

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

**FAA CONCORD T, INC., DBA
CONCORD TOYOTA**

and

Case 32-CA-264162

**MACHINISTS AUTOMOTIVE
TRADES DISTRICT LODGE NO. 190,
MACHINISTS LOCAL 1173**

**MOTION FOR SUMMARY JUDGMENT ON TEST OF
CERTIFICATION SECTION 8(a)(5) AND REQUEST FOR ISSUANCE
OF DECISION AND ORDER**

The above-captioned case is a test of the certification issued by the National Labor Relations Board (the Board) to Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173 (Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by FAA Concord T, Inc. dba Concord Toyota (Respondent). Pursuant to Sections 102.24 and 102.50 of the National Labor Relations Act (the Act) and upon the facts stated below and the attached exhibits, the undersigned Counsel for the General Counsel hereby moves that the above-captioned case be transferred to and continued before the Board to be heard on a Motion for Summary Judgment. Counsel for the General Counsel further requests that the Board issue a Decision and Order, prior to and without the necessity of an evidentiary hearing, containing findings of fact and conclusions of law in accordance with the Section 8(a)(1) and (5) allegations of the Complaint and Notice of Hearing issued in the above-captioned case, and ordering Respondent to appropriately remedy the unfair labor practices found, and granting such other, further and different relief as may be proper under the circumstances. In support of this Motion, Counsel

for the General Counsel alleges and shows the following:

1.

On January 24, 2020, the Union filed a Petition in Case 32-RC-255130 (Petition) seeking an *Armour-Globe* self-determination election to represent all of Respondent's full-time and regular part-time advisors, including the Service Advisors, Floater Service Advisors and Internal Advisors (herein collectively referred to as Advisors), as part of the Union's existing bargaining unit of technicians and parts employees. A copy of the Petition is attached hereto as **Exhibit 1**.

2.

On March 4, 2020, following a pre-election hearing held on the Petition, the Regional Director of Region 32 (Regional Director) issued a Decision and Direction of Election finding that the Advisors constituted a distinct, identifiable voting group that shared a community of interest with the Union's existing unit of repair and service technicians and parts employees, and directing an *Armour-Globe* election be conducted for the following voting unit:

All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California; excluding employees represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

A copy of the Regional Director's Decision and Direction of Election is attached hereto as **Exhibit 2**.

3.

On March 12, 2020, the *Armour-Globe* election was conducted and resulted in determinative challenges, as follows. A copy of the Tally of Ballots is attached hereto as

Exhibit 3.

Appropriate number of eligible voters-----	9
Number of Void ballots -----	0
Number of Votes cast for Petitioner-----	4
Number of Votes cast against participating labor organization(s) ---	3
Number of Valid votes counted-----	7
Number of undetermined challenged ballots -----	1
Number of Valid votes counted plus challenged ballots -----	8

4.

On March 26, 2020, the Regional Director issued a Decision to Open and Count Determinative Challenged Ballot. A copy of the Regional Director’s decision is attached hereto as **Exhibit 4.**

5.

On May 7, 2020, the determinative challenge ballot was opened and the Regional Director issued a Revised Tally of Ballots showing that a majority of the valid votes had been cast by the Advisors for representation by the Union in its existing bargaining unit of technicians and parts employees, as follows. A copy of the Revised Tally of Ballots is attached hereto as **Exhibit 5.**

Appropriate number of eligible voters-----	9
Number of Void ballots -----	0
Number of Votes cast for Petitioner-----	5
Number of Votes cast against participating labor organization(s) ---	3
Number of Valid votes counted-----	8
Number of undetermined challenged ballots -----	0
Number of Valid votes counted plus challenged ballots -----	8

6.

On May 15, 2020, the Regional Director issued a Certification of Representative based on the Revised Tally of Ballots, and named the Union as the certified bargaining representative of the Advisors, who were to be represented as part of a combined unit with

the existing bargaining unit of technicians and parts employees, which is herein referred to as the Unit. A copy of the Certification of Representative is attached hereto as **Exhibit 6**.

7.

On or about May 28, 2020, Respondent filed a Request for Review of the Regional Director's Certification of Representative. Respondent argued, among other things, that the Regional Director erred in ordering a self-determination election and applied the wrong legal standard when finding that the petitioned-for voting unit of Advisors is an identifiable, distinct segment so as to constitute an appropriate voting group that shares a community of interest with the existing unit of technicians and parts employees. A copy of Respondent's Request for Review is attached as **Exhibit 7**.

8.

On September 22, 2020, the Board issued an order denying Respondent's Request for Review and remanding the matter to the Regional Director to issue a certification of results of the election. In denying the request for review, the Board ruled that the request raised no substantial issues warranting review. A copy of the Board's Order is attached as **Exhibit 8**.

9.

On October 9, 2020, the Regional Director issued a Certification of Results of the election in Case 32-RC-255130. A copy of the Certification of Results is attached as **Exhibit 9**.

10.

By letter dated March 12, 2020, and emails dated March 18, March 27, May 15, May 28, October 9, and October 14, 2020, the Union requested and demanded that

Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the Advisors. Copies of Union's letter and emails demanding to bargain are attached as **Exhibit 10**.

11.

By email dated March 18, 2020, Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Advisors by stating, in relevant part:

The Employer is not recognizing the Union as the bargaining agent at this time. We understand your position, and you should understand that the Company is challenging the unit as a valid unit.

A copy of Respondent's March 18, 2020 email is included in Exhibit 10 at pages 061-062.

12.

On August 5, 2020, the Union filed a charge in Case 32-CA-264162 alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Charging Party, the certified bargaining representative of the Advisors. The charge was served by regular mail on Respondent the same date. A copy of the charge, including the affidavit of service, is attached as **Exhibit 11**.

13.

(a) On October 19, 2020, pursuant to Section 102.15 of the Board's Rules and Regulations, the Regional Director issued a Complaint and Notice of Hearing in Case 32-CA-264162 alleging that, since about March 18, 2020 and continuing to date, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Charging Party as the exclusive collective bargaining representative of the

Advisors. A copy of the Complaint was served via E-Issuance upon the parties to this proceeding. A copy of the Complaint, including the affidavit of service, is attached as **Exhibit 12a**.

(b) On December 15, 2020, an Amendment to Complaint issued to include a remedy for the violations alleged in the Complaint. A copy of the Amendment to Complaint, including the affidavit of Service, is attached as **Exhibit 12b**.

14.

(a) On November 2, 2020 Respondent filed an Answer to the Complaint and Notice of Hearing and served a copy thereof on the parties to this proceeding. A copy of Respondent's Answer, including the affidavit of service, is attached as **Exhibit 13a**.

(b) On December 29, 2020, Respondent filed an Answer to Amended (sic) Complaint in answer to the Amendment to Complaint that issued on December 15, 2020, a copy of which is attached as **Exhibit 13b**.

15.

(a) In its Answer, with regard to the allegation set forth in Complaint Paragraph 1(a), Respondent admits that it received a copy of the Charge in Case 32-CA-264162 shortly after August 5, 2020; while Respondent asserts that it lacks information and knowledge sufficient to form a belief as to the remaining allegations, its answer to Complaint Paragraph 1(a) and Exhibit 1, as referenced above in Paragraph 1, establishes the filing of the Charge and Proof of Service thereof.

(b) In its Answer, Respondent admits the allegation set forth in Complaint Paragraph 2(a) that at all material times Respondent has been a California corporation with

an office and place of business located in Concord, California and is engaged in the retail sale and service of motor vehicles.

(c) In its Answer, Respondent admits the allegation set forth in Complaint Paragraph 2(b) that, in conducting the business described above in paragraph 15(b) during a twelve-month period ending August 5, 2020, Respondent derived gross revenues in excess of \$500,000.

(d) In its Answer, Respondent admits the allegation set forth in Complaint Paragraph 2(c) that, during the period of time described above in paragraph 15(c), Respondent purchased and (sic) materials in excess of \$5,000 directly from points outside the State of California.

(e) In its Answer, Respondent admits the allegation set forth in Complaint Paragraph 3 that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(f) In its Answer, Respondent admits the allegation set forth in Complaint Paragraph 4 that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(g) While Respondent asserts in its Answer that the allegation set forth in Complaint Paragraph 5 states a legal conclusion for which no answer is required, Respondent nevertheless admits that its attorney is or was an agent for certain limited purposes and not a general agent with plenary authority. Thus, despite its objections otherwise to the language of Paragraph 5 of the Complaint, Respondent essentially admits the substantive language of this paragraph.

(h) In its Answer, with regard to the allegations set forth in Complaint

Paragraph 6, Respondent denies that the following described Unit, which was established by the Advisors' vote to be included in the established bargaining unit of service technicians and parts employees, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Service Advisors, Floater Service Advisors, Internal Advisors, Repair and Service Technicians, and Parts employees; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

However, as set forth above in Paragraph 8 and Exhibit 8, the Board has upheld the Regional Director's finding that the Unit established by the certified results of the *Armor-Globe* election in this matter is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and Respondent's denial raises no new issue that has not already been decided by the Board's Order.

(i) In its Answer, with regard to the allegations set forth in Complaint Paragraph 7, Respondent denies that, at all times since May 7, 2020, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit, and denies that the Union has been the lawful exclusive bargaining representative of the Unit on the basis that the Unit is not a proper unit under the Act. However, Respondent's denial raises no new issue that has not already been decided by the Board's Order described above in Paragraph 8 and set forth in Exhibit 8.

(j) In its Answer, with regard to the allegation set forth in Complaint Paragraph 8, Respondent admits that, by letter dated March 12, 2020, and emails dated March 18, March 27, May 15, May 28, October 9, and October 14, 2020, the Union requested and demanded that Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the Advisors; however, Respondent denies that the

Union is the lawful bargaining representative of those employees. Thus, Respondent essentially admits the substantive portion of Paragraph 8 of the Complaint and its denial raises no new issue that has not already been decided by the Board's Order described above in Paragraph 8 and set forth in Exhibit 8.

(k) In its Answer, Respondent partially denies the allegations set forth in Complaint Paragraphs 9 and 10, but admits that it has refused to bargain with the Union as Respondent challenges that the Union is the lawful bargaining agent and continues to assert that the Unit is not an appropriate unit. Thus, Respondent essentially admits the substantive portion of Paragraphs 9 and 10 of the Complaint and its denial raises no new issue that has not already been decided by the Board's Order described above in Paragraph 8 and set forth in Exhibit 8.

(l) In its Answer, Respondent denies the allegation set forth in Complaint Paragraph 11 on the basis that it states a legal conclusion for which no answer is required. Respondent's denial raises no new issue that has not already been decided by the Board's Order described above in Paragraph 8 and set forth in Exhibit 8.

16.

(a) Established Board law holds that a party may not re-litigate in an unfair labor practice proceeding a representation issue that was or could have been previously litigated in a prior representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161162 (1941); *Delek Refining, Ltd.* 363 NLRB No. 41 (Nov. 13, 2015); *Fedex Freight, Inc.* 362 NLRB 1182 (June 30, 2015); *The George Washington University*, 346 NLRB 155 (2005), enfd. per curiam 2006 WL 4539237 (D.C. Cir. 2006).

(b) Respondent's Answer does not raise any *bona fide* issues of fact and, in

essence, denies only the legal conclusions to be drawn from the factual allegations of the Complaint and admitted in Respondent's Answer. With regard to the Complaint, it is noted that each factual allegation therein is either directly admitted in Respondent's Answer or is indirectly but indisputably established by the attached Exhibits. Thus, Respondent concedes in its Answer that it has refused, and is refusing, to recognize and bargain with the Union, and Respondent's answers and affirmative defenses set forth in its Answer make clear that Respondent's basis for doing so is to challenge the Regional Director's findings concerning the appropriate Unit, an issue which is not properly litigable in this unfair labor practice proceeding. *Terrace Gardens Plaza, Inc.*, 315 NLRB 749 (1994).

(c) Respondent's contention that the Regional Director erred in ordering a self-determination election among the Advisors and that the Unit at issue herein is not appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act has been fully litigated. As shown herein, Respondent has fully raised its objections to the validity and appropriateness of the Unit at various stages during the proceedings in Case 32-RC-255130. These issues were considered and decided by the Board, and thus may not be re-litigated in a subsequent unfair labor practice hearing. Respondent has not presented any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the underlying representation proceeding. Moreover, because all of Respondent's affirmative defenses involve matters that have already been resolved or could have been resolved in the underlying representation case, they are not proper defenses to the unfair labor practice allegations involved herein. Accordingly, summary judgment is appropriate.

17.

The record submitted herein conclusively establishes that Respondent has an obligation under the Act to bargain with the Union as the exclusive bargaining representative of the Unit, and that Respondent refuses to honor said obligation based on its overruled and incorrect claims that the Unit at issue herein is not appropriate. Since the record submitted herein clearly proves all of the allegations set forth in the Complaint and Respondent's Answer raises no new issues that were not resolved by the Board's Order described above in Paragraph 8 and set forth in Exhibit 8, there are no genuine or material issues of fact in dispute and a formal hearing is unwarranted in this matter. Based on the foregoing, the Board should transfer this case and continue the proceedings before it, find the allegations set forth in the Complaint to be true without receiving evidence, grant summary judgment, and issue a Decision and Order finding the violations alleged in the Complaint.

As an appropriate remedy for the allegations of the Complaint, it is requested that Respondent, its officers, agents, successors and assigns, be required to: (a) on request of the Union, bargain in good faith with the Union, and if an agreement is reached, reduce it to writing and execute it; (b) give effect to the terms and provisions of the above-described agreement; (c) bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit; (d) post at Respondent's Office for a period of no less than sixty (60) days a Notice to Employees to be provided by the Regional Director of Region 32 of the Board; (e) mail to each Unit employee at their residence a Notice to Employees to be

provided by the Regional Director for Region 32 of the Board; and, (f) comply with such other Order of the Board as the Board deems appropriate in the circumstances of this case.

WHEREFORE, Counsel for the General Counsel respectfully moves the Board for the relief prayed for herein as follows:

- (a) to transfer and continue this case before the Board;
- (b) to find, pursuant to Sections 102.20 and 102.50 of the Board's Rules and Regulations, that the allegations in the Complaint are true;
- (c) to rule upon this Motion prior to the opening of any hearing and prior to taking any evidence because Respondent raises no new issue not decided by the Board's Order described above in Paragraph 8; and,
- (d) prior to, and without necessity of further proof, issue a Decision and Order against Respondent herein, its officers, agents, successors, and assigns, containing findings of fact, conclusions of law, and an appropriate remedy for the violations alleged in the Complaint.

DATED AT Oakland, California this 6th day of January 2021.

Respectfully submitted,

/s/ Amy Berbower

Amy Berbower
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 32-RC-255130	Date Filed 01/24/2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer
FAA Concord T, Inc., dba Concord Toyota

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
1090 Concord Avenue Concord, CA 94520

3a. Employer Representative - Name and Title
Michael Mourelatos, GM

3b. Address (if same as 2b - state same)
same

3c. Tel. No.
925-682-7131

3d. Cell No.

3e. Fax No.
925-609-7613

3f. E-Mail Address
michael.mourelatos@concordtoyota.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)
Automotive Dealership

4b. Principal product or service
Automobile Sales and Service

5a. City and State where unit is located:
Concord, CA

5b. Description of Unit Involved
Included: All Full Time and Part Time Parts Service Advisors.
Excluded: All other employees at this location.

6a. No. of Employees in Unit:
8

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: 7a. Request for recognition as Bargaining Representative was made on (Date) By petition and Employer declined recognition on or about _____ (Date) (If no reply received, so state).
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (if none, so state)
none

8b. Address

8c. Tel No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)
none

10a. Name

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: Manual Mail Mixed Manual/Mail

11b. Election Date(s):
Friday, February 7, 2020

11c. Election Time(s):
To Be Determined

11d. Election Location(s):
1900 Bates Avenue, Suite H Concord, CA 94520-1239

12a. Full Name of Petitioner (including local name and number)
Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173

12b. Address (street and number, city, state, and ZIP code)
1900 Bates Avenue, Suite H Concord, CA 94520-1239

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
International Association of Machinists and Aerospace Workers, AFL-CIO

12d. Tel No.
925-687-6421

12e. Cell No.

12f. Fax No.
925-685-4116

12g. E-Mail Address
jjuarez1173@sbcglobal.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title David W.M. Fujimoto, Attorney

13b. Address (street and number, city, state, and ZIP code)
Weinberg, Roger & Rosenfeld ,1001 Marina Village Parkway, Suite 200, Alameda, CA 94501

13c. Tel No.
510-337-1001

13d. Cell No.

13e. Fax No.
510-337-1023

13f. E-Mail Address
nlrnotices@unioncounsel.net

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) David W.M. Fujimoto

Signature 

Title Attorney

Date January 24, 2020

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**FAA CONCORD T, INC., D/B/A CONCORD
TOYOTA**

Employer

and

Case 32-RC-255130

**MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190, MACHINISTS
LOCAL 1173**

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

FAA Concord T, Inc., d/b/a Concord Toyota (the Employer) is engaged in the retail sale and service of new and used automobiles at its Concord, California facility (the Facility). Petitioner Machinists Automotive Trades, District Lodge No. 190, Machinists Local 1173 (the Petitioner) currently represents a bargaining unit of approximately 50 parts personnel and repair technicians. The Employer has a collective-bargaining agreement with the Petitioner covering the parts personnel and repair technicians (the technicians), and with the Teamsters General Truck Drivers, Warehousemen, Helpers and Automotive Employees Local No. 315 (the Teamsters) representing porters, detailers, and shuttle drivers, that is effective from September 9, 2018 through September 8, 2021 (the Agreement). Petitioner seeks an *Armour-Globe* self-determination election to add nine full and part time advisors to the existing unit of parts personnel and technicians.¹ The advisors consist of three subcategories: (1) service advisor; (2) floating advisor; and (3) and internal advisor.

The Employer maintains that the petitioned-for advisors do not share a community of interest among themselves. Specifically, the Employer contends that the service advisors and the internal advisor do not share a community of interest. The Employer also contends that the advisors do not share a community of interest with the technicians and parts employees in the existing unit represented by the Petitioner. The Employer further maintains that the advisors may have a community of interest with other employees including a unit of employees represented by a different labor organization, and/or with remaining employees of the service department who are currently unrepresented such that not including those other unrepresented employees would leave them out and unable to seek representation.

The Petitioner contends that the advisors are a distinct and identifiable voting group that shares a sufficient community of interest with the technicians and parts personnel in the existing unit, such that their inclusion in a unit with technicians and parts employees would be appropriate.

¹ *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 297 (1937).

A hearing officer of the Board held a hearing in this matter on February 5, 2020. Petitioner and the Employer appeared at the hearing and the parties filed timely post-hearing briefs with me, which I have duly considered. As evidenced at the hearing and on brief, and explained in more detail below, the only issue before me is the one raised by the petition in this matter, whether the advisors should be allowed to vote in an *Armour-Globe* election to determine if they wish to be included in the existing unit of the Employer's parts personnel and technicians already represented by the Union.

I have carefully considered the evidence and the arguments presented by the parties on this issue. For the reasons set forth below, I find that the advisors constitute a distinct, identifiable voting group that shares a community of interest with both the parts employees and technicians in the existing unit. I am therefore directing a self-determination election among the advisor employees to join the existing bargaining unit of parts employees and technicians represented by Petitioner Union.²

STATEMENT OF FACTS

The Employer is engaged in the sale of new and used automobiles at its facility located at 1090 Concord Avenue, Concord, California. The Employer is further engaged in the service of new and used automobiles at its facility. There are about 50 employees represented by the Machinists Union, including 30 repair and service technicians (i.e., mechanics who repair and service cars) and eight parts employees, who order and retrieve the parts required for the repairs and services on the cars. The Employer also employs nine employees classified as "advisors"—service advisors, floater advisor and internal advisor. Each of these advisors are responsible for inspecting and evaluating the repair and maintenance needs for every car that comes in, and in the case of the internal advisor, the repair needs for any used car coming in to be resold. Petitioner Machinists Union seeks to add these approximately nine advisors to the existing unit of parts personnel and technicians.

The Facility

The front area of the dealership is where the customers are received and greeted. The service advisors engage the customers in that front area. The customer's vehicles are brought to the service bays at the back of the facility, which is where the cars are worked on by the technicians. The parts employees also work in the back area of the facility where the technicians are able to access the parts in stock. The front area of the facility also consists of an area where the cashiers are stationed to engage with the customers on payment for services and repairs. The used car manager, warranty administrators, and internal service advisors work in that office area within the front area of the dealership. The service advisors and floater service advisors are also clustered in the front area in a separate office area. The break room and lunchroom are the same for all employees. They all have access to the same restroom upstairs. There are also restrooms in the customer area and in the shop.

² Because I am finding that the petitioned-for voting group is appropriate, it is unnecessary for me to decide whether a separate unit of service advisors, or any other bargaining unit would be appropriate.

The Existing Unit

The Technicians

Shop Foreman Todd Nankivelle supervises the technicians, including line technicians, lube technicians, master technicians, and journeymen – about 30 in total. Nankivelle is involved in the interviewing and hiring process for these technicians. Nankivelle does not supervise the parts personnel. (Tr. 30). The technicians work in the back area of the facility, in the “service bays.” (Tr. 29). The shop is accessed via car through the bays, and through a door in the back of the main building.

Technician Pay and Compensation

The technicians are paid based on an hourly rate and a contract piece rate, which is based on achieving a certain productivity level. Each type of repair has an associated flag rate – which means that a certain amount of time is allocated to a particular job and the technician either makes extra money if she or he completes the task in less time than is allotted or loses money if they exceed the time allotted. (Tr. 82). The amount of time the technician spends on the repair is called his or her flag hours.

Technicians keep their time records through a computer program called “CDK” – they punch in upon arrival, punch out for lunch, and punch back in upon return and punch out for the day. The technicians access this computer program on the computers in the shop that are specifically for technicians. The technicians work a five-day work week, 40 hours a week with two consecutive days off.

Technician Training and Skills

Most of the technicians have Automotive Service Excellence (ASE) training and certification in order to perform work on Toyota vehicles. Lube technicians and line technicians do not have that special training or certification. Line technicians primarily do “maintenance jobs,” and lube technicians do oil changes and tire rotations. Generally, the lube techs and line techs eventually obtain their ASE and become repair technicians.

Technicians perform maintenance and repairs on vehicles. The technicians wear full uniforms and are required to wear safety equipment. The technicians perform the repairs and services according to the Repair Orders (RO). The ROs are handed down from the technicians’ team leaders and are written by the advisors. The technicians retrieve the vehicles to be worked on after receiving the ROs. Any questions the technicians have about the ROs are directed to the advisor who wrote the particular RO. When the technician is done with the car, he or she will park it in the staged area, or in the detail area if it will be getting a car wash. The technician notifies the advisor in person or by putting the completed RO on the advisor’s desk. The advisor then contacts the customer to notify him or her that the car is ready for pick up.

The technicians do not contact the customers. The technicians have some interaction with customers, but only to clarify certain problems with the car – such as noises or

observations that the customer has reported to the advisor giving rise to the RO.

At times, the technicians notify the advisor that there is a repair needed that does not appear on the RO. The technician fills out an “online inspection sheet” that gets routed to the service advisor who wrote the RO. The service advisor then contacts the customer to seek his or her approval for the additional repair.

The Parts Personnel

The Parts employees supply the parts -- making sure the technicians have the physical parts to perform the service and repairs. The parts department has a front and back counter. The back counter serves the service department, getting parts for the technicians. The front counter deals with commercial accounts and customers that come in off the street seeking parts. The parts personnel are paid hourly and do not earn a commission. They are supervised by Parts Manger Kevin Kopacz.

The Teams

As of November 2019, the Employer has divided employees according to teams. Team 1 is the “Used Car Reconditioning Team,” which consists of the internal advisor and the technicians who work on used cars. The Express Team is comprised solely of technicians. Teams 2, 3, and 4 are all composed of both service advisors and technicians. The Floater Team consists solely of floater advisors. Prior to the “Team” arrangement on the schedule, the advisors would write a RO, give it to the shop foreman and the foreman would dispatch that order to the technicians. Now, the advisors dispatch the ROs to the technician team leader who then dispatches it to the technicians on that team. With respect to employee meetings, the service manager holds meetings for each classification separately – the advisors, the technicians, and parts employees each have separate staff meetings.

The Classification Sought to Be Included

The Service Manager oversees the service department, including the service advisors, internal advisor, and floater advisor. The parties stipulated on the record that a community of interest exists as between the service advisors and floating advisors.

Service Advisors

The service advisors work five days a week, alternating between an eight-hour and ten-hour day, totaling 44 or 46 hours a week, and are treated as overtime exempt by the Employer. Service advisors are paid an hourly rate as well as a commission on the individual gross profit labor sales, and on the individual customer pay, service labor, and parts gross profit. They are paid on the first and fifteenth of the month, with the check on the fifteenth including the hourly rate plus any commissions earned. They are required to wear a black polo shirt as part of their uniform.

The service advisors do not have specialized training or certification other than on-the-

job training and online training through the University of Toyota that has multiple modules on subjects like Prius maintenance, brakes, conflict resolution, and service. This online training is available to other employees as well.

The service advisors are responsible for receiving the customers who come in and need service or repairs on after purchase vehicles. "After-purchase" refers to repairs or services performed on a vehicle after it has been purchased by a customer, including installation of alarms, running boards, tow hitches, or any problems that may have been missed prior to delivery. The service advisors do a walk-around to inspect the vehicle and determine what services or repairs are needed. The service advisors do this "walk around" with the customers in order to go over the customer's service needs, but also to try and upsell things that they may have declined previously, like brakes, tires, alignments, filters, fluid flushes, and any service appropriate given the timing and mileage of the vehicle. The "walk around" on the car is a visual inspection, and includes taking tire measurements, checking the fluid levels, the wipers, and for any damage on the vehicle. The visual inspection also includes checking internally for leaky valve covers, dirty fluids, or cracked belts. The service advisor writes up a RO for these items plus whatever the customer came in for. The service advisor's RO contains codes signifying certain repairs and services. The service advisor gives the RO to the technician team leader, who then assigns it to a technician. The service advisor may also provide notes alongside the ordered repairs or services to help the technicians understand exactly what is being requested. As noted above, the technicians may ask the service advisors directly for further clarification if necessary.

The service advisors communicates directly with the technicians throughout the day, often in one-on-one dialogue to explain certain service or repairs – sometimes the Technicians come to the service advisors with questions, or the service advisors will specify in a note on the RO that the Technician should seek out the service advisors to discuss certain services and repairs. The Technicians may discover a needed repair in the course executing the RO, and she or he sends an additional work request by computer to the service advisor. In many of those cases, the technician will also walk over to the service advisor to inform him or her verbally of what exactly the vehicle needs. The service advisor will create a work cost estimate by inputting the amount of time it will take to do the job, and will then forward that request to the parts department, who then inputs the cost and tax on the necessary parts for the repair. The service advisor then contacts the customer to inform them of the additional repair or service and the cost, and the try to persuade the customer to pay for the additional work.

The service advisor communicates with the cashiers by relaying information about the customer to the cashier, such as whether or not the customer has a coupon or to notify the cashier about a customer on his or her way to settle the bill. The service advisors give the pre-invoice to the cashiers or "pre-close it to the cashiers." Whether it is a warranty service or repair or a customer-paid job, the customer needs to come to the cashier and sign and finalize the bill. In order to get their car back, the customers need to return to the cashier.

The service advisor also communicates with the parts department to determine if there is a particular part in stock, to notify the parts department of certain needed parts, or to get an estimate on parts costs for a customer. The technician will initiate a parts requisition online based on a given RO, and the parts department will complete it, noting whether the part is in or out of stock.

If the part is out of stock, a notice is sent to the service advisor who then writes an Order Card and delivers that to the parts department.

When repairs and service are completed by the technicians, the technicians return the RO to the service advisor in person or by leaving it on his or her desk. The service advisor completes the RO and prepares the final copy for the customer, contacts the customer letting him or her know of the recommendations and the actual repairs, the status of the vehicle – break measurements, tire measurements, tire pressure, quality of the air filters, what fluids were topped off, if any. Then the service advisor takes the RO to the cashier, both electronically and a hard copy in person.

Floater Service Advisor

The floater service advisor works Tuesday through Saturday, fills in for the service advisors, and earns \$13 per hour, plus commission. Just like the service advisors, the floaters speak with customers to determine the issues with the vehicle. The floaters write the ROs accordingly, and deliver those to the team leader, who then gives them to technicians to execute. About once a month, the floater steps in to do ROs for a customer coming with a used car for service and repair. The floater does not do re-conditioning of an as-yet unsold used car. That reconditioning work is performed by the internal advisor.

Internal Advisor

The internal advisor is responsible for determining the repairs needed on used cars that come in needing “reconditioning” in order to be re-sold. The internal advisor is paid hourly (\$13) plus a percentage of the sublet work (this is work outsourced to an outside vendor; 30% of the sublet or \$100, whichever is less), plus a percentage of the sales volume of vehicles, new or used, that the internal advisor worked on in some capacity by advising on repairs, services, or sublets. The internal advisor’s schedule is Monday through Friday, 40 hours a week. The internal advisor reports to the used car manager and works in the same area as the used car manager and the warranty administrator. The internal advisor wears the same polo shirt as the other service advisors and parts employees. There is no specialized training for the internal advisor, only a general safety training online and on-the-job training.

The internal advisor is responsible for writing up ROs for pre-delivery inspections (PDIs) of new cars and ROs for reconditioning of used cars. The PDIs are performed on new vehicles, used vehicles, and after-purchase vehicles. The internal advisor obtains keys from the new car order, after it gets checked in from the delivery truck, and he or she writes an RO: the first line of the order is a pre-delivery inspection, and the second line is a new car detail, the remaining RO is any other problems he or she identifies that need repair or detailing. For repair items that are beyond the warranty, or even within warranty, he speaks with the service manager to let them know of the issue and verifies whether it is warrantable. The warranty advisor will determine if something is within warranty or not. In the case of a low pressure/tire light, he or she checks with the technicians to find out if there is something more than low or high pressure causing the light to go off. The technician will plug in a scanning tool to check the communication between the monitor and the vehicle system. If it is something beyond pressure imbalance, the technician will put in a requisition with the part department if it needs any parts, such as a new sensor.

During the course of the internal advisor's work, he or she may communicate with the technicians, the used car manager, and the detail department. The internal advisor and the technicians communicate about repairs or services that the vehicle may need beyond the internal advisor's inspection, including brakes, tires, missing parts, and safety items. Such communication occurs throughout the day. Likewise, communication with the parts department occurs throughout the day on every car. There is limited communication between the internal advisor and the cashiers – typically only if there is a question from the customer when he or she picks up the vehicle. There is also some communication with the cashier for “due bill items” – those items that are due to the customer after a sale. Those occur about three to eight times a day, each time prompting some communication with cashiers.

The internal advisor also writes orders for the outside vendors referred to as “sublet work.” This includes windshield repair, paint work, dent work, body shop and wheel repair, and touch-ups. The Employer pays a flat rate to the sublet vendor, and then charges a mark-up to the customer. Though the internal advisor does not customarily perform “customer pay work,” where a customer is requesting a certain repair or service, there are certain occasions when the internal advisor will perform this work that is typically done by the service advisors/floater advisor. In other words, the internal advisor has the basic skill set to be able to perform this work.

Other Classifications

The Employer employs a single warranty administrator who is responsible for processing payments for services and repairs that are under warranty. Services and repairs covered under warranty are paid by Toyota, not the customer. The Employer also employs five cashiers, who are responsible for receiving and processing payments for services and repairs directly from the customers. These positions interact with the three types of advisors to close out a service or repair initiated by the advisors' repair orders. This interaction typically consists of the advisor handing off the RO to the cashier or warranty advisor that the service or repairs are completed and that the customer is on his or her way to settle the bill and pick up his or her vehicle.

A. Board Law

The applicable standard for evaluating the appropriateness of adding additional employees to a preexisting bargaining unit is the Board's *Armour-Globe* doctrine. Under the *Armour-Globe* doctrine, employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). An incumbent union may petition to add unrepresented employees to its existing unit through an *Armour-Globe* election if the employees sought to be included share a community of interest with unit employees and “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.” *Warner-Lambert Company*, 298 NLRB 993, 995 (1990); *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011). A certifiable unit need only be an appropriate unit, not the most appropriate unit. *International Bedding Company*, 356 NLRB 1336 (2011), citing *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enf'd, 190 F.2d 576 (7th Cir. 1951). See also *Overnite Transportation Co.*, 322 NLRB 723 (1996) (the unit sought need not be the ultimate, or the only, or even the most appropriate unit). If the petitioned for unit

is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB 152, 153 (2011).

While the petitioned-for employees need not constitute a separate appropriate unit by themselves in order to be added to an existing unit, as noted above, the parties stipulated at the hearing that the service advisors and the floater advisors share a community of interest. In light of this stipulation, which I find to be supported by the record evidence, it is clear that the service advisors and the floater advisors necessarily constitute an identifiable, distinct segment. See *Warner-Lambert Company*, supra. Specifically, there are no other employees who perform the work of receiving customers, inspecting vehicles, up-selling services and repairs to the customers, committing the customer to those services and repairs, drafting ROs for the technicians, and shepherding that process to the end point, in which the advisor delivers the customer to the cashiers for payment.

Likewise, I find that the internal advisors are a part of that same identifiable, distinct segment. In this regard, the record shows that internal advisors perform the same essential task of evaluating and ordering necessary repairs and services – the primary difference being that this is performed on used cars being prepared for sale to used-car-purchasing customers. The service advisor, floater advisor, and internal advisor are all required to draft ROs for the technicians and are responsible for communicating with the technicians to clarify any special instructions on a given vehicle. Again, the difference between their respective duties is that the internal advisor is performs this function for used cars, rather than new cars and returning customers after purchase. This distinction between new and used cars has very little bearing on what the advisor in each instance is doing: an inspection of the vehicle, the drafting of ROs, the dispatching of the RO to the technicians (via a team lead). Any questions from the technicians on the RO are directed to the originating advisor, thus, the advisor in both roles must be able to speak the same technical language with the technicians. That in and of itself is a skill that ties the advisors – whether internal, floater or otherwise -- together. There are no other employees at the facility that perform this ‘advisor’ function.

Further, the pay structure is similar between the internal advisor and service/floater advisors. Each are paid a base rate, plus commissions. Where those commissions come from, be it from the up-sale of servicing or repairs in the case of service/floater advisors, or from the subletting and sales volume for the internal advisors, the general structure is substantially similar.

Finally, I note that contrary to the Employer’s argument on brief, there is no basis to conclude that the warranty administrator and the cashiers must be included among the petitioned for employees. In this regard, the cashiers and the warranty administrator are primarily performing the work of the payment transactions with the customers – they do not explain or recommend the repairs and services to customers, and do not have any relationship to the services provided in the shop other than to provide the business end of each transaction – namely, the handling of payments. As such, there is no requirement that these classifications be included in the petitioned-for group of employees.

In light of the foregoing, the only remaining inquiry is whether the internal advisor and service/floater advisors share a community of interest with the existing unit of technicians and

parts employees. Such an analysis involves reviewing several factors and comparing the disputed employees to determine whether they share a sufficient community of interest to be included in the same unit.

Typical factors to be considered include the nature of employee skills and functions, common supervision, interchange and contact among employees, the degree of functional integration, the work situs, centralized control of labor relations, commonality of wages, hours, and working conditions, bargaining history, and the extent of organization. *United Operations, Inc.*, 338 NLRB 123 (2002); *International Bedding Company*, supra, at 1337; *Boeing Co.*, supra, at 153; *NLRB v. Paper Manufacturers Co.*, 786 F.2d 163, 167 (3d Cir. 1984); *Rinker Materials Corp.*, 294 NLRB 738, 738-739 (1989). While a petitioner's position regarding the scope of the unit is also a relevant consideration, a petitioner's position is not dispositive with regard to what constitutes an appropriate unit, and certain proposed units, such as those based on an arbitrary, heterogeneous or artificial grouping of employees will be found to be inappropriate. *International Bedding*, supra, citing *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); *E.H. Koester Bakery Co., Inc.*, 136 NLRB 1006, 1012 (1962); *Moore Business Forms, Inc.*, 204 NLRB 552, 553 (1973); *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 6 (2016) (extent of organization cannot be given controlling weight).³ In addition to these traditional community of interest factors, I also assess and compare the compensation methods for the advisors and the technicians and parts employees as well as the shifts and schedules of the advisors and the and technicians and parts employees.

Application of Board Law to this Case

Employee Compensation

The already included technicians are paid an hourly rate, plus an hourly production bonus, dictated by the time it takes the technicians to complete a job as compared to the amount of time allotted or "flagged" time for the job by Toyota. In contrast, the already included parts employees are paid on an hourly basis only. Thus, as a starting point, the pay structure within the existing unit is itself discordant.

The internal advisor, service advisors, and floater advisors are each paid an hourly rate (\$13), plus commission on certain services, repairs, and up-sales, and in the case specifically of the internal advisor, on the subletting of certain services.

In this regard, since the existing unit already contains a mix of pay structures and

³ Given that this is an *Armour-Globe* case, I have primarily analyzed the facts pursuant to the *Warner-Lambert* standard discussed above rather than under the Board's more recent decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), which overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). The Board has indicated that *Specialty Healthcare* was not the correct standard for determining whether an *Armour-Globe* self-determination election was appropriate, and this remains true after *PCC Structurals*. See *Republic Services of Southern Nevada*, 365 NLRB No. 145, slip op. at 1, fn. 1 (2017); *South Texas Project Nuclear Operating Company*, 2014 WL 5465003 (footnote of Member Johnson finding it inappropriate to apply *Specialty Healthcare* to determine whether a self-determination election is appropriate). However, I have considered *PCC Structurals* and its progeny insofar as they address general community of interest principles applicable in any representation case, including *Armour-Globe* cases.

incentives, the variations in the types of commissions and bonuses earned by the internal advisor versus the service and floater advisors, are not dispositive. Overall, I find that the factor of employee compensation is neutral in determining whether a community of interest exists between the advisors and the technicians and parts employees in the existing unit.

Employee Schedules and Hours

The standard work schedule for technicians is a five-day work week, 40 hours a week with two consecutive days off. The internal advisor typically works Monday through Friday, 40 hours a week. The service advisors work five days a week, alternating between an eight hour and ten-hour day, totaling 44 or 46 hours a week. The floater advisors work Tuesday through Saturday and overlap in schedule with the technicians and parts employees. The parts employees also overlap in their work schedules with the technicians and advisors.

Given that parts employees, technicians, service advisors, floater advisors, and internal advisors all work different shifts with different start and end times, overlapping on the core hours of work week and workday, I find this factor does not weigh against, or in favor of, finding a community of interest between these classifications. Instead, I find this to be a neutral factor in assessing the asserted community of interest between the advisors and the existing unit of technicians and parts employees.

Nature of Employee Skills and Functions

The existing unit of parts employees and the technicians perform distinctly different functions for the Employer – yet both roles are related to the physical execution of the repairs and services to the vehicles. The advisors, in contrast, have no physical contact with the vehicle parts or machinery. Nevertheless, the advisors evaluate and perform visual inspection of the vehicles, which he or she must translate into ROs for the technicians to execute. In this regard, the skill set is different among these employees, yet, they all share a common knowledge of automotive parts and machinery that underlies each function – with varying degrees of expertise.

Given the similar basic knowledge required across each position, while performing distinct functions, I find that the nature of employee skills and functions is a neutral factor toward finding of a community of interest between the petitioned-for service advisors and the parts personnel and technicians in the existing unit in this case.

Common Supervision

The service manager oversees the service department, which encompasses the advisors, the technicians, and the parts employees. While the shop foreman below the service manager oversees the technicians, he does not oversee the parts employees in the existing unit, and likewise, he does not oversee the advisors. The parts employees are supervised by the parts manager.

Thus, there is a commonality of upper level supervision in the form of the service

manager. While there is an absence of common frontline supervisors between the advisors, technicians, and parts personnel, I note that even in the existing unit the parts personnel are also supervised by a person other than the technicians' supervisor. Thus, I find that the absence of common first line supervision to weigh less than the finding of common management under the service manager. As such, I find this factor weighing in favor of, or at worst being a neutral factor toward finding a community of interest with Petitioner's petitioned-for unit.

Degree of Functional Integration

I find that the record supports a finding that a substantial degree of functional integration exists between the petitioned-for advisors and the already included technicians and parts employees. As an initial matter, internal advisor and service advisors are each on teams with multiple technicians. This reflects the larger fact that their functions are so closely related that they can operate most efficiently as a team, bypassing any bureaucracy, hierarchy, or other middle person or process. The floater advisors sit on a team of their own, presumably because they float between teams. As such, the fact that the floater advisors sit on a team of their own does not diminish the degree of integration they too exhibit in relation to the existing unit. Notably, there are no parts employees assigned to the various teams, yet they are still within the existing unit. As such, the structure of the various teams reflects the fact that the various advisors are highly integrated with the existing unit.

Further, the technicians are in regular contact with the various advisors on both a face-to-face and electronic basis. The record reflects that each position is dependent upon the work of the other position to fulfill its essential job function. In this regard, the service advisors meet with each customer to go over potential issues and repairs of their vehicles and prepare ROs documenting the work authorized by the customer. Technicians perform the work outlined on the repair order. Any variations to the repair order, questions about the repair order, or additional repairs found necessary by the service technicians, must be communicated to the advisors, who are then tasked with contacting the customer to discuss the issue and obtain authorization from the customer before the technician can perform the needed repairs. Thus, the positions must communicate with each other regularly throughout the course of their work and each is dependent upon the work of the other in order to fulfill their own responsibilities. In addition, the parts employees need direction and take requests from the advisors regarding parts for the recommended repairs and services set forth in the ROs. The record establishes that the advisors consult with parts employees about the availability of parts and the requisition of necessary parts.

The three types of advisors and the existing unit of technicians and parts employees are simultaneously engaged in providing the essential product of the Employer's service department, namely, the service and repair of customer vehicles. While employees in each position perform a different facet of the service and repair of customers' vehicles, I find that these employees comprise a functionally integrated group engaged in a singular pursuit. See *Harry Brown Motor Company*, 86 NLRB 652, 654 (1949) (perfectly clear that service departments are heavily dependent upon the parts departments and cannot function without them; sale of parts to general public by parts department employees did not destroy community of interest between parts employees and service employees).

While employees employed in each position work in a distinct area of the Employer's facility, the service bays are near the parts department back counter area, and the advisors in the front of the facility have full access to the back area. Even though employees employed in each position work slightly different shift configurations, the shifts available to those employees overlap so that there is coverage from the advisors and the existing unit of parts employees and technicians during each regular workday.

For these reasons, I find that the factor of functional integration supports the petitioned-for unit in this case. Cf., *The Boeing Co.*, 368 NLRB No. 67, slip op. at 6 (2019) (functional integration is only one factor in the community of interest analysis).

Interchange Among Classifications

The record is devoid of evidence of employees who have moved between the Advisor position and any parts or technician position on either a temporary or permanent basis. Given the complete lack of interchange on a temporary or permanent basis, I find that the interchange factor favors the Employer's position with respect to the lack of community of interest between the three advisor positions and the existing unit of parts employees and technicians.

Contact Between Employees

While I have accorded weight to the complete lack of interchange, I now must also assess the evidence of work-related contact between the advisors and the technicians and the parts employees. See, e.g., *Boeing*, supra, 368 NLRB No. 67, slip op. at 5 ("contact is the only factor that unreservedly favors the petitioned-for unit").

With respect to employee meetings, the record reflects that the service manager holds meetings for each classification separately – the advisors, technicians, and parts employees each have separate meetings. As such, there are no opportunities for interaction between advisors, technicians, and parts employees through these staff meetings.

However, the record contains evidence of daily interactions between parts employees and advisors with respect to locating and procuring the necessary parts with which to complete repairs. As noted above, the advisors interact daily with the technicians on nearly a car-by-car basis. These interactions appear to occur in a myriad of forms including face-to-face, electronic, and by handing off paperwork (ROs), all of which deserve equal weight in my view.

On the bases stated above, I find that the factor of day-to-day contact on a regular basis between advisors and the existing unit of technicians and parts employees favors a finding of community of interest in this case.

Commonality of Wages, Hours and Working Conditions

As noted above, given the opportunity for advisors and technicians to earn both a base pay and additional pay either through commissions or productivity incentives, I do not find

there to be a material difference in pay structures as between the technicians and advisors. See *Indianapolis Mack Sales and Service, Inc.*, 288 NLRB 1123, 1125 (1988) (community of interest between parts and service employees notwithstanding differences in bonus calculations as between each group); *Hanna Motor Company*, 94 NLRB 105, 107 (1951) (community of interest existed where parts employees although paid in different manner than service department employees received approximately same pay as most service department employees). Notably, the parts employees only earn a base pay, and thus the pay structure of the advisors has more in common with the technicians than even the existing members of the unit do. The advisors have access to the Employer's 401k plan, while the technicians and parts employees have access to the Union's 401k plan as set forth in the parties' CBA. In light of this, I find the pay structures substantially similar between the advisors and the existing unit.

All employees use the same computer system to log their hours, albeit at different locations. There is one single lunchroom/breakroom used by employees in all job classifications without any restriction. All employees have access to the same restrooms. *Indianapolis Mack*, supra, 288 NLRB at 1126 (community of interest found where parts and service employees used same entrances, ate in same lunchrooms, and parked in same parking lots). While the technicians work in the service bays, and the advisors work in the front area, there is access to both areas throughout the workday. The technicians wear a mechanics uniform and safety gear. All other employees are required to wear the same black polo shirt and non-slip shoes. The Employer's employee handbook applies equally across the classifications.

With the above factors in mind, I find that the commonality of wages, hours, and working conditions as between the advisors and the existing unit of technicians and parts employees supports the existence of a community of interest.

Bargaining History

While the record contains the Agreement applicable to the technicians and parts employees, there was no evidence in the record with respect to the overall duration of the bargaining relationship between the Petitioner and the Employer. There is no evidence in the record that the composition of the bargaining unit has changed since its original recognition or certification. I have also considered that there is no evidence of a history of collective bargaining for advisors in a different unit and that no union seeks to represent them separately or in a different unit. I therefore find that this factor does not weigh for or against finding the petitioned-for voting group to be appropriate.

Centralized Control of Labor Relations

No party disputes the existence of a centralized control of labor relations. As such, this factor weighs in favor of finding a community of interest exists between the advisors and the technicians and parts employees in the existing unit.

After examining the record as a whole and weighing the factors above, I find that the factors of common supervision, degree of functional integration, contact between employees,

commonality of wages, hours and working conditions, and centralized control of labor relations fully support Petitioner's position with respect to the alleged community of interest between the advisors and the technicians and the parts personnel. Other applicable factors, including the employee schedules and hours, employee compensation, nature of employees' skills and functions, and bargaining history, were neutral factors. While the interchange among classifications was decidedly absent, and therefore supporting the Employer's position that no community of interest exists, this was the sole factor fully weighing against a community of interest.

CONCLUSIONS AND FINDINGS

I have carefully weighed the record evidence and the arguments of the parties, and I conclude that it is appropriate to hold a self-determination election among the advisors to join the existing unit of technicians and parts employees as the same unit. Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of Section 2(6), (7), and (14) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a voting group appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California; excluding employees represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

If a majority of the valid ballots in the election are cast for the Petitioner, the employees in the above appropriate voting group will be deemed to have indicated their desire to be included in the existing unit of employees currently represented by the Petitioner, and it shall bargain for those employees as part of that unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they

wish to be represented for purposes of collective bargaining by the Petitioner, Machinists Automotive Trades District Lodge 190, Machinists Local 1173. If a majority of valid ballots are cast for representation by the Petitioner, they will be taken to have indicated the employees' desire to be included in the existing Technicians, and Parts employees currently represented by the Petitioner. If a majority of the valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

The ballot will ask:

Do you wish to be represented for purposes of collective bargaining by Machinists Automotive Trades District Lodge 190, Machinists Local 1173?

A. Election Details

The election will be held on Thursday, March 12, 2020, from 11:30 a.m. to 12:30 p.m. at the Employer's facility located at 1090 Concord Avenue, Concord, California.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending February 29, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **March 6, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing 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.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties. A certificate of service must be filed with the Board together with the request for review

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Oakland, California this 4th day of March 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed

Case No. 32-RC-255130

01/24/2020

Date Issued 03/12/2020

City Concord

State CA

FAA CONCORD T, INC., DBA CONCORD TOYOTA,

Employer

and

MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE
NO. 190, MACHINISTS LOCAL 1173

Petitioner

Type of Election:
(Check one:)

(If applicable check
either or both:)

Stipulation

8(b) (7)

Board Direction

Mail Ballot

Consent Agreement

RD Direction
Incumbent Union (Code)

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters 9
- 2. Number of Void ballots 0
- 3. Number of Votes cast for Petitioner 4
- 4. Number of Votes cast for _____
- 5. Number of Votes cast for _____
- 6. Number of Votes cast against participating labor organization(s) 3
- 7. Number of Valid votes counted (sum 3, 4, 5, and 6) 7
- 8. Number of challenged ballots 1
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 8
- 10. Challenges are ~~not~~ sufficient in number to affect the results of the election.
- 11. ~~A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for~~ Petitioner

For the Regional Director

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For FAA Concord T, Inc, dba Concord Toyota

For Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173

For

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**FAA CONCORD T, INC., DBA CONCORD
TOYOTA**

Employer

and

Case 32-RC-255130

**MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190, MACHINISTS
LOCAL 1173**

Petitioner

**REGIONAL DIRECTOR'S DECISION TO OPEN AND COUNT DETERMINATIVE
CHALLENGED BALLOT**

Pursuant to a petition filed on January 24, 2020, and a Decision and Direction of Election issued on March 4, 2020, a manual election was conducted on March 12, 2020, to determine whether a unit of employees of FAA Concord T, Inc., dba Concord Toyota desired to be represented for purposes of collective bargaining by Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173. The voting unit consists of:

Included: All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California.

Excluded: Employees represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

The tally of ballots prepared at the conclusion of the election and made available to the parties shows that of the approximately 9 eligible voters, 4 votes were cast for and 3 votes were cast against the Union, with 1 challenged ballot, a number sufficient to affect the results of the election.

On March 13, 2020, the Region wrote to the parties asking that the parties submit a statement of position with respect to the challenge of the voter by March 19, 2020. The Employer and Union both submitted Statements of Position regarding the challenged voter.

THE CHALLENGE

During the election, the Employer challenged the ballot of William Ortega. It is undisputed that Mr. Ortega is employed by the Employer as an internal advisor, a position that I found appropriately included in the voting group. The Employer's position statement essentially disputes my findings in the Decision and Direction of Election that issued on March 4, 2020. Accordingly, I am overruling the Employer's challenge to the ballot of Mr. Ortega. I note that the Employer has the right to request review of my decision as specified in more detail below.

CONCLUSION

For the reason set forth above, I find that the Employer's challenge be overruled, the ballot be opened and counted, and a Revised Tally of Ballots issue. Subsequently, an appropriate certification for the unit shall issue.

ORDER

IT IS ORDERED that the ballot of William Ortega be opened and counted on a date to be determined, at the Oakland Regional Office.

IT IS FURTHER ORDERED that a revised tally of ballots shall be prepared and served on the parties. Therefore, an appropriate certification for the unit shall issue.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties. A certificate of service must be filed with the Board together with the request for review

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Oakland, California this 26th day of March 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FAA CONCORD T, INC., DBA CONCORD
TOYOTA

Employer

and

Case 32-RC-255130

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190, MACHINISTS
LOCAL 1173

Petitioner

TYPE OF ELECTION: RD DIRECTED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations among the following group of employees of the Employer to determine if they desired to be included in the existing unit of employees currently represented by MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173:

All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California; excluding employees represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

The Revised Tally of Ballots shows that MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173 has been designated by the employees in that group as their collective bargaining representative. No timely objections have been filed.

As authorized by the National Labor Relations Board,

It is hereby certified that MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173 may bargain for the employees in the above group as part of the unit of employees that it currently represents.



May 15, 2020

A handwritten signature in black ink that reads "Valerie Hardy-Mahoney".

Valerie Hardy-Mahoney
Regional Director, Region 32
National Labor Relations Board

Attachment: Notice of Bargaining Obligation

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of the regional director's decision to direct an election, if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by May 29, 2020. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32**

FAA CONCORD T, INC., DBA CONCORD
TOYOTA,

Case: 32-RC-255130

Employer,

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190,
MACHINISTS LOCAL 1173,

Petitioner.

**EMPLOYER'S REQUEST FOR REVIEW OF
CERTIFICATION OF REPRESENTATIVE**

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REQUEST FOR REVIEW

Pursuant to section 102.67(c) of the National Labor Relations Board's ("Board") Rules and Regulations ("R&R"), the Employer FAA Concord T, Inc., dba Concord Toyota (hereinafter "Company" or "Employer") seeks review of the Certification of Representative issued in this case by the Region 32 Regional Director ("RD") on May 15, 2020, and the underlying Certification of Representative election on which the Certification was based. The Employer requests that the Board Review the determination that the petitioned-for Unit of "All full-time and regular part-time Advisors" is appropriate to be included in the existing unit of technician (or skilled mechanical) employees already represented by the Petitioner, even though there is no external community of interest between the advisors and the technicians. Additionally, there is no community of interest even within the petitioned-for Unit, and dismiss the Certification. In the alternative, the Employer requests that the Board reverse the Decision and the DDE and remand to the Board to apply the correct legal standard.

I. SUMMARY OF EVIDENCE AND ARGUMENT

Two different unions have represent employees for many years in two different bargaining units in the Service Department of Concord Toyota, a franchised new car dealership in Concord, California. (HT 294:20-22; and the Collective Bargaining Agreement ("CBA"), received into evidence as E-3.) The Teamsters represent a group of blue-collar, unskilled (non-technical) staff who are porters, detailers, and shuttle drivers. (HT 70:21 – 71:6; and E-3.)¹ The Machinists represent a group of skilled blue-collar workers (automotive service and repair technicians) and the parts employees that directly support the technicians in providing them with the parts and supplies to do the service/repair. (HT 18:4-5; and E-3.) There are some 50 employees already represented by the Union in the Service Department of the Employer. No other department has a union workforce.

¹ Reference is made herein to the hearing transcript ("HT") from the Unit Determination Hearing held on February 5, 2020, and the HT constitutes the evidence of the Employer in this matter.

Also in the Service Department are a group of white-collar retail salespeople known as Retail Service Advisors (Service Advisors and Floating Advisors) who sell to third-party customers in the Service Drive who come to the Employer's Service Drive to have their vehicles repaired and/or serviced. (HT 30:5-24 and 33:15-24.) There is also another position in the Service Department called an Internal Advisor (who is not a salesperson at all) but who works directly in the Service Department Office (not the Service Drive). In the Service Department, there are also other office workers such as the Cashiers, the Receptionist, the Warranty Administrator and the Used Car Manager. The Internal Advisor administers the new car preparation process (new car PDI) and Used Car Reconditioning for the new and used car departments of the Dealership. The Internal Advisor is essentially a Used Car Reconditioning Manager and New Car Inventory Manager as his job is to make sure that new and used cars owned by the Employer are ready for retail sale (HT 189:16 – 190:10.) The Internal Advisor, the Cashiers and the Warranty Administrator do not do physical labor and do not sell anything, but instead do only paperwork and computer work. (HT 58:17 – 59:24.)

In a rank attempt at gerrymandering, Petitioner Machinists Union has cherry-picked just some of a functionally-integrated group of Service Department employees to vote in an election—an *Armour-Globe* unit according to the Union. This selected unit consists only of the Service Advisors and Internal Advisor (9 total employees) in order to select only those employees the Union believes will support it in an election (the “Cherry-picked” employees). The Machinists Union has left out of its group of cherry-picked employees, the other Service Department employees it believes will not support the Union in an election (the “remnant” employees) which consist of the Service Department Cashiers, Receptionist and Warranty Administrator (six total employees).

Both the cherry-picked employees and the remnant employees are non-skilled, non-technical white-collar staff who have next to nothing in common with the skilled, technical, shop technicians and the supporting parts employees who are the overwhelming majority of the persons covered by the subject CBA. (See E-3.) The current bargaining unit represented by the

Machinists has approximately 50 employees in it. (HT 70:24 – 73:5.) The Machinists Union wants to add only nine more (eight sales people and one new/used car admin) to a group of fifty blue-collar auto technicians and parts technicians, while leaving out the remaining six Service Department employees. (*Ibid.*) Granting what Petitioner seeks will create a situation where the technicians will be able to bargain for contract terms that will be suitable for them as skilled technicians, but not for the white-collar minority despite any terms that may be unsuitable for their significantly different types of jobs. The petitioned-for unit fails on several grounds.). The Board has a long history of excluding unskilled workers from units of highly skilled employees such as those in the existing unit. *See, e.g., Avco Lycoming Division*, 173 NLRB 1199 (1968) (technical employees use independent judgment and specialized skills and training to accomplish highly technical work); *Nevada-California Electric Corp.*, 20 NLRB 79 (1940) (excluding clericals from unit of linemen and electricians because interests are different and no evidence union ever bargained for both groups); *cf. Mercy Catholic Medical Center*, 365 NLRB No. 165, slip op. at 1, n. 2 (Dec. 16, 2017) (denying request for review and excluding OR Technicians as technical employees from a non-professional bargaining unit).

First, it fails because the petitioned-for employees do not have an internal shared community of interest. The petitioned-for employees include Service Advisors and Floater Advisors, and an Internal Advisor. The sole job of the Service and Floater Advisors is to sell directly to retail customers who bring in their vehicles to the Service Department. They do a visual inspection of the vehicle looking for things to sell to the customer. (HT 34:19 – 35:2.) They are paid a small minimum wage and the majority of their earnings are from commissions based on what they sell individually to customers. (HT 95:11-22.) In contrast, the Internal Advisor does what his names suggests – works directly with internal departments, especially the used car and new car departments and handles orders received from them for service and repair of vehicle owed by the dealership. (HT 172:3-24 and 182:7-19.) In other words, the Internal Advisor is the administrative employee that gets new and used cars coming into the dealership through the preparation for sale process in terms of administrative tasks. The actual recondition

is actually done by outside vendors (third-parties). Because of the stark differences between the Service/Floater Advisors and the Internal Advisor, there is no shared community of interests between them.

Second, the petitioned-for unit fails as an appropriate unit to add to the existing Machinists Unit because the petitioned for Unit does not share a community of interests with the technicians and parts advisors. In fact, about all they share in common is a loose functional integration because they are all part of the Service Department.

Third, because the distinct community of interests shared between the petitioned for unit and the remnant employees (Cashiers, Receptionist and a Warranty Administrator) is so strong, that community of interests outweighs any similarities and/or functional integration between the petitioned-for employees and the existing service and parts technicians. All of the unrepresented employees are part of a functionally integrated group that processes paperwork for the sales of service and repairs of vehicles, ensuring that the sale results in third-party payment to the dealership from either customers or the factory (if warranty work).

Fourth, the petitioned for unit fails because including the petitioned-for employees within the collective bargaining unit would contravene established Board precedent. Historically, the Board has included mechanics, tire installers, and brakemen, for instance, while excluding office clerical employees, Cashiers, and salesmen from a unit appropriate for the purposes of collective bargaining. Doing otherwise in this case would not only violate that precedent but also plain common sense. The petition would leave six people from the Service Department excluded from the CBA, while including almost sixty. They include five (5) Cashiers (one of which is a part-time receptionist as well) and one (1) Warranty Administrator. (HT 14:4-16.) These are the people who receive and/or process payments for services and repairs from either customers (the Cashiers) or the factory (the Warranty Administrator) and who handle the return of the vehicle to every customer. (HT 61:7-24.) These people work closely and in conjunction with all the advisors with the full process of intaking a vehicle, servicing, repairing or reconditioning it, getting paid for the work, and then returning the vehicle to the customer.

The Decision and Direction of Election (“DDE”) was issued on March 4, 2020. The RD found that there was a shared community of interest between the proposed bargaining unit and the existing unit of technicians and parts, and further found that the Internal Advisor shared a community of interest with the Retail Service Advisors and thus approved the proposed unit. A manual election was conducted on March 12, 2020, The vote resulted in a count of a total of 7 votes, 4 vote for the Union, 3 votes against the Union, with 1 challenged ballot. One proposed bargaining unit member did not vote. The challenged ballot was that of the Internal Advisor William Ortega.

In her Decision on March 26, 2020, regarding the challenged ballot of William Ortega, the RD ruled that William Ortega’s ballot was valid, as he was previously found to be appropriately included in the voting group pursuant to the RD’s prior findings in the DDE that was issued on March 4, 2020. As a result, the RD overruled the Employer’s challenge to the ballot of Mr. Ortega.

This Request for Review addresses the RD’s application of the improper legal standard leading to an improper factual finding. This Request for Review is appropriate for three separate and distinct reasons: (1) The RD’s decision raises a substantial issue of law in that the RD applied the wrong legal standard and hence is a departure from officially reported Board precedent; (2) The RD’s DDE decision finding of a shared community of interest between the Internal Advisor and the Retail Service Advisors; and between the Internal Advisor and the existing blue-collar unit of technicians and parts employees is clearly erroneous based on the record and such error prejudicially affects the rights of the Employer; and (3) the Certification fails to meet the applicable standard for evaluating the appropriateness of adding additional employees to a pre-existing bargaining unit pursuant to the Board’s *Armour-Globe* doctrine. Pursuant to *Armour-Globe*, an incumbent union may petition to add unrepresented employees to its existing bargaining unit ONLY IF the employees sought to be included share a community of interest with the pre-existing unit employees AND constitute an identifiable, distinct segment so

as to constitute an appropriate voting group. Neither community of interest test requirement is met in this case.

In short, the RD refused to apply the Board's holding in *The Boeing Company*, 368 NLRB No. 67 (2019) (*Boeing*), and instead decided to apply a pre-*Boeing* decision to come to her Decision. If the RD were to apply the correct Board precedent as the legal standard in examining the appropriateness of including the Internal Advisor in the unit, i.e., *The Boeing Company, supra*, the Regional Director should have found that the Employer's challenge to the ballot of William Ortega should be upheld.

II. PROCEDURAL HISTORY

The Union filed its Petition on January 24, 2020. A Unit Determination Hearing was held on February 5, 2020. The DDE was issued on March 4, 2020. A manual election was conducted on March 12, 2020, resulting in a total of 7 votes: 4 vote for the Union, 3 votes against the Union, and 1 challenged ballot. On March 26, 2020 the RD issued her Decision To Open And Count Determinative Challenged Ballot ("Decision") regarding the challenged ballot of William Ortega.

III. LEGAL ARGUMENT

A. The Board has broad discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.

One of the Board's principal duties is to determine whether employees desire to be represented for collective-bargaining purposes. *See* 29 U.S.C. § 159. The National Labor Relations Act grants employees the right "to bargain collectively through representatives of their own choosing . . . and to . . . refrain from . . . such activities." 29 U.S.C. § 157. When an employer and an employee do not agree that an appropriate unit of employees should be represented for purposes of collective bargaining, the Board has authority to conduct a secret ballot election and certify the results. *Id.* § 159. In making bargaining unit determinations, the "Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of

collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” *Id.* § 159(b). The Board has delegated authority to its regional directors to decide representation cases, subject to discretionary Board review. *See id.* § 153(b); 26 Fed. Reg. 3911 (May 4, 1961) (Regional Directors—Delegation of Authority).

Among other grounds, the Board may grant review of a regional director’s decision when: there is a substantial question of law or policy that is raised because of a departure from officially reported Board precedent; 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; or the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. 29 C.F.R. § 102.67(d).

The Supreme Court of the United States has emphasized that Congress gave the Board “a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). However, with respect to the current issue, the Board itself, in *Boeing*, has recently announced the standards that should be applied when an existing unit is attempted to add additional employees but leave out others. In this regard, the Regional Director must follow the new standards set forth by the Board and refused to do so in her decision.

B. The RD’s Decision, relying on the DDE, applied the *Warner-Lambert* standard holding that if the proposed unit shares a community of interest with the existing unit the inquiry ends.

At the commencement of the hearing, and in the DDE, in direct contradiction of Employer’s counsel’s argument that the appropriate legal standard for this determination is set forth in the 2019 Board decision in *Boeing*, the Hearing Office made it clear that the RD would not apply *Boeing* and instead would make the Unit Determination based on applying the overruled legal standard set forth in the older decisions of *Warner-Lambert Company*, 298 NLRB 993, 995 (1990) and *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011):

During the election, the Employer challenged the ballot of William Ortega. It is undisputed that Mr. Ortega is employed by the Employer as an internal advisor, a position that I found appropriately included in the voting group. The Employer’s position statement essentially disputes my

findings in the Decision and Direction of Election that issued on March 4, 2020. Accordingly, I am overruling the Employer's challenge to the ballot of Mr. Ortega.

See Decision at 1.

The RD's Decision referenced her prior DDE which stated:

Petitioner seeks an *Armour- Globe* self-determination election to add nine full and part time advisors to the existing unit of parts personnel and technicians. (citing *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 297 (1937)). The advisors consist of three subcategories: (1) service advisor; (2) floating advisor; and (3) and internal advisor.

The Employer maintains that the petitioned-for advisors do not share a community of interest among themselves. Specifically, the Employer contends that the service advisors and the internal advisor do not share a community of interest. The Employer also contends that the advisors do not share a community of interest with the technicians and parts employees in the existing unit represented by the Petitioner. The Employer further maintains that the advisors may have a community of interest with other employees including a unit of employees represented by a different labor organization, and/or with remaining employees of the service department who are currently unrepresented such that not including those other unrepresented employees would leave them out and unable to seek representation.

The Petitioner contends that the advisors are a distinct and identifiable voting group that shares a sufficient community of interest with the technicians and parts personnel in the existing unit, such that their inclusion in a unit with technicians and parts employees would be appropriate.

A hearing officer of the Board held a hearing in this matter on February 5, 2020. Petitioner and the Employer appeared at the hearing and the parties filed timely post-hearing briefs with me, which I have duly considered. As evidenced at the hearing and on brief, and explained in more detail below, the only issue before me is the one raised by the petition in this matter, whether the advisors should be allowed to vote in an *Armour-Globe* election to determine if they wish to be included in the existing unit of the Employer's parts personnel and technicians already represented by the Union.

See DDE at 1-2.

The applicable standard for evaluating the appropriateness of adding additional employees to a preexisting bargaining unit is the Board's *Armour-Globe* doctrine. Under the *Armour-Globe* doctrine, employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). An incumbent union may petition to add unrepresented employees to its existing unit through an *Armour- Globe* election if the employees sought to be included share a community of interest with

unit employees and “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.” *Warner-Lambert Company*, 298 NLRB 993, 995 (1990); *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011). A certifiable unit need only be an appropriate unit, not the most appropriate unit. *International Bedding Company*, 356 NLRB 1336 (2011), citing *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enf’d, 190 F.2d 576 (7th Cir. 1951). See also *Overnite Transportation Co.*, 322 NLRB 723 (1996) (the unit sought need not be the ultimate, or the only, or even the most appropriate unit). If the petitioned for unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB 152, 153 (2011).

See DDE at 7-8.

Given that this is an *Armour-Globe* case, I have primarily analyzed the facts pursuant to the *Warner-Lambert* standard discussed above rather than under the Board’s more recent decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), which overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). The Board has indicated that *Specialty Healthcare* was not the correct standard for determining whether an *Armour-Globe* self-determination election was appropriate, and this remains true after *PCC Structural*. See *Republic Services of Southern Nevada*, 365 NLRB No. 145, slip op. at 1, fn. 1 (2017); *South Texas Project Nuclear Operating Company*, 2014 WL 5465003 (footnote of Member Johnson finding it inappropriate to apply *Specialty Healthcare* to determine whether a self-determination election is appropriate).

See DDE at 9 fn. 3.

C. The RD’s Decision, relying on the DDE, applied the wrong legal standard—the RD should have applied the 2019 *Boeing* decision.

Petitioner and the Hearing Officer have characterized this petition as an *Armour-Globe* case. (See HT 21:3-9 and 288:19 – 289:2.) Also, the Hearing Officer stated his and the Regional Director’s position that *Warner-Lambert* supplied the standard that should govern in this case, and that *Republic Services of Southern Nevada*, 365 NLRB No. 145 (2017), and *South Texas Project Nuclear Operating Company*, 2014 WL 5465003, supported that position. (HT 21:3-16.) Petitioner has argued that this case is an *Armour-Globe* case and therefore *Boeing* is inapplicable. (HT 288:19 – 289:2.) This is a false distinction. This is just another attempt by Region 32 to ignore the current Board’s different views on issues that have been addressed in the past.

However Petitioner and the Hearing Officer wish to characterize and compare *Boeing* in relation to prior Board decisions, it is in fact the case that *Boeing* controls the petition here.

Therein, the petitioner sought to create a collective bargaining unit from two classifications employees that would be represented by a union. *Boeing, supra*, slip op. at 1. That scenario is no different from the one here, where Petitioner seeks to add three classifications (Service Advisor, Floater Advisor, and Internal Advisor) to the CBA of the Machinists and the Teamsters. Characterizing those additions to union representation as “self-determination” does nothing to change the fact that classifications are sought to be added to union representation. And when petitioned-for employees are sought to be formed as an appropriate unit for collective bargaining purposes, as is the case here, *Boeing* governs the analysis and procedure for making that determination. The Regional Director is therefore bound by *Boeing*.

D. The Board reinstated the traditional Community-of-Interest standard for determining an appropriate bargaining unit and directed that a three-step analysis be used in making that determination.

Despite the RD’s rejection of *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) *PCC Structural* reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. *Id.*, slip op. at 1. In applying the community-of-interest standard, the Board has historically considered the following factors: “whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including 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.” *Boeing, supra*, slip op. at 2 (citing to *PCC Structural*, slip op. at 5, quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

The Board has long given substantial weight to prior bargaining history and is reluctant to disturb units established by collective bargaining. *Boeing, supra*, slip op. at 2. In appropriate unit determinations, the Board affords “significant weight” to prior bargaining history such as this establishing that a group of employees have historically been excluded from an existing unit. *See Michigan Bell Telephone*, 192 NLRB 1212, 1213 (1971) (no history of bargaining for

commercial department employees relevant factor in appropriate unit determination). *See also, ADT Security Services, Inc.*, 355 NLRB 1388 (2010) (prior bargaining history given significant weight in appropriate unit determinations); *CHS, Inc.*, 355 NLRB 914, 916 (2010) (historical exclusion from existing unit relevant factor in UC petitions); *Teamsters United Parcel Service National Negotiating Committee*, 346 NLRB 484, 485 (2006) (previously unrepresented employees may not be accreted into existing unit where the group sought has been in existence and historically excluded from the unit). When weighing the factors in determining the community of interest, the Board never addresses, solely and in isolation, the question of whether the employees in the unit sought have interests in common with one another. *Boeing, supra*, slip op. at 2. The inquiry necessarily proceeds to a further determination of whether the interests of the unit group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. *Id.*, slip op. at 2-3.

“The required assessment of whether the sought-after employees’ interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or ‘fractured’—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 right of excluded employees who share a substantial (but less than ‘overwhelming’) community of interests with the sought-after group are taken into consideration.” *PCC Structurals, supra*, slip op. at 5.)

The Board’s inquiry necessarily begins with the petitioned-for unit; if that unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing, supra*, slip op. at 3. However, in determining whether the petitioned-for unit is appropriate, the Regional Director shall consider both the shared and the distinct interests of petitioned-for and excluded employees. *Ibid.* The community-of-interest analysis must consider whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities

with the included employees. *Ibid.* This is exactly what the RD refused to do in her DDE and Decision.

The Board in *Boeing* set forth a three-step process for applying the above legal principles in determining an appropriate bargaining unit under its traditional community-of-interest test. The RD did not apply this 3-step test at all. “First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.” *Boeing, supra*, slip op. at 3.

1. Step One – The proposed unit must share an internal community of interest.

“The first step requires identifying shared interests among members of the petitioned-for unit. Thus, the traditional community-of-interest standard is not satisfied if the interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit. In sum, the analysis logically begins by considering whether the petitioned-for unit has an internal community of interest using the traditional criteria discussed above. A unit without that internal, shared community of interest is inappropriate.” *Boeing, supra*, slip op. at 3, quotation marks and citations omitted.

2. Step Two – The interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed.

The second step requires a comparative analysis of excluded and included employees. *Boeing, supra*, slip op. at 4. The Board has stressed that it is not enough to focus on the interests shared among employees within the petitioned-for group. *Ibid.* Instead, the inquiry must also consider whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members. *Ibid.* The fact that excluded employees have some community-of-interest factors in common with included employees does not end the inquiry. *Ibid.* The Board must determine whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh

similarities with unit members. *Ibid.* If those distinct interests do not outweigh the similarities, then the unit is inappropriate. *Ibid.*

This inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a different unit might be more appropriate. *Boeing, supra*, slip op. at 4. What is required is an analysis of the distinct and similar interests as to why, taken as a whole, they do or do not support the appropriateness of the unit. *Ibid.* Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation.

3. Step Three - Consideration must be given to the board's decisions on appropriate units in the particular industry involved.

The traditional community-of-interest standard includes, where applicable, consideration of guidelines that the Board has established for specific industries with regard to appropriate unit configuration. *Boeing, supra*, slip op. at 4. These guidelines are appropriately considered at the third and final step of the community-of-interest analysis. *Ibid.*

E. The Union is trying to create a fractured unit.

Step One requires that the proposed unit share an internal community of interest. The Board “does not approve fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis.” *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999).

Here, Petitioner's proposed unit consists of six (6) Service Advisors, two (2) Floater Advisors, and one (1) Internal Advisor, William Ortega. Petitioner and Employer stipulated that the Service Advisors and the Floater Advisors share a community of interest. (HT 120:5-12.) Thus, the issue is whether the service and Floater Advisors, on the one hand, and the Internal Advisor, on the other hand, share an internal community of interest. As shown below, they do not.

The following analyzes those factors that strongly that the service and floating advisors do not share an internal community of interest with the Internal Advisor.

1. There is no specific training for the Internal Advisor, while there is training for Service Advisors.

There is no specific training for Ortega's position as Internal Advisor, while there is training for Service Advisors. (HT 168:4 – 169:5.) Ortega has not had any additional training to be an Internal Advisor. (HT 169:1-2.)

2. The Service Advisors, as a group, are customer-facing employees who sell to customers, while the Internal Advisor is just that – he works with the new and used car departments on internally-owned (inventory) vehicles.

Service Advisors sell to customers as their sole job duty. (HT 150:10-17.) Ortega, the Internal Advisor only rarely deals with customers and only where the customer has to have something done that was sold by the new or used car departments. (*Ibid.*) It has “been a couple of years” since he was asked to do customer pay work. (*Ibid.*) Even when there were not as many Service Advisors as there are now, Ortega still did not do customer pay work that often – maybe “a couple of times a year.” (HT 150:21-24.) His supervisor has never placed Ortega to fill in for a Service Advisor. (HT 66:22-23.)

Whereas the Service Advisors help external customers, Ortega, as the Internal Advisor, helps the internal customers, which is always the new and used car sales department. (HT 77:7-13.) Service Advisors general profit from paying customers. The Internal Advisor does not—he only generates expenses to the dealership. (HT 188:24 – 189:15.)

Ortega has been the Internal Advisor, and the only Internal Advisor, for ten years. (HT 178:11 – 179:10.) As an Internal Advisor, he deals with the in-house used or new car departments in terms of shepherding inventory through the process of getting the vehicles ready to put into inventory for sale. (HT 179:25 – 180:3.) The new and used departments instruct Ortega what needs to be done for customers based on pre-sold items. (HT 180:6-14.) Also, the sales department makes the decisions on what work will be performed on cars by outside vendors, or “sublets”. (HT 182:3-12.) Ortega is merely the clerical employee that takes care of that. (HT 188:4-23.) He is an “order-taker” not a salesperson. (HT 182:7 – 193:6.)

Ortega, as the Internal Advisor, is the only advisor who handles the paperwork for the reconditioning of used cars, which is the process of taking a used car that is received from a

third-party source and turned into something that is ready for sale. (HT 185:19 – 186:15.) During the process, Ortega is the only one who handles sublets for used cars. (HT 187:12 – 188:17.)

Ortega also is the only one who handles “due bills,” on vehicles that have been purchased by a customer with some service sold by the new or used car department, which are services that are owed to the customer that have been paid by the dealership as part of the sales transaction. (HT 153:8-16.) The customer relations manager sets up appointments only for Ortega on due bills, and does not set up the appointments for another Service Advisors. (HT 185:10-16.)

With respect to the Floater Advisors, although they help out other advisors, they do not help out Ortega, the Internal Advisor. (HT 104:2-6.)

3. The Internal Advisor works closely with the Used Car Department, as sixty percent (60%) of his time is spent doing reconditioning of used cars.

Ortega sits next to the Used Car Manager behind the Cashiers. (HT 172:1-5.). His job location is not where the Service Advisors or Floater Advisors are located. (HT 30:5-24 and 31:19 – 32:2.) They are located in the Service Drive. (*Ibid.*) He is located in the office because the Used Car Manager has to authorize and sign the repairs orders written for used car reconditioning. (HT 172:6-19.) Ortega, as the Internal Advisor, is the only one who has the job of dealing with the used car manager for used car reconditioning. (HT 172:17 – 173:7.) No Service Advisor has that job. (*Ibid.*) Ortega has the same schedule as the Used Car Manager so that they can be at work at the same time. (HT 173:8-10.) Sixty percent (60%) of Ortega’s time is spent doing shepherding the reconditioning of used cars. (HT 191:17-19.) Clerical employees and skilled employees simply do not share a community of interests. In fact, it was on this basis that the Board in *BF Goodrich Rubber Co.*, 55 NLRB 338 (1944), held that unskilled tool clerks should be excluded from a machinists voting group. In particular, the Board noted that, “they are unskilled employees performing essentially clerical duties.” *Id.* at 345; *see also Mitchellace, Inc.*, 314 NLRB 536 (1994); *Swift & Co.*, 166 NLRB 589, 590 (1967); *Westinghouse Electric Corp.*, 118 NLRB 1043 (1957) (citing cases and stating that the Board customarily excludes office clericals from a unit of production and maintenance workers); *California Cornice Steel*

& Supply Corp., 104 NLRB 787, 789 (1953) (office clericals customarily excluded from residual unit of production and maintenance employees); *Brown Instruments Division*, 115 NLRB 344, 348 (1956) (office clericals customarily excluded when a union seeks to add them to an existing production/maintenance unit); *Power Inc. v. NLRB.*, 40 F.3d 409, 420- 21 (D.C. Cir. 1994) (“Exclusion of office clericals from production units is consistent with long standing NLRB policy, and has repeatedly been upheld”).²¹ The same applies with equal force here because the Service Advisors and Internal Advisor are not functionally integrated with the existing Machinists’ bargaining unit and do not share a sufficient community of interest with it.

4. The Internal Advisor has infrequent contact with the Service Advisors and frequent, everyday contact with other employees such as the Cashiers.

Ortega only infrequently communicates with the Service Advisors. Usually, the only interaction is when a Service Advisor informs him there is a customer waiting for Ortega, or that a customer believes something should be covered under a plan or warranty that is not. (HT 167:7-24.) In contrast, Ortega interacts with the Cashiers and Used Car Manager every day. (HT 171:10-17.)

5. The Internal Advisor has terms and conditions of employment that are distinct from the Service Advisors.

Ortega’s earnings are increased or decreased on how many new and used cars are sold by the Sales Department, not on his individual sales of service. (HT 182:20 – 183:3.)² In contrast, the Service Advisors are commissioned salespersons who receive more on commissions than from their hourly wage rate. (HT 95:11-22; and the Service Sales Advisor Compensation Program, received into evidence as E-1.) The Internal Advisor and the Service Advisors have a separate pay plan and the Service Advisors share a common pay plan. (HT 36:22 – 37:3 and 40:7-13; and E-1.) Having a pay plan that is different between the Internal Advisor and the other Service Advisor and Floater Advisors is the norm. (HT 40:10-13.)

² The RD erroneously stated that the Internal Advisor is paid on the sale of new and used cars. That is not accurate. He is paid on the amount of sublet work sent out to third-party vendors, not on the sales price of the vehicles themselves.

For this year, the Service Advisors got a reduction in the percentage paid of their individual retail sales. (HT 205:19-21.) Ortega did not have any reduction. (HT 205:24-25.)

Ortega works a schedule different from that of the Service Advisors. (HT 75:15-17; and the Schedule for the Service Department, received into evidence as E-2.) He works a fixed schedule, Monday through Friday, 8 to 5, which is different from the schedule of the Service Advisors. (HT 75:20 – 76:1; and E-2.) *C & L Systems Corp.*, 299 NLRB 366, 386 (1990) (excluding clerk who maintained different working hours than production unit, wore office clothes, spent the majority of day doing paperwork unrelated to production work, and utilized skills different from production unit).

F. In the context of collective bargaining, the distinct interests of the excluded employees do not outweigh the similarities with the petitioned-for employees.

Step Two requires an analysis of the distinct interests of the excluded employees in comparison to the similarities with the petitioned-for employees. The RD and the hearing officer flatly rejected this step of the required analysis. The petitioned-for unit, as stated above, includes six (6) Service Advisors, two (2) Floater Advisors, and one (1) Internal Advisor. Included employees (the employees covered by the CBA) are comprised of technicians, parts, porters, detailers, and shuttle drivers. (HT 67:13 – 68:17.) There are approximately fifty (50) individuals that are currently represented by the CBA. (HT 71:19 – 72:11.) If the petitioned-for unit is accepted, the excluded employees include five (5) Cashiers and one (1) Warranty Administrator.

The distinct interests of the excluded employees – the Cashiers and the Warranty Administrator, do not outweigh the similarities with the petitioned-for employees – the Service Advisors, the two Floater Advisors, and the Internal Advisor.

The following analyzes those factors that show that the distinct interests do not outweigh the similarities, and thus the unit is inappropriate.

1. The excluded employees and the petitioned-for employees are organized in the same department.

The excluded employees, the Cashiers and the Warranty Administrator, are in the same department as the petitioned-for employees, the Service Advisors, the Floater Advisor, and the

Internal Advisor. (HT 24:4-20 and 28:20 – 29:17.) The service manager is Cathyrine Oliver and they all answer to her. (*Ibid.*) The technicians on the other hand report to the Shop Foreman, who does their discipline and evaluations. (HT 24:14-22 and 25:12-18.) The Parts technicians report to the Parts Manager, who in turn answers to Cathyrine Oliver. (HT 75:10-12.)

Constellation Power Source Generation, Inc., 05-RC-14906, et al., 2000 NLRB LEXIS 942 at *263 (Shuster, 2000) (having “separate immediate supervision from production and maintenance employees” a factor in decision to exclude customer service investigator from unit); *see also Judge & Dolph, Ltd.*, 33-CA-11482, 1997 NLRB LEXIS 352 at *71 (Pannier, III, 1997) (unlawful accretion based in part upon the separate immediate supervision between employee groups).

2. The excluded employees and the petitioned-for employees do the same type of white collar work, unlike the represented employees who do blue-collar work.

The excluded employees – the Cashiers and the Warranty Administrator – perform “white collar” work, meaning work that entails paperwork, computer work, and office work. (HT 58:19-59:2-9.) “Blue-collar” entails physical labor, such as detailing cars. (*Ibid.*) The represented employees, such as the technicians, do blue-collar work. (HT 60:8-11.) Customers interact with the Cashiers, not the technicians, to make payment and have their cars returned. (HT 61:22 – 62:1.) For a warranty payment from the factory, the Warranty Administrator works on obtaining payment, not the technicians. (HT 63:3-23.) Neither technicians nor those handling parts ever deal with customers to work out problems with their bills. (HT 65:2-7.) Technicians do not contact or interact with customers, or sell customers services or repairs. (HT 55:3-23 and 55:18-23.)

Mechanics are required to be certified. (HT 50:24-25.) They must obtain an ASE (Automotive Service Excellence) certification. (HT 51:1-16.) Lube techs or line techs, even though they do not initially have ASE certification, eventually obtain that certification as a normal progression in their careers. (HT 105:10-19.)

The Service Advisors, the Floater Advisors, and the Internal Advisor all do the same type of white collar work as the Cashiers and the Warranty Administrator, dealing with paperwork, working on computers, customer service, and sales, and not the type of blue-collar work of the technicians. (HT 58:17 – 60:7.) One hundred percent (100%) of Ortega’s work is paperwork, or clerical and administrative. (HT 195:19 – 196:3.) Unlike the technicians, the advisors interact with the customers in getting their vehicles serviced and repaired. While it may seem odd that the Parts employees are included, they are so functionally integrated to the work of the technicians it only makes sense to have them included. The Parts technician physically find the parts needed by the technicians and physically give the parts to the technicians to be installed. (HT 77:18 – 78:5.)

3. The excluded employees are functionally integrated with the petitioned-for employees.

The Service Department is a functionally integrated department with a full process that begins with receiving a vehicle and ends with returning it to a customer or placing it on the lot for sale, with all the steps in between. (HT 34:14 ff.) When a customer brings in his or her vehicle, a porter greets the customer. (HT 34:14-18.) A Service Advisor comes out and goes over the needed services and tries to upsell. (HT 34:19 – 35:2.) A repair order (RO) is written up for what is to be done to the vehicle. (HT 36:3-10.) Although a greeter/porter usually does not involve the Internal Advisor, the Internal Advisor will be notified only when there is a “due bill”, services that have already been pre-sold by the sales department. (HT 36:15-23.)

When Service Advisors are on duty, Cashiers need to be there as well. (HT 73:9-11.) The purpose for this duality is because the Cashiers need to be there to take the payments from the customers when they pick up their cars and to release the vehicles to the customer. (HT 73:24 – 74:2.)

The Cashiers and the Warranty Administrator are an integral part of the process of handling repair of a vehicle brought in by a customer and returning the vehicle to the customer. (HT 65:20 – 66:5.) And, as mentioned, the Service Advisors are the ones selling services to the customers.

All of the Service Advisors, Internal Advisor, Cashiers, Warranty Administrator, porters, and greeters wear the same black Polo shirts. (HT 41:19-22.) The technicians wear uniforms and safety equipment. (HT 41:23 – 42:2.)). *The Mirage Casino Hotel*, 338 NLRB 529, 531 (2002) (different uniforms a factor in decision to exclude craft employees from a unit of engineers).

4. The Service Advisors and the Internal Advisor have frequent contact with the Cashiers in particular.

As mentioned, Ortega sits next to the used car manager behind the Cashiers. (HT 172:1-5.) He is located there because the used car manager has to authorize the repairs orders written for used car reconditioning. (HT 172:6-19.) The Service Advisors and the Cashiers work in tandem, as the Cashiers need to be present to take payments from customers and have their cars delivered back to them. (HT 73:9 – 74:2.)

5. The excluded employees and petitioned-for employees have far more similar terms and conditions of employment than in comparison to the represented employees.

Union employees have their own pension and/or 401(k) plan. (HT 69:22:25; and E-3.) In comparison, the excluded employees and the petitioned-for employees have a company-sponsored 401(k) plan. (HT 70:4-13.)

Technicians keep their time by punching in and out on computers in the shop. (HT 112:22 – 113:10.) In contrast, the Cashiers and the Internal Advisor keep track of their time on their own computers. (HT 113:16-24.) The Cashiers, the Service Advisors, and the Internal Advisor all have their own computers. (HT 113:21 – 114:1.) Technicians do not have their own computers. (HT 114:2-3.)

Also, whereas Cashiers need to be present at the same time as the Service Advisors, this is not true of the technicians, who have different work schedules and start times. (HT 74:15-23.)

6. The excluded employees and the petitioned-for unit have the same supervisor.

Cathyrine Oliver is the service manager of Employer. (HT 24:4-5.) She oversees the Service Department, which include the Cashiers, Warranty Administrator, Service Advisors, Floater Advisors, the Internal Advisor, detailers, porters, and shuttle drivers. (HT 24:6-20 and

28:20 – 29:17.) She has one shop foreman, Todd Nankivell, whose sole supervisory capacity is over the technicians. (HT 24:18-22 and 25:14 – 28:11.) He has no supervisory responsibilities over any of the Cashiers, Warranty Administrator, Service Advisors, Floater Advisors, the Internal Advisor, detailers, porters, and shuttle drivers. (*Ibid.* and HT 28:20 – 29:17.)

Consequently, the excluded employees (Cashiers and the Warranty Administrator) and the petitioned-for unit (the Service Advisors, the Floater Advisors, and the Internal Advisor) all answer to the same supervisor – Cathyrine Oliver. In contrast, the technicians, who are part of the represented unit, answer to a different person, as do the parts employees.

G. The Board has historically excluded the type of white collar job classifications of the petitioned-for employees from the unit appropriate for collective bargaining purposes.

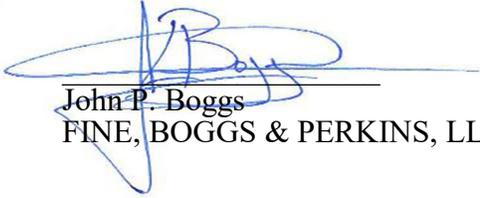
The last step is to consider any industry-specific guidelines applicable to this case. *Boeing, supra*, slip op. at 4. The NLRB has provided guidance for automotive service centers, in both *Montgomery Ward & Co.*, 150 NLRB 598 (1964) and *Bamberger's Paramus Div., Macy, R.H. & Co., Inc.*, 151 NLRB 748 (1965). In *Montgomery Ward*, the Board found a unit appropriate for collective bargaining purposes to include “mechanics, tire mounters, seat cover installers, stockmen, and gas island attendants”, and excluded “all other employees, office clerical employees, Cashiers, salesmen, watchmen, guards, and supervisors”. *Montgomery Ward, supra*, at 601-602. In *Bamberger's*, the Board found similarly that the appropriate unit included “tire installers, brakemen, front-end men, stockmen, and set cover men, but exclud[ed] all other employees, office clerical employees, salesmen, guards, and supervisors”. *Bamberger's, supra*, at 752.

The petitioned-for employees here – Service, Floater, and Internal Advisors – obviously fit with the job classifications of office clerical employees, salespersons, and Cashiers that have historically been excluded by the Board from the appropriate unit. Allowing them to become part of the appropriate unit would contravene Board precedent.

IV. CONCLUSION

Based on the foregoing, Employer requests that the Board either dismiss the Petition as not being an appropriate bargaining unit or reverse the RD's Decision and DDE and remand to the RD to apply the correct legal standard in making her determination.

Respectfully Submitted,


John P. Boggs
FINE, BOGGS & PERKINS, LLP

Dated: May 28, 2020

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FAA CONCORD T, INC., D/B/A
CONCORD TOYOTA
Employer

and

Case 32-RC-255130

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190, MACHINISTS
LOCAL 1173
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.¹ The Board also remands

¹ In denying review, we agree with the Regional Director's decision that a self-determination election was appropriate, as modified and corrected below. We agree with the Regional Director's overall conclusions that the petitioned-for voting unit of advisors is an identifiable, distinct segment so as to constitute an appropriate voting group and that it shares a community of interest with the existing unit of technicians and parts employees. See, e.g., *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990). The RD erred, however, in finding that the advisors' shared community of interest necessarily showed that they are an identifiable, distinct segment so as to constitute an appropriate voting group; even where a proposed voting group shares a community of interest, it is not an identifiable, distinct segment if it is an arbitrary segment. See *Capital Cities Broadcasting Corp.*, 194 NLRB 1063, 1063–1064 (1972). Addressing "identifiable, distinct segment" separately, we conclude that the advisors are not an arbitrary segment because they perform the same essential task of evaluating and ordering necessary parts and services; generally perform the same types of tasks (e.g., initial vehicle inspections, writing repair orders, ordering necessary parts, and dispatching the repair order to the appropriate technician team leader); have the same general qualifications; and perform tasks that no other classification performs. By contrast, the employees excluded from the voting group—cashiers and a warranty administrator/clerk—perform payment and warranty transactions with customers and have no role in explaining or recommending repairs. The voting group of advisors is consequently not arbitrary.

We also correct two additional errors in the Regional Director's analysis. First, she erred in treating employee shifts and schedules, and method of compensation, as separate relevant factors in addition to the "terms and conditions of employment" community-of-interest factor. See *Buckhorn, Inc.*, 343 NLRB 201, 204 (2004) (work schedules); *Omni International Hotel*, 283 NLRB 475, 475 & fn. 2 (1987) (tips and hourly wages). Second, she erred in analyzing "centralized control of labor relations" as a traditional community-of-interest factor in self-determination elections, because that factor is not relevant where, as here, the unit is a single-facility, not a multi-facility, unit.

this matter to the Regional Director with a directive to issue a certification of results, which is the proper certification in any self-determination election, irrespective of the results. See *Public Service Co. of Colorado*, 365 NLRB No. 104, slip op. at 1 (2017).

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., September 22, 2020.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FAA CONCORD T, INC., DBA CONCORD
TOYOTA

Employer

and

Case 32-RC-255130

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190, MACHINISTS
LOCAL 1173

Petitioner

TYPE OF ELECTION: RD DIRECTED

CERTIFICATION OF RESULTS

An election has been conducted under the Board's Rules and Regulations among the following group of employees of the Employer to determine if they desired to be included in the existing unit of employees currently represented by MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173:

All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California; excluding employees represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

The Revised Tally of Ballots shows that MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173 has been designated by the employees in that group as their collective bargaining representative. No timely objections have been filed.

As authorized by the National Labor Relations Board,

It is hereby certified that MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173 may bargain for the employees in the above group as part of the unit of employees that it currently represents.



October 9, 2020

A handwritten signature in black ink that reads "Valerie Hardy-Mahoney".

Valerie Hardy-Mahoney
Regional Director, Region 32
National Labor Relations Board

Attachment: Notice of Bargaining Obligation

Exhibit 9

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of the regional director's decision to direct an election, if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by May 29, 2020. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

STEWART WEINBERG
DAVID A. ROSENFELD
WILLIAM A. SOKOL
ANTONIO RUIZ
MATTHEW J. GAUGER
ASHLEY K. IKEDA
LINDA BALDWIN JONES
PATRICIA A. DAVIS
ALAN G. CROWLEY
KRISTINA L. HILLMAN
EMILY P. RICH
BRUCE A. HARLAND
CONCEPCIÓN E. LOZANO-BATISTA
CAREN P. SENCER
ANNE I. YEN
KRISTINA M. ZINNEN
JANNAH V. MANANSALA
MANUEL A. BOIGUES
KERIANNE R. STEELE
GARY P. PROVENCHER
EZEKIEL D. CORDER
LISL R. SOTO
JOLENE KRAMER
ALEJANDRO DELGADO

CAROLINE N. COHEN
XOCHITL A. LOPEZ
CAITLIN E. GRAY
TIFFANY GRAIN ALTAMIRANO
DAVID W. M. FUJIMOTO
ALEXANDER S. NAZAROV
THOMAS GOTTHEIL (1986-2019)
JERRY P. S. CHANG
ANDREA C. MATSUOKA
KATHARINE R. McDONAGH
BENJAMIN J. FUCHS
CHRISTINA L. ADAMS
WILLIAM T. HANLEY
ABEL RODRIGUEZ

OF COUNSEL

ROBERTA D. PERKINS
NINA FENDEL
TRACY L. MAINGUY
ROBERT E. SZYKOWNY
ANDREA K. DON
LORI K. AQUINO
SHARON A. SEIDENSTEN

• Admitted in Hawaii
• Also admitted in Nevada
▼ Also admitted in Illinois
▶ Also admitted in New York and
Alaska
* Also admitted in Florida
• Also admitted in Minnesota

March 12, 2020

VIA EMAIL AND U.S. MAIL

Mr. John P. Boggs
Fine, Boggs & Perkins LLP
111 West Ocean Blvd., Suite 2400
Long Beach, CA 90802

Re: Demand to Bargain - FAA Concord T, Inc., d/b/a Concord Toyota

Dear Mr. Boggs:

This letter is written on behalf of Machinists Automotive Trades District Lodge No. 190, Automotive Machinists Local Lodge No. 1173. The Union has won the election conducted by the NLRB.

Under current Board law, your client may not make unilateral changes after the date of the election.

We recognize that many employers attempt to delay bargaining with the Union by various strategies.

We want to put FAA Concord T, Inc., d/b/a Concord Toyota on notice that it should make no changes in wages, hours and working conditions without affording the Union an opportunity to bargain. Any such unilateral changes would become unfair labor practices upon issuance of the Board's certification. We intend to impose the greatest risk upon your client if your client makes any unilateral changes.

We are, therefore, putting you on notice. We insist that, henceforth, your client make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit without affording an opportunity to this Union to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of all those changes.

1. No promotional position should be filled without bargaining;
2. No employee should have his/her hours changed without bargaining;
3. No employee should be warned, counseled, disciplined or terminated without bargaining;
4. No one should be hired without bargaining over the person who should fill the position;

EXHIBIT 10

5. No employee should be laid off without bargaining;
6. No health and welfare, pension or other fringe benefits should be denied without bargaining;
7. No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion;
8. No work location, assignment, classification or any other aspect of employment should be changed without bargaining;
9. No discipline should be imposed without affording the employee the Weingarten rights which we hereby demand;
10. No changes in the method and manner by which work is being performed may be made without bargaining;
11. No introduction of any new work techniques without bargaining;
12. No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining.
13. No jobs should be bid or commenced without bargaining.

In considering this list, your client should consider the risk which you bear if your client chooses to make those changes without bargaining. If positions open in this unit or some other unit and your client does not bargain over the filling of those positions, we will argue that someone is entitled to back pay and your client may end up paying back pay for a lengthy period of time. If your client chooses to promote one individual and refuses to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If your client terminates someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that you should reinstate the person and/or owe back pay. If you lay off any individuals, we will take the position that your client should have bargained over the decision as well as the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the Union forthwith may be severe.

We are hoping that your client will not file objections to the election but rather, that your client will sit down and bargain with the chosen representative of the employees.

We, of course, demand that if there are any wage increases, benefit increases, or transitions from apprenticeship to journeyman positions, which would have normally occurred without the Union, those should be implemented in the normal course of business. We insist, however, being notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will most likely be a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place, and furthermore requires that you afford the Union a chance to bargain over those decisions as well as the effects of those decisions.

The employer may not discipline anyone without affording the Union a chance to bargain before implementing any such discipline.

Please provide the following information in preparation for bargaining (the requests are limited to the recognized bargaining unit):

1. A list of current employees including their name, date of hire, rate of pay, job classification, last known address, phone number, date of completion of any probationary period.
2. A copy of all current company personnel policies, practices or procedures.
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.
5. Copies of all current job descriptions.
6. Copies of any company wage or salary plans.
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.

Please consider this letter to be a continuing demand.

Please provide dates when you can bargain immediately.

Sincerely,



David W. M. Fujimoto

DWFMF:lbh
opeiu 29 afl-cio(1)

cc: Machinists Automotive Trades District Lodge No. 190, Automotive Machinists Local Lodge
No. 1173

148961\1075029

From: [Jesse Juarez](#)
To: [Gomez, Lelia](#)
Cc: [Jesse Juarez](#)
Subject: FW: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)(IR) 32-CA-261352
Date: Tuesday, June 16, 2020 10:51:29 PM

FYI,

Jesse Juarez

From: Jesse Juarez
Sent: Friday, March 27, 2020 10:21 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; 'Richard Breckenridge' <rbreckenridge1101@sbcglobal.net>; 'Steve Older (E-mail)' <solder1546@sbcglobal.net>; Jesse Juarez <jjuarez1173@sbcglobal.net>
Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)(IR)

Hello John,

You have failed to provide dates or information so the union could bargain over COVID-19. It was reported the employer made changes without bargaining with the union. The union serve you a letter on March 12, 2020 requesting information and not to make any changes without bargaining. The union is unaware of the COVID-19 measures that were implemented and concerned about the safety of the writers that were retained. Any advisor that gets sick or infected will become a workmen comp claim. It been reported the employer has retained lower seniority writers over other with less tenure. This could have been avoided if the employer would have bargained with the union.

You have forced the union to make your client an appointment with region 32 once this National Criss is over. You were given plenty of time to provide information and provide bargaining dates and you failed to do neither.. You even welcomed me to file charges. I'm assuming so you can put in more billable hours defending losing cases and making losing arguments.

Finally, the union is going to demand that every employee impacted by the employer unilateral changes be made whole. Why is it so difficult for your client to respect a democratic process ? This is time to practice humanity and gratitude towards the employees.

Jesse Juarez

From: Jesse Juarez
Sent: Thursday, March 19, 2020 10:22 AM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; 'Richard Breckenridge' <rbreckenridge1101@sbcglobal.net>; 'Steve Older (E-mail)' <solder1546@sbcglobal.net>; Jesse Juarez <jjuarez1173@sbcglobal.net>

Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)

Good Morning John,

Has the employer made any changes to my advisor unit at Concord Toyota?

Jesse Juarez

From: Jesse Juarez

Sent: Wednesday, March 18, 2020 10:26 PM

To: 'John Boggs' <jboggs@employerlawyers.com>

Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; Jesse Juarez <jjuarez1173@sbcglobal.net>; Richard Breckenridge <rbreckenridge1101@sbcglobal.net>; Steve Older (E-mail) <solder1546@sbcglobal.net>

Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)

My job is to represent workers. How is that unreasonable? What unreasonable is all the BS you and your client try to put us thru.

COVID-19 is here, it's real and we need to bargain.

Ok, will file charges and the Union has the right to take action whenever we feel like it. Your client is not the only that knows how to antagonize. Did you give Vicki a copy of my video in SD?

Finally, expect another info request for the main shop.

Jesse Juarez

From: John Boggs

Sent: Wednesday, March 18, 2020 10:13 PM

To: Jesse Juarez <jjuarez1173@sbcglobal.net>

Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)

File your charge Jesse. As usual, you are unreasonable.

Sent from my Sprint Samsung Galaxy

----- Original message -----

From: Jesse Juarez <jjuarez1173@sbcglobal.net>

Date: 3/18/20 10:04 PM (GMT-08:00)

To: John Boggs <jboggs@employerlawyers.com>

Cc: vicki.sylvia@sonicautomotive.com, 'David Fujimoto' <dfujimoto@unioncounsel.net>, "'Steve Older (E-mail)'" <solder1546@sbcglobal.net>, Jesse Juarez <jjuaraz1173@sbcglobal.net>, Richard Breckenridge <rbreckenridge1101@sbcglobal.net>
Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)

John,

The only reason we don't represent the advisors yet is because you and your client are no longer skilled at cheating and can't win union elections fair and square these days. So, plan B becomes filing frivolous objections and appeals in order to sabotage workers' rights. The employer refuses to respect the will of its workers and going to retaliate against them by teaching them a lesson. Nice! You made your argument at the hearing and lost your argument and the hearing officer decision will stand. What unit do you think an internal advisor should go? We have other union contracts with internal advisors in the same unit as other advisors and why the hearing officer decided in the unions favor. He used common sense to make his determination. How's that for taking a few minutes to back pedal? At least Josh from LM was a straighter shooter when we dealt with him. This is about you and putting in billable hours and teaching the employees a lesson for not believing the employers briber in chief. This case is a loser and you know it.

Like I already informed you and will be redundant. This is the union 2nd request. Your reply doesn't satisfy the union's request. Please provide the requested information within 48hrs.

You know that certain employers like car dealerships are "essential business" and exempt from the order. There is a lot of concerns over COVID-19 and the health and safety of our future members that we need to bargain over. ? If the employer is forced to reduce its workforce, we need to bargain over all the effects. The advisors are in direct contact with the public and areas where they could become infected.

The union is just as busy as you are. The employer should agree to bargaining if they understand this pandemic is a serious and urgent matter concerning the health and safety of its advisors.

Failure to provide the information within 48hrs will result in board charges.

Our staff is changing and don't be surprised who takes over Concord Toyota servicing and bargaining.

Finally, please provide times and dates you can bargain over COVID-19.

Jesse Juarez

From: John Boggs

Sent: Wednesday, March 18, 2020 6:18 PM

To: Jesse Juarez <jjuaraz1173@sbcglobal.net>

Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; Steve Older

(E-mail) <solder1546@sbcglobal.net>

Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (

Jesse,

Let's step back a minute. The Employer is not recognizing the Union as the bargaining agent at this time. We understand your position, and you should understand that the Company is challenging the unit as a valid unit. That will proceed according to the Board's rules and any appeals. However, the Employer is taking steps to address the COVID-19 pandemic and to respond to OSHA, as well as federal and state guidelines and Health Orders. To say that the Employer is doing nothing is a complete fabrication. Indeed, the Employer, through Vicki Sylvia, has been discussing union employee issues with Steve Older directly where the unit is not in question. Your demand to immediately sit down and bargain is rejected for many reasons. Have you not read the Health Order in affect in the Bay Area? No meetings are permitted. You must Shelter In Place and demanding an in-person meeting immediately would violate that Order. If you have something you want specifically, put it in writing and we will consider the request and then let you know whether the Employer is consider it or not. But, once again, please don't look at this as an acknowledgment that the Union represents the service advisors at Concord Toyota because there is no such ruling yet.

John.

John P. Boggs, Esq.
Fine, Boggs & Perkins LLP
80 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019
Office: (650) 712-8908
Direct: (650) 712-7540
Cell: (415) 378-3150
fax: (650) 712-1712
Email: jboggs@employerlawyers.com

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error, please reply to us immediately by e-mail, and delete the original message.

From: Jesse Juarez [<mailto:jjuarez1173@sbcglobal.net>]
Sent: Wednesday, March 18, 2020 2:03 PM
To: John Boggs
Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto'; Steve Older (E-mail); Jesse Juarez
Subject: Demand to Bargain COVID-19 Concord Toyota Advisors (

<<...>>

Hello John.

This is the union demand to bargain over COVID-19. Don't not make any unilateral changes until the union is afforded the opportunity to bargain.

Sincerely,

Jesse Juarez
Area Director of Organizing
Machinists Automotive Trades
District Lodge 190
Phone: 925 687-6421 x16
Fax: 925 685-4116

From: [Jesse Juarez](#)
To: [Gomez, Lelia](#)
Cc: [Jesse Juarez](#)
Subject: FW: Concord Toyota Writer (IR) (IR) 32-CA-261352
Date: Tuesday, June 16, 2020 10:55:12 PM
Attachments: [Machinists Demand to Bargain FAA Concord T.pdf](#)

FYI,

Jesse Juarez

From: Jesse Juarez
Sent: Friday, May 15, 2020 8:33 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: vicki.sylvia@sonicautomotive.com; Jesse Juarez <jjuarez1173@sbcglobal.net>; 'David Fujimoto' <dfujimoto@unioncounsel.net>
Subject: Concord Toyota Writer (IR) (IR)

<<...>>

John,

Please provide the information that was requested on March 12, 2020.

Finally, please provide by COB Monday May 18,2020.

Sincerely,

Jesse Juarez
Area Director of Organizing
Machinists Automotive Trades
District Lodge 190
Phone: 925 687-6421 x16
Fax: 925 685-4116

From: [Jesse Juarez](#)
To: [Gomez, Lelia](#)
Cc: [Jesse Juarez](#)
Subject: FW: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR) 32-CA-261352
Date: Tuesday, June 16, 2020 10:56:04 PM

FYI,

Jesse Juarez

From: Jesse Juarez
Sent: Friday, May 15, 2020 8:44 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; 'Steve Older (E-mail)' <solder1546@sbcglobal.net>; Jesse Juarez <jjuaraz1173@sbcglobal.net>
Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)

John,

As you know the board certified the election today. Please provide the information that was requested on March 18, 2020.

Jesse Juarez

From: Jesse Juarez
Sent: Wednesday, March 18, 2020 2:03 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; Steve Older (E-mail) <solder1546@sbcglobal.net>; Jesse Juarez <jjuaraz1173@sbcglobal.net>
Subject: Demand to Bargain COVID-19 Concord Toyota Advisors (

<<...>>

Hello John.

This is the union demand to bargain over COVID-19. Don't not make any unilateral changes until the union is afforded the opportunity to bargain.

Sincerely,

Jesse Juarez
Area Director of Organizing
Machinists Automotive Trades
District Lodge 190
Phone: 925 687-6421 x16

Fax: 925 685-4116

From: [Jesse Juarez](#)
To: [Gomez, Lelia](#)
Cc: [Jesse Juarez](#)
Subject: FW: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)(IR) 32-CA-261352
Date: Tuesday, June 16, 2020 11:02:05 PM

FYI,

Jesse Juarez

From: Jesse Juarez [<mailto:jjuarez1173@sbcglobal.net>]
Sent: Thursday, May 28, 2020 8:34 PM
To: 'John Boggs'
Cc: vicki.sylvia@sonicautomotive.com; David Fujimoto; Jesse Juarez
Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)(IR)

John,

As you know the election was certified and the union has requested information and bargaining dates. You have failed to provide dates or the information. This will be the union final request before your client gets served with charges. Your request for review is mainly whether the internal advisor belongs in the unit or not. Provide dates that you can bargain for the CP writers. Either way the employer will not prevail with your frivolous appeal concerning the internal writer. I hope you can do some simple math concerning the tally. The employer has made changes without bargaining which will become unfair labor practices.

Finally, provide dates and all the information the union has previously requested by this Monday June 1, 2020.

Jesse Juarez

From: Jesse Juarez
Sent: Friday, May 15, 2020 8:44 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; 'Steve Older (E-mail)' <solder1546@sbcglobal.net>; Jesse Juarez <jjuarez1173@sbcglobal.net>
Subject: RE: Demand to Bargain COVID-19 Concord Toyota Advisors (IR) (IR)

John,

As you know the board certified the election today. Please provide the information that was requested on March 18, 2020.

Jesse Juarez

From: Jesse Juarez

Sent: Wednesday, March 18, 2020 2:03 PM

To: 'John Boggs' <jboggs@employerlawyers.com>

Cc: vicki.sylvia@sonicautomotive.com; 'David Fujimoto' <dfujimoto@unioncounsel.net>; Steve Older (E-mail) <solder1546@sbcglobal.net>; Jesse Juarez <juarez1173@sbcglobal.net>

Subject: Demand to Bargain COVID-19 Concord Toyota Advisors (

<<...>>

Hello John.

This is the union demand to bargain over COVID-19. Don't not make any unilateral changes until the union is afforded the opportunity to bargain.

Sincerely,

Jesse Juarez
Area Director of Organizing
Machinists Automotive Trades
District Lodge 190
Phone: 925 687-6421 x16
Fax: 925 685-4116

From: [Jesse Juarez](#)
To: [Berbower, Amy](#)
Cc: [Jesse Juarez](#)
Subject: FW: Concord Toyota Writers bargain date & Info request (IR) (IR)
Date: Wednesday, October 14, 2020 1:15:07 PM

FYI,.

Jesse Juarez

From: Jesse Juarez
Sent: Wednesday, October 14, 2020 1:11 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: 'David Fujimoto' <dfujimoto@unioncounsel.net>; 'Steve Older (E-mail)' <solder1546@sbcglobal.net>; 'vicki.sylvia@sonicautomotive.com' <vicki.sylvia@sonicautomotive.com>
Subject: RE: Concord Toyota Writers bargain date & Info request (IR) (IR)

Hello John,

I heard the NLRB may rent a MB sprinter and come and pick your client up. Didn't you hear they issued a corrected certification for my unit of writers at Concord Toyota last week? .

I hope you are not going to rely on Amy Barrett to bail you out.

Finally, once again please provide requested information relevant for bargaining and provide the union dates per my last email.

Jesse Juarez

From: Jesse Juarez
Sent: Friday, October 9, 2020 2:56 PM
To: 'John Boggs' <jboggs@employerlawyers.com>
Cc: Jesse Juarez <jj Suarez1173@sbcglobal.net>; 'David Fujimoto' <dfujimoto@unioncounsel.net>; Steve Older (E-mail) <solder1546@sbcglobal.net>; vicki.sylvia@sonicautomotive.com
Subject: Concord Toyota Writers bargain date & Info request

<<...>>

Hello and Happy Friday John,

Isn't it a great day? I just received a corrected board certification dated today. The employer has a legal obligation to bargain and provide information.

There are a numerous board charges because you decided to advice your client to engage in a lawless manner. Please provide all the requested information since March of 2020 to present and provide bargaining dates. We need to make up for lost time so please provide 5 available dates for October, November, and December. This union works 24-7 and will be happy to bargain any day of the week even after church on Sundays.

Finally, please provide the information by COB today.

Sincerely,

Jesse Juarez
Area Director of Organizing
Machinists Automotive Trades
District Lodge 190
Phone: 925 687-6421 x16
Fax: 925 685-4116

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER**DO NOT WRITE IN THIS SPACE**Case **32-CA-264162**Date Filed **08-05-2020****INSTRUCTIONS:**

File an original with NLRB Regional Director for the Region in which the alleged unfair labor practice occurred or is occurring

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer FAA Concord T, Inc., dba Concord Toyota	b. Tel. No. 925- 682-7131 c. Cell No. f. Fax No. 925-609-7613
d. Address (Street, city, state, and ZIP code) 1090 Concord Avenue Concord, CA 94520	e. Employer Representative Michael Mourelatos, GM g. e-Mail michael.mourelatos@concordtoyota.com h. Number of workers employed 8
i. Type of Establishment (factory, mine, wholesaler, etc.) Automotive Dealership	j. Identify principal product or service Automobile Sales and Service
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) In the past six months, the above-referenced Employer has refused to recognize the Union as the certified representative of the service advisors certified in 32-RC-255130.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173	
4a. Address (Street and number, city, state, and ZIP code) 1900 Bates Avenue, Suite H Concord, CA 94520-1239	4b. Tel. No. 925-687-6421 4c. Cell No. 4d. Fax No. 925-685-4116 4e. e-Mail jjuaarez1173@sbcglobal.net
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Machinists and Aerospace Workers, AFL-CIO	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	David W. M. Fujimoto, Attorney (Print/type name and title or office, if any)
Address: Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501	August 5, 2020 (date)
Tel. No. 510-337-1001 Office, if any, Cell No. Fax No. 510-337-1023 e-Mail nlrbnotices@unioncounsel.net	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**PRIVACY ACT STATEMENT**

1\1100799

Exhibit 11

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**FAA CONCORD T, INC., DBA CONCORD
TOYOTA**

Charged Party

and

**MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190, MACHINISTS
LOCAL 1173**

Charging Party

Case 32-CA-264162

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on August 5, 2020, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

JOHN P. BOGGS, ESQ.
FINE BOGGS & PERKINS LLP
80 STONE PINE ROAD
SUITE 210
HALF MOON BAY, CA 94019

MICHAEL MOURELATOS, GM
FAA CONCORD T, INC.
dba CONCORD TOYOTA
1090 CONCORD AVENUE
CONCORD, CA 94520

August 5, 2020

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FAA CONCORD T, INC., DBA CONCORD TOYOTA

and

Case 32-CA-264162

**MACHINISTS AUTOMOTIVE TRADES DISTRICT
LODGE NO. 190, MACHINISTS LOCAL 1173**

COMPLAINT AND NOTICE OF HEARING

This Complaint is based on a charge filed by Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173 (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that FAA Concord T, Inc., dba Concord Toyota (Respondent) has violated the Act as described below.

1.

(a) The charge in this proceeding was filed by the Union on August 5, 2020, and a copy was served on Respondent by U.S. mail on that same date.

2.

(a) At all material times Respondent has been a California corporation with an office and place of business located in Concord, California and is engaged in the retail sale and service of motor vehicles.

(b) In conducting its operations described above in paragraph 2(a), during a

twelve-month period ending August 5, 2020, Respondent derived gross revenues in excess of \$500,000.

(c) During the period of time described above in paragraph 2(b), Respondent purchased and materials valued in excess of \$5,000 directly from points outside the State of California.

3.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5.

At all material times, Respondent's attorney, whose name is known to Respondent, has been an agent of Respondent within the meaning of Section 2(13) of the Act.

6.

The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Service Advisors, Floater Service Advisors, Internal Advisors, Repair and Service Technicians, and Parts employees; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

7.

At all times since May 7, 2020, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

8.

By letter dated March 12, 2020, and emails dated March 18, March 27, May 15, May 28, October 9, and October 14, 2020, the Union requested and demanded that Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

9.

By email dated March 18, 2020, and continuing to date, Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

10.

By the conduct described above in paragraph 9, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

11.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Complaint. The answer must be **received by this office on or before November 2, 2020.** Respondent must serve a copy of the answer on each of the other parties. The answer must be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. Responsibility for the receipt and usability of the answer

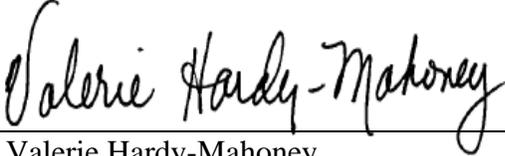
rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer 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. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on January 19, 2021, at 9:00 a.m. in a manner (video conference) or location to be determined at a later time, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Complaint. The procedures to be

followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 19th day of October 2020.



Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case 32-CA-264162

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds thereafter must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request;

and

- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Michael Mourelatos, GM
FAA Concord T, Inc.
dba Concord Toyota
1090 Concord Avenue
Concord, CA 94520

John P. Boggs, Esq.
Fine Boggs & Perkins LLP
80 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019

Jesse Juarez
Machinists Automotive Trades
District Lodge No. 190
Machinists Local 1173
1900 Bates Ave., Suite H
Concord, CA 94520-8557

David W.M. Fujimoto, Esq.
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**FAA CONCORD T, INC., DBA
CONCORD TOYOTA**

and

**MACHINISTS AUTOMOTIVE
TRADES DISTRICT LODGE NO. 190,
MACHINISTS LOCAL 1173**

Case 32-CA-264162

Date: October 19, 2020

AFFIDAVIT OF SERVICE OF COMPLAINT AND NOTICE OF HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Michael Mourelatos, GM
FAA Concord T, Inc., dba Concord Toyota
1090 Concord Avenue
Concord, CA 94520
Email: michael.mourelatos@concordtoyota.com
SERVED VIA E-ISSUANCE

John P. Boggs, Esq.
Fine Boggs & Perkins LLP
80 Stone Pine Road Suite 210
Half Moon Bay, CA 94019
Email: jboggs@employerlawyers.com
SERVED VIA E-ISSUANCE

Jesse Juarez
Machinists Automotive Trades District
Lodge No. 190, Machinists Local 1173
1900 Bates Ave., Suite H
Concord, CA 94520-8557
Email: jjjuarez1173@sbcglobal.net
SERVED VIA E-ISSUANCE

David W.M. Fujimoto, Attorney at Law
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Email: nlrbnotices@unioncounsel.net
SERVED VIA E-ISSUANCE

Davette Repola
eScribers
7227 N. 16th Street, Suite 207
Phoenix, AZ 85020
VIA E-MAIL: davette.repola@escribers.net

National Labor Relations Board
Division of Judges
901 Market Street, Suite 485
San Francisco, CA 94103
E-File

October 19, 2020

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FAA CONCORD T, INC., DBA CONCORD TOYOTA

and

Case 32-CA-264162

**MACHINISTS AUTOMOTIVE TRADES DISTRICT
LODGE NO. 190, MACHINISTS LOCAL 1173**

AMENDMENT TO COMPLAINT AND ORDER RESCHEDULING HEARING

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board, the Complaint and Notice of Hearing that issued on October 19, 2020 is amended as follows to add in a remedial paragraph after paragraph 11 of the Complaint:

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraph 9 and 10, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Amendment to Complaint. The answer must be **received by this office on or before December 29, 2020.** Respondent must serve a copy of the answer on each of the other parties. The answer must be filed electronically through the Agency's

website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. Responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer 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. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Amendment to Complaint are true.

ORDER RESCHEDULING HEARING

Pursuant to Section 102.16(a)(5) of the Board's Rules and Regulations, **IT IS HEREBY ORDERED** that the hearing in the above-captioned matter is now rescheduled to commence on March 2, 2020, at 9:00 a.m., in a manner to be determined at a later date, and on consecutive days

thereafter until concluded before an administrative law judge of the Board.

DATED AT Oakland, California this 15th day of December 2020.



Christy J. Kwon
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case 32-CA-264162

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds thereafter must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request;

and

- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Michael Mourelatos, GM
FAA Concord T, Inc.
dba Concord Toyota
1090 Concord Avenue
Concord, CA 94520

John P. Boggs, Esq.
Fine Boggs & Perkins LLP
80 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019

Jesse Juarez
Machinists Automotive Trades
District Lodge No. 190
Machinists Local 1173
1900 Bates Ave., Suite H
Concord, CA 94520-8557

David W.M. Fujimoto, Esq.
Weinberg Roger & Rosenfeld
1375 55th Street
Emeryville, CA 94608

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**FAA CONCORD T, INC., DBA
CONCORD TOYOTA**

and

**MACHINISTS AUTOMOTIVE
TRADES DISTRICT LODGE NO. 190,
MACHINISTS LOCAL 1173**

Case 32-CA-264162

Date: December 15, 2020

**AFFIDAVIT OF SERVICE OF AMENDMENT TO COMPLAINT AND ORDER
RESCHEDULING HEARING**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Michael Mourelatos, GM
FAA Concord T, Inc., dba Concord Toyota
1090 Concord Avenue
Concord, CA 94520
Email: michael.mourelatos@concordtoyota.com
SERVED VIA E-ISSUANCE

John P. Boggs, Esq.
Fine Boggs & Perkins LLP
80 Stone Pine Road Suite 210
Half Moon Bay, CA 94019
Email: jboggs@employerlawyers.com
SERVED VIA E-ISSUANCE

Jesse Juarez
Machinists Automotive Trades District
Lodge No. 190, Machinists Local 1173
1900 Bates Ave., Suite H
Concord, CA 94520-8557
Email: jjuaraz1173@sbcglobal.net
SERVED VIA E-ISSUANCE

David W.M. Fujimoto, Esq.
Weinberg Roger & Rosenfeld
1375 55th Street
Emeryville, CA 94608
Email: nlrbotices@unioncounsel.net
SERVED VIA E-ISSUANCE

Davette Repola
eScribers
7227 N. 16th Street, Suite 207
Phoenix, AZ 85020
VIA E-MAIL: davette.repola@escribers.net

National Labor Relations Board
Division of Judges
901 Market Street, Suite 485
San Francisco, CA 94103
E-File

December 14, 2020

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FAA CONCORD T, INC., DBA CONCORD TOYOTA

Case 32-CA-264162

**MACHINISTS AUTOMOTIVE TRADES DISTRICT
LODGE NO. 190, MACHINISTS LOCAL 1173**
Charging Party

ANSWER TO COMPLAINT

Pursuant to Section 102.20 of the Rules and Regulations of the National Labor Relations Board (“Board”), and by and through counsel, FAA CONCORD T, INC., DBA CONCORD TOYOTA (“Respondent”) answers the Complaint in this matter (“Complaint”), as follows. Respondent reserves the right to seek to amend or supplement this Answer, as may become appropriate at a later date.

GENERAL DENIAL

Except as otherwise expressly stated herein, Respondent denies each and every allegation contained in the Complaint, including, without limitation, any allegations contained in the preamble, headings, or subheadings of the Complaint, and Respondent specifically denies that it violated the National Labor Relations Act (“NLRA”) in any of the manners alleged in the Complaint or in any other manner. Pursuant to Section 102.20 of the Board’s rules, averments in the Complaint to which no responsive pleading is required shall be deemed as denied.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof, persuasion or production not otherwise legally assigned to it as to any element of the claims alleged in the Complaint, Respondent asserts the following defenses.

FIRST AFFIRMATIVE DEFENSE

The Union is not the lawful, exclusive bargaining representative of the Unit as the Unit is not a proper unit pursuant to Section 9 of the NLRA (the "Act")

SECOND AFFIRMATIVE DEFENSE

Respondent has not violated Section 8(a)(1) and/or (5) of the Act as alleged and has not unlawfully refused to bargain with a lawful, exclusive bargaining representative of the Unit.

THIRD AFFIRMATIVE DEFENSE

The Unit is not a proper unit under the Act as Petitioner Machinists Union has cherry-picked just some of a functionally-integrated group of Service Department employees to vote in an election and has left other employees out of the Unit that should have been included.

FOURTH AFFIRMATIVE DEFENSE

All actions set forth in the Complaint which the Charging Party and the Board allege that the Respondent carried out in violation of the Section 8 of the National Labor Relations Act were carried out by the Respondent for lawful business reasons and justifications under the Act.

FIFTH AFFIRMATIVE DEFENSE

The Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.

SIXTH AFFIRMATIVE DEFENSE

The proposed addition to the Unit does not share a sufficient community of interest with the existing unit of technicians and/or other blue-collar teamsters, and instead shares a stronger community of interest with the employees excluded from the Unit.

SEVENTH AFFIRMATIVE DEFENSE

The Internal (Used Car) Advisor does not share a community of interest with the Service Advisors, and instead shares a stronger community of interest with the employees excluded from the Unit.

EIGHTH AFFIRMATIVE DEFENSE

The petitioned-for unit fails as an appropriate unit because the Union seeks to add white-collar sales employees to the existing Machinists Unit and as such do not share a community of interest with the technicians and/or parts advisors, but instead only share a loose functional integration because they are all part of the Service Department.

NINTH AFFIRMATIVE DEFENSE

The distinct community of interests shared between the petitioned for unit and the remnant employees (Cashiers, Receptionist and a Warranty Administrator) is so strong, that the community of interests between the petitioned-for unit and the remnant employees outweighs any similarities and/or functional integration between the petitioned-for employees and the existing service and parts technicians.

TENTH AFFIRMATIVE DEFENSE

The decision in *The Boeing Company*, 368 NLRB No. 67 (2019) (*Boeing*) makes the certified unit improper.

Respondent reserves the right to raise any additional defenses not asserted herein of which they may become aware through investigation, as may be appropriate at a later time.

RESPONSE TO SPECIFIC ALLEGATIONS OF COMPLAINT

COMES NOW, incorporating the foregoing, Respondent states as follows in response to the specific allegations of the Complaint:

Preamble: Respondent denies each and every allegation, and all of them, contained in the preamble, except to admit that Machinists and Mechanics Local 11732, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO ("Union") has filed a charge alleging that Respondent has engaged in certain unfair labor practices prohibited by the NLRA, and that the NLRB, through its Regional Director, has issued a Complaint in the above-captioned case based upon the Union's charges.

1. (a) Respondent lacks information and knowledge sufficient to form a belief as to the allegations of this paragraph except to admit that soon after August 5, 2020 it received a Charge in case 32-CA-264162.
2. (a) Respondent admits the allegations of this paragraph.
(b) Respondent admits the allegations of this paragraph.
(c) Respondent admits the allegations of this paragraph.
3. Respondent admits the allegations of this paragraph.
4. Respondent admits the allegations of this paragraph.

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///

///

5. The first sentence of Paragraph 5 states legal conclusions for which no answer is required. As to the remaining allegations in Paragraph 5, Respondent admits that the attorney is or was an agent for certain limited purposes and not a general agent with plenary authority.
6. Respondent denies all the allegations, and each of them individually, of this paragraph, including subparts, in that Respondent avers that the Unit does not constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
7. Paragraph 7 states a legal conclusion for which no answer is required, and on that basis denies the allegations. Respondent denies that the Union has been the lawful exclusive bargaining representative of the Unit in that the Unit is not a proper Unit under the Act.
8. Respondent admits the allegations of this paragraph but denies that the Union is the lawful bargaining representative.
9. Respondent denies all the allegations, and each of them individually, of this paragraph other than to admit that Respondent has refused to bargain with the Union as Respondent challenges that the Union is the lawful bargaining agent and that the unit is not an appropriate unit.
10. Respondent denies all the allegations, and each of them individually, of this paragraph other than to admit that Respondent has refused to bargain with the Union as Respondent challenges that the Union is the lawful bargaining agent and that the unit is not an appropriate unit.

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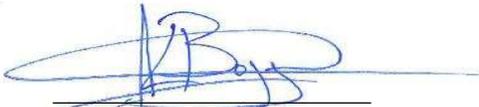
11. Paragraph 11 states a legal conclusion for which no answer is required, and on that basis denies the allegations.

Prayer for Relief (Remedies Sought): Respondent denies that the Union or the Employees are entitled to any relief on any allegation and/or charge stated in the Complaint. Respondent further denies that the NLRB is entitled to the remedies sought.

CONCLUSION

BASED THEREON, Respondent respectfully requests that the Complaint be dismissed in its entirety, and that Respondent be awarded such other relief as is just and proper.

Respectfully Submitted,



John P. Boggs
FINE, BOGGS & PERKINS, LLP

Dated: November 1, 2020

AFFIDAVIT OF SERVICE OF ANSWER TO COMPLAINT

I, Kathryn M. Cherry, hereby declare and state:

I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 16870 West Bernardo Drive, Suite 360, San Diego, California 92127. My email address is kcherry@employerlawyers.com. I am not a party to the cause, and I am over the age of eighteen years.

On November 2, 2020, I caused to be served the following document(s):

ANSWER TO COMPLAINT

on the interested parties in this action by addressing true copies thereof as follows:

- BY MAIL:** I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.
- BY ELECTRONIC SERVICE:** by electronically mailing a true and correct copy through Fine, Boggs & Perkins' electronic mail system from kcherry@employerlawyers.com to the email addresses set forth below.

Jesse Juarez
Machinists Automotive Trades
District Lodge No. 190
Machinists Local 1173
1900 Bates Ave., Suite H
Concord, CA 94520-8557
VIA ELECTRONIC SERVICE
jj Suarez1173@sbcglobal.net

David W.M. Fujimoto, Esq.
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
VIA ELECTRONIC SERVICE
dfujimoto@unioncounsel.net
nlr notices@unioncounsel.net

National Labor Relations Board
Division of Judges
901 Market Street, Suite 485
San Francisco, CA 94103
E-FILE

I certify under penalty of perjury that the above is true and correct. Executed at San Diego, California on November 2, 2020.

/s/ Kathryn M. Cherry
Kathryn M. Cherry
Fine, Boggs & Perkins LLP
16870 W. Bernardo Drive, Suite 360
San Diego, CA 92127
Tel: (858) 451-1240 // Fax: (858) 451-1241
kcherry@employerlawyers.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FAA CONCORD T, INC., DBA CONCORD TOYOTA

Case 32-CA-264162

**MACHINISTS AUTOMOTIVE TRADES DISTRICT
LODGE NO. 190, MACHINISTS LOCAL 1173**
Charging Party

ANSWER TO AMENDED COMPLAINT

Pursuant to Section 102.20 of the Rules and Regulations of the National Labor Relations Board (“Board”), and by and through counsel, FAA CONCORD T, INC., DBA CONCORD TOYOTA (“Respondent”) answers the Amended Complaint in this matter (“Amended Complaint”), as follows. Respondent reserves the right to seek to amend or supplement this Answer, as may become appropriate at a later date.

GENERAL DENIAL

Except as otherwise expressly stated herein, Respondent denies each and every allegation contained in the Amended Complaint, including, without limitation, any allegations contained in the preamble, headings, or subheadings of the Amended Complaint, and Respondent specifically denies that it violated the National Labor Relations Act (“NLRA”) in any of the manners alleged in the Amended Complaint or in any other manner. Pursuant to Section 102.20 of the Board’s rules, averments in the Amended Complaint to which no responsive pleading is required shall be deemed as denied.

Exhibit 13b

AFFIRMATIVE DEFENSES

Without assuming any burden of proof, persuasion or production not otherwise legally assigned to it as to any element of the claims alleged in the Amended Complaint, Respondent asserts the following defenses.

FIRST AFFIRMATIVE DEFENSE

The Union is not the lawful, exclusive bargaining representative of the Unit as the Unit is not a proper unit pursuant to Section 9 of the NLRA (the "Act")

SECOND AFFIRMATIVE DEFENSE

Respondent has not violated Section 8(a)(1) and/or (5) of the Act as alleged and has not unlawfully refused to bargain with a lawful, exclusive bargaining representative of the Unit.

THIRD AFFIRMATIVE DEFENSE

The Unit is not a proper unit under the Act as Petitioner Machinists Union has cherry-picked just some of a functionally-integrated group of Service Department employees to vote in an election and has left other employees out of the Unit that should have been included.

FOURTH AFFIRMATIVE DEFENSE

All actions set forth in the Amended Complaint which the Charging Party and the Board allege that the Respondent carried out in violation of the Section 8 of the National Labor Relations Act were carried out by the Respondent for lawful business reasons and justifications under the Act.

FIFTH AFFIRMATIVE DEFENSE

The Amended Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.

SIXTH AFFIRMATIVE DEFENSE

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NINTH AFFIRMATIVE DEFENSE

The distinct community of interests shared between the petitioned for unit and the remnant employees (Cashiers, Receptionist and a Warranty Administrator) is so strong, that the community of interests between the petitioned-for unit and the remnant employees outweighs any similarities and/or functional integration between the petitioned-for employees and the existing service and parts technicians.

TENTH AFFIRMATIVE DEFENSE

The decision in *The Boeing Company*, 368 NLRB No. 67 (2019) (*Boeing*) makes the certified unit improper.

ELEVENTH AFFIRMATIVE DEFENSE

The request that the Board extend the certification year pursuant to Mar-Jac Poultry Co., 136 NLRB 785 (1962), is inappropriate where, as here, the underlying representation proceeding involved a self-determination election. *See* *Winkie Mfg. Co.*, 338 NLRB 787, 788 fn. 3 (2003), *affd.* 348 F.3d 254 (7th Cir. 2003); *White Cap, Inc.*, 323 NLRB 477, 478 fn. 3 (1997) (citing cases).

Respondent reserves the right to raise any additional defenses not asserted herein of which they may become aware through investigation, as may be appropriate at a later time.

RESPONSE TO SPECIFIC ALLEGATIONS OF AMENDED COMPLAINT

COMES NOW, incorporating the foregoing, Respondent states as follows in response to the specific allegations of the Amended Complaint:

Preamble: Respondent denies each and every allegation, and all of them, contained in the preamble, except to admit that Machinists and Mechanics Local 11732, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO (“Union”) has filed a charge alleging that Respondent has engaged in certain unfair labor practices prohibited by the NLRA, and that the NLRB, through its Regional Director, has issued a Complaint in the above-captioned case based upon the Union’s charges.

1. (a) Respondent lacks information and knowledge sufficient to form a belief as to the allegations of this paragraph except to admit that soon after August 5, 2020 it received a Charge in case 32-CA-264162.
2. (a) Respondent admits the allegations of this paragraph.
(b) Respondent admits the allegations of this paragraph.
(c) Respondent admits the allegations of this paragraph.
3. Respondent admits the allegations of this paragraph.
4. Respondent admits the allegations of this paragraph.
5. The first sentence of Paragraph 5 states legal conclusions for which no answer is required. As to the remaining allegations in Paragraph 5, Respondent admits that the attorney is or was an agent for certain limited purposes and not a general agent with plenary authority.
6. Respondent denies all the allegations, and each of them individually, of this paragraph, including subparts, in that Respondent avers that the Unit does not constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
7. Paragraph 7 states a legal conclusion for which no answer is required, and on that basis denies the allegations. Respondent denies that the Union has been the lawful exclusive bargaining representative of the Unit in that the Unit is not a proper Unit under the Act.
8. Respondent admits the allegations of this paragraph but denies that the Union is the lawful bargaining representative.

9. Respondent denies all the allegations, and each of them individually, of this paragraph other than to admit that Respondent has refused to bargain with the Union as Respondent challenges that the Union is the lawful bargaining agent and that the unit is not an appropriate unit.
10. Respondent denies all the allegations, and each of them individually, of this paragraph other than to admit that Respondent has refused to bargain with the Union as Respondent challenges that the Union is the lawful bargaining agent and that the unit is not an appropriate unit.
11. Paragraph 11 states a legal conclusion for which no answer is required, and on that basis denies the allegations.

Prayer for Relief (Remedies Sought): Respondent denies that the Union or the Employees are entitled to any relief on any allegation and/or charge stated in the Amended Complaint. Respondent further denies that the employees, the Union, and/or the NLRB are entitled to an order pursuant to Mar-Jac Poultry Co., 136 NLRB 785 (1962), as such a remedy is inappropriate where, as here, the underlying representation proceeding involves a self-determination election. *See* Winkie Mfg. Co., 338 NLRB 787, 788 fn. 3 (2003), *affd.* 348 F.3d 254 (7th Cir. 2003); White Cap, Inc., 323 NLRB 477, 478 fn. 3 (1997) (citing cases). Respondent further denies that the NLRB is entitled to the remedies sought.

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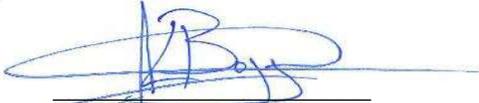
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CONCLUSION

BASED THEREON, Respondent respectfully requests that the Amended Complaint be dismissed in its entirety, and that Respondent be awarded such other relief as is just and proper.

Respectfully Submitted,



John P. Boggs
FINE, BOGGS & PERKINS, LLP

Dated: December 29, 2020

AFFIDAVIT OF SERVICE OF ANSWER TO AMENDED COMPLAINT

I, Kathryn M. Cherry, hereby declare and state:

I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 16870 West Bernardo Drive, Suite 360, San Diego, California 92127. My email address is kcherry@employerlawyers.com. I am not a party to the cause, and I am over the age of eighteen years.

On December 29, 2020, I caused to be served the following document(s):

ANSWER TO AMENDED COMPLAINT

on the interested parties in this action by addressing true copies thereof as follows:

- BY MAIL:** I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.
- BY ELECTRONIC SERVICE:** by electronically mailing a true and correct copy through Fine, Boggs & Perkins' electronic mail system from kcherry@employerlawyers.com to the email addresses set forth below.

Jesse Juarez
Machinists Automotive Trades
District Lodge No. 190
Machinists Local 1173
1900 Bates Ave., Suite H
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David W.M. Fujimoto, Esq.
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VIA ELECTRONIC SERVICE
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nlr notices@unioncounsel.net

National Labor Relations Board
Division of Judges
901 Market Street, Suite 485
San Francisco, CA 94103
E-FILE

I certify under penalty of perjury that the above is true and correct. Executed at San Diego, California on December 29, 2020.

/s/ Kathryn M. Cherry
Kathryn M. Cherry
Fine, Boggs & Perkins LLP
16870 W. Bernardo Drive, Suite 360
San Diego, CA 92127
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kcherry@employerlawyers.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FAA CONCORD T, INC., DBA CONCORD TOYOTA

and

**MACHINISTS AUTOMOTIVE TRADES DISTRICT
LODGE NO. 190, MACHINISTS LOCAL 1173**

Case 32-CA-264162

Date: January 6, 2021

**AFFIDAVIT OF SERVICE OF MOTION FOR SUMMARY JUDGMENT ON TEST OF
CERTIFICATION SECTION 8(a)(5) AND REQUEST FOR ISSUANCE
OF DECISION AND ORDER**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Michael Mourelatos, GM
FAA Concord T, Inc., dba Concord Toyota
1090 Concord Avenue
Concord, CA 94520
Email: michael.mourelatos@concordtoyota.com
SERVED VIA E-ISSUANCE

John P. Boggs, Esq.
Fine Boggs & Perkins LLP
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Half Moon Bay, CA 94019
Email: jboggs@employerlawyers.com
SERVED VIA E-ISSUANCE

Jesse Juarez
Machinists Automotive Trades District
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SERVED VIA E-ISSUANCE

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Weinberg Roger & Rosenfeld
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Email: nlrbotices@unioncounsel.net
SERVED VIA E-ISSUANCE

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
VIA E-FILE

January 6, 2021

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam