

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

WAYNE CROUSE, INC.

Employer

and

Case 6-UC-456

GENERAL TEAMSTERS, CHAUFFEURS AND  
HELPERS, LOCAL UNION NO. 249 A/W INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Union-Petitioner

**REGIONAL DIRECTOR'S DECISION AND ORDER**

Wayne Crouse, Inc., herein called the Employer, is engaged in the construction industry as a mechanical HVAC and plumbing contractor. The Employer's operation at issue involves only its facility located in Pittsburgh, Pennsylvania (herein the facility). The Union-Petitioner, General Teamsters, Chauffeurs and Helpers, Local Union No. 249 a/w International Brotherhood of Teamsters, AFL-CIO (herein the Union) filed a petition with the National Labor Relations Board (the Board) under Section 9(b) of the National Labor Relations Act seeking to clarify an existing recognized unit described in the parties' successive collective-bargaining agreements dating back since before 1966 as "All men who drive team, truck or automobile and all helpers and dockmen who load and unload vehicles and ride on same, also all warehousemen and garagemen who are not mechanics" (herein the Unit). It does not appear that the Unit was certified by the Board.<sup>1</sup> By the petition filed in this matter, the Union seeks to include the position of shipper/receiver in the Unit.

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<sup>1</sup> The most recent collective-bargaining agreement is effective by its terms from May 1, 1998, to April 30, 2003. By Memorandum of Agreement dated May 6, 2003, the 1998-2003 collective-bargaining agreement was extended indefinitely until the parties reach agreement on a new collective-bargaining agreement. A new agreement has not as yet been reached by the parties. The successive collective-bargaining agreements and the existing Memorandum of Agreement contain union security provisions.

Specifically, the Union contends that the recognition clause of the successive collective-bargaining agreements has always included “helpers, dockmen who load and unload vehicles, and warehousemen” and that the current shipper/receiver, Michael Sharp, who has been employed by the Employer since January 2003, primarily performs these warehouse-type duties.<sup>2</sup> Although the Union concedes that the employee whom Sharp replaced, Phil Collins, was not a member of the bargaining unit from the date of his hire in 1973 until his retirement in December 2002, the Union avers that Collins was excluded from the Unit because, in addition to performing warehouse-shipping/receiving work, he also performed certain managerial duties and exercised a certain amount of supervisory authority.

Contrary to the Union, the Employer asserts that clarification is not appropriate. In this regard, the Employer argues that it is immaterial whether the term warehousemen<sup>3</sup> has been included in the successive recognition clauses since employees who perform warehouse-shipping/receiving job duties have been historically excluded from the Unit.

I have considered the testimony and evidence presented at the hearing in this matter, as well as the arguments presented by both parties in their briefs.<sup>4</sup> I have concluded, as described below, that the long period of exclusion of employees classified as warehouse-shipper/receiver

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The Employer also has collective-bargaining agreements with various other craft unions covering employees who work for the Employer.

<sup>2</sup> Sharp was laid off in December 2003 for lack of work. As of the date of the hearing, he had not been recalled to work.

<sup>3</sup> The parties appear to be in agreement that the terms warehousemen, as contemplated by the recognition clause, and shipper/receiver, are synonymous. The Employer has designated Sharp, and before him Collins, as a shipper/receiver rather than as a warehouseman. The Union apparently filed the instant petition to add the classification shipper/receiver to the Unit description set forth in the recognition clause because it appears that employees who work in the warehouse are designated as shipper/receivers rather than as warehousemen.

The 1966-1969 contract provides rates of pay for drivers, helpers and winch drivers. The 1969-1972 and 1975-1978 contracts provide pay rates for the aforementioned job classifications and for boom drivers. The record reveals that, at least since 1992, the contracts provided a rate of pay for drivers only, and continued to be silent on warehousemen.

<sup>4</sup> Both parties filed timely briefs which have been duly considered by the undersigned.

requires that the issue raised concerning their inclusion in the existing bargaining unit be resolved in a Section 9(c)(1) election proceeding.<sup>5</sup>

**I. BACKGROUND**

The Employer is a mechanical contractor engaged in the construction industry as an HVAC and plumbing contractor. Although the record does not set forth in detail the physical layout of the facility, or the Employer's organizational and management structure, the record reveals that one area of the facility is designated the warehouse or "shop" area, which is under the overall supervision of Manager Vincent DiClaudio. The record further reveals that the Employer's drivers, who the parties agree are encompassed by the Unit, and the employee(s) who work in the warehouse as shipper/receivers, report to DiClaudio. The record does not reveal whether DiClaudio supervises any other employees.

In 1973, the Employer hired Phil Collins to work in a position as a shipper/receiver. Collins, who was member of Teamsters Local 341 when he applied for the position, took a withdrawal card from Local 341 in order to take the job. During the tenure of his employment at the Employer, Collins testified that he was never a member of the Union and was never asked by the Union to become a member of the Union or to pay dues to the Union pursuant to the union security clause contained in the successive labor contracts. At the time of his retirement in December 2002, Collins received a salary approximating \$40,000 per year.

During the period of Collins' employment, it is unclear how many other employees were employed as either warehousemen or shipper/receivers. In this regard, Collins testified that he was hired to replace an individual by the name of Jim Beltz. Beltz, according to Collins, was a

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<sup>5</sup> Accordingly, I find the Union's contention raised in its post-hearing brief, that if Sharp is not included in the Unit he could not be represented by a union for collective-bargaining purposes, to be without merit. If it is determined in a Section 9(c)(1) proceeding that Sharp enjoys a community of interest with the Unit, he could be granted a self-determination election regarding his inclusion in the Unit.

In addition, at the hearing, the Employer averred that the contractual unit should be clarified to read as follows: "All persons who drive tractor trailers, boom or flatbed trucks which require a CDL license for the express purpose of delivery of materials or tools to jobsite." Since this proposed clarification is not the subject of an existing UC petition, I deem it unnecessary to pass upon the Employer's proposal.

shipper/receiver who was not a member of the Union nor considered to be part of the Unit.<sup>6</sup> Collins testified further, without providing any detail, that during the period of his employment other employees worked “in the shop” with him and that none of these employees were considered by either the Employer or the Union to be working in “union” positions. Employer shop manager Vincent DiClaudio testified that during his eight-year tenure as shop manager, approximately five or six different employees worked as nonunion warehousemen or shipper/receivers. DiClaudio further testified that an employee, Jake Comminotti, worked in the warehouse until approximately May 2002. Comminotti, according to DiClaudio, reported to him and worked primarily as a warehouseman-shipper/receiver. Occasionally, when the need arose, Comminotti would be assigned to work in the tool room.<sup>7</sup> According to DiClaudio, Comminotti’s position was not considered by the Employer to be covered by the Union contract as part of the Unit.

No evidence was provided by the Union that Collins, Beltz, Comminotti or any other employee working in the warehouse or performing shipping/receiving duties were members of the Union or paid dues pursuant to the union security clause. There is no evidence that prior to Sharp’s hire in January 2003, the Union ever objected to the apparent exclusion of these employees from the Unit or that it at any time sought to enforce the union security clause with respect to these employees.

As noted, when Collins retired, his vacant position was filled by Michael Sharp in January 2003. Sharp had no prior employment with the Employer and received an hourly wage rate of \$11.50. At the time of Collins’ retirement, it does not appear that any other employee

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<sup>6</sup> Beltz relinquished his shipper/receiver position, according to Collins, to become a driver for the Employer. At that time, Collins testified, Beltz became a member of the Union.

<sup>7</sup> Daniel Spell, one of the two drivers employed by the Employer in recent years, testified that Comminotti was employed primarily as a “tool room” employee and for that reason was not considered to be part of the Unit by the Union. The record reveals that the tool room is located somewhere in the vicinity of the warehouse area and is under the supervision of Richard Harris.

was performing warehouse-shipper/receiver job duties. At the same time, in January 2003, newly elected Union business agent Rocco DiFilippo assumed responsibility for the Unit and for administering the collective-bargaining agreement.<sup>8</sup>

In late January 2003, Daniel Spell, one of the two drivers then employed, was laid off for lack of work.<sup>9</sup>

On January 28, 2003, the Union filed a grievance on behalf of Spell contending that he was laid off out of seniority while a “non-union employee in the warehouse stays working”. On March 10, 2003, a second grievance was filed related to the Spell layoff, which alleged that the Employer violated the union security provision of the collective-bargaining agreement as applied to “warehousemen”.

On November 11, 2003, the grievances were processed to arbitration. The issue presented at the arbitration hearing was whether the position of shipper/receiver is part of the Unit.

On February 10, 2004, the arbitrator issued his decision denying the grievances. In this regard, the arbitrator found that the shipper/receiver position is not part of the bargaining unit and that, accordingly, since Spell was the least senior member of the Unit, the Employer properly applied the contract when it laid him off.<sup>10</sup>

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<sup>8</sup> Other than DiFilippo, no other current or past representative of the Union testified at the hearing.

<sup>9</sup> Spell had been employed as a driver since July 2001. There is no dispute that Spell and the other driver, Jim Stehle, worked in positions covered by the recognition clause of the contract. Besides Spell and Stehle, no other employees were included in the Unit. At the time of his layoff, Spell was the union steward. Spell has not been recalled to work.

<sup>10</sup> The Employer urges that the Board should defer to the aforementioned arbitration decision and that the instant petition should be dismissed on that basis alone. The Board has generally declined to defer to arbitration awards in the representation case area unless resolution of the issue turns solely on the proper interpretation of the parties' contract. See Hershey Foods Corp., 208 NLRB 452, 457 (1974), *enfd.* 506 F.2d 1052 (3d Cir. 1974). Where resolution turns on statutory policy, including the scope of a contract's recognition clause, the Board will not defer. St. Mary's Medical Center, 322 NLRB 954 (1997). The issue before the undersigned is whether the recognition clause of the contract encompasses the position of shipper/receiver. This is not a matter of contract interpretation but of the application of statutory policy. Accordingly, I am not relying on the arbitrator's decision in reaching my decision to dismiss the instant petition.

Collins testified that as a shipper/receiver he had the responsibility to “load and unload trucks”; receive equipment and materials from different suppliers and check those materials off against purchase orders; file bills of lading; prepare bills of lading; order materials as needed; supply the shop with materials; move fabrications out of the shop; ensure on a daily basis that the proper materials went to the right jobs and advise the drivers what materials were to go on each truck for delivery to the jobsites; order all gases, oxygen, acetylene and keep tabs on them; perform general maintenance in the shop and grounds, i.e. snow removal; assist drivers with directions to the jobsites; check inventory and advise Shop Manager DiClaudio of items the Employer needed; and to perform general routine maintenance on the Employer’s trucks with respect to such matters as checking the fuel, oil and tire pressure and advise higher management on such matters as repairs that were needed, scheduled vehicle inspections and license renewals.

In addition to the above, Collins testified that whenever DiClaudio was absent from work, usually a few times a year, he would substitute for DiClaudio. During these periods, the record indicates that Collins would be responsible for scheduling the drivers, e.g. the jobsites they were to make deliveries to, and assigning the drivers other duties, e.g. operating cranes, backhoes and boom trucks. The record does not indicate whether Collins performed other duties normally performed by DiClaudio when substituting for him. The record is also not clear of the extent to which Sharp, during the period of his employment, performed the job functions that were previously performed by Collins. DiClaudio testified that Sharp was hired to “replace” Collins and, with more experience, would have essentially performed the entire range of duties encompassed by the shipper/receiver classification.

## II. ANALYSIS

In support of its contention that the Unit should be clarified to include the classification of shipper/receiver, the Union argues that the shipper/receiver position constitutes an accretion to the existing Unit. In this regard, the Union argues that Sharp did not replace Collins but was hired to perform only those “bargaining unit type duties”, presumably warehouse duties, which were performed by Collins. Thus, the Union argues that by not challenging Collins’ non-inclusion in the bargaining unit, the Union “did not give the Employer carte blanche to ignore the recognition clause.” The hiring of Sharp to perform bargaining unit work is, according to the Union, a changed circumstance sufficient to justify clarification of the Unit.

It is well established that employees may not be accreted to a bargaining unit through the processing of a unit clarification petition where the employees have not been included in the unit for some time, and the union has made no attempt to include the position(s) in the unit. Rather, the Board holds that in these circumstances the long period of exclusion requires that issues raised concerning their inclusion in an existing unit be resolved in a Section 9(c)(1) election proceeding. Plough, Inc., 203 NLRB 818 (1973); see also SunarHauserman, 273 NLRB 1176 (1984). In addition, it is well established that it is immaterial whether a classification of employees was included in successive contractual recognition clauses in determining whether that group of employees should be accreted to an existing unit in a unit clarification proceeding following a long hiatus when no employees in that classification were employed by the Employer. In the Board’s view, the long hiatus when the employer had no employees actually working in the job classification(s) at issue renders the earlier inclusion of those employees in the unit insignificant since “the Board looks to the actual, existing composition of units and to employees actually working to determine the composition of units, not to abstract grants of recognition.” Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993).

In view of the foregoing, the instant petition must be dismissed and the issue raised concerning the inclusion of the shipper/receiver position in the bargaining unit must be resolved

in a Section 9(c)(1) election proceeding. In this regard, the record affirmatively establishes that, notwithstanding the language set forth in the recognition clause, shipper/receivers or warehousemen historically have been, for whatever reason, excluded from the Unit. In fact, there is no evidence that any shipper/receiver has ever been included in the Unit and there is no evidence that the Union, prior to the hire of Sharp, ever attempted to enforce the union security provision as to these employees. It is also significant that the successive collective-bargaining agreements since 1966 reveal that there has never been a rate of pay provided for warehousemen. In addition, even accepting the Union's position that Collins was justifiably excluded from the Unit based upon his alleged supervisory and/or managerial status, this consideration does not alter my conclusion that the instant clarification petition must be dismissed pursuant to the Board's holding in Plough, Inc., supra, and its progeny, since other shipper/receivers have historically been excluded from the Unit for at least 37 years.<sup>11</sup> Further, I reject the Union's argument that the express language of the collective-bargaining agreement clearly and unambiguously covers the duties performed by Sharp and therefore is controlling on the clarification issue presented herein. The language of a collective-bargaining agreement's recognition clause, listing a category of employees encompassed in a contractual unit, is immaterial when that category of employees has been excluded from the unit for a long period of time. Clarification is inappropriate to add that category of employees to a collective-bargaining unit by accretion in these circumstances. Coca-Cola Bottling Co. of Wisconsin, supra.

### **III. FINDINGS AND CONCLUSIONS**

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

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<sup>11</sup> Accordingly, I deem it unnecessary to pass upon Collins' alleged supervisory/managerial status in resolving the issues presented herein.

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. General Teamsters, Chauffeurs and Helpers, Local Union No. 249 a/w International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

In sum, for the reasons set forth above, I shall dismiss the petition in the instant case.

**ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.

**IV. THE 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 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m. on May 5, 2004. The request may **not** be filed by facsimile.

Dated: April 21, 2004

/s/Gerald Kobell

Gerald Kobell  
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD  
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**Classification Index:**

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