

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FIVE

CLEAR CHANNEL OUTDOOR,
BALTIMORE/WASHINGTON, D.C. DIVISION¹
Employer

and

Case 5-RC-15521

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 24, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

ISSUE

The issue in this proceeding is whether the petitioned-for unit of all the Employer's Operations Department employees constitutes an appropriate unit for bargaining.

CONCLUSION

For the reasons that will follow in this decision, I find the petitioned-for unit constitutes an appropriate unit for bargaining. There are approximately 16 employees in the unit found appropriate.

BACKGROUND

The Employer sells, constructs, erects and services outdoor advertising products and billboards. The Employer's facility in issue is its Washington, D.C./Baltimore Metroplex facility located in Laurel, Maryland. Prior to opening its Laurel, Maryland facility, the Employer had two distinct facilities to serve the Washington, D.C./Baltimore area. The Washington D.C. facility was located in Hyattsville, Maryland; the Baltimore facility was located in Baltimore, Maryland. Upon opening the Laurel facility in 1999, employees and personnel from the Hyattsville and Baltimore locations were relocated into the Laurel facility. There are about 45 individuals employed in four different departments working out of the Laurel facility. The four departments are Sales, Finance/Human Resource, Realty, and Operations. The Petitioner seeks to represent employees in the following unit:

Included: All full-time and regular part time employees employed by the Employer at its Laurel, Maryland facility in its garage, electrical, billboard testing, and construction departments, including working foremen, paint department

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

employees if this department is reestablished, all the foregoing, hereinafter called "Employees,"

Excluded: Office clerical employees, Art Department employees, salespersons, guards and supervisors as defined in the National Labor Relations Act, as amended.

POSITIONS OF THE PARTIES

The Petitioner contends that the employees in the petitioned-for unit, more accurately described as consisting of all Operations Department employees, share a community of interest sufficient for them to constitute an appropriate unit for collective bargaining. The Petitioner points to the employees' skills, functions, duties, working conditions, and the functional integration, common supervision, and contact among employees in the proposed unit.

The Employer asserts the Operations Department employees working at the Laurel facility include two historically distinct groups: Operations employees who formerly worked out of the Hyattsville facility (herein the former-Hyattsville employees), and Operations employees who formerly worked out of the Baltimore facility (herein the former-Baltimore employees). The Employer argues these groups of employees do not share a community of interest, and therefore, the combined unit sought by the Petitioner is not appropriate. In support of its position, the Employer relies on the respective collective bargaining histories of the two groups, geography of the field work, pay rates, hours of work, savings plans, holidays, and Section 7 of the Act. Indeed, the former-Hyattsville employees were represented by the International Union Painters and Allied Trades, District Council No. 51, Local Union No. 1937 (IUPAT), whereas the former-Baltimore employees were represented by the Petitioner. In a secret ballot election conducted by the Board on February 13, 2002, the former-Hyattsville employees decertified the IUPAT.² The former-Baltimore employees are still represented by the Petitioner, but the collective-bargaining agreement between the Petitioner and the Employer expired on January 31, 2003.³ The Employer did not assert that any other employees should be included in the unit.

The Employer at the hearing and in brief moved for the dismissal of the petition. The Employer averred the instant petition is barred by Section 9(c)(3) of the Act. The Employer also contended the Section 7 rights of the former-Hyattsville employees should be respected asserting that former-Baltimore employees are responsible for the Petitioner's showing of interest in the instant case. The Employer further argues that the Petitioner never made a demand for recognition as claimed on the petition itself.⁴

² The petition in Case 5-RD-1293 was filed on January 15, 2002. The results of the February 13, 2002 election were certified by the Board on February 28, 2002. The former-Hyattsville unit decertified included all full-time and regular part-time employees engaged in the operation of painting, posting, electrical, erection, maintenance and services of all signs, exhibits, and displays owned and operated by the Employer; and excluded all other employees, professional employees, guards and supervisors as defined by the Act.

³ Petitioner has represented the former-Baltimore employees for at least ten years. IUPAT had represented the former-Hyattsville employees for ten or twelve years.

⁴ The Employer's contention that the petition is fatally deficient because there was no demand for recognition is without merit. The filing of a representation petition is, in itself, a demand for recognition to which the Employer

The Employer called the only three witnesses at the hearing: the Employer's President, Don Scherer; the Employer's Operations Manager, Johnny Cifolilli; and the Petitioner's Business Representative, Charles Weakley.⁵

FINDINGS

A. ELECTION BAR

The Employer's Motion to Dismiss the Petition is denied.

The election in Case 5-RD-1293 was held on February 13, 2002. Section 9(c)(3) of the Act states, in pertinent part, "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." The twelve-month period runs from the date of balloting. *Mallinckrodt Chemical Works*, 84 NLRB 291 (1941). Section 9(c)(3) does not prohibit the processing of a petition filed within sixty days before the expiration of the twelve-month period, as long as the subsequent election flowing from the petition is not held before the expiration of the twelve-month period. *Vickers, Inc.*, 124 NLRB 1051 (1959). The election I am directing in this case is beyond the twelve-month period. In any event, Section 9(c)(3) only prohibits the direction of an election in the bargaining unit or any subdivision thereof in which the prior election was held; it does not bar the direction of an election in larger unit, such as the facility-wide unit here. *Allegheny Pepsi-Cola Bottling Co.*, 222 NLRB 1298 (1976).

B. SHOWING OF INTEREST

The adequacy of the showing of interest is an administrative matter not subject to litigation at the hearing. *O. D. Jennings & Co.*, 68 NLRB 516 (1946); *General Dynamics Corp.*, 175 NLRB 1035 (1969). If there are employees who do not wish to be represented by a collective bargaining representative or employees who have changed their minds about being represented by a collective bargaining representative, those employees will vote their conscience during the election by secret ballot. *See Plains Cooperative Oil Mill*, 123 NLRB 1709 (1959). Accordingly, I affirm the Hearing Officer's ruling foreclosing the Employer from adducing record testimony regarding which employees signed union authorization cards. I am administratively satisfied the Petitioner's showing of interest is sufficient to support these proceedings.

C. NATURE AND OBJECTIVE OF HEARING

The hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination under Section 9 of the Act. The hearing is investigatory in nature, not adversary. Moreover, no

must respond. *Uniontown Hospital Association*, 277 NLRB 1298, 1318 (1985); *Gray Drug Stores*, 197 NLRB 924, fn 6 (1972).

⁵ All of the substantive testimony at hearing was given by Scherer and Cifolilli.

credibility determinations are made during a representation case pre-election hearing. *Marion Manor for the Aged and Infirm, Inc.*, 333 NLRB No. 133 (2001).

D. EMPLOYER'S OPERATION

The Operations Department at the Laurel facility is housed separately from the other departments in a back shop or warehouse, cloistered from the offices of the other departments located in the open shop to the front and sides of the facility. The Operations Department consists of approximately eighteen individuals: one Operations Manager; one Assistant Operations Manager; one bill room coordinator; eight construction laborers; six billposters; and one mechanic. Currently, the Employer has an opening for a bill room coordinator and an opening for a billposter.

The Operations Manager oversees the Operations Department and all of the Operations Department employees, including the mechanic.⁶ The Operations Manager hires, fires, disciplines, and promotes former-Baltimore and former-Hyattsville employees. The Operations Manager designates where Operations employees go in a particular day, and allocates the resources and supplies to them. The Operations Manager reviews and maintains the Operations employees time cards. He also approves all sick leave and vacation leave requests for the Operations Employees. The Operations Manager reviews and evaluates the Operations Employees' job performance and productivity.

The Assistant Operations Manager assists the Operations Manager when needed. Specifically, the Assistant Operations Manager regulates the flow of materials to and from the billposters, monitors the productivity of materials, and sends and receives information between the Operations Department and the Sales and Realty Departments. The Assistant Operations Manager also works in the warehouse prepping materials by cataloging them and disposing of scrap materials. The Assistant Operations Manager works primarily in the warehouse or shop.⁷ The Assistant Operations Manager often helps the bill room coordinators.

The Employer had two bill room coordinators, one for each group. For the last three or four weeks, and at the time of the hearing, the Employer has had one bill room coordinator. The bill room coordinators maintain and distribute the materials inventory for the billposters. The bill room coordinators collect, collate, bag, and separate bill posting materials. After the bill room coordinators collect and collate the materials, they place all of the materials for a given work site in a bag in the order in which the pieces for the job will be posted. The bill room coordinators then set the various bags in separate tubs according to their respective work sites. This coordination streamlines the bill posting as it allows the bill posters to grab a bag from a tub

⁶ The parties stipulated that Operations Manager Johnny Cifolilli is a supervisor as defined in Section 2(11) of the Act.

⁷ Neither the Employer nor the Petitioner asserted the Assistant Operations Manager is a supervisor as defined in Section 2(11) of the Act.

for a given job, open the bag at the job, and post the materials in the order in which he takes them out of the bag. The bill room coordinators spend most of their time in the warehouse or shop. When the Assistant Operations Manager becomes overburdened, the bill room coordinators may assist him.

Five of the Operations employees are billposters, three in the former-Baltimore group and two in the former-Hyattsville group. The billposters perform general billposting duties which consists of pasting and fixing advertisements onto various surfaces. Eight of the employees are constructors, four work in the former-Baltimore group and four work in the former-Hyattsville group. Constructors are assigned to construction crews termed rotary crews. The construction employees use vinyl and wood to build various structures to wrap around the billboard. The lone mechanic services and maintains the Employer's entire operations fleet, which is shared by the Operations employees. The mechanic services and repairs vehicles at the facility but will also travel out to the worksite, if need be, to service and repair the vehicles. In assessing the mechanical problems and repairing the vehicles, there is frequent interaction between the mechanic and the field employees. The mechanic is cross-trained so that he could work as a constructor.

Prior to the 1999 consolidation, 9 of the 16 current Operations employees operated out of the Baltimore facility and worked mainly in the Baltimore area. The remaining billposters and constructors worked out of the Hyattsville facility and worked mainly in the Washington, D.C. area. Since being moved to the Laurel facility in 1999, the former-Baltimore billposters and constructors continue to work in the Baltimore area while the former-Hyattsville billposters and constructors continue to work in the Washington, D.C. area.

The former-Hyattsville and former-Baltimore billposters have the same training, skills, and duties. The former-Hyattsville and former-Baltimore billposters share the same tools and take their tools out of the same inventory. The former-Hyattsville and former-Baltimore billposters work the same hours. Most billposters have sufficient cross training to enable them to do a constructor's job, though it has rarely happened. The billposters set their own hours and their interaction with the constructors is infrequent and coincidental. When the billposters are not overburdened, they may be assigned to a construction crew and work on the same sign as the construction crew. Because of the billposters' heavy work load, the billposters and constructors do not often work together.

The former-Hyattsville and former-Baltimore constructors have the same training, skills, and duties. The former-Hyattsville and former-Baltimore constructors share tools and take their tools out of a common inventory. They operate in rotary crews and are in the field seven out of eight working hours. During this time, the constructors interact constantly. Because of the collective-bargaining agreement between the Petitioner and the Employer, the former-Baltimore constructors work 6:00 a.m. to 2:30 p.m. The former-Hyattsville constructors work 4:00 a.m. to 12:30 p.m. There is no extrinsic reason for the difference in their hours. Approximately six times in the last year, the former-Baltimore construction crew has performed work for the former-Hyattsville construction crew, or vice versa. Constructors are responsible for maintaining advertisement sites and structures, but billposters are often directed to do this as well.

The Assistant Operations Manager, bill room coordinator, billposters, constructors and mechanic all work out of the same common warehouse. The current Operations employees all share and utilize the vehicles in the Employer's operations fleet. All of the Operations Department employees use the same time clock. The time clock is in the warehouse by the Operations employees' lockers. The time cards are kept together in the same rack and reviewed by the Operations Manager and Human Resource Manager. Prospective applicants for the positions of billposter or constructor fill out the same application and go through the same application procedure, drug testing, and approval. This procedure is overseen by the Operations Manager. Upon approval, the successful candidate is given a copy of the Employer's employee guide by the Operations Manager. All of the employees receive the same employee guide. The employee guide notes that some provisions of the guide may be abrogated by a collective-bargaining agreement. New employees, regardless of the primary geographic area they may work, are trained on the job in both the Baltimore and Washington, D.C. areas. All Operations employees attend the same departmental safety meetings.

Obviously, there are some current distinctions in the terms and working conditions between the former-Baltimore and former-Hyattsville employees based on the collective-bargaining agreement. The former-Baltimore employees have two extra holidays a year. Their health insurance, pension, and 401(k) plan are provided by the Petitioner. The former-Baltimore employees may, if they so choose, participate in the Employer's 401(k) plan, but there is no automatic participation for them in this plan as there is for the former-Hyattsville employees. Health insurance, stock purchase, and 401(k) plans are provided for the former-Hyattsville employees by the Employer.

ANALYSIS

Section 9(b) of the Act states the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof..." The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be "appropriate." *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Parsons Investment Co.*, 152 NLRB 192, fn. 1; *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4th Cir. 1962), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F. 2d 478, 480 (10th Cir. 1962).

In *Airco, Inc.*, 273 NLRB 348, 349 (1984), citing *Kalamazoo Paper Box Corp.*, 136 NLRB at 136, the Board found that a petitioned-for "plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such

employees.” When a plant-wide unit is sought by the petitioner, the burden of proving that the interests of a particular classification are so disparate from those of other employees that they cannot be represented in the same unit rests with the party challenging the unit’s appropriateness. *Livingstone College*, 290 NLRB 304, 305 (1988); *Airco, Inc.*, 273 NLRB at 349.

In determining the community of interest of employees in a unit, the Board will consider skills, duties, working conditions, the Employer’s organization, supervision, and bargaining history, but no one factor has controlling weight. *Airco, Inc.*, 273 NLRB 348 (1984); *E.H. Koester Bakery Co.*, 136 NLRB 1006, 1009-11 (1962); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136-38 (1962). Prior collective-bargaining history is accorded substantial weight; however, even in multiplant situations with long bargaining histories, when significant changes have occurred after prior certification, the former collective-bargaining history loses its controlling effect. *Plymouth Shoe Co.*, 185 NLRB 732 (1970); *General Electric Co.*, 185 NLRB 13 (1970); *General Electric Co.*, 100 NLRB 1489 (1951). Here, the former-Baltimore and former-Hyattsville groups were merged into the single Laurel facility in 1999. At least since 1999, the former-Baltimore and former-Hyattsville Operations employees have shared similar skills and duties, working conditions, organization, and common supervision. In February 2002, the former-Hyattsville employees decertified the IUPAT. Based on the record evidence, I find that significant changes have occurred such that the bargaining history is not controlling, since as a result of reorganization, two geographically separate facilities have merged into one. I find that the Employer has not rebutted the presumptive appropriateness of an overall unit of all Operations Department employees, and that the petitioned-for employees share a sufficient community of interest to permit their inclusion in a single overall unit of all Operations Department employees.

I have considered the Employer’s argument that the Section 7 rights of the former-Hyattsville employees should be respected since they decertified the IUPAT as their collective-bargaining representative. The Board has addressed the issue of self-determination elections versus single-unit elections in analogous factual circumstances on several occasions. Where a fringe group of employees continued unrepresented because of a defect or accident, and a question concerning representation has arisen in the historical unit, and the incumbent union seeks to represent the previously unrepresented fringe employees, the Board has directed a single election among all of the employees. *See New Berlin Grading Co. v. NLRB*, 946 F. 2d 527 (7th Cir. 1991); *Duke Power Co.*, 173 NLRB 240 (1968); *D. V. Displays Corp.*, 134 NLRB 568 (1961). The Board’s rationale was two-fold in *D. V. Display* at 571-572: (1) to direct a self-determination election among the fringe group of unrepresented employees would be to perpetuate the fringe defect or accident; and (2) a single overall election would allow all of the employees, represented and unrepresented, equal voice in selecting their bargaining representative. Like *D. V. Display*, here, it is clear that the former-Baltimore employees and the fringe former-Hyattsville employees share a community of interest sufficient to warrant a single-unit; that is to say, had the issue been presented to the Board at the time the historical unit was established, the unrepresented fringe employees would have been included in the historical unit by the Board. I find the fact that the “fringe defect” here exists as a result of the election in Case 5-RD-1293, rather than as a result of oversight or accident, does not warrant a different result. The determinative factors, rather, are that a defect exists, in that the former-Hyattsville employees do not share a sufficiently separate community of interest to constitute a separate

appropriate unit, *and* that a question concerning representation has been raised involving the former-Baltimore employees. Accordingly, I find a single-unit to be an appropriate unit under the facts of this case.

FINDINGS

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude 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 an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner, International Brotherhood of Electrical Workers, Local 24, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act, 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 Sections 2(6) and 2(7) of the Act.
5. The parties stipulated that Clear Channel Outdoor, Baltimore/Washington D.C. Division, a Delaware Corporation, with an office and place of business located in Laurel, Maryland is engaged in the sale of outdoor advertising products. During the past twelve months, a representative period, the Employer in the conduct of its business operations described above, purchased and received at its Laurel, Maryland facility materials and goods in excess of \$50,000 directly from points outside the State of Maryland.
6. The parties stipulated that Donnell Scherer, Division President, and Johnny Cifolilli, Operations Manager, are supervisors within the meaning of 2(11) of the Act and are excluded from the unit.
7. I find 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 full-time and regular part-time Operations Department employees employed by the Employer at its Laurel, Maryland facility, but excluding office clerical employees, employees in the Sales, Finance/Human Resources and Realty Departments, guards, and supervisors as defined in the National Labor Relations Act, as amended.

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 **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 24, AFL-CIO**. 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 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, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **MARCH 13, 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 (410) 962-2198. 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.

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., EST on **MARCH 20, 2003**. The request may not be filed by facsimile.

(SEAL)

/s/WAYNE R. GOLD

Dated: MARCH 6, 2003

Wayne R. Gold, Regional Director
National Labor Relations Board
Region 5