

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

HANSON AGGREGATES PACIFIC
SOUTHWEST, INC.¹

Employer

and

Case 21-UC-403

BUILDING MATERIAL, CONSTRUCTION,
INDUSTRIAL, PROFESSIONAL &
TECHNICAL TEAMSTERS, LOCAL UNION
NO. 36, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner-Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) 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:

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

¹ The name of the Employer appears as corrected at the hearing.

the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner-Union is a labor organization within the meaning of Section 2(5) of the Act.

4. By the instant petition, filed on August 14, 2001, the Petitioner-Union proposed to clarify the existing contractual bargaining unit to include jointly employed Ready Mix Drivers, as defined in M.B. Sturgis, (the "rental drivers"), whose work was covered by the September 10, 1999, collective-bargaining agreement between the Petitioner/Union and the Employer. On September 19, 2001, I dismissed the petition without a hearing based on my conclusion that there had been no recent, substantial changes in the unit classifications to warrant a unit clarification.

On December 5, 2001, the Board issued an Order reinstating the petition and directing that a hearing be conducted to determine whether in fact, recent changes in the Employer's operation had occurred to warrant a unit clarification. As is noted below, based on the record presented, I conclude that there have been no recent, substantial changes in the unit classifications to warrant unit clarification, and accordingly, I again dismiss the petition.

STANDARDS FOR UNIT CLARIFICATION

The Board's express authority under Section 9(c)(1) of the Act to issue certifications includes the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Thus, Section 102.60(b) of the Board's Rules and Regulations, Series 8, provides that a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists.

With respect to a UC petition, the petitioning party has the burden of establishing that clarification is appropriate. The Washington Post Co., 256 NLRB 1243 (1981)(stating that "the petitioning party has the burden of establishing some compelling reasons" why clarification is appropriate).

The Board described the purpose of unit clarification proceedings in Union Electric Co., 217 NLRB 666, 667 (1975):

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, **within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees** in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category-excluded or included-that they occupied in the past. **Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit**

placement of various individuals, even if the agreement was entered by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent. [Emphasis added.]

Traditionally, the Board has applied the doctrine of accretion sparingly and restrictively because it denies the affected workers the right to select their own bargaining representative, a right most central to the Act. United States Steel Corp., 280 NLRB 837 (1986); Melbet Jewelry, 180 NLRB 107 (1969).

As stated in Robert Wood Johnson University Hospital, 328 NLRB 912, 914 (1999), quoting United Parcel Service, 303 NLRB 326, 327 (1991), enfd. Teamsters National UPS Negotiating Committee v. NLRB, 17 F. 3d 1518

(D.C. Cir. 1994):

The limitations on accretion ... require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. ***It is the fact of historical exclusion that is determinative. [Italics in original; Emphasis added.]***

A petition seeking to include a classification that historically has been excluded raises a question of representation, which can only be resolved through an election, or based on majority status. Boston Cutting Die Co., 258 NLRB 771 (1981). Similarly, when the employees have not been included in the unit for some time and the union has made no attempt to include the position in the unit, the Board may find that the position is historically

outside the unit, and that the union has waived its right to a unit clarification proceeding. Sunar Hauserman, 273 NLRB 1176 (1984); Plough, Inc., 203 NLRB 818 (1973). Accord: ATS Acquisition Corp., 321 NLRB 712 (1996).

BACKGROUND

The Employer, a Delaware corporation, with an office and multiple facilities located in San Diego, California, is engaged in the manufacture, distribution and sale of Ready Mix concrete and construction aggregates.

The record discloses that the Employer and the Petitioner-Union are parties to a collective-bargaining agreement, effective from September 10, 1999, to October 31, 2003. The current collective-bargaining agreement recognizes the Petitioner-Union as the collective-bargaining agent for all persons employed by the Employer in the following classifications:

Ready Mix Drivers, Water Truck/Off Road Drivers, Lubeperson, Mechanic I, Mechanic II, Material Truck Drivers, including Bottom Dump Drivers, Truck/Transfer Drivers, Truck/Pup Drivers, and End Dump Drivers, Welders, and Utility Persons, including Parts Clerks, Yard Persons, Mobile Sweepers, and Warehouse Persons; excluding executives, managers, superintendents, watchmen, weigh masters, time keepers, payroll clerks, dispatchers and all clerical or office workers.

The record reveals that the Employer and the Petitioner-Union have had a collective-bargaining relationship since in or about March 1998. The Employer purchased the operations involved in the instant matter from two predecessor employers, Pre-Mix Fenton and Nelson &

Sloan. The Petitioner-Union represented a similar unit of drivers with each predecessor employer.

Pursuant to Articles 2 and 5 of the parties' current collective-bargaining agreement, the Employer has the right to subcontract labor. The record reveals that since 1999, the Employer has utilized subcontracted rental drivers to perform Ready Mix Driver unit work. The rental drivers are provided by a broker, or, in the alternative, the Employer will arrange to have the work performed by individual owner-operators.²

The record reveals that both Pre-Mix Fenton and Nelson & Sloan similarly utilized rental drivers, and that the rental drivers were excluded from the unit. No evidence was presented in the record that the primary task of the rental drivers (to load, deliver, and unload Ready Mix concrete), or the rental drivers' terms and conditions of employment, have undergone any recent change. The only evidence presented by the Petitioner-Union of recent changes in the Employer's operation, are described next. I conclude that the changes noted are insubstantial and do not warrant clarification of the unit.

² The Petitioner does not seek to have true owner-operators accreted into the unit.

ALLEGED CHANGES

(a) Dispatch Method

Hanson drivers began using the Employer's current voicemail dispatch system in the early part of 1999. Prior to 1999, Hanson drivers would call an answering machine, which had a recorded message that provided the driver dispatch information.

Under the new dispatch method, a Hanson driver calls a telephone voicemail dispatching system in order to find out if he is working the next day. The voicemail system will prompt the Hanson driver to select among options based on the Hanson driver's reporting location.

Thereafter, once a Hanson driver has selected the option that matches the location that he works out of, the voicemail system will inform the Hanson driver if he is scheduled to work the next day and the scheduled start time.

The current voicemail dispatch system is prepared by one of the Employer's dispatchers. Each day, a dispatcher is charged with the task of reviewing the number of orders for the next day, then matching and assigning Hanson drivers available to fulfill the orders. If there is more work to be done than there are Hanson drivers available, the dispatcher will contact a broker to arrange for rental drivers to perform the additional work³. Thereafter, the dispatcher prepares the dispatch voicemail tape as is noted above.

Under the predecessor employers (Fenton Pre-Mix and Nelson & Sloan), dispatch information was relayed by phone to the broker and then the broker would relay the information to the rental drivers. The record discloses that the Employer began utilizing rental drivers in 1999. The record reveals that the voicemail dispatch system described above was in effect at the time the Employer started using rental drivers. The only modification that occurred was that the Employer added a selection option for the rental drivers so as to permit them to obtain dispatch information directly from the voicemail system.

Thus, the rental drivers currently call into the same voicemail dispatch system that the Hanson drivers use. Once the Employer makes arrangements with a broker for rental drivers, the brokers direct their rental drivers to call the voicemail system that night for dispatch information. When the rental drivers call the Employer's voicemail dispatch system, they select an option for rental drivers, as opposed to an option based on work location. The dispatch information is then conveyed to the rental drivers.

(b) Radio & Computer Head

The Hanson driver trucks are equipped with a 450-megahertz radio and a computer head. These items are permanently mounted on the inside of each Hanson driver

³ Pursuant to the current collective-bargaining agreement, the Employer uses rental drivers only after all available Hanson drivers have been assigned work.

truck. An antenna is permanently mounted to the outside of the Hanson driver truck.

The radio is for drivers to contact dispatch if there are problems during transport, with delivery, or if they otherwise need to get a hold of someone while on the road. The radios are operated on a certain frequency such that the Hanson drivers are able to hear other Hanson drivers communicating with the dispatchers, but they cannot hear any rental drivers who may be communicating with the same dispatchers.

The computer head permits the Hanson driver to log the delivery process (e.g., start time, time of arrival at a location, time unloading started, time unloading finished, and time left a particular facility). The Hanson driver enters codes into the computer head to reflect the above information. This system allows the Employer to track the truck and monitor the status of deliveries, as well as the location of the truck.

The record discloses that the rental drivers use their own vehicles. Prior to the Fall of 2000, the rental drivers would communicate information to the Employer's dispatch office by cellular phone. Thus, prior to the Fall of 2000, rental drivers did not utilize the Employer's radio/computer/antenna equipment.

Since the Fall of 2000, when a rental driver performs work for the Employer, an 800-megahertz radio and a computer head, owned by the Employer, is placed in the

rental driver's truck. This equipment is mounted to a board, referred to by the parties as a "dinette set," that sits on the seat inside the truck. The equipment is plugged into the cigarette lighter for power. The rental drivers use antennas on top of their vehicles, owned by the Employer, which are magnetically mounted to the trucks.

Since it is not permanently mounted inside of the vehicle, the equipment can be removed and transferred from one rental driver's truck to another. Once a rental driver is finished with work for the Employer, the rental driver removes the equipment from his vehicle and returns it to the Employer.

Since the radio for the rental drivers is operated on a different frequency than the Hanson drivers, the rental drivers can hear conversations between other rental drivers and the Employer's dispatchers, but the rental drivers can not hear conversations between Hanson drivers and the dispatcher.

ANALYSIS

There is no dispute as to the historical and present contractual exclusion of the rental drivers from the unit. The Petitioner-Union argues, however, that the changes involving the rental drivers' use of the Employer's voicemail dispatch system and radio/computer head equipment are recent, substantial changes warranting unit clarification. Contrary to the Petitioner-Union's

assertion, the record evidence reveals that the alleged changes are not substantial changes.

Initially, it is noted that the changes are only with respect to the medium used by the Employer to disseminate information to, or communicate with, the rental drivers. Instead of relaying dispatch information through a telephone call to the broker, the dispatch information is now relayed through the Employer's voicemail dispatch system. Instead of communicating with the rental drivers by cellular phone, the rental drivers now provide information to the dispatchers utilizing the radio/computer equipment. Thus, there is no evidence in the record to indicate that the information disseminated and communicated has changed in any material way; only the technology used to transmit that information has changed.

The primary job function of a rental driver, both before and after the noted changes, has been to load, transport, and unload concrete. That primary function has not been altered by the new technology. Moreover, the changes in technology have not resulted in any change to the rental driver's fundamental terms and conditions of employment.

Because the alleged changes have not altered the rental drivers' primary job function or their terms and conditions of employment in any substantial way, the changes are insufficient to override the historical and contractual exclusion of the rental drivers from the unit. Union

Electric Co., 217 NLRB 666, 667 (1975); Bethlehem Steel Corp., 329 NLRB 243 (1999); see also Batesville Casket Co., 283 NLRB 795, 797 (granting petition would not further the Act's purpose of promoting industrial stability through the preservation of the status quo agreed to by the parties).

Based on the above, I find that the rental drivers have been historically, and are currently contractually, excluded from the unit, and that there is insufficient evidence of recent, substantial changes regarding the positions to warrant clarification.

M.B. STURGIS, 331 NLRB No. 173 (2000).

The Petitioner next argues that under the Board's decision in M.B. Sturgis, the unit should be clarified to include the rental drivers. However, such an argument misstates the Board's holding in that case. In M.B. Sturgis, the Board held that employees jointly employed by a user employer and a supplier employer can be included in a bargaining unit with employees who are solely employed by the user employer without the previously-required consent of both employers. The Board's holding is that inclusion of those employees in the same unit is permitted, but the Board's decision does not mandate their inclusion.

I further find any argument that historical and contractual exclusion should be overlooked because it results from operation of law, or that the Board's decision in M.B. Sturgis constitutes a recent substantial change warranting accretion, is also without merit. Board law

before M.B. Sturgis did not preclude inclusion of the positions sought here. Rather, Board law prior to M.B. Sturgis merely required the consent of each employer in an alleged joint employer relationship before a unit could include jointly employed and solely employed employees of a single user employer. Furthermore, the change in Board law under M.B. Sturgis does not constitute a recent, substantial change in the **duties and responsibilities of the positions** at issue as contemplated in Union Electric. See also Bethlehem Steel Corp., 329 NLRB 243 (1999), supra.

Based on the above, I conclude that the Board's decision in M.B. Sturgis does not mandate that the unit be clarified to include the rental drivers.

EMPLOYER'S ADDITIONAL ARGUMENTS

In addition to arguments advanced by the Employer consistent with my findings and conclusions noted above, the Employer raises the additional, alternative arguments that the rental drivers are not "joint employees" under the Act, and/or that the rental drivers do not share a sufficient community of interest with the Hanson drivers to permit accretion. Given my findings and conclusions, it is unnecessary to address the Employer's alternative arguments.

CONCLUSION

Because of the historical and contractual exclusion of the rental drivers from the unit, and because the Petitioner has failed to present evidence of recent, substantial changes in the duties and responsibilities of

the rental drivers, I find that accretion of the rental drivers to the unit is not appropriate. I further find that the Board's decision in M.B. Sturgis does not mandate the inclusion of the rental drivers into the unit.

Accordingly, the petition is dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case 21-UC-403 be, and hereby is, dismissed.

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, D.C. 20570. This request must be received by the Board in Washington by 5 p.m., EDT, on April 11, 2002.

DATED at Los Angeles, California, this 28th day of March, 2002.

/s/Victoria E. Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board

Classification Codes:

385 7501 2500
385 7533 2020