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12 & AEROSPACE WORKERS, DISTRICT LODGE 725

13 UNITED STATES OF AMERICA
14 NATIONAL LABOR RELATIONS BOARD
15 REGION 27

16 K & N ENGINEERING, INC. ,

17 Employer,

18 and

19 INTERNATIONAL ASSOCIATION OF
20 MACHINISTS & AEROSPACE WORKERS,
21 DISTRICT LODGE 725,

22 Petitioner.

Nos. 21-RC-174486; 21-RC-174700

**OPPOSITION TO K & N
ENGINEERING INC.'S REQUEST FOR
REVIEW OF THE DECISION AND
ORDER SUSTAINING CHALLENGES,
OVERRULING OBJECTIONS, AND
CERTIFICATION OF
REPRESENTATIVE ISSUED BY THE
REGIONAL DIRECTOR ON
JANUARY 20, 2017**

23 **I. INTRODUCTION**

24 Although the employer fails to explicitly state the grounds for review in its request, it
25 appears that K & N Engineering, Inc. ("K & N") is seeking relief from the stipulated election
26 agreement that it entered into. The thrust of K & N's argument is that the unit, otherwise agreed
27 to by the parties, should have been found inappropriate by the Regional Director when there were
28 objections to the election and when determinative ballots were cast as challenged ballots. In its
argument, K & N misstates the controlling case law, provides an incomplete view of the evidence
and urges a departure from both *Specialty Healthcare and Rehabilitation Center of Mobile*, 357
NLRB 934 (2011) and *White Cloud Products*, 214 NLRB 517 (1974).

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III. THE SCOPE OF THE UNIT

The Board's longstanding policy is to permit "parties to stipulate to the appropriateness of the unit, and to various inclusions and exclusions, if the agreement does not violate any express statutory provisions or established Board policies." *Goucher College*, 364 NLRB No. 71, p. 1-2 (2016) citing *White Cloud Products*, 214 NLRB 516, 517 (1974). This policy honors the parties agreement in the event a stipulated election is held in a unit that would not meet a standard community of interest test but does not violate any statutory provisions or established policies. The Board has stated that "a stipulated inclusion or exclusion which may not coincide with a determination which the Board would make in a nonstipulated-unit case on a 'community of interest' basis is not a violation of Board policy such as would justify overriding the stipulation," *Goucher College*, 364 NLRB No. 71 at p. 3 (Miscamarra dissent), citing *White Cloud Products*, 214 NLRB at 517. There is no grounds to override the stipulation of the parties in this case.

The employer asserts that the stipulated election agreement which it entered into should not be upheld because it creates a fractured unit. First, the unit is not fractured because it is neither too narrow in scope nor is there a complete absence of a rational basis for its scope. *See Seaboard Marine*, 327 NLRB 556, 556 (1999). Second, K & N fails to address the long-standing precedent which requires the agreement of the parties to control the scope of the unit unless the agreement is repugnant to the Act. Here, the employer, the party with the most information at the time the stipulated election agreement was entered into, included the janitors along with production employees in the stipulated unit. K & N is now saying because the janitors were included, the only appropriate unit must include not only the Maintenance Technicians, who voted by challenged ballot, but also the Machine Adjustment Coordinator, Pleatings, who neither was listed in the election agreement, nor sought to vote in the election. The employer takes the position that there is only one appropriate unit in the entirety of this facility and that must include all employees.²

² It is a little uncertain what K & N's position is regarding the Facilities Maintenance Technician. It seems inconsistent that the employer could take the position that the Maintenance Technicians levels 1, 2, 3 and Lead must be included to avoid a fractured unit but that the Facilities Maintenance Technician should be excluded, resulting in a residual unit of one. That formulation would fracture the Maintenance department, by including all other classifications (maintenance technicians and janitors) except the lone Facilities Maintenance Technician.

1 K & N argues that this case must be analyzed under the two prong test of *Specialty*
2 *Healthcare* notwithstanding the stipulated election agreement. In *Odwalla, Inc.*, 357 NLRB 1608
3 (2011), a post-*Specialty Healthcare* case, the Board reviewed, post-election, a stipulated unit. Its
4 analysis started from a determination that the stipulated unit stands in the place of the petitioned-
5 for-unit and as long as the two-prong test of readily identifiable and sufficient community of
6 interest was satisfied, the party seeking to expand the unit has the burden to establish that the
7 additional employees share an overwhelming community of interest with the stipulated unit. *Id.* at
8 1611.

9 Here the unit is readily identified as all non-craft employees at the facility and they share a
10 sufficient community of interest. This community of interest test applied under the second prong
11 of *Specialty Healthcare* does not require the overwhelming community of interest which would
12 be necessary to modify a properly defined unit. The only employees that were intentionally
13 excluded from the eligible voters were those who were engaged in the skilled trade/craft of
14 Maintenance Technician (despite its name, the Machine Adjustment Coordinator, Pleatings is a
15 Maintenance Technician position per the testimony on the record). Thus, the unit includes all
16 employees who perform production or production support but are not part of the Maintenance
17 unit. This is a readily identifiable group and a group, based on the factors as laid out by the
18 employer, that shares a community of interest. The question then becomes whether there is such
19 an overwhelming community of interest with the Maintenance Technicians that they must be
20 included in order for it to be considered the only appropriate unit. The Regional Director
21 appropriately found the Maintenance Technicians do not share an overwhelming community of
22 interest and the employer does not seek a wall-to-wall unit.

23 Further, the Regional Director found an appropriate unit that continued to honor the
24 agreement that had been entered into by the parties. *Specialty Healthcare* does not address the
25 overarching intent by the Board and its Regions to uphold stipulated election agreements as
26 written by the parties. The employer's urged formulation completely disregards the stipulated
27 election agreement that it willingly entered into. It claims that there is no legitimate basis to
28 exclude the Maintenance Technicians, but the exclusion of a craft unit from an otherwise

1 production and production support unit is neither uncommon, nor irrational. The employer points
2 to the stipulated fact that the Union does represent some units in which production workers and
3 Maintenance Technicians are in the same unit to bolster its position. However, it fails to
4 reference the rest of that stipulation; the Union also represents units of either the production
5 employees or Maintenance Technicians but not both, or may represent both but in two separate
6 units.

7 **IV. CONCLUSION**

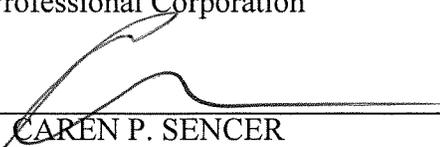
8 Simply put, the employer's Request for Review is an attempt for a second bite at the apple
9 because it was unhappy with the Decision as reached by the Regional Director. The employer's
10 unhappiness does not create grounds for review or indicate that there is a substantial question of
11 law or departure from officially reported Board precedent. The employer makes no attempt to
12 show that the Regional Director's Decision is based on a mistake of fact or that the conduct at the
13 hearing has resulted in prejudicial error, or that there are other compelling reasons for
14 reconsideration. This is simply a continued attempt by this employer to delay the rights of the
15 employees to have the representative of their choosing.

16 Because the Regional Director's Decision is free from error and carefully took into
17 consideration all factual evidence on the matter, the Decision of the Regional Director should be
18 upheld, no additional ballots should be opened, and the Union should remain the certified
19 representative.

20 Dated: February 10, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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22
23 By:


CAREN P. SENCER

Attorneys for Petitioner INTERNATIONAL
ASSOCIATION OF MACHINISTS
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**PROOF OF SERVICE
(CCP §1013)**

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 February 10, 2017, I served the following documents in the manner described below:

OPPOSITION TO K & N ENGINEERING INC.'S REQUEST FOR REVIEW

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

On the following part(ies) in this action:

Mr. Gary Shinnners, Executive Secretary
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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 February 10, 2017, at Alameda, California.



Lara Hull