

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Dallas, Texas

CMT, INC., et al., a Single Employer 1/

Employer

and

Case No. 16-RC-10242

AMERICAN POSTAL WORKERS UNION, AFL-CIO

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, the undersigned finds:2/

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/
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/

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:

INCLUDED: All full-time and regular part-time inner-city and over-the road truck drivers employed at or supervised from the Employer's Dallas, Fort Worth, or Tyler, Texas, or Oklahoma City or Tulsa, Oklahoma, terminals or locations.

EXCLUDED: Office clerical employees, technical employees, dispatchers, and professional employees, guards and supervisors as defined by the Act.

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 the 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 the American Postal Workers Union, AFL-CIO.

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 containing the full names and addresses of all eligible voters 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); and *North Macon Health Care Facility*, 315 NLRB 359 (1994). 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 the undersigned, 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 NLRB Region 16, 819 Taylor Street, Room 8A24, Fort Worth, Texas 76102, on or before August 4, 2000. 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 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 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by August 11, 2000.

DATED July 28, 2000, at Fort Worth, Texas.

/s/ Claude L. Witherspoon
Claude L. Witherspoon
Acting Regional Director
NLRB Region 16

-
1. At the hearing, the petition was amended to reflect the Employer's correct name.
 2. The Employer and the Petitioner filed briefs which were duly considered.
 3. The parties stipulated, and I find, that CMT, Inc. (CMT), Mitchell Mail Services, Inc. (Mitchell) and JC Houasel, Inc. (Houasel), Texas corporations, Fast Freight, Inc., Fast Freight West, Inc., Fast Freight South, Inc., Fast Freight North, Inc. (Fast Freight), Oklahoma corporations, wholly owned subsidiaries of Cross Street Service, Inc., (Cross Street) an Arkansas corporation, Texas Mail Service, Inc. (Texas Mail), a Texas corporation, a wholly owned subsidiary of Pat Salmon & Sons, Inc., an Arkansas corporation, are a single employer and collectively called the Employer, with locations, offices, and terminals in Dallas, Fort Worth, Tyler, Texas, Oklahoma City and Tulsa, Oklahoma, and are engaged in intrastate and interstate transportation of the mail for the United States Postal Service. During the last 12 months, a representative period, the Employer derived gross revenues in excess of \$50,000 for transportation of the mail for the United States Postal Service from the State of Texas directly to points outside the State of Texas.
 4. The parties stipulated, and I find, that the Petitioner is a labor organization as defined in Section 2(5) of the Act.
 5. By its petition, the Petitioner seeks to represent a single, employer-wide unit consisting of the Employer's full-time and regular part-time inner-city and over-the road truck drivers employed at or supervised from the Employer's Dallas, Fort Worth, or Tyler, Texas, or Oklahoma City or Tulsa, Oklahoma, terminals or locations. The parties stipulated, and I so find, that the petitioned-for unit is appropriate.

The sole issue in dispute in this case concerns whether the Petitioner has a conflict of interest which would serve to disqualify it from representing employees in the petitioned-for unit. The Employer operates trucking companies and is exclusively engaged in the pick up, transportation and delivery of mail pursuant to contracts competitively awarded

by the USPS. The Employer derives all of its business from its contracts with the United States Postal Service, herein USPS. Pursuant to this contractual agreement, the Employer picks up, transports and delivers mail in, around and outside the Dallas/Fort Worth area. In the performance of its business operations, the Employer employs 35 to 50 inner-city drivers who pick up, transport and deliver mail to 35 USPS area offices in and around the Dallas/Fort Worth area. The Employer also employs 260 to 275 over-the-road, long-haul drivers.

The record reflects that the Petitioner represents USPS inner-city drivers. The Petitioner and the USPS have a collective bargaining agreement, hereinafter CBA, in effect which governs the wages, benefits, terms, and conditions of employment for all hourly USPS employees, including a unit of USPS motor vehicle service drivers who pick up, transport and deliver mail to 35 USPS area offices in and around the Dallas/Fort Worth area. The Petitioner owns no facilities, equipment, or motor vehicles and does not hire employees to pick up, transport or deliver mail.

The record revealed that the Employer's and USPS's inner-city drivers perform essentially the same duties in transporting and delivering mail for the USPS in and around the Dallas/Fort Worth area. The Employer's inner-city drivers and the USPS inner-city drivers move the mail between and among USPS processing and distribution centers to various USPS area offices located throughout the Dallas/Fort Worth area. The Employer's and USPS's inner-city drivers pick up mail at one USPS location, either load or assist in loading, transport and deliver the mail to the appropriate USPS area office(s) and then unload or assist in the unloading of mail at the receiving facility. The Employer's inner-city drivers and USPS inner-city drivers are also responsible for receiving any mail to be returned to the originating Postal Office or facility. The USPS drivers do not transport mail over the road, outside the Dallas/Fort Worth area.

The Employer's and USPS's inner-city drivers also interact with the same Dallas/Fort Worth area USPS personnel in the performance of their respective jobs. The Employer's inner-city drivers and the USPS inner-city drivers are governed by the same rules and regulations related to individuals who handle mail.

With respect to the wages and benefits for the Employer's inner-city drivers, the record reflects that such are set by the Service Contract Act's prevailing wage determination. The wages and benefits for USPS inner-city drivers are set by the CBA between the Petitioner and the USPS.

The Petitioner in this case is the APWU International Union and not the Local. While the record reflects that the Dallas or Fort Worth APWU Local may negotiate a local agreement with a particular branch of the USPS, no APWU Local may negotiate such an agreement that is contrary to the USPS/APWU CBA. Article 32 of the CBA between the Petitioner and USPS requires the USPS to provide the Petitioner certain information regarding the award of new (or renewal of existing) mail contracts to private mail contractors such as the Employer. The Petitioner uses this information to enforce the CBA.

Finally, the record evidence disclosed that a separate Fort Worth or Dallas Local of the Petitioner, which is not a party to this petition, has filed grievances on behalf of APWU-represented USPS motor vehicle service employees, including Dallas or Fort Worth USPS inner-city drivers, over the USPS contracting or subcontracting work to private mail contractors.

The Employer argues in its brief that the potential for an impermissible conflict of interest exists because the Employer's and USPS' inner city drivers perform like jobs, from like facilities, drive like routes, interact with the same Dallas/Fort Worth USPS personnel and are governed by the same rules and regulations in the handling of mail. In support of its contention, the Employer asserted that the North Texas Processing and Distribution Center in Coppell, Texas has 50 to 80 loading doors and during mail deliveries and/or pick-ups, USPS vehicles sometimes pull up to the same door that the Employer's drivers use and work next to each other. Additionally, on numerous occasions after the Employer transports the mail on a given day, the USPS may have additional mail to deliver to facilities in the Dallas/Fort Worth area and instead of waiting for the Employer or calling the Employer for a quote, the USPS may use USPS inner-city drivers to transport mail. The USPS drivers and the Employer's drivers both deliver mail originating from the Dallas Bulk Mail Center to the North Texas facility. However, the USPS drivers only deliver mail locally and, as referenced above, do not engage in over-the-road, long-hauling of mail. Because of the identical nature of duties, the Employer argues there is direct competition between the USPS and Employer's employees. Notwithstanding this contention, the record reflects that these similarities apply to only a very small percentage of the Employer's workforce. Moreover, such similarities do not compel a finding that the Petitioner has a disqualifying conflict of interest.

The Employer further argues that the Petitioner has an innate conflict of interest because of its desire that the USPS retain all of its mail delivery by truck in-house. In its brief, the Employer relies on *Catalytic Industrial Maintenance Co.*, 209 NLRB 641 (1974) in support of its contention that the Petitioner should be disqualified from representing the employees in the petitioned-for unit. In *Catalytic*, a post-certification proceeding, the Board affirmed the ALJ who found the Union's certification should be revoked because of an "overt act" committed by the Union, creating a conflict of interest in the Union's representation of the both the contracting (Oxochem) and subcontracting employers' (Catalytic) employees. The ALJ found that the union demanded that the subcontracting employees be brought "in-house" to the contracting employer and that demand, in fact, impacted the negotiation of a new collective-bargaining agreement between the union and the contracting employer, Oxochem. The Judge noted that by seeking to force Oxochem to retain for its employees work which it had contracted to Catalytic, the union was acting in substantial conflict of interest with regard to its obligations to the employees of Catalytic and such conflict was inherently inimical to the bargaining relationship between the union and Catalytic.

The facts in the instant case are clearly distinguishable from those in *Catalytic Industrial*. First, the instant case is not a post-certification proceeding. Secondly, there is no record evidence that the Petitioner has performed any "overt act" tending to show that it would

act in an inconsistent manner with its future representational obligations with regard to the employees in the petitioned-for unit.

The Employer also argues that the Petitioner should be disqualified from representing the employees in the petitioned-for unit because they will be in direct competition with USPS inner-city drivers thereby creating a conflict of interest for the Petitioner. While the record discloses that the Petitioner represents USPS inner-city drivers in the Dallas/Fort Worth area, there is no evidence or authority cited by the Employer to support its contention that this constitutes a disqualifying conflict of interest under Board law.

The Employer further argues that evidence of direct competition is not necessary to conclude that a conflict of interest exists in this matter. Notwithstanding this contention, it is well settled that enough evidence of a conflict of interest exists if...“the proximate danger of infection of the bargaining process” exists. *NLRB v. Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968). The Employer speculates that if the Petitioner is certified to bargain on behalf of the Employer’s inner-city drivers, the Petitioner will be in a position to make demands upon the Employer with respect to wages and benefit increases and if the Employer refuses, it could lead the Petitioner to strike and that could put the Employer out of business. The court in *Buttrick*, supra, remanded the case to the Board to determine whether the potential for conflict of interest would have an adverse affect on the bargaining relationship. The Board reaffirmed its earlier decision finding that evidence of a potential conflict of interest was remote. *David Buttrick Company*, 167 NLRB 438 (1967). Upon review, the court reconsidered its earlier decision and affirmed the Board and stated there was a considerable burden on an employer to come forward with a showing that a danger of a conflict of interest interfering with the collective bargaining process is clear and present. *NLRB v. Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968). The Employer has not met this burden here and is simply speculating that a conflict of interest may exist.

In its brief, the Employer argues that the Petitioner has taken a consistent position against the privatization of USPS jobs and has uniformly opposed the contracting and/or subcontracting of any jobs covered by its national agreement with the USPS and that such evidences a conflict of interest. In further support of its position that the Petitioner has a disqualifying conflict of interest, the Employer argues that the Petitioner has negotiated a provision in the national agreement with the USPS restricting the USPS’ right to contract work out. Article 32 requires the USPS to provide APWU certain information regarding the awarding of new contracts or the renewal of new contracts to truck carriers for the transportation of mail. The Employer also argues that the Petitioner has filed “probably dozens” of grievances in an effort to preclude the USPS from contracting out work and that the filing of those grievances over many years constitutes “overt acts” as described in *Catalytic*, supra. The Employer’s reliance on *Catalytic*, is wholly misplaced. In the instant case, the Petitioner has not been certified as the exclusive bargaining representative of the Employer’s inner-city drivers and the record evidence does not disclose any “overt acts” by the Petitioner demonstrating an “ulterior purpose” for representing the employees in the petitioned-for unit. Notably, the record

evidence reflects that the Petitioner has not caused the Employer to lose any kind of business.

The Petitioner argues at the hearing and in its brief, and the parties stipulated, that the Petitioner is not in business competition with the Employer. Moreover, Petitioner owns no facilities, no equipment or motor vehicles and hired no employees to pick up, transport or deliver mail. Notwithstanding the Employer's reliance on *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1558 (1954), by this stipulation, the Employer has acknowledged a critical difference in this case from *Bausch & Lomb*. In that case, the union owned and operated a business that was in direct competition with the employer whose employees it sought to represent. As noted, there is no such evidence in this instant case, nor does the record support any reasonable inference that Petitioner intends to become a business competitor of the Employer.

The Petitioner also argues that the Employer has failed to adduce evidence warranting the Petitioner's disqualification from representing the employees in the petitioned-for unit. In support of its contention that no conflict of interest exists, the Petitioner cites a National Arbitration Panel decision in a matter between the American Postal Workers Union and United States Postal Service, dated July 24, 1992, wherein the arbitrator ruled that the USPS was not barred from contracting or subcontracting out work pursuant to Article 32 of the APWU National Agreement. The Arbitrator's decision states in pertinent part:

Evidence submitted to the arbitrator has not established that Article 32.3 contemplated a competition between subcontractors and the Union. As a practical matter the Union has no equipment, no motor vehicles, and no transportation employees. It is the Employer, not the Union that employs mechanics, dispatchers, drivers, and others. It is the Employer that owns trucks and facilities, necessary to transporting mail by highway. The point of course, is obvious, but its implications may not be clear. Article 32.3 could not have been intended to establish a bidding competition between the Union and subcontractors because the Union was not in a position to contract with the Employer to provide such services.

It is well established that a union may not represent the employees of an employer if there exists a conflict of interest on the part of the union that would jeopardize a good-faith collective bargaining relationship between the parties. The Board's standard for finding that a union has a disqualifying conflict of interest is the showing of a "clear and present danger" of interference with the collective bargaining process. *Alanis Airport Services, Inc.*, 316 NLRB 1233 (1995), citing *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954). In *Pony Express Courier Corp.*, 297 NLRB 171 (1989) and *Garrison Nursing Home*, 293 NLRB 122 (1989) the Board found that disqualification was appropriate where a personal financial relationship exists between executives of a labor organization and the employer whose employees the union seeks to represent. The burden of proof for establishing that a disqualification exists falls on the Employer and "strong public policy favoring free choice of a bargaining agent by employees" is not to

be “lightly frustrated.” *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), *enfd.*, 783 F.2d 1444 (9th Cir. 1986), citing *Sierra Vista Hospital, Inc.*, 241 NLRB 631, 633 (1979).

The Employer has failed to adduce any evidence or cite any case authority establishing the types of conflicts envisioned by the Board in the above-referenced cases. For the reasons stated above, and based on the record as a whole, I find that the Petitioner’s representation of the Employer’s employees does not constitute a “clear and present danger” to the collective bargaining process and I do not disqualify the Petitioner from representing the employees in the petitioned-for unit.

Finally, the parties stipulated, and I find, that a mail-ballot election is the most appropriate manner of conducting an election in this matter.

6. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.