certain is that, despite the Union’s contention otherwise, the parties did not “clearly intend” to include only employees who work full-time, 40 hours per week as electricians. That interpretation, after all, would contradict the very purpose of the hearing in which the stipulation was made, which was to determine whether those three employees should be included in the Unit. Additionally, the Union concedes that even the “stipulated-to” bargaining unit members do not fit this description. (Union Request, p. 3.)

Accordingly, the Regional Director properly applied controlling Board precedent in concluding that the parties did not intend to stipulate to excluding the very employees that Noll-Fisher was advocating to include in the unit. (Determination, fn. 21) (citing *Viacom Cablevision*, 268 NLRB 633 (1984) (interpreting unit description in stipulated election agreements).

² *Id.*

³ *Id.*

(b) The Regional Director Did Not Make a Clearly Erroneous Factual Determination to the Union's Prejudice

The Union next claims that the Regional Director made a clearly erroneous factual determination because he failed to acknowledge two employees' alleged admissions "that they are not sufficiently competent at performing electrical work to be included in the stipulated-to bargaining unit of 'full-time electricians.'" This argument is also without merit, for at least three reasons.

The first reason is that this argument is predicated on the premise that the "stipulated-to bargaining unit" is, in fact, determinative of which employees are appropriately included in the unit. As explained in part (a), however, that premise is false; the Regional Director correctly concluded that the "stipulated-to bargaining unit" is not controlling in this case. Therefore, it is irrelevant whether these employees are "sufficiently competent" to fit within the stipulated-to unit or not.

Secondly, there is no evidence that the Regional Director ignored or otherwise incorrectly valued either of these admissions. In fact, the Regional Director expressly acknowledged that they were made; noting that other employees indeed had "low opinions" of Mr. Hausfield's and Mr. Fisher's electrical skills. (Determination, p. 8.) Accordingly, the Union is not actually disputing any of the Regional Director's factual determination. What the Union disputes, rather, is the conclusion that the Regional Director drew from this factual determination: that regardless of whether these employees are "sufficiently competent," they should be included in the unit. This is an issue of law, not of fact, and the Union references no authority or controlling Board precedent that requires threshold competence as a precondition for inclusion in the appropriate unit. On the contrary, Board precedent is clear that the determination of whether dual-function employees should be included in a unit of single-function employees is simply based on the *amount* of overlapping work that the dual-function and single-function employees perform; how well they perform that work is irrelevant. *See Air Liquide America Corp.*, 324 NLRB 661, 662 (1997). This precedent was expressly and correctly applied by the Regional Director. (Determination, p. 7)

Finally, even if the Regional Director's ruling could be characterized as an erroneous factual determination and even if, moreover, threshold competence were necessary for unit inclusion, the Union would not be able to establish that these errors affected the outcome of the case. This is because the Union's conclusions about competence do not follow necessarily from the admissions. Consider first Mr. Hausfield's admission, that he characterized himself as a "plumber, not an electrician." Even if Mr. Hausfield did make this statement genuinely and non-facetiously, how Mr. Hausfield characterized himself to one co-worker on one particular day simply has nothing to do with his electrical competence. It could very well be the case, after all, that although he is competent to work as an electrician, his assignment on that day was to be a plumber; and at no point did Mr. Hausfield admit that he lacked the *skills* of an electrician.

The same is true of the admission by Mr. Fisher. Even if that admission was also true, that Mr. Fisher failed to correctly perform one isolated task on one isolated occasion does not establish that he lacked the overall competence of an electrician. At best, this admission

establishes that Mr. Fisher is not competent to perform “highly skilled electrician work,” but has no bearing on whether he can perform “low-skilled electrician work,” which is also considered unit work. (See Determination, p.3.)

III. CONCLUSION

Because the Union has identified no compelling reasons for the Board to Review the Director’s Determination, Noll-Fisher respectfully asks that the Union’s Request be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that an exact copy of this brief has been sent to Petitioner's Counsel John Stock via electronic mail at jstock@beneschlaw.com and via U.S. mail to 41 S. High St., Suite 2600 Columbus, OH 43215.



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RYAN T. SMITH
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October 4, 2013

Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20470-0001

Re: Noll-Fisher, Inc.; Case No. 8-RC-107099
Employer's Motion Opposing Union's Request for Board Review of the
Regional Director's Decision and Direction of Election

Dear Sir:

We represent the Employer, Noll-Fisher, Inc. Enclosed for filing are eight (8) copies of our Motion Opposing Union's Request for Board Review of the Regional Director's Decision and Direction of Election. Please time-stamp the additional copy and return in the stamped, self-addressed envelope.

If you have any questions, please contact me.

Sincerely,



Ryan T. Smith

RTS:pf

Enclosures

cc: Mark Noll
Frederick J. Calatrello, Regional Director, Reg. 8
John Stock via jstock@beneschlaw.com
Fred A. Ungerman, Jr., Esq.

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