

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

TRANSERV SYSTEMS, INC.

Employer

and

Case 36-RC-6138

INDUSTRIAL WORKERS OF THE
WORLD, INDUSTRIAL UNION 540

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter 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 record¹ in this proceeding, the undersigned finds²:

As detailed below, 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:

All drivers, bicycle messengers, process servers, and dispatchers employed by the Employer; but excluding all other employees, office clericals, managers, guards and supervisors as defined in the Act.

BACKGROUND

In late 2000, the Petitioner filed a petition in Case 36-RC-6112 for a unit of driver and bicycle messengers located in Portland, Oregon. The Employer contended the unit should include all drivers and bicycle messengers, including process servers, located in Portland and the Outlying Areas.³ On January 31, 2002, the Region issued a Decision and Direction of Election ("January 31, 2002 Decision" or "Decision") holding that the single facility unit

¹ Briefs were timely received from the parties and were duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 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; the labor organization involved claims to represent certain employees of the Employer and; 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.

³ "Outlying Areas" was defined in the Decision and Direction of Election for case 36-RC-6112 as the 12 cities outside of Portland where additional servers are located.

presumption had been rebutted, and therefore, the appropriate unit included all drivers and bicycle messengers (including process servers) employed by the Employer. The Decision is attached as Exhibit A. The Petitioner thereafter voluntarily withdrew its petition.

On May 24, 2002, the Petitioner filed the instant petition seeking a unit of all the Employer's bike messengers and drivers in the Portland area, but excluding all process servers, clerical employees, management and any drivers working outside of Multnomah and Washington counties. The Petitioner was allowed to advance to a hearing with the understanding that it would present new evidence as to the scope of the unit. During the June 5, 2002 hearing, the Petitioner clarified its position. The Petitioner seeks to represent general delivery drivers ("drivers"), bicycle messengers ("messengers"), and dispatchers in Multnomah, Washington, Clackamas and Clark Counties (known collectively as "Portland") and exclude all drivers, in and outside of Portland, who function primarily as legal process servers ("servers"). The Employer contends the unit should include *all* the Employer's drivers, messengers, and servers, and should exclude dispatchers. Based on the instant record and the prior record in case 36-RC-6112, I find the appropriate unit to include all drivers, messengers, servers, and dispatchers employed by the Employer.

STIPULATIONS

The parties stipulated that all office clericals, guards, supervisors, and managers⁴ as defined in the Act should be excluded from any unit found appropriate by the Regional Director. The parties further stipulated that the excluded office clericals include bookkeepers, customer service representatives, and general office employees, as they do not share a sufficient community of interest in regards to wages, hours and working conditions.

FACTS

In writing this decision, I rely on the instant record and the record and Decision in Case 36-RC-6112. As such, I will not be reiterating facts described in the appended January 31, 2002 Decision; rather, I will only note newly presented information.

In providing document and package service and legal process service to its customers, the Employer utilizes drivers, messengers⁵ and servers. As of at last the pay period, ending April 26, 2002, the Employer employed approximately 13 drivers, 9 messengers, and 20 servers. All drivers do some process serving in addition to general deliveries, although it encompasses less than 5% of their work. Approximately 2 messengers serve process: one messenger spends approximately 15-20% of his/her time process serving, the other approximately 5-10%. The servers, on an infrequent basis, deliver documents and packages in addition to process serving.

Messengers and drivers are dispatched for general deliveries in the Portland area out of the Employer's dispatch office, shown on Exhibit B (attached). Doug Popp is the messenger dispatcher and Glen (last name not stated on the record) is the driver dispatcher. They are both supervised by operations manager, RG Roske⁶. The dispatchers do not perform deliveries.

⁴ "Managers" is not defined in the Act and is not a term of art.

⁵ Messengers are similar to drivers, except they use bicycles for transportation.

⁶ The parties stipulated in Case 36-RC-6112 that RG Roske and Mitch Worth, head of the legal department, are statutory supervisors. Such stipulation has not been withdrawn. In any event, Roske and Worth are responsible for hiring delivery employees and office employees in their respective departments. I find them to be Section 2(11) supervisors.

Roske testified that one driver assists in dispatching when necessary; however, the record does not state how often the driver provides assistance. The local messengers and drivers are dispatched via pager and radio transmission. The dispatches are based on which driver or messenger calls his/her respective dispatcher at the time a delivery is needed. Popp testified that he does not dispatch servers for deliveries. Glen however, occasionally dispatches servers for general deliveries. Popp and Glen do not dispatch any out of town employees. This is handled through the legal department. If employees have questions about general deliveries, they typically ask the dispatchers or Roske.

Popp testified that he does not dispatch any employees for process serving. On occasion, Glen dispatches drivers for rush process serving jobs. However, both messengers and drivers are regularly dispatched by Doug and Popp to pick up service documents. Once the service documents are picked up by the messengers or drivers, the documents are deposited in the legal department, immediately adjacent to the dispatch office. The legal department processes the documents and then dispatches servers to serve them. After service, the servers deliver (personally or by mail) the Proofs of Service to the legal department. Messengers and drivers thereafter deliver such post-service documents to the courthouse.

The legal department at times also dispatches two messengers, and all the drivers to do some process service work. When the drivers and messengers serve legal documents, they generally deal with the legal department, instead of with Doug or Popp. Typically, Mitch Worth, who is in charge of the legal department, dispatches the legal processing to both in- and out-of-town servers, although several clerical employees in the legal department occasionally dispatch servers as well. If an employee has questions about legal processing, they go to Worth or someone else in the legal department. The legal department also handles all dispatching of non-process materials outside the Portland area.

Messengers make deliveries mainly in the downtown Portland areas, but also make deliveries in some close-in areas outside of downtown. Servers have designated areas in which they work. Drivers make deliveries and serve process anywhere they are needed – as far as Seattle or Canada, albeit not frequently -- both in and outside of Portland.

Messengers often hand deliveries directly to drivers after picking up the delivery inside a Customer's building. However, instead of a direct transfer of service documents from messengers and drivers to servers, servers generally either pick up the service documents in the legal department, or the documents are mailed to them. Typically, documents are mailed to out-of-town servers. However, there may be instances where drivers deliver documents to out of town servers who then serve the documents. This appears to take place on a limited basis. There is one exception: on a daily basis, Portland drivers and Salem servers meet in Aurora, Oregon, to exchange deliveries and service documents. There can then be further handoffs to other employees stationed farther south in the I-5 corridor.

Some Portland servers are in the Portland facility on a daily basis, some go in three days a week, and some on a more infrequent basis. However, it does not appear that the servers interact to any significant extent with the other delivery employees when they are at the facility. Pop testified he sees a server once or twice a day, but does not see them using the break room, which is down the hall from the dispatch desk. A driver and several messengers testified that they do not know who most of the servers are and the only interaction they have with the servers is passing them in the hallway outside of the dispatch office. In addition, these employees rarely see the servers in the break room. However, witnesses also do not use the

break room on a regular basis.⁷ It does not appear that the out-of-town servers come into the office, except on rare occasions.

Messengers, drivers, and dispatchers have a set schedule of work hours. However, the messengers and drivers who also serve process may work outside of these set hours. The servers do not have a set schedule. The messengers have regularly scheduled meetings with management, although attendance is not mandatory. Dispatchers do not attend these meetings. Drivers have meetings maybe once a year, but again, they are not mandatory. Process servers are included in the driver meetings, although it is unclear if they actually attend. One driver, one messenger and an office employee volunteered to be on the Employer's Safety Committee. Vice-president Gassen Gutierrez testified the Safety Committee driver represents both drivers and servers. Handbooks are to be provided to all delivery employees⁸, although it appears some delivery employees in each category have not received the handbooks. It does not appear that any employees receive formal training. However, those employees that serve process are given minimal training in the form of handouts and verbal instructions.

Delivery employees and dispatchers fall under different benefits packages. Dispatchers are under the office benefit package. Although the delivery employees and dispatchers/office employees are under the same medical plan, the waiting period for delivery employees is six months while it is only three months for dispatchers/office employees. Delivery employees and dispatchers/office employees have different medical plans. The Employer pays 100% of the medical and dental premiums for dispatchers, but only 50% for delivery employees. Dispatchers and office employees get four personal days a year. Delivery drivers do not receive this benefit. Workers' compensation and liability rates differ between delivery employees and dispatchers/office personnel. Dispatchers and office employees are paid an hourly rate, while delivery employees are typically paid piece rate.⁹ The dispatchers and office employees receive a different handbook from delivery employees.

Doug Popp testified he does not have access to employee files or payroll records. He also testified that he is not involved in hiring, interviewing, terminating, disciplining or suspending employees. Popp testified that he recommended to Roske that three or four employees be terminated for performance problems. However, there is no testimony as to whether these recommendations were considered and followed, and what degree of reliance, if any, was placed on these recommendations in making any termination decision. Popp's dispatching decisions are, at times, corrected by his supervisor.

CONCLUSIONS

Unit

Having considered the entire records from this case and Case 36-RC-6112, I reach the conclusion that the appropriate unit must include all drivers, messengers, servers and dispatchers employed by the Employer. I include drivers, messengers and servers for the same reasons detailed in my January 31, 2002 Decision.

Drivers, Messengers, and Servers

⁷ They are paid on a piece-rate basis.

⁸ "Delivery employees" refers to messengers, drivers, and servers collectively.

⁹ Servers are generally paid a piece rate. However, if a customer approves wait time, a server is also paid an hourly rate if he/she has to wait to serve process. Presumably, any driver or messenger who serves process would also be paid by the hour if the customer approved such wait time.

The Petitioner was allowed to proceed with the hearing based on representations that substantial new evidence related to the scope of the unit would be presented.¹⁰ Upon review of the record, no substantially new information related to the employees in Portland or in the Outlying Areas was presented that would alter my prior Decision.

The newly presented evidence provided more details regarding the Employer's supervisory hierarchy and departmental division. The evidence revealed that the legal department is in charge of servers and process serving and the dispatching office is in charge of the drivers, messengers and general deliveries. However, evidence was also presented that there is interchange of work. Drivers and messengers serve process, and to some extent, servers make general deliveries. Although drivers and messengers are generally supervised by Roske, they answer to Worth when serving process. Likewise, Portland servers report to the driver dispatcher when making general deliveries. Further, Worth is in charge of supervising and dispatching all the servers in the Outlying Areas whether it is for general deliveries or process serving.

The duties of drivers and messengers are intertwined with the servers' duties. Drivers and messengers, rather than the servers, typically pick up the service documents and deposit them in the legal department for the servers to later deliver. The drivers and messengers also file the service documents in court. In addition, there is daily contact between servers and drivers who meet in Aurora to hand off work between Portland and Salem. Although drivers, messengers and servers otherwise do not seem to personally interact on a substantial basis, they do see each other to some extent while at the facility as the legal department is next to the dispatch office.

In accordance with the analysis in my January 31, 2002 Decision, I find that the common and centralized supervision of the employees at issue, the integration of the service and general delivery work, the "integrated network" nature of the entire operation, the similar skills and terms and conditions of employment, the centralized control over personnel and labor relations policies, and the lack of local autonomy or even local facilities (outside Portland) outweigh the generally separate first level supervision, limited employee interchange and the geographic distance of some of the Outlying areas. The drivers, messengers, and servers in Portland and the Outlying Areas share such a close community of interest as to overcome any presumption of a single facility unit. In simplest terms, every possible separation or distinction that has been suggested between classifications or geographic areas is defeated by the overlapping, fuzzy boundaries between them. Thus, I find, based on the evidence presented in both cases, that the appropriate unit must include drivers, messengers, and servers in Portland and the Outlying Areas.

Dispatchers

The Petitioner contends dispatchers should be included in the unit. The Employer argues the dispatchers share a distinct interest separate from the delivery employees and should, therefore, be excluded from the unit. Although neither party has asserted that the dispatchers are statutory supervisors, there has been no stipulation that they are not. I view this as an issue to be addressed. I find the dispatchers are not statutory supervisors. Further, I find

¹⁰ In particular, one key representation related to the supposed non-employee status of the Outlying employees. Nothing to back that critical representation was produced.

the dispatchers share a close community of interest with the delivery drivers so as to make the combined unit of drivers, messengers, servers, and dispatchers the only appropriate unit.

The burden of establishing supervisory status is on the party asserting the status exists. *Kentucky River Community Care*, 121 S.Ct. 1861, 1866 – 67 (2001). In this case, as neither party asserts that the dispatchers are supervisors, the burden has not been met. Furthermore, the evidence reveals that the two dispatchers, Doug and Popp, do not possess any supervisory indicia. The only two arguable indicia of supervisory status -- dispatching and recommending discipline -- fall short of meeting the statutory indicia. The dispatchers merely relay delivery details to delivery employees after receiving the information on the dispatchers' computer screens. The employees are dispatched according to which employee is available at the time a delivery is needed. This direction and selection of drivers is a "routine or clerical" decision made without the exercise of significant judgment. Moreover, although there is testimony that Popp recommended that several employees be terminated, there is no evidence that the recommendations were considered or that they had any effect on the employees' employment status. Without evidence of the effect of the recommendations, these actions do not warrant a finding of supervisory status. Based on the foregoing and on the record as a whole, I find there is insufficient evidence showing that the dispatchers possess supervisory authority within the meaning of the Act.

The evidence fails to establish that dispatchers share a community of interest sufficiently separate and distinct from that of the delivery employees that the dispatchers must be excluded. Throughout each workday, the dispatchers are in constant contact with the delivery employees - both through radio contact and in person at the facility - to advise them of upcoming deliveries. Additionally, the drivers and messengers frequently pick up assignments and drop off paperwork at the dispatchers' desk. Furthermore, the dispatchers' duties are integral to the completion of the delivery employees' duties. Without the coordination between the dispatchers and the drivers and messengers, the deliveries could not be completed. Finally, the messengers, drivers, and dispatchers are all directly supervised by operations manager Roske. I recognize that the dispatchers and delivery employees don't work outside the office, do receive different wages and benefits, have different employee handbooks, and attend different meetings. These factors do give them a certain community of interest with the clerical staff. I also note that the parties excluded the staff of the legal department, who themselves do some dispatching of the servers, whom I have included. However, on balance, these distinctions are offset by the continuous contact, integrated work, and common supervision. Moreover, the clerical individuals in the legal department have substantially less dispatching activities, and apparently have other purely clerical functions, in contrast to the dispatchers. For these reasons, I find that the dispatchers should be included in the unit. Of course, the issue is not whether it is "best" that the dispatchers be included, or excluded. A petitioner gets its choice of unit so long as it is *an* appropriate unit. Thus, the question is whether inclusion of the dispatchers is "appropriate". Their inclusion is appropriate.

Based on the above, and the records as a whole, I conclude that a unit consisting of the drivers, messengers, servers, and dispatchers, Employer-wide, constitutes the smallest appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

As the parties have not challenged the eligibility formula devised in the prior Decision, such formula will be used to determine eligibility, based on the last completed payroll prior to the issuance date of the instant decision.

There are approximately 32 employees in the Unit.¹¹

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were 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 their status as such during the eligibility period and their replacements. Those in the military services of the United States 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 Industrial Workers of the World, Industrial Union 540.

LIST OF VOTERS

In order to assure 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 that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 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. The Region 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 Subregion 36, 601 SW Second Ave., Suite 1910, Portland, Oregon 97204-3170, on or before July 18th 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 to (503) 326-3085. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of 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

¹¹ Petitioner's showing of interest is adequate in the expanded unit. Petitioner may withdraw the petition without prejudice if a withdrawal is received by July 22, 2002.

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. 20570. This request must be received by the Board in Washington by July 25, 2002.

DATED at Seattle, Washington, this 11th July day of 2002.

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

362-3355-0000
420-2900-0000
420-8440
440-3350-0100

EXHIBIT "A"

BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
REGION 19

TRANSERV SYSTEMS, INC.

Employer

and

Case 36-RC-6112

INDUSTRIAL WORKERS OF THE
WORLD INDUSTRIAL UNION 540,
MUNICIPAL TRANSPORT WORKERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter 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 record¹² 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 the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
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:

All driver and bicycle messengers (including process servers) employed by the Employer; but excluding all other employees, casual employees, guards and supervisors as defined in the Act.

¹² Briefs were timely received from the parties and duly considered.

The Employer is engaged in the business of delivery services, with headquarters in Portland, Oregon. The Employer also has employees located in 12 additional cities: Salem, Albany, Eugene, Newport, Roseburg, Coos Bay, Tillamook, Pendleton, Redmond, McMinnville, St. Helens and Medford, Oregon (herein collectively called the "Outlying Areas"), but has no physical facilities in those locations¹³. The Petitioner seeks a unit of all of the Employer's driver and bicycle messengers in Portland, Oregon only. The Employer contends the unit should include all driver and bicycle messengers employed in Portland and all drivers located in the Outlying Areas. No history of collective bargaining is demonstrated in the record.

The parties stipulated that all regularly scheduled driver messengers¹⁴ and bicycle messengers employed by the Employer for delivery service at its Portland, Oregon, facility should be included in any unit found appropriate by the Regional Director as they share a sufficient community of interest in regards to wages, hours and working conditions.¹⁵ The parties stipulated that the supervisor of legal processing and the operations manager are statutory supervisors within the meaning of the Act. Further, the parties stipulated that the classifications of office clerical employees, including dispatchers, bookkeepers, customer service representatives and general clerical employees, do not share a sufficient community of interest in regards to wages, hours, and working conditions and should therefore be excluded from any unit found appropriate by the Regional Director.

FACTS

The Employer provides document - both legal and general - and package delivery services in and around the named cities for both private customers and the State of Oregon. It also serves legal process at all locations. Bicycle messengers perform only general deliveries. Drivers may perform only general deliveries, only process services, or a mixture of both. The amount and type of deliveries differ from city to city, depending on the market.

At the time of the hearing, 14 Portland bicycle messengers and 23 Portland drivers worked directly out of the Portland facility. All of the Employer's bicycle messengers are located in Portland and work only in the downtown Portland area. In approximately the last two quarters of 2001, there were roughly up to 18 Portland drivers whose primary duties did not include process serving and up to 14 Portland drivers whose primary duties were process serving. There are two drivers in Salem, two drivers in Eugene, and one driver in Medford who make both legal and non-legal deliveries, although their primary work is process servicing.

¹³ See Exhibit B.

¹⁴ This term is used to cover all these who deliver packaging and/or papers or serve legal process, by vehicle.

¹⁵ In 1993, the Portland Bicycle Messengers Union petitioned for a unit of bicycle messengers at the Employer's Portland facility, excluding drivers. The Employer contended the petitioned for unit was inappropriate and should also contain drivers. At the time the Employer's facility was in Portland, but, it also had drivers in Eugene and Salem. There were no bicycle messengers outside of Portland. On May 28, 1993, the Board issued a Decision on Review and Order holding that the petitioned for unit of bicycle messengers did not have a sufficiently distinct community of interest from drivers to warrant separate representation. The Board did not speak to the issue of an employer-wide unit. On remand, the then Regional Director issued a Supplemental Decision and Direction of Election on June 4, 2002, finding the appropriate unit to be all bicycle messengers and drivers working for the Employer in Portland, Salem, and Eugene. The decision did not discuss the appropriateness of an employer-wide unit. I take administrative notice that the Union thereafter withdrew its petition.

Until fairly recently, the Employer generally did not operate directly in the following 8 cities: Newport, Coos Bay, Tillamook, Roseburg, Pendleton, Redmond, McMinnville, and St. Helens (herein collectively called "The New Areas"). Previously, if the Employer were to handle deliveries in one of these areas, the transaction would have been accomplished through a local sub-contractor. However, the Employer recently entered into a statewide contract with the State of Oregon for deliveries ("State Contract"). The majority of the State of Oregon work is legal service. Due to insurance specifications in the State Contract, the Employer engages individuals directly to perform State Contract work in these "new" areas, rather than working through a subcontractor or an independent contractor. These individuals may also be direct employees of the Employer's subcontractors for other deliveries originating from the Employer's non-State customers, or whatever other work the subcontractors might generate themselves, but not necessarily; they might perform no such services for anyone else. Accordingly, the drivers in the New Areas may actually perform only a relatively limited amount of work - restricted to State of Oregon deliveries - as the Employer's employees¹⁶.

All the Employer's supervisors, managers and support personnel work in the Portland facility. The vice-president is Gatson Gutierrez, who interviews and trains employees as well as assisting in dispatching drivers for legal process in the Outlying Areas. Mitch (last name not stated on the record), the process server manager in Portland, also interviews and dispatches drivers for legal processing in these areas.¹⁷ The record states that all the drivers outside of Portland are supervised out of the Portland office, but such supervision is unnamed. It is unclear if the same supervisor(s) supervise(s) the Portland employees. The record also states that a supervisor - unnamed in the record - handles all discipline for all messengers system-wide.¹⁸ However, the record also states that the vice-president, the process server manager, and Steve Justin (title unidentified) have disciplined employees in Eugene. Suffice it to say, all discipline and all supervision of all employees is handled from the Portland office.

There is a dispatcher for the drivers and a separate dispatcher for the bicycle messengers. Both dispatchers work out of the Portland facility. The Portland messengers are dispatched by radios and the drivers outside of Portland are dispatched by telephone, pager or mail¹⁹. However, the driver dispatcher typically does not dispatch process-serving work for drivers in Outlying Areas, as those drivers do not carry radios. These dispatches are generally handled by either the process server manager, customer service, the vice-president, or other staff. The record does not indicate that the dispatchers handle any supervisory functions; the "exclusions" stipulation excludes them as clerical.

Bicycle messengers generally make deliveries during regular business hours (7:30 a.m. to 6:00 p.m.) and do not work on the weekends. The record regarding the specific work hours and schedules of the drivers is rather vague. Some of the drivers who do not serve process, work the same hours as the bicycle messengers, as their deliveries can be done during work hours. Some of these Portland drivers have specific delivery schedules during regular work

¹⁶ No party suggests that these individuals performing the State Contract deliveries, in the New Areas are anything but "pure" employees of the Employer. The Employer seeks out and hires these individuals directly, and dispatches them directly.

¹⁷ Gatson and Mitch interview and train drivers in cities outside of Portland, but the record is silent as to *who* interviews and trains drivers and bicycle messengers in Portland. It is clear that the function is performed from Portland, however.

¹⁸ "Messengers" refers to both driver and bicycle messengers.

¹⁹ Process that required legal service, but not immediate action, might be mailed to the outlying employee, to perform personal service.

hours, but are sometimes given extra work outside their schedules. A number of Portland drivers who serve process, work only when work is assigned and do not have a set schedule. At one point, the record states that outside of Portland, most drivers have a regular work schedule in that they have specific deliveries to make on specific days. At a later point in the record, the testimony is that drivers outside of Portland do not have a regular work schedule in that they do legal processing, so that they are assigned work when needed, normally outside of work hours. This seeming contradiction may be due to a failure to distinguish between drivers in the New Areas from drivers in the rest of the Outlying Areas. Suffice it to say that there is regular work that is identical to some of the work routinely performed in Portland, routinely performed outside of Portland.

In Portland, the bicycle messengers either pick up and complete a delivery or pick up deliveries at customers' offices and then transfer them to a driver for ultimate, more distant delivery. The Salem and McMinnville drivers have made some deliveries to Portland; however, there is no specific evidence as to how often these employees work in Portland or if they interact with Portland Unit employees when they do. Salem drivers also make deliveries to Eugene, and Portland drivers make deliveries "all the time" to some of the other cities, including, at least, Salem and Newport. However, the record gives no specific evidence as to how often these inter-city deliveries occur, which other cities are involved, how many drivers do these deliveries, or if drivers interact with each other in these circumstances. However, it does not appear that drivers outside of Portland have any significant contact with Portland messengers or with each other. There have not been any job transfers between drivers and bicycle messengers; or from drivers in Portland to the other cities, or vice versa.

Messengers are paid based on the type of delivery made. For ordinary deliveries the rate of pay is 30% of the gross revenue per piece. For legal process serving, employees get a fixed rate per piece, but the rate in Portland is different from the other cities, and outside of Portland, the rates vary from city to city. The set rate for Portland is not indicated in the record. Outside of Portland, the rate is either \$10, \$12, or \$15, depending on the volume of work, the distance traveled, and the deadline for delivery. The rates for each particular city are not reflected in the record. The rates outside of Portland were negotiated on a one-on-one basis with each employee, although all employees within any one city are paid the same rate.

In Portland, all employees must report their hours for each pay period. The bicycle messengers punch in on a time clock through the dispatchers. Those Portland drivers whose primary functions are not process serving also use the time clock through the dispatcher, with supplemental hours for any process serving turned in on a handwritten log. The Portland drivers who serve legal process keep a handwritten log and then turn in the log. However, not all employees outside of Portland are required to report their hours worked. It appears from the payroll records that approximately 11 of the 16 drivers do not turn in their hours. Because of some difficulties in payroll, these employees are paid according to the piece rate without a record of actual hours worked. Instead of turning in a timecard, these employees turn in documentation of deliveries made. If the employee notices the pay does not meet minimum wage²⁰, they report it to the Employer who adjusts the pay. Those drivers outside of Portland who are required to report hours worked, turn in a handwritten log. In sum, all are paid on a piecework basis of some kind, but there are *some* time records kept to establish compliance with minimum wage laws.

²⁰ I take administrative notice that the Oregon minimum wage is \$6.50 per hour.

The Employer makes standard deductions, including state and federal income taxes, FICA, and workers' compensation, from the paychecks of all drivers and bicycle messengers. Medical and dental plans are available for all employees, provided coverage could be found in each particular city. The record does not specify which cities are covered by health benefits. The employee handbook states employees are eligible for health benefits after six months if they are regularly scheduled to work 30 hours or more per week. The record does not indicate which employees are currently eligible. Employees become eligible for vacation pay after they have been employed for one year and if they earn a minimum average of 20 hours per week over the previous 24 consecutive pay periods²¹. Only one employee outside of Portland is currently eligible for vacation pay. The record does not indicate how many people in Portland qualify. According to the handbook, all employees are eligible for holiday pay after one year of employment.

All drivers must provide their own car and are paid the same mileage rate. Drivers are allowed to use a company gas card and are charged back, but only three Portland drivers have opted to use the card. All bicycle messengers must wear a company uniform consisting of a red shirt and helmet cover. Portland drivers whose main work does not involve process serving must wear the red company shirt. Portland drivers who mainly serve process do not have to wear the company shirt, the shirt being an identifier, a negative in process-serving contexts. None of the drivers in the outlying cities has to wear a uniform, as most of them mainly serve process. Magnetic and window company signs are provided to Portland drivers so they can park in Portland without fear of receiving a parking ticket. Such signs are not provided to employees outside of Portland²². Pagers are offered to all drivers and bicycle messengers; all employees in Portland carry the company pager. Some employees in the other cities have chosen to use their own pagers and are not reimbursed for such use; but all those in the Outlying Areas carry a pager.

There are regularly scheduled meetings for the bicycle messengers; however, the record does not indicate the regularity or purpose of the meetings. Drivers do not have such meetings. The same clerical employees handle payroll issues for all drivers and bicycle messengers. The Employer has company parties for its employees, to which *all* employees are invited. Customer service employees in the Portland facility and/or the vice-president take care of all customer complaints from all locations.

CONCLUSIONS

Unit

The Employer argues that all its drivers and bicycle messengers are subject to the same terms and conditions of employment and do identical tasks.²³ The Employer further relies on the 1993 Board decision and the Regional Director's June 4, 1993 decision. As noted, neither the Board decision nor the Regional Director's decision addressed the issue of an employer-wide unit.²⁴ The Petitioner argues that it should only represent those messengers who work in

²¹ There are two pay periods per month.

²² The record does not reflect if they are simply not needed outside of Portland, or perhaps not honored by the authorities outside of Portland.

²³ The Employer's brief was not timely filed and is therefore not considered. The Petitioner did not file a brief.

²⁴ It would seem likely, based on the absence of discussion, that the parties simply stipulated to the larger unit. The only issue discussed was whether bicycle messengers shared a community of interest with

the Portland office. The Petitioner presents a second issue, arguing that the drivers working in the Outlying Areas do not work a regular amount of hours and are therefore not eligible to vote.

A single-facility unit is presumptively appropriate unless it has been effectively merged into a more comprehensive unit, or is so functionally integrated with another grouping of employees that it has lost its presumed separate identity. *J & L Plate*, 310 NLRB 429 (1993); *Cargill*, 336 NLRB No. 18 (2001). The party challenging the appropriateness of a single-facility unit has the burden of rebutting the presumption. In determining whether the presumption has been rebutted, the Board looks at such factors as control over daily operations and labor relations, including extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; the physical and geographic location including distance; and bargaining history, if any. *Esco Corp.*, 298 NLRB 837, 839 (1990). The Board has historically emphasized most heavily the extent of local autonomy, especially separate supervision, as well as the degree of employee interchange.

In analyzing the factors relied on by the Board, I note that the instant case presents a close question as to whether the presumption of a single-facility unit has been rebutted. There are factors present which support a finding of a single-facility unit. Most noteworthy is the limited amount of employee interchange. Although there are vague references to drivers making deliveries outside of the city they normally work in, the exchange of work appears limited, and to a limited number of cities. There is also a lack of temporary or permanent employee transfers between cities. Finally, I take administrative notice that the geographic separation between the cities ranges from 29 miles between Portland and St. Helens, to about 273 miles between Portland and Medford; some of these distances are rather large.

There are however, significant factors which undercut the single-facility presumption. In making such a finding, the Board relies heavily on “whether the control of day-to-day working conditions is separate and autonomous” at each location. *AVI Food Systems, Inc.*, 328 NLRB No. 59, 8 (1999). As there are *no* Employer facilities in the Outlying Areas, all employee functions are centrally controlled, from Portland. Significantly, direct supervision and day-to-day concerns of all the messengers are handled centrally in Portland. Hiring decisions, disciplinary actions, and training are determined by Portland supervisors. All customer orders – phone in most or all circumstances – come through the Portland office and are dispatched from there. All customer complaints are resolved there.

Further, the Employer maintains centralized control over labor relations and administrative operations. The personnel policies and employee handbook apply to all employees regardless of location. The wage range and hours of employment are determined by Portland management. All payroll cards, timesheets, and work documentation are turned into the Portland office. The employees are all paid a piece rate per delivery and are all eligible for medical/dental coverage, vacation pay, holiday pay, and a 401(k) plan. Further, all drivers receive the same mileage reimbursement rate. All employees perform some or all aspects of a common pool of similar work: deliveries and process serving. Employees in all locations serve process. Uniform requirements are the same company-wide. All drivers are eligible for gas cards and all messengers use pagers.

The distances between Portland and the various cities served does not support either a Portland unit or an overall unit. St. Helens, McMinnville and Salem are only 29, 38 and 47 miles

other employees. Further, any finding by a Regional Director is not binding, as Regional Director’s decisions lack precedential value. *Rental Uniform Service*, 330 NLRB No. 44, fn. 10 (2000).

from Portland, respectively. On the other hand, Pendleton and Medford are 208 and 273 miles from Portland respectively. In weighing all factors, I find that the centralized control over personnel and labor relations policies; common supervision of all employees total and lack of local autonomy or even local facilities; and the same duties, skills and terms and conditions of employment, outweigh the few factors which would support the single- facility presumption, including limited employee interchange, and geographic distance in some cases. In view of the record as a whole, the fact that there is not substantial employee interchange diminishes in its importance to the determination of the issue. *Big Y Foods, Inc.*, 238 NLRB 860 (1978); *V.I.M. Jeans*, 271 NLRB 1408 (1984). Thus, on balance, the record evidence in the instant case forces the conclusion that the single facility presumption favoring a Portland-only unit has been rebutted, and I find the appropriate unit must include Portland and the Outlying Areas. I also note that exclusion of the Outlying Area drivers would leave a hodge-podge, fragmented residual unit, or multiple single-location units, many of which would have only one employer, making representation impossible, even if wanted by employees.

In most enterprises, there are full-time employees, and the balance of employees regularly work substantial hours. All such employees are normally deemed eligible to vote. In some situations, such as the instant one, some employees work substantial numbers of hours, while other work smaller amounts. The Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and condition of employment offered by the employer." *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). In seeking such a goal, the Board routinely devises eligibility formulas tailored to the factors of each case.

In the instant case, there is limited record evidence of *hours* worked by the messengers, since all compensation is by piece rate. However, the record contains *wages* earned by messengers from the pay period ending June 26, 2001 to the pay period ending December 11, 2001. As there is a close correspondence between wages and hours worked, the eligibility formula for this case will be based on pay periods worked and wages earned. In using wages as the basis for the formula, I note that typically, affinity with the unit would increase in relationship to the amount of money earned as well as to the amount of hours worked. More of either in a given time frame, likely leads to a higher level of interest in the terms and conditions of employment offered by the employer. It must be kept in mind that no formula is perfect, that there is no single, absolute answer to any particular situation, and that several different formulas might be reasonable. Nevertheless, some formula must be selected.

In creating a formula, I relied on gross wages earned from the pay period ending August 11, 2001, to the pay period ending December 11, 2001.²⁵ The gross *wages* for each messenger employed during that time were summed, so that each employee had a grand total of gross wages for the time period. The grand total of each messenger is graphed on a chart which is attached as Exhibit A. As shown on the chart, there is no obvious break point in the amount of gross wages earned; rather - somewhat unusual in my experience - there is a full range of earnings in a nearly linear relationship from high to low. Nevertheless, some point must be selected.

I devised a formula to establish a break point in gross wages which will determine eligibility. In establishing the formula, I extrapolated the earnings from the August 11, 2001 through December 11, 2001 pay periods, to what they would likely be in a span of two full

²⁵ The pay periods ending June 26, July 11, and July 26, 2001, were not used, as it appears many drivers were not yet employed during that time period, presumably because of the recency of the State Contract.

quarters - 26 weeks, or 12 pay periods. The Board often sets voting eligibility at an average of 4 or more hours of work per week over a particular period. See, e.g., *Queen Kapiolani Hotel*, 316 NLRB 655, 667 (1995). Thus, I multiplied the 26 weeks in the two-quarter period by 4 hours of work per week, to establish a minimum 108 hours worked during the sample time span as a reasonable eligibility minimum, if the formula were based on *hours* worked. To convert these 108 hours into a dollar amount²⁶, I multiplied the 108 hours by \$7.00 per hour to arrive at a total of \$756.00.²⁷ I then rounded the total of \$756.00 to \$750.00. Therefore, all employees who had gross earnings of at least \$750 total in the time period of the 12 consecutive completed pay periods ending immediately prior to the date of this Decision, and who are still employed in the Unit as of the election date, will be eligible to vote.

There are approximately 53 employees in the Unit²⁸.

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 be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are *only* those who earned at least \$750 total in the 12 consecutive completed pay periods ending immediately prior to the date of this Decision, regardless of when hired. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States 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 INDUSTRIAL WORKERS OF THE WORLD INDUSTRIAL UNION 540, MUNICIPAL TRANSPORT WORKERS.

LIST OF VOTERS

In order to assure 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 that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an eligibility list containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer in Charge of Sub-Region 36, within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the lists available to all parties to the election.

²⁶ Since complete Employer records are available on the record only in terms of earnings, not hours worked.

²⁷ The minimum wage in Oregon is \$6.50 per hour. I increased the rate in the formula to \$7.00 per hour as it appears from the payroll records that most employees are paid more than minimum wage.

²⁸ In view of the fact that the Unit has been substantially increased over the Unit petitioned for, the Petitioner will have 10 days to furnish an additional Showing of Interest, or to withdraw its petition without prejudice. The Petitioners has a sufficient Showing of Interest to support the larger Unit.

In order to be timely filed, such list must be received in the Sub-regional Office, 601 SW 2nd Ave., Suite 1910, Portland, OR 97204-3170, on or before February 7th, 2002. No extension of time to file the lists may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such lists. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted by facsimile transmission to (503) 326-5387. Since the lists are to be made available to all parties to the election, please furnish a total of 4 copies, unless the lists are submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of 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. 20570. This request must be received by the Board in Washington by February 14th, 2002.²⁹

DATED at Seattle, Washington, this 31st day of January 2002.

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

362-3355-0000
420-2900-0000
420-8440
440-3350-0100

²⁹ Because of delays caused by biological decontamination of governmental mail in D.C., it is strongly suggested that commercial delivery services be utilized.

EXHIBIT "B"

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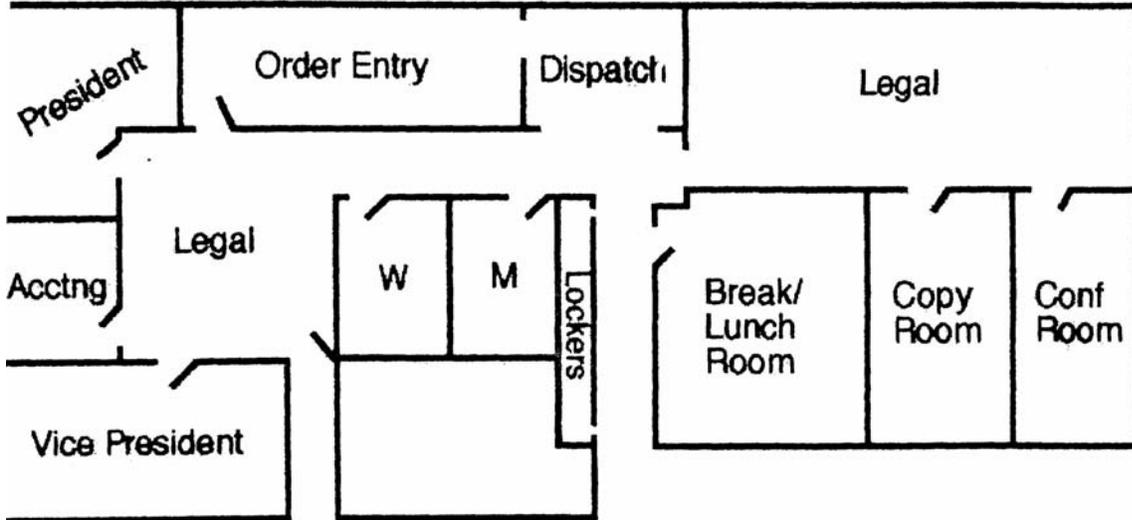
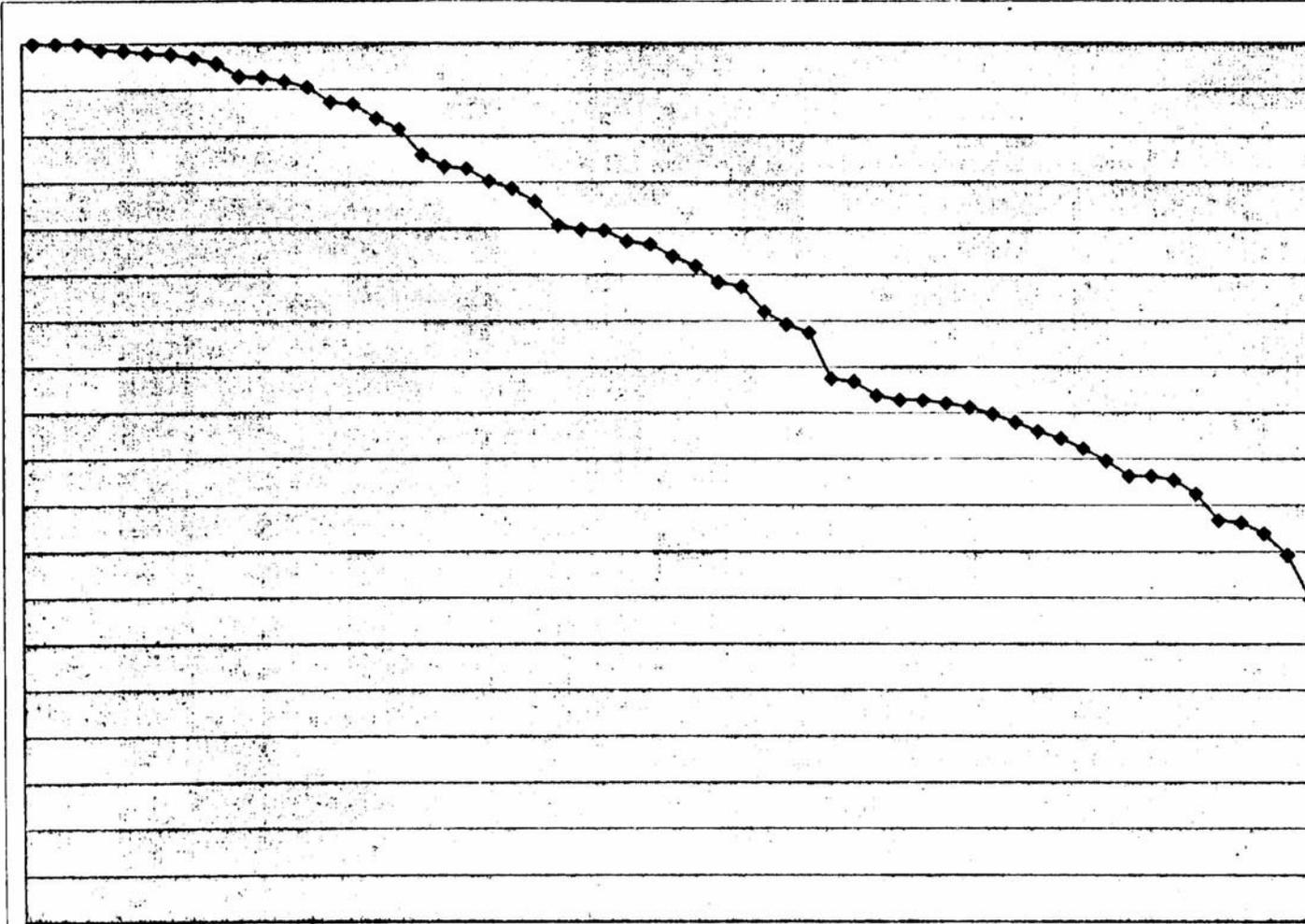
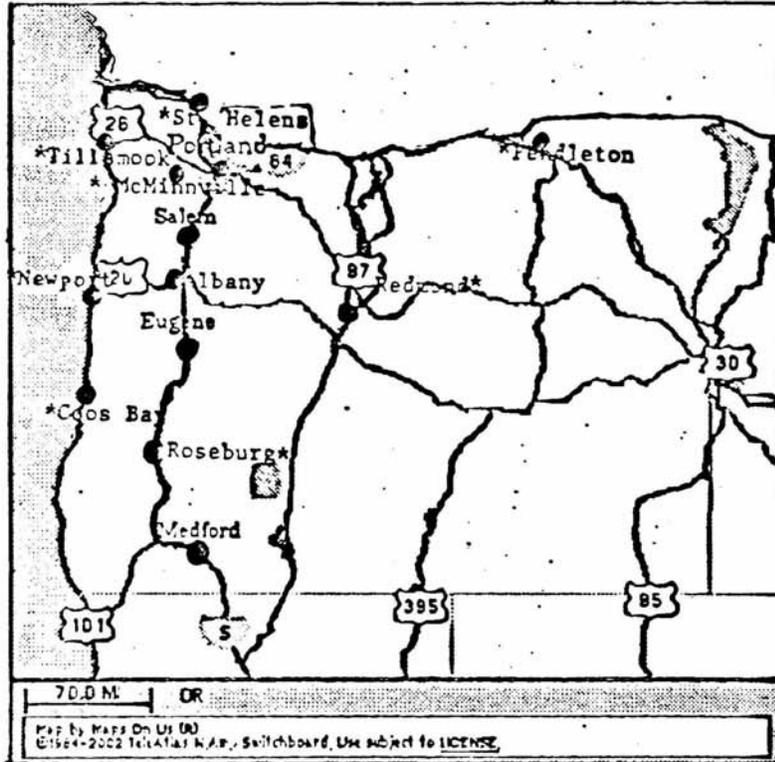


EXHIBIT A



TRANSERV EMPLOYEE GROSS
Payroll Periods ending 8/11, to the one ending 12/11/01)

MAP OF OREGON



"Outlying Areas" - Miles from Portland:

| | |
|-------------|-----|
| Albany | 69 |
| Coos Bay | 212 |
| Eugene | 110 |
| McMinnville | 38 |
| Medford | 273 |
| Newport | 114 |
| Pendleton | 208 |
| Redmond | 144 |
| Roseburg | 177 |
| St. Helens | 29 |
| Salem | 47 |
| Tillamook | 74 |

"New Areas" - (*):

- Coos Bay
- McMinnville
- Newport
- Pendleton
- Redmond
- Roseburg
- St. Helens
- Tillamook

Exhibit B

