

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**AVID WASTE SYSTEMS, INC.
Employer**

- and -

Case No. 2-RC-23357

**LOCAL 813, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

Avid Waste Systems, Inc. (“the Employer”), at its 1330 Oak Point Avenue, Bronx, New York, herein its facility, is engaged in the collection and disposal of commercial, industrial and institutional waste from commercial customers.

Local 813, International Brotherhood of Teamsters, (“Petitioner”) filed this petition seeking to represent a unit of all full-time and part-time drivers, helpers, mechanics and welders, but excluding all other employees excluded under the Act. The Employer contends that it also employs “on-call” or “casual” drivers and helpers, who act as substitutes for the regularly scheduled employees, and a painter who works in a similar manner to the on call driver and helpers. The Employer, in contending that on call employees are entitled to representation pursuant to this petition, further indicated that it is willing to proceed to elections in two separate units, the first being the full-time and regular part-time employees and the second unit being comprised of the on call or casual employees, but Petitioner has not indicated a willingness to proceed in any alternate units.

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter¹ and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that the Employer, a New York State corporation, with a facility located at 1330 Oak Point Avenue, Bronx, NY, the only facility involved herein, is engaged in the collection and disposal of commercial, industrial and institutional waste from commercial customers. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$50,000 from commercial customers which themselves are directly engaged in interstate commerce.

Accordingly, based upon the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Petitioner, Local 813, International Brotherhood of Teamsters, 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 Sections 9(c) (1) and 2(6) and (7) of the Act.

5. Petitioner seeks an election among all full-time and regular part-time drivers, helpers, mechanics and welders, but excluding all other employees excluded under the Act.

¹ The briefs filed by the parties have been duly considered.

As evidenced at the hearing and in the briefs, the parties disagree on whether the on call driver and helpers should be in the petitioned-for unit, with Petitioner contending that they should be included and the Employer contending that they are casual employees and should not be included in the petitioned-for unit. The parties also disagree on the inclusion of the painter. Petitioner would exclude this position, while the Employer would treat the painter in the same manner as the other casual employees and would exclude this position from the petitioned-for unit but would place the painter in a separate casual unit. Finally, the parties disagree on the inclusion of the cash management/account receivable clerk. This position is held by the spouse of a shareholder and would be excluded on that basis by the Petitioner.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, in the absence of any disagreement that the petitioned-for unit is an appropriate unit and based on the record, I find the unit sought by the Petitioner is an appropriate unit. As to the issues presented at this hearing, I find that the on call drivers and helpers and the painter who worked an average of 4 hours in the preceding quarter have a sufficient expectancy of continued employment and are eligible to vote, while the business office clerical is excluded from the unit. To provide a context for my discussion, I will first provide an overview of the Employer's operations. Then, I will present the facts and reasoning that supports my conclusions on these issues.

I. RELEVANT FACTUAL BACKGROUND

A. Employer's Operations

The Employer is in the business of providing waste collection and recycling in the New York area serving commercial, industrial and institutional entities. The Employer is a closely

held corporation owned by three shareholders: Anthony Delbroccolo, the president of the corporation, is a 40% shareholder; Bennett Velocci, the secretary-treasurer, is a 40% shareholder of the corporation; and Gaetano Grieco, a 20% shareholder in the corporation, serves as the Employer's Operations Manager. In or around October 1, 2008, the Employer acquired John Corrieri, Inc., a related business, and the acquisition of this company added a salesman and for a short period of time one helper. Otherwise, the Employer did not retain any drivers or helpers from Corrieri.

In performing its business, the Employer enters into service agreements with various clients in and around the New York City area for the removal of waste and recyclable materials. The service agreement specifies the amount of waste and recycling to be collected from that client, and based thereon, a price is reached for this service. When the service agreement is finalized, the client is added to the pickup schedule, at which times the Employer dispatches a truck to collect the material and lawfully dispose of it. Based upon Mr. Velocci's testimony, the Employer employs drivers, helpers, mechanics, maintenance employees, a welder, a painter and a bookkeeper/biller.

The Employer operation is housed in a 10,000 square foot facility located at 1330 Oak Point Avenue in the Bronx, New York. This facility also has a separate 1,000 square foot area which is dedicated to office space. In addition to the large open area, which houses the 14 trucks used to collect waste and matter to be recycled, there is an enclosed and locked area set aside for use as a locker room where all employees change before reporting to work. There are two types of trucks used by the Employer in its business operation. The type of truck dictates the crew that is required for the collection of waste and recycled material. There is a rear loader which requires a two person crew consisting of a driver and a helper, and a roll off truck, which

requires only a driver. The roll off truck has a mechanized lift used in picking up and emptying large refuse bins or dumpsters, which the Employer maintains and provides to its clients. The Employer's facility is where the mechanics maintain and repair of the trucks and equipment.

B. Terms and Conditions of Employment

The Employer employs several drivers who work from 5 to 6 days per week on a regular full-time schedule. One driver, Joseph Aquafreddo is called a night supervisor, and one driver, Idrissa Sega, is not a full-time employee. All drivers, including Mr. Sega, have commercial drivers' licenses. The drivers are responsible for the truck they are assigned. There is a checklist that they perform, which includes checking the air pressure in the tires, the oil and lubricants. The driver will ensure that the route to which he or she is assigned is completed and all clients are serviced. The driver is also responsible for uploading the collected material at the disposal site, driving safely, the safety of the crew and returning the truck to the Employer's facility.

The helpers assist the drivers during the pickups by providing the necessary physical labor. There are also 4 helpers, Jamal Wilkinson, Efrain Diaz, Jose Lantingua and Justin Tiru, who are not employed on a full-time basis. The inclusion of these helpers and Idrissa Sega, the driver, is in dispute.

In addition to the drivers and helpers, the Employer employs two full-time mechanics who service the trucks. One of the mechanics, Ramon A. Cruz is called a mechanic/supervisor², There is one full-time welder who repairs the dumpsters, which have a life span or 18-months to 3 years, and one painter, Eric Wilson, who determines his own hours.

² The parties have agreed to permit Ramon A. Cruz and driver/night supervisor, Joseph Aquafreddo to cast challenged ballots.

Gianna Velocci the billing clerk, works Monday through Thursday from 9am to 5pm or later. She is paid \$22 per hour. She is the spouse of Bennett Velocci, the Secretary-Treasurer and 40% shareholder in the corporation. Ms. Velocci works in one of the two private offices in the office area, with the other used by the president, Anthony Delbroccolo. Her office contains files relating to payroll, retirement, the medical plan, and insurance. Ms. Velocci's responsibilities are in the area of cash management and accounts receivable. She processes checks received from the Employer's customers and she collects unpaid accounts by writing or calling the customer. Ms. Velocci does not receive a written evaluation, but receives an informal evaluation orally from her husband and Mr. Delbroccolo.

All full-time and regular part-time employees are given the same benefits, including Ms. Velocci. They receive the same health plan, 401K plan with a 50% contribution from the Employer, 4-days paid sick leave, vacation benefits computed at 2 weeks after a year of employment and additional vacation based on length of tenure, annual wage reviews and a minimum of 40 hours of work per week. The on-call employees do not receive any benefits. Company issued uniforms are worn by the drivers, helpers, mechanics and welder.

C. On Call Employees' Hours of Employment

The on call employees are on a list which is used to replace regularly scheduled drivers and helpers who are on vacation or sick leave. At times, the Employer knows in advance that it needs a replacement and at other times the need arises on short notice. The on call employees can, and have, declined an offer to work. The record regarding hours worked by on call employees consists primarily of two exhibits entered into evidence by the Employer. Employer Exhibit 1 is a list for the period from October 1, 2008 through December 31, 2008, which was generated from the Employer's payroll. It shows the total number of hours worked by employees for which they were paid an hourly rate and the number of hours they worked for

which they were paid at the overtime rate. The final column shows the total number of hours for which they were paid during that calendar quarter. Employer Exhibit 2 shows the same information for the period from January 1, 2008 through January 31, 2009. Employer Exhibit 2 does not note the hire date for employees.

Eric Wilson, the painter, does not appear on either of the Employer's Exhibits. The only record evidence regarding him is that he is only available from November to May, he chooses his own hours to work, and during the two week period preceding the February 2, 2009, hearing, he worked 5 days. Wilson is not part of the pool of on call drivers and helpers. On call driver Idrissa Sega's name does not appear on the October to December list, but he does appear on the list that runs through the end of January 2009. It appears from the record that he was hired in January 2009. Sega worked 53.5 hours in January 2009 during the few weeks he was employed. Even assuming he worked those hours in a full 4 week period, he averaged 13.4 hours work per week.

During the 13-week period from October 1, 2008 through December 31, 2008, the on call helpers worked the following hours:

<u>Employee</u>	<u>Total hours worked</u>	<u>Weekly average</u>
Jamal Wilkinson	70	5.4
Efrain Diaz	242	18.6
Jose Lantigua	52.25	4.1
Justin Tiru	126.25	9.7

II. ANALYSIS

Whether the petitioned for unit is an appropriate unit was not the subject of the hearing. The Employer, in disputing the eligibility of the on call employees, urges that I place the on call

employees in a second separate unit and that elections be ordered in both units. Petitioner did not indicate that it was willing to proceed in any alternate units. As there was no contention that the petitioned-for unit was not an appropriate unit, and based on the record, I find that the petitioned-for unit is an appropriate unit. Thus, the sole issues before me are the inclusion or exclusion of the on call driver and helpers and the painter and the accounts receivable business office clerical.

1. On call Driver and Helpers

On-call employees are eligible to vote in Board elections if they have a substantial working history, with a substantial probability of regular hiring and meet other criteria established by the Board. *Davison-Paxon Co.*, 185 NLRB 21 (1970); *Berlitz School of Languages*, 231 NLRB 766 (1977). The Board has historically included on-call employees in the unit if they regularly average four hours or more of work per week during the quarter prior to the election eligibility date. *Davison-Paxon Co.*, supra.

Petitioner, citing *Arlington Masonry Supply Inc.*, 339 NLRB No. 99 (2003) which relied on *Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979), argues that the test regarding casual employees eligibility considers factors such as the regularity and continuity of employment, the tenure of employment, the similarity of work duties, and the similarity of wages, benefits, and other working conditions. Based on the record here, Petitioner urges me to use the *Davison-Paxon* 4-hour average for the prior quarter to determine voter eligibility for the on call employees. The Employer agrees with the appropriateness of this test, but urges me to look beyond the hours worked and conclude that the on call employees share no community of interest with the regularly scheduled drivers and helpers. In this regard, the Employer states “At hand the wage structures are totally different; the hours are not even comparable; the terms and conditions of employment are as different as day is to night.”

In *Trump Taj Mahal Associates*, 306 NLRB 294, 295 (1992), the Board reviewed the case law involving whether on call employees should be included in the bargaining unit. The Board noted that while there are many formulas used in such cases dependent upon the nature of the employer's business, the most commonly used standard has been the *Davison-Paxon* standard. The Board noted that this standard is used most frequently and is used "absent a showing of special circumstances." *Supra* at 295.

While only the regularly scheduled drivers and helpers receive benefits, this record establishes that they work together, share the same supervision, have the same licensing and skills, work the same schedules and use the same locker room. It further appears that they receive an hourly wage rate which fits in the scale of the wages for the regularly scheduled drivers and helpers, albeit at the bottom of the scale. Based on all the record evidence, it is clear that the on call employees in these classifications share a sufficient community of interest to be included in the petitioned-for unit.

The only issue then is whether they have worked sufficient hours in the preceding quarter to meet the *Davison-Paxon* test, which I find is the appropriate test in these circumstances. I note that the Employer does not assert that there are special circumstances warranting application of any other standard for determining sufficient employment history. A review of the Employer's exhibits discloses that all four helpers, Jamal Wilkinson, Efrain Diaz, Jose Lantigua and Justin Tiru, worked in excess of an average of 4 hours per week for the preceding quarter. I also note that Sega, a newly employed on call driver, has averaged 13 hours per week in his first month of employment and may well also meet the *Davison-Paxon* average in the 13-week period immediately preceding this decision. Thus, I conclude that those on-call employees in the petitioned-for unit who were employed an average of four hours

per week during the calendar quarter preceding the election eligibility date are eligible voters herein.

2. *The Painter*

The Employer contends that the painter should be treated in the same manner as the on call driver and helpers. The record is very limited as to the nature and duration of the painter's employment. Eric Wilson, the painter, is not on the on call list and performs only a limited amount of work for the Employer. He is only available for work between November and May. He sets his own hours, although it appears that he works for the Employer infrequently, as his name does not appear on the 13-month list of employees which was entered in the record as Employer Exhibit 2. It also does not appear on the list of workers who were employed during January 2009.

In deciding whether Wilson is a casual employee with intermittent and irregular employment or a seasonal employee or a regular part-time employee, the Board has held that the ability to reject work is not determinative of an individual's employment status so as to exclude the individual from the unit as a casual employee. [Mid-Jefferson County Hospital, 259 NLRB 831 \(1981\)](#); [Leaders-Nameoki, Inc., 237 NLRB 1269 \(1978\)](#). Rather, the test for whether an employee is a regular or a casual part-time employee takes into consideration such factors as regularity and continuity of employment, length of employment, and similarity of work duties. [Muncie Newspaper, 246 NLRB 1088 \(1979\)](#). In short, the individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit. *Mid-Jefferson County Hospital*, supra. The standard that the Board generally applies to casual employees in determining whether they have a sufficient community of interest is

whether they regularly average 4 hours or more per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970).

Based on this record, the painter may not qualify to vote in the petitioned-for unit of the Employer's employees as he may not satisfy the hours per week average required under the *Davison-Paxon* formula. However, if he has worked an average of 4-hours per week in the 13-weeks prior to the eligibility date for voting in this election, he would be eligible to cast a ballot.

3. *The Business Office Clerical*

The Employer contends that Gianna Velocci should be included in the unit. I disagree. Ms. Velocci is a business office clerical who does not share a community of interest with the drivers, helpers, mechanics, and welders. She works in an office in a separate area of the Employer's facility. She performs solely clerical work relating to accounts receivable and the cash management of the Employer. The record fails to establish that she is plant clerical as none of her work relates to the work of the unit employees.

Moreover, Ms. Velocci is the spouse of a 40% shareholder in a closely held corporation. She is driven to work by the shareholder, keeps her own hours informally and does not receive a formal evaluation. She has a special status as the spouse of the corporate secretary-treasurer and 40% shareholder. In *NLRB v. Action Automotive*, 469 US 490 (1985), the Supreme Court affirmed the Board's practice of excluding from the bargaining unit close relatives of the owners of closely held corporations even in the absence of special job related benefits. In that case, the spouse of the corporate president, who owned one third of the shares in the closely held corporation, and the mother of the three sons who owned the shares were excluded based solely on their relationships to the shareholders.

For all of the above, I find that Gianna Velocci is not included in the petitioned-for unit.

Based on the above analysis, and the record in its entirety, I find that the following constitutes an appropriate unit for purposes of collective bargaining:

Included: All full-time and regular part-time drivers, helpers, mechanics, welders and painters employed by the Employer at its facility located at 1330 Oak Point Avenue, Bronx, NY, including on call drivers and helpers who have worked an average of 4 hours per week in the 13-weeks preceding the eligibility date herein.

Excluded: All other employees, including the billing clerk/ cash management and accounts receivable position, and professional employees, guards and supervisors as described in the Act.

NOTE: The parties agreed that Driver/night Supervisor Joseph Aquafreddo and Mechanic Supervisor Ramon A. Cruz may cast a challenged ballot.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time³ and place set forth in the notice of election⁴ to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed at the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off and all employees who meet the criteria described herein as of the date of this decision. 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 that commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but

³ Pursuant to Section 101.21 (d) of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this decision.

⁴ The Board has adopted a rule requiring that election notices be posted by an employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, the Board has held that Section 103.20 (c) of the Board's Rules requires that an employer notify the Regional Office at least five 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 No. 52 (1995).

who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit 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 commencement thereof and 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.⁵ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local 813, International Brotherhood of Teamsters.⁶

Dated at New York, New York,

March 9, 2009

/s/

Celeste J. Mattina, Regional Director,
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

⁵ In order to assure 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. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *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, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make a list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **March 16, 2009**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁶ 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, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by no later than **March 23, 2009**.