

UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

Dowling College

Employer-Petitioner

and

Case No. 29-UC-523

Local 30, International Union of Operating  
Engineers, AFL-CIO

Intervenor

Dowling College

Employer

and

Case No. 29-RC-10222

Local 30, International Union of Operating  
Engineers, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Emily Cabrera, a Hearing Officer of the National Labor Relations Board, herein called the Board.

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

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

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

2. On the first day of hearing in the instant case, June 10, 2004, Anne Scricca, Esq., attorney for Dowling College, herein called the Employer, refused to enter into a jurisdictional stipulation. However, previously on July 8, 2002, Ms. Scricca executed the following commerce stipulation on behalf of the same Employer in Case 29-RC-9859:

Dowling College, herein called the Employer, a domestic corporation, with its principal office and place of business located at Idle Hour Boulevard, Oakdale, New York, and with the Rudolph Campus at Oakdale (herein called the Oakdale campus) located at Idle Hour Boulevard, Oakdale, New York, and the Brookhaven Center (herein called the Brookhaven Center) located at William Floyd Parkway, Shirley, New York, is engaged in the operation of a private, non-profit educational institution. During the past 12-month period, which period is representative of the Employer's annual operations generally, the Employer, in the course and conduct of its business operations, received gross annual revenues in excess of one million dollars and purchased goods and supplies valued in excess of \$5,000 from enterprises located in the State of New York, which enterprises purchased and received said goods and supplies directly from suppliers located outside the State of New York. The Employer is engaged in commerce within the meaning of the Act.

On June 10, 2004, Ms Scricca promised to present witnesses on June 14, 2004, in support of her argument that the Employer no longer meets the Board's jurisdictional standards. However, on June 11, 2004, Ms. Scricca faxed a letter to the Region, admitting that the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, but without stating any basis for the assertion of jurisdiction.

In *Spring Valley Farms, Inc.*, 274 NLRB 643, 643-44 (1985), the Board asserted jurisdiction on the basis of a commerce stipulation executed in a past representation case by the respondent employer, which subsequently failed to provide evidence that it no longer met the Board's jurisdictional standards. In the instant case, in light of the commerce stipulation in Case No. 29-RC-9859, the absence of evidence of changed

circumstances, the Employer's June 11, 2004, admission, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim 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 (7) of the Act.

5. Local 30, International Union of Operating Engineers, AFL-CIO, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time custodians, maintenance mechanics, and mechanics' helpers employed at the Employer's Brookhaven facility, but excluding all clerical and professional employees, guards and supervisors as defined in the Act.<sup>1</sup>

### **Positions of the Parties**

The Employer raised the same two issues in connection with both the unit clarification and representation petitions in the instant case: accretion, and recognition bar. The Employer takes the position that the eight employees in the bargaining unit sought by Petitioner are an accretion to an existing bargaining unit represented by Local 434, International Association of Machinists, herein called Local 434.<sup>2</sup> The Local 434 bargaining unit consists of all full-time and regular part-time custodians, maintenance mechanics, and maintenance helpers, employed at the Employer's Oakdale, New York, facility.

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<sup>1</sup> The unit description appears as amended at the hearing.

<sup>2</sup> Local 434 was contacted by the Region, and declined to intervene and attend the hearing.

The Employer argues, in the alternative, that the representation petition is barred by the Employer's recognition of Local 434 as the exclusive collective bargaining representative of the petitioned-for bargaining unit, consisting of all full-time and regular part-time custodians, maintenance mechanics, and maintenance helpers, employed at the Employer's Brookhaven, New York, facility.

Based on the record evidence and applicable law, I have concluded that these arguments lack merit. Accordingly, I am directing an election in the petitioned-for unit.

**Witnesses**

The Employer's witness was Thomas Downs, Director of Facilities. The Petitioner's witnesses were Robert Meyer and Justine Reyes, maintenance mechanics at the Brookhaven campus, and Maurice Haren, a custodian who worked at Brookhaven from March, 1998, through November, 2003, and is currently on disability leave.

**Background**

The record reflects that the Employer has two campuses. Its 54-acre main campus in Oakdale, New York, is attended by 17,000 students. The Oakdale campus's 18 buildings are serviced by an 18-person custodial and maintenance unit, consisting of custodians, maintenance mechanics and maintenance helpers. These employees are represented by Local 434, which has negotiated two successive collective bargaining agreements on their behalf.

The Employer's branch campus, in Brookhaven, New York, is attended by 2,000 students. There are a total of eight custodians, maintenance mechanics and maintenance helpers employed there. The Brookhaven campus consists of three buildings, known as Buildings A, B and C. Building A, a converted airplane hangar, contains 26 classrooms.

Building B contains administrative offices, some classrooms and a conference room.

With regard to Building C, the record reveals only that it has been leased to BOCES (Board of Cooperative Educational Services) until December, 2004.

The record reflects that until recently, the Employer operated an aviation school on the Brookhaven site, known as the Dowling College National Aviation and Transportation (“NAT”) Center. According to Downs, it was not until about a month before the hearing that the New York State Department of Education officially certified the Employer’s Brookhaven facility as a branch campus. The Employer’s attorney agreed to provide a copy of the New York State certification, but did not do so.

Downs testified that starting in 1992, when the NAT Center opened at the Brookhaven site, the maintenance and custodial functions at the Brookhaven facility were outsourced to Aramark,<sup>3</sup> which employed two employees at the Brookhaven facility. He testified that in late 2000 or early 2001, the two Aramark employees became employees of the Employer; Reyes testified that this occurred in 2000. Downs testified that there were still only two custodial and maintenance employees working at Brookhaven as of February, 2003, at the time the current contract covering the Oakdale employees was signed. However, the record discloses that all three of the Petitioner’s witnesses were employed at that time. Currently, there are eight employees in the petitioned-for unit.<sup>4</sup> The record does not reflect when the employee complement increased from two to eight.

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<sup>3</sup> Justine Reyes testified that when he first started working at the Brookhaven facility in 1994, he was employed by Laro Maintenance. He testified that in 1997 or 1998, he became an employee of Aramark, which assumed the maintenance contract at that time.

<sup>4</sup> Two of the eight custodial and maintenance employees at the Brookhaven facility are referred to in the record as “temporary employees.” However, these two individuals have not been identified by name. The record does not establish that any of the eight Brookhaven employees is employed for only a set period of time, without any substantial expectancy of continued employment, and that a definite termination date has been established. *See United States Aluminum Corporation*, 305 NLRB 719 (1991); *Pen Mar Packaging*

### **Recognition Bar**

Without a “clear and positive demonstration” of majority status, an employer’s extension of recognition to a union is invalid, and does not bar a petition. *Jack L. Williams*, 231 NLRB 845 (1977); *see Rollins Transportation System, Inc.*, 296 NLRB 793 (1989), *as modified by Smith’s Food and Drug Centers, Inc.*, 320 NLRB 844 (1996); *cf. Garment Workers Union (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 48 LRRM 2251, 2253 (1961)(observing that “[t]here could be no clearer abridgment of Section 7 of the Act” than the recognition of a bargaining agent representing a minority of an employer’s employees, “thereby impressing that agent upon the non-consenting majority”); *see also Dana Corporation*, 341 NLRB No. 150 (2004).

In the instant case, the Employer offered into evidence a document entitled, “Voluntary Recognition Agreement,” dated October 10, 2003. The document purports to have been signed by Albert E. Donor, the Employer’s president, and James Scagnelli, a business representative for Local 434. Neither of these individuals testified at the hearing. The document states that a majority of the maintenance workers employed at the Employer’s NAT Center “have designated and selected [Local 434] as their collective bargaining agent. The Employer also admits that the Union does in fact represent a majority of employees in the unit described above.” The recognition agreement does not indicate that a card check was conducted, and no authorization cards were offered into evidence.

Downs testified as follows with regard to the recognition of Local 434 at the Brookhaven campus, in response to leading questions by the Employer’s attorney:

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*Corporation*, 261 NLRB 874 (1982). Hence, the Employer has not met its burden of establishing that any of the eight custodial and maintenance employees at the Brookhaven location is ineligible to vote in the election herein.

Q: Now in October of last year, 2003, were you approached by Local 434 and shown cards signed by your maintenance and custodial workers at Brookhaven?

A: Yes, I was.

Q: And for those cards – were all the cards shown to you?

A: Yes, they were.

Q: Did you look at the signatures?

A: I looked. And he showed me cards and I looked at signatures. I didn't verify—

Q: And those cards indicated that the workers at Brookhaven wanted to be represented by Local 434, is that correct?

A: That's correct.

Q: And subsequent to that time, there was an offer of voluntary recognition to Local 434, to be the exclusive representative of the Brookhaven workers, is that correct?

A: That's correct.

The record does not disclose how many unit employees were employed at the Brookhaven campus at the time of the recognition agreement on October 10, 2003, or the number of current, valid authorization cards. Meyer, who has been employed at the Brookhaven location since 2001, and Haren, who was there from March 1998 until November 2003, were not asked whether they signed cards. Reyes, who has worked at Brookhaven since 1994, testified that he signed a card in 1993.<sup>5</sup> Downs conceded that the Brookhaven employees have frequently told him about their lack of interest in joining Local 434.

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<sup>5</sup> The apparent contradiction between Reyes's date of hire and the date he signed the card was not cleared up on the record.

Accordingly, the record herein falls short of establishing that the Employer's recognition of Local 434 as the bargaining representative of its Brookhaven employees was based on a "clear and positive demonstration" of majority status. Moreover, a recognition agreement bars an election only "for a reasonable period of time to allow the parties to bargain free from challenge to the union's majority status." *The Ford Center for the Performing Arts*, 328 NLRB 1 (1999); see *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1996). What constitutes a "reasonable time" is "not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions." *Ford Center*, 328 NLRB at 1. Among the factors considered by the Board are whether the parties have been "working diligently to reach a final agreement," *Ford Center*, 328 NLRB at 2, and whether further bargaining sessions have been scheduled. See *Lee Lumber and Building Material Corp.*, 322 NLRB 175, 179-180 (1996), and cases cited therein.

In the instant case, the parties are no longer negotiating. Downs testified that after signing the recognition agreement covering the Brookhaven employees in October, 2003, the Employer and Local 434 negotiated a tentative memorandum of agreement that was not ratified by the employees or executed by the parties, and negotiations were abandoned. Downs did not know whether the Employer's labor negotiators have had any contact with Local 434 since that time. Thus, inasmuch as bargaining has been abandoned, interposing the recognition agreement with Local 434 as a bar to the instant election would no longer serve the purpose of providing the parties with "a reasonable period of time...to bargain free from challenge to the union's majority status." See *Ford Center*, 328 NLRB at 1.

## Accretion

In determining whether a new group of employees is an accretion to an existing bargaining unit, the Board “gives special weight to the interests of the unrepresented employees in exercising their own right to self-organization.” *Save-It Discount Foods*, 263 NLRB 689, 693 (1982); see *Melbet Jewelry Co., Inc., and I.D.S.-Orchard Park Inc.*, 108 NLRB 107, 109 (1969)(declaring that “very effectively disenfranchising” employees of a new store by accreting them to the pre-existing unit would “do serious violence to the mandate that employees’ rights are to be protected and that appropriate unit findings under Section 9(b) must be designed to preserve those rights”). In a recent case, the U.S. Court of Appeals for the 4<sup>th</sup> Circuit, in finding that the Board “failed to follow its usually cautious [accretion] standard,” summarized the Board’s traditional approach as follows:

Because the accretion doctrine is in considerable tension with the statute’s guarantee of employee self-determination, the Board has historically favored employee elections, reserving accretion orders for those rare cases in which it could conclude with great certainty, based on the circumstances, that the employees’ rights of self-determination would not be thwarted. Thus, the Board enters an accretion order only when the accreted employees have an insufficient group identity to function as a separate unit and their interests are so closely aligned with those of the preexisting bargaining unit that the Board can safely assume that the accreted employees would opt into that unit if given the opportunity.

*Baltimore Sun*, 257 F.3d 419, 427 (2001)(citations omitted). In close cases,

“when the relevant considerations are not free from doubt,” the Board and courts are in agreement that “it would seem more satisfactory to resolve such close questions through the election process rather than seeking an addition of the new employees by a finding of accretion” because “as a general rule, the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit.”

*Save-It*, 263 NLRB at 693 (quoting *Westwood Import Company, Inc.*, 251 NLRB 1213, 1220 (1980)(quoting *Westinghouse Electric Corp.*, 440 F.2d 7, 11 (1971), and cases cited therein).

The Board and courts have been careful to draw the distinction between the showing required for a finding of accretion and that required for a finding that a petitioned-for unit is appropriate:

While a mere finding of a “community of interest” among affected employees may be sufficient to justify the Board’s action in defining a unit to conduct a representation election, a decision to accrete employees to a unit *without an election* requires a showing of much more. Accordingly, the Board has determined that it may issue an order to accrete employees to a preexisting bargaining unit only when the employees have “little or no separate group identity and thus cannot be considered to be a separate appropriate unit” *and* the community of interest between the employees and the existing unit is “overwhelming.”

*Baltimore Sun*, 257 F.3d at 427, and cases cited therein (emphasis in original); *see Sara Lee Bakery Group*, 296 F.3d 292, 297 (4<sup>th</sup> Cir. 2002). It therefore follows that, “[b]ecause the Board’s discretion in selecting an appropriate bargaining unit for an election is broad, that same breadth correspondingly narrows its discretion in accreting employees because, under the Board’s accretion rule, any employees that could appropriately be a separate unit cannot be accreted to another unit.” *Baltimore Sun*, 257 F.3d at 430. Thus, even though an Employer-wide bargaining unit “may be appropriate if the issue is raised in the context of a petition for a representation election, the Board will not, ‘under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.’” *Save-It*, 263

NLRB at 693 (1982)(citing *Melbet Jewelry*, 180 NLRB at 110). Notably, the “presumption is in favor of petitioned-for single facility units, and the burden is on the party opposing that unit to present evidence overcoming the presumption.” *J & L Plate, Inc.*, 310 NLRB 429 (1993)

The most important factors in determining whether employees should be accreted to an existing unit, without an election, are employee interchange and day-to-day supervision. *Towne Ford Sales*, 270 NLRB 311 (1984); see *Super Valu Stores*, 283 NLRB 134, 136-37 (1987). Day-to-day supervision “is particularly significant, since the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location.” *Towne Ford*, 270 NLRB at 312 (citations omitted). Other relevant factors include the degree of functional autonomy or integration, the level of centralized managerial control, geographical proximity, bargaining history, and similarity of skills, job functions, and working conditions. *Super Valu Stores*, 283 NLRB at 136; *Save-It*, 263 NLRB at 693.

In the instant case, the Employer has failed to establish that the employees have “little or no separate group identity and thus cannot be considered to be a separate appropriate unit,” or that “the community of interest between the employees and the existing unit is overwhelming.” See *Baltimore Sun*, 257 F.3d at 427.

**Day-to-Day Supervision vs. Centralized Management**

The record reflects that the Oakdale and Brookhaven campuses have separate site supervisors, each of whom reports to facilities director Downs. There is no evidence that Downs, who works in Oakdale, has any day-to-day contact with employees in Brookhaven, although Meyer conceded that it was Downs who hired him. At

Brookhaven, site supervisor Steve Sorrentino gives the employees their work assignments each day. When Sorrentino is on vacation, Mark Carrattini, the Oakdale site supervisor, comes to the Brookhaven campus to make sure things are running smoothly. However, Meyer testified that he has never been supervised by Carrattini.<sup>6</sup> Downs acknowledged that when Sorrentino is on vacation, Carratini does not spend the whole day in Brookhaven, because he has more employees to supervise in Oakdale.

In sum, the record demonstrates that the Brookhaven employees are separately supervised.

### **Integration of Operations vs. Autonomy**

The evidence reveals that the custodial and maintenance departments at the two campuses operate with a considerable degree of autonomy. Downs acknowledged that the custodial and maintenance employees at Oakdale and Brookhaven have separate seniority lists. Although the two campuses have the same work order system, the work orders for Brookhaven employees are generated in Brookhaven. Despite having the same type of tools and equipment, the record reflects that each campus maintains its own separate set of equipment and supplies. The equipment and machines for the separate facilities are labeled “Brookhaven,” or “Oakdale,” as the case may be.

Downs asserted that the Employer’s faculty, adjunct faculty, clerical and security staffs “go back and forth” between campuses. There are four shuttle buses between the two campuses, which are used by both students and staff. However, there is no record evidence that the employees in the petitioned-for unit have ever used these shuttle buses,

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<sup>6</sup> Meyer conceded that Carrattino has the authority to supervise him, and in answer to a hypothetical question by the Employer’s attorney, he acknowledged that he would not refuse an order from Carrattino.

or that the day-to-day operations of the custodial and maintenance departments at the two campuses are integrated.

**Permanent Interchange**

Meyer testified that he was initially hired in mid-2000, or early 2001, to work at the Employer's Oakdale facility as a temporary replacement for another employee. After about five months, he was transferred to the Brookhaven facility. There is no record evidence regarding other permanent transfers.

**Temporary Interchange and Contacts Among Employees**

The record evidence does not establish that temporary interchange among employees at the two campuses has been regular or frequent.

**Filling in for Absent Employees**

According to Downs, employees at Oakdale and Brookhaven relieve one another when they are on vacation or out sick. He did not indicate how often this occurs. He admitted that if an employee has to take sick leave and go home on short notice, an employee employed at the same campus would be asked to cover for him. Only if co-workers at the same campus are all unavailable would an employee from another campus be asked to fill in.

Haren testified that he has never worked at the Oakdale facility, that nobody has ever asked him to work at the Oakdale facility, and that he has never requested it. He did not know of anyone from the Oakdale facility who had ever performed work at the Brookhaven facility. According to Haren, Sorrentino told Brookhaven employees that they could not perform work in Oakdale because Oakdale was unionized. Sorrentino did not testify at the hearing.

Downs testified that on unspecified dates, when Haren was out sick, his work was performed by an unnamed Oakdale employee. In addition, Downs contended that on the day of the hearing, an unnamed Oakdale employee performed work at the Brookhaven campus to relieve Brookhaven employees who were testifying at the hearing. Downs did not mention any specific occasions when Brookhaven employees filled in for Oakdale employees.

*Helping with Large Jobs*

Downs asserted that employees from the two campuses have worked together at barbecues, holiday parties, alumni events and the like. While conceding that it “is not an everyday occurrence,” he testified that they sometimes help one another with large office moves. By way of illustration, Downs maintained that about two weeks prior to the hearing, a Brookhaven employee worked at the Oakdale campus for three days, to help the Employer’s payroll department move to another office on the Oakdale campus. It is not clear from the record whether this was a reference to Meyer, who testified that on May 18 and 19, he was at the Oakdale campus, moving offices and painting them.

Reyes testified that in the course of his ten years working at the Brookhaven facility, he has never worked at the Oakdale campus. He has seen Oakdale employees working at Brookhaven only about three times during his tenure there. He recalled that sometime before Dowling College became his employer in 2000, someone from Oakdale helped him to put up a blackboard.

*Making Deliveries*

Downs stated that the Employer has had “guys moving tables back and forth, chairs, whatever it needs.” He conceded that this “doesn’t happen every day, but it

happens maybe like I'll have a guy bring furniture out to Brookhaven, you know, maybe once a month. Maybe it won't happen for two months, but [then] it will happen twice in a week." Reyes testified that he performs deliveries with Meyer about once every three months. Meyer recalled delivering furniture or sound systems to the Oakdale campus about seven or eight times in the three years he has worked at the Brookhaven facility. Haren has never performed deliveries.

Downs testified that employees from the two campuses help one another unload the furniture. By contrast, Meyer and Reyes testified that when making deliveries, the Brookhaven workers are not allowed to help unload the furniture when they get to Oakdale, because unloading the furniture is considered union work. According to Meyer, Sorrentino told him about this prohibition, and Downs also mentioned it. Reyes stated that he learned of the prohibition through Sorrentino and an Oakdale worker. Sorrentino did not testify at the hearing.

#### Annual Social Event

The record reflects that the Brookhaven and Oakdale employees attend an annual barbecue together.

#### Future Plans

Downs testified that the Employer will soon begin to build a new student activity center on the Brookhaven campus. He did not know how long this construction project will take. He testified that after the new building is built, the Oakdale and Brookhaven employees will work together to perform cleaning work and repairs there.

Downs testified that he had a recent discussion with the Employer's president, regarding a "reorganization" which would involve "moving people around" and "working

together.” Downs claimed that two weeks ago, “I more or less sent a letter out to both campuses stating that, you know, that we got this approval from the New York State Department of Education, and we are going to reorganize the department, and we’d be moving guys back and forth to help out the college.” This letter was not offered into evidence, and it is not clear from the record precisely what the letter said, or how often employees at the two campuses will work together after the planned reorganization is implemented, and the new building is built.

### **Bargaining History**

The record reflects that the Employer recognized Local 434 in January, 2001, as the bargaining representative of its Oakdale employees. The Employer and Local 434 signed their first collective bargaining agreement within one week. A second collective bargaining agreement between the Employer and Local 434, also covering the Oakdale employees, is effective from February 15, 2003, through June 30, 2006.

By contrast, there has never been a collective bargaining agreement covering the Brookhaven employees. The Employer recognized Local 434 in October, 2003, but negotiations were abandoned after the employees refused to ratify a tentative memorandum of agreement negotiated by the Employer and Local 434.

The memorandum of agreement that was not ratified provided that with the exception of a few provisions, the terms of the Oakdale collective bargaining agreement would be applied to the Brookhaven employees, and “these workers shall lose the wages and benefits that they had as Brookhaven, non-union workers.” The excepted provisions included long-term disability (for one individual), vacation entitlements, and work shifts.

### **Skills and Functions**

Meyer testified that his job functions as a maintenance mechanic at the Brookhaven campus include carpentry, painting, plumbing, electrical and mechanical work, and general maintenance. When he arrives at work, he checks to make sure that the classrooms are lit, that the boiler and air handlers are running, and that the restrooms have been cleaned. The record indicates that the custodians at the Brookhaven facility clean restrooms, mop and sweep floors, clean and dust classrooms, and take care of the garbage.

Downs did not testify regarding the job duties of employees in Brookhaven. He stated that the job functions of the maintenance and custodial employees at the Oakdale campus include custodial work, grounds work, painting, spackling, setting up rooms, office moves, hanging bulletin boards, and setting up the ballroom, for large gatherings, and the performing arts center.

On this record, it appears that one or more maintenance mechanics in Brookhaven may be performing more skilled work, such as electrical and plumbing work, than maintenance mechanics in Oakdale. However, it appears that there is considerable overlap between the job functions of the custodial and maintenance employees at the two campuses.

### **Geographical Proximity**

Downs testified that the Oakdale and Brookhaven campuses are 17 miles apart.

### **Centralization of Administration**

The record reflects that Anne DeMola is the Director of Human Resources for both the Oakdale and Brookhaven campuses.

**Wages, Benefits and Working Conditions**

The record indicates that there are substantial differences between the employees at the two campuses with regard to working hours, pay and benefits. Downs acknowledged that the Oakdale employees work a 37 ½ hour week, while the Brookhaven employees work 40 hours per week. The record reveals that the employees in the Oakdale bargaining unit are receiving annual contractual raises that the Brookhaven employees are not receiving.<sup>7</sup> Further, the Oakdale employees receive overtime pay after they have worked eight hours in any given day, but it appears from the record that the Brookhaven employees are only paid overtime if they work more than 40 hours during the week. In addition, it appears that the Oakdale employees receive a tuition benefit, but that the Brookhaven employees have stopped receiving this benefit.

Downs's testimony regarding the extent to which contractual provisions applicable to the Oakdale employees are also applied to the Brookhaven employees was elicited entirely through leading questions. The resulting series of "yes" answers raise more questions than they resolve. For example, when asked, "Leaves, by the way, most of the leaves are treated the same way?" he answered "Yes," but he also stated that the Brookhaven employees get more sick leave and personal leave than do the Oakdale employees. Similarly, when asked, "Vacations, are they implemented the same way?" Downs answered, "Exactly the same way." However, the memorandum of agreement negotiated by the Employer and Local 434, which was never ratified, acknowledges that there are historical differences in the vacation entitlements of the Oakdale and Brookhaven employees:

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<sup>7</sup> Meyer and Reyes disclosed their hourly wage rates (\$15.44 per hour for Meyer, \$18.18 per hour for Reyes), but the record does not disclose the wage rates of employees at the Oakdale facility.

7. As for vacation entitlement, the College agrees to red circle and save harmless the existing non-union vacation entitlement of the named Brookhaven employees through June 30, 2006. Effective July 1, 2006, however, the vacation entitlement of the Brookhaven employees shall revert to the vacation entitlement set forth in the collective bargaining agreement (Article 20).

Downs again answered “yes” when asked, “You give them jury duty at Brookhaven?” but this time, he did not indicate whether jury duty is treated the same in Brookhaven as it is in Oakdale. It is not clear from the record whether the Brookhaven employees are given jury duty pay, paid leave, or unpaid leave to fulfill their jury duty requirements. When Downs was asked, “Is there a bulletin board over in Brookhaven?” he replied, “Yes, there is,” but he did not indicate what this bulletin board is used for. The bulletin board provision in the collective bargaining agreement with Local 434, covering the Oakdale employees, is for a bulletin board to be used exclusively for union announcements and notices.

Downs also answered “yes” when asked whether employees at the two facilities have the same health insurance plan, holidays, work breaks, uniforms and equipment, wash-up time, safety provisions, and procedures for calling in late or absent.

### **Summary and Conclusion**

The Employer has failed to demonstrate that the petitioned-for bargaining unit has an “insufficient group identity to function as a separate unit.” Rather, the record reveals that the Brookhaven employees are separately supervised, and that the custodial and maintenance department in Brookhaven exercises a considerable degree of autonomy. There is only minimal evidence of interchange among the Brookhaven and Oakdale employees. There are substantial differences in the wages, benefits, and working conditions of the two groups of employees, and there is a history of separate collective

bargaining. Accordingly, the community of interest between the Oakdale and Brookhaven employees is not so “overwhelming” as to require the accretion of the Brookhaven employees into the Oakdale bargaining unit. The identity of the Brookhaven employees has not been so submerged into that of the Oakdale bargaining unit as to obliterate their ability to function as a separate bargaining unit. Accordingly, I find that the petitioned-for Brookhaven unit constitutes a separate appropriate unit, and is not an accretion to the Oakdale bargaining unit.

Accordingly, I will direct an election in the petitioned-for unit. Inasmuch as a question concerning representation exists, I will dismiss the unit clarification petition. I find the following unit to be appropriate for the purposes of collective bargaining:

All full-time and regular part-time custodians, maintenance mechanics, and mechanics’ helpers employed at the Employer’s Brookhaven facility, but excluding all clerical and professional employees, guards and supervisors as defined in the Act.

### **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 employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, 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. Those in the military services of the United States who are employed in the unit 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 to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 30, International Union of Operating Engineers, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an 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 the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before July 9, 2004. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list

except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

IT IS HEREBY ORDERED that the petition in Case No. 29-UC-523 is dismissed.

### **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 July 16, 2004. The request may be filed by electronic transmission through the  
Board's web site at NLRB.Gov but not by facsimile.

Dated: July 2, 2004, Brooklyn, New York.

/S/ JOHN J. WALSH

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John J. Walsh  
Acting Regional Director, Region 29  
National Labor Relations Board  
One MetroTech Center North, 10th Floor  
Brooklyn, New York 11201