UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

DBI BEVERAGE SAN JOAQUIN Stockton, California

Employer

and Case 32-RC-5763

GENERAL TEAMSTERS LOCAL NO. 439

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on May 7, 2010, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether the petitioned-for bargaining unit consisting of all drivers employed at the Employer's facility in Stockton, California is appropriate, or whether the unit must include warehouse employees employed at the facility.[1] No other issues were raised in this matter.

I. DECISION

Based upon the record as a whole, a review of the parties' briefs, and the application of relevant case law, I find that the petitioned-for unit of drivers constitutes an appropriate unit and I will direct an election therein.

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[1] Upon review of the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
b. 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. Commerce facts: The Employer, DBI Beverage San Joaquin is a State of California Corporation with a facility located in Stockton, California where it is engaged in the business of wholesale beverage sales and delivery. During the past twelve (12) months, the Employer purchased and received goods valued in excess of $50,000 directly from sources located outside the State of California.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Accordingly, the following employees of the Employer employed at its Stockton, California facility constitute a unit appropriate for the purpose of collective bargaining with in the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers employed by the Employer at its facility located at 1401 South Fresno Avenue, Stockton, California; excluding all office clerical employees, professional employees, mechanics, merchandisers, sales department employees, route settlement clerk, warehouse employees or associates, managerial employees, guards and supervisors as defined in the Act, as amended, and all other employees.

There are approximately 20 drivers employed by the Employer in the unit found appropriate herein.

II. ISSUE

The Petitioner seeks a bargaining unit of all drivers currently employed by the Employer at its Stockton, California facility. The Employer, on the other hand, asserts that a unit of drivers is not appropriate because the Employer's warehouse associates share a community of interest with its drivers. As such, the Employer takes the position that the smallest unit consists of all drivers and warehouse employees employed at the facility. The parties agree that no other classifications are in dispute, and no party seeks to include in the bargaining unit the mechanics, merchandisers, route settlement clerk, or sales department employees employed by the Employer at the facility.

III. STIPULATIONS and EXCLUSIONS

The parties entered into several stipulations at the hearing concerning the exclusion of various classifications and individuals. The parties stipulated at the hearing that all employees within the classifications of merchandisers, mechanics and the sales department are excluded from an appropriate bargaining unit based on a lack of community of interest. The parties also stipulated that route settlement clerk Yolanda Infante is excluded from the bargaining unit based on a lack of community of interest. Lastly, the parties stipulated that delivery supervisors Sean Snell, Miguel

Soriano, and R. Buettner, and night warehouse supervisor Rudy Hernandez should be excluded from the unit as Section 2(11) supervisors. Based on the parties' stipulation that the above named individuals possess the authority to hire, fire, transfer, suspend, lay off, recall, promote, assign, reward, or discipline other employees, or effectively recommend such actions with independent judgment, I find that they are supervisors within the meaning of Section 2(11) of the Act, and they will be excluded from the unit. During the hearing, testimony was provided concerning VP/General Manager Stan Butkowski, Warehouse Manager Lester Fisher, and Distribution Manager Mike Somers, all of whom work out of the Employer's Stockton, California facility. Although the parties did not enter into stipulations concerning their status during the hearing, based on the record, I find that Butkowski, Fisher, and Somers each possess supervisory authority within the meaning of Section 2(11) of the Act, and accordingly these three individuals are also excluded from the unit.

IV. STATEMENT OF FACTS

Overview of Operations

The Employer is a California corporation engaged in the business of wholesale beverage sales and delivery from its facility located at 1401 South Fresno Avenue, Stockton, California. From this facility the Employer services the counties of Amador and San Joaquin. The Employer's current facility is approximately 32,000 square feet in size and sits approximately one mile from a second facility located on Tilly Louis Road that functions as an overflow warehouse. There is no evidence that any driver works out of the overflow warehouse. The Employer plans to move to a larger 80,000 square feet facility at 4547 Frontier Way, Stockton, California in July 2010, which will replace its facilities on South Fresno Avenue and Tilly Louis Road.

The Employer employs approximately 20 drivers at its Stockton facility and the drivers are assigned to one of three classifications: bulk drivers, side load drivers, and on-premises drivers.

Drivers work either an 8 or 10 hour shift with the possibility of overtime. Bulk drivers deliver to larger retailers and liquor stores. They report as early as 4:00 or 4:30 a.m. and work until approximately 2:30 p.m. Side load drivers deliver to smaller customers and report anywhere between 5:30 a.m. to 8:00 a.m., depending on their delivery schedule, and work until around 4:30 p.m. The on-premises drivers deliver to establishments where a consumer can drink on the premises, such as a bar or restaurant, and report to work at about 7:30 a.m. or 8:00 a.m. and work until approximately 5:30 p.m. The Employer's drivers are divided into three districts covering Amador and San Joaquin counties. The Employer has approximately 6 or 7 drivers assigned to each district and each district has its own delivery supervisor. Sean Snell is over District 1. Miguel Soriano is over District 2. R. Buettner is over District 3. The three delivery supervisors report to a district manager as well as to Distribution Manager Mike Somers. Somers reports to VP/General Manager Stan Butkowski.

The Employer employs approximately 16 warehouse associates who work out of the 1401 South Fresno Avenue facility on three separate shifts. The first or day shift warehouse associates work from anywhere between 4 a.m. to approximately 12:30 p.m. The second or mid-shift warehouse associates start anywhere between 11:00 a.m. and noon and work until approximately 8:30 p.m. The third or night shift warehouse associates start around 6:30 p.m. and work until approximately 3:00 a.m. The Employer also employs two warehouse lead employees, Auggie Barragan and Mario Pascua.[2] Barragan and Pascua, as well as the other day and mid shift warehouse employees report to Warehouse Supervisor Lester Fisher. The night shift warehouse employees report to Night Shift Supervisor Rudy Hernandez. Hernandez reports to Fisher, and Fisher reports to VP/General Manager Stan Butkowski.

[2] At the hearing, the parties agreed that Barragan and Pascua did not possess supervisory authority pursuant to Section 2(11) of the Act.

The Employer's process of delivering beverages to its customers starts with its sales department generating orders that are then forwarded to the Employer's warehouse employees who are also referred to as warehouse associates. The warehouse associates take the sales orders and build pallets of product to fill the order's specifications. Once the pallet is built, the warehouse associate loads the pallet into the appropriate truck for delivery.

Each driver enters the warehouse each day to punch in and pick up his equipment. Drivers use a handheld computer that contains their scheduled stops for the day. The driver compares the product loaded on his truck with the printed schedule from their handheld computers before leaving the warehouse. Each driver performs an inspection of his truck prior to departure. Drivers embark on their respective routes, only returning to the Employer's facility if the driver needs to reload or once their route is completed for the day. Upon their return to the facility at the end of their work day, the drivers give their handheld computers to a warehouse associate to confirm that the product delivered that day matched the delivery schedule for that day. After the driver and warehouse associate sign off on the handheld computer, the driver submits a final delivery ticket and all money that he collected during his deliveries the day.

V. ANALYSIS

A. Community of Interest

In deciding whether a petitioned-for unit is appropriate under Section 9(b), the Board has broad discretion, which reflects Congress' acknowledgment of the need for flexibility in shaping the bargaining unit to the particular case. *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944). The determination of whether a unit is appropriate for the purposes of collective bargaining turns on the degree to which the employees involved share a community of interest. When the interests of a group of employees are dissimilar from those of another group, a separate unit is appropriate. See e.g.

Engineered Storage Products Co., 334 NLRB 1063 (2001); *Swift & Co.*, 129 NLRB 1391 (1961). However, when the interests of the group in question are not sufficiently separate from the larger group, a more comprehensive unit will be required. *Carpenter Trucking*, 266 NLRB 907 (1983); *Boeing Co.,* 337 NLRB 152 (2001). The Board will first decide whether the petitioned-for unit is appropriate. *Overnite Transportation Company*, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the "smallest appropriate unit" encompassing the petitioned-for employee classifications. Id. Further, as stated in *Marks Oxygen Co.*, 147 NLRB 228 (1964), the Board's policies regarding the unit placement of drivers, including the policy announced in *E.H. Koester Bakery Co.*, 136 NLRB 1006 (1962), did not reverse basic policies regarding unit determinations including the policy that a plantwide unit is presumptively appropriate; that a petitioner's desires as to the unit is always a relevant consideration, and that it is not essential that a unit be the most appropriate unit.

In determining whether employees share a community of interest, the Board examines such factors as (1) functional integration; (2) frequency of contact with other employees; (3) employee interchange; (4) degree of skill and common functions; (5) commonality of wages, hours and other working conditions; and (6) shared supervision. *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004).

B. Review of Community of Interest Factors

1. Functional Integration and Frequency of Contact

There is certainly an element of functional integration of the work of the drivers and the warehouse associates. Warehouse associates load product onto the drivers' trucks; the drivers transport and deliver that product to the Employer's customers; the drivers transport any excess,

flawed or broken product back to the Employer's facility; and the warehouse associates check delivery trucks upon their return to the facility.

While the record evidence established that drivers and warehouse associates have daily contact, such contact is minimal and comprises only a small fraction of each employee's work day. Indeed, drivers spend less than an hour each day at the Employer's facility, with the remainder of their work time spent on their routes delivering product to customers. The drivers' interaction with the warehouse employees occurs at the end of the drivers' shifts when they arrive back at the facility and turn their handheld computers over to a warehouse associate in order for the warehouse associate to confirm the driver's delivery for the day. When the warehouse associate has completed this check, both classifications sign off on the day's order and the driver then submits to the office his documentation and money collected during the day. The testimony by drivers from all three driver classifications established that drivers are in the warehouse, at most, for ten minutes at the end of the day. If there are problems with the driver's truck, product or equipment, there is no evidence to establish that the drivers address these issues with the warehouse associate, either before or after the driver leaves on his route. The drivers take their issues to their delivery supervisor.

The only other evidence of employee contact comes in the form of the occasional facility-wide meeting or barbecue. However, these meetings or social functions are infrequent and do not establish consistent contact between employees in these two classifications.

2. Employee Interchange

The record evidence established that there is very little employee interchange at the Employer's facility between drivers and warehouse associates. Since the Employer commenced operations at the Stockton, California facility, only one warehouse associate has permanently transferred to the driver classification and that transition was not scheduled to take place until a few

days after the hearing. The Employer's assertion that the classification of warehouse associate acts as a "feeder group" for drivers is not supported by any concrete evidence. With regard to temporary interchange, the Employer provided two examples of warehouse associates who also held Class A drivers' licenses. The Employer asserts that when a delivery needs to be made to a larger retailer such as Costco or Sam's Club and no drivers are available to make the delivery, the two warehouse associates with Class A licenses can and have made those deliveries. Although the Employer provided limited direct evidence concerning these deliveries, it appears that such occurrences are limited to once or twice a month during the summer. The only other evidence of interchange involves the rare occasion when a driver is temporarily placed in the warehouse when the driver has light duty work restrictions or temporarily loses his drivers license. Again, the evidence of this is minimal and the interchange is temporary in nature. There was no evidence presented to show the reverse, i.e., that warehouse associates are ever temporarily assigned to work directly with drivers.

3. Degree of Skill and Common Functions

The record evidence established that the degree of skill and common functions of the drivers and warehouse associates are not so similar to necessitate a combined bargaining unit. Each job calls for a different skill set and requirements for hire. Pursuant to the delivery driver job description and drivers' testimony, it is clear that the duties of the Employer's driver classification includes (1) driving the Employer's product to its customers, (2) completing the sales transaction by delivering the requested product and collecting money from customers, (3) driving the Employer's trucks back to its facility at the end of the day, and (4) turning in all money received during the day to the Employer. Drivers must be at least 21 years of age and hold either a Class A, B, or C Commercial drivers' license and have 6 months to 3 years driving experience. Each of the Employer's drivers has a Class A license except for one individual who possesses a Class C license. Warehouse

associates' requirements and functions are significantly different.[3] Warehouse associates are asked to (1) put together pallets based on the orders made by the Employer's sales team, (2) load the driver's trucks with the appropriate type and quantity of product ordered by the customer, (3) operate various types of equipment in the warehouse such as forklifts, pallet jacks, hand trucks, sweepers, scrubbers and delivery trucks, (4) receive any product upon the driver's return, and (5) check in the driver's truck upon return. Warehouse associates can be hired if they are 18 years of age. They are not required to have driving experience or a Class A, B, or C Commercial drivers' license, although 6 months to 3 years of warehouse experience is preferred.

There are some similarities between the two classifications. Both use similar equipment in electric pallet jacks and hand trucks, though only warehouse associates use fork lifts. Depending on the type of truck involved, extra product can be unloaded by the driver or warehouse associate. For example, excess product will be unloaded by the bulk load driver. Yet with an on-premises truck, the warehouse associate will do the unloading. Also, on a daily basis customers will visit the Employer's facility to pick up product. Customers will either (1) go directly to a warehouse associate with their payment or (2) go to the Employer's office to pay and then provide the warehouse associate with proof of payment. Following either scenario, the warehouse associate subsequently brings the customer's product out to their vehicle. Although the Employer asserts that this is a daily occurrence, the testimony provided suggests that the warehouse employees' interaction with customers is minimal in comparison to drivers. With respect to any driving performed by warehouse associates, it is inaccurate to claim that this is a function that is engaged in regularly by warehouse employees. Rather, only occasionally do the two warehouse employees with Class A drivers' licenses drive between the Employer's facility and its overflow warehouse in order to obtain product for driver deliveries, or make other deliveries. Other warehouse employees move trucks

[3] No warehouse associates provided testimony during the hearing.

around at the Employer's facility, but there is no evidence that they leave the property. There was no evidence presented that regular delivery drivers currently perform such a duty. What is clear, though, is that these two warehouse employees and their driving duties appear to be an exception to the daily routine of all other warehouse associates.

4. Commonality of Wages, Hours and Other Working Conditions

The drivers and warehouse associates do share some common employment benefits including vision, dental, health insurance, life insurance and a 401(k) plan. Both wear the same Employer issued uniform, both are given the same amount of time for breaks and lunch; are eligible for the same safety bonus; are subject to the same corporate policies; receive annual performance reviews; are paid on an hourly basis; and are paid bi-weekly. Both classifications are paid within a range, with a starting rate, a mid-range and a maximum rate of pay. However, drivers are paid at a higher wage range, starting at $15/hour, a mid-range of $18.50/hour, and a maximum of $22/hour. Warehouse associates start at $11/hour, have a mid-range of $13.50/hour, and a maximum of $16/hour. In addition to their hourly wage rate, drivers receive compensation through a pay for performance plan. The pay for performance is dependant upon the type of truck that is driven. Bulk drivers receive one cent for each case delivered up to 1400 cases and an additional one and a half cents per case after that. Side load and on-premises drivers receive two cents per case and either 25 or 50 cents per keg delivered. Warehouse employees do not receive additional pay for performance. Drivers are also eligible for a "driver of the month" award within each district. Warehouse employees do not have a similar monthly award.

The hours for the drivers and warehouse associates are different per classification. Drivers work either an 8 or 10 hour day-shift plus approved overtime. As described previously, drivers'

hours differ depending on the type of truck that is being driven. The warehouse, on the other hand, is practically a 24-hour operation, with three shifts operating most days around the clock.

5. Lack of Shared Supervision

The organizational charts presented by the Employer show separate supervisory channels for drivers and warehouse associates. Direct testimony provided by three drivers established that the drivers receive no direction, instruction or discipline from either of the Employer's warehouse supervisors. There was no direct testimony provided to establish any cross-supervision. Therefore, the record reflects that day-to-day immediate supervision and control of matters of interest to the drivers are handled by different supervisors than those to whom the warehouse associates report on a day-to-day basis.

C. Conclusion

A review of the community of interest factors demonstrates that the petitioned-for unit of drivers is an appropriate unit for the purpose of collective-bargaining. It cannot be disputed that there is a certain degree of functional integration between the drivers and the warehouse associates as the drivers depend on the warehouse associates to load their trucks and this integration comes full circle when the drivers return to the facility and the warehouse associates essentially check in their vehicles. Yet, functional integration is but one of the elements to consider when analyzing community of interest. I find that when all factors are considered together, the lack of significant interchange, the lack of common supervision, the lack of common skills and functions, nominal daily contact and the lack of common wages, hours and other working conditions, outweighs other factors such as the basic functional integration and any minimal similarities the two classifications have in finding the petitioned-for unit of drivers to be appropriate. There are many examples of the Board finding a unit of drivers to constitute an appropriate unit apart from warehouse or production

employees. See *Overnite Transportation Co.*, 325 NLRB 612 (1998)(Board found that mechanics did not need to be included in a unit consisting of drivers where the employer argued the existence of functional integration between drivers and mechanics, drivers reported problems to mechanics, and mechanics performed limited driving); *Triangle Building Products Corp.*, 338 NLRB 257 (2002)(Driver unit found appropriate where drivers spent a majority of time away from the Employer's facility; contact with other employees is limited; joint supervision was limited); *Mc-MorHan Trucking*, 166 NLRB 700, 701 (1967)(Board found drivers had a sufficient community of interest separate and apart from a group of mechanics); *Overnite Transportation Co.*, 331 NLRB 662 (1999)(Drivers excluded from plant-wide unit where they spent most of their time away from the facility; limited evidence that drivers performed work at the facility; limited evidence that other employees performed driving); *Office Depot, Inc.*, 184 F.3d 506 (6th Cir. July 2, 1999)(Driver unit found appropriate where drivers spend their time away from the facility; drivers have their own training; drivers do not perform work of warehouse employees except when placed on light duty; and interchange was rare).

For the reasons outlined above, I conclude that the petitioned-for unit consisting of all drivers employed at the Employer's Stockton, California facility constitutes an appropriate unit.

VI. 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 be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as

strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed 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. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the General Teamsters Local No. 439.

V. ELECTION NOTICES

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

In order to insure 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 directed that two 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 Regional Director for Region 17 within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make this list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, Ronald V. Dellums Federal Building & Courthouse, Suite 300 N, 1301 Clay Street, Oakland, California, on or before **May 28, 2010**. 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. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall by department, etc.) If you have questions, please contact the Regional Office.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the

Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. (ET) on **June 4, 2010**. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov, but may not be filed by facsimile.

SIGNED at Oakland, California, this 21st day of May 2010.

/s/ Alan B. Reichard
Alan B. Reichard, Regional Director
National labor Relations Board
Region 32
Ronald V. Dellums Federal Bldg. & Courthouse
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32-1363