

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LYON VIDEO, INC. & VIDEO CREW
SERVICE, LLC,

Employer,

-and-

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES, ITS TERRITORIES
AND CANADA, AFL-CIO, CLC (“IATSE”)

Petitioner.

Case No. 08-RC-258375

PETITIONER’S OPPOSITION TO EMPLOYER’S REQUEST FOR REVIEW

The Petitioner International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC (“IATSE” or “Union”), pursuant to Section 102.67(f) of the National Labor Relations Board’s Rules and Regulations, submits this Opposition to the Employer’s Request for Review (“RFR”) of the Decision and Direction of Election issued by the Acting Regional Director of Region 8 on July 7, 2020 (“DDE”).¹ The Employer, Lyon Video, Inc., and Video Crew Service

¹ All references to the Acting Regional Director’s Decision and Direction of July 7, 2020 appear as “DDE [p.]” References to the transcript of the pre-election hearing of May 12-13, 2020 appear as “Tr. [p.]” Exhibits introduced by the Petitioner during the May 12-13, 2020 pre-election hearing are referenced as “Pet. Ex. __.” May 12-13, 2020 pre-election Board exhibits are referenced as “Bd. Ex. __.” Exhibits introduced by the Employer at the May 12-13, 2020 hearing are referenced as “Er. Ex. __.” Lyon’s Request for Review is referenced as “RFR at [p].” All dates herein are in 2020 unless otherwise noted.

LLC (“Lyon”)² identifies no basis for Review under Section 102.67(d) of the Board’s Rules and Regulations.

Under Section 102.67(d) of its Rules and Regulations, the “Board will grant a request for review only where compelling reasons exist therefor.” The party seeking review must rely on 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 any 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).

There are no compelling reasons for review here. Lyon offers no regulatory or statutory—let alone compelling—basis for its request. In roughly 14 pages of its “Memorandum in Support,” of its RFR Lyon offers *no* existing Board case and *no* statutory authority to support its position. Rather, the Employer’s submission consists largely of an “appendix” (over 250 pages in total), which was not submitted into evidence during the Region’s pre-election hearing and consequently cannot form the basis for its RFR here. 29 C.F.R. § 102.67.³ Lyon’s request for

² The Employer stipulated that Lyon Video, Inc. and Video Crew Service, LLC are a single integrated enterprise and a single employer. (DDE 1, n. 2.) Yet, Lyon now describes—without factual support—some other association between the two entities. (*See* RFR n. 1.) As is clear in the record, the Employer’s identity—as a single employer—is settled. (DDE 1, n. 2.)

³ Furthermore, the Employer’s RFR entirely fails to comply with the Board’s Rules and Regulations for submissions under these circumstances. *See* 29 C.F.R. §102.5 (“[w]here any brief filed with the Board exceeds 20 pages, it must contain a subject index with page references

review, including its “appendix” must be rejected. Without permission or authority, Lyon further claims that the “appendix,” “is comprised of” Employer Exhibit 4. (RFR, 7-8.) Yet, Employer’s Exhibit 4 is part of the record as a whole, which the Board may now review even though Lyon chooses not to rely upon it here. Lyon’s attempts to supplement—or supplant—the evidentiary record must be rejected out of hand. In addition to constituting quintessentially sharp practice, the Employer’s ignorance of the Board’s Rules and Regulations (to lay groundwork for the so-called “facts” set forth in its RFR—e.g., the “appendix”) require the Board to deny review. The RFR’s reliance upon documents outside the record, including the “appendix” (which again was not before the Acting Regional Director) require immediate denial of Lyon’s request.

A request for review, “must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. *Such request may not raise any issue or allege any facts not timely presented to the Regional Director.*” 29 C.F.R. § 102.67 (emphasis added). No Board decision here could be based upon the RFR or its “appendix” because the “appendix,” upon which the RFR is based in part, was not in the underlying DDE record. In other words, the Employer’s request for review cannot be granted for these procedural reasons (let alone the RFR’s entire lack of merit as discussed below). Lyon’s attempts to recreate the record and otherwise dismiss facts that it settled by stipulation should be ignored entirely the Its RFR must be denied and rejected.

The Acting Regional Director correctly applied well-settled Board authority to conclude that the petitioned-for unit is appropriate. As set forth in her DDE, upon the record from the

and an alphabetical table of cases and other authorities cited”). The Employer’s submission should be rejected.

May 12-13, 2020 hearing, the Acting Regional Director’s findings, conclusions, and direction of an election in the unit found appropriate must be upheld here. *See* 29 C.F.R. § 102.67. The Acting Regional Director’s thorough and well-reasoned DDE explains that the petitioned-for unit of broadcast technicians working for the Employer in Cuyahoga County, Ohio (*i.e.*, Cleveland) is appropriate under Board law.

In its RFR, the Employer utterly fails to precisely explain what—if any—grounds it relies upon to require (let alone compel) review here. In other words, Lyon sets forth no argument whatsoever meriting review under the Board’s Rules and Regulations. In its RFR, the Employer relies fails to address the Acting Regional Director’s factual conclusions, which were well-supported by the record. The Board’s Rules and Regulations do not permit review under these circumstances. 29 C.F.R. § 102.67(d)(2). The DDE was based upon evidence in the record *submitted by* Lyon and its employees. (DDE 2-14.) Nonetheless, as described above, Lyon urges the Board to examine *different* evidence (e.g., its “appendix” to the RFR) and now reach different conclusions. Again, the Board’s Rules and Regulations do not permit review under these circumstances.

The Acting Regional Director appropriately found that the Cuyahoga County technicians comprise an appropriate bargaining unit. The Acting Regional Director correctly applied the Board’s traditional community of interest factors and the test set forth in *PCC Structural*s, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017). In applying *PCC Structural*s to the present case, the Acting Regional Director, further adhered to the Board’s more recent clarification of the traditional community of interest test. (DDE 8-9.) In analyzing appropriate bargaining units under the traditional community-of-interest test, the Board’s recent ruling in *Boeing Company*, 368 NLRB No. 67, slip op. at 3 (2019), sets forth a three-step process for determining if a

petitioned-for unit should include additional personnel. (DDE 8-15.) First, the Board examines the petitioned-for employees' shared internal community of interest (here, as described above, the Employer has not relied upon record evidence concerning the unit of employees set forth in the DDE). *Id.* Second, the next step contemplates the petitioned-for employees' potential shared interests with the excluded classifications. (See DDE 8-15.) Third, the Board considers any applicable special unit rules. *Boeing Company*, 368 NLRB No. 67, slip op. at 3

Here the Acting Regional Director thoroughly applied each of the above *Boeing* steps, and her conclusions—which were well-supported by the evidence—should be upheld. Overall, to find that a petitioned-for unit is appropriate despite an opposing party's claim that additional employees should be added to the petitioned-for unit, the Board must determine “whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 6 (Dec. 15, 2017) (emphasis in original). The parties currently raise no dispute about the classifications that were included in (or excluded from) the bargaining unit. Lyon's disagreement with the Acting Regional Director's DDE focuses only upon the territorial reach of the unit. (RFR 1.)

In weighing the “shared and distinct interests of petitioned-for and excluded employees [...] the Board must determine whether ‘excluded employees have meaningfully distinct interests *in the context of collective bargaining* that outweigh similarities with unit members.’” *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 6 (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (emphasis added). Once this determination is complete, “the appropriate-unit analysis is at an end.” *Id.* With this assessment, the Board relies on its traditional community of interest analysis, which examines:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including an inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees, have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. (citing *United Operations*, 338 NLRB 123 (2002)).

The Board in *Boeing* clarified that the above analysis also involves—as described above—a three-step process of examining the proposed unit. *Boeing Company*, 368 NLRB no. 67, slip op. at 3. Applying all these factors here the Acting Regional Director correctly concluded that the Cuyahoga County bargaining unit technicians share a community of interest sufficiently distinct from technicians elsewhere in the State of Ohio. (DDE 8-15.) The petitioned-for unit employees share a common skills, job functions, and perform distinct work for the Employer. (*Id.*) The freelance technicians here, the Acting Regional Director correctly found, are organized into a distinctive Cleveland group. (*See id.*, “[t]here is a very clear geographic division.”) This finding is supported by testimony from witnesses, who unequivocally emphasized this division throughout their testimony. (Tr. 37:5-13.) The Cleveland (Cuyahoga County) technicians distinctly hired first (and often exclusively hired) for events in Cleveland. (*Id.*) *See also* Tr. 234:14-16; 311-4-9. Cleveland technicians in the petitioned-for unit are hired primarily by Lyon to work for Lyon on events occurring within the Cleveland (Cuyahoga County) area. (Tr. 37:5-13; DDE 13.) In other words, Cleveland bargaining unit technicians are hired to work primarily on the Employer's Cleveland sports broadcasts. The unit employees who testified never or rarely been offered work for Lyon on an event elsewhere in Ohio, and they are never required to do so. (Tr. 234:14-16; 311-4-9.)

The Acting Regional Director also appropriately found that the Cleveland bargaining unit technicians do not share common supervision with (e.g., by directors and other personnel) technicians working at other Lyon events in distant Ohio venues. (DDE 14-15.) The supervisors who customarily work Cleveland do not have overall authority to oversee events across the State of Ohio. (*Id.*) Largely, separate supervisors oversee events staffed by—and taking place in—each of Ohio’s other major cities, respectively. (*Id.*) Thus, the Regional Director properly concluded that the hiring and day-to-day supervision of the Cleveland technicians in the petitioned-for unit is sufficiently distinct from those considerations confronted by other Ohio technicians. (DDE 12-15.) Based on these considerations, Lyon’s Cleveland technicians form a sufficiently distinct unit of employees appropriate for purposes of collective bargaining.

The Acting Regional Director also properly found the Cleveland unit technicians have little to no contact or interchange with the Employer’s freelance employees elsewhere in Ohio. Again, the Acting Regional Director’s factual findings are well-supported by the evidence. As described by the Acting Regional Director— of roughly 5,000 work days (or shifts) in Cleveland, only 145-150 of those were staffed by technicians from outside Cleveland. (DDE 13; Tr. 146:11-25; 147:1-9; 149:17-150:24.). A similarly nominal amount of shifts in other Ohio cities are staffed by Cleveland technicians. (DDE 13; Tr. 152:1-14; 154:21-23; 155:23-156-4; 156:7-157:1; 158:16-159:2.) The Employer’s operations in Ohio—Cleveland on one hand and other major Ohio cities on the other—are also separated by considerable geographic distance. (DDE 5.) Consequently, interaction between the groups of technicians working for Lyon in primarily each Ohio’s major metropolitan markets is significantly. (DDE 13-14.) The Acting Regional Director’s conclusions about these limitations are wholly supported by employee testimony. (Tr. 246:19-247:6.; 280:16-20.) The Cleveland unit technicians, however, based on

the record evidence—who frequently and primarily work on events in Cleveland—have frequent contact among themselves. (Er. Ex. 3.) It is rare for Cleveland unit technicians to encounter others working for Lyon and travelling from Columbus or Cincinnati. Lyon employees who testified at the hearing (and have many collective years of work experience with Lyon on events in Cuyahoga County) have not been offered (let alone required to accept) any significant amount of work on events in other Ohio locations. Based on documents furnished by the Employer and testimony by employees, the record clearly supports the Acting Regional Director’s conclusion that there is minimal interchange between the Cleveland technicians and others working in locations elsewhere in Ohio (namely, Cincinnati and Columbus).

Further, the Acting Regional Director’s conclusions about the Cleveland unit technicians’ lack of interchange and contact with other Ohio technicians is supported entirely by evidence supplied by the Employer. (*E.g.*, Er. Ex. 3.) Only specific instances of interchange should be given significant weight. *Cf. Waste Mgmt. of Wash., Inc.*, 331 NLRB 309, 310 (2000) (“incidents of temporary interchange are of little evidentiary value unless given some meaningful context, e.g., portrayed as a percentage [of work] . . . or as a percentage of total employees so involved.”). Accordingly, the Acting Regional Director rightfully disregarded the vagaries of Lyon’s arguments and “attempt to re-frame” the evidence. (DDE 13.) No employer representative offered first-hand testimony about instances of employee interchange between Ohio markets. The Employer’s documentary evidence nonetheless provided ample support for the Acting Regional Director’s conclusions about this factor of the community of interest analysis. (*See* DDE 6-7, 13-14; Er. Ex. 3)

In sum, the Acting Regional Director correctly decided that the Cuyahoga County unit of Lyon technicians here form an appropriate bargaining unit. Under the Board’s traditional

community of interest test described in *PCC Structural*s and its more recent *Boeing Company* clarification, the interests of the Lyon's Cuyahoga County employees here are sufficiently district to form an appropriate unit for collective bargaining. Those interests—in Cleveland—are sufficiently district from those of Lyon employees working elsewhere in Ohio. In other words, the Acting Regional Director's decision and findings about the territorial scope of the petitioned-for unit are well supported by substantial evidence and must be upheld.

CONCLUSION

The Employer has failed to meet the standards set forth in the Board's Rules and Regulations for review of the Acting Regional Director's Decision and Direction of Election. For the foregoing reasons, Lyon's Request for Review should be denied.

Dated: New York, New York
August 4, 2020

Respectfully submitted,

By:



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STATEMENT OF SERVICE

I hereby certify that on July 23, 2020, the foregoing Petitioner's Request for Extension of Time was e-filed with the National Labor Relations Board at www.nlr.gov and/or sent electronically to the following:

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Dated this 4th day of August 2020