

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

STERICYCLE, INC.,

Employer,

and

TEAMSTERS LOCAL 174, affiliated  
with the INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,

Petitioner.

Case: 19-RC-088671

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**TEAMSTERS LOCAL 174'S RESPONSE  
TO EMPLOYER'S REQUEST FOR REVIEW**

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## I. INTRODUCTION

On October 31, 2012, employer Stericycle, Inc. and Stericycle of Washington, Inc., a single employer, (“Employer”) filed a Request for Review challenging Regional Director, Ronald Hook’s, October 17, 2012 decision (“Decision”) finding that the unit petitioned-for by Teamsters Local 174 (“Union”) is appropriate, and directing an election.

The Union seeks to represent all full and part-time drivers employed out of the Employer’s facility located in Kent, Washington. The Employer originally sought to expand the unit to include all of its employees based out of Washington, Oregon, Idaho, and Montana, including other drivers, biosystems techs, dispatchers, plant workers, and other administrative employees. The Regional Director found that the Employer failed to meet its burden of demonstrating that the employees in the petitioned-for unit share an overwhelming community of interest with the employees sought to be included by the Employer. The Regional Director also found that the Employer had failed to rebut the presumption that the single facility Kent unit of drivers was applicable.

The Employer now seeks to redefine the unit to include all route drivers and long-haul drivers employed in Washington, including drivers out of the Woodinville, Spokane, and Pasco facilities, as well as drivers based out of Montana and dispatchers based in the Kent, Washington facility – a unit it describes as the “Washington/Montana Drivers & Dispatchers unit.” The Employer argues that review is necessary because the Regional Director’s decision is “clearly erroneous” on “substantial factual issues” and that those errors prejudicially affect the rights of the parties.

No compelling reasons exist for reviewing the Regional Director's decision and the Employer's Request for Review should be denied.

## II. ARGUMENT

### A. No Compelling Reasons Exist For Granting The Petition For Review.

29 C.F.R. 102.67 limits the Board's jurisdiction to review Regional Directors' Decisions in representation cases to certain circumstances, including when a decision involves (a) a substantial question of law or policy, (b) a clearly erroneous decision on a factual issue, (c) prejudicial procedural errors, or (d) a compelling reason to reconsider an important Board rule or policy. None of those circumstances are met here and review of the Regional Director's DDE must be denied.

The Employer argues that the Regional Director made a clearly erroneous decision on a substantial factual issue by not finding that the *only* appropriate unit was a unit of all drivers and dispatchers located in Stericycle's Washington and Montana facilities. The Employer itself *invited* the Regional Director to make this supposed mistake in its post-hearing brief, where it failed to argue that the only appropriate unit was what it now describes as the Washington/Montana Drivers & Dispatchers Unit, or indeed that such a unit would be appropriate at all. In its post-hearing brief, the Employer instead argued that the only appropriate unit was a unit of all employees in the "Old District 96," including Washington, Oregon, Idaho, and Montana. The Employer's failure to argue its current legal theory before issuance of the DDE precludes it from raising it for the first time in a petition for review.

A petition for review is not a chance for a party to take a second bite at the apple by relitigating an argument it has already lost. Much less is it the opportunity for a party to try out a

new argument that it did not assert. The purpose of a petition for review is to correct decisions made in error. Here, the Employer faults the Regional Director for failing to adopt a legal theory it never even argued or briefed. Regional Directors cannot and should not be expected to anticipate and refute every single collateral argument that could later be launched against their decisions, drafting DDEs that address the appropriateness (or inappropriateness) of hypothetical units neither party advocates. Granting review under these circumstances would be inappropriate and contrary to the policy of judicial economy. See *Wisconsin Bell, Inc.*, 346 NLRB 62, 67 (2005) (Board found that when a party failed to raise its affirmative defense that the claim should have been deferred to arbitration before the Administrative Law Judge, the argument had been waived); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738-39 (1998) (“This argument suffers from the legally fatal problem that it makes its first appearance here in this Court ... Thus, we believe these other claims that the Sierra Club now raises are not fairly presented here, and we cannot consider them.”).

Review must also be denied because while the Employer urges the Board to take the case to remedy a “clearly erroneous” factual determination, it is apparent that what the Employer is really unhappy with is the Regional Director’s legal conclusions. The heart of the Employer’s basis for appeal is the Regional Director’s conclusion that the presumption in favor of a single-facility unit was not overcome. Pet. for Rev., p. 3. However, this is an alleged *legal* error, not a factual error.

To support its argument, the Employer highlights a number of legal conclusions in the DDE that it would have resolved differently, such as that the Regional Director “placed too much weight on this particular lack of interchange and contact.” Pet. for Rev. at p. 5. Because the

Employer has not pointed to any “clearly erroneous” resolution of a substantial factual issue, and instead takes issue with the Regional Director’s legal conclusions, review must be denied.

**B. The Regional Director Correctly Applied The Single Facility Presumption To Determine That A Unit Comprised Of All Drivers Based In The Kent Facility Is Appropriate.**

The Board has long held that a single location unit is presumptively appropriate for collective bargaining. *D&L Transportation*, 324 NLRB 160 (1997). This presumption may be overcome by a showing of functional integration “so substantial as to negate the identity of the single facility.” *Bowie Hall Trucking*, 290 NLRB 41, 41 (1988). The presumption applies even where a single facility unit does not include all classifications that work out of that facility. *See Courier Dispatch Group*, 311 NLRB 728, 731 (1993) (finding that single facility presumption had not been rebutted in unit limited to drivers out of a single facility).

The Regional Director in this case considered several factors before arriving at his conclusion that the single facility presumption was applicable: (1) the degree of control over daily operations, (2) similarity in employee functions, skills, and working conditions, (3) interchange, (4) bargaining history, (5) distance between facilities. After considering all of the evidence adduced at trial, the Regional Director correctly found that the Kent, Washington facility *had not* been so integrated with other Stericycle facilities as to lose its separate identity, and that a single location unit of Kent-based drivers was appropriate.

**1. Control over daily operations**

The Employer has not demonstrated that the drivers it would add to the unit are subject to the same common daily supervision as the Kent drivers to such an extent that it would negate the single facility presumption. The Regional Director correctly found that the Employer failed to

meet its burden of presenting “affirmative evidence establishing a lack of autonomy.” *Courier Dispatch Group, Inc.*, 311 NLRB 728 (1993). Instead, the evidence at hearing suggests that the drivers at other facilities are subject to different daily common supervision, and the drivers at the Kent facility are subject to a higher level of control and supervision.

Mike Lewis testified that Stericycle has appointed “Route Manager Leads” in some of the remote facilities. The leads are tasked with ensuring drivers maintain their equipment, follow procedures, show up for work, maintain a good appearance, and other general supervisory duties. Testimony at hearing suggested the leads exercise independent judgment in determining whether the issuance of discipline is appropriate, and communicate their recommendations to Mike Lewis for him to act on.

Additionally, while the remote drivers fall under the ultimate authority of Mike Lewis, there are significant differences in the level of common daily supervision to which they are subject. For instance, the remote drivers are debriefed by telephone since they do not actually see the dispatchers or Mike Lewis on a daily basis. Mike Lewis testified that he holds morning and afternoon “tailgate meetings” with the remote drivers by telephone rather than in person, as he does with the Kent drivers, because of their geographic separation.

These differences in common day-to-day supervision are particularly important and strongly support a single location unit because the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location.” *Frontier Telephone of Rochester, Inc. and Communications Workers of America*, 344 NLRB 153 (2005). Here, the Kent drivers are likely

to have different concerns arising out of the fact that they have a different level of day to day supervision from Mike Lewis.

## **2. Employee functions, skills, and working conditions**

The Regional Director identified several differences in the functions, skills, and working conditions of the Kent drivers and the remote drivers; however, there are several more which the DDE did not address in detail, but which mitigate against rebutting the single facility presumption. The Montana drivers perform certain functions and use certain equipment, which the Kent drivers do not. For instance, only the Montana drivers are required to maintain a Class A commercial driver's license. The Montana drivers drive a type of vehicle the Kent drivers do not use – they are required to pull a “double,” the equivalent of a large horse trailer pulled behind their truck and used to collect extra waste.

Differences in equipment used by the drivers in the Kent facility only supports applying the single facility presumption. The Kent drivers are the only drivers assigned to work in a warehouse as part of their regularly scheduled work assignment. On those days, they use a forklift and perform miscellaneous jobs like assembling office furniture. While all of the drivers use PDTs (personal data devices used to track the drivers' pick-ups and their routes and also to click in and out for breaks while on the road), only the Kent drivers leave them at work, as the remote drivers do not have a designated driver room in which to take them. The drivers out of Billings and Roseburg are required to maintain home docking stations for their PDTs, which they use in order to upload their daily route sheets. The Kent drivers are also the only drivers who use time clocks – other drivers clock in and out at the beginning and end of their shift using their PDT devices.

Differences in the Kent and the remote drivers' working facilities is also a significant difference in working conditions that weighs in favor of a single facility unit. The Woodinville drivers the Employer would include start their day in what is actually Ryder Truck service area, and there are various Ryder facilities located on the premises, such as a wash bay, work bays, a Ryder office area, a Ryder sales office, and several Ryder employees on the premises. Woodinville driver, Scott Geoghegan, testified that the Kent facility is considered by drivers to be the most desirable of the various transportation hubs because it has more comforts, such as a lunch room, whereas the remote drivers are largely limited to working out of their trucks and have no reliable access to an office. Unlike the other drivers the Employer would include, only the Kent drivers change into their uniform at a Stericycle facility before starting their workday. The Ryder Woodinville facility has a locker room available to the drivers, but the drivers only have keys to the room in the afternoon, so they are not able to change into their uniform at work in the same way as the Kent drivers.

### **3. Interchange**

The Employer acknowledges that "there is only a modest amount of interchange," but argues that the Regional Director placed too much weight on this lack of interchange. The proper weight given to the lack of interchange is a legal determination, not a "clearly erroneous" factual determination. Given the extremely limited amount of interchange, and the importance of the interchange factor to the single facility analysis, the Employer is incorrect in its claim that the Regional Director gave it improper weight.

As the Board has explained, "infrequent and limited interchange does not preclude a finding that the petitioned-for unit had a distinct community of interest." *DTG Operations, Inc.*

*and Teamsters Local Union No. 455*, 357 NLRB 175, 7 (2011). The Board has found interchange sufficient to require the inclusion of additional employees where “the employees *regularly* overlap and interchange duties.” *United Rentals, Inc. and Laborers’ Local 886*, 341 NLRB No. 72 (2004) (emphasis added). In *United Rentals*, the Board found that the interchange amongst petitioned-for employees and those the Employer sought to add were significant enough to warrant including the additional employees in the unit because “the Employer relies on everyone to ‘pitch in’ to do various types of jobs, despite their designated classification. Employees therefore perform the duties of different classifications everyday.” *Id.* at 540.

The interchange that occurs here comes nowhere near this level. Far from crossing over on a daily basis, the Kent drivers only occasionally drive stops normally assigned to other drivers, and even when they do, the Kent drivers still begin and end their day at the Kent facility. The evidence the Employer submitted makes abundantly clear that it is extremely rare for drivers from the different facilities to cover for one another. Between July 1, 2012 – September 19, 2012, there were only 22 instances in which *any* Stericycle drivers covered routes not normally assigned to their base facilities, and just 13 instances in which drivers from Kent covered routes from other transportation hubs. This is an infinitesimal amount of interchange, totaling just one percent of the total routes driven.

More importantly, in every single employer-provided example of a Kent driver covering a route normally assigned to another hub, the drivers started and ended their day at the Kent facility, just as they normally would. Dispatcher, Don Wilson, testified that it may occur a couple of times a year that a Kent-based driver might need to spend the night in Portland, for instance, before covering a Portland route, but there was no evidence of any specific examples of

this taking place. Thus, even when the supposed interchange took place, the Kent drivers still interacted with their fellow Kent drivers, drove their usual equipment, and used their usual drivers' room and other common spaces. Their route sheets listing drivers' stops for the day are still headed with "Kent," the way it is every other day. This extremely limited interchange weighs in favor of a single location unit.

#### **4. Geographic distance**

The Employer argues that the Regional Director gave too much weight to geographical distance between the Kent facilities and the other facilities it would add. Again, this is a legal conclusion, not a "clearly erroneous" factual determination. The Employer claims that despite the fact that the facilities it would add are up to 500 and 700 miles away, those facilities are so substantially integrated with the Kent facility that the Kent facility's identity has been negated. *Bowie Hall Trucking*, 290 NLRB 41, 41 (1988). The Employer's argument is based on the legal theory that new technologies used by the Employer make the extreme geographic separation inconsequential.

However, this argument is in conflict with a long line of Board decisions, which have considered distances of far fewer miles to be indicative of geographic separation and supportive of a single-facility unit. *See Rental Uniform Services*, 330 NLRB 334, 336 (1999); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001); *Cargill, Inc.*, 336 NLRB 1114 (2001). See also *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999) (finding distances of six and twelve miles militated against a multi-facility unit); *Massachusetts Society for Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 46 (1st Cir. 2002) (holding distances of 20 to 95 miles between facilities fit within Board case law finding geographic distance to favor single facility units).

Contrary to the Employer's arguments, the extremely far distances between facilities here strongly support a finding that a single location unit is appropriate.

Finally, even if some of the above factors did weigh against application of the single facility presumption, it does not follow that the Regional Director's decision finding appropriate a unit of the Kent-based drivers was incorrect. As the Regional Director recognized, "Even if there are some factors supporting a multi-location unit, the appropriateness of such a unit does not establish the inappropriateness of a smaller unit." DDE at p. 18 (citing *McCoy Co.*, 151 NLRB 383, 384 (1965)). Thus, while the Petitioner believes the Regional Director was correct in finding that none of the factors weighed against the single facility presumption, even if one of the factors did weigh in favor of a multi-location unit, that does not establish that a unit of Kent-only drivers is inappropriate.

**C. The Employer Failed To Prove That The Administrative Employees/Dispatchers Share An Overwhelming Community Of Interest With The Kent Drivers.**

The dispatchers out of the Kent office do not share an overwhelming community of interest with the Kent drivers such that a unit of only drivers would be inappropriate. Those employees are not required to drive a truck or use any of the other equipment used by the Kent drivers. While the dispatchers spend their day working out of an office at the Kent facility, the drivers spend their day driving between various healthcare facilities, and to a lesser extent, on the floor of the Kent warehouse. The dispatchers are not required to wear uniforms to work. The dispatchers utilize a set of skills (primarily administrative) wholly irrelevant to the job of being a driver. In addition to scheduling routes, the dispatchers are also responsible for billing, communicating with customers, conducting post-route debriefs, and other tasks.

Additionally, while the Kent drivers' schedules are somewhat variable depending on how long their routes take to complete on a given day, the dispatchers tend to work set hours. For instance, Dispatcher, Tonia McElderry, testified that she works from 7am – 4pm. Further, while the dispatchers work five days a week, the drivers work four days a week with rotating days off. Because the route drivers spend their day in the field, they clock out for breaks on their PDTs, while the dispatchers clock in and out for breaks using the Kent facility time clock.

The fact that the dispatchers communicate with the Kent drivers does not, in and of itself, create an overwhelming community of interest. First, the testimony at hearing makes clear that the communication between the drivers and the dispatchers is not of a high volume – Ms. McElderry testified that she receives approximately six calls a day from the Kent drivers. Ms. McElderry also testified that only about 20 percent of her phone calls come from Kent drivers. An occasional need to communicate does not create an overwhelming community of interest. Further, while the Kent drivers interact only with one another and others out of Kent, the dispatchers are required to interact with all drivers across Old District 96.

The Decision out of Region 32 cited by the Employer, in which dispatchers were included in a unit of drivers, is not applicable in this case. There, the Regional Director considered whether the biotrack administrators were plant clericals, who in some ways resembled drivers, or office clericals. In this case, there is no evidence to support the argument that the dispatchers perform any functions of plant clericals and it is clear that the dispatchers are office clericals who should be excluded from the unit. More importantly, however, is that the referenced Region 32 DDE was issued in 2008, prior to *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers*, 357 NLRB No. 83 (2011). It should therefore be

given little, if no weight, as it would likely have been decided differently under *Specialty Healthcare's* exacting standard. Under that standard, the petitioned-for unit which excludes dispatchers would only be inappropriate if the Employer could demonstrate that the employment interests of the dispatchers are *nearly identical* with the drivers, and that there is no rational basis from excluding them from the unit. *Specialty Healthcare, supra*, at 11 & 13. The plethora of divergent interests between the dispatchers and the drivers discussed above precludes the Employer from making this showing, and a unit of all drivers is appropriate.

**D. The Employer Failed To Meet Its Burden Of Rebutting The Single Facility Unit Presumption And Of Demonstrating That The Kent Drivers Share An Overwhelming Community Of Interest With Other Employees.**

Nothing in the National Labor Relations Act (“the Act”) requires the petitioned-for unit to be the most appropriate or only appropriate unit. Rather, the Act only requires that the petitioned-for unit be “an” appropriate unit. *See American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991) (“not necessarily *the* single most appropriate unit”) (emphasis in original). Once the petitioner has met its burden of demonstrating that the petitioned-for unit is “an” appropriate unit, the burden shifts to the employer to demonstrate that the unit is inappropriate because it leaves out certain employees who share an “overwhelming community of interest” with employees in the petitioned-for unit. *Specialty Healthcare, supra*. This is a heightened showing and cannot simply be met by demonstrating that “another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate.” *Id.* at 10. Instead, the employer must show that there “is *no legitimate basis* upon which to exclude certain

employees from [the unit].” *Id.* at 11 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008)) (emphasis added).

The Employer incorrectly asserts that, “Petitioner bears the burden of establishing ineligibility” of the voters it would include in the unit, and claims that “Petitioner here has failed to carry that burden.” Pet. for Rev. p. 18 (citing *Kroger Co.*, 342 NLRB 202 (2004)). This is a misstatement of the law.

The case cited by the Employer to support its claim that it is the Petitioner’s burden to prove that the additional employees should not be included in the unit is inapplicable to the case at hand. *See Kroger, supra*. That case dealt with a post-election challenge of the eligibility of certain voters. It is true that once an appropriate unit has been settled on, the party challenging the eligibility of a particular voter bears the burden of establishing that the voter is not eligible to vote in the unit. However, this rule has no applicability in determining whether a petitioned-for unit is appropriate and it is undisputedly the Employer’s burden to prove that the employees it would add share an “overwhelming community of interest” with those in the unit. The Regional Director correctly found that the Employer failed to meet this high burden.

## V. CONCLUSION

For the foregoing reasons, the Employer’s Request for Review should be denied. The Regional Director correctly found that the Kent drivers share a community of interest, and that they do not share an “overwhelming community of interest” with other drivers, or other employees employed by Stericycle. The Regional Director’s decision was based on a careful and exhaustive application of the *Specialty Healthcare* factors and the factors supporting the

application of the single facility presumption. The Regional Director's Decision should stand and an election should proceed.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 2012.



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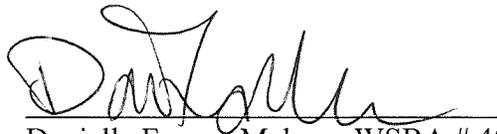
**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of November, I caused the foregoing Petitioner's Response to Employer's Request for Review to be filed electronically at *nlr.gov* and a copy to be sent via electronic mail to the following:

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