UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CLARKE POWER SERVICES, INC.

Employer

and — Case 9-RD-2134

KYLE HINKLE, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO [1]/

Union

<u>REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION</u>

I. INTRODUCTION

The Employer repairs truck engines at various facilities located throughout the United States, including facilities in Cincinnati and Medway, Ohio, the only facilities involved in this proceeding. The Employer and the Union have had a collective-bargaining relationship for over 10 years which has resulted in successive collective-bargaining agreements, the most recent of which is effective by its terms from March 22, 2004 through March 18, 2007. The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to have a representation election conducted in the bargaining unit set forth in the "Voluntary Recognition Agreement" between the Employer and the Union. That agreement describes the bargaining unit as: "[M]echanics, fabricators, welders, utility men, mechanic trainees, partsmen, shipping & receiving, clerks, wranglers, customer support representatives and janitors employed by Clarke Detroit Diesel at US Xpress Leasing, at 55 Victory Safety Lane, Medway, Oh 45341 which the parties further agree constitutes an appropriate bargaining unit for the purposes of collective-bargaining." The Union, contrary to the Employer and Petitioner, asserts that the contractually defined bargaining unit is not appropriate for conducting an election because it does not include employees at the Employer's Cincinnati, Ohio facility.

[1]/ The name of the Union appears as amended at the hearing.

A hearing officer of the Board conducted a hearing and thereafter the parties filed briefs with me. [2] Based on the record and the briefs of the parties, the only issue for me to resolve is whether the unit sought to be decertified is co-extensive with the voluntarily recognized or certified unit, and thus is the appropriate bargaining unit in which to conduct an election. [3] Having considered the evidence and arguments presented by the parties, I find, for the reasons discussed in detail below, that the unit described in the petition is co-extensive with the voluntarily recognized unit and constitutes a unit appropriate for purposes of collective bargaining and I will direct an election. According to the record testimony the unit consists of two employees.

In reaching my determination on the issues, I have carefully considered the record evidence and the arguments made by the parties at the hearing and in their post-hearing briefs. To provide a context for my discussion of the issues, I will first provide a brief overview of the Employer's operation. I will then discuss and analyze the facts and legal precedent supporting my conclusions.

II. THE EMPLOYER'S OPERATIONS

Bargaining History:

As noted above, the Employer is engaged in the business of repairing truck engines at its various shops located throughout the United States, including the Cincinnati and Medway, Ohio facilities, which are separated by a distance of 55 miles. The Employer and the Union have a bargaining history at the Cincinnati facility in excess of 10 years. The current agreement between them covering the employees at the Cincinnati facility describes the bargaining unit as:

> "[A]ll mechanics, mechanic trainees, partsmen, shipping and receiving clerks, wranglers, customer support representatives and janitors of the Employer at its Cincinnati, Ohio establishment, 3133 East Kemper Rd., or a new location in case the establishment moves their plant to a point within a radius of 25 miles from said establishment, or within the Cincinnati Commercial Zone as outlined on the 1977 Cincinnati Chamber of Commerce Map, whichever is greater, but excluding all sales employees, office clerical employees, vocational co-op students, and all professional employees, guards, and supervisors as defined in the Act."

[2] The Petitioner did not submit a brief.

[3] At the hearing, the Union asserted that the Petitioner, Kyle Hinkle, was a supervisor within the meaning of the Act. However, the Union declined the hearing officer's request to present any evidence in support of its position. It is well settled that proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). Because the Union failed to submit any evidence bearing on Hinkle's asserted supervisory status there is no basis for excluding him from the unit described in the petition.

On February 13, 2003, the Employer and the Union entered into a "Voluntary Recognition Agreement" for employees at the Medway location. The unit as described in the agreement is:

> "[A]ll mechanics, fabricators, welders, utility men, mechanic trainees, partsmen, shipping and receiving, clerks, wranglers, customer support representatives and janitors employed by Clarke Detroit Diesel at US Xpress Leasing, at 55 Victory Safety Lane, Medway, OH 45341 which the parties further agree constitutes an appropriate bargaining unit for the purpose of collective-bargaining."

The parties stipulated at the hearing that during negotiations for the current collective-bargaining agreement covering the Cincinnati facility, the Union proposed to amend the recognition clause of that agreement to include all satellite locations in the "Tri-State area." However, according to the parties' stipulation, the Employer rejected the Union's proposed amendment to the recognition clause, noting that the issue was a matter of permissive bargaining. Thus, the parties did not agree to change the scope of the Cincinnati bargaining unit.

<u>Interrelationship Between the Cincinnati and Medway Units</u>:

The record reveals that employees from the Cincinnati bargaining unit occasionally performed work at the Medway location on an infrequent, as needed, basis. The last such instance occurred about 8 months prior to the hearing when Cincinnati employees were assigned to Medway to assist with an unusually heavy workload for a day or two. The record reflects that these short-term, episodic assignments of Cincinnati employees to the Medway location have occurred for the past 6 years. During these temporary assignments, the Cincinnati bargaining unit employees working at the Medway location keep their Cincinnati seniority. Additionally, the two employees who are permanently employed at the Medway location are listed on the Cincinnati seniority list and have the ability to bump back to positions in the Cincinnati unit if they transfer from the Medway location.

The record evidence establishes that the Cincinnati and Medway employees receive the same wages and benefits under the terms of the Cincinnati agreement, except that the Medway employees receive a $1 hourly off-site premium for performing additional duties, including parts and warranty work. The basis for this additional compensation is described in the Cincinnati agreement as follows:

> "<u>Field Service or Off-Site Work</u>. Bargaining Unit Employees (except for Leadmen) while performing Field Service or Off-Site work, will receive a $1.00 per hour premium, except when assisting a regular Field Serviceman."

In addition to the few Cincinnati employees occasionally working at Medway, the record discloses that the Petitioner, Kyle Hinkle, "very often" talks by telephone with Cincinnati bargaining unit employee, Cliff Grigsby, on "parts" issues. However, there is no other evidence regarding how they speak with another or the nature of these discussions.

III. THE LAW AND ITS APPLICATION

It is well settled that the appropriate unit for a decertification election is co-extensive with the recognized or certified bargaining unit. *Campbell Soup Co.*, 111 NLRB 234 (1955); see also, *Delta Mills*, 287 NLRB 367, 368 (1987); *Arrow Uniform Rental*, 300 NLRB 246 (1990). Thus, as a general rule, "a decertification petition for a single-facility location will be dismissed if that location's bargaining history has occurred within a *multilocation* unit of the employer's employees for more than a year." *Arrow Uniform*, supra, (citations omitted).

The parties have a defined bargaining unit at the Cincinnati location as evidenced by successive collective-bargaining agreements, including the current agreement expiring on March 18, 2007. It is clear by the terms of the "Voluntary Recognition Agreement," that the parties have established a separate bargaining unit for Medway which is clearly confined to that location. Similarly, the Cincinnati agreement's recognition clause limits the scope of the unit to that facility. Although there are occasional personal contacts between employees of the Cincinnati and Medway operations, as well as regular telephonic contact, there is no evidence that the parties agreed to treat or merge the two locations as a single, multi-location bargaining unit.

Accordingly, I find the recognition provisions of the respective collective-bargaining agreements are sufficient to establish that these are single location units and that the petition seeking a decertification election at the Medway facility is, in fact, co-extensive with the certified or voluntarily recognized unit at that location. In reaching this conclusion, I note that the clear and unequivocal language contained in each agreement establishes the parties' intent to create separate bargaining units. Even assuming, arguendo, that the respective recognition clauses are vague and susceptible to more than one interpretation, the conduct of the parties during bargaining establishes the parties viewed the Cincinnati and Medway locations as separate bargaining units. In this regard, the Union's proposal to amend the Cincinnati recognition provision during the last negotiations by adding "satellite" locations to that agreement was summarily rejected by the Employer.

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in their briefs, I conclude that the Medway bargaining unit is co-extensive with the bargaining unit voluntarily recognized by the Employer and is an appropriate unit in which to hold a decertification election.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the above discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims that the Union does not represent a majority of unit employees.

5. 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.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All mechanics, fabricators, welders, utility men, mechanic trainees, partsmen, shipping and receiving, clerks, wranglers, customer support representatives and janitors employed by Clarke Detroit Diesel at US Xpress Leasing, at 55 Victory Safety Lane, Medway, OH 45341.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote on whether they wish to be represented for purposes of collective bargaining by International Association of Machinists and Aerospace Workers, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any 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 which commenced less then 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.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **March 27, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, **www.nlrb.gov**, [4]/ by mail, or by facsimile transmission at (513) 684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice.

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[4]/ To file the list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional**, **Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.

Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received in Washington by **April 3, 2007**. The request may be filed electronically through E-Gov on the Board's web site, www.nlrb.gov, [5]/ but may not be filed by facsimile.

DATED: March 20, 2007

/s/ Gary W. Muffley, Regional Director

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177-8560-8000

[5]/ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.