UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TOP GRADE EXCAVATING, INC.,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 25-RD-124878
	)	
RUSSELL J. HORSFIELD,	)	
	)	
Petitioner,	)	
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 150, AFL-CIO,	)	
	)	
Union.	)	

IUOE LOCAL 150's STATEMENT OF OPPOSITION TO REQUEST FOR REVIEW

INTRODUCTION

On May 5, 2014, Regional Director Rik Lineback issued his "Decision and Order Dismissing Petition" in this case. There, the Regional Director explained (Decision at 2):

> For the reasons discussed in detail below, it is concluded that the appropriate units in this matter are those contained in the Union's most recent collective-bargaining agreements with the Quad City Builders Association and the Associated Contractors of the Quad Cities. It is further concluded that under *Daniels Construction Co*., 133 NLRB 264 (1961) there are currently no eligible voters in the appropriate units, and the petition is hereby dismissed.

In arriving at this decision, the Regional Director relied upon basic principles of Board law that in no way depart from officially reported Board precedent. Nor does the Employer raise compelling reasons for reconsideration of important Board rules or policy. The Board should deny the Employer's Request for Review.

ARGUMENT

Under Section 102.67(c) of the Board's Rules and Regulations (29 C.F.R. 102.67(c)):

> The Board will grant a Request for Review only where compelling reasons exist therefore. Accordingly, a Request for Review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) 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.

The Employer relies on subsections (1) and (4) in requesting review of the Regional Director's Decision. It suggests five separate questions of law or policy which it contends depart from officially reported Board precedent or for which precedent is absent (Request at 2). The Employer adds that there are "compelling reasons for reconsideration of an important Board rule or policy because the Decision and Order Dismissing Petition deprives Top Grade's operators of their rights under Section VII [sic] of the National Labor Relations Act" (Request at 3).

The Employers "law or policy" issues really boil down to two: whether the Regional Director identified the appropriate bargaining unit; and whether there is any relevance to the Section 9(a) status of the Memoranda Agreements signed by the Employer. Neither warrant review. Nor does the Employer identify any Board rule or policy for which there exist compelling reasons to reconsider.

I. The Employer Raises No Substantial Question Of Law Or Policy Warranting Review Because The Regional Director's Decision Is Based Upon Well Settled Board Precedent.

A. The Regional Director Ruled upon the Issues to which the Parties Stipulated at the Hearing.

At the hearing into this matter, the parties stipulated that "the issue for hearing today is the appropriateness of the petitioned-for bargaining unit, specifically, whether the bargaining unit described in the petition is the appropriate bargaining unit, or whether the bargaining unit described in either of the collective bargaining agreements is the appropriate bargaining unit" (Board Ex. 2, ¶10). The petition filed by the Employer's cousin described the unit as (Board Ex. 1):

> Included: all full-time and regular part-time operators employed by the Employer from its Farley, IA facility.
>
> Excluded: all their employees, office clerical employees, professionals, guards and supervisors as defined in the Act.

As the Regional Director observed in his Decision, however, the Memorandum of Agreements signed on two separate occasions by the Employer recognize the Union "as the sole and exclusive representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION" (Decision at 2-3). Those Memoranda Agreements adopt master construction agreements which depict the geographic scope of their jurisdiction as coinciding with the Union's territorial jurisdiction, which covers all or parts of four counties in Illinois and seven counties of Iowa (Union Ex. 3 at 1-2; Union Ex. 4 at 1-2).

The Employer's Farley, Iowa facility is outside of the Union's territorial jurisdiction (Transcript of Proceedings conducted April 1, 2014, at 50 (hereafter "Tr. ___"). The Union demonstrated and the Regional Director found, moreover, that only one employee worked on a single construction project in Low Moor, Iowa, in the two years prior to the filing of the petition

anywhere within Local 150's territorial jurisdiction, and then reported fewer than 20 hours of work (Decision at 4). The Regional Director added that, "the Employer has not performed any work within the Union's jurisdiction since the completion of the Low Moor project." *Id.* The petitioned-for unit, therefore, did not correspond to the geographic scope of the bargaining units described in the contracts signed by the Employer and the Union.

As the Regional Director found, "it is well established Board policy that the bargaining unit in which a decertification election is held must be coextensive with the certified or recognized unit." (Decision at 5, relying on various cases collected and discussed in *An Outline of Law and Procedure in Representation Cases* ("NLRB Outline") at 67 (NLRB 2013). The parties further stipulated at the hearing that (Board Ex. 2, ¶7):

> The formula for determining the voting eligibility of employees will be that found in *Daniel Construction Co.*, 133 NLRB 264 (1961), meaning that employees in any bargaining unit found appropriate by the Regional Director will be eligible to vote who are either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date.

Based upon the parties' stipulations, once the Regional Director properly concluded under well-established Board law that the petitioned-for bargaining unit was not appropriate for a decertification election, in part because no employees had performed any work there such as to be eligible under the *Daniel* formula, it followed that the petition should be dismissed.

The Union did not deviate from the stipulated issues; it simply argued the conclusion that absent any eligible voters in the appropriate unit, no question concerning representation existed warranting dismissal of the position. *NLRB Outline* at 70 ("a petition… raises no question concerning representation, when the future scope and composition of the unit is in substantial

doubt.") The Regional Director's decision was consistent with well-established Board law and simple common sense that if there are no eligible employees, there is no election to be conducted and properly dismissed the petition.

The other stated reasons for which the Employer seeks review both hinge on the Regional Director's analysis of the collective bargaining agreements between the Union and the Employer. The Regional Director's analysis turned on a plain reading of the agreements themselves, and rejected various oral agreements upon which the Employer sought to rely. Those written agreements plainly depicted the bargaining units, and the Regional Director made no error in declining to go beyond them.

B. The Regional Director Properly Dismissed the Petition Regardless of Whether the Union Enjoyed Majority Support Under Section 9(a) of the Act.

In its other basis for requesting Review, the Employer asserts that "the Regional Director erroneously concluded that the relationship between Top Grade and Local 150 is governed by Section 9(a) rather than Section 8(f) of the NLRA" (Request at 3). In support, the Employer argues that the Memoranda Agreements establish an 8(f) bargaining relationship not a 9(a) relationship under the Act (Brief at 24-30). This argument fails to support Board review for several reasons.

First, the Employer failed to raise this issue at the hearing and therefore waived it. NLRB Rules and Regulations Sec. 102.67(d) (Requests for Review "may not raise any issue or allege any facts not timely presented to the Regional Director"). The Employer never questioned the validity of the Memoranda Agreements which it introduced itself at the hearing, and which on their face establish § 9(a) status (Tr. 14-15; Er. Exs. 1, 2). Nor did the Employer identify this question in pretrial discussion of the case. It stipulated only to whether the unit petitioned for

was appropriate (Board Ex. 2, ¶10), and made no reference to the issue in its opening statement (Tr. 24).

Next, the Memoranda on their face establish majority status under Section 9(a) of the Act and *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001). Both memos state that "the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of the EMPLOYER" (Er. Exs. 1, 2). Had the Employer properly preserved this issue, it would have been required to present "direct evidence that the Union did not actually have majority support at the time the employer extended Section 9(a) recognition." *Memorandum* OM 14-23, February 4, 2014 at 2.

At the hearing into this case, the Employer offered only a simple hearsay statement that "Top Grade <u>was not</u> offered anything to read when Mr. Seymour signed the 2005 Memo Agreement or the 2007 Memorandum of Agreement." (Brief at 28). This assertion made by a person who was admittedly not the signer of the document is hardly the "direct evidence" necessary to overcome the plain language representation signed by an agent of the Employer. Even if true that the Union offered Mr. Seymour nothing to read, it does not amount to evidence the Union "actually" lacked majority support.

Finally, assuming the Employer is correct and the relationship with the Union is only one under Section 8(f) of the Act, that proposition simply offers an alternative basis for supporting the Regional Director's decision to dismiss the petition. The Board's decertification process can be invoked when there is either a certified or a currently recognized majority bargaining representative in place. *NLRB Outline*, § 7-340 at 76 (2013). A pre-hire bargaining relationship established under Section 8(f) of the Act is <u>not</u> based on majority support and creates no ongoing

bargaining relationship with the employer, which can lawfully refuse to bargain with the union upon termination of the agreement. *John Deklawa & Sons*, 282 NLRB 1375 (1987). If the relationship between Top Grade and the Union arises under Section 8(f) of the Act, then there is no basis upon which to invoke the decertification process and the petition was properly dismissed.

II. The Employer Identified No Board Rule Or Policy To Warrant Compelling Reasons For Reconsideration.

In its final basis for requesting review, the Employer asserts that, "there are compelling reasons for reconsideration of an important Board rule or policy because the Decision and Order Dismissing Petition deprives Top Grade's operators of their rights under Section VII [sic] of the National Labor Relations Act" (Decision at 3). In its argument, however, the Employer fails to identify the "rule or policy" it wants the Board to reconsider, and offers nothing more than some purported "compelling equitable consideration pertaining to the predicament of the Top Grade employees involved" as its basis for review (Brief at 38-39).

The Board is compelled to grant review to reconsider an important rule or policy when it contemplates overruling a previous decision and/or change a basic principle under the Act. *See, e.g., Lamons Gasket Co.*, 357 NLRB No. 72 (2011) (granting review to reconsider rule adopted in *Dana Corp.*, 351 NLRB 434 (2007) and return to well-established recognition bar rule). Here the Employer has identified no rule or policy it wishes the Board to reconsider and therefore offers no basis for review.

Nor is the "equitable… predicament" of the Employer's employees compelling. These employees do not work under the Union's agreements, yet they assert a Section 7 right to reject

its representation anyway. These is no such right under the Act, and the Regional Director's decision was proper.

CONCLUSION

For all the above stated reasons, the NLRB should deny the Employer's Request for Review of the Regional Director's Decision dismissing the decertification petition in this case.

Dated: May 23, 2014

Respectfully submitted,

IUOE, LOCAL 150, AFL-CIO
LEGAL DEPARTMENT

/s/ Dale D. Pierson
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on May 23, 2014, he caused the foregoing to be served *via the NLRB website e-filing system,* and sent courtesy copies to the following via e-mail:

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In addition, the undersigned certifies that on May 23, 2014, he caused the foregoing to be served on the following *via e-mail and UPS Overnight Delivery*:

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In addition, the undersigned certifies that on May 23, 2014, he caused the foregoing to be served on the following via UPS Overnight Delivery*:*

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