

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

DEX MEDIA, INC. d/b/a DEX YP

Employer

Case 20-UC-214148

and

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, [IBEW] LOCAL 1269**

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER DISMISSING PETITION

Pursuant to Section 9(c) of the National Labor Relations Act, International Brotherhood of Electrical Workers, [IBEW] Local 1269 (herein referred to as the "Petitioner"), filed a unit clarification petition with the National Labor Relations Board seeking to clarify an established bargaining unit of certain specified sales employees employed by Dex Media, Inc. d/b/a Dex YP (herein referred to as the "Employer") to include two additional job classifications, Thryv Business Advisor and Marketing Consultant (a/k/a Expansion Representative) (collectively referred to herein as the "petitioned-for classifications"). A hearing officer of the Board held a hearing in this matter on May 15 and 16, 2018.¹ The Petitioner and the Employer both filed briefs in this matter, which I have carefully considered.

As evidenced at the hearing and in their briefs, the parties disagree as to whether the petitioned-for classifications should be included in the existing bargaining unit, which is defined in Article 1, Section 1.1.1 of the most recent collective-bargaining agreement between the parties. The Petitioner contends that because the petitioned-for employees perform essentially

¹ The petition was originally filed in Region 20 and a similar petition was filed in Region Six in case 06-UC-214687. Since the issues in both cases involved the same parties and the same classifications, a decision was made for the hearing to be conducted in Region 20. After the close of the hearing I approved the petitioner's request to withdraw the petition in case 06-UC-214687. On August 29, 2018 an Order issued transferring the petition filed in Region 20 to Region Six for further processing.

the same work as the existing bargaining unit employees perform, they should be included in a clarified unit. The Petitioner does not seek to add the petitioned-for classifications by accretion.

The Employer disputes the appropriateness of including the petitioned-for classifications in the existing unit and seeks to have the petition dismissed in its entirety. Specifically, the Employer argues that the petitioned-for classifications are not properly included in the existing unit because they do not perform the work delineated in the contractual unit description. Further, although the Petitioner does not seek to add the petitioned-for employees to the unit by accretion, the Employer notes that an accretion would be improper in any case because the petitioned-for classifications lack the requisite overwhelming community of interest with the existing employees in the bargaining unit to be accreted. *AT Wall Co.*, 361 NLRB 695 (2014). As stipulated by the parties at the hearing, within the past five years the Petitioner has not filed any petition seeking to represent the petitioned-for employees.

I have fully considered the record evidence,² the parties' respective arguments concerning the issues raised, and applicable case authority in this matter. As discussed more fully below, I have concluded that the Petitioner failed to meet its burden of establishing that the petitioned-for classifications are properly included in the existing bargaining unit.³ Accordingly, I am issuing an Order dismissing the petition.

² At the hearing, the Employer introduced into the record an exhibit which it identified as a list of documents residing on a portable electronic storage device, or thumb drive (Employer Exhibit 1). Some of the documents listed in the exhibit were introduced into evidence during the hearing; others were not. When identifying Employer Exhibit 1 on the record, Employer's counsel affirmatively stated that he did not intend to introduce into evidence *all* of the documents referenced in Employer Exhibit 1, or the actual storage device itself. In reaching my determination in this matter, I have relied primarily on evidence admitted into the record, notwithstanding the parties' periodic references in the hearing and in their briefs to documents apparently contained on the portable storage device. Several of the documents listed on Employer's Exhibit 1 are purportedly in the public record, and to the extent they are relevant I have taken official notice of the public records.

³ Because the Petitioner has specifically stated that it is not seeking an accretion of the petitioned-for classifications into the existing unit, I will not make a decision as to the propriety of accretion in this Decision. Moreover, as described more fully below, the Petitioner did not present at the hearing the evidence necessary to determine whether the petitioned-for classifications share such an overwhelming community of interest with the classifications in the existing bargaining unit as to warrant their accretion to the unit. See *AT Wall Co.* 361 NLRB 695 (2014).

To provide a context for my discussion of the issues, I will first describe the background of the Employer's operations. I will then present the relevant facts concerning the disputed classifications and the reasoning that supports my conclusions on the issues.

I. FACTS

A. Background

The Employer is engaged in the business of selling print advertising, electronic advertising and software packages for business use. The Employer's current operation resulted from a merger between Dex Media, Inc. ("Dex"), and YP, which took place in June 2017. Historically, both Dex and YP were in the business of selling the type of advertising that appeared in "yellow pages" printed directories. With the development and growth of the internet, however, Dex and YP extended their businesses into the fields of digital advertising and internet-based services.

In mid-2015, Dex introduced digital products called "DexHub" and "DexLink." In about February 2017, Dex combined these two products and re-branded them as a single software product called "Thryv." Dex's introduction of the Thryv software product represented a departure from its traditional focus on print advertising, as Thryv is a software product designed to assist small businesses in their general daily operations, with capabilities applicable to such matters as inventory control, payroll, and sales processing. Dex used its existing customer base for print advertising to sell the new Thryv software product.

Prior to the June 2017 merger, predecessor company YP continued the business of its predecessors, selling advertising in printed directories. Over time, it, too, added internet-based advertising products. YP's digital product was limited to advertising that was similar to its print products, however, and, unlike Dex, YP did not venture into selling software for small businesses' daily operational use.

Since Dex acquired YP and its subsidiaries to form the Employer in June 2017, the Employer has been engaged in selling print and digital advertising, as well as the Thryv product originally developed by Dex. At issue in this case are those employees of the Employer whose primary function is to sell the Thryv software product.

B. Relevant Collective Bargaining History

The Employer and the Petitioner are parties to a collective-bargaining agreement that was originally negotiated between the Petitioner and YP and subsequently adopted by the Employer upon YP's merger with Dex. The contract was effective by its terms from February 7, 2014 through August 6, 2016, and was extended by agreement of the parties to February 23, 2018.

The collective bargaining agreement sets forth 11 job classifications of the employees that comprise the bargaining unit.⁴ The disputed classifications have not been the subject of bargaining between the parties, as they did not exist at the time the most recent agreement was negotiated. In this regard, the Thryv Business Advisor classification was created by the Employer in about the mid to late Fall of 2017.

C. Employees in the Existing Bargaining Unit

As noted above, the existing bargaining unit is comprised of employees in classifications established based on YP's operations prior to the merger. Their job functions were directly related to YP's sale of print advertising for traditional "yellow pages" directories. Working out of sales offices, the unit employees performed their work in a geographic area roughly described in the record as northern California and Nevada.

⁴ The most recent collective bargaining agreement, at Article 1, Section 1.1.1, describes the bargaining unit as including the following titled classifications: Account Executive New Media, Advertising Sales Representative, Customer Associate, Directory Representative, Directory Sales Representative, Field Sales Collector, Key Account Executive, Office Assistant, Supervisor's Assistant, Telephone Sales Representative and Universal Support Associate.

As the use of the internet became more common, these employees began selling digital and electronic advertising products in addition to the traditional printed "yellow pages" directories. The unit employees' assumption of these new tasks coincided with YP's closure of many of its brick and mortar sales offices, and the unit employees began working almost exclusively from their homes. The targeted customers of the unit employees' sales efforts were the same as for YP's print advertising products.⁵

D. The Petitioned-for Employees

At issue in this proceeding are three Thryv Business Advisors who exclusively sell the Thryv software product, and 13 additional employees who sell both the Thryv software product and more traditional advertising products. Common to the petitioned-for employees is a requirement for several months of training related to the marketing and sale of the Thryv software product.

1. Thryv Business Advisors

There are three employees currently in the petitioned-for classification of Thryv Business Advisor. They are: Douglas Sturgess, Kristin Challendes and Kimberly Dunham. The record reflects that all three of the Thryv Business Advisors are former YP supervisors who chose to accept this newly created position as an alternative to losing their employment as a result of the merger.

Sturgess and Challendes work in northern California, while Dunham works in Nevada. All three of the Thryv Business Advisors work from their homes and report to a supervisor in a

⁵ While these changes in the nature of the business appear to be undisputed, the most recent collective bargaining agreement does not reflect any change in the job classifications by which the bargaining unit is defined. The record reflects that the YP employees who were working almost exclusively from their homes are called "premise representatives," but the contractual unit description, set forth above, does not include such a classification. In addition, because the petitioned-for classifications did not exist at the time the most recent collective bargaining agreement was negotiated, the contractual unit description contains no reference to the Thryv Business Advisor and Marketing Consultant (a/k/a Expansion Representative) classifications.

remote location. The Thryv Business Advisors perform functions solely related to the sale of the Thryv software product and they do not sell any print or digital advertising products.⁶

2. The Remaining Petitioned-for Employees

The remaining 13 employees whom the Petitioner seeks to include in the unit are identified as those who “report to Sales Director Rick Troutman” and “work out of their homes in California and Nevada.” According to the Employer’s records, these employees’ specific job titles include, “Outside Sales Media Consultant,” “Major Account Executive,” “Account Executive,” and “Premise Sales Rep – Expansion.”⁷ The record does not reflect any evidence concerning the specific daily job functions or terms and conditions of employment for these 13 employees, whom the Petitioner identifies as “Marketing Consultants (a/k/a Expansion Representatives”).

With respect to evidence concerning any community of interest that the petitioned-for employees might share with the existing bargaining unit, the record reveals that the employees in the petitioned-for classifications report to different supervisors and managers than those to whom the employees in the existing bargaining unit report. Moreover, the record is devoid of evidence concerning any interchange of employees or regular day-to-day contact between and among these employees; nor does it reflect how the employees in the petitioned-for classifications are paid or the details of any benefits that they may receive.⁸ It is unclear from

⁶ The record does not reveal more detailed information concerning the Thryv Advisors’ daily job tasks, hours, wages, and other terms and conditions of their employment.

⁷ Notably, the petitioned-for classification of “Marketing Consultant (a/k/a Expansion Representative)” does not appear on the Employer’s list of employees who report to Sales Director Rick Troutman. Similarly, at the hearing, the Employer’s counsel asserted that Marketing Consultant is not an existing job classification.

⁸ The parties stipulated that, as of January 1, 2018, all former Dex employees are getting same medical benefits except that the Petitioner “ has pending an arbitration in which they object to getting the same medical benefits as the other 35 to 4500 people. (267-268) No further detail or evidence was provided and it is unclear what benefits are being provided to the petitioned-for employees.

the record precisely how the petitioned-for employees receive their assignments, what specific tasks are involved in their daily job functions, how they process orders, or what work rules they must follow. While the record shows that 13 of the employees in the petitioned-for classifications report to Rick Troutman, it is unclear from the record to whom Sturgess, Challenges and Dunham, the three petitioned-for Thryv Business Advisors, report.

II. THE PARTIES' POSITIONS

The Petitioner asserts that the job functions of the employees in the petitioned-for classifications are similar or identical to those in the existing bargaining unit. More particularly, it argues that employees in both groups are engaged in selling products by telephone and in person, and that they do not have an identity separate from the existing unit.

In support of its position, the Petitioner relies on the Board's decision in *Premcor, Inc.*, 333 NLRB 1365 (2001), discussed below, to argue that the petitioned-for classifications are properly part of the existing unit. The Petitioner specifically does not seek to add the petitioned-for classifications to the existing unit by accretion. Consistent with this position, at the hearing the Petitioner did not introduce evidence of an overwhelming community of interest between the petitioned-for employees and the existing bargaining unit employees sufficient to support an accretion of the new classifications into the existing bargaining unit.

By contrast, the Employer argues that the petitioned-for job classifications are not sufficiently similar or identical to those in the bargaining unit as to warrant their automatic inclusion in the unit under *Premcor*, supra. In support of this position, the Employer relies, in large part, on the Board's decision in *AT Wall Company*, 361 NLRB 695 (2014), described below. The Employer further contends that the petitioned-for classifications should not be accreted into the existing bargaining unit because the two groups have substantially separate identities and do not possess the requisite overwhelming community of interest to support an accretion.

III. ANALYSIS

The Board has long held that unit clarification is the appropriate mechanism “for resolving ambiguities concerning the unit placement of individuals who come within a newly established classification of disputed unit placement.” *Union Electric Co.*, 217 NLRB 666, 667 (1975). The Board will view a new classification as already belonging in the bargaining unit (rather than being added to the unit by accretion) if employees in the new classification perform the same basic work functions historically performed by unit employees. *Premcor*, supra; *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166 (2001).

However, if the employees in the new classification do not perform the same basic functions historically performed by unit employees, the Board will apply a traditional accretion analysis and will only add the new classification to the unit if the employees in the existing unit “have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.” *CHS, Inc.*, 355 NLRB 914, 916 (2010), quoting *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005) (internal quotations omitted).

As noted above, the Petitioner suggests that the Board’s decision in *Premcor* requires that the petitioned-for positions be included in the existing unit. In *Premcor*, the unit clarification petition arose when the employer established a central control room in a facility separate from its oil refinery and created a new “PCC” position. In that matter, the employees occupying the new PCC classification performed essentially the same work as the bargaining unit classification of “operator 1s” in the employer’s facility, except with more advanced technology. The PCCs were hired from the bargaining unit and were all formerly employed as operator 1s. Both positions were responsible for modulating the mix and flow of product based on production standards developed by management, maintaining continual communication with unit employees in the field in order to examine and correct malfunctions in the units, and issuing work permits to company mechanics and contractors. The Board found that despite the PCCs

use of new technology, employees in the new classification were essentially performing bargaining unit work.

Notwithstanding the Petitioner's assertions to the contrary, I find that *Premcor* and *Developmental Disabilities Institute, supra*, are inapplicable here because the work performed by the petitioned-for employees, i.e., selling the Thryv product, has not historically been performed by employees in the existing bargaining unit.

The Board has found that when *Premcor* does not apply, one must consider whether accretion is appropriate. See *AT Wall, supra*. In *AT Wall*, the Board considered whether to clarify an existing bargaining unit of production employees who engaged in the tubing, stamping, and manufacture of gun magazines to include new classifications established by the employer after it acquired the operations of another company. The Board in *AT Wall* decided that the *Premcor* standard was not applicable in that matter given the restrictive definition of the unit in the collective-bargaining agreement, which listed 21 specific job classifications that were labeled by department and sometimes by product. In finding that *Premcor* was inapplicable in those circumstances, the Board further noted that the employees in the new classification produced an entirely different product using different processes under different working conditions than did the bargaining unit employees.

As was the case in *AT Wall*, the provisions of the most recent collective bargaining agreement in the instant case narrowly define the unit to include *only* the classifications specified in the agreement. Also, like *AT Wall*, the employees in the petitioned-for classifications in this matter primarily sell a different product than the employees in the existing bargaining unit.⁹

⁹ The record is silent concerning the percentage of time the 13 petitioned-for Marketing Consultants (a/k/a Expansion Representatives) spend selling the Thryv business software packages versus products that are specifically linked to advertising.

As noted elsewhere, it is unnecessary here to consider an accretion analysis, as the Petitioner does not wish to pursue accretion by its unit clarification petition. Further, notwithstanding the Petitioner's preferences in this regard, the record evidence is insufficient to evaluate whether the petitioned-for employees share such an overwhelming community of interest with the existing bargaining unit employees as to warrant their inclusion in the unit by accretion. *AT Wall, supra*.

IV. CONCLUSION

Based on the above, and the record as a whole, I find that the Petitioner has failed to meet its burden of establishing that the Thryv Business Advisors and the Marketing Consultants (a/k/a Expansion Representatives) perform the same basic work functions historically performed by the classifications listed in the unit description in the collective bargaining agreement, as required by the Board under *Premcor*. I am, therefore, dismissing the petition.

V. ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on **September 13, 2018**, unless filed electronically. If filed electronically, it will be

considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on September 13, 2018.**

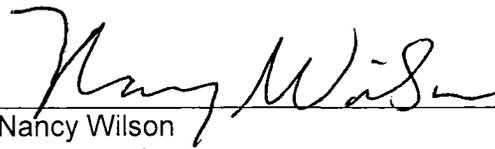
Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically. Section 102.114 of the Board's Rules does not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of

such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Dated at Pittsburgh, Pennsylvania, this 30th day of August, 2018.

A handwritten signature in cursive script, appearing to read "Nancy Wilson", is written over a horizontal line.

Nancy Wilson
Regional Director
National Labor Relations Board
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