

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRESHPOINT OF DENVER, INC.,

Employer,

and

Case 27-RC-8524

TEAMSTERS LOCAL UNION 455

Petitioner.

DECISION AND DIRECTION OF ELECTION

On May 9, 2008, the Petitioner, Teamsters Local Union 455, filed a petition under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (Act), seeking to represent approximately 22 full-time and part-time drivers of the Employer, FreshPoint of Denver, Inc. On May 20, 2008, a hearing was held before Hearing Officer Daniel L. Robles. Following the hearing, the parties filed timely briefs.

The issue in this case is whether the petitioned-for unit consisting solely of truck drivers is an appropriate unit. Specifically, the Petitioner seeks a unit including “all full-time and regular part-time drivers employed by the Employer at its plant located at 5151 Bannock Street, Denver, Colorado 80216” and excluding “office clerical employees, sales employees, professional employees, supervisors as defined in the Act, warehouse employees, and all other employees.” The Employer contends that the petitioned-for unit is inappropriate, and that the only appropriate unit would include the drivers, warehouse employees and warehouse

maintenance employees. For the reasons discussed below, I find that the petitioned-for unit is appropriate.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this proceeding to me. Upon the entire record in this proceeding I find:

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

2. The parties stipulated, and I find that the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that it is subject to the jurisdiction of the National Labor Relations Board (Board).

Specifically, I find that the Employer is a Colorado corporation, with a facility located at 5151 Bannock Street in Denver, Colorado, where it is engaged in the wholesale distribution of fresh produce. Within the past twelve months, a representative period, the Employer purchased and received at its Denver, Colorado facility, goods and materials valued in excess of \$50,000 directly from suppliers located in states other than the state of Colorado.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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) of the Act.

5. It is appropriate to direct an election in the following unit of employees:

Included: All full-time and regular part-time drivers employed by the Employer at its Denver, Colorado facility.

Excluded: Office clerical employees, sales employees, professional employees, warehouse employees, guards and supervisors as defined in the Act, and all other employees.

FACTS

The Employer is a fresh produce distributor that delivers fruits and vegetables to hotels, restaurants and various retail industries. The Employer employs a total of approximately 135 employees. There are 22 truck drivers, whom the Petitioner seeks to represent. The Employer also employs 24 day and night warehouse employees, 2 warehouse “value added” employees and 3 warehouse maintenance employees, all of whom the Employer would seek to include in the unit. In addition to these classifications, there are approximately 28 tomato department employees, 8 repack employees and 16 “fresh-cut” employees, approximately 8-10 sales associates and 14-15 administrative employees who are not at issue in this proceeding.

The Drivers

The drivers’ primary duty is to deliver product to the Employer’s customers. A driver’s job qualifications include being physically capable of handling the product and having the ability to drive the truck. All drivers must possess a valid driver’s license, have no DUI convictions and no more than seven points on their motor vehicle record. It is also preferred that they have six months of route delivery experience. Most of the drivers drive trucks that weigh less than 26,500 pounds and therefore are only required to possess a regular

“Class C” ^{1[1]}driver’s license. Two part-time drivers and the transportation lead, Adrian Mendoza are “Class A” drivers who possess CDLs that are only required for the tractor-trailer deliveries. The Employer maintains a separate seniority list for drivers.

Most of the drivers report to work between 4:00 and 5:30 a.m., with the only exception being the “Broadmoor” route for which the driver regularly reports at 12:00 a.m. There is also one “van route” with a report time of 10:30 a.m. The van route is to run small deliverers to customers who wants only one or two cases of product. On each of the four schedules contained in the record, the van route has a notation stating “no delivery.” When the drivers arrive at work in the morning, their trucks have already been loaded by the night warehouse crew. The driver checks the load to verify it is complete and then leaves the facility to make deliveries to the customers. Most of the drivers do not return to the facility during the day and are gone for approximately eight hours. On a given day, approximately 25-30% of the drivers return to the facility after completing their deliveries and take out a second load. When this occurs, the driver selects the order if this has not already been done by the warehouse employees, loads it onto the truck and makes the deliveries. Overall, a typical driver spends approximately 80% of the time on the road and 20% in the warehouse.

The Employer has a “Years of Service Wage Range Program,” which applies to all employees and provides that as long as they meet the minimum standards of the Employer’s “Best Business Practices,” employees receive an

^{1[1]} Throughout the record the parties refer to those drivers who have “regular” driver’s licenses as having “Class C” or “C Class” licenses. Similarly they refer to drivers who have commercial driver’s licenses (CDLs) as “Class A” or “A Class” drivers.

automatic wage progression at specified times. The drivers' wages range between \$11.00-\$13.75 per hour for a regular Class C licensed driver, \$11.50-\$14.25 per hour for a Class B driver (certified on air brakes)^{2[2]} and \$13.75-\$15.75 per hour for a Class A (CDL) driver. Drivers are paid in one of two ways. They are either paid according to their hourly wage, or are paid under the "activity based compensation program" (ABC), whichever is higher in any given pay-period. The drivers are the only employees eligible for ABC. Under that plan, the driver is credited a certain monetary amount for each activity, including number of cases delivered, stops, miles driven, number of runs, backhauls and delays. Currently, approximately 51% of the drivers are earning the ABC and 49% the regular hourly wage rate.

Drivers are supervised by Mike Daher, who is the Transportation Supervisor. Daher reports to the Operations Manager, who reports to the Employer's President. Daher has been the Transportation Supervisor since July, 2007. He works during the day, from approximately 4:00 a.m. until about 2:00 or 3:00 p.m. There is also a Transportation Lead, Adrian Mendoza, who works during the day, coming in around 4:00 or 5:00 a.m. and working 8-10 hours or more. Mendoza is a Class A driver, meaning he possesses a CDL, and either runs a route or rides along with other drivers to evaluate them under the Employer's "Best Business Practices and Standard Operating Procedures." The two part-time Class A drivers are employed to afford Mendoza the ability to fulfill this driver evaluation function. It appears from the schedules in the record that

^{2[2]} The record is unclear as to whether any drivers were Class B drivers at the time of the hearing.

Mendoza rides along with other drivers approximately two days per week. The best business practice forms he fills out serve as quarterly evaluations of the drivers, based upon their compliance with the criteria outlined in the evaluation form. The best business practice forms are driver specific and contain 74 items, with “yes” and “no” checkboxes next to each criteria. A few examples of items evaluated include: checking the truck and filling out a pre-trip report (required by D.O.T.); filling out manifests; checking product; not letting the engine idle; logging stops properly; delivering product to proper location as designated by customer; assisting customer with credit issues, pick-ups, returns and log on invoice; various requirements regarding the customer signing the invoice and addressing different payment methods; procedures for checking in upon return from routes; and cleaning out the cab and sweeping out the truck. After Mendoza rides with the driver, he and the driver discuss the evaluation and both can make written comments on the last page of the form, then it goes into the driver’s personnel file. The record indicates the evaluations are handled by Mendoza and Daher for the drivers, but the record is silent with respect to the extent of Daher’s involvement.

The Warehouse Employees

There are 24 warehouse employees whose duties are to receive and stock product, select product to fill customer orders, and load product onto the delivery trucks. The majority of these employees appear to be order selectors. On each shift, day and night, there is also an inventory control position. In addition to these positions, there are two “value added” employees who work in

the warehouse. These employees select processed and packaged products such as carrot and celery sticks to fill orders, clean-up, and “crisp” products such as lettuce. The qualifications of the warehouse employees include the physical ability to handle the product. They are not required to have a driver’s license.

The day warehouse employees work from 6:00 a.m. until 2:00 or 3:00 p.m. The schedules in the record indicate that the night warehouse employees are scheduled from 7:00 p.m. until 3:30 a.m. The testimony indicates that they generally work from 7:00 p.m. until 3:00 or 4:00 a.m. The record does not clearly reveal how often they finish early or stay for overtime. Nor is the record clear as to the exact schedules of value added employees, though it appears they work during the day shift.^{3[3]} Day warehouse employees earn between \$9.50-\$13.50 per hour. Night warehouse employees earn between \$9.50-\$13.75 per hour. Forklift operators earn between \$9.75-\$13.75 per hour and receivers between \$10.00- \$14.00 per hour. All warehouse employees are paid according to the Employer’s “Years of Service Wage Range Program.”

In addition to his job as Transportation Supervisor, Daher is the Acting Supervisor for both the Day and Night Warehouse. Daher was appointed Acting Night Warehouse Supervisor on January 1, 2008. He became the Acting Day Warehouse Supervisor on April 14, 2008, after the Day Warehouse Supervisor was terminated by the Employer. According to testimony of the Employer’s President Dan Locricchio, the Employer was not seeking to fill the Day and Night

^{3[3]} It is unclear whether the value added employees are included on the regular warehouse schedules in the record. Throughout the record, the Employer does not distinguish much between these employees and the regular warehouse employees. Therefore, unless specified otherwise I am considering the “value-added” employees to be included in the classification of “warehouse employees.”

Warehouse Supervisor positions at the time of the hearing. During the day shift, there is a Day Warehouse Lead who provides day-to-day direction to the warehouse crew, consisting of 8-10 employees. Since Daher works the day shift and is not present at night, the 11 night warehouse employees' work is guided by the Night Warehouse Leads. There are two Night Warehouse Leads, at least one of whom is present during each night shift. The Night Warehouse Leads take part in the evaluation of the night warehouse employees, using the Employer's best practices criteria. Daher currently handles the best practices evaluations for the day warehouse.^{4[4]} There is also an Inventory Control Lead who performs these evaluations for the inventory control employees. The record is devoid of any additional evidence regarding the Inventory Control Lead position. Daher is responsible for managing the leads. According to President Locricchio, Daher is essentially on call "24/7". If there is an operational problem, the leads call him if he is not present. For example, if a driver doesn't show up, the lead would call Daher. Leads can give verbal warnings and redeploy employees to do different work. Leads cannot otherwise discipline employees or send them home, grant time off, or make recommendations regarding wages.

The best practices evaluations for the day warehouse order selectors contain 30 items, some examples of which include participating in a daily 10 minute safety meeting; verifying quality in pick slots; filling out quality reports and reporting quality problems; bringing out pallets to be used for selection of second run orders; and safety specifics for pallet-jack and forklift operation. The

^{4[4]} President Dan Locricchio testified that he did not know whether the Day Warehouse Lead took part in the evaluation process as well.

evaluation for inventory control employees is only 8 items long and aside from punching in and being properly dressed (which appears in all of the evaluations) includes general items such as completing assignments listed on the daily inventory control checklist, and filling out the checklist and signing it. The night crew order selector evaluation is 26 items in length, and includes things such as participating in a daily 10 minute safety meeting; bringing out pallets and building loads properly; examining quality of the product and using older product first; pulling 75 cases or more per hour with one or less errors; and, instructions for loading trucks and cleaning up after all trucks are loaded.

Maintenance Employees

The Employer has three maintenance employees, one janitor and two helpers, whose main function is cleaning and sanitation of the building. They also perform minor building repairs and painting as needed. These employees work in the warehouse and are separately supervised by the Maintenance Supervisor. The maintenance employees earn between \$9.75-\$14.00 per hour. The maintenance employees work hours are in the range of 6:30-7:30 a.m. until 3:00 or 4:00 p.m.

Other Warehouse Departments

In addition to the categories mentioned above, there are at least three other departments located in the warehouse. There is a tomato department with approximately 28 employees who sort tomatoes by color and size and pack them for the customer orders. After they are sorted, the tomatoes are then received and stocked by the warehousemen. There is also a repack department,

consisting of approximately 8 employees. These employees take large cases of product and repack them into smaller cases, which are then received by the warehousemen. Finally, there is a fresh cut department where approximately 16 employees custom cut produce for fruit and vegetable trays for customers. After these products are custom cut they are sent to distribution and received by the day warehouse receivers. Each of these three departments has its own separate supervision, and the employees earn between approximately \$8.01-\$9.00 per hour.

Common Policies and Interaction

All employees in the company are subject to the Employer's Associate Handbook and are covered by the same benefits, including health and life insurance and long and short term disability coverage. Likewise, all employees use the same break room. However, the drivers generally take their lunch breaks on the road. As for attire, drivers wear uniforms provided by the Employer, while warehouse employees do not have uniforms, but wear appropriate street clothes and steel-toed boots.

Warehouse employees and drivers generally do not attend the same meetings held by the Employer. Drivers attend a monthly safety meeting, which is unique to them. Approximately three times a year the drivers might attend a meeting with warehouse and other employees to address company-wide training issues and initiatives. There are also monthly celebration meetings to celebrate birthdays, anniversaries, employees of the month, and other special occasions.

Any employee of the company may attend these meetings, but attendance is not required.

The Employer has a cross-training program whereby drivers can achieve certifications on equipment used in the warehouse such as the pallet jack and forklift. Some of the drivers, approximately nine at the time of the hearing, are certified on the pallet jack, which they utilize on occasion when getting a second load. Only one or two drivers are certified on the forklift. However, according to the record as a whole, drivers do not regularly fill-in for warehouse employees or vice-versa. If a warehouse employee is absent, the Employer generally fills the vacancy by calling in a warehouse worker. At times, maintenance employees are also used to help select orders and sort value-added merchandise if extra help is needed. There are no examples in the record of a driver filling in for a warehouse employee during the 6 months prior to the hearing. Similarly, if a driver is absent or on vacation, the Employer fills the vacancy with another driver, not a warehouse employee. While the Employer maintains that warehouse associates can be assigned to drive trucks and have been "at various times," and "infrequently," there are no specific instances of this actually occurring in the record.

As for transfers, there have been a total of six employees who have voluntarily transferred between driver and warehouse positions. One employee transferred from driver to sales, worked there for almost two years, then transferred to a warehouse lead position. Another employee transferred from driver to warehouse selector in March, 2006, then became the Night Warehouse

Lead in August, 2006, and finally ended up as the Night Warehouse Supervisor in October, 2006 (a position he left and has, since his departure, been vacant). Another employee switched from night warehouse employee to Night Warehouse Lead in May, 2005; then to driver in June, 2005; to day warehouse employee in October, 2005; and back to driver in August, 2006. Another employee transferred from day warehouse employee to driver in May, 2006, and another one from driver to night warehouse employee in August, 2006 and then to night warehouse lead in December, 2007. Finally, the current Transportation Supervisor Mike Daher transferred from warehouse employee to day warehouse lead in September, 2003 and then to Transportation Supervisor on July 1, 2007. Aside from these transfers, three employees from fresh cuts, which the Employer does not seek to include in the unit, have transferred to the night warehouse. The record indicates that any employee may apply for any opening in the company.

The drivers have contact with the day warehouse employees mainly when they return to the warehouse, either for a second load or when they are finished for the day. The drivers who take out second routes interact with the warehouse crew upon their return. If an order is ready, the drivers just load it onto the truck. If it is not ready, the drivers will coordinate with the warehouse employees so that the drivers can select and pull the load. The driver then loads it onto the truck. When the drivers return at the end of the day, if they have picked up product from a supplier, they will interact with the warehouse employees who receive that product. For example, if a driver has picked up a shipment of bananas from a

supplier, which occurs daily, the warehouse employees will help unload the truck and break down the pallets to stock the bananas.^{5[5]} If product is being returned from the customer, the drivers unload it themselves, give the product to the value added warehouse employees and tell them what the problem is so that those employees can take care of it.

As for interaction with the night warehouse employees, the drivers have contact with them when they arrive at work in the morning if their work hours overlap. The record indicates that the night warehouse employees are scheduled until 3:30 a.m., but mainly work until 3:00 or 4:00 a.m. However, as stated above, it is unclear from the record how often they stay beyond 3:30 a.m. and most of the drivers start work between 4:00 and 5:00 a.m. When they report for their shifts, the drivers fill out a load condition report and, if night warehouse employees are still working the drivers address any issues with the load with those employees.

ANALYSIS AND FINDINGS

Section 9(b) of the Act empowers the Board to determine whether a petitioned-for unit is “an appropriate unit.” Nothing in the Act requires that the unit found appropriate be the only, or even the most appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). The Board’s procedure for determining an appropriate unit under Section 9(b) is to first examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. *Overnite Transportation Co.*, 331 NLRB 662 (2000). “If the petitioned-for unit is not

^{5[5]} It is unclear on the record whether one or more drivers would pick up bananas or any other product each day.

appropriate, the Board may examine alternative units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties.” *Id.* In general, the Board attempts to select the smallest appropriate unit including the petitioned-for classifications. *Id.* The Board does not compel a petitioner to seek any particular unit. The Board’s policy is to consider only whether the requested unit is an appropriate one, even though it may not be the optimum or most appropriate unit. *Overnite Transportation*, 322 NLRB 723 (1996).

In defining an appropriate bargaining unit, the Board weighs various community-of-interest factors, including the following: similarities or differences in wages; hours of work; employment benefits; supervision; job qualifications; training and skills; work location; contact with other employees; integration of work functions or interchange; and bargaining history. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). The appropriateness of the unit depends on the facts of each particular case. *Overnite Transportation Co.*, 322 NLRB at 723.

It is well established that drivers are not required to be included in a unit of non-drivers. *Home Depot USA, Inc.*, 331 NLRB 1289, 1290 (2000); *Longeran Corp.*, 194 NLRB 742 (1971); *Mc-Mor-Han Trucking Co. Inc.*, 166 NLRB 700 (1967). The Board has consistently found in circumstances similar to those in this case, that truck drivers comprise a functionally distinct group which may constitute a separate appropriate unit where, a union seeks to represent them separately, there is no bargaining history, and no labor organization seeks to

represent them in a broader unit. *Mc-Mor-Han Trucking Co.*, supra. However, the Employer in this case argues that the drivers share such a substantial community of interest with the warehouse employees that the only appropriate unit would include the warehouse employees, warehouse value-added employees and warehouse maintenance employees.

Based on the entire record, I find that the petitioned-for unit of truck drivers is an appropriate unit, and that the Employer has failed to meet its burden of establishing that it is inappropriate based on an overwhelming shared community of interest with the warehouse employees, warehouse value-added employees and warehouse maintenance employees.

Wages/Compensation

Contrary to the Employer's argument, the drivers and warehouse workers do not share common wages or a common method of compensation. On average, the drivers' hourly wages are slightly higher than the warehouse employees' and generally similar to those of the warehouse maintenance employees. However, the drivers are the only employees in the entire company subject to the ABC system, under which they can be compensated based upon their daily activity. The drivers are paid either their hourly wage, or the ABC rate, whichever is higher. Since the system went into effect, approximately 51% of the drivers have been paid under the ABC system and 49% under the traditional hourly wage method. The fact that drivers alone are eligible for the ABC pay system certainly supports a finding that they share a unique community of interest when it comes to wages.

Hours of Work

The drivers, warehouse employees and maintenance employees work different schedules. Most drivers report to work between 4:00 and 5:30 a.m. and work 8 or more hours, although 80% of that time is spent working away from the warehouse. The day warehouse employees generally work from 6:00 a.m. until 2:00 or 3:00 p.m., and maintenance employees report between 6:30 or 7:30 a.m. and work until 3:00 or 4:00 p.m. While these day shift employees have schedules that have some overlap with the schedules worked by the drivers, since the drivers are out of the warehouse most of their working day, their contact with these day shift employees is extremely limited. With respect to the night warehouse employees, as noted, they normally work from 7:00 p.m. - 3:30 a.m., a time at which drivers are normally not present at the warehouse. Accordingly, the hours that drivers, warehouse and maintenance employees work do not require a finding that drivers must be included in a broader unit.

Employment Benefits

The Employer asserts that the fact that drivers, warehouse employees and warehouse maintenance employees receive the same insurance and other benefits and are subject to the same company handbook and covered by the same general Employer policies establishes community of interest. However, the record establishes that all of the Employer's employees receive these same benefits and are covered by these same policies. Under these circumstances, these factors are insignificant and fail to establish that drivers share such a

strong community of interest with warehouse employees that they cannot be separated.

Supervision

The issue of supervision in the instant case is complicated by the fact that Mike Daher is currently acting as the Day Warehouse and Night Warehouse Supervisor in addition to fulfilling his regular role as Transportation Supervisor. However, as noted earlier, prior to January 1, 2008 and April 14, 2008, respectively, the night warehouse and day warehouse employees were supervised separately by the Night Warehouse Supervisor and the Day Warehouse Supervisor. While the Employer maintained at the time of the hearing in this case that it did not have plans to fill these positions, only months have passed since those positions became vacant and it is clear from the record that those positions continue to exist and that Mike Daher is filling them on an “acting” basis. Thus, it cannot be said with certainty that the warehouse employees will continue to be supervised by the Transportation Supervisor in the future.

Regardless, while the drivers and warehouse employees are currently included under Mike Daher’s supervision this fact does not mandate their inclusion together in one unit. In *Mc-Mor-Han Trucking Co.*, supra, the Board found that truck drivers comprised a separate appropriate unit although they were currently working under the same supervision as mechanics (whom the Employer wanted included); where their supervision had previously been separate. The facts in this case warrant the same conclusion. Similarly, in

Publix Super Market, Inc., 343 NLRB 1023 (2004) the Board found that the fact that truck drivers were supervised by the same individual as other employees did not require the drivers' inclusion in a more comprehensive unit. Based on the foregoing, even assuming that the drivers and warehouse employees in the instant case will continue to be supervised by Mike Daher, that fact when considered in the context of the entirety of the record does not mandate their inclusion in a larger unit with warehouse employees.

Regarding supervision generally, I note that the parties in this proceeding stipulated on the record that the supervisory status of the lead employees is not an issue before me in this proceeding. In addition, I note that the record clearly does not contain enough evidence to determine whether in fact they would be supervisors under the Act.^{6[6]} The record however does indicate that the Day Warehouse Lead provides day-to-day direction of the day warehouse employees. It is unclear whether the day lead has any input into the evaluations of those warehouse employees. However, Employer President Dan Locricchio testified that since Mike Daher is not present during the night shift, the night warehouse employees are "supervised" by the leads, who play a role in those employees' evaluations^{7[7]}. President Locricchio also testified though that if a problem arises on the night shift, the lead calls Mike Daher who is essentially on-call "24/7". The record also establishes that leads can give verbal warnings and redeploy employees to do different work; but cannot discipline employees or send them home, grant time off, or make recommendations regarding wages.

^{6[6]} Whether the leads took on any additional responsibilities after the departure of the Day and Night Warehouse Supervisors is not addressed in the record.

^{7[7]} The record does not specifically address what their role is in the evaluations.

I note that it is undisputed that the warehouse maintenance employees are under completely separate supervision by the Maintenance Supervisor, which fact does not support their inclusion in any unit that would include drivers and warehouse employees.

Job Qualifications, Training and Skills

While both drivers and warehouse employees must be physically able to handle the product, their job qualifications, training and skills differ significantly. The drivers must have a valid driver's license, no DUI convictions and a maximum of 7 points on their driving records. Moreover, the Employer prefers drivers to have six months of delivery experience. In addition, Class A drivers must possess CDLs and the Class B drivers must be certified on the operation of air brakes. Warehouse or maintenance employees are not even required to possess a driver's license, much less have a clean driving record.

The drivers also do not receive the same training as the warehouse employees or maintenance employees. Fewer than half of the drivers are certified in the operation of pallet jacks and there is nothing to indicate that this is a job requirement. Only one or two drivers are certified on the forklift. In addition, each group has its own safety training. There is no record evidence to indicate that the warehouse employees engage in training similar to that received by the drivers. The record is also devoid of any information regarding the training of maintenance employees.

Regarding skills, the drivers' primary job is to deliver product to the customers, though on second runs they may select and load product. They are

out of the warehouse approximately 80% of the time, delivering product to customers. The warehouse employees primary function is to receive and stock product, select product to fill customer orders, and load it onto the delivery trucks. The maintenance employees take care of cleaning and sanitation. The differences in job skills and performance criteria are highlighted in the best practice evaluation forms used for the different classifications. For example, the drivers' evaluations are the only ones containing items relating to customer relations and payment issues. Accordingly, the skills of these groups are not so similar as to require their inclusion in the same unit.

Work Location

The drivers do not share the same work location with other employees. It is undisputed that drivers spend 80% of their time on the road and away from the warehouse. Warehouse and maintenance employees work only in the warehouse. Though all drivers report to the warehouse in the morning and at the end of the day, and some return for a short period of time during the day to pick up a second load, their primary location throughout 80% of the day is either in the truck or at the customers' locations. This factor therefore does not support a conclusion that drivers and warehouse employees must be included in the same unit.

Contact with Other Employees

Contrary to the Employer's assertions, the record does not support a finding that the drivers have substantial contact with warehouse employees. As discussed above, the drivers are out of the warehouse 80% of their day. Their

interaction with the day warehouse crew is limited to when drivers return from their routes, if they are returning product from a customer or bringing in product from a supplier. The 25% or so of drivers who may return for a second load have a bit more contact with the day warehouse employees, however according to the record the driver generally selects and pulls his second load. Accordingly, the record does not support a finding that the drivers regularly work together alongside the warehouse employees as argued by the Employer.

Nor do the drivers have substantial contact with the night warehouse employees. The Employer argues that the drivers have contact with the night warehouse crew from the time they arrive at work until they leave on their routes. However, the record indicates that the night warehouse employees are regularly scheduled until 3:30 a.m., while the drivers generally do not arrive until at least 4:00 a.m. and generally depart the warehouse on their routes one half hour after arriving. On some heavier days (four days out of five weeks of schedules in the record) the night warehouse employees can be scheduled until 4:30 a.m. Nonetheless, aside from the fact that the drivers may address any load issues with the night crew if any exist, there is no specific evidence as to their interaction even on the infrequent days when they might be present at the same time. Overall, there is little contact between these groups.

Finally, there is no evidence in the record relating to contact between drivers and maintenance employees.

Integration of Work Functions

The Employer argues that there is substantial integration between the drivers and the warehouse crew. In general, to find that a separate unit of drivers is not appropriate, drivers duties have to be so functionally integrated with the duties performed by other employees that they spend a substantial amount of time performing the same functions, including driving duties, and have the same supervision, pay scale and benefits as other employees. See *Standard Oil Co.*, 147 NLRB 1226 (1964). The key in this line of cases is that the drivers work with and spend substantial time performing the same functions as other employees. For example, in the main case on which the Employer relies to support its argument in this case, *United Rentals, Inc.*, 341 NLRB 540 (2004), the Board found such substantial integration. However, that case is clearly factually dissimilar to the case at hand. First of all, *United Rentals* involved a finding that only a wall-to-wall unit was appropriate rather than the smaller petitioned-for unit, a situation significantly different from the instant case where the Employer is not seeking a wall to wall unit or even to include all employees who perform work in the warehouse. Second, in *United Rentals*, there was overwhelming and undisputed evidence of overlapping duties and interchange between the petitioned-for and excluded employees. The employees excluded under that petition regularly and frequently performed the duties performed by those in the petitioned-for unit. Moreover, the evidence in that case showed that both the excluded and petitioned-for employees filled in for each other when an

employee was out sick. Such is clearly not the case here and there is no evidence of such interchange.

The record here indicates that the drivers' primary job is to drive and deliver product away from the warehouse. While about a quarter of the drivers may select and load their trucks for second runs each day, they do not work together with the warehouse employees to load their trucks for these second runs. Moreover, neither drivers nor warehouse employees regularly fill in for each other. In fact, there is no evidence of a driver filling in for a warehouse employee during the six months prior to the hearing, and no examples in the record of a warehouse worker performing driving work. Warehouse employees generally perform their function separately by getting product ready for the drivers and loading it onto their trucks before the drivers even arrive for work. There is only limited contact when a driver returns with product from a supplier and the warehouse employees help unload it, or, if the driver has returned product, the product may be given to the value added employees. However, the record indicates that the drivers and warehouse employees do not regularly work together or perform each other's jobs. Thus, while there is some minimal degree of functional integration, the contact that drivers have with warehouse employees is incidental to their primary function of operating the delivery trucks and it is certainly not so substantial as to mandate the warehouse employees' inclusion in a bargaining unit with the drivers. *Home Depot USA, Inc.*, 331 NLRB at 1291.

I note that there is no record evidence regarding functional integration of the drivers and maintenance employees.

Interchange

As discussed above, the record reveals no temporary interchange between drivers and warehouse workers or maintenance employees. The overwhelming weight of the record establishes that the drivers and warehousemen do not fill in for each other during absences or perform each others jobs on a day-to-day basis. Neither do drivers fill in for maintenance employees or vice versa.

Further, the minimal evidence of permanent transfers does not establish the type of substantial interchange that would mandate the inclusion of warehouse employees with the drivers. Specifically, according to the record, a total of six employees have transferred between driving and warehouse in the past several years. These were permanent transfers requested by the employee, to positions for which any employee could have applied. In addition, the record indicates that at least three employees from departments the Employer does not seek to include in the unit have transferred to become night warehouse employees. Accordingly, this evidence is insubstantial and does not establish meaningful interchange that would mandate the inclusion of warehouse employees with drivers. *Home Depot USA, Inc., ibid.* I further note that there is no evidence of interchange between drivers and maintenance employees in the record.

Bargaining History

There is no relevant bargaining history in this case. The Employer did elicit some evidence regarding collective bargaining agreements between the Petitioner and other companies in the Denver area, including a parent company. However, it does not contend there is any bargaining history between the Employer and the Petitioner involving employees at issue in this case, which would be the only relevant bargaining history. *Big Y Foods, Inc.*, 238 NLRB 855 (1978).

CONCLUSION

Based upon the entire record as a whole, I find that the Employer has failed to establish that the drivers share such a substantial community of interest with other of its employees as to make a drivers-only unit inappropriate. Rather, the drivers share a community of interest among themselves that renders the petitioned-for unit appropriate.

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 issue subsequently, subject to the Board's Rules and Regulations.^{8[8]} Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during

^{8[8]} Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States Government 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 designated payroll period: who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in 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 Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed

that within seven (7) days from the date of this Decision, two (2) 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. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **June 24, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **July 1, 2008**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado, this 17th day of June, 2008.

Michael W. Josserand, Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, CO 80202-5433
