

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

Omaha, Nebraska

The Hertz Corporation 1/
Employer

and
Kay Gammell, an Individual
Petitioner

Case 17-RD-1671

and
General Drivers and Helpers Union, Local No. 554, affiliated with the
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers
of America 2/
Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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 the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3
3. The labor organization involved claims to represent certain employees of the Employer.
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 unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 4

All full-time and regular part-time Counter Sales Representatives, instant return representatives, and Clerical employees employed by the Hertz Corporation at its facility located at 5404 Abbott Drive, Omaha, Nebraska, excluding all professional employees, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding 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 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. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

General Drivers and Helpers Union, Local No. 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

LIST OF VOTERS

In order to insure 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); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the **Regional Office**, 8600 Farley Street - Suite 100, Overland Park, Kansas 66212-4677 on or before **June 11, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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. This request must be received by the Board in Washington by **June 18, 2003**.

Dated June 4, 2003

at Overland Park, Kansas

/s/ F. Rozier Sharp
Regional Director, Region 17

- 1/ The Employer's name appears as amended at the hearing.
- 2/ The Union's name appears as amended at the hearing.
- 3/ The Employer, a State of Delaware corporation, is engaged in the business of renting vehicles from its facility located at 5404 Abbott Drive, Omaha, Nebraska, the only facility involved herein.

DETERMINATION

- 4/ For the reasons detailed herein, an election is directed in the following unit:

All full-time and regular part-time Counter Sales Representatives, Instant Return Representatives, and Clerical employees employed by The Hertz Corporation at its facility located at 5404 Abbott Drive, Omaha, Nebraska, excluding all professional employees, guards, and supervisors as defined by the Act, and all other employees.

THE PARTIES' POSITIONS

The instant decertification petition seeks an election in the following unit:

All full-time counter sales representatives and clerical employees, including instant return representatives, but excluding all shop supervisors and other supervisors as defined by the Act.

At the hearing, both the Petitioner and the Employer additionally contended that the appropriate unit should also include regular part-time employees, of which there are two, currently working as Counter Sales Representatives.

The Union asserts that the petition must be dismissed because the petitioned-for unit is not identical to the certified unit or the recognized unit. In its brief, the Union proffers several reasons why the petition must be dismissed, all of which are grounded in the notion that the requested unit does not match the "clear and unequivocal recognized unit". Specifically, the Union asserts that while the parties have bargained about the terms and conditions of the Instant

Return Representatives since 1994, that classification cannot be included in the appropriate unit because those employees were not in the initial certification and because nothing in the succeeding collective-bargaining agreements made the Union their "recognized exclusive bargaining representative." The Union also attacked the petition's viability on the grounds that the parties have recognized a unit including all part-time employees, not just "regular" part-time employees, contending that the petition is thereby rendered defective.

BACKGROUND

The Certified Unit

On April 1, 1988, the Union was certified as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time rental representatives and clerks employed by The Hertz Corporation at its facilities located at the terminal of Eppley Airport and at 5404 Abbott Drive, Omaha, Nebraska, but excluding all professional employees, guards and supervisors within the meaning of the Act, and all other employees.

At all times since the certification, the Employer has recognized the Union as the exclusive representative for certain of its employees, and the parties have negotiated successive three-year collective bargaining agreements.

The Evolution of the Appropriate Unit

At all times relevant herein, the Employer has been engaged in the rental of vehicles to the general public. When the Union was certified as the exclusive bargaining representative in 1988, employees, then known as Rental Representatives, handled the entire rental process. These Rental Representatives assisted the customers in making reservations, processed the

necessary paperwork when customers arrived to pick up the vehicle, and completed the rental transactions upon the return of the vehicle.

The first collective bargaining agreement between the parties, which had a term of July 29, 1988 through July 28 1991, modified the unit description from that in the certification, to the following:

Article I
RECOGNITION

The Employer recognizes the Union as the exclusive bargaining agent for Rental Representatives and Clerical Employees, but shall not include shop supervisors, sales representatives, sales coordinators and all employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

This first contract established the wages and other working conditions for the classifications set forth in the recognition clause, with express provisions governing “part-time employees”, although such employees were not expressly identified in the recognition language.

The recognition clause in the second contract, with a term of July 29, 1991 through July 28, 1994, substituted the phrase “Counter Sales Representatives” for “Rental Representatives”, but otherwise tracked the recognition language from the initial contract. The evidence indicates that the term ‘Counter Sales Representative’ was simply a change in the classification title and did not reflect new or additional employees encompassed in the unit.

Also in 1991, the Employer introduced the instant return process, which enabled the customers to return rented vehicles and complete the rental transactions without the need to enter the building and await service at the counter. Under this new return process, the newly-titled Counter Sales Representatives, aided by hand-held computers, would greet the customers in the parking lot, secure the requisite information, complete the billing process and send customers on

their way. The Counter Sales Representatives performed this instant return job along with their other counter duties.

Upon gaining some experience with the instant return process, in about 1991, the Employer decided to hire employees whose primary job responsibility was to handle the instant return functions, rather than have the Counter Sales Representatives perform it as part of their regular duties. This decision resulted in the creation of the Instant Return Representative position.

Despite the creation of this new job classification in 1991, the recognition clause in the 1994 – 1997 collective-bargaining agreement did not explicitly mention the Instant Return Representatives as part of the unit. However a new provision in that agreement, Article IV, Section C, Wages and Working Hours, expressly dealt with the Instant Return Representatives, setting out their specific wage rates and their wage progression schedule. That same provision of the 1994 – 1997 agreement states as follows: “Employees hired into this separate classification will be covered by all terms and conditions of the labor agreement but will be placed on a separate seniority list”. The agreement further provided that on those occasions when a Counter Sales Representative performed the instant return job, they would be paid at their regular higher rate of pay. A side letter agreement dated September 1, 1994, explained that the Employer would furnish coats for the employees assigned to work outside when performing the instant return function. The 1994 -- 1997 contract continued the same language related to the terms and conditions of part-time employees.

Neither the 1997 – 2000 nor the 2001 – 2003 collective-bargaining agreements mentioned the Instant Return Representatives in their respective recognition clauses, referring instead only to Counter Sales Representatives and Clerical Employees. However, like the 1994

agreement, these agreements set forth a specific wage rate and wage progression schedule for the Instant Return Representatives, and defined their seniority rights. Again, each of these agreements also set terms and conditions of employment for part-time employees.

THE LEGAL STANDARD GOVERNING UNIT DETERMINATION IN A DECERTIFICATION PROCEEDING.

The Board has stated the standard to determine the appropriate unit in a decertification election as follows:

It is well established that the scope of the unit in a decertification election must be coextensive with the certified or currently recognized bargaining unit, unless the unit is contrary to the statute or Board policy. If the parties have, by agreement, changed the scope of the bargaining unit, then it is that unit which is the appropriate unit for a decertification election.

Tom Kelley Ford, 264 NLRB 1080-1082 (1982). See also, *Kardon Chevrolet, Inc.*, 249 NLRB 598 (1980); *Utah Power & Light Company*, 258 NLRB 1059 (1981). The Board has recognized too that the change in the scope of a certified unit can be by express or implied agreement of the parties. *McKenzie Engineering*, 326 NLRB 473 (1998); *Brom Machine & Foundry Co. v. NLRB*, 569 F. 2d 1043 (8th Cir. 1978)

With respect to part-time employees and their placement in a unit, Board law is clear. Part-time employees are included in a unit with full-time employees wherever the part-time employees perform work within the unit on a *regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours, and working conditions of the full-time employees.* *Fleming Foods*, 313 NLRB 948 (1994); *Pat's Blue Ribbon*, 286 NLRB 918 (1987). The term historically applied to describe those part-time employees who have a sufficient community of interest to be included in a unit with full-time employees is "regular part-time employees".

SUMMARY

While the Instant Return Representatives have not been identified in the recognition clauses of any of the collective-bargaining agreements, it is beyond dispute, based on the substantive terms of the contracts since 1994, that the Employer and the Union have considered the Instant Return Representatives as part of the collective-bargaining unit, and have negotiated their terms and conditions of employment. Similarly, and contrary to the assertion by the Union, the contract recognition clauses have never designated part-time employees, regular or otherwise, as expressly included in the unit. Nevertheless, just like with the Instant Return Representatives, the parties have consistently bargained about their terms and conditions of employment. The Union's argument that the appropriate unit must include all part-time employees and not just "regular" part-time employees, is not persuasive because Board policy dictates that part-time employees can only be included in a unit with full-time employees if they *regularly* work a sufficient amount of time in the unit to establish a community of interest. In any event, based on the record, there are only two part-time employees. The Union did not raise this issue at the hearing, instead raising it for the first time in the brief, so there was no opportunity to explore this issue further at the hearing.

Accordingly, guided by the Board's principles set forth in *Tom Kelley Ford, McKenzie Engineering*, and *Fleming Foods*, supra, the appropriate collective-bargaining unit includes all full-time and regular part-time Counter Sales Representatives, Instant Return Representatives, and Clerical employees, with the aforementioned exclusions.

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