

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

CHIPPER EXPRESS, INC. AND TRANSPORT PRODUCTION SYSTEMS, INC.¹

Joint Employers

And

TEAMSTERS LOCAL 179, TEAMSTERS LOCAL 330, AND TEAMSTERS LOCAL 673

Joint Petitioners

Case 13-RC-20939

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 record² 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

3. The labor organization(s) involved claim(s) 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:⁴

All full time and regular part time local and regional truck drivers employed by Transport Production Systems, Inc. and all full time and regular part time local and regional truck drivers jointly employed by Chipper Express, Inc. and Transport Production Systems, Inc. at Chipper Express Inc.'s facilities located in the States of Illinois, Wisconsin and Minnesota; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act and all other employees.

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. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced is also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. 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 Teamsters Local 179, Teamsters Local 330, and Teamsters Local 673.

LIST OF VOTERS

In order to insure 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 the full names voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before March 10, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the 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, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by March 17, 2003.

DATED March 3, 2003 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13

- */ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
 - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
 - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing and in their briefs have been carefully considered.
- 3/ Transport Production System, Inc. (TPS) is a corporation engaged in the business of employee leasing. Chipper Express, Inc. (Chipper) is engaged in the trucking business.
- 4/ The Petitioner seeks to represent a unit of all full time and regular part time regional and local truck drivers employed by TPS and leased to Chipper to operate Chipper trucks from various facilities in Illinois and Wisconsinⁱ.

1. The Parties' Contentions

The Joint Petitioners contend that TPS and Chipper are joint employers of the employees sought in their petition. TPS and Chipper, on the other hand contend that they are not joint employers but, rather, TPS is the sole Employer of the employees in the unit sought by the Joint Petitioners. TPS and Chipper also maintain that a combined unit of regional and local drivers, as sought by the Joint Petitioners, is inappropriate and that only separate units for regional drivers and for local drivers are appropriate.

Thus, based on the parties' positions at the hearing and in their briefs, there are two issues to be decided herein. First, is TPS the sole employer of the Unit sought or are TPS and Chipper joint employers of the unit sought for purposes of collective bargaining under the Act? Second, is a combined unit of local and regional drivers as sought by the Petitioners appropriate for the purposes of collective bargaining or must local and regional drivers be placed in separate units?

Because the record, as discussed in more detail below, shows that, despite being independent legal entities, TPS and Chipper codetermine essential terms and conditions of the drivers' employment such as wage rates, pension benefits, time off, and discharges, I find them to be joint employers. Furthermore, the record shows that the regional drivers and local drivers share a sufficient community of interest such that they can be represented for bargaining purposes in a single unit as sought by the Joint Petitioners. Accordingly, I find that a unit comprised of the Joint Employers' local and regional drivers is an appropriate unit for collective bargaining.

2. The Facts

In about June 1992, Chipper and an entity called Transportation Personnel Services, Inc. ("Transportation Personnel"), entered into a Driver Leasing Agreement that

ⁱ The Petition defines the unit in terms of all full and regular part time drivers of the Employers "domiciled" in Illinois, Wisconsin and Minnesota. However, it is clear from the record that the unit sought encompasses local and regional drivers who work out of Chipper facilities located in Illinois and Wisconsin. Two of the "regional" drivers live in Minnesota but work from the Chipper facility located on Kostner Avenue in Chicago, Illinois (the "Kostner facility").

provided for the employment of drivers by Transportation Personnel who were then leased to Chipper as drivers for trucks owned by Chipper. Transportation Personnel and another entity called PTO Services (“PTO”) are related businesses that engage in the leasing of employees to other entities. In 1997, Chipper requested that the drivers it leased from Transportation Personnel be separated from other drivers employed by Transportation Personnel for purposes relating to the drivers’ receipt of 401k plan pension benefits. TPS was established as a separate entity by Transportation Personnel in 1997. The Driver Leasing Agreement executed in 1992 was amended to reflect the name change of the drivers’ employing entity to be TPS. TPS and Chipper have different ownership, officers, directors, and employees. There is no overlap of insurance between TPS and Chipper, and these two companies maintain their own tax records apart from each other.

Chipper is engaged in the business of transporting products, such as foodstuffs for its customers. Some of the Chipper Customers include: LeGrew, Delmonte, Clorox and Knox, which are located in Illinois and Northern Labs and Holiday House located in Wisconsin. Chipper is owned by Mr. Donald Schimak (“Schimak”) who is the corporate vice-president, while his spouse is the president. Schimak provides oversight to the day-to-day trucking operations for Chipper regarding pick-ups and deliveries and acts as a dispatcher. Chipper assigns drivers to work from one of several facilities. The record shows that there are approximately 64 drivers in total who are leased by Chipper from TPS. Chipper does not employ any of its own drivers and is, thus, dependent on TPS for personnel to drive its trucks. Approximately 15 to 16 drivers are assigned to Chipper’s Kostner Avenue facility. All of these drivers are regional drivers. In addition, Chipper has 16 to 17 drivers at its Bolingbrook, Illinois facility; 16 to 17 drivers are assigned to the West Chicago Facility, although some drivers work primarily from Chipper’s customer’s facilities, such as one located in Franklin Park, Illinois. Also, there are four drivers based in Rochelle, Illinois; three in Sauk Village, Illinois; two to three in Vandalia, Illinois, and two to three drivers at an unspecified location in Wisconsin. Other than the regional drivers domiciled at the Kostner facility, all of the other drivers are local drivers.

Pursuant to the terms of the Driver Leasing Agreement, TPS is responsible for the hiring of drivers leased to Chipper, which is performed by TPS at the offices it shares with Transportation Personnel and PTO. TPS, under the terms of the agreement is also obligated to supervise, discipline, discharge the drivers, and to set their pay rates and benefits. TPS is required to maintain records required by law and to provide workers compensation coverage for the drivers. Under the Agreement, Chipper provides the equipment and liability insurance for personal injury and property damage. Chipper retains the right to determine in its sole discretion the quantities of merchandise to be picked up and/or delivered to its customers. Further, there is an attachment to the Agreement referred to as Schedule A. The information contained in Schedule A establishes the pay rates for the drivers and the rates charged by TPS to Chipper for the services of the leased drivers. TPS initiates pay raises for the drivers but it does so only after obtaining input from Schimak and his agreement to grant the raise.

Until recently, TPS supervisor David Kowalski provided day-to-day administrative oversight and supervision of the drivers leased to Chipperⁱⁱ. Kowalski's job at TPS for the Chipper account was to work with the drivers, provide orientation to the drivers, maintain the Chipper drivers' personnel and administrative records including logbooks, manifests, and drivers' drug tests to insure compliance with DOT rules and regulations. Kowalski would perform his job duties from an office located at Chipper's Kostner facility where he was allowed the use of the office and office equipment such as the phone without charge to TPS. Other than Kowalski and the corporate officials, the drivers leased to Chipper are the only employees of TPS.

The record shows no differences in the job duties of the regional and local drivers. Their job is to make deliveries for customers and to pick up loads and bring them back. Usually no loading or unloading of the trucks is involved. However, drivers may unload their trucks on infrequent occasions. Regional drivers report to the Kostner facility to begin their day. They can be assigned to runs that take them out of State, and on these runs they can be gone from home for a few days at a time. The local drivers report to their assigned facility to get their dispatches for their daily runs. The local drivers usually work in a geographic area of 75 to 100 miles around their assigned facility, and they return home every evening. All drivers are equipped with Nextel radio/phones by which they can communicate to each other and with their dispatchers. There are three people who act as dispatchers for Chipper, and they are all located at the Kostner facility. Bob Waller dispatches drivers on assignments to points outside the State of Illinois. Steve Gillis dispatches local drivers. Don Schimak dispatches drivers with assignments in the Chicago area. If a driver has a problem with a pick up or delivery or a mechanical problem, the driver would call Schimak if in Chicago or Waller or Gillis if outside Chicago.

The record shows that local and regional drivers encounter each other regularly at various Chipper facilities and at Chipper customers' facilities. For example, local drivers can be assigned to make stops at places such as Rantoul and Vandalia in Illinois and at Little Shoot, Manitowoc, Madison, and Milwaukee in Wisconsin. One local driver based in Rochelle, Illinois was dispatched on a run that took him to Collinsville, Illinois. The drivers talk to each other on their Nextel phones and arrange to meet for lunch if they are in the same vicinity. Drivers are not transferred from one Chipper facility to another to cover operational needs. Rather, it appears that operational needs are simply covered by dispatching a driver from another facility that normally does not handle that customer or facility where Chipper has a driver shortage. For example, a local driver assigned to the Rochelle facility was given a dispatch that took him to Indiana where he had to spend the night in a hotel and did not return home until completing his run. This appears to have happened several times. The record also shows that regional drivers may be assigned pick-ups and deliveries that would normally be handled by a local driver. Thus, regional drivers do occasionally return home from their runs the same evening.

ⁱⁱ Kowalski was sent to work for TPS at a facility operated by R.R. Donnelly.

Regional drivers are paid by the mile and stops. Local drivers are paid by the hour. The record does not show what these rates are. Regional and city drivers both receive the same benefits such as paid holidays and vacations, health insurance, and the 401k plan benefits. The record shows that once a driver is hired by TPS and placed with Chipper, the drivers receive verbal direction and counseling when necessary by Schimak. There are no written rules given to the drivers by either TPS or Chipper. Drivers get their work assignments by going to their assigned facility and talking to one of the dispatchers by Nextel phone. Drivers may be given assignments for themselves and other drivers. For example, a driver based at Rochelle may call in to Schimak and be given a dispatch for himself and for the other Rochelle drivers. The driver then conveys this information to the appropriate driver. It does not appear from the record that any one particular driver in any location is responsible for calling in to get the dispatches at the start of the day. More than one driver can be dispatched to the same location at the same time. When this happens the drivers “run” together. Running together can involve drivers from the same facility, different facilities and even involve regional and local drivers. Regional drivers are dispatched by Schimak on occasion and can be sent on dispatches that would otherwise be handled by local drivers.

The drivers generally start their day between 6:00 a.m. and 7:00 a.m. However, Schimak can change their start time. For instance, one driver was recently changed from his regular starting time to a later starting time by directions from Schimak. If a driver is late or needs time off, the driver calls Schimak. Schimak schedules the vacations for the drivers. Since the reassignment of Kowalski to R.R. Donnelly by TPS, Schimak has been handling matters relating to payroll for the drivers, as well as assigning work to them and giving them direction. There are no on-site supervisors or other representatives of TPS at any of the Chipper facilities. Drivers are paid weekly. The local drivers punch a time clock. The record does not indicate how earnings for the Regional drivers are tracked. The time and payroll records are submitted by the various Chipper facilities to the main office on Kostner, checks are prepared and then returned to the appropriate facility for distribution to the drivers. It appears, from the record, that the drivers can elect to have their paychecks deposited directly to their bank accounts. If a driver has a problem with a paycheck, the driver would bring the matter to Schimak’s attention, who would then resolve it. Time records appear to be tracked by both Chipper and TPS although exactly how this is accomplished is not clear from the record.

Drivers receive notices by mail from TPS to remind them about matters, such as the expiration of their driver’s license or that they need to take a physical. Disciplinary letters would be sent to a driver by TPS and a copy put in the driver’s file. If Chipper suggests to TPS that a driver should be discharged, TPS would conduct its own investigation about the matter. This happens on average of two to three times per year. If TPS agrees, then TPS would notify the driver of the termination. However, on occasion, a driver may be removed from the Chipper account and placed with a customer of Transportation Personnel. This has happened on at least one occasion.

3. Legal Analysis

A. The Joint Employer Issue

The Board will find that a joint employer relationship exists when two or more employers share or codetermine essential terms and conditions of employment for particular employees. *M.K. Parker Transport, Inc.*, 332 No. 54 slip op. at p. 3 (2000); *Laerco Transportation*, 269 NLRB 325 (1984); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). A finding that companies are joint employers assumes in the first instance that the companies are “what they appear to be”—independent legal entities that have merely “historically chosen to handle jointly...important aspects of their employer-employee relationship.” *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1996). The determination as to whether a joint employer relationship exists is essentially a factual one. *Pacific Mutual Door Co.*, 278 NLRB 854, 859 fn. 18 (1986). The essential factor to consider in a joint employer relationship is whether one employer possesses sufficient control over the work of the employees of another employer. *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000); *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). To establish such status there must be a showing that the employers in question meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *TLI Inc.*, 271 NLRB 798 (1984); *Laerco Transportation, supra*.

An examination of the facts contained in the record for this case demonstrates that both TPS and Chipper meaningfully affect matters relating to the drivers’ terms and conditions of employment. While TPS hires the drivers, provides them with health insurance, a 401k-pension plan, issues their paychecks, provides all administrative oversight of the drivers employment, and ultimately fires the drivers leased to Chipper, Chipper exercises control over the drivers day-to-day job duties and has significant input into rates of pay for the drivers, the 401k-pension plan, and discipline of drivers.

Thus, Chipper, through its owner and other dispatchers, exercises complete and exclusive control over the drivers’ daily work activities. The Driver Leasing Agreement grants Chipper the sole discretion to determine the quantities of merchandise to be picked up and/or delivered to Chipper’s facilities or those of its customers. Chipper determines when the drivers are to start their work day, assigns pick ups and deliveries to them, gives them direction on how to perform their jobs and resolves problems. Chipper owner Schimak grants time off to the drivers and schedules approves and their vacations. Schimak also issues verbal discipline to employees, corrects their mistakes, and can effectively recommend that a driver be removed from working for Chipper or even cause the driver to be discharged. While TPS sets the rate of pay for the drivers, it does so only after obtaining input and the agreement from Chipper. The record also shows that TPS’s existence is due to Chipper’s determination to provide a different 401k-pension plan than what was available through Transportation Personnel.

TPS and Chipper contend that TPS is the sole employer of the drivers, urging that the only control asserted over the drivers by Chipper is in merely dispatching them to

their destinations and that, all other supervision and direction is provided by TPS. Contrary to the Employers contentions, the record, as set forth above, demonstrates that Chipper has significant control over the drivers' day to day duties beyond assigning destinations to them, including setting the hours of employment, giving daily directions to drivers in the performance of their duties, and scheduling the drivers time off. In fact, the record shows that since the transfer of Kowolski to the R.R. Donnelly account, the drivers are otherwise unsupervised by anyone from TPS. In addition Chipper has significant impact on the driver's rates of pay, benefits, discipline, and discharge. Accordingly, based on the record, which shows that Chipper and TPS, jointly, meaningfully affect matters relating to the employment relationship of the drivers, such as hiring, firing, discipline, supervision, and direction, I find that TPS and Chipper are joint employers. *W.W. Grainger, Inc.*, 286 NLRB 94 (1987).

B. The Unit Issue

At the outset, it should be noted no party has raised an issue concerning the multi-facility scope of the unit sought herein by the Petitioners. The only issue raised is whether the regional drivers and local drivers may be included in the same unit or must be in separate units.

The Act does not require a unit for bargaining be the only appropriate unit, or the most appropriate unit. Rather, the Act requires only that the unit be "appropriate." *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Washington Palm, Inc.*, 314 NLRB 1122, 1126 (1994). In determining whether a unit is appropriate for the purposes of collective-bargaining, the Board analyzes a number of factors including the following: differences in method of wages or compensation; hours of work; differences in benefits; separate supervision; qualifications, training and skills, job functions; employee contact; and employee interchange. *See, e.g. Overnite Transportation Company*, 322 NLRB 723, 724 (1996). The desires of the petitioner are always a relevant but not a dispositive consideration. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964). The Board's procedure for determining an appropriate unit under Section 9(b) of the Act is to first examine the petitioned-for unit. If that unit is determined to be an appropriate unit, the inquiry into the appropriate unit issue ends. Only if the petitioned-for unit is not appropriate will the Board examine alternative units. *The Boeing Co.*, 337 NLRB No. 24 (2001).

The record shows that the local drivers and regional drivers share a sufficient community of interest to warrant including them in the same unit for collective bargaining. Thus, the local drivers and regional drivers perform the same job functions, which require the same skills and training. While the method of pay differs between regional drivers and local drivers, both receive the same benefits - the same 401k plan and workers compensation insurance. They receive their work assignments from the same Chipper dispatchers and must notify the same people if they want time off and to schedule their vacations. They are subject to common supervision and direction. The local and regional drivers "run" together on occasion and can be assigned to make pick ups and deliveries at the same places and same times. The local and regional drivers talk

to each other on their Nextel radios and coordinate meeting for lunch if they are in the same area. The record shows that on occasion a local driver has been sent on a dispatch that took him more than 100 miles from his assigned facility. On other occasions, regional drivers have made pick-ups and deliveries at facilities normally serviced by local drivers. All drivers receive the same mailed notices from TPS regarding license expiration and DOT physicals and are subject to the same administrative oversight by TPS. Accordingly, I find that a unit comprised of the local drivers and regional drivers jointly employed by TPS and Chipper is an appropriate unit for collective bargaining. Furthermore, the Joint Petitioners have requested to include both the regional and local drivers in the same unit.

TPS and Chipper contend that there are sufficient differences between the local drivers and the regional drivers to warrant separate bargaining units. This contention is based upon the difference in method of payment i.e. hourly versus by the mile and stop, that local drivers return home every night, and that local drivers are not based at Chipper's Kostner facility. Relying upon the Board's holding in *Georgia Highway Express, supra*, Counsel contends that the only appropriate unit is one that includes only the local drivers. However, Counsel appears to misapprehend the holding in *Georgia Highway Express*. Contrary to the Employer's assertions, in the view of the undersigned, the record does not establish that the local drivers and regional drivers are clearly defined, homogenous and functionally distinct groups with so little common community interest that they must constitute separate units. Rather, the record, as set forth above, demonstrates sufficient community of interests between the regional drivers and locals such that collective bargaining for them as a unit is appropriate. At best, TPS and Chipper have shown that separate units of local and regional drivers may also be appropriate, but such does not negate the common community of interests between the regional drivers and local drivers that make a combined unit appropriate. *Washington Palm, Inc. supra*. Therefore, because the evidence as discussed above shows that the unit sought by the Joint Petitioners is an appropriate unit, the fact that there may be other ways to group the drivers for the purpose of collective bargaining as suggested by the Employer's Counsel is inapposite.

4. Conclusion

For the reasons set forth above and the entire record, I find that Transport Production Systems, Inc. and Chipper Express Inc. are joint employers of the local drivers and regional drivers who perform truck driving duties for Chipper at Chipper's facilities located in the States of Illinois and Wisconsin. I further find that the petitioned for unit of regional and local drivers is appropriate. Accordingly, I shall direct an election in the unit described above.

There are about 64 employees in the unit.

At the hearing, the Joint Petitioners and Joint Employers stipulated and agreed that a mail ballot election should be held in this matter. The method for conducting this

Chipper Express, Inc. and Transport Production Systems, Inc.
13-RC-20939

election is an administrative matter that will be determined by the undersigned at a later time.

177-1650-0100
420-2921
420-2957
420-2963
420-5027
440-1760-6240

CATS – UntOS (13)