

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-SIX**

VICTOR L. ROBILIO COMPANY, INC.
Employer

and

Case 26-RC-8371

**TEAMSTERS LOCAL NO. 1196,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**
Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Victor L. Robilio Company, Inc., is an importer and wholesale distributor of wines and alcoholic beverages. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The petition, as amended, seeks a unit of about 29 employees consisting of picker/pullers, delivery drivers, displaymen, and temporary employees. Following a hearing before a hearing officer of the Board, the parties filed briefs with me.

The issues raised in the hearing involve whether 3 warehouse support employees and 10 sales employees¹ should be included in the petitioned-for unit. The Employer asserts that employees in these positions share a sufficient community of interest to be included in the unit. The Petitioner opposes the inclusion of these two employee groups. The parties agree on the inclusion of the 29 employees, including the temporary employees.

¹ Although the Employer's witnesses sometimes referred to the sales employees as route delivery/sales employees, the Petitioner's witnesses testified at the hearing they had never heard of that classification prior to the hearing. Accordingly, I will use the more general term, sales employees.

I have considered the evidence adduced during the hearing and the arguments advanced by the parties in their briefs.² As discussed below, I have concluded that the warehouse support employees share a sufficient community of interest and must be included in the petitioned-for unit. In regard to the sales employees, I conclude that they lack a sufficient community of interest to mandate their inclusion in the petitioned-for unit. Accordingly, I have directed an election in a unit consisting of approximately 32 employees.

To provide a context for my discussion of these issues, I will first discuss the Employer's operations and personnel. Then, I will present an analysis of the issues, discuss the relevant facts, and set forth the reasoning that supports my conclusions.

I. THE EMPLOYER'S OPERATIONS AND PERSONNEL

The Employer distributes wines and spirits throughout western Tennessee. The Employer's facility, located in Memphis, Tennessee, is a single building that consists of a front office area and a warehouse. The front office area houses the administrative group,³ which consists of human resources, office clericals, a receptionist, assistants, and payroll. These administrative personnel report to Vice President John Robilio.

In the warehouse, but adjacent to the front office area, are a conference room and separate offices for the managers of off-premises sales, on-premises sales, and wine sales.

² The Employer submitted both a post-hearing brief and a brief in response to the Petitioner's brief. The post-hearing brief was timely but the response brief was received after the close of business on the day the briefs were due. Therefore, the Employer's response brief was not timely and was not considered. I also have not considered the three pages from collective-bargaining agreements that were attached to the Petitioner's brief since those documents were not received into evidence at the hearing.

³ The Employer asserts its operations consist of two groups or departments: an administrative department and a service operations department. The record, however, is unclear on this point in that the Employer's General Warehouse Manager described four groups and elsewhere the record refers to a warehouse operations group.

The 10 sales employees use the conference room and those sales offices when they work at the facility working on sales proposals or making telephone calls to customers.

On the left as you enter the warehouse from the front office area is an office used by the three warehouse support employees. This office includes a computer workstation for each of the three employees.

Other employees working in the warehouse include picker/pullers, delivery drivers, and the displayman. The picker/pullers and delivery drivers report to General Warehouse Manager Ed Stahl. The displayman, or merchandising man, reports to the three sales managers.⁴ The picker/pullers handle receiving duties⁵ and use order forms generated by the warehouse support employees to pull wine and spirits for customers. The orders are staged on the loading dock for delivery to the north, south, or east. Picker/pullers and drivers then load the orders into a truck or delivery van driven by a delivery driver. Sometimes a picker/puller accompanies the driver. The delivery driver delivers the wines and spirits to the customers and, upon delivery, ensures the order is correct and sometimes collects payment. If there is a mistake in an order, the driver contacts Warehouse Manager Stahl for instructions on how to deal with the situation. When making deliveries the drivers may, but are not required, to wear shirts provided by the Employer bearing the Employer's name.

The displayman maintains the point-of-sale materials, which are giveaway items, T-shirts, banners, and other display paraphernalia for the Employer. He makes deliveries

⁴ There was testimony that the displayman was part of the sales department. However, there was also testimony that there were only ten employees in the sales department and when the ten were broken down by classification, the displayman was not included.

⁵ Currently three full-time employees, referred to as receivers, work in the receiving department.

of those items and attends special events, such as wine tastings, coordinated by the sales employees to promote the Employer's products. He works both at the Employer's facility and in the field.

Drivers and picker/pullers punch time clocks and have their arrival and departure times recorded by a security guard. They work Monday through Friday from 7 a.m. until the work is completed. Picker/pullers have scheduled break times at 10 a.m. and 3 p.m. Drivers spend 70 percent of their time outside of the warehouse and do not have scheduled break times. Picker/pullers and drivers are paid hourly. The displayman is salaried.

All employees are subject to the same policies, receive annual evaluations, and share the same benefits package, which includes health insurance, a 401(k) plan, life insurance, sick leave, short-term disability, holidays, bereavement leave, credit union, and tuition reimbursement.

Warehouse Support Employees

The three warehouse support employees report to General Manager Marne Anderson, who in turn reports to President Victor Robilio. The warehouse support employees schedule receiving trucks and prepare customer order forms. They receive orders from customers by telephone and from the sales employees. They then input the orders into computers and generate an order form. The order forms are then taken by either Warehouse Manager Stahl or the warehouse support employees to picker/pullers to pick the products and load them on the trucks or vans for delivery to the customer. The same forms are used by the drivers to ensure the delivered order is correct and returned to the warehouse upon completion of the driver's route. Warehouse support employees also answer questions for picker/pullers about the location of product. The warehouse support

employees also inform the displayman which customers are having sales and where to send merchandising materials.

Warehouse support employees are paid hourly and punch a time clock. The warehouse support employees generally work the same hours as other warehouse employees, beginning at approximately 8 a.m. and ending when the work is done. However, two of the three warehouse support employees are always gone by 5 p.m.

Sales Employees

The 10 sales employees are divided into three positions: on-premises sales, off-premises sales, and wine sales. The three on-premises sales employees service customers such as bars, restaurants, and private clubs where liquor is consumed on the premises. They are supervised by Manager Charles Long. The four off-premise sales employees service customers such as package stores where liquor is consumed off the premises. Manager B.J. Johnson supervises the off-premise sales employees. The three wine sales employees sell wine and are supervised by Manager Dan Cannon .

The sales employees' duties include calling on customers and meeting the customers' needs by doing wine tastings, wine dinners, seminars for their staff, and making deliveries if necessary. The sales employees use their personal vehicles to make these calls. One on-premises sales employee testified that he had 150 customers and that he tried to see them once a week. He spends about 80 percent of his time outside of the warehouse interacting with customers. On Fridays, the sales employees come to the facility for sales meetings and to take care of any last minute orders, as the Employer has same day delivery on Fridays. The sales employees also assist with the once-a-year warehouse inventory.

The Employer gives the sales employees special training on how to interact with customers, how to make proposals, the operation of the warehouse, and general sales. Sales employees have the authority to negotiate discounts for customers and generate sales proposals with the aid of the Employer's administrative group.

The sales employees are paid a salary draw plus a commission on their sales and an additional \$175 per month for the use of their personal vehicles. The sales employees do not punch a time clock and generally work Monday through Friday from 8 a.m. until the work is done. Although the record is unclear on the exact amount, it would appear that some of their work, such as wine dinners and wine tastings, would occur in the evenings.

Although sales positions are not posted when they become available, a few warehouse employees have been become sales employees. For example, Manager Cannon was a driver prior to becoming a sales employee and Manager Johnson worked as a picker/puller and driver before he moved to off-premises sales. In addition, Chris Pratt moved from being warehouse manager to a wine salesman and Thomas Dye worked in the warehouse, then became the merchandising employee, and then moved to off-premises sales. There is no evidence of sales employees becoming warehouse employees.

There is some interaction between the sales employees and the picker/pullers, drivers, and the deliveryman. Although there was testimony that sales employees are not supposed to be in the warehouse, on at least a few occasions sales employees have assisted in pulling orders and have instructed picker/pullers on what product to pull for a last minute delivery or a special order. Picker/pullers have also loaded products into the personal vehicles of sales employees for delivery. Picker/pullers are not permitted to enter the sales offices unless instructed by their supervisors.

Sales employees have contact with drivers when drivers are delivering product to customers. Like the drivers, sales employees were given shirts with the Employer's name but they are not required to wear them. The sales employees have contact with the displayman when doing bar promotions or other special events like wine tastings where the Employer donates wines. The sales employees coordinate with the displayman to ensure that the product gets to the event. The displayman has the key to the office with the point-of-sale materials so the sales employees contact him to see what materials are available.

II. ANALYSIS

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties. Overnite Transportation Company, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. Bartlett Collins, 334 NLRB No. 76 (2001). In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. Bartlett Collins, supra, citing, Ore-Ida Foods, 313 NLRB 1016 (1994). It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409, 419 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951).

Warehouse Support Employees

The issue with respect to the warehouse support employees is whether they are plant clericals who should be included in the unit or office clericals who should be excluded. The distinction is rooted in community-of-interest concepts. Caesar's Tahoe, 337 NLRB No. 170, slip op. at 3 (2002). Certain factors predominate in Board decisions finding employees to be plant, rather than office, clericals. The indispensable and conclusive element is that the asserted plant clericals perform functions closely allied to the production process or to the daily operations of the production facilities at which they work. *Id.* Normally, plant clericals spend most of their working time in the plant production area. The test generally is whether the employees' principal functions and duties relate to the production process, as distinguished from general office operations. *Id.*

The Board has previously found that employees who prepare documents used for filling orders in the warehouse are plant clericals. For example, in John N. Hansen Co., Inc., 293 NLRB 63 (1989), the Board found an employee who initiated the warehouse order-filling process was a plant clerical with a close community of interest with the warehouse employees. The employee performed no work in the warehouse but converted customer orders into "picking tickets" which informed warehouse employees of the merchandise to be packaged and shipped. The Board noted that her duties were integral to the operation of the warehouse operation and found her duties were characteristic of a plant clerical appropriately included in a warehouse unit. *Id.* at 65. In Hamilton Halter Co., 270 NLRB 331 (1984), the Board found that two employees were plant clericals and were included in the unit, where they worked in an enclosed office area adjacent to the

production floor and whose primary job responsibility was handling customer orders for the employer's product.

Here, the warehouse support employees take customer orders and generate invoices used by the picker/pullers and drivers throughout the process of filling a customer's order. They also answer questions on product location to further facilitate completion of a customer's order. They work in an office in the warehouse, and like other employees in the petitioned-for unit, are hourly paid and punch a time clock.

In its brief, the Petitioner asserts that the warehouse support employees should be excluded from the petitioned-for unit because they do not perform any of the duties of the picker/pullers or delivery drivers. While this may be accurate, it does not diminish their functional integration into the work performed by the other warehouse employees. The Petitioner also asserts that documents it subpoenaed from the Employer which were not provided would have cleared up whether the warehouse support employees or sales employees should be excluded from the unit. The Petitioner served this subpoena on the Employer three days before the hearing. The Petitioner did not seek compliance with the subpoena or otherwise raise this issue at the hearing until after all witnesses had testified, just before the closing of the record. I find the record is sufficiently complete for me to decide the issues raised without the subpoenaed documents.

Here the record establishes that the principal functions and duties of the warehouse support employees relate to filling customer orders, a production process, as distinguished from general office operations, and are integral to the operation of the warehouse operation. Therefore, I find the warehouse support employees are plant clericals and the smallest appropriate unit must include the three warehouse support employees.

Sales Employees

I find the sales employees lack a sufficient community of interest to require their inclusion in the petitioned-for unit. While they have some contact with other employees in the unit and have the same supervision as the displayman, I nevertheless find that their duties and working conditions are sufficiently distinct so that they have a separate community of interest.

The Board has long held that employees engaged in selling their employer's products who drive vehicles and deliver the products "as an incident" of their sales activity, are regarded as essentially salesmen with "interests more closely allied to salesmen in general than to truckdrivers or to production and maintenance employees or warehouse employees." Plaza Provision Co., 134 NLRB 910, 912 (1961). See also Dr Pepper Bottling Company, 228 NLRB 1119 (1977). In wholesale operations, the Board commonly finds units of truckdrivers and warehousemen appropriate. The Brescome Distributors Corporation, 197 NLRB 642 (1972).

In Femco Machine Company, 238 NLRB 816 (1978), the Board sustained the challenge to a salesman's ballot based on the fact the employee spent 95 percent of his time outside of the production facility calling on customers. The Board stated that even though the salesman also loaded and drove a truck to deliver and pick up equipment, those duties were incidental to his sales functions. The employee was also paid a salary and did not punch a time clock, as did the hourly paid production and maintenance employees. The Board excluded the employee from the unit on the basis he was a salesman and not a truckdriver or deliveryman, whose interests were diverse from those of the production and maintenance employees.

The sales employees in this case do not punch a time clock and are paid a salary draw plus a commission based on the sales they generate. Except for the displayman who is salaried, all other unit employees are hourly paid. The sales employees spend about 80 percent of their time away from the Employer's facility and when they are working at the facility, they work in offices that are off limits to the picker/pullers. The sales employees also conduct staff seminars for customers and organize and attend special functions, such as wine tastings, where the Employer's product is showcased. In attending these functions and otherwise helping to meet the customers' needs, the sales employees must have a knowledge of the Employer's products that is more detailed than would be required of a picker/puller or driver who needs only to ensure that product pulled and delivered matches the order. The sales employees also have individual customer accounts which they must maintain either through personal contact or by telephone. Although the drivers have contact with the customers, they are not responsible for making sales or maintaining customers.

While there is some interaction between the sales employees and picker/pullers and drivers, that interaction is minimal and incidental to their functions as sales employees. Although four warehouse employees have moved into sales positions, no sales employees have become picker/pullers or drivers and there is no evidence that sales employees substitute for picker/pullers or drivers or vice versa.

In its brief, the Employer relies on Wilson Wholesale Meat Co., Inc., 209 NLRB 222 (1974), *enfd.* 516 F. 2d 1244 (DC Cir. 1975), to support its position that the sales employees should be included in the unit. In Wilson Wholesale, the Board examined whether driver-salesmen should be included in a unit in which a Gissel bargaining order

had been sought. The Board determined that the driver-salesmen possessed a sufficient community of interest to warrant their inclusion in a unit of production employees. In that case, however, the driver-salesmen worked in the production area for two to four hours each day before departing on their deliveries. This time included assisting production employees in preparing orders including slicing meats, wrapping orders, and loading trucks. In including the driver-salesmen in the unit, the Board relied especially on the fact that the driver-salesmen spent considerable time each day performing in-plant work and that they could and did perform many of the same work functions performed by production employees.

Wilson Wholesale is distinguishable from this case as here the Employer's sales employees spend 80 percent of their time outside of the warehouse facility. When they are at the facility, a majority of their time is spent in the sales offices contacting customers, and preparing sales proposals in an office whereas in Wilson Wholesale the driver-salesmen spent most of their time in the warehouse preparing orders alongside production employees. Here, any interaction by the sales employees with the warehouse employees is incidental and occurs on an as-needed basis. In Wilson Wholesale, the interaction between the drivers-salesmen and production employees occurred on a routine basis and was a part of their regular duties.

In its brief, the Employer also relies upon Crystal Tire Co., 165 NLRB 563 (1967), Sears, Roebuck & Co., 319 NLRB 607 (1995) and Coca-Cola Bottling Co., 229 NLRB 553 (1977). Those cases are factually distinguishable from this case. In Crystal Tire, the driver-salesmen performed a substantial amount of manual labor, including their own loading and unloading of product onto trucks. In Sears, Roebuck, salesmen were included

in a unit of service technicians because they were hourly paid, all unit employees worked in close proximity and were expected to act as salesmen in selling maintenance agreements, and a planned transfer would increase the contact between salesmen and other unit employees. Coca-Cola Bottling involved the inclusion of salesmen in a unit that already included other salesmen and other positions with overlapping duties. None of these factors - manual labor, hourly paid salesmen, an expectation that all unit employees act as salesmen or the presence of salesmen in the unit - are present in this case.

Accordingly, I find that the total functions and duties of the on-premise, off-premise and wine sales employees are different and unique enough to give them a separate community of interest and do not mandate their inclusion in the petitioned-for unit. I will therefore exclude them from the unit.

III. 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 picker/pullers, delivery drivers, displaymen, temporary employees, and warehouse support employees.

EXCLUDED: All office clerical and professional employees, on-premise sales employees, off-premise sales employees, wine sales employees, guards, and supervisors⁶ as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local No. 1196, affiliated with the International Brotherhood of Teamsters. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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 are 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 who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit

⁶ The parties stipulated that the following were supervisors under 2(11) of the Act: President Victor Robilio; General Warehouse Manager Ed Stahl; Vice-President and Administrative Manager John Robilio; On-Premises Sales Manager Charles Long; Off-Premises Sales Manager B.J. Johnson, Wine Sales Manager Dan Cannon; and Manager Marne Anderson.

employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

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 within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before **June 27, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the

filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board 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 if proper objections to the election are filed. Section 103.20(c) 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.

V. 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. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **July 7, 2003**. The request may **not** be filed by facsimile.

Victor L. Robilio Company, Inc.
Case 26-RC-8371

Dated at Memphis, Tennessee, this day of 20th day of June 2003.

/ S /

Ronald K. Hooks, Regional Director
Region 26, National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627
(901) 544-0018

Classification Outline:
440-1760-2400
440-1760-7200