

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

FRED'S, INC.

Employer

and

CASE 26-RC-8316

**UNION OF NEEDLETRADES,
INDUSTRIAL AND TEXTILE
EMPLOYEES (UNITE) – SOUTHERN
REGION JOINT BOARD, AFL-CIO, CLC**

Petitioner

DECISION AND DIRECTION OF ELECTION

Following the filing of a petition under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. At the conclusion of the hearing the only remaining issue is whether approximately 77 transportation department employees, specifically the drivers, spotters, and transportation clerks, should be included in a unit of about 462 warehouse and maintenance employees.¹ The Employer, Fred's Inc., contends that the transportation department employees should be included because they are functionally integrated with and share a community of interest with the employees in the petitioned-for unit and have been permitted to vote in prior elections at the facility. The Petitioner, Union of Needle Trade Industrial and Textile Employees (UNITE) – Southern Region Joint Board, AFL-CIO, CLC, contends that the transportation department employees possess a separate community of interest and their inclusion in the petitioned-for unit is not required.

¹ Although the inclusion of the clerks in the inventory control department was an issue at the beginning of the hearing, later in the hearing the parties agreed to include the inventory control department employees in the Unit.

I have considered the testimony and evidence presented at the hearing and the briefs filed by the Employer and the Petitioner. As described below, I have decided that the drivers and the spotters who drive on the road have a separate community of interest and their inclusion in the petitioned-for unit is not required. I have also decided that the spotters who do not drive on the road and the transportation clerks should be included in the petitioned-for unit because they share a sufficiently strong community of interest with other employees in the petitioned-for unit as to require their inclusion in the unit.

FACTS

The Employer is engaged in the warehousing and distribution of goods from its Memphis, Tennessee distribution center to retail stores in Tennessee, Missouri, Arkansas, Louisiana, Georgia, and Alabama. The distribution center consists of two warehouses, referred to as warehouse one and two, which have 100 doors. In addition, the Employer stores bulk freight and bagged items such as bird seed and dog food at a satellite warehouse, known as the Delp warehouse, located one-half mile from the distribution center.

The distribution center consists of five departments: outbound, inbound, maintenance, inventory control, and transportation. In the outbound department, pickers pick the orders. In the inbound department, receivers unload the trucks. The maintenance department consists of mechanics, and the inventory control department includes clerks and problem resolution employees.

The warehouse employees work on two shifts. Employees on the first shift start at 4 a.m., 6 a.m. or 7 a.m. The second shift begins at 3:30 p.m. The warehouse employees record time by punching a time clock. The warehouse employees receive 15-minute breaks at various scheduled times depending on when their shifts begin. The Employer has three break areas used

by all of the employees at the facility. Some of the warehouse employees work Sunday through Thursday and others work Monday through Thursday. Although the warehouse employees' wage rates range from \$9.40 to \$12 per hour, the median wage is \$9.75 to \$10 per hour.

The transportation department is supervised by Transportation Manager Bobby Savage. In addition to Transportation Manager Savage, the transportation department consists of 5 spotters, about 70 drivers, and 2 or 3 transportation clerks. These employees work out of the transportation office which is an enclosed office located at the corner of warehouse one and warehouse two, which is connected to warehouse two where the shipping department is located. Transportation department employees attend meetings with Savage which are not attended by other employees. Although the majority of the transportation department employees previously worked in the warehouse, there is no evidence of transportation department employees transferring to the warehouse.

At hearing, the Employer introduced election agreements in two cases and contended that the transportation department employees were included in the unit and allowed to vote in six previous elections. In the first case, Case 26-RC-6527, an election agreement between Baddour, Inc. and Teamsters Local 667, provided for an initial election on October 29, 1982. I take administrative notice that at least three elections were held in that case. In the second case, Case 26-RC-7732, an election agreement between the Employer and Laborers' Local 1441 provided for an initial election on August 4, 1995. I take administrative notice that two elections were held in that case and that a certification of results issued after the rerun election. The transportation department employees were included in the agreed-upon units in both of those cases.

Drivers

The approximately 70 drivers report to Transportation Manager Savage. Their primary function is to transport freight to the retail stores within the city and outside of the state. To perform these duties they must have a commercial driver's license. Some drivers are classified as city drivers and others as over-the-road drivers. City drivers make deliveries that are shorter in time and distance and may perform between one and eight deliveries in a day. Over-the-road drivers handle longer deliveries and therefore perform fewer deliveries in a day.

Drivers are assigned routes by Transportation Manager Savage and then obtain packaged bills of lading from either the transportation clerks or someone at the guard shack. The city drivers have contact with shipping clerks when an assigned trailer is still parked at the shipping dock and the driver goes into the warehouse to check with a shipping clerk to see if the load is ready. Although Inbound Manager Newsom estimated that the city drivers spend 10 to 20 percent of their time interacting with shipping employees, he explained that these conversations with the shipping clerks last only a minute or two and might occur more than once a day.

Drivers usually assist in unloading at the stores but the Employer also uses drop trailers, which are for stores that unload their own freight and do not require the drivers to assist in unloading. With drop trailers, the driver takes the trailer to the store, drops it off, picks up an empty trailer and returns to the facility. Depending on the location of the store, drivers may make multiple runs during a day or make one delivery and not return to work until the next day. At least two drivers, Kip Herring and Chuck Littlejohn, work as spotters when someone is out or on vacation, which is about once per month. Although the record establishes that drivers have worked as back-up clericals, it does not establish the amount of time drivers spend performing such work.

Drivers do not punch a time clock, but keep their time using a log maintained in the transportation office. Drivers report to work between 5 a.m. and 6 a.m. depending on their routes. Drivers usually wear denim shirts or t-shirts with the Employer's name. Drivers are paid between \$13 and \$14 an hour. Unlike warehouse employees, drivers are guaranteed 40 hours a week and do not receive overtime pay. Drivers do receive the same benefits as warehouse employees. Drivers making city deliveries use the same break rooms as the warehouse employees. Some of the drivers were hired from within the Employer's distribution center, while others were hired from outside. There is no evidence that drivers have transferred into warehouse positions.

Spotters

The five spotters are of two types: (1) spotters who drive on the road; and (2) spotters who do not drive on the road,. All five spotters perform spotter work, which consists of moving trailers from the yard to a door or between doors, using a vehicle called a spotter or yard jockey. Spotters receive lists of trailers to be moved from either a supervisor or from the checkers. Four of the spotters report to Transportation Manager Savage, while one reports to the second shift supervisor.

While there have been permanent transfers of employees from the warehouse to the position of spotter, there is no evidence of transfers from the position of spotter to a position in the warehouse. The pay rate for spotters ranges from \$9.16 to \$10.66 an hour. Spotters receive the same benefits as other warehouse employees.

The spotters who drive, Tommy Wooten, Tommy Mack, and Early Rixie, each possess a commercial driver's license, which qualifies them to transport freight to the stores when necessary. These spotters substitute for drivers when needed and move trailers from the

distribution center to the off-site warehouse on Delp. Drivers who move trailers from the distribution center to the Delp warehouse are referred to as warehouse-transfer drivers. Earl Rixie is both a spotter and a warehouse transfer driver and drives on the road about once or twice a month. According to Inbound Manager Newsom, spotter Tommy Wooten spends most of his time as a spotter but pulls a load in the afternoon. Inbound Manager Newsom estimated that Tommy Mack works as a spotter 95 percent of the time, but explained that if they do not work on Thursday nights, Mack drives on the road on Fridays. Spotters who drive record their time in a log kept in the transportation office and are guaranteed 40 hours a week.

Spotters who do not drive, Willie Hill and Ed Jackson, do not have commercial driver's licenses. They record their time by punching a time clock, rather than recording time in a logbook. These spotters are not guaranteed 40 hours a week.

In addition to the five spotters in the transportation department, the Employer also has an unspecified number of spotters in the receiving department. According to Inbound Manager Newsom, the spotters in the receiving department perform the same duties as those in the transportation department. The receiving department spotters are included in the petitioned-for bargaining unit by agreement of the parties.

Transportation Clerks

There are at least two transportation clerks, Brenda South and Cheryl Crawley. An unidentified woman who works on the second shift in the transportation office may be a third transportation clerk. The transportation clerks work primarily in the transportation office and report to Transportation Manager Savage.

The job duties of the transportation clerks primarily relate to bills of lading and seals for the trailers. The information to generate the bills of lading or invoices is entered by a shipping

clerk in a tower or platform in the shipping department. The invoices are then printed in the transportation office. Next, the transportation clerk separates the printed invoices and puts them in a bag and writes the store numbers and seal numbers on them and stacks them in alphabetical order by store for that particular day. Then, the transportation clerks take the bills of lading and the seals to the guard shack for the drivers to pick up as they leave. Two or three times a day Brenda South goes into the shipping area and picks up seals for the trailers. At times the transportation clerks use a calculator to determine the total number cases going to the stores.

Inbound Manager Newsom testified that South interacts with warehouse employees 40 percent of the time. A witness who worked as a loading clerk in the tower testified that she spoke to South three or four times a day for two or three minutes each time and that South went into the shipping area two or three times a day for about five minutes each time.

With regard to warehouse employees temporarily or permanently working as transportation clerks, Inbound Manager Newsom testified that three distribution center employees have assisted in doing the bills of lading for the transportation department. There is no evidence as to how long or when this occurred. The transportation clerks receive the same benefits as warehouse employees. The record does not establish the rate of pay for the transportation clerks.

ANALYSIS

Initially, I note that 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. 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. Home Depot USA, Inc., 331 NLRB No. 168, slip op. at 2 (2000) (citation omitted). 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. *Id.*, quoting Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

In applying those principles to the issues here, I will first consider the Employer's argument regarding the effect of the transportation department employees voting in prior elections. Next, I will separately address the driver, spotter and transportation clerk classifications.

Prior Elections

In it brief, the Employer cites E.H. Koester Bakery Co., 136 NLRB 1006 (1962) for the proposition that substantial weight should be given to the collective-bargaining history and the agreement or stipulation of the parties. Here, however, there is no collective-bargaining history and the prior election agreements are not entitled to weight because the Petitioner was not a party to either of those agreements. Accordingly, I find that the fact that the transportation department employees were included in the bargaining unit in prior elections is not entitled to substantial weight in determining whether they should be included in the petitioned-for unit.

Drivers

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). In Home Depot USA, Inc., *supra*, the Board found that the drivers shared a distinct community of interest separate from the petitioned-for unit. In its decision, the Board emphasized that drivers were required to have special driving qualifications and licensing, had little or no contact with other employees and any such contact was incidental, drivers wore distinct uniforms, and there was little interchange with other employees. Similarly, in Overnite Transportation Co., 331 NLRB No. 85 (2000), the Board found that the drivers did not share a sufficient community of interest with dockworkers, jockeys, facilities maintenance employees, and janitors at a service center as to mandate their inclusion in the unit. There the Board emphasized that the drivers performed a separate function and possessed special skills and qualifications, worked away from the facility most of the day, and did not have any overlapping duties or interchange with the other employees.

Here, the drivers have separate immediate supervision from the warehouse employees, and use equipment unique to their positions. Drivers are required to maintain commercial driver's licenses and to keep their time in logs maintained in the transportation office while warehouse employees punch a time clock to track their hours. There is minimal interaction or interchange between the drivers and the warehouse employees. Also, the drivers receive a higher rate of pay than the warehouse employees and, unlike warehouse employees, are guaranteed 40 hours a week and do not receive overtime pay. In these circumstances, I find the drivers do not share a sufficient community of interest with the other employees in the petitioned-for unit to mandate their inclusion in the unit. Overnite Transportation Co., *supra*.

Contrary to the Employer's argument, a different result is not required by Birdsall, Inc., 268 NLRB 186 (1983). In Birdsall, the Board found there was a high degree of functional integration, which included "substantial interchangeability and contact among employees." *Id.* at

190. Due to the employer's operations, employees were frequently moved from one area to another and the promptness of the Employer's response was essential to its function. Here, there is no evidence of substantial interchange or contact between the employees in the warehouse and the drivers. Therefore, I find that Birdsall is distinguishable and does not require the inclusion of the drivers in the petitioned-for unit here.

Spotters

In Overnite Transportation Company, supra, the petitioned-for unit included jockeys, a position similar to spotters. Jockeys were responsible for moving the trailers around the yard so they could be loaded and unloaded. Only 3 of the 22 jockeys possessed commercial driver's licenses and therefore a majority were not qualified to drive the trucks. The Board also found any driving done by the jockeys was de minimis. The Board found that the jockeys were unskilled positions and did not require the inclusion of drivers in the unit with the jockeys.

As described earlier, here there are two types of spotters – those who drive on the road and those who do not drive on the road. The three spotters who drive on the road, Tommy Wooten, Tommy Mack, and Early Rixie, each possess a commercial driver's license, perform delivery runs for the Employer, keep their time in logs in the same manner as the drivers, and are guaranteed 40 hours a week. Due to their special skills and performance of duties separate from other warehouse employees, I find they share a separate community of interest with the drivers and therefore their inclusion in the petitioned-for unit is not mandated.

In contrast, the two spotters who do not drive on the road, Willie Hill and Ed Jackson, do not possess commercial driver's licenses and spend all of their time on the yard because they cannot drive trailers on the street. These spotters record their time with a punch clock rather than in a log and use the same break facilities as the warehouse employees. Most importantly, the

transportation department spotters who do not drive perform the same duties as the receiving department spotters who are included in the petitioned-for unit. In these circumstances, I find the spotters who do not drive on the road, Willie Hill and Ed Jackson, share such a strong community of interest with the other employees in the petitioned-for unit that their inclusion is mandated and I will include them in the petitioned-for unit. .

Transportation Clerks

Although the transportation clerks work under separate supervision and in an office separated from the other employees, the office is located near the shipping department and they have regular interaction with the shipping department employees. The transportation clerks' duties are functionally integrated with the shipping department clerks in that the bills of lading used by the transportation clerks are printed from information entered by the shipping clerks. Some warehouse employees have, at least temporarily, performed the transportation clerk job duties. The transportation clerks are not required to possess any special skills other than the ability to use a calculator. They punch a time clock and use the same break rooms as the other warehouse employees.

In Avon Products, Inc., 250 NLRB 1479 (1980), the Board found that several clericals in the transportation department, including the order service clerks, the lost order clerk, a transportation clerk, and an outbound clerk who maintained the bills of lading, were plant clericals and should be included in the production and maintenance unit. The Board relied upon the fact their duties were integrally involved in the order flow process, they engaged in work relating to the movement of goods within the facility as well as into and out of the facility, and they shared common wages, hours, and working conditions with other unit employees with whom they had repeated daily contacts.

Here, the transportation clerks do not possess special skills, they come in regular contact with shipping clerks and the duties and function of the transportation clerks are closely associated with the tasks performed by the warehouse employees in preparing and shipping freight to stores. Therefore, I find the transportation clerks are plant clericals and share a community of interest with the warehouse employees and I will include them in the petitioned-for unit. Avon Products, Inc., supra.

In its brief, the Petitioner argues that the transportation clerk's exclusion is supported by cases such as Mitchellace, 314 NLRB 536 (1994); Cook Composites & Polymers Co., 313 NLRB 1105 (1994); Avecor, 309 NLRB 73 (1992); and Case, Inc. 237 NLRB 798, 806 (1978). In those cases, the Board found the clericals were office clericals rather than plant clericals. In Mitchellace, the two data entry employees were separately supervised, had limited work-related contact with the production employees, attended office functions and were excluded from the production in-plant incentive programs and were characterized by the employer as office clericals in their evaluations. In Cook Composites & Polymers, the data entry operators did not even minimally engage in assisting the unit employees or working alongside them and spent all their time supervised by the office manager with no oversight at all by other supervisors. They did not punch the time clock or use the lunchroom. In Avecor, the order entry clerk and a lab secretary were office clericals because they principally performed work typically accomplished by office clerical employees; worked in the same office or in an office adjacent to office clerical employees; had limited contact with production employees; worked the same hours as office employees, which were different from the production employees; and, unlike the production employees, were unaffected by a change to 10-hour shifts; and did not receive a 40-cent-per-hour wage increase granted to the production and maintenance unit employees. In Case, Inc., an

employee who prepared job progress tickets was found to be an office clerical because her duties were almost totally related to office record keeping and scheduling as opposed to plant production work. Accordingly, I find the facts in each of those cases distinguishable and do not require a different result here.

CONCLUSION AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

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. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
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 constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

INCLUDED: All warehouse and maintenance employees including department heads, warehouse clerical employees, spotters who do not drive, transportation clerks, and employees employed in the following named departments: POS maintenance, warehouse maintenance, facility maintenance, picking, receiving and stocking, loading, shipping, and inventory control.

EXCLUDED: All other employees (including spotters who drive, drivers, and employees in the following departments: accounting, advertising, engineering, finance, human resources, information systems, insurance, legal, merchandising, payroll, pharmacy, printing, purchasing and real estate), guards, and supervisors² as defined in the Act.

² The parties stipulated that the following are supervisors under Section 2(11) of the Act: John Reier, President; Reggie Jacobs, Senior Vice-President; Bobby Savage, Transportation Manager; Michael Steen, Industrial Engineer;

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 Union of Needle Trade Industrial and Textile Employees (UNITE) – Southern Region Joint Board, AFL-CIO, CLC.

Steve Sexton, Warehouse Administration; Donnie Terrell, Manager Maintenance; LeNora Hickman, Manager Inventory Control; Kenny Newsom, Manager Inbound; Donald Seymour, Manager Outbound; Christine Czech, Second Shift Manager; Wade Love, Maintenance Supervisor; Michael Beach, Receiving Office Manager; Rick Spriggs, IC Audit Manager; Mike Masterson, Receiving Manager; John Jones, Unit One and Two Manager; Willie Jennings, Unit Three and Four Manager; Delmar Adams, Receiving Manager; Cecil Ollor, Replenishment Put-Away Manager; Rapael Shipp, Receiving Office Supervisor; Mark Love, IC Supervisor; Tony Mabry, Receiving Supervisor; R.T. McClinton, Unit One Supervisor; Larry Jackson, Unit Two Supervisor; Preston Amos, Repack Supervisor; Stan Kimbrough, Module Three Supervisor; Charles Gross, Receiving Supervisor; James Chesney, Manager Training; David Cox, Put-Away Supervisor; Mark Curtis, Replenishment/ Delp Manager; Dorothy Reed, D&R Cross-Dock Manager; Michael Gettings, Picking Manager; Larry Callicutt, Put-Away Supervisor; Robert Burl, Delp Supervisor; Larry Hult, Replenishment Supervisor; Melissa Gross, D&R Supervisor; Ben Abram, Shipping Manager; Johnny Freits, Shipping/JIT Manager; and Michael Herron, Shipping/JIT Supervisor.

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 to 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 an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 26 within 7 days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before May 6, 2002. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices to Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions 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. 10570. This request must be received by the Board in Washington by 5 p.m., EST, on May 13, 2002.

Dated at Memphis, Tennessee, this 29th day of April 2002.

/S/

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