

organization, a factor to which, under Section 9 (c) (5) of the Act, the Board is precluded from according controlling weight. Thus the history of past bargaining on a plantwide basis, the Petitioner's more recent action in filing a petition for the plant employees, and its initial consent to a plantwide election in the case which immediately preceded the present one, demonstrate the appropriateness here of the broader unit. We therefore find that, in the circumstances of this case, only a plantwide unit, including the plant employees as well as drivers and driver-salesmen, is appropriate.

The parties disagree regarding the unit placement of city salesmen, whom the Employer would include, and the Petitioner would exclude. City salesmen, in addition to posting advertising matter and soliciting new accounts, also serve as substitute driver-salesmen, at which time they perform the same duties as the regular route men. As the city salesmen regularly perform the duties of relief driver-salesmen, we shall include them within the unit.⁵

Accordingly, we find that all employees employed at the Employer's Houston, Texas, plant, including all plant employees, maintenance men, garage and body men, retail route salesmen, wholesale route salesmen, relief drivers, ice cream route salesmen, relay drivers, special delivery drivers, and city salesmen, but excluding all office and plant clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

[Text of Direction of Election omitted from publication.]

⁵ See Foremost Dairies, Inc., 90 NLRB No. 189 (not reported in printed volumes of Board Decisions).

ABC VENDING CORPORATION AND DEE-LISH BEVERAGES, INC. *and* VENDING MACHINE AND BEVERAGE EMPLOYEES UNION (INDEPENDENT), Petitioner. Case No. 2-RC-5793. January 27, 1954

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Murray Geller, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

¹ At the hearing Dee-Lish Beverages, Inc., herein called Dee-Lish, objected to being made a party to this proceeding, on the ground that it was not named in the petition. Dee-Lish is a wholly owned subsidiary of ABC Vending Corporation, herein called ABC. Only ABC was named in the petition. However, Dee-Lish was named in and served with a copy of the order

Upon the entire record in this case, the Board finds:

1. ABC and Dee-Lish constitute a single Employer which is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.²

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.³

4. At its New York City operation, the only operation involved in this proceeding, the Employer is engaged in the manufacture of beverage syrups and popcorn, and in the retail sale of soft drinks, candy, popcorn, cigarettes, and similar merchandise. The Employer sells its merchandise through automatic candy and drink vending machines, and at stands located inter alia in theatres and other places of amusement in the New York metropolitan area. At its 43rd Street warehouse, the Employer employs⁴ (1) popcorn employees, syrup employees, and porters, who are essentially production and maintenance employees; (2) warehousemen; (3) mechanics who repair and maintain the automatic vending machines, both at the places where such machines are located and at the warehouse; and (4) truckdrivers and helpers, who deliver merchandise to the stands and automatic vending machines operated by the Employer. The Employer also employs theatre-stand attendants, who sell merchandise at the theatre stands, and certain other employees whose duties are not clearly set forth in the record, such as chargemen's helpers, who apparently engage in certain selling activities, and subway-stand attendants, who apparently sell merchandise at stands operated by the Employer at various locations on the New York subway system.

scheduling the hearing, it appeared and participated fully therein, some of the employees in the unit sought herein are on the payroll of Dee-Lish, and there is no contention that any prejudice resulted from the omission of the name of Dee-Lish from the petition. We therefore agree with the hearing officer that this objection is without merit, Hutchinson & Co., 101 NLRB 90.

The Employer also questioned the showing of interest made by Local 805, and sought to elicit information on that subject from the hearing officer. As the Board has consistently held, showing of interest is a matter for administrative determination, and is not litigable by the parties, Morganton Full Fashioned Hosiery Company, 102 NLRB 134. We are administratively satisfied that Local 805 has made an adequate showing of interest.

²Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F. of L., herein called Local 805, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 816, A.F. of L., herein called Local 816, intervened at the hearing. Contrary to the contention of Local 816, we find on the record that the Petitioner is a labor organization within the meaning of Section 2 (5) of the Act.

³The hearing officer granted the request of the Petitioner, made at the close of the hearing, that it be permitted to withdraw from the hearing, and that its name be omitted from the ballot. We are administratively satisfied that Local 816 has made a showing of interest adequate for a petitioner among the employees in the unit hereinafter found appropriate. Twentieth Century-Fox Film Corporation, 96 NLRB 1052.

⁴Some of these employees are on the payroll of ABC and some are on the payroll of Dee-Lish.

The parties agree that the appropriate unit should include all drivers and helpers, mechanics, warehousemen, porters, popcorn employees, and syrup employees employed by the Employer at its 43rd Street warehouse, and that chargemen's helpers and subway-stand attendants⁵ should be excluded therefrom. They disagree as to the unit placement of theatre-stand attendants, whom the Employer would include and the labor organizations would exclude.

All the employees in the proposed unit except the theatre-stand attendants either work at the 43rd Street warehouse or report there daily in connection with their work, and it does not appear that there are any employees at the warehouse other than clericals who are not in the agreed unit. The theatre-stand attendants, on the other hand, as set forth above, work in various theatres; there they are under the direct and constant supervision of the theatre manager, not an employee of the Employer, as well as the supervision of the Employer, exercised through periodic visits by the Employer's supervisors. Although these attendants are nominally employed out of the 43rd Street warehouse, they report for work directly to the theatre to which they are assigned. They have no contact with any of the employees in the proposed unit except the drivers and helpers, in connection with the delivery of merchandise.⁶ They work different hours than the other employees in the proposed unit, and are required to work a 6-day week, whereas the others are normally required to work a 5-day week. There has been no history of interchange between theatre-stand attendants and employees in other job categories in the proposed unit.

For at least 15 years, Amusement Clerks and Concessionaires Employees Union, Local 1115-C, R.C.I.A., A.F. of L., herein called Local 1115-C, represented the employees in the proposed unit, including theatre-stand attendants, and also other employees of the Employer and its predecessors, and executed contracts covering such employees with the Employer and its predecessors. The most recent contracts were executed on August 24 and November 20, 1951; these contracts expired by their terms on May 31, 1953. Although provisions pertaining to theatre-stand attendants were included in the same contract as provisions with respect to other employees in the proposed unit, the two groups of employees received different treatment with respect to eligibility for a bonus, wage scales, the receipt of a wage increase, paid holidays, and eligibility for a "cost-of-living" wage increase.

On July 24, 1953, the Board, pursuant to a settlement stipulation in Cases Nos. 2-CA-1748 et al., ordered the Employer inter

⁵ Subway-stand attendants are presently represented by a labor organization which is not a party to this proceeding.

⁶ About 70 percent of such deliveries are made while the theatre-stand attendants are on duty.

alia to cease recognizing Local 1115-C unless and until certified, and to cease giving effect to the foregoing contracts, or to any renewal or extension thereof.

The Employer asserts that the bargaining history establishes that theatre-stand attendants have been included in the same unit with the other employees in the proposed unit, and would on that basis include them in the appropriate unit in this proceeding. The labor organizations would exclude them from the unit on the ground that they have no community of interest with the other employees therein; they also assert that the bargaining history is not controlling, because of the Board's decision in Cases Nos. 2-CA-1748 et al., supra.

We agree that, apart from the bargaining history, there is nothing in the record to establish that the theatre-stand attendants, who are essentially retail sales employees, have any community of interest with the other employees in the proposed unit. Moreover, the Board has customarily excluded retail sales employees from units of manual employees, particularly when, as here, the sales employees are employed away from the principal place of employment of the manual employees, and there is little contact or interchange between the two groups.⁷ In view of the Board's order with respect to Local 1115-C and its contracts, we find that the bargaining history between the Employer and Local 1115-C is not entitled to controlling weight in this proceeding.⁸

Upon consideration of all the relevant factors, including the bargaining history, we can perceive in the record no persuasive reason for departing from the Board's established policy of excluding retail sales employees from units of manual employees in circumstances such as are involved herein. We shall therefore exclude the theatre-stand attendants from the unit.

We find, accordingly, that all drivers and helpers, mechanics, warehousemen, porters, popcorn employees, and syrup employees, employed by the Employer at its 43rd Street warehouse in New York, New York, but excluding chargemen's helpers, subway-stand attendants, theatre-stand attendants, office and plant clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication.]

Member Rodgers took no part in the consideration of the above Decision and Direction of Election.

⁷E.g., Tower Cleaners, 97 NLRB 376; cf. Progressive Matrix Company, 93 NLRB 383 Compare Bogalusa Motors, Inc., 107 NLRB 87, in which the Board included sales and manual employees in the same unit, when the record established the existence of a close relationship between such groups of employees.

⁸Cf. Albert's Incorporated, 91 NLRB 522.