

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 27, 2004

TO : Irving E. Gottschalk, Acting Director
Region 30

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Transpersonnel, Inc. and 177-1650-0100
Menasha Transport, Inc. 347-4040-3333-3333
Case 30-CA-16150 420-1218
420-2900
420-2915
420-2933
420-2963
420-5000
420-5068
440-1760-9067-9200
440-1760-9067-9267
518-4040-6700
518-4040-6733-3300
524-5012-6000
524-5012-7000
530-6067-4022-4800
596-0420-5500

These cases were submitted for advice as to 1) whether a transport company and the leasing company that supplied it with drivers represented by the Union were joint employers; 2) if the two were joint employers, whether the employers violated Section 8(a)(3) by transferring bargaining unit work to other locations and violated Section 8(a)(5) by failing to provide the Union with notice of an opportunity to bargain the decision and its effects; 3) whether the employers unlawfully failed to offer bargaining unit employees jobs at the new locations; 4) whether the employers unlawfully closed its Wisconsin facility; 5) whether the new locations constituted an accretion to the Wisconsin facility; 6) whether the employers unlawfully recognized and executed a collective bargaining agreement with a second union; 7) whether the second union violated Section 8(b)(1)(A) and (2) by accepting unlawful assistance from the employers; and 8) [FOIA Exemptions 2 and 5 .]

We conclude that the transport company and the leasing contractor are not joint employers and, therefore, neither

the user employer nor the supplier employer violated Section 8(a)(5) by failing to bargain over the the user employer's decision to transfer bargaining unit work to service its new facilities. We also conclude that the transport company lawfully closed its Wisconsin facility; that the new facilities are not an accretion to that facility; and, therefore, the leasing contractor did not violate 8(a)(2) by recognizing a second union, and the second union did not violate 8(b)(1)(A) and (2) by accepting unlawful assistance. Finally, we agree with the Region that the leasing company unlawfully failed to consider bargaining unit drivers for positions at the new facilities.¹

FACTS

Menasha Transport, Inc. (MTI), located in Green Bay, WI, is in the business of transporting by truck paper products and other materials for Menasha Corporation and other non-affiliated companies throughout the Midwest.² MTI does not use its own drivers. Rather, for approximately 30 years, MTI has contracted with leasing companies to provide MTI with drivers. Each contractor has recognized Paper, Allied-Industrial, Chemical, and Energy Workers International Union (PACE) as the exclusive collective bargaining representative of this Green Bay area bargaining unit of drivers.

Transpersonnel (TP), located in Milwaukee, WI, hires and leases drivers to trucking companies. In 1999 TP took over the leasing operation in Green Bay and has since leased drivers to MTI. The parties' leasing agreement is a typical "cost-plus" agreement; MTI pays TP for all driver expenses, plus a \$40 per week premium (per employee). TP voluntarily recognized PACE as the representative for Green Bay drivers and adopted, with only a few changes, the prior lessor's collective bargaining agreement.³

In Spring 2002, MTI opened a facility in Porter, IN. MTI contracted with TP to hire and provide MTI with drivers to work out of that location. Porter drivers operate along

¹ [FOIA Exemptions 2 and 5 .]

² Menasha Corporation and MTI are separate entities.

³ The Green Bay unit was made up of the approximately 40 drivers "employed by the [supplier] Employer and who are assigned to perform services for Menasha Transport, Inc."

some of the same routes and deliver the same kinds of products to some of the same MTI customers as did Green Bay drivers. Unlike Green Bay drivers, who are on the road for several days at a time and drive trucks with sleeping compartments, Porter drivers are only on the road during the day. PACE learned of the Porter facility after drivers reported to PACE that MTI was operating there; MTI did not formally advise PACE that it intended to open, or had opened, the Porter facility. In July 2002, PACE filed grievances seeking accretion of the Porter drivers into the Green Bay unit, but TP denied both grievances.

In Fall 2002, MTI opened a facility in Kalamazoo, MI, and again contracted with TP to hire and provide drivers to work out of that facility. Like the Porter drivers, Kalamazoo drivers operate along some of the same routes, delivering the same kinds of products to some of the same customers as the Green Bay drivers. Unlike Porter drivers, and similar to Green Bay drivers, Kalamazoo drivers are on the road for several days at a time and, therefore, drive trucks equipped with sleeping compartments. MTI did not formally advise PACE that it was operating out of Kalamazoo; as with the Porter facility, the Union learned of the operation based on drivers' observations.

At the end of November 2002, Teamsters Local 164 (Teamsters) organized the Kalamazoo drivers. All seven (7) Kalamazoo drivers signed Teamsters authorization cards and on November 27, after an employer authorization card check, TP recognized Teamsters as the representative for the Kalamazoo drivers. TP and Teamsters entered into a collective bargaining agreement covering Kalamazoo drivers on January 19, 2003. The agreement is a supplement to the national agreement between TP and the International Brotherhood of Teamsters covering TP drivers around the country.

In early 2003, Teamsters attempted to organize the approximately 50 Porter drivers and on February 18, 2003, filed a petition to represent those employees. The Region has blocked the processing of the petition, pending resolution of the instant charges.

In March 2003, MTI announced its intention to close the Green Bay facility by the end of April. TP advised PACE and the Green Bay drivers that it would not operate out of Green Bay after MTI closed its facility there. MTI has closed its Green Bay facility but continues to operate out of Porter and Kalamazoo. MTI recently announced, however, that it will cease doing business no later than March 8, 2004, and will close both the Porter and Kalamazoo facilities as it winds down its operations.

ACTION

We conclude that MTI and TP are not joint employers and neither violated Section 8(a)(5) by failing to bargain over the decision to transfer bargaining unit work to service the user employer's new facilities. We also conclude that MTI lawfully closed its Wisconsin facility; that the new facilities are not an accretion to the existing facility; and, therefore, TPI did not violate Section 8(a)(2) by recognizing a second union, and the second union did not violate Section 8(b)(1)(A) and (2) by accepting that recognition. Finally, we agree with the Region that TPI unlawfully failed to consider bargaining unit drivers for positions at the new facilities. Accordingly, the Region should dismiss all allegations related to any purported joint employer relationship, and allegations related to accretion. The Region should issue complaint, absent settlement, regarding TP's failure to consider Green Bay drivers for positions in Kalamazoo and Porter.

I. MTI and TP are not joint employers.

To establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment.⁴ The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.⁵ The essential element in this analysis is whether a putative joint employer's control over employment matters is *direct and immediate*.⁶

Whether two separate entities exert sufficient control over one group of employees to be treated as joint

⁴ Airborne, 338 NLRB No. 72, slip op. at 1, fn. 1; M.B. Sturgis, Inc., 331 NLRB 1298, 1301 (2000); NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982); Riverdale Nursing Home, 317 NLRB 881, 882 (1995); Laerco Transportation, 269 NLRB 324 (1984).

⁵ Airborne, 338 NLRB No. 72, at 1, fn. 1; M.B. Sturgis, 331 NLRB at 1301; Riverdale, 317 NLRB at 882, citing TLI, Inc., 271 NLRB 798 (1984).

⁶ Airborne, 338 NLRB No. 72, at 1 fn. 1, TLI, 271 NLRB at 798-799 (emphasis added).

employers under the NLRA is a factual question depending largely on such factors as the supervision of the employees' day-to-day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, and issuance of operating instructions.⁷ A user employee will not be deemed a joint employer solely by "routine" direction of supplied employees.⁸ More extensive supervision and direction of supplied employees may, however, be sufficient to support joint employer status.⁹

The Board will not find joint employer status where the putative joint employer merely instructs employees what, where and when to perform certain tasks (i.e. merely limited to routine direction), and does not involve itself with the details of how those tasks should be performed.¹⁰

⁷ Boire v. Greyhound Corp., 376 U.S. 473 (1964); Browning-Ferris, above, 691 F.2d at 1121-23; W.W. Grainger, Inc. v. NLRB, 860 F.2d 244, 247 (7th Cir. 1988). The "joint employer" and "single employer" concepts are distinct, therefore, the Board uses different tests to determine each. When determining whether two entities are in fact a single employer, the Board considers (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. The two concepts approach the issue of "who is the employer" from two different viewpoints and should not be used interchangeably. Browning-Ferris, 691 F.2d at 1122, citing Boire v. Greyhound.

⁸ See, e.g., TLI, above, 271 NLRB at 799 (user foreman instructed supplied employees as to which deliveries were to be made but drivers selected their own routes; user reported misconduct to supplier which investigated and imposed discipline.).

⁹ See, e.g., M.B. Sturgis, above, 331 NLRB at 1301-1302 (user employer assigned jobs, directed work to be performed and had authority to discipline as it "saw fit"); W.W. Grainger, Inc., 286 NLRB 94, 96 (1987), enf. denied and order vacated, 860 F.2d 244 (joint employer of contractor's drivers found where employer exercised "complete and exclusive control over [their] daily work activities.").

¹⁰ Island Creek Coal, 279 NLRB 858, 864 (1986); TLI, above, 271 NLRB at 799.

"Telling an employee where to perform, or what work to perform, at a given time or a given location is certainly not the type of supervision that would make the employer an employer of the employee performing the work. This is merely routine direction of where to do a job rather than how to do the job and the manner in which to perform the work."¹¹ Thus, the Board will not find users and suppliers to be joint employers where the user employers do little more than dispatch employees and have little or no say in hiring, firing, or discipline.¹²

¹¹ 279 NLRB at 864.

¹² See Laerco Transportation, 269 NLRB at 325-326 (no joint employer relationship even though user employer gave drivers initial instructions, told drivers what routes to follow, and attempted to resolve minor problems with drivers; user's day-to-day supervision of drivers was extremely routine, drivers merely followed predetermined routes, and user referred all major problems to the supplier employer); TLI, 271 NLRB at 798-799 (Board rejected ALJ's finding that the user and supplier were joint employers; user's supervision was routine and limited; user did not hire, fire, or discipline drivers; user gave the supplier, not the driver, an "incident report" when a driver's conduct was reported and supplier determined whether discipline was appropriate); United States Steel, 270 NLRB 1318, fn. 3, 1321 (1984) (user's control over supplied employees was incidental to the parties' cost-plus agreement; all terms and conditions were covered by a collective bargaining agreement between the user and the drivers' collective bargaining representative and user employer had no role in collective bargaining, grievances, etc.); Island Creek Coal, 279 NLRB at 864 (cost-plus agreement did not establish joint employer relationship where supplier did its own hiring and firing, paid wages and benefits, and administered the grievance procedure of the union bargaining agreement; user's assignment and direction was too routine to be meaningful and failed to sustain the assertion that the user and supplier were joint employers); Goodyear Tire & Rubber Co., 312 NLRB 674, 686, 690 (1993) (user employer did not provide direct supervision of supplied over-the-road truck drivers where drivers were trained and knowledgeable about safety rules, logging requirements, runs; drivers were responsible for their own conduct while on the highway they

The evidence establishes that TP, alone or through negotiations with drivers' collective bargaining representatives, determines employees essential terms and conditions of employment. The evidence fails to show that MTI's assignment and direction of supplied drivers is anything more than extremely routine dispatching of equally skilled employees who are familiar with MTI's routes and customers.

Historically, the supplier employers and the unions representing employees driving for MTI, and not MTI, have determined drivers' terms and conditions of employment. MTI has never been involved in labor relations: MTI has never been involved in collective bargaining, grievances, or related matters. TP hires, fires, and disciplines employees; there is no evidence that MTI makes any effective recommendations, or otherwise plays any meaningful role in these areas.¹³ Green Bay area drivers have long been represented by a union; the unions and the supplier employers, including TP, have entered into successive collective bargaining agreements covering almost every aspect of employees' working conditions, including wages, grievances, vacation, benefits, and procedures for equipment failure. Drivers' wages are set by the collective bargaining agreement between the supplier and the union and there is no evidence that MTI and TP, or any other supplier employer, have jointly negotiated drivers' wages and benefits.

There is also no evidence that MTI has the authority to exercise or actually exercises meaningful, direct, and immediate control over employees' working conditions. MTI leases its trucks from a third party. Drivers pick up

were responsible for their own conduct; supplier took whatever steps were necessary to correct a shortcoming).

¹³ There is some evidence that MTI representatives may have participated in hiring. For example one PACE witness claims that MTI representatives were present during interviews; another PACE witness, however, stated unequivocally that MTI has no role in hiring. This evidence does not establish that MTI meaningfully affects TP's hiring decisions. In addition, while the leasing agreement gives MTI the authority to terminate an employee's assignment to MTI, there is no evidence that MTI has the authority to terminate the employee's employment with TP, which contracts with other users.

their trucks from the lessor's location and contact an MTI dispatcher for their assignments. MTI's contact with drivers consists of mere destination dispatching. After receiving their assigned destinations, drivers make deliveries along their routes and, depending on their starting location, return one to four days later. Drivers may call MTI dispatch when they have empty loads, but there is no evidence that drivers must contact dispatch, or that they must call under certain conditions or within a certain period of time, etc. There is also no evidence that dispatchers give detailed instructions to drivers while they are making their pick-ups and deliveries.¹⁴

¹⁴ See Laerco, above; TLI, above; Goodyear, above. Pacemaker Driver Service, Inc., 269 NLRB 971 (1984), enfd. sub nom. Carrier Corp. v. NLRB, 768 F.2d 778 (6th Cir. 1985) and Browning-Ferris Industries, 259 NLRB 148 (1981), enfd. 691 F.2d 1117, are distinguishable. In Pacemaker "working conditions were considered management decisions made by the supervisory personnel of [the user employer] and it was in the best interest of the . . . drivers to adhere to those management decisions[.]" Moreover, the supplier employer advised drivers in writing that their jobs depended on such adherence. In addition, the user and supplier employers "discussed" any wage and benefit increases before they were presented to drivers. In Browning-Ferris, the Board found a joint employer relationship where user employer exercised considerable control over drivers: user employer established starting times for drivers and speed limits at transfer stations; directed drivers as to which road to use, which loading area to use, and to specific dumping areas; and engaged in on-the-job observation of drivers. If drivers were late to a transfer station or left a transfer station early, the user employer would "criticize" the driver. Most importantly, the user employer had the authority to effectively discharge and rehire drivers.

We also do not find MTI's retention of records, or its right to inspect TP's records to be dispositive of whether a joint employer relationship exists. The employers assert that records are kept to allow for accurate billing for actual driver miles logged, and to comply with Department of Transportation regulations. In the former instance, the maintenance of records appears to be incidental to the contractor-customer relationship. The latter instance is mandated by the United States government. The Board has

II. Neither MTI nor TP violated 8(a)(5) by failing to bargain over the decision to transfer unit work

Given our conclusion that MTI and TP are not joint employers, MTI had no obligation to provide PACE with notice and an opportunity to bargain over the decision to perform trucking out of Porter and Kalamazoo, since it had no bargaining relationship with PACE, and TP had no control over the decision. Thus, we conclude, in agreement with the Region, that neither employer violated Section 8(a)(3) or (5) by failing to provide the Union notice of, or any opportunity to bargain over the decision to transfer work from Green Bay to Kalamazoo and Porter. The Region has determined, and did not submit for advice, that TP violated Section 8(a)(5) by failing to give PACE an opportunity to bargain over the effects of the decision to transfer work.

III. TP unlawfully failed to consider Green Bay Drivers for positions in Kalamazoo and Porter.

We agree with the Region that TP violated Section 8(a)(3) by failing to consider any Green Bay drivers for hire in Kalamazoo and Porter. To establish that an employer has unlawfully refused to consider bona fide applicants for hire, pursuant to Wright Line, the General Counsel must show (1) that the employer excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once the General Counsel has established this prima facie violation, the burden shifts to the employer to show that it would not have considered the applicants even in the absence of their union activity or affiliation.¹⁵

The evidence shows that TP excluded Green Bay employees from the hiring process in Porter and later in Kalamazoo. There is also evidence that Green Bay employees' union activities generally, and PACE's proclivity for resorting to the contractual grievance procedural in particular, contributed to TP's decision not to consider Green Bay drivers for positions at either of

overruled any case law that inferred operational control based on the user employer's compliance with governmental regulations. Goodyear Tire & Rubber, above, 312 NLRB at 677, citing Container Transit, 281 NLRB 1039 (1986) and Precision Bulk Transport, 279 NLRB 437 (1986).

¹⁵ FES, 331 NLRB 9, 15 (2000).

the new facilities. Despite this evidence of a prima facie violation, TP has offered no evidence to suggest that it would not have considered Green Bay drivers, regardless of their union activity or affiliation.

[FOIA Exemptions 2 and 5

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IV. MTI closed its Green Bay facility, and opened its Kalamazoo and Porter facilities, for bona fide business reasons.

We conclude, in agreement with the Region, that MTI closed its Green Bay facility and opened the Porter and Kalamazoo facilities for legitimate business reasons and not because of union animus. The evidence shows that the amount and regularity of work originating in and returning to the Green Bay area had decreased significantly, making it fiscally impractical to maintain even a skeletal fleet of drivers in Green Bay. Thus, even if two supervisory statements (which the Region has concluded to be Section 8(a)(1) statements) constitute some evidence of union animus, the evidence shows that MTI closed its Green Bay facility only after it was no longer cost effective to maintain it.

V. [FOIA Exemptions 2 and 5]

The Board disfavors accretion because the accreted employees are denied their Section 7 right to decide for themselves whether or not to be represented by a labor organization.¹⁷ Rather, "the overriding policy of the Act is in favor of the interest in employees to be represented

¹⁶ [FOIA Exemptions 2 and 5.]

¹⁷ Passavant Retirement & Health Center, 313 NLRB 1216 (1994); Gitano Group, Inc., 308 NLRB 1172, 1174 (1992); Towne Ford Sales, 270 NLRB 311 (1984), affd. sub nom. Machinist District Lodge 190 v. NLRB, 759 F.2d 1477 (9th Cir. 1985).

by a representative of their own choosing for the purposes of collective bargaining."¹⁸ Thus the Board will find an accretion "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted."¹⁹ (Emphasis added.) The fact that a combined unit of the existing employees and those sought to be added by accretion may constitute an appropriate unit does not compel an accretion so long as the employees sought to be accreted may also be represented in a separate appropriate unit.²⁰

The Board has identified several traditional community-of-interest factors as especially important in a finding that accretion is appropriate. These include the similarity of job functions and classifications between the two groups of employees;²¹ whether the day-to-day supervision of employees is the same in the group sought to be accreted;²² the degree of interchange of employees;²³ and

¹⁸ Ready Mix USA, Inc., 340 NLRB No. 107, slip op. at 9 (2003), citing Meijer, Inc. v. NLRB, 564 F.2d 737, 743 (6th Cir. 1977).

¹⁹ Ready Mix, 340 NLRB No. 107, slip op. at 9, citing Safeway Stores, 256 NLRB 918 (1981); Passavant, above, 313 NLRB at 1216.

²⁰ See Melbet Jewelry Co., 180 NLRB 107, 109-110 (1969).

²¹ St. Francis Hospital, 282 NLRB 950, 952 (1987) (IFP nurses performed the same nursing duties in the same nursing units alongside employer's other registered nurses); Richfield Oil Corp., 119 NLRB 1425, 1427-28 (1958) (offshore drillers and marine employees shared same living, working, and recreational facilities, and there was no functional delineation in their work).

²² Towne Ford Sales, above, 270 NLRB at 311-12, citing Save-It Discount Foods, 263 NLRB 689 (1982) and Weatherite Co., above, 261 NLRB 667 (1982); Silver Court Nursing Center, 313 NLRB 1141, 1146-47 (1994), citing Towne Ford Sales, above, 270 NLRB at 312 (what is "particularly significant is the perception of the employees in the two entities, because 'the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location'"); Gitano Distribution Center, above, 308 NLRB at

the integration of operations.²⁴ Thus, the Board has found no accretion where there was an absence or infrequency of interchange among employees in the new and existing groups,²⁵ there was a lack of common supervision,²⁶ there was a lack of physical, functional, and administrative integration of the groups of employees,²⁷ there were

1174 (no accretion where employees did not work closely together, performed different work from unit employees, and lacked employee interchange and common day-to-day supervision); Weatherite Co., above, 261 NLRB at 669-70 (no accretion where there were different work methods and equipment, different day-to-day control and supervision, and no interchange of employees).

²³ Towne Ford Sales, above, 270 NLRB at 311, citing Mac Towing, 262 NLRB 1331 (1982); cf. United States Steel Corp., above, 192 NLRB at 59, 60 (1971) (when all maintenance and technical employees had similar working conditions, were under common supervision, and interchanged jobs frequently, a unit including only part of them was inappropriate); Brand Precision Services, 313 NLRB 657, 657, 658 (1994) (petitioned-for unit limited to operators held inappropriate where work was highly integrated and commonly supervised, operators and laborers had similar training, skills, and functions, and portions of jobs overlapped so that operators and laborers each performed some work of the other).

²⁴ St. Francis Hospital, above, 282 NLRB at 952 (IFP nurses performed the same nursing duties in the same nursing units alongside employer's other registered nurses); Richfield Oil Corp., above, 119 NLRB at 1427-28 (offshore drillers and marine employees shared same living, working, and recreational facilities, and there was no functional delineation in their work); cf. Meyer's Café & Konditorei, above, 282 NLRB at 1 fn. 1, 4-7 (1986) (employees of new restaurant operation were additions to existing unit of restaurant employees in same store, where they shared similar job functions and classifications, had common supervision, and where there was an integration of operations).

²⁵ Combustion Engineering, Inc., 195 NLRB 909 (1972).

²⁶ Melbet Jewelry, 180 NLRB 107, 109 (1969).

²⁷ Pullman Industries, Inc., 159 NLRB 580 (1966).

different skills and functions in the two groups,²⁸ or there was a history of exclusion of these new employees from the unit.²⁹

The evidence is insufficient to establish that the Kalamazoo and Porter facilities are so physically, functionally, and administratively integrated, or share such an overwhelming community of interest with the Green Bay facility, or each other, that they constitute an accretion to the Green Bay unit. The new facilities are hundreds of miles from the Green Bay facility and each other. Other than irregular chance meetings at customer locations, there is no evidence of employee interchange. With regard to day-to-day supervision, Green Bay drivers reported to TP officials working out of TP's Milwaukee office, but it is unclear to whom at TP the Porter and Kalamazoo drivers report.³⁰ There is also evidence that Porter drivers use different trucks under different conditions than Kalamazoo and Green Bay drivers, suggesting that Porter drivers may possess different skills, perform different functions, and have different concerns than drivers at other locations. Finally, there is no evidence of bargaining history between PACE and TP regarding employees at the new facilities, and there is insufficient evidence to establish that the employees at the new facilities may not also constitute separate appropriate units. Separate facilities are presumptively appropriate; the Teamsters have treated the Kalamazoo employees as a separate distinct unit, and have petitioned to represent Porter employees as a separate distinct unit. In these circumstances, we conclude that the employees at the new facilities can be considered separate appropriate units, and that the drivers at all of the facilities do not share such an overwhelming community of interest to constitute an accretion to the Green Bay unit.³¹

²⁸ Jos. Schlitz Brewing Co., Container Division, 192 NLRB 553 (1971).

²⁹ Aerojet-General Corporation, 185 NLRB 794 (1970).

³⁰ Although drivers at each facility receive dispatches from MTI, MTI's limited contact with drivers is too routine to constitute meaningful common supervision, as discussed above.

³¹ See, e.g., Newspaper and Mail Delivers' Union of NY, 337 NLRB 1102, 1107 (2002) (accretion inappropriate given local autonomy, lack of employee interchange, and lack of geographic proximity); Super Valu Stores, 283 NLRB 134, 137

VI. TP did not violate Section 8(a)(2) and Teamsters did not violate Section 8(b)(1)(A) and (2).

Given our conclusion that the Kalamazoo and Porter facilities do not constitute an accretion to the existing Green Bay unit, we also find that TP did not violate 8(a)(2) under Midwest Piping,³² by recognizing and executing a collective bargaining agreement with Teamsters covering Kalamazoo drivers. The Board in Bruckner Nursing Home³³ clarified Midwest Piping and the circumstances under which an employer may lawfully recognize one of two unions competing to represent unit employees. The Board held that where no petition has been filed, an employer is free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render assistance of the type that would otherwise violate Section 8(a)(2) of the Act. PACE has never filed a petition covering Kalamazoo drivers and, absent some other facts that would establish that a question concerning representation existed, PACE and Teamsters were merely competing unions when Teamsters solicited and received signed authorization cards from each of the Kalamazoo drivers. Thus, TP did not violate Section 8(a)(2) by recognizing Teamsters, and Teamsters did not violate Section 8(b)(1)(A) and (2) by accepting that recognition.³⁴

In sum, the Region should dismiss allegations related to MTI and TP's putative joint employer relationship, and that the Kalamazoo and Porter facilities are an accretion to the Green Bay unit. The Region should issue complaint, absent settlement, alleging that TP unlawfully failed to consider Green Bay drivers for positions at the new facilities, consistent with the above analysis.

B.J.K.

(1987) (accretion inappropriate given the "total lack of interchange of employees between the two facilities" and common day-to-day supervision "[did] not exist").

³² 63 NLRB 1061 (1945).

³³ Bruckner Nursing Home, 262 NLRB 955, 958 (1982).

³⁴ See, e.g., Tecumseh Corrugated Box Co., 333 NLRB 1, 8 (2001); Metric Constructors, 297 NLRB 913, 913 (1990).