

**Home Depot USA, Inc. and Local 456, International Brotherhood of Teamsters, AFL-CIO, Petitioner.** Case 2-RC-22092

August 25, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On July 21, 1999, the Acting Regional Director for Region 2 issued a Decision and Order dismissing petition finding, *inter alia*, that the employees in the petitioned-for unit of all full-time and regular part-time drivers and dispatchers who drive do not share a distinct community of interest, and therefore do not constitute an appropriate unit within the meaning of the Act.<sup>1</sup> Thereafter, on September 2, 1999, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's determination. The Employer filed an opposition brief. By order dated February 18, 2000, the Board granted the Petitioner's request for review. The Employer thereafter filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully examined the record and the Employer's brief on review, we find, contrary to the Acting Regional Director, that the Employer's drivers and dispatchers who drive share a sufficient community of interest to constitute an appropriate unit.

The Employer operates warehouse-style facilities in New Rochelle and Bronx, New York, where it sells home improvement merchandise to the general public and commercial entities. There are seven drivers and one dispatcher who drives employed at the New Rochelle facility,<sup>2</sup> and four drivers and one dispatcher who does not drive employed at the Bronx facility. The organizational structure at both stores is similar.<sup>3</sup>

Employees, including drivers, are paid on an hourly basis, punch a timeclock, are eligible to participate in a number of companywide benefit programs, and attend a 5-day new employee orientation session, which includes 3 days of sales

training.<sup>4</sup> All employees are invited to attend regular "product knowledge" training sessions held by the Employer in which employees learn how to use and install products sold in the store. Drivers have attended such product knowledge training sessions. Additionally, drivers are subject to the same employee work rules, attend meetings and Employer-sponsored social events with other employees, and use the same parking, restroom, and break facilities.

However, unlike other employees, drivers are required to be of legal age to drive, must possess a commercial driver's license with hazardous materials certification, as well as a Department of Transportation certification, and must have a clean driving record. Drivers also must undergo a medical examination, as well as periodic drug testing. Additionally, drivers must take and pass a "Truck Driver Load Performance Test," and know the Employer's safety regulations for the operation of commercial vehicles. Also, drivers are obliged to complete and maintain daily trip logs, as well as a logbook regarding the condition of the trucks, and must wear a distinct uniform not given to other employees.

The Acting Regional Director found that the drivers have overlapping job functions with other employees, as well as considerable interchange with coworkers. She further found that the drivers are a component of a larger group of employees that provide special services to customers. Although the record in the instant matter shows a degree of overlapping job function and employee interchange, we disagree with the Acting Regional Director that this evidence of job overlap and employee interchange is significant enough to warrant the conclusion that the drivers do not constitute a functionally distinct group with a distinct community of interest.

The drivers and dispatchers are part of the special services department, and, like the other employees in the special services department, report to the special services supervisor.<sup>5</sup> The other job classifications included in the special service department are phone sales associates, special services associates, and pullers.<sup>6</sup>

New Rochelle Store Manager Siuta testified that the drivers spend the majority of their work time out on the road, making deliveries. Before the drivers begin their deliveries, however, they have a variety of responsibilities. Drivers must pull from the store shelves whatever merchandise the pullers did not gather the previous night. Since pullers do not work at all on Sunday nights, on Mondays drivers may spend approximately 4 hours of their 8-hour shift in the store pulling merchandise. On the other days of the

<sup>1</sup> The Petitioner sought to represent a unit of all full-time and regular part-time drivers and dispatchers who drive employed at the Employer's New Rochelle and Bronx, New York facilities. The unit was amended by the Petitioner at the hearing to exclude those dispatchers who do not drive. Specifically, the dispatcher at the Bronx facility does not drive or deliver merchandise. Having found the composition of the petitioned-for unit not appropriate, the Acting Regional Director did not make a determination regarding whether the scope of the petitioned-for unit, encompassing the New Rochelle and Bronx facilities, is appropriate.

<sup>2</sup> The New Rochelle store manager testified that the dispatcher is considered a driver. The term "drivers" will be used to refer to the drivers as well as the dispatcher who drives.

<sup>3</sup> The Bronx and New Rochelle stores are part of a larger sales district that also contains a facility in Elmont, New York, and a facility in Valley Stream, New York.

<sup>4</sup> All employees except cashiers go through sales training.

<sup>5</sup> Like all other employees, drivers are subject to performance evaluation by not only their own supervisor, but by management representatives from each department. Also, like other employees, drivers obtain approval for vacation and personal days off from the store manager.

<sup>6</sup> "Pullers" pull the merchandise from the store shelves which is to be delivered the following day. Pullers work every night except Sunday from 10 p.m. to 6 a.m. Drivers start their 8-hour shifts at various times, commencing at 6 a.m.

week, drivers may spend approximately 2 to 3 hours pulling merchandise. Because the work schedules of the pullers and the drivers do not overlap, the drivers do not have significant interaction with the pullers.<sup>7</sup>

With regard to interaction with the other job classifications in the special services department, driver Ortega testified that, in the regular course of his duties, he does not have regular contact with the other special services department employees including the special services associates, or the phone sales associates.<sup>8</sup>

Based on a 40-hour workweek, the drivers spend a maximum 30–40 percent of their time in the store pulling merchandise for delivery. Both the New Rochelle store manager, John Siuta, and New Rochelle driver, Fred Ortega, testified that while drivers are in the store pulling merchandise, they are frequently approached by customers who ask the drivers for assistance. Siuta testified that he observes a driver having some sort of contact with customers virtually everyday. Siuta testified that when employees are approached by customers, all employees, including drivers who are in the store pulling their delivery merchandise, are expected to stop what they are doing and assist customers. Siuta testified that if a customer asks a driver about a product the driver does not know anything about, the driver is expected to walk that customer over to a knowledgeable sales associate.<sup>9</sup> Driver Ortega testified that if a customer approaches him while he is in the store, he directs them to a sales associate. He spends a minimal amount of time talking to sales associates while in the store. Driver Ortega does not sell merchandise while he is in the store, nor does he know how sales are completed.

After pulling the merchandise for delivery, drivers are responsible for inspecting the pulled merchandise for quality, loading merchandise to be delivered onto trucks, securing it on the truck, cross-checking the merchandise with computer orders, telephoning customers to confirm final delivery arrangements, making a pretrip inspection of the truck to ensure it is in proper condition, and delivering the merchandise to the customer. Before leaving the facility to make their deliveries, a driver must be signed out by a management representative.

<sup>7</sup> Driver Ortega testified that pullers are usually leaving work as the truck drivers are arriving at work. Store Manager Siuta also testified that the work times of pullers and drivers do not usually overlap.

<sup>8</sup> Regarding contact with other special service department employees, driver Ortega testified that after drivers have loaded and secured their trucks, they walk through the store to the special services desk, located at the front of the store. Drivers use the phones at the special services desk to call customers regarding the delivery schedule. Ortega testified that assistant managers and customers are usually in the area of the special services desk. Ortega further testified that when he is out on the road making deliveries and a need arises to call an assistant manager, he calls in to the store, identifies himself to the phone sales associate, and the phone sales associate then pages an assistant manager to assist him.

<sup>9</sup> Siuta further testified that he would prefer that the driver stayed there and learn through that process so he could help a customer in the future.

At the New Rochelle store, the drivers use four delivery trucks, consisting of two flat bed trucks with attached forklifts and two box trucks. Drivers also may use several “load and go” pickup trucks.<sup>10</sup> New Rochelle Store Manager Siuta testified that approximately once a week, due to an immediate customer service need, an assistant manager will be assigned to make a delivery using a “load and go” pickup truck. If needed, a nondriver hourly employee may be assigned to accompany the assistant manager on the delivery. Also, on occasion, an hourly employee may accompany a regular driver to assist in a delivery. There is no evidence that any employee other than a driver ever drives the flat bed trucks or the box trucks.

New Rochelle Store Manager Siuta testified that a driver may be assigned to work inside the store instead of driving if driving conditions are hazardous, if the driver were waiting for a certification, or if the volume of deliveries is low. However, driver Ortega testified that he has never been assigned, temporarily or otherwise, to attend to customers.

Three of the nine drivers who have been employed at the New Rochelle facility during the past year held positions other than driver at some point during their career with the Employer. One driver at the Bronx facility was formerly employed in the position of puller.

It is well established that the Act does not require the unit for bargaining be the optimum, or most appropriate unit, but only an appropriate unit. See *Overnite Transportation Co.*, 322 NLRB 723 (1996). In deciding whether a petitioned-for unit is an appropriate unit, the Board’s focus is on whether the employees share a community of interest. *Id.* at 724. Factors considered by the Board in determining community of interest among employees include:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining.

*Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). The Board has acknowledged that truck drivers often have a “dual community of interest,” with certain factors supporting their inclusion in the same unit as other plant employees, and certain factors favoring their representation in a separate unit. See *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971).

<sup>10</sup> These “load and go” pickup trucks are available for rental to customers who want to drive their own merchandise home. The Bronx store has two flatbed trucks, one box truck and three “load and go” pickup trucks.

In concluding that the petitioned-for unit is not appropriate, the Acting Regional Director found that the drivers lack separate supervision, work in close proximity to and are in contact with other employees, are integrated in the activities and operations of the store, and have overlapping job functions and considerable interchange with other employees. Although it is undisputed that the drivers do share a number of common benefits, terms, and conditions of employment with the Employer's other employees, share common supervision with other employees, and have some degree of interaction and integration with other employees, we find that these similarities are substantially outweighed by the factors supporting a conclusion that the drivers as a group share a distinct community of interest, and therefore constitute an appropriate unit.

Unlike other employees, drivers are required to have special driving qualifications and licensing. Although drivers spend some portion of their work time performing a "pulling" function, they have little to no contact with the pullers, and spend the majority of their work time on the road making deliveries. Drivers wear distinct uniforms. They do not have substantial contact with the other employees in the special services department. The contact that drivers have with the sales associates and customers while the drivers are in the store pulling their merchandise for delivery occurs randomly, and is incidental to their primary job function of operating the delivery trucks, preparing for deliveries and making deliveries.<sup>11</sup> Although other employees, primarily assistant managers, may be assigned to make deliveries to customers using the "load and go" pickup trucks, and occasionally a nondriver employee will accompany a driver on a delivery, there is no evidence that any employee other than a driver ever operates the large delivery trucks.

Further, that several drivers previously held other positions at some point during their career with the Employer does not demonstrate substantial interchange of employees. Similarly, we do not find that the possibility that drivers may be assigned to work in the store if the volume of deliveries is low or weather conditions are hazardous is sufficient evidence to find substantial interchange among drivers and other employees.<sup>12</sup>

Although the Employer contends, and the Acting Regional Director found, that the instant matter is con-

trolled by *Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61 (1971), where the Board found that a proposed unit of truckdrivers did not constitute a functionally distinct group with special interests sufficient to warrant their separate representation, we find the facts here clearly distinguishable. In *Levitz*, the truckdrivers were not required to have any special licenses or driving tests. Other employees performed work regularly performed by truck drivers, and used the drivers' trucks to haul trash and other activities. In *Levitz*, the Board found that sales of merchandise required the close cooperation of selling and nonselling categories of employees, and that in the course of such sales there was substantial contact between customers and most employees, including truckdrivers. Further, all employees participated in taking inventory once a year, approximately every 6 weeks all employees participated in dockside sales of surplus merchandise, and at least three truckdrivers had been asked to sell on the sales floor. Additionally, in *Levitz*, temporary interchanges of employees throughout the store were frequent and regular. With the high degree of functional integration and employee interaction in *Levitz*, the Board found that, notwithstanding that truckdrivers spent a majority of their time away from the plant, the facts supported a finding of a community of interest with all of the employees at the employer's store, and therefore determined that the truck drivers did not constitute a functionally distinct group with special interests sufficient to warrant separate representation. *Id.* at 62-63.

The circumstances in the present case are clearly distinguishable. In particular, the degree of employee integration and interchange in the instant matter is significantly less than in *Levitz*. Unlike the truckdrivers in *Levitz*, the drivers here do not spend substantial portion of their time working alongside or in close proximity with other employees. Similarly, other employees here are not involved substantially with driving. And the drivers here, unlike those in *Levitz*, are licensed.

It is well settled that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnite Transportation Co.*, *supra* at 723. On balance, we find that although drivers share a number of similarities with other employees, and have contact with other employees, the weight of evidence supports a finding that the petitioned-for unit of drivers share a sufficiently distinct community of interest, and therefore constitute an appropriate unit under the Act.<sup>13</sup>

Having found the drivers to be an appropriate unit, we remand the case to the Regional Director for a determination regarding the scope of the unit.

<sup>11</sup> In evaluating the degree of integration among various classifications of employees, the Board has acknowledged that there are necessarily instances where various groups of employees may act in concert in the furtherance of their job responsibilities. However, the frequency and substance of such instances must also be considered. See *Big Buck Lumber*, 241 NLRB 639, 641 (1979). We find the fact that drivers, while they are inside the store pulling the merchandise they need in order to make their deliveries, may provide assistance to the customers that approach them and direct the customers to knowledgeable sales associates, is insufficient to show substantial functional integration or interaction between drivers and other store employees.

<sup>12</sup> See *Office Depot, Inc. v. NLRB*, 184 F.3d 506 (6th Cir. 1999) (a unit of drivers found to be appropriate notwithstanding that drivers performed work of warehouse employees when drivers were placed on light duty or when they returned early from the road).

<sup>13</sup> As the record contains insufficient evidence concerning the duties of the dispatcher at the Bronx facility, this dispatcher shall vote under challenge in any election that might be directed by the Regional Director.