

R.D. # 0010-99  
Carteret, NJ

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

**FASHION MARKETING, INC.**<sup>1</sup>  
Employer

and

CASE 22-RC-11735

**LOCAL UNION NO. 202 A/W INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**<sup>2</sup>  
Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein 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,<sup>3</sup> 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 will effectuate the purposes of the Act to assert jurisdiction herein.<sup>4</sup>

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The name of the Petitioner appears as amended at the hearing.

<sup>3</sup> Briefs filed by the parties have been fully considered.

3. The labor organization involved claims to represent certain employees of the Employer.<sup>5</sup>
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 constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time local drivers employed by the Employer at its Carteret, New Jersey facility, excluding all office clerical employees, dispatchers, over-the-road drivers, mechanics, helpers, professional employees, guards and supervisors as defined by the Act.

The Petitioner seeks to represent a unit of all full-time and regular part-time local drivers employed at the Employer's Carteret facility but excluding office clerical employees, over-the-road drivers, mechanics, professional employees, guards and supervisors as defined in the Act. There are approximately 64 employees in the petitioned for unit. The parties stipulated that dispatchers should be excluded from any unit found appropriate herein. In dispute is the unit placement of 11 mechanics and helpers and approximately 56 over-the-road drivers, whom the Employer, contrary to the Petitioner, would include in the unit.

The Employer is engaged in the trucking and distribution of clothing for various customers at its Carteret, New Jersey facility. It operates two wholly owned subsidiaries, namely FMI Trucking (herein Trucking) and FMI Express (herein Express) having a

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<sup>4</sup> The Employer is a New Jersey corporation engaged in the trucking and distribution of clothing and related items at its Carteret, New Jersey location, its only location involved herein.

common executive management structure. The drivers on Trucking's payroll are primarily engaged in local driving whereas drivers on Express' payroll are involved in over-the road driving.

The record reveals that the 64 local drivers are hourly paid, earning a rate ranging from \$10.75 (the entry level rate) to \$16 per hour.<sup>6</sup> They punch a time clock and earn overtime after 40 hours of work. Local drivers on the day shift report to the Carteret facility between 5:00 AM and 9:00 AM, whereas second shift drivers report at 4:00 PM. Local drivers drive twin axle or single axle tractor trailers and/or straight trucks. They make pick ups and deliveries in the local area serviced by the Employer. Although not fully developed in the record, it appears that a substantial component of local driving work involves runs at the shipping ports in New Jersey as well as to customers located in New York City.<sup>7</sup> In any event, local drivers pick up their assigned trucks at Carteret and return them there after their daily shift. This pick up and return of vehicles process lasts about 15 minutes on each end. In the main, local drivers are away from the Carteret facility during their entire shift. It is rare for local drivers to be engaged in an assignment requiring an overnight stay. Local drivers regularly perform loading and unloading of trucks incidental to their driving function.

The Employer conducts a separate annual meeting for local drivers where wage policies, profit sharing and other issues relating to local drivers are discussed. The Employer's annual Christmas party is primarily attended by local drivers. Local drivers are dispatched to their routes by dispatcher Ruster who does not dispatch over-the-road

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<sup>5</sup> The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

<sup>6</sup> The rate is determined by an employee's length of service with the Employer.

<sup>7</sup> Pier work requires the local drivers to have a "C-link card" in order to operate at the pier. The Employer acknowledges that not every over-the-road driver has such a card. The record does not describe whether over-the-road drivers are required to have such cards or specifically how many of them have cards.

drivers. General Manager Joe D'Amato is the immediate supervisor of the local drivers.<sup>8</sup> Requests for time off by local drivers are directed to their dispatcher, Ruster, Tom LaRock or Ken (last name unknown). It is undisputed that the local driving dispatchers report to D'Amato. Although the Employer contends that local drivers have performed over-the road driving, it offered no documentary evidence or records to support this assertion. In testimony, the Employer's witness, Richard Nazzaro, Vice President of Corporate Trucking, could only identify two (2) local drivers who performed over-the road driving. In this connection, the Employer was unable to provide evidence as to the frequency of such assignments or when they occurred. The Employer acknowledges that local drivers are not required to accept an over-the-road driving assignment. In this regard, he asserted that Morris McNair and Eric Morris may have had an over-the-road driving assignment to Virginia and Connecticut, respectively, during the past year but that he was uncertain thereof.<sup>9</sup> There is no other evidence of local drivers performing over-the-road work. Nazzaro also testified that there were three other drivers (Bill McMichael, Carl Pires and Everton Scharschmit) who during their careers performed as local drivers and over-the-road drivers. However, there is no explanation as to the circumstances thereof, such as whether they performed such work simultaneously or at different periods of their employment and when such occurred.<sup>10</sup> The record reveals that the Employer uses independent contractors or owner operators to fill its needs when its own local drivers are unavailable. The frequency and circumstances of such is not described in the record.<sup>11</sup>

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<sup>8</sup> Although his job duties are not described in the record, the parties appear to agree that D'Amato has general supervisory oversight for local drivers and, therefore, should not be included in the unit.

<sup>9</sup> As to McNair, the record is confusing as to whether he was an over-the-road driver who quit and later returned to work as a local driver when the asserted possible over-the-road trip to Virginia took place.

<sup>10</sup> The record is silent as to the current classification of these employees.

<sup>11</sup> The parties agree that independent operators and owner operators are not employees of the Employer and, therefore, should be excluded from the unit.

The Employer employs approximately 56 over-the-road drivers who drive in teams utilizing tractor trailers that have sleeping berths adding to the overall length of their vehicles. They drive to destinations such as Maine, Massachusetts, Connecticut, North Carolina, Tennessee and California. Over-the-road drivers travel in teams so that when one driver is resting or sleeping the other driver is driving in order to minimize the down time of vehicles. Over-the-road drivers do not punch a time clock and are paid by the mile. In this connection, their rates of pay range from \$.28 (entry level rate) to \$.34 per mile depending on the drivers' length of service. As to the frequency with which the over-the-road drivers are present at the Employer's Carteret facility, the Employer described it as "...within a two week period, everyone basically hits home."<sup>12</sup> As described above, the over-the-road drivers are on Express' payroll.<sup>13</sup> They are supervised by General Manager, Karen O'Connor who has primary responsibility in load planning.<sup>14</sup> Over-the-road drivers do not receive overtime pay. They attend a separate annual meeting where pay, pension and other benefit issues are discussed. Over-the-road drivers generally, unlike local drivers, do not perform the tasks of loading and unloading of trucks. The Employer contends that although the over-the-road drivers are not required to perform local driving, they do a substantial amount of such local driving so as to blur the distinction between the two groups. The record does not support this assertion. In this regard, the frequency and volume of such cross assignments is not described in the record. Further, there was no documentary evidence submitted to support this contention. The record reveals that the Employer could merely identify four over-the-road drivers who also performed local driving during the past year. Neither the frequency or

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<sup>12</sup> Home refers to the Carteret facility.

<sup>13</sup> It appears that four local drivers are carried on Express' payroll. The record offers no explanation for this occurrence.

circumstances of such work was described. Richard Nazzaro, the Employer's Vice President of Corporate Trucking acknowledged that these four over-the-road drivers are not required to perform local driving and that more than 80% of their time is spent engaged in over-the-road driving work. Over-the-road drivers, when performing local driving work, do not punch a time clock as do the local drivers.<sup>15</sup> Further, over-the-road drivers, unlike local drivers, receive intensified training on maintaining proper log information when driving.

The record reveals that all drivers are required to have class A and CDL licenses, are subject to the Employer's drug testing policies and share similar health, 401(k) plan, profit sharing, life insurance, vacation and holiday benefits. All drivers are given safety and hazardous material handling training although the record is unclear as to whether such training is given at the same time for the local and over-the-road drivers. The Employer's Safety Director hires all drivers and no drivers wear uniforms. A common human resources department administers a common complaint procedure and provides a common employee handbook. The record does not describe the complaint procedure or the contents of the handbook. Over-the-road drivers and local drivers report to the same Carteret facility albeit to separate dispatching windows for assignments.

The Board has long held that local drivers and over-the-road drivers constitute separate appropriate units where it is shown that they are clearly defined homogeneous and functionally distinct groups with separate interests which can effectively be represented separately for bargaining purposes. *Georgia Highway Express, Inc.*, 150 NLRB 1649 (1965); *Alterman Transport Lines*, 178 NLRB 122 (1969); *Gluck Bros.*, 119

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<sup>14</sup> Although her job duties are not described in the record, the parties appear to agree that O'Connor has general supervisory oversight for over-the-road drivers and, therefore, should not be included in the unit.

<sup>15</sup> The Employer asserts that when an over-the-road driver performs local driving work, the driver is paid on an hourly basis even though the driver does not punch a time clock.

*NLRB 1848 (1958); English Freight Company, 58 NLRB 1387 (1944); see also Jocie Motor Lines, 112 NLRB 1201 (1955); Cf. Carpenter Trucking, 266 NLRB 907 (1983).*

Based upon the above, and the record as a whole, noting that local drivers and over-the-road drivers have separate supervision, different bases of payment, different duties and functions, lack of interchange and limited contact, I find that there is not a sufficient community of interest between the local drivers and the over-the-road drivers requiring them to be included in the same unit. In this regard, I find that the over-the-road drivers have divergent interests from those local drivers sought by the Petitioner and, therefore, should not be included in the unit.<sup>16</sup>

There remains for consideration the unit placement of the 11 mechanics and helpers whom the Employer, contrary to the Petitioner, contends should be included in the unit. The maintenance department which includes mechanics and helpers is engaged in typical truck and vehicle maintenance. It appears that preventative maintenance of equipment including trailers is also part of their function. Although not described in the record, there is reference to a maintenance shop which appears to be a separate building from the Carteret office building. Drivers orally report problems with their vehicles to a mechanic after receiving permission from their dispatcher to do so. A driver is required to obtain a shop pass from their dispatcher prior to being allowed to bring their vehicle to the maintenance shop for repair. If a driver requires maintenance service while on the road, he may be in telephone communication with a mechanic or his dispatcher. If the problem cannot be resolved via telephone, a mechanic may drive a maintenance truck to the scene in order to repair the truck. There does not appear to be any work related contact between drivers and maintenance department employees beyond the limited oral

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<sup>16</sup> The cases relied on by the Employer are misplaced as they involve situations where there is a high degree of functional integration and employee interchange, unlike the facts in the instant matter.

communication required to explain the problem with the vehicle. The frequency of such contacts and their duration are not described in the record. The Employer asserts that, on occasion, mechanics, for safety precaution reasons, have made deliveries to customers if the particular truck used was in need of repair which had not been completed and such a delivery was a necessity. The Employer could not recall the last such occurrence and acknowledged that such instances are rare.

Mechanics and helpers, unlike drivers, are provided with uniforms. They punch a time clock and their rates of pay range from approximately \$15 to \$20 per hour. They are supervised and hired by James O'Neill, vice-president. O'Neill does not supervise any drivers. Mechanics and helpers primarily work in the maintenance shop. Day shift mechanics and helpers begin work at 5AM, 7AM or 8AM, whereas second shift begins at 4PM. Mechanics are required to have CDL licenses. The record reveals that approximately a year and a half prior to the instant hearing a local driver became a mechanic when such a position became available. There is no other evidence of transfers.

As noted above, the Employer contends that the mechanics and helpers have contact with the drivers. In this regard, the record disclosed that drivers may have verbal contact with mechanics during the work day when a driver advises the mechanic regarding a problem he may be having with his vehicle. The frequency of this type of contact is not described in the record. It appears that the mechanics spend the majority of their time working in the shop whereas drivers are on the road away from the Employer's facility.

Based upon the above and the record as a whole, I find to be appropriate a unit of all local drivers, excluding mechanics and helpers as sought by the Petitioner. In this regard, I find there is not a sufficient community of interest or degree of integration

between the petitioned for employees and the mechanics and helpers as would render the sought after unit inappropriate. The petitioned for employees perform job functions both different and separate from the work performed by the mechanics and helpers and they spend the majority of their time away from terminal, thus considerably limiting their work contacts with the mechanics and helpers. There is no regular or substantial interchange among the petitioned for employees and the mechanics and helpers, their job classifications are dissimilar, there are differences in their rates of pay and they are separately supervised. *Mc-Mor-Han Trucking Co., 166 NLRB 700 (1967); Diamond Standard Fuel Corp., 179 NLRB 702 (1969); Walker-Roemer Dairies, Inc., 186 NLRB 430 (1970); Flav-O-Rich, Inc., 234 NLRB 1011 (1978); Overnite Transportation Co., 322 NLRB 347 (1996)*. Under these circumstances, I further note that the petitioned for employees comprise a functionally distinct group where, as here, the Petitioner does not seek to represent them in a broader unit including mechanics and helpers and there is no bargaining history in such a broader unit. *Mc-Mor-Han Trucking Co., supra; Diamond Standard Fuel Corp., supra*.

Based upon the above, and the record as a whole, I find that a unit of local drivers excluding over-the-road drivers and mechanics and helpers, as sought by the Petitioner, is appropriate for purposes of collective bargaining.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are 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. Also eligible are

employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government 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 **Local Union No. 202 A/W International Brotherhood of Teamsters.**

#### **LIST OF VOTERS**

In order 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 in 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 seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned. *North Macon Health Care Facility, 315 NLRB 359 (1994).* This list may initially be used by the undersigned to assist in determining an adequate showing of interest. The undersigned Regional Director shall make the list available to all parties to the election, when I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington

Place, 5<sup>th</sup> Floor, Newark, New Jersey 07102, on or before May 27, 1999. 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. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provision 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 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by June 3, 1999.

Signed at Newark, New Jersey this 20<sup>th</sup> day of May 1999.

/s/ William A. Pascarell

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William A. Pascarell, Regional Director  
NLRB Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102

440-1760-6200  
440-1760-6700