

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

ALLIED POWER SERVICES, LLC,)	Case No. 25-RC-219264
)	
Employer,)	
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS LOCAL)	
UNIONS 145, 146, 364, AND 601)	
)	
Joint Petitioners.)	
)	

**ALLIED POWER SERVICES, LLC'S OPPOSITION TO
JOINT PETITIONER'S REQUEST FOR REVIEW**

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PRELIMINARY STATEMENT

Respondent, Allied Power Services, LLC (“Allied Power” or the “Employer”) submits this brief in opposition to the International Brotherhood of Electrical Workers Local Unions 145, 146, 364, and 601’s (the “Union”) Request for Review (“RFR”) of the Regional Director’s (“RD”) Decision on Challenges and Objections and Revised Tally of Ballots (the “Decision”).

The Union’s Request attempts to fit a square peg in a round hole. Allied Power and the Union stipulated to a unit including four—and *only* four—specific job classifications: electrical superintendent, electrical lead superintendent, electrical work planner, and electrical lead work planner. The Union now argues that David Dais, a *mechanical* work planner *trainee*, falls within the stipulated unit. From the first page to the last, the Union’s Request is without citation to Board precedent and lacks any explanation as to how the facts establish prejudice.

Contrary to the Union’s protestations, the RD’s Decision is supported by law and fact. Mr. Dais falls outside of the stipulated unit because a unit including “electrical work planners” objectively excludes “mechanical work planner trainees” both by virtue of their status as “*mechanical* work planners” and as “*trainees*.” By placing the descriptor “*electrical*” in front of “work planners,” the Parties’ objectively limited the scope of “work planners” that qualified for the unit to the descriptor *only*.

The Union understands this—they understand that by classification alone Mr. Dais is not part of the unit. To side-step this, the Union argues that Mr. Dais is a “dual-function” employee. The Union’s “dual-function” argument cannot overcome the intent of the Parties’ stipulated agreement. Allied Power employs *mechanical* work planners and *electrical* work planners. By stipulating to include only *electrical* work planners, the Parties objectively and unambiguously intended to exclude individuals such as Mr. Dais—*mechanical* work planners.

Additionally, the Union’s attempt to get a second bite at the apple by returning the case to

Region 25 is wholly inappropriate and incorrect. The General Counsel appropriately transferred the case pursuant to well established policy and precedent.

The RD correctly found that David Dais' ballot should not be counted, thus the remaining challenged ballots were not determinative and their eligibility need not be resolved. Because the Union does not offer any compelling reason for review of the RD's decision, Allied Power respectfully requests that the Board deny review and proceed with resolution of the cross-objections.

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

On April 30, 2018, the Union filed a Petition to represent "all full-time and part-time workers in the *electrical department* to include Planners and Superintendents employed within this group by the employer in Illinois." (RC Petition) (emphasis added.) The proposed unit included four job classifications: lead Superintendents, superintendents, planners and lead planners. (*Id.*) The hearing was held from May 8, 2018 to May 10, 2018 before Hearing Officer Tiffany Miller of the National Labor Relations Board (the "Hearing"). During the Hearing, the parties stipulated that the Petitioned-for unit was restricted to the electrical department, specifically the electrical lead superintendents, electrical superintendents, lead electrical planners, and work planners electrical." (*See Ex. 1, selected excerpts from the Hearing transcript, Tr. 16-18.*)

The ballots were counted on July 24, 2018, but the results were indeterminate due to challenges from the Region and Allied Power. The parties submitted their respective positions on the challenged ballots on July 31, 2018 to Region 25. On August 13, 2018, The General Counsel of the NLRB issued an Order Transferring Case from Region 25 to Region 13. On August 27, 2018, the RD issued the Decision. The Union filed a RFR of the RD's Decision on

August 10, 2018, serving an Amended Certificate of Service on August 11, 2018.

II. ALLIED POWER'S OPERATIONS

Allied Power provides a broad suite of repair services for the utility industry and is currently providing maintenance services for 14 different nuclear power plants in 5 states. Within the State of Illinois, this includes sites in: Braidwood, Dresden, LaSalle, Byron, Quad Cities, and Clinton. Allied Power's work includes both "outage" support as well as "online" support for the nuclear power plants. "Outage" work occurs at each site approximately every 18 to 24 months, during which time the site's nuclear reactor is shut down for refueling and maintenance. "Online" or "non-outage" work occurs when the nuclear reactor is online and producing power. For the online and outage work performed at the nuclear power plants, Allied Power's work and the job titles and functions remain essentially the same—Allied Power performs varied and extensive onsite work including maintenance, repair or enhancement of existing equipment, and installation of new equipment.

A. Classifications included in the petitioned-for unit

At the outset of the pre-election hearing in this matter, the parties stipulated to the inclusion of electrical superintendents, electrical lead superintendents, electrical work planners, and lead electrical planners in the petitioned-for bargaining unit. (*See* Ex. 1.) The electrical operations are separate and distinct from the mechanical operations, but with similar structure. Different work is performed by electrical workers, although the hierarchy of job classifications is the same within each work group. Therefore, there are mechanical work planners, mechanical superintendents, etc. The petition was expressly limited to the electrical department, to the objective and unambiguous exclusion of the mechanical department, and specifically included only those classifications identified in Attachment B to the Employer's May 7, 2018 Position Statement. *Id.*

B. Eligibility of David Dais

Central to the Regional Director's Decision and the Union's Request for Review is the voting eligibility of Mr. Dais. The Regional Director found, and the Union did not contest, that Mr. Dais was a *mechanical* work planner *trainee* on the date of the election. (RD's Dec. at 2; Union RFR at 4-5.) Given Mr. Dais' undisputed classification status, Mr. Dais was not included on Allied Power's voter list. Accordingly, Mr. Dais's ballot was challenged by the Region and Allied Power. Allied Power specifically challenged Mr. Dais's ballot on the grounds that he was not eligible as a *mechanical* work planner *trainee* and, regardless of Mr. Dais's classification eligibility, that Mr. Dais is a supervisor under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11).

As a result of the challenges, Allied Power submitted a position statement to the Region consisting of evidence supporting its contention that Mr. Dais was not eligible to vote in the election. (Emp. Position Statement on Challenged Ballots.) For the purposes of the Opposition to this Request, the evidence demonstrates that Mr. Dais was a mechanical work planner trainee when he was hired in August 2017. In the fall of 2017, Mr. Dais was briefly given an opportunity to expand his skill base and provided an opportunity to work as an electrical work planner trainee. However, because Mr. Dais did not have the aptitude for electrical work planning, he was returned to work solely as a mechanical work planner trainee in November 2017. (Emp. Position Statement on Challenged Ballots, Ex. 3.) Mr. Dais agreed with the decision to limit his work to mechanical work planning and has worked exclusively as a mechanical work planner trainee from November 2017 to the present. (Emp. Position Statement on Challenged Ballots, Ex. 3.)

ARGUMENT

III. THE UNION'S REQUEST FOR REVIEW SHOULD BE DENIED BECAUSE IT DOES NOT ARTICULATE A COMPELLING REASON FOR RECONSIDERATION OF THE RD'S DECISION

A request for review may be granted only where a “compelling reason” exists. 29 C.F.R. § 102.67(d). Board regulations establish four narrow grounds upon which review may be granted including where: (1) a substantial question of law or policy is raised due to the absence of or departure from Board precedent; (2) the Regional Director’s determination of a substantial factual issue is clearly erroneous and “prejudicially affects the right of a party”; (3) the conduct of a hearing or determination has resulted in prejudicial error; and (4) there are compelling reasons for reconsideration of Board rule or policy. *Id.* The Union complains that the Regional Director’s decision implicates grounds (2) and (3) only. Neither of these grounds applies here.

A. Mr. Dais was appropriately excluded from the Unit

The Regional Director was correct when he found that, based upon the parties’ stipulated unit description, Mr. Dais was not eligible to vote for either one of two reasons: (1) he was part of a “trainee” classification that was not expressly included in the petitioned-for unit; and (2) the petitioned-for unit included only *electrical* workers and Mr. Dais was a *mechanical* worker.

1. Mr. Dais was appropriately excluded because the Parties’ stipulated unit unambiguously excludes “trainees”

It is well-settled law in stipulated unit election cases that the Board’s function is to ascertain the parties’ intent regarding the disputed employees and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. *Tribune Co.*, 190 NLRB 398, 399 (1971); *Viacom Cablevision*, 268 NLRB 633, 633 (1984).

In order to determine whether a stipulation’s intent is ambiguous or clear, the Board will compare the express descriptive language of the stipulation with the bona fide titles or job descriptions of the affected employee. If the employee’s title fits the descriptive language, the Board will find a clear expression of intent

and include the employee in the unit. *If the employee's title does not fit the descriptive language, it will also find a clear expression of intent and exclude the employee from the unit.* The Board bases this approach on the expectation that the parties are knowledgeable as to the employees' job titles, and intend their descriptions in the stipulation to apply to those job titles.

Viacom, 268 NLRB at 633 (emphasis added). Where an employer maintains distinct and separate categories for regular employees and temporary employees, an agreement to include only regular employees and to exclude all other employees will result in exclusion of temporary employees. *Nat'l Pub. Radio, Inc.*, 328 NLRB 75, 75 (1999). The parties "intent should be given recognition unless the result is inconsistent with the Act or Board policy." *A/Z Electric*, 282 NLRB 356, 356 (1986); *Cruis Along Boats*, 128 NLRB 1019, 1019 (1960).

The intent of the parties in this case was to include four job classifications, and only four job classifications in the petitioned-for unit. At the hearing, while discussing the stipulation, counsel for Allied Power explained the stipulated unit as follows:

[ALLIED POWER COUNSEL]: Let me just double check my job classifications. Electrical superintendent, electrical lead superintendent, work planner electrical, and lead electrical planner, those are the four classifications, and they are contained within the Employer's Attachment B to its position statement.

HEARING OFFICER MILLER: Okay. Joint Petitioner, is that appropriate?

[UNION COUNSEL]: I believe so. Just let me double check. Yes, we're good with that.

(Tr. 17.) The reference to Employers Attachment B is a reference to Attachment B of Employer's Pre-Election Statement of Position. (Statement of Position, May 7, 2018, Attachment B.) Attachment B is a list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit. That document lists only the four job classifications contained in the stipulation.

The Union complains that the Regional Director erred in his "trainee" conclusions in two

ways: (1) trainees must be part of the petitioned-for unit because “the issue of trainee classification was never raised by the Employer or Union prior to the challenge to Dais’ ballot;” and (2) “[e]ven if trainee status were relevant, the proper course of action would be to set an evidentiary hearing” (RFR at 4.) The Union fails to cite *any* Board authority for its position and is incorrect on both points.

As to the first issue, there is no authority supporting the Union’s claim that if an issue is not raised prior to the election, the stipulated unit must be deemed ambiguous. And there is no authority because this is not the law. Instead, the law requires that the RD and the Board interpret the stipulation. *Viacom*, 268 NLRB at 633. “If the employee’s title does not fit the descriptive language, [the RD or Board must] exclude the employee from the unit.” The stipulated agreement between Allied Power and the Union objectively excludes trainees for two reasons. First, the Board reasonably assumes that parties are knowledgeable regarding employee job titles. *Viacom*, 268 NLRB at 633. If the Union desired to include “trainees” in the classifications, it could have easily done so. Second, despite the fact it could have easily done so, the Union agreed to include very specific classifications, implicitly agreeing to exclude all other employees. *Id.*; *Nat’l Pub. Radio, Inc.*, 328 NLRB at 75. The Union agreed to limit the unit not just to “superintendents” but to “*electrical* superintendents.” They agreed to not just “work planners” but “*electrical* work planners.” By agreeing to these four *very* specific classifications, with knowledge that certain employees were electrical work planner *trainees*, the Union excluded trainees from the petitioned-for unit. The Union was not prejudiced by this decision and the Request for Review should be denied.

Next, the Union claims that “if trainee status was relevant, the proper course of action would be to set an evidentiary hearing” (RFR at 4.) The opposite is true. An evidentiary

hearing is not required where the meaning of the stipulation is unambiguous.¹ In these situations, consideration of extrinsic evidence would be error. *Kim/lou, Inc.*, 337 NLRB 191, 191 (2001). The Union was not denied an opportunity to present evidence. The Request for Review should be denied.

2. The Union concedes that Mr. Dais was appropriately excluded from the unit as a *mechanical* work planner trainee

The RD concluded, and the Union concedes, that Mr. Dais was and is a *mechanical* work planner trainee. By its very descriptive term, a *mechanical* work planner (trainee or not) is different from an *electrical* work planner. Therefore, regardless of any conclusion on the inclusion or exclusion of trainees, *mechanical* work planners are objectively and unambiguously not part of the stipulated unit. As a result, the Union was not prejudiced by the Decision and the Request for Review should be denied.

3. The Union’s “dual-function” employee claim fails because the stipulated unit clearly excludes mechanical work planners and Mr. Dais was not a “dual-function” employee on the date of the election.

As the RD’s Decision explains, “[t]he Petitioner . . . admits that [Mr. Dais] is currently classified as a work planner mechanical.” (Decision at 2.) The Union full-well understands that this is a problem. Knowing this, the Union makes the only argument that it can to preserve Mr. Dais’s possible inclusion in the bargaining unit: Mr. Dais is a dual-function employee. Again, the Union makes its argument without *any* citation to precedent or *any* specific evidence supporting its claim. And, again, the Union is incorrect on both the facts and the law.

The Union’s attempt at establishing “dual-function” eligibility first fails because it is dependent on the clarity of the stipulated unit. Where the parties’ intent to exclude a challenged

¹ As extrinsic evidence is not relevant to the RD’s decision, the Union’s claim that individuals “who were in a similar situation to Dais” were included on the voter is irrelevant.

voter from the unit is clear, dual-function analysis does not apply. *Peirce-Phelps, Inc.*, 341 NLRB 585, 586 (2004). This is because dual-function analysis is a variant of the community-of-interest test and is not applied where the parties' intent to exclude the disputed employee(s) is clear. *Halsted Communications*, 347 NLRB 225, 226 (2006). As established above, the parties' intent to exclude individuals with a *mechanical* work planner job title (regardless of trainee status) is unambiguous and clear. Where there are only two departments: (1) mechanical and (2) electrical, and the parties agree to include *only* workers from the electrical department, the parties are objectively and unambiguously excluding employees from the mechanical department. As a result, the RD and Board must "enforce the clear terms of the stipulation." *Id.* at 225. *Mechanical* work planners cannot be part of the stipulated unit. The Union's Request should be denied.

The Union's argument for "dual function" eligibility also fails on the facts. The RD describes the Union's position that Dais performs *some* work planner electrical work. (Dec. at 2.) Where a party seeks the inclusion of an otherwise excluded employee on the basis of the dual-function doctrine, the party seeking inclusion bears the burden of proof. *Harold J. Becker Co.*, 343 NLRB 51, 52 (2004). The Union's Request for Review, and presumably the Union's position statement, falls short of establishing a question of fact for a hearing. The uncontroverted evidence before the Region establishes that Mr. Dais ceased performing any work involving electrical work planning on or about November 2017—far in advance of the Petition and election. To be eligible to vote in a representation election, an employee must be within the proposed bargaining unit on both the established eligibility date and the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). An employee who is transferred out of the unit before the election and who has no reasonable expectancy of returning to the unit is not

eligible. *Mrs. Baird's Bakeries*, 323 NLRB 607, 607 (1997). Dual-function analysis does not apply where the employee has ceased performing unit work by the eligibility date. *Martin Enterprises*, 325 NLRB 714, 715 (1998) (for transferred employee to qualify as dual-function employee, qualification must be based on regular and substantial performance of unit work after transfer). The fact that Mr. Dais performed some electrical work planner work in the past does not convert Mr. Dais to a dual-function employee. The Union's Request for Review should be denied.

B. Region 25 appropriately transferred this matter to Region 13

The Union's unsupported argument that this case was improperly transferred from Region 25 to Region 13 completely misses the mark.² It is well-settled that the General Counsel of the National Labor Relations Board has wide discretion to transfer a case (including a petition and related proceedings) between Regions. Pursuant to 29 C.F.R. §102.72:

(a) Whenever it appears necessary in order to effectuate the purposes of the Act, or to avoid unnecessary costs or delay, the General Counsel may permit a petition to be filed with him/her in Washington, DC, or may, at any time after a petition has been filed with a Regional Director pursuant to §102.60, order that such petition and any proceeding that may have been instituted with respect thereto:

(3) Be transferred to and continued in any other Region, for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such Region.³

²Pursuant to 29 C.F.R. 102.67(f), the Employer's opposition to the Request for Review on the transfer issue is not yet due since the Regional Director has not yet issued a final disposition of the proceeding. However, for purposes of efficiency, the Employer's response is included herein. However, the Employer reserves its right to modify and/or supplement its response at the appropriate time.

³29 C.F.R. §102.33 provides an analogous right of the General Counsel to transfer unfair practice charges between Regions. Moreover, there is an abundance of case law which outlines the General Counsel's wide discretion to do so. See *Valley Hospital, Ltd.*, 226 NLRB 309, 313 (1976) (discussing procedural process of a charge including a transfer by the General Counsel of

See also Casehandling Manual (“CHM”), Part II, §§11712 and 11714. Once transferred, 29 C.F.R. §102.72(b), provides that “the provisions of this subpart shall, insofar as applicable, govern such petition and such proceedings as if the petition had originally been filed in the Region to which the transfer was made.” The General Counsel has interpreted this rule to require transfer of a representation case between Regions where there are allegations of Region misconduct. In General Counsel Memorandum 15-06, the General Counsel stated: “If the subject matter of the objections involves regional or Board agent misconduct that would require that a hearing officer outside the regional office be assigned to hear the matter, the case should be transferred to another region before an order directing a hearing issues so that exceptions to the hearing officer’s report will be reviewed by the out-of-region director.” *See* p. 31.

In the instant matter, General Counsel Robb’s August 13, 2018 “Order Transferring Case From Region 25 to Region 13” was appropriate under 29 C.F.R. §102.72(a)(3). The Order states unequivocally that the General Counsel believed that the transfer was “necessary in order to effectuate the purposes of the National Labor Relations Act, and to avoid unnecessary costs and delay.” While it is true that the Order did not provide a specific explanation for the transfer, it is reasonable to conclude that General Counsel Robb did so in response to the Employer’s July 31, 2018 “Objections to Conduct Affecting the Results of the Election,” in which it alleged the following misconduct by Region 25:

Objection 1: Prior to the election, Allied Power alleged that the Union’s showing

the charge from Region 20 to Region 31); *Consolidation Coal Co.*, 310 NLRB 6, 8 (1993) (detailing that charge originally filed in Region 9 was later transferred to Region 10 and stating that “[t]ransfer of an unfair labor practice charge from one region to another region of the Board is a purely administrative matter, which neither requires Respondent’s permission nor affects the service requirements of Section 10(b) of the Act”) (emphasis added); *McDonalds USA, LLC*, 363 NLRB No. 91, n. 3 (Jan. 8, 2016) (generally citing Rules and Regulations that state that General Counsel may transfer charges and proceedings whenever deemed necessary to effectuate the purposes of the NLRA).

of interest was invalid because of supervisory taint. Pursuant to NLRB Casehandling Manual Section 11028.1, Allied Power's allegation was to trigger an administrative investigation by the Region. No such investigation took place. Moreover, Allied Power was specifically precluded from introducing any evidence of such supervisory taint in the pre-election hearing in this matter conducted May 8-10, 2018.

Objection 3: At the ballot count, the Regional Director and her agent did not allow Allied Power to challenge John Dickson's, Thomas Krager's, and Timothy Langston's individual supervisory status under Section 2(11) of the National Labor Relations Act on the basis that these voters were involved in critical period supervisory taint.

Objection 4: At the ballot count, the Regional Director and her agent did not allow Allied Power to challenge each voter on the basis that the voter was, individually, a supervisor—as opposed to a supervisor by classification—under Section 2(11) of the National Labor Relations Act.

Based on the expansive administrative discretion afforded the General Counsel and clear guidance set forth in GC Memo 15-06 regarding transfers where regional misconduct is alleged, the August 13 transfer Order was appropriate. The Union has failed to assert any ground for review, particularly since the transfer of the case from Region 25 to Region 13 was consistent with Board precedent and no compelling reason has been asserted for reconsideration. Thus, the Board should deny the request for review.

CONCLUSION

The Union has failed to provide any compelling reason for reviewing the RD's determinations on challenged ballots. Therefore the Union's request for review should be denied.

Dated: September 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that she caused a true and correct copy of Respondent's Opposition to Joint Petitioner's Request for Review, in Case No. 25-RC-219264, to be filed electronically using the NLRB's electronic filing system, and also to be served upon the following counsel of record and parties via electronic mail on this 17th day of September, 2018:

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