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11 UNITED STATES OF AMERICA
12 NATIONAL LABOR RELATIONS BOARD
13 REGION 31

14 DTG OPERATIONS, INC.,

Case No. 31-RC-175375

15 Employer,

BRIEF ON REVIEW

16 and

17 COMMUNICATIONS WORKERS OF
18 AMERICA, AFL-CIO, CLC, LOCAL 9003,

19 Petitioner,

20 FIREFLY RENT A CAR, LLC

Case No. 31-RC-175404

21 Employer,

22 and

23 COMMUNICATIONS WORKERS OF
24 AMERICA, AFL-CIO, CLC, LOCAL 9003,

25 Petitioner.
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1 **I. INTRODUCTION**

2 Petitioner Communications Workers of America, AFL-CIO, CLC, Local 9003 (“Local
3 9003”), files this Brief in support of its position that the Exit Gate Agents are not guards. This
4 Decision of the Regional Director of which the Board has granted review has substantially
5 expanded the concept of a guard as contained in Section 9(b)(3) of the Act by including Exit Gate
6 Agents¹, who check vehicles out of car rental lots. On review, the Board needs to establish that
7 such Exit Gate Agents are not guards.

8 This Decision is contrary to numerous cases, including one case where this same
9 employer is involved where Exit Booth Agents or Exit Gate Agents for rental car companies have
10 been included in units of other rental car companies. This Decision will substantially split many
11 existing units in rental car companies where Exit Gate Agents play a critical role in the rental of
12 cars.

13 The terminology used in the industry is telling. These are “agents” because they are part
14 of the renting of cars, just like the agents who handle rentals at rental counters or over the phone.

15 **II. STATEMENT OF FACTS**

16 Everyone who rents cars at airports is familiar with these agents.

17 The Regional Director’s factual recitation is accurate:

18 Customers process their rental contract at the counters of either
19 Dollar, Thrifty, or Firefly. After this, customers walk to the lot and
20 choose a rental vehicle. Since the vehicles are kept unlocked with
21 the keys inside, customers can simply get behind the wheel of any
22 rental vehicle irrespective of whether the terms of the contract
23 allow the customer to drive that particular vehicle. After the
24 customer chooses a rental vehicle, the customer must drive through
25 a revenue gate to exit the lot.

26 At the revenue gate, each vehicle stops at a booth staffed by an Exit
27 Gate Agent. Exit Gate Agents ensure that every customer driving a
28 rental vehicle off the lot is authorized to do so. Exit Gate Agents
help keep track of vehicle inventory, and they have the ability to
sell various upgrades to customers, such as vehicle or fuel
upgrades. There are about 16 Dollar Thrifty employees who work
as Exit Gate Agents.

¹ In some cases they are called “Exit Booth Agents.” In no case we have found are they called “guards.”

1 Exit Gate Agents stop each rental vehicle at the revenue gate by
2 lowering the metal arm barrier and raising the tiger teeth. Exit Gate
3 Agents verify whether the driver is authorized to drive the
4 particular rental vehicle off the lot. They do this by asking for the
5 driver's license and rental contract. They ensure that the driver's
6 license is valid and check that the name on the license matches the
7 customer name on the contract. Exit Gate Agents also check to
8 make sure that the contract permits the customer to drive that
9 particular vehicle. The Exit Gate Agents use a computer tablet to
10 scan a barcode on the customer's contract and another barcode
11 located on the vehicle. Scanning the barcodes with the tablets
12 allows the Exit Gate Agents to keep track of which vehicles from
13 the Employers' fleet are rented. It also helps Exhibit Gate Agents
14 determine whether a particular vehicle has a service hold that
15 makes it unavailable for rent until it gets serviced by the mechanics.

9 Decision p. 5.

10 There have been occasions where Gate Agents have refused to let a customer drive
11 through the lot. On rare occasions, an Exit Gate Agent has spotted a fake I.D., and, on one
12 occasion, a non-customer attempted to drive a vehicle from the lot. Presumably, Rental Agents
13 have done the same thing when processing rental contracts. Rental Agents as well as Exit Gate
14 Agents receive the training to identify fraudulent driver's license and credit cards. Aaron
15 Medina, Division Vice President of Hertz Corporation, stated, "With regard to driver's license
16 and credit cards, we also provide training to the CSRs [Customer Service Representatives] and
17 RSAs [Rental Sales Agents]." (Tr. 81.) They would decline a rental based upon inadequate
18 identification or other disqualifications. Mechanics and others have the same responsibility to
19 protect company assets. (Tr. 84.) Medina said:

20 [I]t's collectively all of our responsibility at different points. So
21 you have – at the time of rental, you're also identifying potential
22 fraud, so a CSR would also identify whether a credit card was a
23 valid credit card or a driver's license was a valid driver's license, to
24 the best of ability [*sic*] at the counter as well.

23 (Tr. 78.)

24 Furthermore, as found by the Regional Director, "other employee classifications will
25 cover for Exit Gate Agents" Multiple witnesses testified that other employee classifications
26 covered for Exit Gate Agents. In answer to questions regarding other positions or titles covering
27 the exit booth, Exit Gate Agent Melina Madrid answered, "Definitely, yes. ... This month they've
28 covered me about three to four times." (Tr. 309.) Exit Gate Agent Manuel Jimenez responded,

1 “People from returns,” in answer to a question about what other employee positions or titles
2 covered the exit gate. (Tr. 352.) Jimenez specifically related an incident where he asked an
3 Instant Return Representative to cover the exit gate. (Tr. 358.) Others also noted that, when the
4 lines at the exit gates were long, other employee positions would help with Exit Gate Agent duties
5 to clear the line. Amar Tankha, Senior Director of Operations for Dollar Thrifty, stated, “During
6 peak hours, there’s a long line wrapped around the location. I have seen and instructed IR
7 [Instant Return] or lot attendants or managers to go help clear the line.” (Tr. 283.) Karen
8 Karapetyan, City Operations Manager II for the Orange County Airport, stated, “[I]f there was a
9 long time [*sic*] and we had a lot agent that has knowledge how to do the gate, how to do the – all
10 the – you know, all the process and everything, they would go help them out to make sure we
11 don’t have customers waiting.” (Tr. 162-63.) Exit Gate Agent Alan Jones stated, “We have had
12 people from instant return, they come help, and also management come help if we have long lines
13 or we were short on staff.” (Tr. 336.) The reverse can also occur, where the Exit Gate Agents
14 cover for other positions, such as Instant Return. (Tr. 307, 335.)

15 Importantly, as pointed out by the Regional Director, the non-revenue gates used by
16 employees are staffed by outside guards employed by Securitas. They are plainly guards and
17 serve no sales purpose.

18 The Exit Gate Agents work at what is described by the employer as “revenue gates” for
19 customers. On occasion, an employee will use the revenue gate. The Regional Director correctly
20 described this as follows:

21 Although revenue gates are reserved for customers, and employees
22 are supposed to move rental vehicles through the non-revenue
23 gates, in practice, employees will sometimes drive rental vehicles
24 out of the lots by going through revenue gates. In instances when
25 employees use the revenue gates, the Exit Gate Agents verify the
26 employee identification of the driver before allowing them to exit
27 through the revenue gate. If the employee does not have an
28 employee identification, the Exit Gate Agent will not remove the
 protective barriers.²

26 Decision p. 6.

27 ² There is no record evidence that they ask the employee for identification; presumably they know
28 each other, and the employees wear the same uniforms.

1 The difference, of course, is that the non-revenue gate is used by the employees, and, thus, the
2 guards, who are employed by a third party, are protecting the employer's property from theft by
3 employees. They have no sales or upgrade function.

4 In contrast:

5 Exit Gate Agents do not make rounds on the Dollar and Thrifty
6 lots. They do not monitor the non-revenue-(entrance) gate. They do
7 not carry weapons and they are not bonded or fingerprinted. They
8 wear the same uniforms as other Dollar Thrifty and Firefly
9 employees and do not have any special designation to identify them
10 as security personnel. Upon hire, Exit Gate Agents receive an
11 online training regarding how to scan vehicles and how to deal with
12 asset protection; fraud, and theft. Aside from that initial training,
13 Exit Gate Agents do not receive additional special training that is
14 different from trainings received by other Dollar Thrifty or Firefly
15 employees: Exit Gate Agents do not escort individuals off the
16 Employers' property, are not trained or expected to use any kind of
17 physical force to detain individuals who may be causing problems,
18 and are riot trained to call the police when security issues arise.
19 When such issues do arise, the Exit Gate Agents must contact a
20 manager for assistance. Exit Gate Agents do not write incident
21 reports to document situations involving attempted vehicle theft.
22 Other employee classifications will cover for Exit Gate Agents, but
23 will do so only very sporadically.

24 Decision p. 6 (footnote omitted). This recitation undermines the suggestion that Exit Gate Agents
25 are guards. Exit Gate Agents receive no special training on dealing with suspicious persons or
26 detaining suspects. (Tr. 334.) Police would be called to escort people off the property. It would
27 not be something done by the Exit Gate Agents. (Tr. 295, 334, 353.) Training that Exit Gate
28 Agents do receive pertains to tasks related to sales, such as how to use the inventory tablets and
how to present and sell upgrades to customers. (Tr. 333-34.) Madrid described some of her
duties as follows:

29 Yes. I greet the customers, check their license – driver's license,
30 the contract, make sure the names match. If asked to do so, I'll
31 write off any damages they might want me to. And then I just give
32 them receipt with the car attached to their contract, and I let them
33 out the gate.

34 (Tr. 305.) As Madrid mentioned, one task of Exit Gate Agents is to make note of preexisting
35 damage to a car if requested by a customer. (Tr. 81-82, 291.) Exit Gate Agents also sell upgrades
36 to customers, and the agents earn reward points from the company for selling the upgrades.
37 (Tr. 309-10, 328.) Jones stated, "I can offer to make an upgrade to them with additional fee and I

1 can also sell them fuel if they haven't received fuel. Sometimes you have customers that ask
2 about insurance and I'm able to sell them insurance as well." (Tr. 328.) There is nothing on the
3 Exit Gate Agent uniform that distinguishes it from the uniform of any other classification of
4 employee. (Tr. 297, 305-06, 328-29.)

5 Exit Gate Agents perform the same functions as many employees who check customers
6 both coming into the employer's property as well as leaving the employer's property. Consider
7 the following: (1) Bank tellers who check identification before giving cash to customers;³
8 (2) Pharmacy technicians – they must verify proper identification before allowing a customer to
9 pay for medicines including narcotics, and they ensure payment of all products; (3) food store
10 cashiers who must ensure that the customers are authorized to purchase liquor, the use of food
11 stamps or that the customers do not engage in shoplifting; (4) rental agents of tools, sports
12 equipment, home or business equipment, construction equipment etc., who retain identification or
13 driver's license in order to ensure the return of property, check out the property's condition and
14 ensure the payment of the rental equipment; (5) parts counter person in auto parts stores or
15 dealerships who locate parts for customers and only hand them to customers after they have paid
16 for them; (6) jewelry store sales clerks who watch the piece of jewelry and do not allow the
17 customer to handle except in their sight and ensure payment; (7) meat cutters at traditional meat
18 counters who do not allow customers to have product until they cut it, wrap and price it and often
19 receive the payment for the product. All of these persons "guard" in the same sense as Exit Gate
20 Agents.⁴

21 The Regional Director erroneously found that the Exit Booth Agents' "major
22 responsibility is to ensure that individuals are authorized to drive a particular vehicle out of the
23 lot." But that is true of everyone who sells or rents property.

25 ³ Much of these functions are now performed by an ATM.

26 ⁴ The Regional Director focused on the "tiger teeth" and gate arm, which are moved to allow the
27 vehicle to exit. A pharmacy technician doesn't hand the narcotic or medicine to the customer
28 until after all identification and payment procedures are completed. There is no need to have
"tiger teeth." In many cases, there are cameras recording each sale, like there are at this
employer. (Tr. 123-24.)

1 Most car rentals are online or by phone call. What is left is for the Exit Gate Agent to
2 verify identification and the car by scanning the vehicle identification tag and to upgrade
3 customers or offer other options. The Exit Gate Agent verifies identification, upgrades and sells
4 services.

5 **III. EXIT GATE AGENTS ARE NOT GUARDS.**

6 First, it is notable that these Exit Gate Agents do not serve any purpose of protecting the
7 employer's property from other employees. As noted, the Exit Gate Agents are only at the
8 revenue gates to be used by customers, and, as the Regional Director noted, when an employee
9 uses the revenue gate, all that is checked is the identity of the employee. There is no evidence
10 that allowing another employee through the revenue gate requires anything more than recognizing
11 the employee leaving with a car and opening the gate. As Jones stated, "Well, we have a small
12 circle of employees. I know everybody that comes through my gate. Like for instance, Amar
13 comes to the gate, Brooks come [*sic*] to the gate. So anybody that comes to the gate already
14 knows – I know they're working so I have no problem." (Tr. 342.) There are strike related duties
15 that would put them in conflict with the other employees, but such duties during strikes do not
16 transform them into guards. *Cf. The Boeing Co.*, 328 NLRB 128, 130-131 (1999). The Regional
17 Director ignored the lack of conflict between the Exit Gate Agent employees and the other
18 employees who process rental cars.

19 The Regional Director relied upon checkers. *See Stern's Graham*, 150 NLRB 799 (1965),
20 and *Broadway Hill Stores*, 215 NLRB 46 (1974). The only function of those fitting room
21 checkers was to enforce limits in the number of garments allowed in the customer fitting room.
22 The Exit Gate Agents serve a somewhat different purpose. It is more of a sales related function
23 than a guard function or property control function.

24 The Regional Director erroneously analogized the Exit Gate Agents to alarm technicians,
25 who were held to be guards. *See Wells Fargo Alarm Servs.*, 289 NLRB 562 (1988). Here, the
26 Exit Gate Agents serve only to ensure that the proper vehicle is being rented by the customer. It
27 is not a matter of theft. It is a matter of making sure that the customer has located the correct
28 vehicle. If a customer has the wrong vehicle, the Exit Gate Agent could potentially offer an

1 upgrade or send the customer back to get the correct vehicle. (Tr. 272, 327-28.) In addition, they
2 have important sales functions, and they are effectively the last sales representative before the
3 customer leaves the lot. In many cases, they are the only customer sales representative because
4 the sale was either done online or by telephone. They sell the upgrades, fuel options and so on.
5 They give directions and maps. (Tr. 305, 307, 328, 334.)

6 *Tac/Temp's & the Philadelphia Coca-Cola Bottling Co.*, 314 NLRB 1142 (1994), is
7 instructive. Checkers who certified that “the correct amount of a product is on a route truck or
8 tractor trailer before and after deliveries,” were not guards. Thus, their function was solely to
9 monitor and protect the employer’s property. Yet, they were not guards. The Board stated,
10 “Although the checkers have guard-like functions, we find that the protection of Coca-Cola’s
11 property is incidental to the checker’s primary clerical function of certifying that the correct
12 product amount is on the outgoing/incoming delivery trucks.” *Id.* at 1143.

13 In *Tac/Temp's*, the Board also noted that where other employees shared the same
14 obligation to protect the employer’s property, this mitigates against the finding that the checker is
15 a guard. Exit Gate Agents engage in such a process, just as, when a car is rented by phone, the
16 phone agent will check to make sure that the customer is properly authorized to rent. The same
17 process happens at the rental counter. As Medina stated, all employees are ultimately collectively
18 responsible for stopping theft from the company. (Tr. 78.) In *Tac/Temp's*, the Board also
19 emphasized the point we made above, that the purpose of the checkers had nothing to do with the
20 conflicting loyalties. *Id.* at 1144. *See also Lion Country Safari*, 225 NLRB 969-970 (1976).
21 Here, the Regional Director’s Decision ignores this fundamental issue of conflicting loyalties.

22 This is also analogous to circumstances where individuals protect the employer’s property
23 on the front end. That is, when an outsider enters the property, receptionists, greeters, doormen or
24 others have other duties but yet also “guard” the employer’s property from intruders. In such
25 cases, these individuals have not been found to be guards. *See Wolverine Dispatch, Inc.*,
26 321 NLRB 796, 798 (1996), and *55 Liberty Owners Corp.*, 318 NLRB 308 (1995) (Open door
27 persons and elevator operators who protected the employer’s property from unauthorized entry
28 were not guards).

1 The Regional Director ignored the many other factors that the Board often looks at to
2 determine whether employees are guards. As noted, the Regional Director deliberately ignored
3 the fact that “the Exit Gate Agents do not wear special uniforms, do not make security rounds, do
4 not carry weapons, and are not trained or expected to use any kind of physical force.” Decision
5 p. 8. The primary case that the Regional Director cited is wholly distinguishable. In *Allen*
6 *Services Co.*, 314 NLRB 1060 (1994), employees whose whole function was to observe and
7 report trespass infractions to the police were guards, because their function was protecting the
8 employer’s property and equipment from both intruders as well as other employees. They did not
9 need to wear uniforms, carry firearms, and so on, because they could perform their duties as
10 simply observing and reporting trespass and other infractions. This case is no support for the
11 finding that Exit Gate Agents are guards.⁵

12 This Decision will reverse recent Board Decisions where Exit Booth Agents have been
13 included in overall units or units with non-guards. *See Enter. Leasing Co.*, 357 NLRB 1799,
14 1801 (2012), *subsequent case*, 359 NLRB 251 (2012), *enforced*, No. 14-2072 (5th Cir. 2015)
15 (unpublished opinion); and *DTG Operations Inc.*, 357 NLRB 2122, n.2 (2011) (same employer,
16 different location). *See also Alamo Rent-A-Car*, Case 32-RC-4602 (Exit Gate Agents called
17 “Best Friend” Gate Agents, not guards).

18 Exit Gate Agents are part of the sales and processing team for rental cars.⁶ The employer
19 deliberately does not identify them to the public as guards as it does with the Securitas guards at
20 the non-revenue gates. They are at the gate to complete the rental. They wear the same uniforms
21
22

23 ⁵ Here, the protection function is all electronic and automatic. The Exit Gate Agent scans the
24 car’s identification and checks against the same identification number on the rental agreement and
25 the driver’s license. If they do not match, the gate does not go down. No evidence was presented
26 that the Exit Gate Agent exercises any discretion; the process is governed by numbers on rental
27 agreements and drivers’ licenses. The Regional Director noted one occasion where a fake ID was
28 presented. The fact that this occurred one time (and could have happened to the counter rental
agents) demonstrates that the protection function is an irrelevant portion of their duties.

⁶ In non-airport locations, the counter rental person completes the sale, hands over the keys and
shows the customer to the car, often performing an inspection. This is the same alleged guard
function.

1 as other rental agents. The customer perceives them as part of the rental process.⁷

2 **IV. THIS DECISION WOULD APPLY TO MANY WORKERS WHO HAVE THE**
3 **SAME FUNCTIONS OF PROTECTING EMPLOYER PROPERTY BUT WHO**
4 **ARE INTEGRATED INTO SALES AND SERVICE FUNCTIONS**

5 The following are examples of employees who perform similar functions as the Exit Gate
6 Agents. If these Exit Gate Agents are found to be guards, such a ruling virtually sweeps into the
7 guard category many classes of workers who are primarily involved in the sales and delivery
8 function, yet whose function incorporates, in part, the duty of all employees of the employer to
9 guard the employer's property:

- 10 • The liquor store clerk who stands behind the counter to protect the liquor from
11 being taken and to assure the identity, including age, of the customers;
- 12 • The window clerk at the racetrack who guards the money and assures that all
13 betting is done lawfully according to the horseracing rules of that particular jurisdiction;
- 14 • The jewelry store clerk who watches the jewelry and unlocks the jewelry case to
15 show jewelry to the potential customer;
- 16 • The bank teller who carefully guards the bank's cash and doesn't cash checks
17 without receiving proper identification; often tellers have glass windows and other guard-like
18 structures;
- 19 • The postal clerk who works behind a glass window with a shelf that rotates in
20 order to guard the postal stamps and service from customers;
- 21 • The clerk in the grocery store who checks ID for the sale of liquor and has keys to
22 liquor or cigarette cabinets to protect the employer's property;
- 23 • The automobile salesman who doesn't allow the customer to drive off the car until
24 all the formal paperwork is completed, and this often includes identification and determination of
25 financial ability to pay;

26
27 ⁷ In ensuring that the customer has the right car, they are not guarding, they are assisting the
28 customer to select the proper car consistent with their contract. There is no evidence that
prevention of "shoplifting" or stealing of cars is the real purpose of such Exit Gate Agents.

1 • The electronics store clerk who has to go get a product from behind the counter or
2 the store room because the products on display are attached to security devices. The product is
3 only handed over after the clerk is assured the item has been paid for;

4 • The pharmacist or pharmacist assistant who keeps the medicine behind the counter
5 and only turns it over upon proper proof of identification and payment; this often includes
6 scheduled drugs and some over the counter medicines:

7 The sale of cold medicine containing pseudoephedrine is limited to
8 behind the counter. The amount of pseudoephedrine that an
9 individual can purchase each month is limited and individuals are
10 required to present photo identification to purchase products
11 containing pseudoephedrine. In addition, stores are required to
12 keep personal information about purchasers for at least two years.

13 (U.S. Food & Drug Administration, *Legal Requirements for the Sale and Purchase of Drug*
14 *Products Containing Pseudoephedrine, Ephedrine, and Phenylpropanolamine*, available at
15 <http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm072423.htm>.);

16 • The clerk in the medical marijuana facility who ensures that the person is entitled
17 to purchase the marijuana based upon medical reasons and documentation;

18 • The clerk at a rental store who doesn't give the keys to the property until proper
19 identification and payment is made;

20 • The parking garage attendant who accepts payment or makes sure that a customer
21 has already paid their parking fee before letting the customer exit the garage; and

22 • The salesperson in an auto rental agency who has the customer fill out the
23 paperwork, assures payment, inspects the car with the customer and then hands over the key after
24 the transaction is completed.

25 The Exit Gate Agents in this case serve some or all of the functions of the above-
26 described employees. They ensure that the person has the proper identification before the car is
27 taken off the property. Moreover, as this record indicates, they perform a part of the sales
28 function by both ensuring that the customer has a proper contract and offering information about
directions, maps, upgrades and fuel and other choices. The fact that there is a metal security
guard at the gate is no different from the various other secure devices used by all the employees

1 described above, whether it's a key, a glass window or other apparatus designed to protect the
2 employer's property. These rules apply to small items such as jewelry and larger items such as
3 cars, and even much larger items at construction equipment rental sites.

4 Security and property protection is more important and more integrated into other
5 functions such as sales. Exit Gate Agents illustrate this principle and are not guards.

6 **V. CONCUSION**

7 Exit Booth or Exit Gate Agents for car rental companies are not guards. The Regional
8 Director erroneously concluded that the Exit Gate Agents in the automobile rental industry are
9 guards. The Board should find that the Exit Gate Agents are not guards.

10 Dated: December 7, 2016

Respectfully Submitted,

11 WEINBERG, ROGER & ROSENFELD
12 A Professional Corporation

13 By: /s/ David A. Rosenfeld
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 7, 2016, I served the following documents in the manner described below:

BRIEF ON REVIEW

(BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld’s electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 7, 2016, at Alameda, California.

/s/ Karen Kempler
Karen Kempler