

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

MODERN TRANSPORTATION SERVICES, INC.¹
AND TSL, LTD., JOINT EMPLOYER

Employer

and

Case 6-RC-12706

GENERAL TEAMSTERS, CHAUFFEURS AND
HELPERS, LOCAL NO. 249 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

Modern Transportation Services, Inc., herein called Modern, is engaged in the transportation of dry bulk material. TSL, Ltd., herein called TSL, is engaged in the leasing or supplying of employees to clients. TSL employs approximately 20 drivers, one mechanic, one utility employee and one clerical employee at Modern's terminal in the Green Tree section of Pittsburgh, Pennsylvania, and approximately ten drivers at Modern's terminal in Williamsport, Pennsylvania.² TSL is headquartered in Toledo, Ohio, and Modern's corporate office is located in Sewickley, Pennsylvania. The Petitioner, General Teamsters, Chauffeurs and Helpers, Local No. 249 a/w International Brotherhood of Teamsters, filed a petition, as amended, with the

¹ The name of this party appears as amended at the hearing.

² The Green Tree terminal is also known as the Rook Terminal. This terminal is comprised of a large garage building and silos located next to a rail yard. The Williamsport terminal is also known as the Avis Terminal.

National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time drivers employed by Modern and TSL at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the alleged joint employers each filed a timely brief with me.

As evidenced at the hearing and in the briefs, the parties disagree on a number of issues. The Petitioner contends that TSL and Modern constitute a joint employer. Contrary to the Petitioner, TSL and Modern contend that TSL is the sole employer of the employees at issue herein. The second issue on which the parties disagree is whether a unit limited to the drivers who work out of the Green Tree terminal is an appropriate unit. Contrary to the Petitioner, TSL and Modern assert that the only appropriate unit is one which encompasses both the drivers who work out of the Green Tree terminal and the drivers who work out of the Williamsport terminal. The parties also disagree as to the composition of the petitioned-for unit. Specifically, the parties disagree as to the inclusion of mechanic Gary Lamb, utility employee James Fallon, and clerical employee Samantha Evans. The Petitioner contends that each of these employees must be excluded from the petitioned-for unit, whereas TSL and Modern contend that these employees must be included in any unit found appropriate herein based on community of interest considerations. There is no history of collective bargaining for any of the employees involved herein. The Petitioner stated on the record that it will not proceed to an election in any unit other than the one defined in the amended petition.

I have carefully considered the record evidence and the arguments presented by the parties on these issues. As discussed below, I have concluded that the petitioned-for unit, a unit limited to drivers who work out of the Green Tree terminal, is not appropriate for the purposes of collective bargaining and that the drivers who work out of the Williamsport terminal must be included in the bargaining unit. I have also concluded that the mechanic at the Green Tree terminal must be included in the bargaining unit. Because the Petitioner will not proceed to

an election in a unit that includes either the drivers working out of the Williamsport terminal or the mechanic, I am dismissing the petition.³

To provide a context for my discussion of the issues, I will first provide an overview of the trucking operations. Then, I will present in detail the facts and reasoning that support my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

Modern is a Delaware corporation engaged in the transportation of dry bulk material with operating authority to transport materials, such as sand used in “fracing” operations to extract natural gas from gas wells. Although Modern has terminals throughout the United States, the two terminals involved in this proceeding are the only terminals that perform fracing operations. As noted, the Green Tree terminal has approximately 20 drivers, one mechanic, one utility employee and one clerical employee. The Williamsport terminal has approximately ten drivers.

TSL, a West Virginia corporation, is engaged in the business of leasing employees to companies. With respect to Modern, the record establishes that TSL interviews, screens, hires, trains and administers benefits to the drivers and other employees located at the Green Tree and Williamsport terminals.⁴ The record establishes that Modern and TSL entered into a contract in 1993 pursuant to which TSL hires employees and handles all aspects of the employment relationship, and these employees operate Modern’s equipment. The agreement further provides that TSL will charge Modern a weekly service fee for labor services.

The record establishes that the Green Tree and Williamsport terminals are approximately 175 to 200 miles apart. Operations at the Green Tree terminal commenced in

³ Because of my conclusions on these issues, I find it unnecessary to resolve either the joint employer status of Modern and TSL or the unit placement issues relating to the utility employee and the clerical employee.

⁴ TSL also services Modern terminals in Meadville, DuBois and Butler, Pennsylvania, but these locations do not haul sand.

May 2008. The drivers who work out of that terminal haul sand used in the drilling process to frac wells, which are natural gas wells. As of the time of the hearing, the Green Tree terminal also employed one mechanic, one utility employee and one clerical employee. Due to the customer base located north of Pittsburgh, a second facility was opened in Williamsport in late April 2009.

The Green Tree and Williamsport terminals are under the overall supervision of General Manager of Frac Division Michael Frisco. Reporting to Frisco is Terminal Manager Rick Shaner.⁵ Frisco spends at least one day per week at the Williamsport facility. The record reveals that since the Williamsport terminal opened Shaner has only been physically present there on a few occasions, but he is in daily telephone contact with the terminal. There are no other supervisors working at the Williamsport terminal.

All employee relations matters at both locations are the responsibility of TSL Vice President Brian Benner, who works at TSL's corporate headquarters in Toledo, Ohio. Thus, discipline beyond the warning stage, including any discharges, is the responsibility of Benner.⁶ In addition, all employee benefits, FMLA, workers compensation and other employee relations matters are handled by Benner. The record establishes that the same individual at TSL's corporate headquarters processes the payroll for both the Green Tree and Williamsport terminals. Personnel records for both of these terminals are maintained at TSL's office facility in Midland, Pennsylvania.

All calls from customers come to Terminal Manager Shaner or, at times, to General Manager Frisco at the Green Tree terminal. Shaner then distributes the loads between the two

⁵ Shaner's correct title is unclear in that he is referred to in the record as both Terminal Manager and "Supervisor." Frisco is also referred to in the record as Terminal Manager, but testified that his title is General Manager of Frac Division. The parties stipulated that Frisco and Shaner are supervisors within the meaning of Section 2(11) of the Act based on their authority to discipline employees and/or effectively recommend discipline.

⁶ The parties stipulated that Benner is a supervisor within the meaning of Section 2(11) of the Act based on his authority to hire and fire employees.

terminals depending on customer needs. He also determines which driver will haul the load, taking into account all applicable Department of Transportation regulations. Shaner personally notifies the drivers at the Green Tree terminal of their assignments. For the Williamsport drivers, Shaner conveys instructions to the lead driver at the Williamsport terminal, Andy Weslan, who then communicates the instructions to the Williamsport drivers.⁷

There is no distinction between the Green Tree and Williamsport terminals in either the type of trucks or trailers utilized or in the skills and duties of the drivers. All drivers are required to maintain a commercial driver's license (CDL), Class A; and all drivers must be skilled in operating the pneumatically controlled trailers. The record reflects that this skill is unique to the work involved in operating the trailers involved in the delivery of sand to the natural gas wells. One of the witnesses called by the Petitioner testified that although he was an experienced tractor trailer driver, specific training was required in order to operate the pneumatic trailer.⁸

Both terminals operate 24 hours per day, seven days per week. Drivers are called to haul loads at any time of the day or night to meet customer needs. Thus, the drivers working out of either the Green Tree or Williamsport terminals do not work a set schedule. It appears that none of the drivers from either terminal has assigned routes.

The driver's daily duties begin with a pre-trip inspection of the equipment. The driver then waits in line until sand is loaded into the trailer at the terminal. Once loaded, the driver drives to the site of the natural gas well, which is generally located in a remote area.⁹ At the site

⁷ The record establishes that Weslan spends 80 percent of his time driving to and from customer sites to deliver sand. There is no contention or evidence that Weslan has any supervisory authority within the meaning of Section 2(11) of the Act.

⁸ The record indicates that all drivers were required to attend a training session on operation of the pneumatic trailer before being permitted to operate the equipment.

⁹ The driver reaches the well sites via dirt roads.

the driver may wait for a period of two and one-half hours to three days¹⁰ to unload the sand,¹¹ after which he will return to one of the two terminals, as determined by Shaner. Each trip is followed by a post-trip inspection.

The record reflects that drivers from both the Green Tree and Williamsport terminals regularly travel between terminals, and haul sand from either terminal. They also haul loads of sand to the same wells. The two Green Tree drivers called as witnesses by the Petitioner acknowledged that they have picked up loads at the Williamsport terminal on many occasions. For example, one of the drivers testified that he and most of the Green Tree drivers had worked with all of the Williamsport drivers when delivering sand to a large well site in Troy, Pennsylvania. During the detention time on that job, which ranged from four hours up to one day, the drivers mingled together. On another occasion when this particular driver was transporting an oversized piece of equipment and required an escort service from the well site, one of the Williamsport drivers drove to the site in a pickup truck to escort him back to the terminal.

The record contains documentary evidence consisting of numerous daily logs¹² of drivers from both the Green Tree and Williamsport terminals for various weeks during the months of April, May, July, August and September 2009. These logs establish that on numerous occasions the Williamsport drivers have worked out of the Green Tree terminal for successive days. In addition, the driver logs reflect that Green Tree drivers have on numerous occasions worked out of the Williamsport terminal for days at a time. The driver logs also show that on occasion drivers begin at one terminal, travel to the other terminal, and then end the day

¹⁰ The time spent waiting to load and unload is referred to as detention time. During this time, drivers from both facilities often communicate with each other.

¹¹ The driver may be directed to unload sand into a particular bin of the equipment known as the sand king, where different grades of sand are stored.

¹² Drivers are required to maintain such logs pursuant to Department of Transportation regulations.

at the first terminal. On other trips a driver will start out at one terminal, travel to the other terminal and return home the following day.

The drivers employed out of both terminals, as well as the mechanic, utility employee and the clerical employee have uniform benefits. Thus, Employees at both facilities have the same health, dental, vision and accidental death and dismemberment insurance. Vacation benefits are also identical. The mechanic and the utility employee are paid approximately \$16.25 per hour and the clerical employee is paid approximately \$14.25 per hour. Until November 1, 2009, the drivers at both the Green Tree and Williamsport terminals were paid \$18 per hour. On November 1, 2009, the pay scale for drivers changed. The wage rate of all drivers was reduced to \$15 per hour after the first hour of detention time, plus 25 percent of the profit on each load. The record indicates that Frisco, Shaner and other officials met with drivers at the Green Tree terminal to discuss this change. Frisco also met with the drivers at the Williamsport terminal to discuss the change and compensation.

A TSL handbook is issued to all of the employees at the Green Tree and Williamsport terminals. The handbook is enforced by Shaner, Frisco and, ultimately, Benner.

II. THE APPROPRIATE UNIT

It is well settled that a single location unit is presumptively appropriate for collective bargaining. D & L Transportation, Inc., 324 NLRB 160 (1997). When a union seeks a presumptively appropriate single location unit, it is the employer's burden to present evidence rebutting the presumption that such a unit is appropriate for collective-bargaining purposes. E.g. Trane, 339 NLRB 866 (2003); Cargill, Inc., 336 NLRB 1114 (2001); R. B. Associates, 324 NLRB 874 (1997). To rebut the presumption, the employer must demonstrate that the single-facility unit has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. Trane, supra; Cargill, Inc., supra; J & L Plate, Inc., 310 NLRB 429 (1993). However, the Board "has never held or suggested that to rebut the presumption, a party must proffer 'overwhelming evidence . . . illustrating the complete

submersion of the interests of employees at the single store,' nor is it necessary to show that 'the separate interests' of the employees sought have been 'obliterated.'" Trane, supra, at 867, citing Petrie Stores Corp., 266 NLRB 75, 76 (1983).

To determine whether a single-facility presumption has been rebutted, the Board examines a number of community of interest factors, including (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions and working conditions; (3) degree of employee interchange; (4) distance between locations; and (5) bargaining history, if any exists. Trane, supra; Cargill, Inc., supra; J & L Plate, Inc., supra.

To prevail in its argument that a single-location unit is not appropriate, particularly in circumstances where a geographical separation between or among locations exists, where there is an absence of any bargaining history, and where no labor organization is seeking to represent a more comprehensive unit, a crucial factor is whether the employer has affirmatively established a lack of local autonomy over labor relations. The extent of evidence sufficient to establish a lack of local autonomy is determined on a case-by-case basis and is inextricably intertwined and must be analyzed with the degree of the presence or absence of evidence supporting or not supporting other aspects of the presumption.

The presumptive appropriateness of a petitioned-for single location unit has been rebutted where the evidence demonstrated the complete lack of any separate supervision or other oversight at the petitioned-for location and where the evidence further demonstrated common supervision at all facilities, centralized control over daily operations, identical skills, duties and other terms and conditions of employment among employees and regular contact between employees employed at the facilities. These factors, in the Board's view, outweighed several factors which favored the single-facility presumption—geographical distance and lack of specificity as to the level of interchange. E.g. Trane, supra; Waste Management Northwest, 331 NLRB 309 (2000); R & D Trucking, Inc., 327 NLRB 531 (1999).

Conversely, the Board has also held that where local autonomy exists, the evidence of centralized administration, operational integration, common benefits and personnel policies, common job classifications, and centralized direction of labor policy, including top level constraints on local supervision, are insufficient to rebut the finding of the appropriateness of a single-facility unit. E.g. Cargill, Inc., supra; J & L Plate, Inc., supra; Red Lobster, 300 NLRB 908, 912 (1990); Bowie Hall Trucking, 290 NLRB 41 (1988); New Britain Transportation Co., 330 NLRB 397 (1999); AVI Foodsystems, Inc., 328 NLRB 426 (1999); Esco Corp., 298 NLRB 837 (1990).

For example, in Cargill, the Board found that local autonomy was established where, unlike here, each facility had its own supervisory staff who made assignments, supervised work, scheduled maintenance inspections, scheduled vacations, imposed discipline and handled employee complaints. In New Britain Transportation Co., local autonomy was found to exist where local dispatchers set schedules, approved time off, and training was conducted on a site to site basis. In Esco Corp., the Board found sufficient local autonomy even in the absence of a statutory supervisor assigned to the site sought by the petitioner in that case. However, the Board found significant the fact that the employer relied on a leadman to oversee the operations at the petitioned-for warehouse operation. The Board relied on this “limited local autonomy” in addition to the facts that there was little or no contact between employees of the two facilities.

Unlike the facts in Esco Corp., the record here shows that Frisco is present at the Williamsport terminal at least once each week, and lead driver Weslan does not oversee operations. Rather, Shaner determines all assignments which are then communicated to Weslan who, in turn, merely communicates the assignments to the other drivers. As noted above, Weslan spends 80 percent of his time driving the tractor trailer in the sand hauling operations.

Analyzing the facts presented here in light of the applicable criteria that a single-location unit is presumptively appropriate unless it has been so effectively merged into a more

comprehensive unit, or is so functionally integrated that it has lost its separate identity, I find that burden of presenting evidence rebutting the presumption has been met in the instant case.

This case is factually similar to Dayton Transport Corp., 270 NLRB 1114 (1984) where the Board found, contrary to the regional director, that the single location unit presumption was rebutted based on the highly integrated nature of the operation, centralized personnel and labor relations and the frequent temporary interchange of drivers and equipment. In that case, the Board found that the employees' interests at each terminal had been effectively merged into the more comprehensive unit such that the terminals at issue could be said to have lost a significant portion of their individual identity.

Here, the Williamsport terminal appears to be an outgrowth of the Green Tree terminal and, based on the record evidence, it lacks an individual identity. The Williamsport terminal is managed from Green Tree. Drivers working out of the Williamsport terminal receive their assignments from Green Tree, where all customer orders are received. All of the drivers are directly supervised by Frisco and Shaner. Overall, the record demonstrates that the operation of Williamsport terminal is completely dependent on the operation of the Green Tree terminal.

In sum, the record demonstrates that there is centralized control over daily operations and common supervision in that Frisco and Shaner are responsible for meeting customer demands, scheduling and assigning runs and handling minor disciplinary matters. Centralized control over labor relations is also established in that wages, benefits, employment policies are all established by TSL's corporate office, and are uniformly applied at both terminals. The drivers at both the Green Tree and Williamsport terminals utilize the same equipment to perform the same work, often for the same customers, which requires them to be identically licensed and skilled. Interchange and interaction among drivers from the two terminals occurs regularly. The record demonstrates that since the Williamsport terminal opened, drivers from this terminal often work out of the Green Tree terminal, and drivers from the Green Tree terminal work out of the Williamsport terminal. Finally, there has been no bargaining history for any of the employees involved herein. Such factors are sufficient to overcome the single location unit

presumption in the circumstances presented here. I am cognizant that the geographic separation between the Green Tree and Williamsport terminals is significant. However, the evidence of regular interchange between the two sites and the other factors detailed above outweigh the geographic distance between terminals. See, e.g., Trane, supra at 868.

Based on the entire record and having considered the factors relied upon by the Board, I find that the single location unit sought by the Petitioner is rendered inappropriate for collective bargaining. Accordingly, inasmuch as the Petitioner has stated that it is not willing to proceed to an election in any unit other than the unit set forth in the amended petition, I am dismissing the petition.

III. UNIT PLACEMENT OF THE MECHANIC

Notwithstanding my determination with respect to the appropriateness of a multi-facility unit, I shall also address the unit placement of mechanic Gary Lamb. Lamb was one of the original drivers employed at the Green Tree terminal when it opened in May 2008. From about March to July 2009, Lamb worked in the terminal yard at night organizing equipment for the drivers. For the past three to four months, Lamb has been the mechanic at the Green Tree terminal. The record indicates that TSL initiated the most recent change in Lamb's duties because there was no mechanic at the terminal, and either Shaner or the drivers had to perform the necessary light maintenance duties.

Lamb primarily services the trailers utilized by the drivers.¹³ For example, Lamb replaces lights and hoses, and performs some brake work. Lamb also handles other duties, including metal fabrication. Major repairs are not performed by Lamb; rather, such repairs are sent to outside vendors from the Green Tree terminal.¹⁴ Lamb has followed drivers in a separate vehicle when they drop off equipment for repair with an outside vendor in order to transport them back to the Green Tree terminal.

¹³ Modern owns most of the trailers utilized in the operation, whereas the tractors are leased.

¹⁴ The record establishes that Lamb is not Automotive Service Excellence (ASE) certified.

Lamb is hourly paid at a rate comparable to the rate paid to drivers, and he receives all of the same benefits as the drivers. Like the drivers, Lamb is supervised by Shaner. Lamb uses the same break room at the Green Tree terminal as is used by the drivers. Lamb maintains his CDL, Class A because he occasionally works as a backup driver. The record indicates that during the month preceding the hearing in this matter Lamb worked as a driver hauling loads two to three times.¹⁵ In addition, Lamb regularly moves tractors and trailers around the terminal yard and must possess a CDL to perform this work.

Drivers can request repairs in one of two ways. The driver can fill out a vehicle inspection report for repairs and give it to Lamb or place it in his mailbox at the Green Tree terminal. Otherwise, the driver can orally explain the problem to Lamb. The record indicates that sometimes drivers experience problems requiring Lamb's assistance several times per week. At other times, the drivers may have no problems for a few weeks. On occasion, drivers interact with Lamb while Lamb performs repair duties. Lamb initials the vehicle inspection report when he completes the needed repairs. Lamb also attends some of the safety meetings attended by the drivers.

In Carpenter Trucking, 266 NLRB 907 (1983) the Board reversed the regional director's exclusion of mechanics from a unit of drivers noting the common supervision, the fact that the mechanics occasionally drove the employer's trucks and that the drivers assisted the mechanics in performing major repairs. While I note that no major repairs requiring teamwork are performed at the Green Tree terminal, I find that Lamb, the only mechanic at the facility,¹⁶ and the drivers are commonly supervised and share virtually identical terms and conditions of employment. Moreover, Lamb has no specialized mechanical skills or training. He performs minor maintenance and occasionally works as a driver. In addition, Lamb's work is functionally

¹⁵ On these occasions Lamb was paid the same rate as would be paid to a driver.

¹⁶ There is no mechanic at the Williamsport terminal.

related to the work of the drivers and he has regular contact with the drivers at the Green Tree terminal. In these circumstances, I find that Lamb shares a community of interest with the drivers so as to require his inclusion in the unit of drivers. See also, Courier Dispatch Group, 311 NLRB 728 (1993). Cf. Overnite Transportation Co., 322 NLRB 723 (1996) (Board excluded mechanics from drivers unit based on their specialized skills and training, separate supervision, different work hours and lack of regular interchange.)

IV. FINDINGS AND CONCLUSIONS

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. TSL and Modern are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the asserted Joint Employer.
4. No 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.

V. ORDER

The petition in this matter is dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **December 28, 2009**. The request may be

filed electronically through E-Gov on the Agency's website, www.nlr.gov,¹⁷ but may not be filed by facsimile.

Dated: December 11, 2009

/s/Robert W. Chester

Robert W. Chester, Regional Director

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¹⁷ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.