

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Houston, Texas

WAY SERVICE, LTD.,

Employer

and

Case No. 16-RC-10575

**PIPEFITTERS LOCAL UNION 211 OF THE
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner, Pipefitters Local Union 211 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking all service technicians in the industrial division at the Deer Park Industrial Office. The Petitioner seeks to exclude all office clerical employees, all professional employees, all guards and supervisors as defined in the Act. The parties agree that there are five employees in the petitioned-for unit. The Employer contends that the Petitioner's proposed unit is inappropriately narrow. Specifically, the Employer argues that any unit found appropriate must include all service technicians employed by the Employer in both Houston and its

Beaumont, Texas operations. Additionally, the Employer argues that the unit should include the dispatcher.¹

The issues before me are as follows: (1) determining whether an appropriate unit in this matter shall consist of a single-facility or multi-location unit; and (2) determining whether the Houston dispatcher should be included in any appropriate unit. The Petitioner argues that the petitioned-for employees have a distinct community of interest justifying a unit composed of only industrial service technicians in the Employer's Deer Park, Texas operations. The Petitioner also argues that the dispatcher should be excluded from the unit as either a supervisor and/or clerical employee. To the contrary, the Employer alleges that the only appropriate unit must include all service technicians employed in both Houston and Beaumont, and that the dispatcher shares a sufficient community of interest so as to mandate her inclusion in any appropriate unit.

A hearing officer of the National Labor Relations Board conducted a hearing on this matter and the parties have filed post-hearing briefs. Based on the record evidence as a whole, I conclude that the appropriate unit should include all the Employer's service technicians in its Beaumont and Houston operations. I also conclude that the Houston dispatcher does not share a sufficient community of interest with the employees in the proposed unit, and therefore, will exclude her from the unit.

STATEMENT OF FACTS

Introduction

The Employer maintains a principal office and place of business at 5308 Ashbrook in Houston, Texas and provides heating, ventilating, and air conditioning (HVAC) services to

¹ At the hearing, the Employer originally argued that the appropriate unit should also include all sales representatives. The Employer and Union subsequently stipulated that the sales representatives should be excluded

various customers. As a service firm, the Employer is principally engaged in the maintenance and operation of HVAC units for commercial and industrial clients in South Texas. The Employer provides emergency service, preventive maintenance, repair and retrofit services to its clientele. In addition to the Ashbrook office, the Employer has a client-provided office in Deer Park, Texas – the primary location for its industrial clients in the greater Houston area. The Employer also maintains a satellite presence in Beaumont, Texas.

Corporate Structure

Henry Oramas is the president of the company. The Employer's business is organized into two departments, a Sales Department and an Operations Department. Trey Calvery is the Sales Manager and is the head of the Sales Department in the Houston territory. Selling General Manager A.J. Moranto is responsible for sales in the Beaumont territory. Ray Bruce holds the title of Service Manager and is head of all of the employees in the Operations Department, including those employed in Beaumont. Industrial Service Manager Rudy Zubia assists Ray Bruce by providing day-to-day supervision of the five petitioned-for employees, commonly referred to as industrial service technicians.

Two sales representatives work out of the 5308 Ashbrook office and report directly to Trey Calvery in the Sales Department. A.J. Moranto currently has no employees who report directly to him. A dispatcher, all of the commercial service technicians working out of the Ashbrook facility, and all of the Beaumont service technicians report directly to Ray Bruce. The petitioned-for employees report directly to Industrial Service Manager Rudy Zubia. Zubia, in turn, reports directly to Bruce. The parties stipulated, and I find, that Henry Oramas, Trey Calvery, A.J. Moranto, Ray Bruce and Rudy Zubia are supervisors within the meaning of Section

2(11) of the Act because they have the authority to hire, fire, discipline, or effectively recommend such action and, therefore, are excluded from the appropriate unit.

Operations Department

Both parties contend that the appropriate bargaining unit will consist of some combination of the Employer's operational employees. The Employer employs approximately 19 operational employees. In the Houston area, the Employer employs one dispatcher and 15 service technicians. The Employer also employs three service technicians in Beaumont. The Employer seeks a bargaining unit composed of the dispatcher and 18 service technicians, including a working foreman.

Dispatcher

Every morning the dispatcher communicates with all service technicians in both Houston and Beaumont to dispatch work assignments for that day. Dispatcher Shirley McCall dispatches the employees according to a pre-determined criteria based on the particular customer, nature of the call and the individual skill set of the technicians. For instance, if the client requests work on a chiller, McCall may dispatch one of the employees who has specialized knowledge on how to work on this system. Bruce provides McCall with detailed instructions on which employees should be dispatched to which customers based on the nature of the call. If McCall is unable to dispatch a service technician pursuant to the pre-determined criteria, she will personally contact Bruce, Zubia or even Oramas for further instruction.

McCall works out of a cubicle in the Employer's 5308 Ashbrook facility in Houston, Texas and utilizes a dispatch screen to perform her dispatching duties. McCall does not go into the field but communicates with the service technicians at least twice a day, at the beginning of their shift and at the end of the day. McCall receives the same 401(k) plan, health and dental

insurance the Employer provides to all other employees. In addition to these benefits, McCall is a salaried employee, currently accrues two weeks of vacation annually and has five days of sick leave per year. The Employer's witnesses were unable to testify as to how much McCall earns in a year. As stated earlier, Bruce directly supervises McCall.

Service Technicians

The term commercial and industrial service technician is not an official company designation; it is a term used to distinguish those service technicians employed in the Houston area who perform primarily industrial work from those who perform principally commercial work. Those employees assigned to Industrial Service Manager Zubia are commonly referred to as industrial service technicians, whereas the other Houston-area technicians are referred to in the record as either commercial service technicians or simply service technicians. The three Beaumont service technicians are simply referred to as service technicians in spite of testimonial evidence that ninety percent of their work is industrial in nature.

The Employer requires no formal training to be a service technician but requires only a high school education or its equivalent. The baseline qualification is a working knowledge and skill on how to service an HVAC system. However, employees, whether based on skill and/or experience, are not all equal. As with any profession, expertise and skill are not evenly distributed; specialization in one area or another arises. For instance, certain employees are more skilled than others working on chillers. Chillers are found on both industrial and commercial clients' systems.

Generally, the five petitioned-for employees, classified as industrial service technicians, service primarily industrial clients. The record disclosed that approximately eighty percent of the petitioned-for employees' work is performed on industrial sites. The type of work performed

on an HVAC unit does not depend on whether the client is industrial or commercial. The tools utilized to service the HVAC units do not vary based on whether the client is industrial or commercial, but are dependent on the type of work performed. All service technicians are responsible for providing their own hand-held tools, which are the same. In contrast, the Employer provides certain specialty tools to the service technicians. All service technicians store their tools in vans and/or trucks provided by the Employer, which the service technicians take home at the conclusion of their shift. Variations in the type of company vehicle, whether it be a pick-up or a van, is not determined by whether the service technician performs industrial or commercial work, but simply reflects the different corporate decisions as to which type of vehicle to purchase in a given year.

The primary distinction between the work performed on an industrial or a commercial client's premises are the different safety rules regarding access to the client's facility. The industrial clients have certain general and site-specific safety requirements that must be satisfied in order to gain access to an industrial facility. Specifically, all industrial service technicians must meet the safety standards of the Houston Area Safety Council (HASC). HASC annually conducts a certification test that lasts about an hour. Individuals must renew their certification each year. All of the Employer's industrial clients require the service technicians to be HASC-certified in order to gain entrance into their respective facilities. In addition to the HASC certification requirement, several of the Employer's industrial clients have their own site-specific safety requirements that must be completed in addition to the HASC certification in order to gain on-site admission.

As a result of the different safety requirements, there is a difference in the equipment and uniforms utilized by industrial service technicians as compared to the other service technicians.

Industrial service technicians are required to carry respirators in their vehicles, a requirement from which the other service technicians are exempt. Other differences between the equipment stored in the trucks of the industrial service technicians include larger fire extinguishers, fall harnesses, and lock-outs/tag-outs for locking out electrical equipment.

In addition, because of the general and site specific safety requirements, industrial service technicians are commonly required to wear fire retardant uniforms, long sleeved shirts, steel-toed boots, hard hats and even safety goggles at times. In contrast, technicians on a commercial jobsite are allowed to work without hardhats and often wear t-shirts and tennis shoes. The record disclosed that the Employer requires all service technicians to wear some form of safety glasses. Even here, however, there are slight differences. On certain industrial sites, the service technicians are required to wear safety goggles rather than safety glasses.

The industrial service technicians also work a different schedule than the other service technicians. Most of the service technicians in the Houston area work a standard five-day workweek consisting of eight-hour shifts per day. The industrial service technicians work four days per week and ten hours per day. As a result of the 4/10 schedule, the industrial service technicians are able to perform voluntary overtime work on their days off, typically Fridays, for the commercial customers.

Bruce is the ultimate authority for all service technicians; he is responsible for hiring and employee reviews of all technicians. In addition, Bruce provides the day-to-day supervision for the service technicians employed in Houston who perform primarily commercial work, and the three service technicians employed in Beaumont as well. Bruce also directly supervises the industrial service technicians when they perform voluntary overtime work for commercial customers. He maintains an office at the Employer's Ashbrook facility but visits the Beaumont

service technicians approximately once a month. The Employer maintains an office in Port Arthur, Texas for the Beaumont technicians.

As stated earlier, Zubia provides the day-to-day supervision for the five petitioned-for employees commonly known as the industrial service technicians. The record revealed that in addition to providing supervision on job assignment matters, Zubia also has the authority to discipline employees. Zubia's primary assignments include several commercial clients in addition to the Employer's industrial clients in the Houston area. The industrial service technicians service these commercial clients under Zubia's day-to-day supervision.

For approximately three and one-half years, Zubia has maintained an office at one of the Employer's client's facilities located at 5900 Highway 225 in Deer Park, Texas. The office is provided to the Employer by one of its industrial clients, Resolution Performance Products (Resolution). Resolution provides office space in this facility to the Employer and several other contractors. Zubia has a desk, phone line, fax machine and two four-drawer file cabinets in the office. His name is on the office door and he has a key to access the office. Zubia has conducted meetings of the petitioned-for employees in the Deer Park office, received new and spare parts at that address, disciplined employees in the office and set up mailboxes for the petitioned-for employees.

In contrast to the preceding, payroll processing, wages and other fringe benefits are the same for all service technicians and administered from the Employer's Ashbrook facility. Most of the Houston service technicians come to the Ashbrook location twice a week to drop off their timesheets. The Beaumont service technicians fax their timesheets directly to Dispatcher McCall. Zubia collects the time sheets from the industrial service technicians and personally

turns them in to the Ashbrook office every Friday, the day the industrial service technicians are typically off under their 4/10 schedules.

Additionally, service technicians are hourly employees and belong to the same employee pay scale of A, B and C, with C being the lowest step. The hourly wage varies from \$12 - \$25 per hour. Differences in pay are not dependent on whether the technician performs primarily industrial or commercial work but is individually based on a variety of factors including years of experience, areas of expertise and performance on mechanical and electrical aptitude tests. All service technicians enjoy the Employer-provided benefits of health and dental insurance and 401(k) plan. All service technicians receive one week of vacation and may earn bonus days based on an individual employee's safety record. None of the service technicians receive sick leave.

ANALYSIS

The Petitioner seeks a single-facility unit consisting of the five service technicians working under the direction of Industrial Service Manager Rudy Zubia in the Deer Park, Texas industrial complex. In contrast, the Employer contends that the petitioned-for unit is inappropriate in both its scope and composition. The Employer contends that any appropriate unit should also include all service technicians employed in its Houston and Beaumont, Texas operations. The Employer also contends that the Houston dispatcher should be included in any appropriate unit.

In evaluating the appropriateness of a bargaining unit under Section 9(b) of the Act, the Board is given broad discretion to decide whether the unit most appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision to assure employees the fullest freedom in exercising their rights guaranteed by this Act. 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 732 (1996). In determining whether a petitioned-for unit is appropriate, the unit sought by the petitioning union is always a relevant consideration. *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994).

A. Work Situs of Petitioned-for Employees

Initially, I must decide whether the industrial service technicians have a separate work situs from that of the other service technicians employed in the Houston area. This is not a mere academic exercise, as the answer to this inquiry will determine whether the Petitioner enjoys the single facility presumption in this case with the applicable burdens of proof on the Employer. The Employer alleges that all of its service technicians work out of the Ashbrook facility in Houston, Texas. Specifically, the Employer alleges that the fact that all service technicians are dispatched out of the Ashbrook facility and have a workspace at the Ashbrook facility supports its contention. Additionally, the Employer notes that Zubia’s business card and an employee call-in sheet reference the Ashbrook location only. Contrary to the Employer’s argument, I conclude that the Deer Park, Texas office maintained by Zubia constitutes the work situs of the petitioned-for employees.

Ascertaining the identity of the work situs for the service technicians in this case is a difficult inquiry because the employees principally work in the field. However, common sense dictates that the facility where the petitioned-for employees convene to conduct group meetings, perform administrative duties, meet with their immediate supervisor and store equipment and related supplies should constitute the employees’ work situs. With regard to the preceding, the record in this case revealed that Zubia has utilized the Deer Park office on numerous occasions to

convene group meetings. The petitioned-for employees turn in their weekly time sheet to Zubia at the Deer Park office. Zubia maintains mailboxes for the petitioned-for employees at the Deer Park office; maintains some spare and new parts at the Deer Park office and calls the petitioned-for employees from that office to assign work and provide instruction. Zubia has disciplined the petitioned-for employees in the Deer Park office.

In contrast, the record disclosed that the petitioned-for employees physically enter the Ashbrook facility only once or twice per month for service and/or safety meetings. If the petitioned-for employees need additional time sheets or work orders, they are instructed to pick up these documents from Zubia's Deer Park office. The Deer Park office is the location the petitioned-for employees contact when they need to speak to Zubia. Also, the record disclosed that the industrial service technicians subjectively perceive the Deer Park office to be their work situs. The testimony of one of the petitioned-for employees established that the Ashbrook facility is 27.5 miles from the Deer Park office, which is located in the Deer Park industrial complex, the location of numerous of the Employer's industrial clients. The estimated length of a round trip from the Deer Park industrial complex to the Ashbrook facility is well over one hour.

Considering the preceding, the Employer's argument that the Ashbrook facility constitutes the petitioned-for employees work situs is unpersuasive. The record reveals that there is a "space" in the Ashbrook facility that any technician may use if they need to sit down and complete paperwork. According to Zubia, this "very seldom" occurs as most paperwork is completed in the field. The Employer's argument regarding the identification of the address of the Ashbrook facility on Zubia's business card and the company call list is similarly unconvincing. Although the Ashbrook location is listed on Zubia's business card, the phone and

fax number listed on the card is for the Deer Park office. Similarly, the call-in sheet lists the Deer Park office phone number and fax number as the contact for Zubia.

Because I conclude that the Deer Park office constitutes a separate work situs for the petitioned-for employees, the Board's single location presumption is applicable to the instant case. The Board has long held that a single location unit is presumptively appropriate for collective bargaining. *Cargill, Inc.*, 336 NLRB 1114 (2001); *J&L Plate*, 310 NLRB 429 (1993); *Bowie Hall Trucking*, 290 NLRB 41 (1988). The presumption in favor of a single location unit can only be overcome "by a showing of functional integration so substantial as to negate the identity of the single facility." *Bowie Hall Trucking*, supra at 42. The burden is on the party opposing the petitioned-for single facility unit to present evidence sufficient to overcome the presumption. *J&L Plate*, supra at 429. Here, I find that the Employer has presented sufficient evidence to overcome the single facility presumption with respect to the Houston and Beaumont service technicians.

B. Houston Operations

In determining whether the single facility presumption has been rebutted, the Board examines various factors such as centralized control over daily operations and labor relations, similarity of employee skills and functions, general working conditions, bargaining history, degree of employee interchange, and geographic location of facilities in relation to each other. *New Britain Transportation Co.*, 330 NLRB 397 (1999) and *Rental Uniform Service*, 330 NLRB 334 (1999).

Centralized Labor Relations Policy

The record disclosed that all of the service technicians employed by the Employer in Houston and Deer Park are subject to identical personnel and labor relations policies, which are

centrally determined. Specifically, the employees in the petitioned-for group are subject to the same work rules as the other service technicians. Employee files are centrally maintained by the Employer at the Houston Ashbrook facility. The service technicians are all paid on the same day and work under the same pay scale. The similarity and centralization of labor relations policy is one of the factors weighing in favor of a multi-location unit. See *Saint Luke's Health System*, 340 NLRB No. 139 (2003); *Purity Supreme, Inc.*, 197 NLRB 915 (1972); and *Dan's Star Market*, 172 NLRB 1393 (1968).

Commonality of Supervision

Service technicians in Deer Park and Houston share some common supervision with each other. Specifically, Service Manager Ray Bruce exercises supervisory authority over all Employer's service technicians, including the petitioned-for employees who work out of the Deer Park office. Although Zubia is the day-to-day supervisor of the petitioned-for employees, his supervisory autonomy is substantially constrained. Bruce retains the authority to hire all service technicians and also performs all employees' review or evaluations. The Board has cited "the degree of day-to-day managerial responsibility" as a relevant inquiry in conducting a single unit presumption analysis. *Red Lobster*, 300 NLRB 908, 910, (1990). With respect to this inquiry, the retention of supervisory functions such as hiring authority and employee evaluations is evidence of substantial involvement by area supervisors over employees' terms and conditions of employment. See *Pic-Way Shoe Mart*, 274 NLRB 902 (1985); *Petrie Stores Corp.*, 266 NLRB 75 (1983); and *Super X Drugs of Illinois*, 233 NLRB 1114 (1977). Zubia's lack of hiring authority and participation in employee evaluations erodes the indicia of autonomy.

Additionally, as discussed below, the employees in the petitioned-for unit perform voluntary overtime for commercial customers under the direct supervision of Bruce on their day

off. Bruce sets up the voluntary overtime work and acts as the employees' immediate supervisor when they are performing this commercial work. Similarly, when employees from the commercial side of the Employer's Houston operations perform industrial work, they work under the direct supervision of Zubia. Thus, there is shared supervision of the technicians by both supervisors.

Similarity of Work Skills/Equipment

The service technicians working out of the Houston and Deer Park offices have substantially the same skills, work functions and equipment. In particular, the technicians have a company-owned vehicle, provide their own hand-held work tools, use the same or similar work tools and perform the same or similar work duties on the jobs. The primary distinction between the petitioned-for employees and the Houston service technicians are general and site-specific safety requirements for entrance on the industrial clients' facilities. Because the petitioned-for employees perform approximately eighty percent of their work for industrial clients, there are some differences in the safety training and equipment of the industrial service technicians. Specifically, the petitioned-for employees are all currently certified by HASC, have certain site-specific training and must wear fire-retardant uniforms and other safety-related clothing/accessories.

The minor differences, however, in the safety training and equipment is not a dispositive factor. "The Board has long held that no one single factor is determinative in analyzing whether the single facility presumption has been overcome." *Saint Luke's Health System*, 340 NLRB No. 139 (2003). Further, the record disclosed that at one time, all of the Houston Ashbrook service technicians were certified by HASC. At the time of the hearing, those certifications, which must be annually renewed, had expired. The renewal process lasts approximately one

hour. Additionally, service technicians on the commercial side may work on industrial sites. When this occurs, Industrial Service Manager Zubia issues the commercial service technicians the proper uniform and/or related equipment necessary for them to gain admission to the industrial client's facility.

Geographical Separation

The record disclosed that the Employer's Houston Ashbrook facility is approximately 27.5 miles from the Deer Park office, the work situs of the petitioned-for employees. The Board has not articulated a specific numerical rule requiring separate facilities to be within a certain geographical distance to qualify as a single unit. Thus, the Board has found that separate facilities located 43 miles apart were properly included in the same unit in *Barber-Colman Co.*, 130 NLRB 478, (1961) and 90 miles apart in *Capital Coors Co.*, 309 NLRB 322 (1992). Moreover, the Board has stated that when the subject employees are dispatched directly to their work from home, the relevance of geographical separation is reduced. *In re Trane*, 339 NLRB No. 106 (2003). In *Trane* the Board concluded that a multi-location unit of HVAC technicians was appropriate where 108 miles separated the two groups of employees. The Board concluded that although 108 miles was significant, the fact that the employees were dispatched directly to work without physically reporting to their respective offices ameliorated the geographical separation. In the instant case, none of the Employer's service technicians physically report to a central location at the start of their shift, rather the dispatcher dispatches them at 7:30 a.m. to the client's facilities. Under these circumstances, the geographical separation of 27.5 miles is even more negligible than the facts present in *Trane*.

Interchange of Employees

Although no single factor is determinative, the interchange of employees is a crucial factor in the single location analysis. For example, in *Esco Corp.*, 298 NLRB 837 (1990), the Board emphasized employee interchange as a critical element in determining whether the single-facility presumption was overcome. The record in this case demonstrates that frequent employee interchange occurs between the Employer's service technicians in Houston and Deer Park. The Employer's weekly time records demonstrate that on numerous occasions in 2003, service technicians Reynold Busch, Joseph Reeves, Mike Adkisson and Mike Yarbrough were transferred from the commercial side of the Employer's operations to perform work on industrial sites and at times worked side-by-side with the industrial service technicians on the industrial jobsites.

Transfers in the opposite direction (industrial to commercial) are as prevalent if not more so than the above. The Employer currently has far more commercial clients than industrial clients. The record disclosed that the Employer has approximately 150 commercial and 16 industrial accounts. When commercial assignments are overloaded or at a peak, the industrial service technicians will cross over and assist the service technicians who primarily work on commercial jobsites. Weekly time records were admitted into evidence demonstrating the commercial work performed by the petitioned-for employees. However, the records make no distinction between those commercial clients permanently assigned to Zubia and the petitioned-for employees and the commercial accounts that are assigned to Bruce and the so-called commercial service technicians working out of the Ashbrook facility. Only instances of the latter work performed by the industrial service technicians constitutes evidence of interchange or

transfer of employees from the industrial to the commercial side. Because the record does not identify the name of the five or six commercial accounts that Zubia manages, it is impossible to provide a detailed description of the amount of employee interchange from industrial to commercial.

In spite of the lack of specificity of the true interchange by the industrial service technicians to the commercial side, there is ample evidence to conclude that the industrial technicians perform a substantial amount of commercial work. The uncontradicted evidence established that all five of the petitioned-for employees have regularly worked overtime on the commercial side. When they perform this overtime work, they work under the direct supervision of Ray Bruce. One of the five petitioned-for employees estimated that he had compiled approximately 250 hours of overtime on commercial projects in 2003 and that he crosses over to perform overtime work “quite frequently.”

The documentary and testimonial evidence indicates that a substantial number of the Deer Park and Houston Ashbrook service technicians have transferred between the commercial and industrial side in 2003. By conservatively adding Jackson to the list of Reynolds Busch, Joseph Reeves, Mike Adkisson and Mike Yarbrough, the record reflects that a total of five employees transferred between the commercial and industrial side of the Employer’s operations in 2003. There are currently a total of 15 service technicians employed by the Employer in Houston and Deer Park, therefore, the preceding is evidence of a thirty-three percent transfer rate amongst the technicians. The Board has found transfer rates of fifteen to twenty percent sufficient to establish the regularity of temporary transfers. *Saint Luke*, slip op. at 3.

Conclusion

Based upon the preceding evidence, I find that the Houston and Deer Park service technicians employed by the Employer have been so effectively merged into a comprehensive unit that the single facility presumption has been rebutted. In making this conclusion, I am mindful of the Board's directive it "'has never held or suggested that to rebut the [single facility] presumption a party must proffer 'overwhelming evidence illustrating the complete submersion of the interests of employees at the single store,' nor is it necessary to show that 'the separate interests' of the employees sought have been 'obliterated.'" *In re Trane*, slip op. at 2 quoting from *Petrie Stores Corp.*, 266 NLRB 75, 76 (1983).

C. Beaumont Operation

I am also compelled to include the three service technicians operating out of the Employer's Beaumont operations in the proposed unit with the Deer Park and Houston service technicians based on the Board's reasoning in *Trane*, supra. In that decision, the Board concluded that a unit of HVAC service technicians employed in the employer's Fenton and Cape Girardeau, Missouri facilities constituted a single unit. The Board noted that all decisions with respect to policies, procedures, hiring, firing, discipline, leave, vacation and wages emanated from the Fenton facility. Fenton supervisors also supervised both the Fenton and Cape Girardeau employees with no local supervisor in Cape Girardeau. Employees were dispatched directly in Fenton and all functions such as payroll and personal finance were administered in Fenton.

In *Trane*, the Regional Director initially concluded that the single location presumption had not been overcome with respect to the Fenton facility because it was located 108 miles from

the Cape Girardeau facility and because the employer's evidence of employee interchange did not meet the particularized standards of *New Britain*, supra. Specifically, the employer generally alleged that there were "hundreds" of transfers between the two facilities each year. The Board conceded that evidence of employee interchange "was not of the caliber required under *New Britain*" however, the Board concluded "that the centralized control over daily operations and labor relations; lack of local autonomy; common supervision; identical skills, duties, and other terms and conditions of employment; and contact between the Fenton and Cape HVAC technicians outweigh the geographic distance and the lack of specificity as to the level of interchange." *Trane* slip op. at 3

The same or substantially similar facts from *Trane* are present in the instant case. The labor relations policies and employee work rules are centrally controlled by the Employer in the Ashbrook office. The Beaumont service technicians receive the same pay rates and have the same fringe benefits. The individual employee skills and working conditions of the Beaumont technicians are similar to that of the Houston employees. The record disclosed that the Beaumont technicians perform both commercial and industrial work. The testimony of the Employer's witnesses established that the Beaumont and Houston employees also interact with one another. Specifically, service technicians from Beaumont and Houston are currently assigned together on a casino project in Louisiana. The record reflects that the Beaumont technicians travel to Houston approximately once a month in the summer to work on commercial projects and less than once a month throughout 2003 to work on industrial projects. Additionally, the Beaumont technicians have attended training sessions in Houston. Finally, the Beaumont technicians are directly supervised by Bruce from Houston. The Employer has no local supervisor in Beaumont.

The Board in *Trane* placed particular emphasis on this last factor. The Board concluded that the lack of local supervision meant that the Cape office had “no local autonomy” apart from Fenton. *Id.* The facts in the instant case lead me to the same conclusion with respect to the Beaumont operations in relation to the Employer’s Houston operations. Therefore, I conclude that the proposed unit should include service technicians employed in the Employer’s operations in Beaumont as well.

D. Dispatcher Shirley McCall

The Petitioner claims that Dispatcher Shirley McCall is a statutory supervisor and, therefore, must be excluded from any appropriate unit as a matter of law. Contrary to the Petitioner’s assertion, the record evidence shows that McCall does not possess any of the indicia of supervisory status and, therefore, is not a supervisor as defined under Section 2(11) of the Act. As the party asserting that McCall is a supervisor, the Petitioner bears the burden of proof. *NLRB v. Kentucky River Community Health Care, Inc.*, 532 U.S. 706, 710 (2001). In order to meet this burden, the Petitioner must demonstrate by a preponderance of credible evidence, that McCall engages in activities described by Section 2(11) of the Act. *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote discharge, assign, reward or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The above definition is commonly referred to as the primary indicia of supervisory authority. Although the exercise of any one of these types of authority is sufficient to confer supervisory

status, it is well settled that such authority must be exercised with “independent judgment on behalf of management and not in a routine or sporadic manner.” *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990). The exercise of some supervisory authority in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee. *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994), *The Clark Machine Corp.*, 308 NLRB 555 (1992).

With respect to McCall, the uncontradicted evidence in the record reveals that McCall does not have the authority to hire, fire or discipline employees. The Petitioner alleges that she is a supervisor because she assigns work to all of the service technicians. The technicians call McCall each morning to receive their daily job assignments and report to her at the conclusion of their shift. At the hearing the Petitioner placed particular emphasis on a standby list distributed by the Employer to the industrial service technicians that identified the rotation of the technicians. At the bottom of the page, the list states “need additional help please call a supervisor.” Below this line is the name and phone number of Zubia, Bruce, and McCall. Such evidence is not dispositive of supervisory status. “Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.” *Acme Markets, Inc.*, 328 NLRB 1208, 1213, (1999).

It is well established that the assignment of work to another employee that is routine in nature does not establish supervisory status. *Byers Engineering Corp.*, 324 NLRB 740 (1997). To establish supervisory status, there must be a showing that the individual exercises independent discretion in the assignment of work. The record disclosed no evidence that McCall exercises such independent discretion in her dispatching duties but that she dispatches the

individual employees according to a predetermined criteria established by management. Bruce provides McCall with detailed instruction on which employees should be dispatched to which customers based on the nature of the call and the individual skill set of the technicians. In Bruce's absence, McCall receives guidance from Zubia or even President Oramas. McCall does not make her own independent assessment of the technicians' particular skills and expertise. (See *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), wherein the Board held that the complexity of the dispatchers' responsibilities does not necessarily make their judgments supervisory.) As the party alleging supervisory status, the Petitioner has the burden to provide such evidence to sustain its supervisory status claim. In the absence of such evidence, I am compelled to conclude that McCall is not a supervisor. Further, when there is no evidence that an individual possesses any of the several primary indicia for statutory supervisory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994); *St. Alphonsus Hospital*, 261 NLRB 620, 626 (1982). Since McCall does not possess any of the statutory primary indicia enumerated in Section 2(11) of the Act, on the record of secondary statutory indicia is not dispositive.

In addition to alleging that McCall is a supervisor, the Petitioner also contends that McCall should not be included in any appropriate unit because she is a clerical employee and therefore does not share a community of interest with the other employees in the petitioned-for unit. The Petitioner did not clarify at the hearing or in its brief whether it contends that McCall is a plant clerical or office clerical employee. Typically, office clericals are excluded from a unit including other employees, but may be represented in a separate unit. *PECO Energy Co.*, 322 NLRB 1074 (1997). On the other hand, plant clerical employees are customarily included in a

unit of other employees because they generally share a community of interest with the employees in a plant-wide unit. *Brown & Root, Inc.*, 314 NLRB 19 (1994).

Unlike supervisors, the Act does not include any definition of office or plant clerical employees. Typically, office clerical duties include billing, payroll, phone and mail. *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993); *Mitchellance, Inc.*, 314 NLRB 536 (1994); *Virginia Mfg. Co.*, 311 NLRB (1993); and *PECO* supra. In contrast, the typical plant clerical employee duties include timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. Because the office clerical duties are related to general office operations, they commonly do not share a community of interest with production and maintenance employees. *Container Research Co.*, 188 NLRB 586 (1971). But workers who perform clerical duties in close association with either the production process or other employees have been included in bargaining units as plant clericals even though they may utilize secretarial skills or are classified as clerks. *Brown* supra.

The record is incomplete as to whether dispatcher McCall is an office or plant clerical. In assessing the Petitioner's claim, I take notice of the Board's admonition with respect to a similar inquiry in determining supervisory status. The Board has cautioned that it must be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights that the Act is intended to protect. *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); *Adco Electric*, 307 NLRB 1113, 1120 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993); and *Chevron U.S.A.*, 309 NLRB 59, 62 (1992). In a similar vein, characterizing dispatcher McCall as an office clerical based on this limited record, and thus automatically excluding her from any appropriate unit is a decision not to be made lightly. As the party

asserting her automatic disqualification, the Petitioner must prove McCall's office clerical status. I find that the Petitioner has not met that burden.

However, regardless of the lack of evidence to sustain the Petitioner's clerical employee allegation, I will exclude McCall from the service technician bargaining unit based on traditional community of interest factors. "When undertaking the community-of-interest analysis, the Board applies the following factors: degree of functional integration, nature of employee skills and functions, common supervision, interchangeability and contact among employees, work situs, working conditions, and fringe benefits." *In re Los Angeles and Power Employees' Ass'n.*, 340 NLRB No. 146 (2003). The balance of the preceding factors and other traditional community of interest factors weigh in favor of excluding McCall.

Specifically, although McCall shares some common interests with the service technicians, such as shared supervision via Bruce and similar fringe benefits, the remainder of the factors are dissimilar. In particular, the working conditions, employee skills and training are distinct. While McCall works exclusively at the Employer's Ashbrook facility, the service technicians spend the overwhelming majority of their time working in the field. In fact, the record revealed that the service technicians typically are dispatched to their work assignment at the beginning of the day without ever physically entering the Employer's facility. The service technicians also must complete numerous safety training courses for both commercial and industrial clients. McCall does not undergo any of this training. The service technicians wear company-provided uniforms, are assigned a company vehicle and must operate several hand-held and specialty tools to perform their job duties. The record does not disclose if McCall is required to wear any uniform, is assigned a company vehicle or possesses similar tools to the petitioned-for employees.

Additionally, although there are some aspects of the fringe benefits that are similar, such as a 401(k) plan and health and dental insurance, there are notable differences. The service technicians are hourly, whereas McCall is salaried. The service technicians do not accrue sick leave, whereas McCall has five days of sick leave each year. The service technicians have one week of vacation a year, whereas McCall accrues two weeks of vacation each year. The service technicians may earn bonus days off based on their safety record. Nothing in the records suggests that McCall may earn such benefits. Lastly, although there is evidence of daily contact between McCall and the service technicians, she does not work physically side-by-side with any of the service technicians and there is no record of employee interchange between the service technicians and the dispatcher.

In its post hearing brief, the Employer cites *Mount Aire Farms of Delmarva, Inc.*, Case 5-RC-15076 (August 31, 2000) in support of the proposition that the dispatcher should be included in the unit of HVAC service technicians. In *Mount Aire*, the Regional Director of Region 5 concluded that a dispatcher shared a sufficient community of interest with operators and maintenance employees to be included in the proposed unit. *Mount Aire* is different from the present case because, unlike the instant case, the dispatcher in *Mount Aire* physically worked alongside the petitioned-for employees examining feed orders, shared common computer skills with the petitioned-for employees and was an hourly employee with compensation in the same range as the petitioned-for employees. These facts are clearly at odds with the circumstances of the instant case.

Therefore, I conclude that the service technicians enjoy a community of interest distinct from that of the dispatcher and I will exclude McCall from the proposed unit of service technicians.

In sum, I find the record supports a conclusion that the Employer's Houston and Deer Park service technicians share a substantial community of interest based on common supervision, similar work skills and working conditions and frequent interchange. I also conclude that the Employer's Houston and Deer Park technicians share a substantial community of interest with the Employer's Beaumont technicians. This conclusion is based on centralized control of labor relations and employee work rules, similar wages and working conditions and common supervision. Finally, I conclude that the record does not support a conclusion that the Employer's dispatcher shares such a substantial community of interest with the Employer's service technicians as to mandate her inclusion in the Unit I find appropriate herein.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer, Way Service, Ltd., a Texas limited partnership, is engaged in providing preventive maintenance and repair work on commercial and industrial HVAC systems with a facility located in Houston, Texas. During the preceding twelve months, a representative period, the Employer, in conducting its business operations performed services valued in excess of \$50,000 in states other than the State of Texas. Based on the foregoing, I find the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. The parties stipulated to the Petitioner's labor organization status.

5. 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.
6. 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 full-time and regular part-time service technicians, including working foremen employed by the Employer in its operations in Beaumont, Deer Park and Houston, Texas.

EXCLUDED: All office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

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 the Pipefitters Local Union 211 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, 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 that 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

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that 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. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. Should the Petitioner not wish to proceed to an election in a broader unit, it will be permitted, upon request, to withdraw its petition without prejudice.

In order to be timely filed, the list must be received in the Resident Office, 1919 Smith Street, Suite 1545, Houston, Texas 77002, on or before May 25, 2004. 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 713-209-4890. 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 5:00 p.m., EST **on June 1, 2004**. The request may **not** be filed by facsimile.

Dated: **May 18, 2004**

/s/ Curtis A. Wells

Curtis A. Wells, Regional Director,
National Labor Relations Board
Region 16
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Fort Worth, TX 76102