

**Overnite Transportation Company and Wholesale and Retail Food Distribution, Local 63, International Brotherhood of Teamsters, AFL-CIO, Petitioner.** Case 20-RC-17321

April 10, 1998

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX,  
LIEBMAN, AND HURTGEN

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached). The request for review is denied as it raises no substantial issues warranting review.<sup>1</sup>

The only issue before the Board is whether the Regional Director correctly found that the petitioned-for unit of pickup and delivery drivers, road drivers, dock workers, OS&D clerks, yard jockeys, and building maintenance employees is an appropriate unit, rejecting the Employer's contention that the unit must also include mechanics and the check bay attendant. In finding the unit appropriate, the Regional Director found that mechanics and the check bay attendant possess a separate community of interest from the employees in the petitioned-for unit. We find this case largely indistinguishable from recent decisions involving this Employer that raised virtually the same issue, but which the Regional Director did not discuss. See *Overnite Transportation Co.*, 322 NLRB 347 (1996), motion for reconsideration denied 322 NLRB 723 (1996). In those cases, the Board found a unit of drivers and dockworkers, excluding mechanics, to be an appropriate unit.

In the instant case, the petitioned-for unit includes 147 employees. The Employer would add approximately 14 mechanics and 1 check bay attendant. The Regional Director found that the mechanics and the check bay attendant: (1) are separately supervised; (2) work in the "shop area which is physically separate from" the area in which the dockworkers and drivers work; and (3) are the only employees other than the maintenance employee who are furnished uniforms at the Employer's expense. The Regional Director found further that the mechanics are a "distinct group of highly trained and skilled craftsmen" whose work requires use of "substantial specific skills as well as specialized tools." The mechanics receive periodic training on a regular basis. In addition, the mechanics and check bay attendant punch a separate timeclock and use separate lunch and bathroom facilities from those used by drivers and dockworkers. All employees are hourly paid, except for the road drivers, who are paid by mileage.

<sup>1</sup> Member Brame took no part in the consideration or disposition of this case.

The Employer argues in its request for review that there is evidence of pronounced and clear functional integration between the mechanics and the employees in the petitioned-for unit, i.e., that the mechanics repair and maintain the vehicles driven by the drivers. The Employer contends that this integration includes contact between drivers and mechanics when mechanics perform inspections, when drivers report vehicle concerns to mechanics, and when breakdowns occur on the road. Interaction also is alleged to occur between mechanics and dockworkers when mechanics repair and maintain fork lifts. We note, however, that this type of integration and contact among mechanics, drivers, and dockworkers has been present in other recent cases involving the Employer. See, e.g., *Overnite Transportation*, 322 NLRB at 348-349.

The Employer also argues in its request for review that mechanics perform common duties with drivers, citing evidence of driving by mechanics. But most of the driving cited by the Employer is not the type of driving performed by the drivers in the unit. Rather, it is driving performed in connection with the emergency repair of vehicles. In the prior *Overnite* cases, such driving was deemed insufficient to require inclusion of the mechanics. See *Overnite Transportation*, 322 NLRB at 347; 322 NLRB at 726.

The Employer notes evidence that one mechanic drives a city vehicle an average of 3 hours per day, 4 days per week, and that in the 3 months preceding the hearing, this mechanic performed driving duties 12 times while he was scheduled to perform mechanic duties. We find that this evidence of common duties between mechanics and drivers is insubstantial. We note first that the Employer does not clearly indicate whether such driving is the same type of driving performed by the pickup and delivery drivers. In any event, this evidence indicates that, at most, only 1 of 14 mechanics performs driving duties that may be similar to the driving duties of drivers included in the unit.<sup>2</sup> There also is no contention that any of the drivers perform mechanics' duties on a regular basis.

The Employer also points out that four mechanics possess commercial driver's licenses (CDLs). The Employer contends that possession of a CDL demonstrates that mechanics are "expected" to perform driving duties. But mechanics are not compelled to obtain such a license. Possession of a CDL is optional; indeed, the Employer acknowledges that it offers mechanics an additional 5 cents per hour extra as an "inducement" to obtain a CDL. Most of the Employer's mechanics (10 of 14) do not possess a CDL.

<sup>2</sup> There is no contention that mechanics perform any driving duties performed by the road drivers, or that they ever have been paid on a mileage basis like the road drivers. The Employer states that there are 56 pick up and delivery drivers (city drivers) and 38 road drivers in the petitioned-for unit.

The Employer contends that there is no significant difference between the skill level of mechanics and the skill level of dockworkers, OS&D clerks or yard jockeys. The Employer explains that while the mechanics have some special training, they are not required to have any special certification. In the prior *Overnite* cases, however, exclusion of mechanics was not based on mechanics having a special certification. The mechanics there, as here, had special skills and training to repair the Employer's vehicles. See *Overnite Transportation*, 322 NLRB at 726. Although the single check bay attendant does not possess these special skills, it appears that the employee in this classification assists the mechanics in their duties much like a mechanic's helper. Indeed, even the Employer characterizes the primary duty of the shop bay attendant and mechanics—service and maintenance—to be the same.<sup>3</sup>

The Employer relies on *Courier Dispatch Group*, 311 NLRB 728 (1993), and contends that the Board there affirmed the Acting Regional Director's inclusion of a mechanic in a driver unit. The Employer is incorrect. The Board did not affirm that aspect of *Courier Dispatch* because no request for review of that finding was filed with the Board. 311 NLRB at 719 fn. 1.<sup>4</sup> In addition, the Employer makes this argument despite the Board's recent unpublished Order denying review in *Overnite Transportation Co.*, Case 9-RC-16833 (June 30, 1997). In that case, we specifically rejected the Employer's reliance on *Courier Dispatch* for the identical reason. In the Order Denying Review, the Board specifically noted that in *Courier Dispatch*, the only issue for which review was sought was the Acting Regional Director's finding that the single-facility presumption had not been rebutted. Hence, as in that case, we find that the Acting Regional Director's finding in *Courier Dispatch* is of no precedential value in this proceeding. Rather, for the reasons outlined above and set forth in *Overnite Transportation*, 322 NLRB 347 and 322 NLRB 723, we deny the Employer's request for review.<sup>5</sup>

The dissent contends that where, as here, a union petitions or desires two "inconsistent" units in two "identical" facilities, and the Board grants them both, an issue arises as to whether, under Section 9(c)(5), the

<sup>3</sup>The Regional Director found that the current attendant works the "graveyard" shift and is responsible for checking vehicles (fuel, oil, brakes, lights, and safety elements of trailer) when the drivers arrive at the terminal. In prior unpublished *Overnite* cases, the Board has excluded employees performing similar functions along with the mechanics. See *Overnite Transportation Co.*, Case 9-RC-15254 (1995).

<sup>4</sup>We also note that the Acting Regional Director included the mechanic in the unit, in part, because he would otherwise be the only unrepresented employee at the location. 311 NLRB at 732.

<sup>5</sup>For the reasons discussed in *Overnite Transportation*, 322 NLRB at 725-726, contrary to our dissenting colleague, we reject the Employer's argument that the Regional Director's decision violates Sec. 9(c)(5) of the Act.

Board has given controlling weight to the factor of "extent of organization." In *Overnite Transportation Co.*, 322 NLRB 723, the Board answered in great detail a similar argument and we will not repeat that entire response here. But the short answer to our colleague's version of this argument is that the units found appropriate are consistent with Section 9(b) of the Act and not inconsistent with Section 9(c)(5).

Section 9(b) clearly permits the Board to find more than one unit appropriate, including units for which there is an overlapping community of interest (e.g., "Employer," "craft," "plant," or "sub-divisions thereof"). *Overnite Transportation*, 322 at 723; see *NLRB v. Lake County Assn. for Retarded*, 156 LRRM 2891, 2895 (7th Cir. 1997) ("The same company may include several or even many communities of interest.") In addition, Section 9(b) does not prohibit the Board from finding different units appropriate at different locations of the same employer. To the extent that different units may be characterized as "inconsistent"—which they are not—it is an inconsistency Congress clearly permitted. Although our colleague is "bothered" by "opposite" results at different locations<sup>6</sup> of the Employer, he ignores the law and facts that support each particular unit finding.

That the units found appropriate at more than one location of the Employer also are the ones petitioned-for, or desired by the union, does not ipso facto mean that their appropriateness is based solely on that factor and in violation of Section 9(c)(5). Rather, each is a unit that the Board historically has found to be an appropriate unit. In addition, each is a unit in which the employees share a community of interest.<sup>7</sup> As articulated in *Overnite Transportation Co.*, 322 NLRB 347 (1996), the law and the facts of each case, without consideration of the petitioners' extent of organization, support the units found appropriate.

The dissent suggests that Section 9(c)(5) was intended to preclude the Board from finding a unit to be appropriate if it has previously found, at another location of the employer, that a differently configured unit is appropriate. This interpretation has no support in the legislative history of that section. As the Supreme Court stated in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442 (1965), Congress enacted Section 9(c)(5) to overrule Board decisions where the unit determined to be appropriate could only be sup-

<sup>6</sup>The dissent presumes that the Employer's facilities are "identical" but that is not necessarily true as even the Employer has argued for different units at different facilities. *Overnite Transportation Co.*, 322 NLRB at 725.

<sup>7</sup>The dissent's contention that we "do not try to distinguish" prior cases is misplaced. The Board and the Regional Directors have found in each of these cases that a community-of-interest analysis supports the petitioned-for units. That is what the Act requires and that is what these cases have done.

ported on the basis of the extent of organization.<sup>8</sup> There is no indication that the purpose of the section had anything whatsoever to do with ensuring uniformity in the units found to be appropriate at different locations of the same employer.

The dissent's position also fails to give due regard to the statutory scheme for representation petitions and ignores the Board's Rules and Regulations. As a result, it misconstrues the import of Section 9(c)(5)'s admonition that "the extent to which employees have organized shall not be controlling."

Section 9(c)(1) requires the Board to provide for a hearing when a union files a petition alleging that a substantial number of employees wish to be represented for collective bargaining, and Section 9(b) provides that the Board "shall decide in each case" the appropriate unit. This statutory scheme does not contemplate a union filing only a bare petition for an election, but rather requires a union to file a petition to represent a particular group or unit of employees. This statutory scheme is implemented by the Board's Rules and Regulations, Section 102.61(a) of which provides that the "Contents of a petition for initial certification" filed by a union "shall contain . . . (4) A description of the bargaining unit which the petitioner claims to be appropriate."

Faced with a petition duly filed pursuant to the Act and in accord with the Board's Rules and Regulations, the Board must decide at the outset whether the petitioned-for unit is or is not appropriate. The Board determines these matters on well-established community of interest grounds. That is all the Board (and the Regional Directors) have done here and in previous cases.

A union's petition, which must according to the statutory scheme and the Board's Rules & Regulations be for a particular unit, necessarily drives the Board's unit determination. In that respect "a petitioner's desires as to the unit is always a relevant consideration." *Marks Oxygen Co. of Atlanta*, 147 NLRB 228, 230 (1964). It is in that respect that a union's petition reflects the extent of its organization, and it is in that respect, and that respect only, that the Board's and the Regional Directors' unit determinations involving the Employer reflect the extent of organization. Thus, our decisions reflect only the extent to which the statutory scheme requires the local petitioning unions to designate the petitioned-for units. That is a far cry from giving any weight,<sup>9</sup> let alone controlling weight, to the unions' extent of organization.

<sup>8</sup> See, e.g., Senator Taft's statement that the purpose of the section is to discourage the Board from finding units appropriate that are "only a fragment of what would ordinarily be deemed appropriate, simply on the extent of organization theory." 2 Leg. Hist. 1535, 1542 (LMRA 1947), cited in *NLRB v. Metropolitan Life Insurance*, 380 U.S. at 442 fn. 3.

<sup>9</sup> Besides, "A factor may be entitled to weight although not controlling. By definition, such a factor in a close case may be deter-

Our decision draws substantial support from the recent decision in *Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760 (3d. Cir. 1997). Although the court held that the Hotel, by failing to seek review, waived its objection to the unit determination, the court went out of the way to end its decision with the following footnote:

Although we decline to pass on the merits of the Hotel's objections, we note that the Hotel's challenge is limited to the claim that the Regional Director's Engineering Department determination was **inconsistent** with an all-employee unit determination made four years earlier and that this **purported inconsistency** thereby raises a strong inference that the Regional Director based his decision on the extent of employee organization in violation of [9(c)5]. However, it is not **necessarily inconsistent** to recognize that there may be two appropriate bargaining units, especially where, as here, the Regional Director articulated substantial reasons for its determination which were based on legitimate criteria . . . a process that dispels any appearance of arbitrariness or reliance on impermissible factors. [Emphasis added; citations omitted.]

The court's footnote serves as a summary of our decision in this case. Thus, we conclude, as the Board concluded in *Overnite Transportation Co.*, 322 NLRB at 726, "As the unit sought by the Petitioner in the instant case constitutes an appropriate unit, the Board has not acted inconsistently with prior cases involving the Employer or contrary to Section 9(c)(5)."

MEMBER HURTGEN, dissenting.

I would grant review. In particular, I am concerned by the apparent willingness to exclude mechanics in a driver unit, or to include them, based controllingly on the desires of the petitioning union. In my view, that legal position may well run afoul of Section 9(c)(5). That provision states:

In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

In the instant case, the Union sought to exclude mechanics from a unit of drivers. The Employer sought to include the mechanics. My colleagues agree with the Union. However, in other cases involving the same Employer, the Board includes the mechanics in the driver unit, because the Union sought such inclusion.<sup>1</sup>

minative; otherwise the factor is deprived of all significance." *Texas Pipe Line Co. v. NLRB*, 296 F.2d 208, 213 (5th Cir. 1961).

<sup>1</sup> See Cases 26-RC-7703 and 26-RC-7831, cited in *Overnite*, 322 NLRB 723.

My colleagues do not try to factually distinguish these cases. Rather, they simply declare that there was a different “community of interest” in each case. However, this declaration cannot alter the fundamental point that the cases are factually the same. The concept of “community of interest” is an ultimate conclusion based on the particular facts of a case. Where, as here, the facts of two cases are the same, one would think that the “community of interest” conclusion would also be the same. If the conclusions are different, and if “extent of organization” is the sole difference in the cases, it may fairly be inferred that “extent of organization” was the controlling factor in determining “community of interest” and appropriateness of unit.

My colleagues believe that different results can be reached “in the same factual setting.”<sup>2</sup> In my view, it is impermissible to reach inconsistent results based upon the desires of the petitioning union. Obviously, a union’s desire to include or exclude a group of employees will reflect the extent to which it has succeeded in organizing that group. Thus, the proscription of Section 9(c)(5) is directly implicated.

I recognize that “extent of organization” can be a factor considered by the Board.<sup>3</sup> I also recognize that there are other factors, cited by my colleagues, which militate in favor of exclusion in this case. However, what bothers me is that the Board would reach the opposite result, in an identical case, simply because the Union desires that opposite result. In these circumstances, I fear that the Union’s position is more than a factor; it has become the controlling factor, i.e., the factor that yields a different result.

I also recognize that a union need only petition for an appropriate unit.<sup>4</sup> Thus, if a union petitions for an appropriate unit, and the employer contends that a different unit is more appropriate, the union’s petition will be granted. However, where a union petitions for two inconsistent units in two identical facilities, and the Board grants them both, I fear that the concept of “an appropriate unit” runs headlong into the express statutory language of Section 9(c)(5).<sup>5</sup> Phrased differently, the issue in this case is not an appropriate unit vs. a more appropriate unit. Rather, it is whether, in determining an appropriate unit, the Board has given controlling weight to the factor of “extent of organization.”

My colleagues suggest that my position would prohibit different units at different locations of the same employer. My colleagues are incorrect. I do not insist on uniformity of units at different locations of the

same employer. If the two locations are structured differently, it would be altogether proper to find different units at different locations.<sup>6</sup> However, if the two locations are structured identically, I would find it troublesome to find different units based on the desires of the petitioning union.

My colleagues also contend that I have ignored the legislative intent of Section 9(c)(5). In this regard, they point to remarks of Senator Taft. I, on the other hand, have relied upon the Supreme Court’s comprehensive and definitive statement of the legislative intent of Section 9(c)(5). Relying on legislative history, the Court said that “extent of organization” can be “one factor,” but it cannot be the “controlling factor.” See *NLRB v. Metropolitan Life*, supra.<sup>7</sup>

The majority asserts that the phrase “extent of organization,” as used by the Board, means only that a union must set forth, in its petition, the unit in which it seeks an election. Concededly, a union must set forth the unit that it seeks, and “extent of organization” may well influence that choice. But it is the Board that must decide whether that unit is appropriate, and “extent of organization” cannot be the controlling factor in that decision.

For all of the foregoing reasons, I am concerned that the Board’s results and rationale contravene Section 9(c)(5). Accordingly, I would grant review.

<sup>6</sup> Thus if, as in *Ritz-Carlton*, 123 F.3d 760, there are factual differences between two facilities, different units can be appropriate.

<sup>7</sup> My colleagues apparently believe that the legislative history does not support the Supreme Court’s quoted language. I am content to rely upon the Court as the ultimate arbiter of legislative history.

## APPENDIX

### DECISION AND DIRECTION OF ELECTION

4/ Petitioner seeks a unit of all full-time and regular part-time pickup and delivery drivers, road drivers, dockworkers, OS&D clerks, yard jockeys and building maintenance employees employed by the Employer at its Commerce facility; excluding all other employees, mechanics, sales employees, check bay attendants, office clerical employees, guards and supervisors as defined in the Act. Petitioner does not seek to represent the Employer’s mechanics and the single check bay attendant. The Employer contends, contrary to the Petitioner, that the unit sought by the Petitioner is not appropriate for the purposes of collective bargaining because it does not include the mechanics and the check bay attendant. As of the hearing there were about 147 employees employed in the unit sought by the Petitioner. The Employer also employed about 14 mechanics.

As of the hearing Steven Hill was the Service Center manager for the Employer’s Commerce facility. He was responsible for the overall operation of the facility and was in overall charge of all the employees employed there. Edwin Requena, the Employer’s Shop Supervisor, was responsible, as of the hearing, for the immediate supervision of the Em-

<sup>2</sup> *Overnite* at 725.

<sup>3</sup> *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 430, 442.

<sup>4</sup> *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610.

<sup>5</sup> See *NLRB v. Lundy Packing*, 68 F.3d 1577 (4th Cir. 1995). In *American Hospital Assn.*, supra, the Court was not faced with the problem presented by Sec. 9(c)(5).

ployer's mechanics and check bay attendant. He did not supervise any of the other employees at the Employer's facility. Requena reported directly to Hill and to Shane Molenarie, the Employer's Area Fleet Services Manager. The termination of any employee employed at the Employer's facility requires the approval of Hill.

The Shop Supervisor is responsible for overseeing the functioning of the shops at the Employer's facility with respect to the service and repair of the Employer's vehicles. He directs the work of the mechanics and the check bay attendant and assigns work to them. He grants time off to the shop employees. He is also responsible for preparing daily reports on the operation of the shops. The record shows that Requena has interviewed applicants for employment but the record does not establish whether he can effectively recommend the hiring of employees.

He has not taken any disciplinary actions as Shop Supervisor and the record does not establish whether he has any authority to discipline employees or to effectively recommend such action. The record also does not establish whether Requena has the authority to reward, transfer, lay off, recall, promote, or reward the shop employees or to adjust their grievances or to effectively recommend such action. The parties did not state at the hearing their positions as to whether Requena is a statutory supervisor. However, based on his authority to responsibly direct the work of the shop employees and to assign work to them it is clear that Requena is a supervisor within the meaning of Section 2(11) of the Act.

The Employer's drivers and dockworkers work out the Employer's terminal which is located in a single building. The shop is located in a separate enclosure which is connected to the dock of the terminal building. The Employer's mechanics and check bay attendant work in the shop. They punch the timeclock there. The drivers and dockworkers use separate timeclocks located in the terminal building. There is a restroom and a breakroom located in the shop which are used almost exclusively by the mechanics and the check bay attendant. There is another restroom and another breakroom in the terminal building which are used by the drivers and dockworkers.

The Employer's mechanics are paid an hourly wage. The dockworkers and city drivers also receive an hourly wage while the road drivers are compensated according to their mileage. All of the Employer's hourly employees receive the same fringe benefits. The personnel office at the Employer's facility is responsible for administering the benefit programs for all the employees at the facility. All of the employees at the facility are subject to the same personnel policies which are set forth in an employee handbook.

The Employer's mechanics are responsible for the servicing and repair of the Employer's vehicles. They receive special training to enable them to perform these functions more effectively. They also attend safety classes at which attendance is limited to mechanics. The Employer provides barbecues for the mechanics which may sometimes be attended by other employees. Moreover, the mechanics and the check bay attendant are furnished uniforms at the expense of the

Employer. The maintenance man is the only other employee who is furnished a uniform at the expense of the Employer.

The mechanics have some contacts with the Employer's drivers during the course of their work. A driver may accompany his vehicle into the shop when it is repaired and may discuss the mechanical problems which he is experiencing with a mechanic. A driver may wait in the shop while his vehicle is being repaired. Furthermore, a mechanic may sometimes unload freight from a trailer in order to make it possible for the mechanic to perform the necessary repairs. Such an unloading last occurred about two months prior to the hearing.

The Employer's check bay attendant works on the graveyard shift and is responsible for checking the vehicles which arrive at the terminal. He fuels the vehicles, checks the oil, checks and adjusts the brakes, and checks the lights, brakes, and safety elements of the trailers. The check bay is located directly adjacent to the shop area where the mechanics work.

In order to determine that the unit sought by the Petitioner is appropriate for the purposes of collective bargaining it is necessary that such unit be an appropriate one. It is not necessary that such unit constitute the only appropriate unit or that it constitute the most appropriate unit. *Taylor Bros. Inc.*, 230 NLRB 861, 869 (1977). The exclusion of the mechanics and the check attendant from the unit sought by the Petitioner requires a showing that they possess a separate community of interest from the other employees employed at the Employer's terminal. *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971).

The record establishes that the mechanics are together with the check bay attendant subject to separate immediate supervision from the other employees employed at the Employer's facility. The mechanics and the check bay attendant work in the shop area which is physically separate from the remainder of the Employer's terminal. These employees have separate breakroom and restroom facilities available to them. They are the only employees other than the maintenance men to whom the Employer furnishes uniforms at its expense. Furthermore, the record shows that the Employer's mechanics are a distinct group of highly trained and skilled craftsmen who are primarily engaged in the performance of tasks which are different from the work performed by the other terminal employees and require the use of substantial specific skills as well as specialized tools. Moreover, the mechanics receive periodic training on a regular basis. Accordingly, it is concluded that the mechanics possess a separate community of interest from the employees in the unit sought by the Petitioner and may properly be excluded from the unit. *Dodge City of Wauwatosa*, 289 NLRB 459, 460 (1986).

The record also establishes that the check bay attendant possesses a separate community of interest from the employees in the unit sought by the Petitioner. He works under the same separate immediate supervision as the mechanics. Moreover, his work station is in a physically separate area from the unit employees and he, like the mechanics, wears a uniform which is provided at the expense of the Employer. Moreover, the duties performed by the attendant are distinct from those performed by the unit employees.