UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

EXPRESS SCRIPTS, INC.

Employer[1]

and Case 14-RC-12714

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 688

Petitioner

REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION

The Employer, Express Scripts, Inc., administers prescription drug programs for various clients. The Petitioner, International Brotherhood of Teamsters, Local Union No. 688, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time printer operators, hand inserters, inserter operators, and material handlers employed by the Employer at its Maryland Heights, Missouri facility.[2] A hearing officer of the Board held a hearing and the Employer filed a brief with me, which I have carefully considered.

As evidenced at the hearing and in the brief, the only issue raised is the unit placement of the four quality control clerks. The Petitioner does not seek to represent

[1] The Employer's name appears as amended at hearing.

[2] All parties agree to the inclusion of these positions in the appropriate unit. The material handler has also been referred to as a warehouse employee and a fulfillment employee. The Employer's attorney stated at the outset of the hearing, and again in the brief, that a position of "data cut operator" should also be included in the unit, however this classification was not referred to again on the record nor was any employee described as holding such a classification. Therefore, I have not referenced this classification. The Petitioner also sought to exclude temporary and seasonal employees, however, the record contains no evidence concerning the use of such employees.

the quality control clerks and contends that the petitioned-for unit is an appropriate unit. The Employer contends that the unit must include the quality control clerks because they share a community of interest with the petitioned-for unit employees.

For the reasons set forth below, I have concluded that the petitioned-for unit constitutes *an* appropriate unit, and that the quality control clerks do not share such an overwhelming community of interest with the petitioned-for unit as to require their inclusion over the Petitioner's objections. Accordingly, I have excluded the quality control clerks from the unit found appropriate here. The appropriate unit currently consists of 18 employees: 5 printer operators, 5 hand inserters, 7 inserter operators, and 1 material handler.[3]

I. OVERVIEW OF OPERATIONS

The petitioned-for unit employees and the quality control clerks are all part of the Employer's Participant Materials department.[4] The employees in this department are responsible for mailing membership cards and informational material to members. The Employer's director of participant materials oversees this department. The printer operators report to supervisor McDuffie. The inserters report to supervisor Lutas. The record does not reflect to whom the material handler reports. Supervisors McDuffie and Lutas report to the senior production manager who reports to the director of participant materials. The quality control clerks do not report to supervisors McDuffie or Lutas, but report to supervisor Childress. Childress does not report to the senior production manager. The record does not reflect to whom supervisor Childress reports, though the supervisory hierarchy would ultimately lead to the director of participant materials.

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[3] While the Employer put on some evidence that the four quality control clerks, printer operator Vauters, and inserter operator Padgitt lack supervisory authority, no party contends that these employees are supervisors. Accordingly, the presumption that they are employees has not been rebutted. *Bennet Industries, Inc.*, 313 NLRB 1363 (1994).

[4] There are also four programmers in the Participant Materials department. Neither party is seeking the inclusion of the programmers in the petitioned-for unit.

The employees in the Participant Materials department perform three different types of tasks referred to as eligibility, clinical, and mail merger or ad hoc tasks. Eligibility primarily involves creating membership cards for new clients. These cards are either plastic cards or resin cards made with a resin laminate strip. The printer operators run various printers, including a high-speed laser printer, which create the membership cards and the resin strip cards. The printer operators also print inserts to mail to the members including letters, brochures, and booklets. Inserters, or "fulfillment" employees, place the inserts into envelopes to be mailed to the members. High volume orders with inserts of 50 pieces or more are generally inserted by machine such as a high-speed inserter. Smaller orders are folded and stuffed into envelopes by hand. The Employer also operates a low-speed or "desktop" inserter. Clinical operations involve sending information to members regarding particular aspects of the Employer's operations and the drugs the member is taking. Again, the information or inserts are printed by the printer operators and inserted by machine or by hand into envelopes to be sent to the member. Mail merger or ad hoc operations are described as information that is sent to the member that is not part of clinical or eligibility materials. This could include communications to the members about changes to the drugs that are available to them or about the harmful effects of a particular drug.

The printer operators and inserters who operate machines work in a large open area referred to as the production floor. The record is not clear on whether the material handler also works in this open area. The material handler does all the shipping and receiving, including ordering materials, ordering the stock or paper for the inserts, keeping track of inventory, and handling the mailing. The photographs provided by the Employer depict an area on the production floor designated as inventory and shipping. The director of participant materials, however, testified that the material handler works in a warehouse that is separated from the production floor by doors. The quality control

clerks are separated from the production floor by a set of swinging double doors. The hand inserters are also separated from the production floor by a different set of swinging double doors. The quality control clerks work in cubicles that appear to be next to the set of cubicles used by the hand inserters, though the record is not clear on where the quality control clerks work in relation to the hand inserters.[5]

The Employer uses a job tracking system, also referred to as JTS, to keep track of orders. Work orders come in through the computer and are prioritized, usually by first in, first out. Some work orders are considered high profile orders which are given priority, and these jobs are usually for high profile clients including the Department of Defense. Most jobs have a turn around time, or TAT, that is determined by the contract between the Employer and the client. The printer operators obtain the work orders from the computer. The work order sets forth the type of envelope that must be used for the job. It also specifies the stock, or type of paper, to be used in printing the inserts. There are multiple types and colors of paper, some of which include logos or particular paragraphs used by the clients. The work order specifies what type of brochure, if any, is to be inserted, and any other inserts to be added into the envelope. The work order also specifies where the information is to be mailed and contains the estimated weight and postage for the entire package.

When a work order comes in, the printer operator checks the order to see what needs to be printed, puts the correct paper into the printer, and then operates the printer. The printer operators also perform a quick check, or "fan", of the printed materials to look for obvious defects including the printing not lining up in the correct format, bright spots on the print, or fuzzy print. Seventy percent of the work orders require that a sample of the work be printed first. When samples are needed, the printer operators print the

[5] Employer's Exhibit 1 is a diagram of parts of the Employer's facility. While the director of participant materials made markings on this diagram during his testimony, the record exhibit does not contain any of these markings.

sample and give it to the quality control clerks who are responsible for checking the sample to make sure it is correct and meets all the specifications for the work order. Sometimes the quality control clerks can check documents on the computer screen or job queue and approve them without going out on the production floor or talking with the production employees, though the record does not reflect how often this occurs. Once the documents are printed, the printer operators separate the documents by jobs and place them on a cart which is wheeled through the double doors into the quality assurance area. If the job is too large for the documents to fit on carts, the quality control clerks will come out to the production area and check the documents on the production floor, though again the record fails to reflect how frequently this occurs.

When the quality control clerks receive the documents, they perform a thorough and "intense" check of the quality of the printed documents and inspect more pieces than the printer operators. The quality control clerks check for such defects as whether the client's logo is correct, whether the address block is complete, and whether certain pieces have been printed twice. The quality control clerks perform this work in their cubicles in the quality control area under the supervision of the quality control supervisor. If the quality control clerks find an error, they will either come out to the production floor and tell the printers what the error is and to reprint the document, or they will leave the work order in a basket for the printers with detailed instructions on what is wrong and needs to be corrected.

When the quality control clerks are finished checking the printed documents, they are then placed on shelves to be inserted into envelopes by inserter operators or hand inserters. The inserters check the work order to make sure they have all the correct inserts for the particular order and the appropriate envelope. They also make sure the address block on the insert is positioned correctly so that it shows through the window

on the envelope. If the address cannot be viewed through the window, the mail cannot be delivered.

The printer operators, quality control clerks, and the inserters all initial and date the work orders. Quality control clerks often initial the work order in the beginning of the production process to indicate the quality control clerk has checked the sample and made sure the sample meets all the requirements of the work order. The quality control clerks also check the documents after they are printed to make sure they have no defects and meet the requirements of the job. The printer operators, quality control clerks, and inserters are all responsible for checking for errors and making sure the printed document is of the correct quality, printed on the correct stock or paper, and that the proper inserts are inserted into the proper envelope with the correct postage. The Employer keeps track of the errors made by each group and sends reports to the supervisor of each group detailing the errors made by those employees.

The record evidence is confusing and conflicting, and therefore not conclusive, with respect to the frequency or regularity of the quality control clerks' contact with the employees in the petitioned-for unit. None of the quality control clerks testified. The Employer's director of participant materials testified that quality control clerks spend 60 to 70 percent of their time "interacting" with the employees in the petitioned-for unit. He also testified that during the busy months of July and August, and December through February, quality control clerks helped daily with hand inserts for high profile jobs, though he did not testify how long quality control clerks helped with hand insertions during those days or whether they also performed their quality control duties. During the entire rest of the year, however, he testified that the quality control clerks helped with hand insertions only a total of 6 to 8 times. The material handler testified that he only saw the quality control clerks in his area 30 percent of the time. The printer operator testified that on about two occasions, during high profile jobs, he observed quality control

clerks checking documents on the production floor for up to an hour, though he testified that at other times quality control clerks quickly check over printed documents stacked on shelves and then walk away back to their own work area off the production floor. The record does not reflect with any degree of certainty the amount of time the quality control clerks spend on the production floor as opposed to working in their cubicles off the production floor, or the amount of time they are in contact with the employees in the petitioned-for unit.

The Employer's Participant Materials department operates continuously 24-hours a day. The Employer has also recently instituted a work week which includes Saturdays and Sundays. The Employer currently has three shifts that overlap, and the starting and ending times for these shifts are staggered. The starting times for the first shift employees vary from 7 a.m. to 8:30 a.m., and these employees generally work 8-hour days. The second shift employees begin between 2 and 3 p.m., and the third shift employees generally work from 11 p.m. to 7 a.m. Two of the employees work 4 10-hour days. Unlike the petitioned-for employees, the quality control employees do not work continuously 24-hours a day. The quality control clerks have staggered starting times between 7 a.m. and 9 a.m. and do not work past 6 p.m. unless needed. The record does not reflect how frequently the quality control clerks are needed to work past 6 p.m. The record does not reflect that the quality control clerks are regularly scheduled to work on Sundays.

All the employees, including the petitioned-for employees, the quality control clerks, and the supervisors, receive the same benefits. They all have the same insurance, the same 401(k) plan, and the same vacation. They all have the same dress code, are all subject to the same personal time off (PTO) requirements, and have the same handbook. All employees, including the quality control clerks, are not allowed vacation or other leave during blocked-off times, which are the busy times for the

Employer. These busy times are between July and August, and December through February. These times coincide with the end of the fiscal year for many of the Employer's clients and open seasons for benefit plan changes. All employees have the same breakroom/lunchroom, and use the same employee parking lot and restrooms.

All the employees in the petitioned-for unit are hourly employees and are eligible for overtime. The quality control clerks, however, are salaried employees and are not eligible for overtime. While the record does not reflect the exact salary range of the quality control employees, there is some evidence that the lower end of their yearly salary range is $27,000, which is approximately $13 per hour. The wages of the hourly employees in the petitioned-for unit range between $10.50 to $15.50.

While all employees are eligible to receive bonuses, the criteria for the bonuses and the amount of the bonuses is different for the quality control clerks than for the employees in the petitioned-for unit. Hourly employees are eligible for bonuses if the Employer meets its three goals of turnaround time, amount produced, and percentage of accurate material out the door. The base bonus for the hourly employees is $150, and the maximum they can earn if all three goals are met is $225. The quality control clerks, however, have different goals and different bonus amounts. In addition to the three criteria for the hourly employees, the quality control clerks are given individual goals by the quality control supervisor, though the record does not reflect exactly what those goals are. The quality control clerks receive from 1 percent to 1½ percent of their salary if they meet their individual goals, which would be approximately $270 or more. These bonuses are given on a quarterly basis.

Quality control clerks do not regularly fill in for employees in the petitioned-for unit. While quality control clerks help with hand insertion work during the busy months, there is no record evidence that quality control employees operate the printers or the inserter machines, or that they have ever performed the duties of the material handler.

The record only reflects one specific instance of a quality control clerk filling in for a production employee and this was in an emergency situation when an inserter did not show up and a high profile job with a 24-hour turnaround time needed to be completed. The quality control clerk filled in for the inserter by folding and inserting documents by hand. There is no evidence of production employees filling in for absent quality control clerks. Production employees can apply for quality control positions. The record reflects that one of the current quality control clerks previously worked as a hand inserter/fulfillment employee. Also, approximately 2½ years ago, a temporary employee who is no longer in the Participant Materials department was hired as a temporary employee to perform quality assurance work and was then hired as a full-time material handler before leaving the department. A current hand inserter/fulfillment employee was originally hired as a temporary employee to perform some quality control and material handler work before she was hired as a full-time hand inserter. There are no special educational requirements for either the employees in the petitioned-for unit or for the quality control clerks.

II. ANALYSIS OF THE QUALITY CONTROL CLERKS

In determining the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. *Overnite Transportation Co.*, 322 NLRB 723 (1996). The Act does not compel a petitioner to seek any particular appropriate unit, nor does the Act compel a petitioner to seek the most appropriate unit or the largest unit of employees. Id. While the statute prevents the Board from finding a union's petitioned-for unit appropriate based solely on the union's extent of organizing, it does not prohibit a union from seeking a particular unit that is otherwise appropriate. Id. at 724-726.[6]

[6] As the petitioned-for unit is appropriate, the Employer's reliance on *New England Power Co.*, 120 NLRB 666 (1958) is misplaced.

In defining the appropriate unit, the Board focuses on whether the disputed employees share such an overwhelming community of interest with the petitioned-for employees as to mandate their inclusion in the unit over the petitioner's objections. *Lundy Packing Co., Inc.*, 314 NLRB 1042, 1043 (1994), enf. denied 68 F.3d 1577 (4th Cir. 1995), cert. denied 518 U.S. 1019 (1996). The Board weighs the various community of interest factors including a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; degree of dissimilar qualifications, training, and skills; difference in job functions; infrequency or lack of contact with other employees; and lack of integration of work functions or interchange with other employees. *Overnite Transportation Co.*, supra at 724.

I conclude that the quality control employees do not share such an overwhelming community of interest with the petitioned-for unit as to require their inclusion over the Petitioner's objections. The quality control clerks have a different method of compensation in that they are salaried employees and not hourly. They are not eligible for overtime as are all the employees in the petitioned-for unit. The quality control clerks also have a very different bonus program than the petitioned-for employees. The quality control clerks have an individualized, additional set of criteria they must meet which is given to them by their supervisor. Their bonus base is different and is based on a percentage of their salary rather than a set rate as it is for the petitioned-for employees. The Employer even met with the quality control clerks separately to explain the bonus program. Quality control clerks also work different hours than those in the petitioned-for unit. They do not work continuously and generally do not work past 6 p.m.

The quality control clerks also have separate supervision. While everyone in the department ultimately reports to the director of participant materials, this does not negate the fact that the quality control clerks have an immediate supervisor who is different from the immediate supervisors of the petitioned-for employees. The supervisor for the

quality control clerks also does not report to the senior production manager as the supervisors for the petitioned-for employees do. Thus, the work of the quality control employees is not reviewed by or otherwise supervised by any production supervisors. The quality control clerks' immediate supervisor is the one evaluating the quality control clerks and determining what goals each one of them will have in order to be eligible for the quarterly bonuses. The quality control supervisor is also the one who receives the error sheet for the quality control clerks and is responsible for addressing those errors with the quality control clerks.

Quality control clerks also have a work area that is separate from the production floor where most of the petitioned-for employees work. The quality control clerks work in cubicles that are separated from the production floor by swinging double doors, though the record reflects that the quality control clerks do work near the hand inserters who also do not work on the production floor. While the quality control clerks perform some of the same functions performed by the petitioned-for employees who also check for defects, their job functions, while related to the production process, are generally different from those performed by the production employees. Quality control clerks do not operate the high-speed laser printer or the inkjet printer, the high-speed inserter, or any of the other production machinery. Other than a single instance when a quality control clerk filled in for an absent hand inserter, the record fails to reflect that quality control clerks regularly fill in for petitioned-for employees who are absent. There is also no evidence that any of the employees in the petitioned-for unit fill in for quality control clerks when they are absent.

The Employer argues in its brief that there have been "transfers" between the quality control clerks and the employees in the petitioned-for unit. As previously noted, one of the current quality control clerks previously worked as a hand inserter/fulfillment employee. Also, a former material handler previously performed quality control work as

a temporary employee. A current hand inserter/fulfillment employee previously performed some quality control and material handler work as a temporary employee before she was hired as a full-time hand inserter. This evidence of "transfer" between the positions, however, appears to be permanent in nature and is not relevant in determining employee interchange because permanent transfers are frequently made for the convenience of the employee concerned and do not contribute to group cohesiveness. *Lipman's, A Division of Dayton-Hudson Corp.*, 227 NLRB 1436, 1438 (1977).

While the quality control clerks are integrated into the production process because they check the product before it is printed and after it is printed, this factor does not require they be included in the unit. The Board has noted that whether employees should be included in a production unit depends not on whether the employee's job has some relationship to the production process, but on whether the employees share an overwhelming community of interest with the production employees so as to make their inclusion mandatory. *Beatrice Foods Co.,* 222 NLRB 883 fn. 3 (1976). Further, while there is some contact between the quality control clerks and the employees in the petitioned-for unit, the record testimony on the amount of contact is conflicting and therefore not conclusive, particularly where no quality control clerks were presented to testify regarding their contact with the petitioned-for unit employees. See *Penn Color, Inc.,* 249 NLRB 1117, 1120, fn. 14 (1980) (where the amount of contact cannot be clearly discernable from the record, all that can be said conclusively is that there is "some" contact.) Even assuming the quality control clerks and the petitioned-for employees have a high degree of contact, the Board has excluded employees from a petitioned-for unit even where their functions were highly integrated with those of the petitioned-for unit employees and where they had a high degree of work-related contact

with the petitioned-for unit employees. See *Overnite Transportation Co*., supra at 724-725, fn 4.

The petitioned-for unit here constitutes an appropriate unit. There are factors here that would support including the quality control clerks in the petitioned-for production unit, including that they perform production-related functions such as checking the quality of the product before and after printing, they have contact with the unit employees, have the same benefits, are not required to have special education or training, and one of the current quality control clerks was formerly employed in a production position. These factors, however, do not require inclusion where the quality control clerks have different methods of compensation, have separate supervision, have generally different job functions, do not regularly interchange with the production employees, have different hours of work, work in a distinct area of the facility, and where no labor organization seeks to represent a broader unit including the quality control clerks. *Lundy Packing Co., Inc.,* supra at 1043-1044; *Penn Color, Inc.,* supra at 1120; *Overnite Transportation Co*., supra at 724-725. Accordingly, I shall direct an election in the petitioned-for unit excluding the quality control clerks.

III. CONCLUSIONS AND FINDINGS

Based on 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 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 in this case.

3. The Petitioner claims to represent certain employees of the Employer.

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

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

> All full-time and regular part-time printer operators, hand inserters, inserter operators, and material handlers employed by the Employer at its 14042 A Riverport Drive, Maryland Heights, Missouri facility, EXCLUDING quality control clerks, office clerical and professional employees, guards, and supervisors[7] as defined in the Act, and all other employees.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local Union No. 688. 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 prior to 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

[7] The parties stipulated that the Director of Participant Materials Fred Boeckman, Senior Production Manager Brian Killian, Manager of Outsourcing Dana Greenstreet, Production Supervisors Neal Lutas and Derek McDuffie, Quality Control Supervisor Alex Childress, and Marvin Shipley and Sarah Brown whose titles are not identified, perform supervisory duties and are supervisors within the meaning of Section 2(11) of the Act. Accordingly, in agreement with the parties, I shall exclude these individuals from the unit found appropriate here.

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 may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

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

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for the unit, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must by received in Region 14, 1222 Spruce Street, Room 8.302, St. Louis, Missouri, on or before **June 23, 2008**. 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 (314) 539-7794. 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 to be submitted. If you have any questions, please contact Region 14.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of 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.

V. E-FILING

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-file your documents.

Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

VI. 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., (EDT) on **June 30, 2008**. The request may **not** be filed by facsimile.

Dated: June 16, 2008
at St. Louis, Missouri

/s/ Ralph R. Tremain
Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14