UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BALDOR SPECIALTY FOODS, INC.

Employer

and **Case No. 29-RC-9418**

LOCAL 202, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner[1]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Kevin Kitchen, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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

2. The parties stipulated that the Employer, a New York corporation with its principal office and place of business located at 4900 Maspeth Avenue, Maspeth, New York, is a wholesale distributor of specialty fruits and vegetables. During the past year, which period is representative of its business operations in general, the Employer purchased and received at its Maspeth facility goods and

materials valued in excess of $50,000 directly from points located outside the State of New York.

Based upon the stipulations of the parties, and the record as a whole, 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 labor organization involved herein claims to represent certain employees.

4. A question affecting commerce exists concerning the representation of certain employees.

5. The Petitioner seeks an election in a unit of all full-time and regular part-time truck drivers employed by the Employer. The Employer contends that the petitioned for unit is inappropriate. It maintains that the only appropriate unit is a wall to wall unit that includes all its warehouse employees.

The record shows that the Employer employs approximately 75 drivers. At its warehouse, it employs approximately 38 warehousemen, four captains, a transportation coordinator, a dockman, and 7 processing room employees. The Employer runs a 24 hour a day operation at its Maspeth warehouse and it employs managers for both its day and its evening shift.[2] The Employer's principal is Kevin Murphy. Reporting to Murphy are Michael Muzyk, its sales manager, and Michael Scicchitto, its comptroller. Its warehouse is overseen by Mannie Lopez and Ray Smythe, its warehouse managers for the day shift, and

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[1]The names of the Employer and the Petitioner appear as amended at the hearing.

[2] These shifts do not have set starting or finishing times.

Edwin Rodriguez, the warehouse manager for the evening shift. Eddie Valera and John Riley, the Employer's transportation mManagers, oversee the Employer's delivery operations.

Like its managers, the warehousemen work either a day or an evening shift. Approximately 30 warehousemen work the evening shift and eight warehousemen work the day shift. The warehousemen on the day shift are responsible for receiving incoming produce, stocking the warehouse and preparing it for the evening shift. They begin work at 8:00 a.m. and do not clock out until the truck delivering produce from Philadelphia has been unloaded.[3] This generally occurs at about 6:00 p.m.

While the day warehousemen are stocking the warehouse, approximately 6 or 7 processing room employees are preparing some of the produce for customers. The responsibilities of the processing room employees include cutting and peeling vegetables and breaking down some of the boxes the suppliers ship into smaller packages. They generally begin work between the hours of 8:00 a.m. and 10:30 a.m., and clock out at about 8:00 p.m. Processing room employees may perform work at the request of the warehouse managers, the sales manager or the purchasing manager.

The warehousemen on the evening shift report to the facility between 6:45 p.m. and 7:30 p.m. while the processing room employees are still on duty, and they do not leave until the final truck has been loaded. Depending upon the time of year, they may punch out at any time between 3:00 and 7:00 a.m. They work

[3] This truck is not driven by the Employer's drivers.

a five day week (Sunday through Thursday) one week, and a six day week (Sunday through Friday) the following week. The warehousemen on the evening shift are divided into four teams, each of which is headed by a captain. The captain is given a batch of sales orders along with a route sheet showing the stops a driver will be making and the order in which the stops will be made. There is one sales order for each stop, and the captain distributes the sales orders to the warehousemen on his team. The produce appears to be stored in two or three large refrigerated rooms called coolers, and the warehousemen retrieve the goods from the coolers and load them on a pallet. The work of the warehousemen is time intensive, and an efficient warehouse worker is expected to load at least 10 pallets per evening. If some of the produce that a customer has ordered has not arrived at the warehouse by the time the pallet is loaded, the missing items are noted on a "back order" sheet. If the back orders have arrived by the time the truck departs, either the driver or a warehouse employee will load these items. After a pallet is loaded, the captain inspects it and shrink wraps the produce. Then he labels the pallet and transports it to the loading dock. It appears that both the captain and the warehousemen use an electric jack or a pump jack to load and/or transport the pallet. The labels that are placed on the pallet show both the number of the truck on which it will be loaded and the order in which it will be loaded onto the truck (i.e. the fifth pallet on Truck Number 81.) The dockman reads these labels and uses an electric pallet jack to carry the pallet onto the truck.[4] The Employer may utilize as many as 70 trucks on a given

[4] The dockman generally works the same hours as the warehousemen on the evening shift. However, he does not work more than 5 days per week. On his days off, his work is performed by a warehouseman.

day, and since the loading bay can only hold 8 trucks at a time, a transportation coordinator must drive trucks into and out of the loading bay as they are loaded. It appears that some of the evening warehousemen have driven trucks from the leasing company to the Employer's facility before the transportation coordinator backs them into the loading bay. Although the Employer's witness, sales manager Michael Muzyk, testified that on a given evening, as many as eight warehousemen may drive trucks from the leasing company to the Employer's warehouse, the record does not show how many of the warehousemen working the evening shift have performed this function. Nor does it show the amount of time they spend moving vehicles.

Most of the drivers arrive at the warehouse between 3:45 a.m. and 5:30 a.m. Upon their arrival, they go to the office to retrieve their paperwork. This consists of the customer invoices, their route sheet and their back order sheet. Drivers also carry a credit book to record customer credit for undelivered or rejected items. They may spend an hour or more at the warehouse reviewing their paperwork, waiting for the dock man to load their trucks or waiting for their back orders to arrive. Approximately 20% of the time drivers will load their own back orders. The rest of the time the back orders are loaded by either the warehousemen or the dockman. Since the back orders are usually stacked along the loading dock, when drivers load their own back orders, they do not have to venture into the coolers to retrieve them. Loading backorders generally takes no more than 15 minutes. Most of the trucks hold 6 or more pallets and are expected to make 10 stops. Drivers usually work alone, but there appear to

have been some occasions in which they have been accompanied by a warehouseman. However, the record does not show the frequency with which warehousemen work on trucks. Sales manager Muzyk asserted that on occasion, more drivers are scheduled to work than there are trucks to be loaded. When this occurs, some drivers may spend their day at the warehouse unloading incoming trucks. Although Muzyk stated that this has been known to happen at least once per week, the Employer did not produce any documentation to establish more accurately the frequency with which this occurs, and it could not be determined how often, if at all, a given driver will be asked to spend his day at the warehouse. Muzyk also asserted that there are occasions in which several drivers fail, for various reasons, to appear at work. When this occurs, the Employer assigns some of its deliveries to its warehousemen. However, the record does not show how many of the warehousemen have driving licenses or how many of them perform driving duties.

Upon arriving at a scheduled stop, the driver unloads his goods and reviews the invoice with the customer. If his truck contains fewer items than the customer ordered, the driver calls the warehouse and informs it of the missing items (shorts). Since many of the customers the Employer serves are prestigious restaurants that set exacting standards, it is not an uncommon occurrence for a customer to reject an item, and drivers often have to deal with the customer's dissatisfaction. When an item is rejected the driver writes a credit memo setting forth the reasons the item was refused. The cost of that item is deleted from the invoice and the item is returned to the warehouse. As is the

case with shorts, drivers are expected to call the office when an item is rejected. Customers may pay for their deliveries in cash, and drivers are expected to record COD payments when they do so. After making all their deliveries, drivers are expected to call the office. On their route sheets, they record the time they arrived at each customer's facility, the time they left, the rejected items, the items that were missing, and the COD payments that were collected. Each day, approximately 6 drivers are assigned a second run to the Hunts Point Market, in the Bronx, New York, where the driver picks up various items. He uses an electric jack to unload these goods upon returning to the warehouse. After completing his runs, the driver turns in his truck, his paperwork and any undelivered produce. The next morning, he may address any complaints about the manner in which his truck was loaded the previous day to the warehouse managers, the captains or the warehousemen themselves.

The Employer also employs two individuals, an airport driver and a market driver, who work the evening shift. The airport driver works Sunday through Thursday, from 7:00 p.m. until at least 5:00 a.m. It appears that he picks up incoming produce from one of the area airports and transports it to the Employer's warehouse. The truck he drives is slightly larger than many of the other trucks and is specially modified to hold air cargo containers. On Friday, the airport driver's day off, either a day driver or a warehousemen drives the truck. The Employer has also asked warehousemen to drive a second truck to the airport on busy evenings. It is not clear how many of the warehousemen have

the proper license to driver the airport truck or how many of them have been assigned this task.

The market driver works Monday through Friday from 6:45 p.m. until at least 5:30 a.m. It appears that he picks up produce at the Hunts Point Market and drives it to the warehouse.

On a day to day basis, the drivers are supervised by the warehouse managers, transportation managers and the sales manager. There was testimony that all these managers have made route assignments. However, a routing employee designs the various routes, and many drivers drive the same route ever day. Edwin Rodriguez, the warehouse manager for the evening shift, discusses backorders with the drivers before they leave and Mannie Lopez, the warehouse manager for the day shift, assures that they receive the proper paperwork. Upon completing their runs, the drivers call either the transportation managers or Lopez. Upon returning to the warehouse, the transportation managers check in both the drivers' paperwork and any returned items.

Although the record shows that the warehouse managers help supervise the drivers, it does not show that the two transportation managers play a significant role in the immediate supervision of the warehouse employees.

Major personnel matters, including decisions to hire, fire, demote and grant merit increases are resolved at the Employer's weekly management meetings. Those applying for positions as drivers are interviewed by both warehouse manager Lopez and transportation manager Valera. Applicants for positions in the warehouse are interviewed by warehouse managers Lopez and

Rodriguez. The final decision on whether a driver or warehousemen should be hired is made at the management meeting.

With regard to discipline, major infractions involving the drivers may be reported by either the transportation managers or Lopez. It appears that Lopez and Rodriguez report similar misconduct among the warehousemen. However, major disciplinary decisions are generally left to the managers as a group to make at their weekly meeting.

As earlier noted, both personal loans and merit increases are also discussed at these meetings. With regard to the latter, it does not appear that employees are given written evaluations. In determining whether a warehousemen will receive a merit increase, the managers evaluate the employees' speed and accuracy. With regard to drivers, the managers evaluate their speed, accuracy, their relations with customers and their driving record (i.e., accidents).

The drivers of 22 of the Employer's 70 trucks are required to carry a commercial driver's license (CDL). It appears that drivers applying for a CDL must complete certain coursework, and the Employer pays for these classes. It has also paid for the vehicles that are used to administer the required driving test. As a result, 62 of the 75 drivers have obtained a CDL.

In addition to possessing a valid driver's license, being familiar with their route and knowing how to fill out the necessary paperwork, drivers must learn to identify the different types of produce they deliver. Thus, a newly hired driver usually spends his first two weeks on the job working in the warehouse.

Thereafter, he will often ride with an experienced driver to learn the route and the various tasks he is expected to perform.

Possibly because of their relative skill level, the rate of pay received by the drivers is considerably higher than that received by the warehousemen. Drivers are paid a starting wage rate of $10.00 to $12.00 per hour while newly hired warehousemen are paid an hourly wage ranging from $6.00 to $8.00. Like the warehousemen, most of the drivers work 5 days for one week and 6 days the following week. However, while the 5 day week for the warehousemen on the evening shift runs from Sunday through Thursday, the drivers' week runs from Monday through Friday. Although both drivers and warehousemen are given a 30 minute lunch period and a 10 minute break, the warehouse employees, or at least those on the evening shift, are required to take their breaks in two groups. In addition, the warehousemen are required to work more overtime than the drivers. Muzyk testified that on a weekly basis, the warehousemen work 10 to 15 hours of overtime. The amount of overtime assigned to drivers ranges from 2 to 6 hours per week. He calculated that when overtime is factored into their earnings, warehousemen are paid an average of $385.00 to $410.00 per week. The weekly pay received by drivers ranges from $530.00 to $580.00. During each of the last few years, the Employer's employees have received an across the board wage increase of 5% in addition to the individual merit increases discussed earlier. Drivers and warehouse employees enjoy the same fringe benefits, wear identical uniforms, share the same break room and use the same locker facilities.

It is well established that to be certifiable under Section 9 of the Act, a petitioned-for unit need not be the optimum unit. Rather, it need only be an appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950). When making unit determinations, the Board initially examines the petitioned-for unit. If it determines that the petitioned-for unit is appropriate, its inquiry ends, and it does not evaluate any competing unit contentions. Thus, it is unavoidable that the Board will accord some weight to the wishes of the Petitioner when fashioning bargaining units. Overnite Transportation Company, 325 NLRB 612 (1998).

The Board has acknowledged that truck drivers often have a "dual community of interest," with certain factors supporting their inclusion in the same unit as other plant employees and certain factors favoring their representation in a separate unit. See Pacemaker Mobile Homes, 194 NLRB 742, 743 (1971).[5] They perform certain "traditionally distinct" functions (i.e., spending most of their time on the road driving, interacting with customers) which support their representation in a separate unit. Mc-Mor-Han Trucking Co., 166 NLRB 700, 701 (1967). At the same time, their work is closely integrated with the work of the other employees at their employer's facility. This integration favors their inclusion in a more comprehensive unit. Where both a separate unit of drivers *and* a more inclusive unit are appropriate, the Board bases its unit determinations

[5] In Pacemaker, a case involving the challenge to the ballots of 7 truck drivers, the Petitioner contended that the production and maintenance unit in which the election was conducted should exclude drivers while the Employer argued that they should be included in the unit. The Board acknowledged that the sole issue in the case was whether the unit requested by the Petitioner was appropriate and sustained the challenges to their ballots.

on the wishes of the petitioning union. Pacemaker, supra; Mc-Mor-Han Trucking, supra.

In the instant case, there are some factors that favor the overall unit requested by the Employer. There is some evidence of interchange. Drivers and warehouse employees enjoy the same benefits, wear identical uniforms and use the same locker facilities. The warehouse managers play a role in the day to day supervision of the drivers, and the weekly management meetings have resulted in the centralization of many of the Employer's labor relations policies.

However, I find that the drivers' interests are sufficiently distinct to warrant their representation in a separate unit. In several ways, the work performed by the drivers differs in character from the functions fulfilled by warehouse employees. Unlike the warehouse employees, they generally work alone and spend most of their time on the road. Their job involves frequent customer contact, as they generally make at least 10 deliveries per day. Rejections are not a rare occurrence and drivers often have to bear the brunt of a customer's anger. Their work also involves various record keeping functions. They must log in when they arrive at their stops and when they depart. In addition, they must record customer credit and handle COD payments. The warehousemen, on the other hand, spend most of their time in a cooler either stocking the warehouse or picking orders. As earlier noted, even when drivers load their own backorders, they rarely have to venture into the cooler to retrieve them. With regard to the processing room employees, who prepare produce for the Employer's customers, there is little question that their work differs in character from that

performed by the drivers and the two groups of employees have virtually no work related contact.

Similarly, although a driver may speak to a warehouseman about the manner in which his truck was loaded, or he may ask a warehouseman where he can locate a certain product, drivers and warehousemen generally have little if any contact with each other throughout the day.

Although there is some commonality in the day to day supervision of the drivers and that of the warehousemen, there are also differences.[6] The transportation managers do not directly supervise the warehousemen. Although there is evidence that some warehouse employees have driven trucks, and there have been occasions in which drivers performed warehouse work, the degree of interchange is not clear from the record. The Employer's assertions in this regard were not supported by any documentary evidence, and the record does not show how many drivers work in the warehouse or how many warehouse employees are called upon to drive the Employer's trucks. As earlier noted, a CDL is required to drive many of the trucks and the record does not show how many warehousemen carry valid drivers' licenses. With respect to the warehousemen who occasionally drive trucks from the Employer's leasing company to the facility, this work does not involve the type of customer contact that is vital to the work of the delivery drivers and appears, at best, to be incidental to their duties as warehousemen.

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[6] In Mc-Mor-Han Trucking, the drivers and warehousemen shared the same immediate supervision and enjoyed identical fringe benefits. The Board found that "these factors are not so significant as to require the inclusion of all employees in a single unit," supra at 701.

In addition, the hours worked by most the drivers differ from those worked by warehousemen on both the day and evening shift. Warehousemen are required to work more overtime than drivers, their breaks are more closely regulated than those of the drivers, and they receive a considerably lower rate of pay.

In view of the above factors, in particular, because the drivers are a functionally distinct group possessing different skills and qualifications than the other employees, and noting their absence from the plant for a major part of their work day and that they do not perform warehouse or other work on a regular or substantial basis, I find that the drivers' interests are sufficiently distinct from those of the various other employees employed at the warehouse to warrant their representation in a separate unit.[7]

Accordingly, I find the following unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time truck drivers employed by the Employer excluding all warehousemen, processing room

[7] See also Cal Maine Farms, Inc., 249 NLRB 944 (1980) (shipping and receiving employees excluded from unit of drivers and mechanics.) In making this determination, I am aware that there have been some cases in which the Board found that the community of interest between drivers and other employees was so extensive as to require their inclusion in the same unit. I find these cases distinguishable. Thus, in Calco Plating, Inc., 242 NLRB 1364 (1979) a divided Board (Truesdale dissenting) found that drivers should be included in a production and maintenance unit where the drivers spent one third to one half of their time at the employer's plant, loaded and unloaded their own trucks, wrapped bumpers, put away finished inventory, and pulled inventory to load their trucks. In Boston Medical Laboratory, 235 NLRB 1271 (1978), the Board included custodial and stock room employees in a unit of drivers based upon the "frequent and varied work contacts" between these groups of employees, and their overlapping job functions. Two of the drivers spent time "making up packages for shipment" while another regularly performed shipping work and other duties. In National Health Laboratories, Inc., 239 NLRB 213 (1978), the drivers came into frequent contact with other employees, and stockroom employees made deliveries on a regular basis.

employees, captains, office clerical employees, guards and supervisors as defined in the Act.

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 employees 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. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or 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 to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 202, International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the issuance of this Decision, four (4) 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. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before February 18, 2000. No extension of time to file the 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.

NOTICES OF ELECTION

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 nonposting 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.

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. This request must be received by February 16, 2000.

Dated at Brooklyn, New York, this 11th day of February, 2000.

/S/ ALVIN BLYER

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