

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

AEROTEK, INC.

and

Cases 20-RC-18169

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 1245

DECISION AND DIRECTION OF ELECTION

Aerotek, Inc. (the Employer), a Maryland corporation, is a staffing agency that supplies employees for manufacturing services for electronic goods at a facility located at 2511 Laguna Blvd., Building B, Elk Grove, California (the Facility).¹ The International Brotherhood of Electrical Workers, Local 1245 (the Petitioner) seeks to represent the following unit of employees:

All full-time and regular part-time technicians employed by the Employer at the 2511 Laguna Blvd., Building B, Elk Grove, California facility, excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

There are approximately 35 to 45 technicians in the petitioned-for bargaining unit.

The Employer asserts that the petitioned-for unit is inappropriate and that the only appropriate unit must also include the Employer's roughly 65 material handlers.

¹ The petition was amended at the January 9, 2008, hearing on this matter to change the address of the Employer on the petition to 2511 Laguna Blvd., Building B, Elk Grove, California.

A hearing was held in this matter on January 9, 2008. Testifying at the hearing were: Brian Fitzgerald, production manager of Flextronics International; Jennifer Blackburn, the Employer's on-premises manager; Raul Valencia, an Aerotek technician; and Ron Fryer, an Aerotek technician. The parties filed briefs. The only issue presented in this case is whether the petitioned-for unit of technicians is an appropriate unit.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, based upon the evidence and relevant law, I have concluded that the petitioned-for unit is an appropriate unit.

The Employer provides contract labor to Flextronics International (Flextronics), a worldwide third-party contract manufacturer and service provider to original equipment manufacturers and original design manufacturers in the electronics industry. Flextronics provides services, including refurbishment, repairs, repackaging and warranty services for Apple, Inc., at Building B of the Facility. These services are performed both by employees who are employed directly by Flextronics and by a contract labor force employed by the Employer. Buildings A, C, and D of the Facility are also involved in operations for Apple, which are performed either by employees of other subcontractors or employees employed directly by Apple. The Employer's employees and those of Flextronics work exclusively in a fenced off area of Building B, which occupies about two-thirds of the building.

The Employer provides two classifications of employees to Flextronics for its operations at Building B of the Facility: technicians and material handlers. Flextronics directly employs two classifications of employees who work together with the Employer's employees in Building B: production technicians and logistics associates.

The Employer's roughly 35 to 45 technicians perform the same duties as the roughly 25 Flextronics production technicians. Similarly, the Employer's approximately 65 material handlers perform the same functions as the approximately 15 Flextronics logistics associates. The Employer's employees as well as the Flextronics employees are supervised directly by Flextronics supervisors and managers.² Flextronics Production Manager Brian Fitzgerald has overall site responsibility for the services Flextronics provides to Apple at the Facility. Five Flextronics supervisors report to Fitzgerald at the Facility, and are responsible for the day-to-day supervision of the Employer's employees and Flextronics' employees. The Employer has an on-premises manager at the Facility, Jennifer Blackburn, who oversees hiring, firing, discipline and pay for the Employer's employees at the Facility.³

Day shift technicians and production technicians are supervised by Ryan Gorman, Flextronics' Engineering Technician. Day shift material handlers and logistics associates are supervised by Janet Tams, Flextronics' Day Shift "Refurb" Lead. Working together to maximize efficiency of operations, they interact with employees in all classifications. They do not, however, regularly supervise each other's employees but do so only when necessary to cover for each other. CJ Lloyd, Flextronics' Logistics and Peripherals Supervisor, manages the entire warehouse, shipping and receiving activities for the Flextronics' operations at Building B of the Facility. She supervises material handlers and logistics associates but does not supervise technicians or production technicians. The great bulk of employees at the Facility work on one of the two day shift schedules but

² Flextronics is not named as a joint employer of the petitioned-for unit of employees.

³ Based on the record evidence, I find that Blackburn is a Section 2(11) supervisor.

Flextronics and the Employer also maintain a “swing shift” from 3:30 p.m. to 12:00 a.m. on which 38 production technicians, technicians, material handlers and logistics associates work. The swing shift is supervised by Flextronics’ Swing Shift Supervisor Joel Sampson, who oversees employees of the Employer and Flextronics in each classification. In addition, Flextronics’ Materials Planner/Buyer Supervisor Michael Gunn, supervises three Flextronics logistics associates, but does not supervise any of the Employer’s employees.⁴

The first step in the process of Flextronics’ operations at the Facility is receiving items, which is handled exclusively by the material handlers and logistics associates. Computers, laptops, desktops, and a variety of peripheral equipment are received from Ingram Micrologistics, another Apple subcontractor that also occupies a portion of Building B of the Facility. Each item is transmitted in a carton either through the gate or receiving dock to the material handlers and logistics associates, who scan the barcode, and affix on the carton a unique label associated with its barcode. Each item is then moved by the material handlers and logistics associates to the Defective Goods Inventory warehouse (the DGI warehouse). At the DGI warehouse, material handlers and logistics associates unpack the cartons and sort through the items, putting like items together. Peripheral items such as keyboards, mice, etc., are moved to a separate area referred to as the peripheral warehouse, which is also within Building B of the Facility. Material handlers and logistics associates also work in the peripheral warehouse.

⁴ The parties stipulated that Flextronics’ employees Gorman, Tams, Lloyd, Sampson and Gunn are Section 2(11) supervisors.

Items such as iPods and iPhones, which have already been repaired, are shipped directly to the Facility in bulk packaging from Apple's China operations. Material handlers and logistics associates then repackage them into individual boxes with related accessories and pack these boxes into cartons. These items are then sent to the Apple distribution center in Building C of the Facility.

After items are sorted at the DGI warehouse, the material handlers and logistics associates retain various Apple brand names of mini-computers, desktop computers, and laptop computers for further processing by the Flextronics operation. Other items are repackaged by the material handlers and logistics associates and sent to other Apple subcontractors. The items retained for further processing are then moved into Flextronics' refurbishment process, in an order determined by Apple's weekly needs. Defective items are again scanned individually by material handlers and logistics associates and moved from the DGI warehouse to what is referred to as the refurbishment whip, where they are removed from their boxes by the material handlers and logistics associates. At this time, the material handlers and logistics associates also remove from the boxes accessory items—such as power cords, CDs and manuals—to be salvaged and reused. Some of these items are tested by the material handlers and logistics associates to determine whether they still function. The material handlers and logistics associates next encase the computers in pink bubble wrap, place the laptops and mini-computers in plastic bags, and load the desktops onto a cart. The material handlers and logistics associates then move the laptops and mini-computers to an area called the drive wipe, where they perform the first powering-on of the unit and use software to delete all information from the hard drives. Historically, depending on workload, a technician may

assist with this phase of Flextronics' operations, although Flextronics now intends for this phase to be handled almost exclusively by the logistics associates and material handlers.

After this stage, older computers that are considered obsolete will have reached the end of the Flextronics' process and will be returned to Ingram Micrologistics to be sold through other channels "as is." Newer computers, however, continue through Flextronics' refurbishment process. The material handlers place the computers on carts and wheel them to one of two conveyor lines—one designated primarily for desktops and the other designated primarily for laptops. The conveyor lines run to the area where the technicians and production technicians are stationed. The technicians and production technicians remove the computers from the conveyor lines and work on the units at their benches. These technicians then power up the computers and run a number of diagnostic tests on them to determine whether they need repair, and, if so, the nature of the problems. When a problem is detected, the technician or production technician disassembles the computer and replaces the part or component that is causing the problem. The technician or production technician obtains a replacement part by making an order that is electronically transmitted and the part is retrieved by a material handler or logistics associate, who delivers the part to the requesting technician. Alternatively, the technician or production technician may obtain certain common parts from "the supermarket," an area nearby the technicians' work area. After obtaining the part or parts, the technician or production technician reassembles the computer and again performs diagnostic testing. If the computer is still not functioning properly, the technician again disassembles the computer and attempts to repair the unit with a different part, a process that continues until the computer passes the diagnostic testing.

After units have been repaired, they are moved to the “serialization and cosmetic” area, where they are inspected by material handlers and logistics associates based on cosmetic standards. The material handlers and logistics associates perform cleaning on the units as needed and, if there are more severe cosmetic problems—such as scratches to the computer—they return the units to technicians for additional work. Once the refurbished computer passes the cosmetic inspection, the material handlers and logistics associates generate new serial numbers for the units and affix labels bearing these new serial numbers to the back of the computers. Material handlers and logistics associates then perform final testing on these completed items and, if there is a failure, the computer is returned to the technicians and production technicians for further review and repair as necessary. When a computer passes these final tests, it receives a last cleaning by a material handler or logistics associate and is re-boxed and re-sealed. Material handlers and logistics associates place the repackaged computers onto a shuttle trailer, which transports them to another building at the Facility.

When hiring technicians, the Employer prefers applicants to have what Jennifer Blackburn, who handles the Employer’s hiring, called “A Plus certification,” which she stated is awarded by a technical school. Technician Raul Valencia received his certification through Tech Skills, a trades skills school, at a cost of about \$12,000. To be considered for employment by the Employer as a technician, an applicant without A Plus certification must have equivalent experience. Because only technicians are capable of installing the component parts into the computers that are refurbished at the Facility, a material handler cannot interchange with a technician. Accordingly, the Employer does not hire material handlers to perform technicians’ work. The technicians’ starting wage is

\$10 per hour, while material handlers begin at \$9 per hour. Material handlers and technicians, however, enjoy the same fringe benefits—including vacation days, holidays, a 401(k) retirement plan, and medical and dental insurance. All employees use the same cafeteria, entrances and exits.

ANALYSIS

It is well-settled that the Act does not require that the petitioned-for unit be the only appropriate unit, the most appropriate unit, or what could become the ultimate unit; it requires only that the unit be “appropriate.” *See, e.g., Overnight Transportation Co.*, 322 NLRB 723 (1996); *Dezcon, Inc.*, 295 NLRB 109 (1989); *Capital Bakers*, 168 NLRB 904 (1968). While a petitioner’s desire in regard to unit composition and scope is relevant, it is, however, in no way dispositive, *see Airco, Inc.*, 273 NLRB 348 (1984), because a proposed bargaining unit based on an arbitrary grouping of employees will always be inappropriate. *See, e.g., Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Additionally, the Act prohibits the Board from establishing a bargaining unit based solely on the extent of organization. *See, e.g., Motts Shop Rite of Springfield*, 182 NLRB 172 (1970). Where, however, a petitioned-for unit of employees has a community of interest that is distinct from the interests of the employees sought to be excluded from the bargaining unit, the Board holds such a unit to be an appropriate unit. *See Aerospace Corp.*, 331 NLRB 561, 562 (2000); *Ore-Ida Foods*, 313 NLRB 1016 (1994), *enfd.*, 66 F.3d 328 (7th Cir. 1995). The factors the Board looks to in determining whether the employees at issue share a community of interest include: degree of functional integration; common supervision; the nature of employee skills and functions;

interchangeability and contact among employees; general working conditions; and fringe benefits. *See, e.g., Overnite Transportation Co.*, 331 NLRB 662 (2000); *J.C. Penney Co.*, 328 NLRB 766 (1999); *K.G. Knitting Mills*, 320 NLRB 374 (1995); *Kendall Co.*, 184 NLRB 847 (1970).

Here, when considering these factors, it cannot be concluded that the technicians and material handlers share such a close community of interest that a petitioned-for unit that does not include both of these classifications must be deemed inappropriate. Although the evidence establishes that the material handlers and technicians work at the same situs and come into contact on a daily basis; that there is a high degree of functional integration in regard to the tasks performed by the employees in the operations at the Facility; and that these employees' share similar general working conditions and fringe benefits, the evidence also establishes some profound differences between these job classifications. Thus the technicians are much more highly skilled employees, requiring a certificate or equivalent technical experience not required of the material handlers. As a result, a material handler cannot interchange with a technician because the material handlers do not possess the skills to perform the technicians' work. While the work functions of the two sets of employees are part of an integrated whole, the functions of the two classifications differ significantly, as technicians perform diagnostic tests and actually install component parts into the sophisticated electronic products that are refurbished at the Facility. In addition, the bulk of employees work on the day shift and do not generally share common supervision. As discussed, day shift technicians and production technicians are supervised by Ryan Gorman, while day shift material handlers and logistics associates are supervised by Janet Tams. Gorman and Tams supervise each other's employees only when needed to cover for

the other. Logistics and Peripherals Supervisor Lloyd oversees only material handlers. The only regular common supervision between material handlers and technicians occurs during the swing shift, when all operations are overseen by Supervisor Joel Sampson; but only 38 of the approximately 150 production technicians, technicians, material handlers and logistics associates work the swing shift. Thus, the evidence does not establish, as the Employer asserts, that the technicians and material handlers generally share common supervision.

In *The Lundy Packing Co.*, the Board considered a similar factual setting in which the petitioning union sought to represent a unit of production and maintenance employees, and the Board determined that technicians (and several other classifications of employees) that the employer argued must be included in the bargaining unit did “not share such an overwhelming community of interest as to require their inclusion in the petitioned-for production and maintenance unit.” *The Lundy Packing Co.*, 314 NLRB 1042, 1044 (1994) (citing *Penn Color*, 249 NLRB 1117(1980)). The Board noted that a petitioned-for unit that also included the technicians and other disputed classifications “might have also been an appropriate unit had such a unit been sought by the Petitioners.” *Id.* In this regard the *Lundy Packing* Board stated that there were “factors present that would support adding the disputed employees to the petitioned-for unit, i.e., they perform production-related functions, have some contact with unit employees, have similar benefits and holidays, are not required to have special education or training, and some were formerly employed in production positions.” *Id.* at 1043-44. This did not, the Board held, require a finding that the petitioned-for unit include these employees in order to constitute an appropriate unit. The Board pointed out that the disputed employees “have separate supervision, are paid

differently [and] do not interchange with the production and maintenance employees.” *Id.* at 1044. Here, the technicians and material handlers are not generally subject to common supervision, do not interchange with each other, have substantially different skills and training, perform very different functions, and start at different pay rates.

Similarly, in *Witteman Steel Mills, Inc.*, 253 NLRB 320 (1980), the Board found that a petitioned-for unit of production and maintenance employees, which sought to exclude laboratory technicians, constituted an appropriate unit. Although these technicians had yet to be hired, the Board based its determination on the evidence that the technicians would spend 75 percent of their time in a laboratory apart from the other employees, using different equipment and working under different supervision. *See id.* at 321.

The Employer correctly points out that the Board will not arbitrarily subdivide employees into separate bargaining units where those employees have no distinct community of interest from the other employees. *See Casino Aztar*, 349 NLRB No. 59 (2007); *TDK Ferrites Corp.*, 342 NLRB 1006 (2004); *Buckhorn, Inc.*, 343 NLRB 201 (2004). This is especially the case, as the Employer asserts, where there is a high degree of functional integration in regard to production employees. *See Potter Aeronautical Corp.*, 155 NLRB 1077(1965).

There are, however, as set forth above, significant differences between the technicians and the material handlers: in the actual work they perform; the lack of any employee interchange between the technicians and material handlers; their lack of regular common supervision; as well as these employees’ differing training and skills levels. Thus, I conclude that the technicians have their own separate and distinct community of interest.

It must be stressed that the inquiry herein is not whether a petitioned-for unit of employees including both the technicians and the material handlers is appropriate, or whether it is the most appropriate unit. Rather the inquiry is whether the unit sought by the Petitioner, which includes only the technicians, is so arbitrary that it cannot constitute an appropriate unit without the inclusion of the material handlers. A unit that includes the material handlers would arguably constitute an appropriate unit,⁵ based on some of the community of interest factors they share that are discussed above. I find, however, that in light of the significant differences between these classifications on which I have elaborated, an appropriate unit need not include the material handlers. Accordingly, I find that the petitioned-for unit of technicians is an appropriate unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer is an employer as defined in Section 2(2) of the Act, is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

⁵ I make no findings in this regard, but note this observation for expository purposes only.

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. 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 technicians employed by the Employer at the 2511 Laguna Blvd., Building B, Elk Grove, California facility, excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

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 ELECTRICAL WORKERS, LOCAL 1245, or no union. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

B. Employer to Submit List of Eligible Voters

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

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 20, 901 Market Street, Suite 400, San Francisco, CA 94103, on or before **February 6, 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 to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁶ by mail, or by facsimile transmission at (415)356-5156. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Because the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential

⁶ To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.

voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **February 13, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,⁷ but may not be filed by facsimile.

DATED AT San Francisco, California, this 30th day of January, 2008.

/s/ Joseph P. Norelli
Joseph P. Norelli, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

⁷ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.