

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUB-REGION 37

AIR LIQUIDE AMERICA L.P.¹

Employer

and

Case 37-RC-4182

HAWAII TEAMSTERS AND
ALLIED WORKERS, LOCAL 996

Petitioner

DECISION AND DIRECTION OF ELECTION

Air Liquide America L.P. (the Employer), a French corporation, is an international supplier of industrial gases and related equipment and medical gases. It maintains five facilities within the State of Hawaii, including one located in the City of Wailuku on the Island of Maui, which is the subject of the Petition. Four individuals are employed out of the Maui facility: a team leader; an outside salesperson; an inside salesperson; and, a driver/delivery person (driver). Hawaii Teamsters and Allied Workers, Local 996 (the Petitioner) seeks to represent a unit consisting of the driver and the inside salesperson at the Maui facility, excluding the outside salesperson and the team leader. The Employer takes the position that: (1) the petitioned-for unit is not appropriate because there is an insufficient community of interest between the driver and the inside salesperson; (2) that the inside sales person is a “managerial employee” and should be excluded from the unit; and, (3) that, in either event, the resulting unit or units include only one employee and,

¹ The Employer’s name has been amended in accord with the parties’ stipulation.

therefore, the petition should be dismissed on the ground that the Board will not certify a one-employee unit. While the Petitioner stipulated that a one-person unit would not be appropriate, it was not asked whether it would proceed to an election in a unit including the outside salesperson and/or the team leader.

After carefully reviewing the record, and for the reasons set forth below, I find that the inside sales person is not a managerial employee who should be excluded from the unit and that the inside salesperson and driver share a sufficient community of interest such to constitute an appropriate unit for purposes of collective bargaining. In addition, I have considered whether the outside salesperson and/or the team leader should be included in the unit with the inside salesperson and the driver and have concluded that the outside salesperson should not be included because he does not share a sufficient community of interest to warrant his inclusion in the unit and that the team leader should be voted subject to challenge because the record is insufficient to determine whether he should be excluded as a statutory supervisor or as a managerial employee.

FACTS

From its facility on Maui, the Employer sells cylinder gases, welding supplies and safety supplies to customers located on the island of Maui. The facility is housed in a building of approximately 3000 square feet, with a 650-square foot retail floor space, three offices, warehouse space, and a yard. Four employees work out of the facility: the team leader; a driver; an inside salesperson; and, an outside salesperson. The team leader reports to the Employer's Assistant Island Manager located on Oahu, the outside salesperson reports to the Employer's Sales Manager located on Oahu, and the driver and inside salesperson report to the team leader at the Maui facility.

The driver spends about 95% of his time making deliveries. He works, on average, 50 hours per week and earns regular overtime. He is paid an hourly rate of \$18 and is eligible for a quarterly bonus of \$850 based on meeting performance criteria. His day begins at 7:30 a.m., but he has the authority to start earlier or later, typically with the approval of the team leader, depending upon his delivery schedule. The driver either gets his delivery schedule in the morning or reviews it at the end of the prior day. He places his deliveries in the truck in an order that is logical to his route, completes a cylinder truck manifest, performs a pre-driving inspection, and begins his route, completing the driver trip report as he goes. On occasion, a customer calls him directly for a weekend delivery, and the driver may or may not get the team leader's approval to make the delivery. The driver and the inside salesperson are in contact with each other throughout the day, usually to determine the driver's location in response to a customer inquiry. The driver uses office space to complete his paperwork at the end of the day. He must have various licenses and certifications, is subject to random drug testing, and must attend a week-and-a-half driver's training program at the Employer's facility in Houston, Texas.

The inside salesperson works 40 hours per week and is paid an hourly rate of \$13.50. She works a regular schedule from 7:30 a.m. to 4:00 p.m., and she primarily works behind the counter in the retail section of the facility. The Employer requires the inside salesperson to have a high school diploma, computer literacy, the ability to lift 50 pounds, and good customer service skills. Her duties are clerical and customer service. She takes orders from customers who come into the store or call on the telephone, and she prepares the required paperwork for a sale. When taking customer orders, she has the discretion to charge prices within ranges established by the Employer. She functions as

the assistant for the outside salesperson, writing up quotes and orders, sending out informational packets to customers, and working to correct pricing or customer information in the system. When the team leader is away from the office—about 15% of the time—the inside salesperson typically is the only person in the office and, as a result, she is “in charge.”

The outside salesperson is responsible for developing new customers and maximizing sales to existing customers. He is generally in charge of the accounts on Maui and typically spends his time working on building customer relationships at the customers’ sites. Although he maintains an office at the Maui facility, as implied by his job title, most of his workday is spent outside the office. The outside salesperson is salaried and is directly supervised by the Employer’s Sales Manager, who is located on Oahu.

The team leader, like the outside salesperson, is salaried. The team leader reports to the Assistant Island Manager, who is located on Oahu and who, in turn, reports to the Island Manager, who also is on Oahu. The only witness at the hearing, the Employer’s Hawaii Region Manager, Dan Rogers, testified that the team leader “directs the work” of the inside salesperson and the driver at the Maui facility and spends time “managing the majority of their daily activities having to deal with customers.” The record is otherwise silent as to the team leader’s responsibilities and duties and does not address the criteria for determining whether the team leader is a supervisor as defined by Section 2(11) of the Act.²

² After the conclusion of the hearing, the Region sought the parties’ positions with respect to the supervisory and/or managerial status of the team leader. The Employer declined to stipulate that the team leader is a manager or supervisor within the meaning of the Act.

The team leader and the outside salesperson are salaried, while the driver and inside salesperson are hourly paid and are required to punch a time card. All four of the employees at the Maui facility share the same medical, dental, and life insurance benefits, which are the same benefits available to all of the Employer's Hawaii employees.³ While the Employer's witness testified that it is possible for the driver or inside salesperson to be promoted to team leader, outside sales, sales management, island management, region management, corporate management, and so on, the record is silent about whether a driver or inside sales person has ever been promoted to any of these positions.

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, not 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). 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

³ The record reflects some minor differences in pay rate, job duties, and minimum qualifications for the inside sales person and the driver. For example, the driver is eligible for a bonus under the Employer's driver incentive program, while the inside sales person is eligible for manufacturers' incentives.

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).

The Petitioner seeks to represent a unit consisting of the inside salesperson and the driver. The Employer argues that these two employees do not share a sufficient community of interest to be included in the same unit and that the resulting one-person units would be, under well-established Board-policy, inappropriate.⁴ While there are differences in pay rates, duties, and minimum qualifications for the positions of driver and inside salesperson, such differences are commonplace. The Employer's Maui facility is a small, self-contained retail unit that functions in an integrated manner in generating sales, processing sales, and warehousing and delivering the sold goods. The driver and inside salesperson both participate in this integrated retail function. Both work out of the same location, are paid hourly, have the same supervisory chain of command, share similar benefits, and punch a time clock. *See Marks Oxygen Company of Alabama, supra; Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998). Finally, I note that the record establishes that the driver and inside salesperson talk to each other, as necessary,

⁴ The Employer's position, if accepted, would preclude the inside salesperson and the driver from exercising representational rights under the Act.

throughout day to share information regarding deliveries and product. In these circumstances, I find that the driver and inside salesperson share a sufficient community of interest to be included in the same unit.

The Employer also contends that the inside salesperson should be excluded from the unit as a “managerial employee.” Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative decisions of their employer.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974) quoting *Palace Laundry Dry Cleaning*, 75 NLRB 320, 323 n. 4 (1947). As the Supreme Court stated in *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980), these employees are “much higher in the managerial structure” than those explicitly mentioned by Congress which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary.” Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has not established any set criteria for determining whether an employee is so aligned, normally an employee will be excluded as managerial only if he or she represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. The burden is on the party arguing for the exclusion of individuals from a unit on the basis of managerial status to prove that such individuals are managerial employees.

The record in the instant case is devoid of evidence showing that the inside salesperson is a managerial employee. The inside salesperson is generally responsible for making sales to customers who come into or call the retail section of the facility. She answers customer’s questions, records complaints, handles paperwork, sets up signs in the

store for sales, mails out paperwork for the outside salesperson, and accesses the Employer's computerized inventory system. The inside salesperson has access to price information negotiated by the Employer with various customers and has authority to offer customers a 10% discount off the Employer's list price on certain products. Finally, she maintains the offices' petty cash, orders office supplies, files, faxes and maintains customer accounts. In sum, there is no evidence that the inside salesperson has authority to set or effectuate policy for the Employer, set prices for product, or otherwise make operative decisions. Therefore, the Employer has not met its burden to establish that she is a managerial employee.⁵

While neither party expressly addressed their inclusion in the unit, as noted above, the outside salesperson and team leader also work out of the Employer's Maui facility. Unlike the driver and the inside salesperson, the outside salesperson is salaried, does not punch a time clock, and is supervised, not by the team leader, but by the Sales Manager located on Oahu. The same Sales Manager supervises all of the outside salespersons located on Oahu, Maui, Kauai, and Hawaii (Big Island). The driver and inside salesperson, on the other hand, must punch a time clock, are paid by the hour, and report to the team leader who, in turn, reports to the Assistant Island Manager who is based on Oahu. Thus, the outside salesperson is in an entirely different branch of the Employer's organizational hierarchy from the inside salesperson, the driver, and the team leader. While excluding the outside salesperson from the unit sought herein might, under some circumstances, have the "assuredly undesirable result" of leaving an employee without representational rights by his exclusion from the unit because such rights were apparently ignored

⁵ *CF&I*, 196 NLRB 470 (1972), is distinguishable because the inside salesmen in that case helped determine the employer's "competitive situation and the prices necessary to meet it," handled customers' emergency calls at night, and helped "determine production schedules."

by the union (see *Gateway Equipment, Co., Inc.*, 303 NLRB 340, 342 (1991)), that concern is not present here, where the outside salesperson employed on Maui appears to share a community of interest with the Employer's other outside salespersons employed on the other Hawaiian Islands and could be represented in such a unit.⁶

Finally, while the testimony reflects that the team leader "directs" or "manages" the driver and inside salesperson, that testimony was conclusory and devoid of supporting evidence. I note that, if the team leader is not a statutory supervisor, the Maui facility operates without a supervisor on the Island. While it may well be that the team leader possesses one or more of the authorities enumerated in Section 2(11) of the Act, the record does not contain any such evidence and, therefore, I cannot find him to be a supervisor. Because the record is insufficient to resolve this issue, I will allow the team leader to vote subject to challenge.

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.

⁶ I note that outside salespersons typically share working conditions unique to the classification (for example, irregular hours and expense accounts), and their exemption from state and federal overtime laws recognizes these different working conditions.

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 driver/delivery persons and inside salespersons employed by the Employer at the 340 Hookahi Street, Wailuku, Maui, Hawaii facility, excluding all other employees, outside salespersons, guards, and supervisors⁷ 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 **HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996**, 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

⁷ The record is insufficient to allow a determination to be made as to Team Leader Dan Higa's supervisory and/or managerial status. Accordingly, he will be permitted to vote subject to challenge.

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 37, 300 Ala Moana Boulevard, Room 7-245, Honolulu, HI 96850, on or before **May 19, 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,⁸ 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 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

⁸ 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.

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 **May 27, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,⁹ but may not be filed by facsimile.

DATED AT San Francisco, California, this 12th day of May, 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

⁹ 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**.