

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 27**

**WALRATH HEATING & AIR  
CONDITIONING CO., INC.,  
Employer**

**and**

**INTERNATIONAL ASSOCIATION OF SHEET  
METAL, AIR, RAIL, AND TRANSPORTATION  
WORKERS (SMART), LOCAL #9, AFL-CIO  
Petitioner**

**Case 27-RC-182749**

**REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION**

Pursuant to the Regional Director's Certification of Representative dated October 14, 2016 (and attached notice of Right to Request Review) and § 102.67 of the Board's Rules & Regulations, the Employer, Walrath Heating & Air Conditioning Co., Inc. ("Walrath" or "Employer"), submits the following Request for Review in the above-referenced Case.

**INTRODUCTION**

Walrath seeks review of the Acting Regional Director's ("RD") September 23, 2016 Decision ("Decision") because of inappropriate inclusion of service technicians at Walrath in the petitioned-for bargaining unit of sheet metal workers. In doing so, the RD failed to consider or disregarded community of interest factors long recognized by Board rules, policies, and precedent. The RD's Decision satisfies several of the various grounds set forth below, warranting Board review and modification of that Decision.

**GROUND FOR REVIEW**

Under its Rules and Regulations, the Board will grant a request for review "only where compelling reasons exist therefor. 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.

29 C. F. R. § 102.67 (d).

Under this section, the Board has the authority to review all aspects of record and make findings and conclusions different from those of a regional director in representation cases. *NLRB v. Sav-On Drugs*, 709 F.2d 536, 542 (9th Cir. 1983). Walrath respectfully submits that there are bases for review under several factors enumerated in §102.67.

### **1. A Substantial Question of Law and Policy is Raised.**

Walrath submits that a substantial question is raised for two reasons. First, the Regional Director disregarded or failed to consider substantial evidence on most of the factors set forth in the Board's Hearing Officer's Guide ("Guide"). Specifically, of the seven Community of Interest Questions set out at pages 72-74 of the Guide, and the twenty-one factors to be considered under Question 7 alone comparing terms and conditions of the two separate groups of employees, the RD selected only a handful of factors to support her Decision and disregarded the vast majority of factors to consider in determining unit appropriateness.

Second, while citing to the concepts of "grouping employees within which freedom of

choice may be given collective expression” and insuring “to employees in each case ‘the fullest freedom in exercising the rights guaranteed by the Act,’” the RD disregarded the testimony of two of Walrath’s five service technicians on the substantial differences between their terms and conditions of employment, on the one hand, and those of the sheet metal workers on the other. These service technicians testified at length in an attempt to exclude themselves from the petitioned-for unit, an important right guaranteed to them by § 7 of the Act. Moreover, un rebutted evidence was presented at the hearing that the sheet metal workers and service technicians could comprise, and in the Denver-metro area often comprise, their own distinct and appropriate bargaining unit. For these reasons, substantial questions of law and policy are raised in this Case.

## **2. The RD’s Decision on Substantial Factual Issues is Clearly Erroneous.**

For similar reasons to those stated above, Walrath submits that the Decision on several substantial factual issues is clearly erroneous. Overall, the RD’s analysis of some of the community of interest factors results in findings that support separate units or groups of employees, and the RD places undue weight and treats as conclusive the prior § 8(f) relationship of the parties.

Regarding Walrath’s organizational framework, Walrath presented substantial evidence that it has two distinct departments, the service and repair department and construction/sheet metal department, with different supervisors and different business owners or principals presiding over each department. (Hearing Transcript (“Tr.”) at 18-20; Employer Ex. 1). Contrary to this evidence, and after finding that other Denver companies like Walrath treat service technicians as separate and distinct from sheet metal workers (Decision, p.3) and that separate supervision militates against inclusion (*Id.*, p. 6), the RD nevertheless concluded that this factor favored inclusion of the service technicians into a single unit with the sheet metal workers. That determination was clearly erroneous and unsupported by the record.

Regarding the physical layout of the operations, the evidence was that service technicians spend at least 95% of their time in the field, while sheet metal workers work at different construction sites. (Tr.: 20-23; 142, ll. 6-11; 165, ll. 6-15). Similarly, Walrath's witnesses testified without rebuttal that there is no interchangeability and only infrequent contact among the service technicians and sheet metal workers. (Tr.: 141, ll. 14-22; 169, ll. 1-11). Contrary to this evidence, and after finding "little regular interchange" and "little day-to-day work-related contact" between these two groups (Decision, pp. 4-5), the RD still concluded this evidence did not preclude finding that service technicians should be included in the unit. That finding also was clearly erroneous.

Regarding the nature of employee skills and functions, the evidence established that service technicians have very distinct job functions, duties and skills than sheet metal workers. (Tr. 27-36, 129-130; 166, ll. 7-16; Employer Ex. 2). Other than mentioning that both groups of employees are involved in installing components of heating, ventilation, or air-conditioning ("HVAC") systems, the RD then goes on to recognize the many differences in job functions, skills, training, and tools and equipment. These important differences include:

- Only service technicians service residential and commercial customers, and have regular and direct customer interaction (Tr.: 32, 118; ; *See also* Employer Ex. 2);
- Only service technicians have the discretion to diagnose and determine what work or repairs needs to be done, what parts to use, how much to charge (including the collection of service and repair fees in cash, check, or credit card from the customer) (Tr.: 49, 56);
- Only service technicians are authorized to purchase parts or equipment on account (Tr.: 61-62);
- Only service technicians are assigned and drive their own company vans (Tr.: 22,

139);

- Service technicians have completely different educational requirements, training, and licenses and certifications (Tr.: 42-43, 47-48, 104; 136-37; 164, ll. 7-24);
- Service technicians use far more sophisticated and technical tools and equipment (Tr.: 46-47; 131-36); and,
- Service technicians provide different products and services to customers (Tr.: 136; Employer Exhibits 2, 3, and 4).

Despite these significant and “clear differences” recognized by the RD (Decision, pp. 6-7), she concluded they were not significant enough to exclude the service technicians from the petitioned-for unit. That determination, too, was clearly erroneous based on the overwhelming evidence of dissimilar job functions and skills.

Regarding the degree of functional integration, service technicians infrequently work with sheet metal workers on construction sites. As referenced above, service technicians spend at least 95% of their time working with residential and commercial customers in the field. Thus, at most, their work with sheet metal workers might account for 5% of their time, at most. Moreover, the work that the RD describes on page 8 of the Decision is performed by only one service technician named Max Vigil (Tr.: 117-18). Also as referenced above, service technicians have infrequent contact and dissimilar job functions, factors that the RD agrees cut against the inclusion of service technicians in the subject unit. Thus, her conclusion that these two groups of employees are functionally integrated is clearly erroneous.

Regarding the comparison of terms and conditions of employment, the RD acknowledges that comparable wages and benefits “does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically

separate area.” (Decision, p. 8). Walrath agrees wholeheartedly with that legal point and conclusion, especially where, as in this Case, the service technicians are separately supervised, *supra*; and, there is no interchange of employees, no frequency of contact, no substitution of one group of employees for another, and no promotional opportunities from one group to another. (Tr.: 66, ll. 17-21; 139-40). Despite recognizing how little these two groups of employees have in common, the RD erroneously concluded that this factor also favored inclusion of the service technicians in the subject unit.

The RD relied heavily on the bargaining history of the parties in reaching her decision. While the Board often considers prior bargaining history, the weight given to a prior history of collective bargaining is “substantial.” It is not “conclusive.” *A.C. Pavement Stripping Co.*, 296 NLRB 206, 210 (1989). Moreover, the Board “will not adhere to the historical bargaining unit where that unit does not conform reasonably well to other standards of appropriateness.” *Crown Zellerbach Corp.*, 246 NLRB 202, 203 (1979); *accord A.C. Pavement Stripping*, 296 NLRB at 210 (“[T]he Board ... long held that it will not give controlling weight to a history of collective bargaining ‘to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units.’”) (*quoting William J. Keller, Inc.*, 198 NLRB 1144, 1145 (1972)); *see also Turner Indus. Grp., LLC & Baton Rouge Bldg. & Constr. Trades Council*, 349 NLRB 428, 430–31 (2007). The RD treated the prior § 8(f) relationship between the parties as conclusive, which was clearly erroneous when viewed against the weight of the evidence favoring exclusion of the service technicians from the subject unit and the community of interest factors recognized by the Board in its Guide. Stated simply, the RD’s decision departed from clearly established Board policy on other standards of appropriateness.

Additionally, the RD failed to consider or factor into the Decision whether the excluded

service technicians would be deprived of the opportunity for representation because they would not constitute a separate appropriate unit (Guide, p. 73, Question 5), though she acknowledged that Walrath introduced evidence that these employees could and often do constitute an appropriate bargaining unit. (Tr.: 17, ll. 15-21, 26-27). Similarly, she failed to consider or factor into her decision that the excluded employees had a vehicle for obtaining separate representation. (Guide, p. 73, Question 6). She also failed to consider or factor into her Decision various areas required in Question 7 in the Guide (pp. 73-74), such as: the types of products or services offered by the two groups; the availability or use of Walrath's facilities; whether there exists any progression or promotional advancement from one group to the other; whether employees from one group are substituted for another; the nature and extent of similar or dissimilar working conditions; and, whether there are common seniority lists.

Finally, Walrath and its service technicians have been prejudiced by the RD's decision. Walrath has been struggling to find qualified service technicians so that it can grow that department. In over 10 years as the supervisor over the service and repair business, Boyd Thurston testified that he has had to find service technicians 98% of the time through Craig's List. (Tr.: 81-82). Over that same period, the union has only referred service technicians two or three times. (Tr.: 80, ll. 12-22). In effect, Walrath has had to become a headhunter or recruiter of service technicians for the union. Also, under their prior § 8(f) relationship, Walrath has paid and, in all likelihood through negotiations will have to pay, into the local training fund for service technicians (Union Exhibits 2, 3). The only record evidence, *supra*, is that Local 9 provides little to no training for Walrath's service technicians, forcing Walrath to obtain and pay for additional training elsewhere. Hence, these training fees are completely wasted.

The service technicians have been prejudiced by being deprived of any opportunity for

self-determination, or to decide separately whether they wish to have (or not to have) this or another union represent them, such as Pipefitters Local 208. At least one group of service technicians in Colorado have had such an opportunity with the Petitioner in this Case, voting in an uncontested election to get out of Local 9 in Case No. 27-RM-00671. That case involved the service technicians from a company called Heating & Plumbing Engineers, Inc. (“HPE”) (Tr.: 211-12). Here, the Walrath service technicians have been lumped in with a group of sheet metal workers with whom the RD acknowledges they have little in common. While the union required them to pay a variety of dues and assessments (Union Exhibits 2 and 3) during the § 8(f) relationship, they receive virtually no training or education from the union, *supra*; nor have they served or been asked to serve as officers, stewards, or negotiating committee members for the union. (Tr.: 90-91; 151). That is likely to continue now through negotiations.

**3. The Decision Made in Connection With the Hearing Has Resulted in Prejudicial Error.**

Walrath and its service technicians have been prejudiced by the RD’s decision, as described above in Section 2 of this Request for Review.

**4. There Are Compelling Reasons for Reconsideration of an Important Board Rule or Policy.**

There also are compelling reasons for reconsideration and review because of the RD’s departure from consideration of all of the factors set forth in the Board’s Guide. As set forth above, the lack of interchange of bargaining unit employees from one group to the other, the lack of similar services, products, or processes between the two groups, and the completely separate lines of supervision between these groups all create the same set of compelling circumstances recognized in *Crown Zellerbach Corp.*, 246 NLRB at 203-04, allowing the Board to disregard the

parties' bargaining history in this Case and carve out service technicians from the petitioned-for unit.

### CONCLUSION

Walrath respectfully requests that the Board grant review of the RD's decision in this Case, and permit the parties to file briefs with the Board in accordance with § 102.67(h), along with such further relief that the Board deems appropriate.

Submitted this 20th day of October, 2016.

Sincerely,

/s/ Todd Fredrickson

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**CERTIFICATE OF MAILING**

I hereby certify that I caused a true and correct copy of the foregoing **Request for Review of Decision and Direction of Election** to be filed via the Agency's E-Filing system to Paula S. Sawyer, Regional Director and served via email to counsel for the Petitioner in this action this 20th day of October, 2016.

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*/s/ Casey M. Kite* \_\_\_\_\_