

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21**

UNITED RENTALS, INC.

Employer

and

Case 21-RC-20746

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 12,
AFL-CIO,

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was conducted before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, customer service associates/yard employees, mechanics, sales coordinators/yard employees, safety analysts and dispatchers employed by the Employer at its facility located at 5860 Paramount Boulevard, Long Beach, California; excluding all commissioned sales representatives/outside salespersons, branch administrators, parts associates, managers, senior customer service associates/yard foremen, guards and supervisors as defined in the Act.

ISSUES AND CONCLUSIONS

Three issues are presented for decision, one involving the inclusion or exclusion of a group of employees and two raising the supervisory status of two individuals. Petitioner seeks an election in a unit that consists of drivers, customer service associates/yard employees¹, mechanics, and safety analysts but that excludes sales coordinators/counter employees.² The Employer contends that sales coordinators/counter employees should be included because they share a community of interest with employees in the petitioned-for unit, whereas the Petitioner argues that the petitioned-for unit constitutes a separate appropriate unit. The supervisory status of the dispatcher and the senior customer service associate, also known as the yard foreman, are also in dispute.³ Petitioner contends that both individuals are supervisors as that term is defined in Section 2(11) of the Act, whereas the Employer claims that they are not

¹ The official title is customer service associates; however, they are commonly referred to as yard employees. Throughout this decision, this classification will be referred to as yard employees.

² The official title is sales coordinators; however, they are commonly referred to as counter employees. Throughout this decision, this classification will be referred to as counter employees.

³ Although Petitioner also took the position at the conclusion of the hearing that Stephen Pondexter, the Service Foreman, was a supervisor, in its brief Petitioner, took no position on his status. The record contains some evidence suggesting that Pondexter may have the authority to hire and discipline employees, but the record does not clearly establish whether Pondexter exercises such authority "with independent judgment on behalf of management, and not in a routine or clerical manner." Hyro Conduit Corp., 254 NLRB 433, 436 (1981). In representation proceedings, the burden of proving that an individual is a statutory supervisor rests on the party making the assertion. The Ohio Masonic Home, Inc., 295 NLEB 390, 393 (1989). Since the record is inconclusive on this issue, I find that Petitioner, as the party asserting supervisory status, has not met its burden and, therefore, I shall include Pondexter in the unit.

and, therefore, that they should be included in the petitioned-for unit.

Based on the record in this case and the considerations noted below, I conclude that the sales coordinators/counter employees should be included in the appropriate unit. I also conclude that the dispatcher should be included in the unit. However, I conclude that senior customer service associates/yard foremen should be excluded from the unit.

FACTS

United Rentals, Inc., is a Delaware Corporation with corporate offices located in Greenwich, Connecticut, and a facility located at 5860 Paramount Boulevard, Long Beach, California, herein called the facility. It is engaged in the rental and sale of construction equipment and supplies to individuals as well as businesses. Although the record contains evidence of a history of collective bargaining between other Operating Engineer Locals and the Employer involving employees at facilities in Illinois and Massachusetts, the record contains no evidence of any history of collective bargaining involving employees at Long Beach, California, the facility involved herein.

The facility rents and sells equipment seven days a week. The Employer employs 10 drivers, 11 mechanics, 11 customer service associates/yard employees, one safety analyst, one dispatcher, six sales coordinators/counter employees, one counter foreman, and one shop foreman. Carlos Cabrera is the yard foreman and Gabriel Hollingsworth is the dispatcher. Branch

Manager Kelly Dingeman and Assistant Branch Manager Doug Vaughn oversee the operations.

Job Functions

The duties of the employees are divided into areas of responsibility. Drivers make deliveries and pickups of construction equipment. Each yard employee is assigned a specific area of the yard to maintain, including the garden area, building tool area, truck area, and gas pump area. However, all the yard employees work in the batch plant mixing concrete. They perform a variety of manual tasks in the yard including loading smaller equipment on customers' vehicles and checking equipment for rental. Mechanics repair and maintain the equipment both at the facility and in the field. Counter employees provide customer service, including preparing rental agreements using computers, demonstrating equipment, maintaining showroom displays, assisting customers with loading smaller equipment and receiving returned equipment.

Notwithstanding the general division of responsibilities, the employees regularly overlap duties and are constantly in contact with each other. Although the primary responsibility of counter employees is customer service, the counter employees regularly and frequently interact with the yard employees. When customers request equipment, the counter employees sometimes retrieve the equipment by themselves, but most often request that the yard employee obtain and load it for the customer. Most of the equipment delivery and pickup is performed by the drivers, but counter employees make deliveries

of the smaller equipment. About once a month, counter employees make deliveries, although they are rarely involved in picking up equipment. Similarly, while most of the dispatching is performed by the full-time dispatcher, Gabriel Hollingsworth, every one of the counter employees has dispatched, mostly on the weekends when the dispatcher is not working. One of the counter employees formerly worked as a driver, and over the years, a couple of employees have transferred from working in the yard to working as a counter employee.

Carlos Cabrera

Carlos Cabrera, the yard foreman, reports to both the Assistant Branch Manager, Doug Vaughn, or the Branch Manager, Kelly Dingeman. Cabrera gives work assignments and directions to the yard employees and generally tells them what to do. Unlike the others who work in the yard who are assigned to specific areas, Cabrera covers the entire yard. According to the undisputed testimony, he spends most of his time either in the yard giving direction to employees or inside the office where he is on the computer. He also initiates and recommends discipline and participates in the hiring process. According to the undisputed testimony, Cabrera tells employees what to do and disciplines them, including sending them home, without consulting anyone else.

Gabe Hollingsworth

Hollingsworth is the dispatcher of the drivers. He reports to the Assistant Branch Manager, Doug Vaughn. Dispatching primarily consists of handing tickets to the drivers.

Seldom are drivers given instructions other than what is written on the ticket. Drivers are not told, for example, what route to use; the drivers make that decision on their own. When a driver leaves early or is absent, the driver notifies Hollingsworth. Similarly, drivers submit their vacation requests to Hollingsworth who transmits them to Dingeman for his approval.

Supervision

Branch Manager Dingeman handles all the hiring, firing, scheduling and disciplining of employees with assistance from Assistant Branch Manager Vaughn, Yard Foreman Carlos Cabrera, and Shop Foreman Stephen Pondexter. Dingeman oversees all the employees and schedules their work hours. Although Vaughn, Cabrera, and Pondexter initiate discipline, Dingeman signs on all discipline notices and speaks to the employee himself, and investigates before signing a write-up. Similarly, although Hollingsworth, for example, may sign a vacation request, it is not approved until Dingeman signs it.

Employment Benefits

All employees receive the same medical, vacation, holidays and sick leave benefits. While the record does not indicate the wage rates for the employees in question, all are paid by the hour and all use the same time clock. The Employer's policy and procedures manual imposes the same work rules on all the employees. All employees attend the same safety meetings regardless of their classification.

All employees are scheduled to work 40-50 hours each week except the branch associate who works until the work is

completed. All employees are subject to the same time and attendance policy. Except for the drivers who have commercial drivers licenses, and the mechanics and drivers who have a certification to move equipment, most classifications require no special qualifications. Counter employees are able to use the Employer's computer system.

All employees are required to wear uniforms provided by the Employer. The mechanics, drivers and yard employees wear pants and shirts provided and laundered by the Employer, whereas the counter employees wear polo shirts provided by the Employer, which they are required to launder themselves.

ANALYSIS

Supervisory Status

Petitioner seeks to exclude from the unit Yard Foreman Carlos Cabrera and Dispatcher Gabriel Hollingsworth, on the ground that they are supervisors within the meaning of Section 2(11) of the Act. Section 2(11) of the Act defines supervisors as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other 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.

It is well settled that Section 2(11) of the Act is to be read in the disjunctive. Possession of any one of the enumerated indicia can establish supervisory status, as long as

the function is not routine or clerical in nature, but rather requires a significant degree of independent judgment. Stephens Produce Co., Inc., 214 NLRB 131 (1974); NLRB v. Kentucky River Community Care, Inc. 532 U.S. 706 (2001).

In representation proceedings, the burden of proving that an individual is a statutory supervisor rests on the party making the assertion. The Ohio Masonic Home, Inc., supra.

The Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect. Hydro Conduit Corp., 254 NLRB 433 (1981).

Carlos Cabrera

Applying this standard here, there is ample evidence to establish that Yard Foreman Carlos Cabrera is a supervisor within the meaning of the Act. The record establishes that he spends a significant portion of his day either on the computer or directing employees in the yard. There is no evidence anyone else instructs yard employees on a daily basis or gives them work assignments. He is the only person in the yard who has overall responsibility and is not responsible for a particular area. Moreover, the record establishes that he is authorized to initiate discipline and that on his own he has exercised his authority to issue write-ups and to send an employee home. Unlike the other yard employees, Cabrera has an office and uses the computer.

In sum, the record establishes Cabrera has more than one indicia of supervisory status. Using independent judgment,

Cabrera assigns work, responsibly directly employees and disciplines them. Accordingly, I find that Cabrera is a supervisor and should be excluded from the unit.

Gabriel Hollingsworth

By contrast, applying the standard explained above, the record contains insufficient evidence to establish that Dispatcher Hollingsworth is a supervisor within the meaning of Section 2(11) of the Act. As a dispatcher, Hollingsworth's job consists of giving the drivers their work assignments. However, dispatchers are not supervisors simply because they direct the flow of work. Spector Freight Systems, Inc., 216 NLRB 551 (1975). In order for a dispatcher to be a supervisor within the meaning of Section 2(11) of the Act, the dispatcher must have one of the powers listed in Section 2(11) of the Act. The record herein fails to establish that Hollingsworth does anything more than distribute prepared information. There was no testimony, for example, that the dispatcher either instructs employees on the routes to take or the sequence of tasks. On the contrary, one employee testified that the delivery route was up to him, not the dispatcher. The record also does not establish that the dispatcher exercises any independent judgment in distributing work assignments.

The Petitioner argues that the dispatcher is a supervisor because he grants time off. While the record establishes that the dispatcher has given employees permission to leave early, the record does not establish that any independent judgment was exercised. Since Petitioner bears the burden of

establishing supervisory status, I find that Petitioner has not met its burden. Accordingly, I am constrained to conclude that the dispatcher is not a supervisor. Because the record establishes that the dispatcher has shared terms and conditions of employment with unit employees, I shall include him in the unit.

Counter Employees

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure employees the fullest freedom in exercising the rights guaranteed by the Act." NLRB v. Action Automotive, Inc., 469 U.S. 490 (1985). In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. P.J. Dick Contracting, 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the Employer's proposals." A petitioner must demonstrate that the employees in the petitioned-for unit share a sufficient "community of interest" so as to constitute an appropriate bargaining unit. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). To assess whether employees share such a community of interest, the Board weighs a variety of factors, including:

[S]imilarity in methods of work or compensation, similar hours of work, employment benefits, common supervision, similar qualifications, training and skills, similarity in job functions, and the location where job duties are performed, the amount of interaction and contact with other employees,

integration and interchange of work functions with other employees and the history of bargaining.⁴

A petitioning union's desire as to a unit, though relevant, is not dispositive. Airco, Inc., 273 NLRB 348 (1984). Regardless of the petitioner's desire, the unit sought must be appropriate—not the *only* appropriate unit, or the ultimate unit, or the *most* appropriate unit; the Act requires only that the unit be an appropriate one. Bartlett Collins Co., 334 NLRB 484 (2001). The appropriateness of a unit is determined by application of traditional community-of-interest analysis. Where counter employees in an automobile rental agency perform primarily clerical work and only occasionally leave the counter to clean or deliver a vehicle, it is appropriate to exclude them from a unit of garagemen, mechanics and the like. Avis Rent-a-Car, 132 NLRB 1136 (1961). However, where counter employees in an equipment rental facility have overlapping duties and there is significant interchange with the petitioned-for unit of mechanics and drivers, and they share common terms and conditions of employment, the Board very recently found that the petitioned-for unit was not appropriate. United Rentals, Inc., 341 NLRB No. 72 (March 31, 2004). Applying the Board's analysis in that United Rentals case to the facts and circumstances of this record, I am constrained to find that the counter employees do not have a separate community of interest apart from the unit sought by Petitioner such as to warrant their exclusion from the unit. In reaching this conclusion, I note the following:

⁴ Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

Like the unit employees, the six counter employees are subject to the overall supervision of the Branch Manager and Assistant Branch Manager. While the record clearly establishes that the yard employees, the drivers and the mechanics receive their work assignments and direction from an immediate supervisor rather than from the Branch Manager or the Assistant Branch Manager, the record does not clearly establish whether the counter employees have an immediate supervisor as well. In addition, all these classifications work in the same facility in close proximity to each other. Although the drivers and field mechanics are frequently engaged in work away from the facility delivering equipment, picking it up or fixing it, the counter employees frequently interact during the workday with the employees who perform their work at the facility, including the yard employees and mechanics. Moreover, counter employees, as well as employees in the petitioned-for unit, are subject to identical terms and conditions of employment in many respects including health insurance, vacations, holidays, sick leave, awards program, employee rules and regulations, and safety.

Although the counter employees are primarily responsible for customer rental and sales, there is functional overlap in their job duties with the petitioned-for employees. In particular, I note that the counter employees regularly load equipment themselves onto customers' vehicles. They also frequently call upon the yard employees to load and unload equipment to and from customers' vehicles. Counter employees

demonstrate equipment and also regularly make deliveries themselves, approximately once a month.

In sum, the foregoing establishes that the counter employees do not have a sufficient separate community of interest to warrant their exclusion from the unit. Unlike the rental agents in Avis Rent-a-Car, the counter employees here are not isolated from the rest of the unit performing exclusively clerical duties. Rather, like the counter employees in United Rental, there is overlapping of duties, frequent interchange and common terms and conditions of employment. Therefore, the record establishes that the counter employees share a strong community of interest with the other employees Petitioner seeks to represent. Accordingly, based on the above-noted considerations and the record as a whole, I conclude that the unit sought by the Petitioner is inappropriate. The appropriate unit must consist of all full-time and regular part-time drivers, customer service associates/yard employees, mechanics, safety analysts, sales coordinators/counter employees, and dispatchers.⁵

There are approximately 41 employees in the appropriate bargaining unit.

⁵ Inasmuch as I have found a unit different than that requested by the Petitioner, in accordance with established Board practice, I shall allow the Petitioner fourteen (14) days from the date of the Decision and Direction of Election in which to perfect its 30-percent showing of interest in the unit. In the event the Petitioner does not establish a proper showing of interest in the unit within the 14-day period, I shall dismiss the petition unless it is withdrawn. Should the Petitioner not wish to participate in an election in the unit found appropriate herein, it may withdraw its petition, without prejudice, by giving notice to that effect to the Regional Director within ten (10) days from the date of this Decision and Direction of Election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced 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 that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **International Union of Operating Engineers, Local 12, AFL-CIO.**

LIST OF 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, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, on or before July XX, 2004. No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the

Board's Rules and Regulations requires an employer to notify the Board at least five (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 provision 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. The Board in Washington must receive this request by 5 p.m., EST, on July 23, 2004.

DATED at Los Angeles, California, this 9th day of July 2004.

/s/Victoria E. Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board