

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

DURHAM SCHOOL SERVICES	)	
	)	
Employer,	)	
	)	
and	)	Case No. 21-RC-21266
	)	
GENERAL TRUCK DRIVERS, OFFICE, FOOD	)	
AND WAREHOUSE UNION, TEAMSTERS	)	
LOCAL 952, INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS	)	
	)	
Petitioner.	)	
	)	

**REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION**

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Durham School Services ("Durham" or "Employer") respectfully submits this request for review of the Regional Director's Decision and Direction of Election issued on February 3, 2011 in the above-captioned matter (the "Region's Decision").

The Board should grant review of the Region's Decision because, in determining that the petitioned-for unit is appropriate, the Regional Director ignored well-established Board law and the undisputed evidence. More specifically, the Region's Decision should be overturned because: (1) the Regional Director entirely ignored the well-established presumption under Board law that a single location constitutes an appropriate unit for bargaining, failing completely to perform any analysis required to overcome that presumption; (2) the Regional Director deviated from Board law and ignored the overwhelming evidence clearly establishing that the only appropriate unit is a separate unit for each of the three facilities at issue; and (3) the

Region's Decision violates Section 9(c)(5) of the National Labor Relations Act because the petitioned-for unit is based solely or essentially on the extent of the Union's organization.

## **I. BACKGROUND AND FACTS**

### **A. The Election Petition and Hearing**

The General Truck Drivers, Office, Food and Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters ("Union" or "Petitioner") seeks certification of a bargaining unit consisting of

[a]ll full-time and regular part-time bus drivers and aides working at or out of the employer facilities at 2818 W. 5th St., Santa Ana, CA 92703, 100 Nightmist, Irvine, CA 92618 and 2003 Laguna Cyn (*sic.*) Rd., Laguna Beach, CA 92651," and excluding "[a]ll managers, supervisors, office/clerical, dispatchers, assistant dispatchers, lot/yard men, mechanics, full-time safety trainers and all others as defined and described by the Act."

Bd. Ex. 1(a); Tr. 6, 14-15.<sup>1</sup> The three facilities included within the petitioned-for multiple location unit will hereinafter be referred to individually as the "Santa Ana Facility", the "Irvine Facility", and the "Laguna Beach Facility", and collectively as the "Facilities."

At the hearing on this matter on January 6, 2011, the parties disagreed as to whether there should be three separate units, one for each of the Facilities, or whether there should be a single unit combining all of the Facilities. Tr. 8-10. Durham contended that a single unit combining the drivers and aids for the Facilities was not appropriate and that the only appropriate unit would be a separate single location unit of drivers and aides at each of the Facilities. Tr. 8-10.

Durham also stated at the hearing that "a single facility unit is presumptively appropriate[.]" and that Union had to overcome that presumption. Tr. 10. The Hearing Officer agreed, declaring:

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<sup>1</sup> "Bd. Ex." and "Emp. Ex." denote exhibits introduced by the Board and Employer, respectively, at the hearing in this matter. "Tr." references the transcript of that hearing.

a single-facility unit involves a presumption under Board law, and that the burden of -- lies with the party seeking to rebut the presumption. You must present specific, detailed evidence in support of your position. General, conclusionary,[sic] statements by witnesses will not be sufficient.

Tr. 10. Petitioner did not disagree that the presumption applied in this case. Tr. 10-13.<sup>2</sup>

### **B. Durham's Operations**

Durham provides school bus services for various school districts across the country. The Santa Ana Facility, the Irvine Facility, and the Laguna Beach Facility are separate Durham Customer Service Centers providing school bus services in the Los Angeles, California area.

Tr. 151. Vivienne Williams is the General Manager over the area which includes the Facilities.

Tr. 14-15. There is a separate Operations Supervisor for each facility, who reports directly to Williams. Tr. 96-97. Williams' office is at the Santa Ana Facility, and she spends very little time at the other two facilities. Tr. 19-20. Williams spends approximately eighty percent (80%) of her time handling customer relations issues – dealing directly with school districts – and about twenty percent (20%) of her time handling financial and other administrative issues. Tr. 81.

### **C. The Facilities**

As detailed below, the Facilities operate independently of each other with minimal commonality and interchange.<sup>3</sup>

#### **i. The Santa Ana Facility**

The Santa Ana Facility primarily serves the Santa Ana Unified School District. Tr. 17.

The Santa Ana Facility also provides service to the Garden Grove Unified School District, the

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<sup>2</sup> Indeed, Petitioner recognizes that the single facility presumption is applicable and, as a result, argued in its post hearing brief that “the evidence rebuts the presumption in favor of a single location.” (Pet'r Post Hr'g Br., 5.)

<sup>3</sup> The Santa Ana Facility is approximately 12 miles from the Irvine Facility and approximately 19 miles from the Laguna Beach Facility, and the Irvine Facility is approximately 10 miles from Laguna Beach Facility. Tr. 38.

Central Regional Occupational Program, the Orange County High School of Arts, and the Crean Lutheran High School. Tr. 20. Durham has contracts with each of those school districts to provide school bus services, and each of those contracts have terms separate and distinct from the service contracts Durham has with other school districts. Tr. 17.

Daily operations at the Santa Ana Facility are controlled by the Operations Supervisor for that facility, Elsa Minjarez. Tr. 24. Minjerez works only at the Santa Ana Facility. Tr. 26. There are approximately 208 drivers working out of the Santa Ana Facility, but no aides. Tr. 37-38. The starting wage for drivers at the Santa Ana Facility is \$12.10 per hour, and regular drivers receive four hours of guaranteed pay while “cover” drivers receive five hours.<sup>4</sup> Tr. 48-50. Santa Ana has its own mechanics that service buses used for Santa Ana routes. Tr. 36.

The Santa Ana Facility maintains the personnel files of its employees. Tr. 39. Minjarez has independent authority and discretion to assess discipline to Santa Ana employees. Tr. 57, 148; Er. Exs. B-H. And, Minjarez resolves payroll issues for Santa Ana employees. Tr. 25.

## **ii. The Irvine Facility**

The Irvine Facility serves *only* the Irvine School District, pursuant to contract for Durham to provide school bus services to the school district. Tr. 17. That contract has terms that are separate and distinct from the service contracts Durham has with other school districts. Tr. 17. For example, the Irvine contract provides that Durham is paid based on both hours and miles driven. Tr. 47. The territory covered by the Irvine Facility is much less densely populated than either Santa Ana or Laguna Beach. Tr. 24.

Daily operations at the Irvine Facility are controlled by the Operations Supervisor for that facility, Gwendolyn Banks. Tr. 24. Banks works only at the Irvine Facility. Tr. 26. There are

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<sup>4</sup> The cover drivers are required by service contracts to cover absences of regular drivers. Tr. 48.

approximately 60 drivers and 13 aides working out of the Irvine Facility. Tr. 37-38. Regular drivers at the Irvine Facility are guaranteed five hours of pay per day, cover drivers receive six hours of guaranteed pay, and the aides receive four hours of guaranteed pay. Tr. 48. The Irvine school district contract mandates a starting wage of \$12.10 per hour for drivers. Tr. 49-50. The Irvine Facility has its own mechanics that service buses used for Irvine routes. Tr. 36.

The Irvine Facility maintains the personnel files for its employees and has its own handbook with different rules on uniforms and other matters. Tr. 34, 41. Banks is in direct control of interviewing and hiring employees for the Irvine Facility, and has discretion to authorize overtime for those employees. Tr. 33-34. Banks has independent authority and discretion to assess discipline to Irvine Facility employees. Tr. 57, 148; Er. Exs. I-K, O. Banks establishes policies for the Irvine Facility based on the unique issues and problems that arise at that facility. Tr. 83-88; Er. Ex. P-R, U-W. Banks resolves payroll issues for Irvine employees. Tr. 25. Banks also has the authority to require employees of the Irvine Facility to attend work-related meetings. Tr. 85, Er. Ex. S-T.

### **iii. The Laguna Beach Facility**

The Laguna Beach Facility serves *only* the Laguna Beach Unified School District, pursuant to a contract for Durham to provide school bus services to the school district. Tr. 15-16. That contract has terms that are separate and distinct from the service contracts Durham has with other school districts. Tr. 16. The territory covered by the Laguna Beach Facility has very steep hills, and, as a result, Laguna Beach drivers have to undergo significantly different and additional training than drivers working out of the Santa Ana or Irvine facilities. Tr. 23-24.

Daily operations at the Laguna Beach Facility are controlled by the Operations Supervisor for that facility, Katherine Lee. Tr. 24. Lee works only at the Laguna Beach Facility.

Tr. 26. There are approximately 23 drivers and one aide working out of the Laguna Beach Facility. Tr. 37. Drivers at the Laguna Beach Facility are guaranteed four hours of pay per day. Tr. 48. The starting wage for Laguna Beach drivers is \$13.10 per hour, and also receive an additional \$1.00 per hour pay differential as an incentive to work at that facility. Tr. 50, 147.

The Laguna Beach Facility maintains the personnel files for its employees. Tr. 39. Lee has the discretion and authority to hire and fire Laguna Beach employees, and to authorize overtime for those employees. Tr. 34. Lee has independent authority and discretion to assess discipline to Irvine employees. Tr. 57, 148; Er. Exs. L-N. Lee establishes policies for the Laguna Beach Facility based on the unique issues and problems that arise at that facility. Tr. 90-91; Er. Ex. Y-Z. Lee resolves payroll issues for Laguna Beach employees. Tr. 24-25. Lee also schedules activities that are unique to the Laguna Beach Facility. Tr. 31.

#### **iv. Additional Significant Differences Between the Facilities**

There are additional significant differences between the Facilities, as listed below:

- The buses used to service each particular school district are housed at the facility servicing that school district. Tr. 18-19.
- Uniforms worn by drivers are different at each facility as the school district determines what attire drivers are to wear. Tr. 19.
- Routing for each location is different. Tr. 26. For example, at the Irvine Facility, the school district does the routing of buses. Tr. 27. For route bidding purposes, there is a seniority list for each of the Facilities; there is not a combined seniority list. Tr. 142-43.
- Dispatching is different for each facility. Tr. 27-28, 35-36. For example, dispatching at Santa Ana is performed by two Santa Ana employees, while dispatching at Irvine is performed by an independent individual. Tr. 35-36. Drivers and aides from one facility cannot hear the dispatch conversations of employees at the other facilities. Tr. 27-28.
- The bus pass systems used in the various school districts are different. Tr. 28-29, 44.
- Drivers at each of the Facilities have unique training and meeting requirements. Irvine drivers receive an additional day of training from the school district as required by that service contract. Tr. 29. Laguna Beach drivers attend an annual meeting with the school district to discuss various issues. Tr. 29. Each facility holds its own safety meetings for

its own drivers. Tr. 131. Durham does not conduct joint meetings, joint trainings, or other group gatherings of any kind where employees of all three Facilities attend. Tr. 32.

- The facilities are independent of and different from each other. Tr. 30-31, 40-41.
- The Santa Ana Facility offers charter services, the other facilities do not. Tr. 42. Field trips are also treated differently at each location. Tr. 42-43.
- School calendars at different at each facility, resulting in different work periods for the drivers of each facility. Tr. 43-45. For example, Irvine has year-round routes. Tr. 43.
- Each facility supervisor has certain responsibilities and authority limited to her facility. Tr. 54-58. For example, each supervisor investigates any discrimination, retaliation, or harassment allegations at her facility and has authority to resolve such issues. Tr. 55.

## II. ARGUMENT

### A. The Regional Director Erred by Failing to Apply the Single Location Presumption.

The Board has a statutory mandate to determine the unit appropriate for collective bargaining. *See* 29 U.S.C. § 159(b). Specifically, Section 9(b) of the Act requires that the Board “decide in each case whether, *in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” *Id.* (emphasis added). In ruling that the single employer presumption did not apply to this matter, the Regional Director ignored this statutory mandate, turning an issue of employee rights under the Act, to one based on union preference.

The Board has consistently applied a rebuttable presumption that a single location unit constitutes an appropriate unit for bargaining. *See, e.g., New Britain Transp. Co.*, 330 N.L.R.B. 397, 397 (1999) (“A single plant or store unit is presumptively appropriate . . . .”); *Cell Agric. Mfg. Co.*, 311 N.L.R.B. 1228, 1236-37 (1993) (“There is a presumption that a single plant is an appropriate bargaining unit.”); *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 631 (1962) (“A single-plant unit, being on the types listed in the statute as appropriate for bargaining purposes, is

presumptively appropriate.”). The presumption is applied to ensure that employee rights to effective representation are protected. *See NLRB v. New Enter. Stone & Lime Co.*, 413 F.2d 117, 118 n.5 (3d Cir. 1969) (citation omitted).

The U.S. Courts of Appeal have recognized and upheld the Board’s application of the single location presumption. *See, e.g., NLRB v. Guardian Armored Assets, LLC, Inc.*, 201 Fed. Appx. 298, 303 (6th Cir. 2006) (recognizing that “the NLRB utilizes a presumption that a single location in a multiple-location business is an appropriate bargaining unit” and setting forth the rebuttal analysis required of the Board); *Mass. Society for Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 46 (1st Cir. 2002) (same); *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847-48 (7th Cir. 1999) (same); *Alaska Statebank v. NLRB*, 653 F.2d 1285, 1287 (9th Cir. 1981) (same); *New Enter. Stone & Lime Co.*, 413 F.2d at 118-19 (same).

The Board has made clear that it is “the party seeking to overcome the presumptive appropriateness of a single-plant unit” that bears the burden “to show that the day-to-day interests of the employees at the location sought have merged with those of the employees at the other location.” *Penn Color, Inc.*, 249 N.L.R.B. 1117, 1119 (1980) (citing *Haag Drug Co., Inc.*, 169 N.L.R.B. 877, 878-79 (1968)). The single location presumption applies unless and until the entity attempting to overcome the presumption shows that the single location “has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity.” *D&L Transp., Inc.*, 324 N.L.R.B. 160, 160 (1997); *Cell Agric. Mfg. Co.*, 311 N.L.R.B. at 1236-37 (same). More specifically,

To determine whether the single-facility presumption has been rebutted, the Board looks at such factors as the similarity of employee skills, functions and training, the distance between the facilities, the functional coordination in operations of the facilities, common supervision, centralized control of operations and labor, contact between employees at different facilities, employee

interchange (particularly temporary transfers) between facilities, common wages, benefits, and terms and conditions of employment, and bargaining history, if any.”

*Budget Rent A Car Systems, Inc.*, 337 N.L.R.B. 884, 885 (2002).

The Regional Director, however, ignored entirely the well-established single location presumption and failed to apply the necessary rebuttal analysis. Instead, the Regional Director *sua sponte* declared that the single employer presumption did not apply because Union requested a multi-location unit.<sup>5</sup> Specifically, the Regional Director held that:

The presumption, however, only tends to establish that a single-site unit, when requested, constitutes an appropriate unit. Where, as here, the union seeks to represent employees in a multi-location unit, the presumption has no application.

(Decision, 11-12.) In other words, the Regional Director improperly made the protection of employee rights as mandated by the statute subservient to Union’s petition.

The Regional Director’s opinion is so contrary to the law it is difficult to imagine how the Regional Director came to this conclusion. Even the case relied upon by the Regional Director for this position clearly does not stand for the proposition asserted by the Regional Director. *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986), does not hold that the single location presumption applies only when a union requests a single location unit, but rather concludes that the Board did not have to rebut the single location presumption at the appellate review level after it had already determined a multiple location unit was appropriate. *See id.* at 886-87. The Ninth Circuit in no way held that the Board may ignore the single location presumption when it is a union that is seeking a multiple location unit. *See id.*

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<sup>5</sup> Both Durham and Union recognize that the single location presumption was applicable to the Board’s determination of whether a unit consisting of drivers and aides at all of the Facilities was appropriate or whether single location units for each of the Facilities was appropriate.

Even if one ignores Board law, the arbitrariness of the Regional Director's decision is obvious. When applying the single location presumption, the Board imposes a virtually insurmountable bar for the party seeking a unit other than a single location unit. *See New Enter. Stone & Lime Co.*, 413 F.2d at 118. Given this high bar, the presumption is dispositive of the statutory unit issue in many cases. While the Board is not required to employ the presumption, having chosen to, the Board must do so in a manner that is consistent with the Act, and not arbitrary. It is difficult to imagine how a single location unit is presumptively appropriate under the statute when sought by a union, but not so when a union seeks a different unit.

This issue has nothing to do with which of many units may be appropriate under the Act. Rather, the Regional Director's application of the presumption ignores the Act. A presumption is an evidentiary tool that assumes a fact or issue to be true under the law, and the application of a presumption has "the effect of shifting to the challenger the burden of proof." *NLRB v. Living & Learning Ctrs., Inc.*, 652 F.2d 209, (1st Cir. 1981) (citations omitted). Given the nature of a presumption, it must apply universally – either a single location is or is not assumed to be appropriate under the Act. It simply cannot be that under the language of the Act, a single location is assumed to be appropriate only when sought by a union, particularly given the dispositive effect of the presumption under Board law. That result is nothing more than a union preference presumption, having nothing at all to do with the single location issue the presumption purports to address. Nothing in the Act permits the Board to so readily jettison employee rights for the preferences of a union.

**B. The Only Appropriate Unit is a Single Unit at Each of the Facilities.**

Even assuming, *arguendo*, that the Regional Director was correct in not applying the single location presumption and requiring the Union to rebut that presumption, the Region's

Decision nevertheless is wholly inconsistent with Board decisions based on analogous facts and also lacks support in the record. The evidence presented at the hearing clearly establishes that employees in the petitioned-for, multiple location unit do not share a community of interest to constitute an appropriate unit.<sup>6</sup> As a result, the Regional Director erred in determining that the appropriate unit was a single combined unit consisting of drivers and aides at all three Facilities.

In circumstances such as those found in this case, the Board has regularly ruled that a multiple location unit was not appropriate and that the only appropriate unit was several single location units. *See, e.g., Dean Transp., Inc.*, 350 N.L.R.B. 48, 58-59 (2007)), *enf'd*, 551 F.3d 1055 (D.C. Cir. 2009); *Van Lear Equipment, Inc.*, 336 N.L.R.B. 1059, 1063 (2001). In *Dean Transp.*, the Board ruled that a single unit comprised of school bus drivers at multiple school bus transportation facilities was not appropriate. 350 N.L.R.B. at 48 & n.3, 58-59. The Board made its decision that a multiple location unit was not appropriate based on the following: despite significant centralization of control of labor relations among the locations, supervisors at each location carried out the corporate policies and were responsible for ensuring the drivers at each location satisfied their contractual obligations with the school districts they served; local supervisors also handled routing and ensuring runs were covered; drivers reported directly to the local supervisors who were responsible for receiving and handling various issues at a local level; and the degree of employee interchange was minimal. *See id.*

Similarly, in *Van Lear*, the Board ruled that a single unit comprised of school bus drivers at multiple school bus transportation facilities was not appropriate. 336 N.L.R.B. at 1063. The Board rejected the argument for a multi-location unit based on the geographic distance between the locations, the lack of employee interchange between the locations, and because of daily

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<sup>6</sup> Union presented no witnesses at the hearing, and Union's attempts to prove its case through its cross-examination of Durham's witness also failed to support Union's position.

supervision of each location by supervisors who maintained independence and discretion on certain matters such as hiring and disciplining drivers. *See id.*; *see also Cargill, Inc.*, 336 N.L.R.B. 1114, 1114 (2001) (multiple location unit not appropriate although employer had centralized control over administration and labor relations policies, where there was significant local autonomy over labor relations as each facility had its own supervisory staff who assigned and supervised work, scheduled inspections, imposed discipline, handled employee complaints, and scheduled vacations; there was not regular nor substantial employee interchange between the facilities; and bidding for jobs was limited to each facility).

In addition, this Region very recently relied on similar facts as those present here to reject a single unit comprised of school bus drivers from three separate facilities. *See Veolia Transp. Svcs., Inc.*, 21-RC-21099, Decision and Direction of Election (June 5, 2009) (attached to Durham’s Post Hearing Brief). In *Veolia Transp.*, the Regional Director ruled that the drivers at the separate facilities constituted a separate unit with a separate identity with no community of interest with the other facilities. *Id.* at 20. The Regional Director noted that there was significant local autonomy over labor relations matters due to each location being “subject to separate day-to-day supervision by operations managers and road supervisors” who had the authority to issue discipline and resolve grievances. *Id.* The Regional Director also relied on the fact that the drivers at each facility bid on assignments for their facility only. *Id.* at 20-21. Further, the Regional Director noted that although there were “similarities in the skills and functions of the drivers at all three facilities, . . . [there were] significant differences with regard to working conditions, pay, and benefits,” such as differences in pay, bidding on work assignments and vacations, and attending safety meetings. *Id.* at 21. With regard to similarities among the employees created by any corporate-wide policies and programs, the Regional Director declared

that “while the drivers at each of the three facilities do share some common working conditions as a result of the implementation of corporate-wide policies, these policies do not negate the separate identity of the [] employees [at issue] from the employees at the [other two locations].”

*Id.* The Regional Director also determined that, where “[t]he record d[id] not show any significant or compelling evidence to establish the [] drivers [at one facility] have any contact with drivers at other facilities or are subject to being transferred to the other facilities,” there was no substantial employee contact or interchange among the three facilities. *Id.*

Based on the above, it is hard to comprehend why the Regional Director ruled here that a multiple location was appropriate. Worse, the Regional Director offered no justification for his clear disregard for Board law and the Region’s recent ruling. Without any explanation for the Regional Director’s deviation from this clear authority, the Region’s Decision must be reversed.

Setting aside the Regional Director’s failure to explain its deviation from clear Board law and its own recent ruling, the Regional Director was also required to establish that all of the employees in the designated unit share a community of interest. *See NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir. 1986) (citation omitted). In determining whether employees of a multiple location unit share a community of interests, and thus should be grouped together for purposes of collective bargaining, the Board takes into account various factors, including:

bargaining history; the extent of interchange of employees; the work contacts existing among the several groups of employees; the extent of functional integration of operations; the differences, if any, in the products or in the skills or types of work required; the centralization or lack of centralization of management and supervision, particularly in regard to labor relations, the power to hire, discharge, or affect the terms and conditions of employment; and the physical and geographical location in relation to each other.<sup>7</sup>

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<sup>7</sup> These factors are very similar to those considered to determine whether the single location presumption has been rebutted. *See supra* Section II.A. As a result, Board cases analyzing the

National Labor Relations Board: An Outline of Law and Procedure in Representation Cases, 145 (August, 2008) (citing *Alamo Rent-A-Car*, 330 N.L.R.B. 897, 897 (2000); *Novato Disposal Services*, 328 N.L.R.B. 820, 820 (1999); and *R & D Trucking*, 327 N.L.R.B. 531, 531-32 (1999)). Applying these factors, it is clear that the Regional Director erred in designating a single combined unit comprised of drivers and aides at the three Facilities as appropriate, as the employees in that unit do not share a community of interests.

Initially, the very nature of the operations at each of the three locations creates an almost insurmountable hurdle to a multi-location unit. As detailed in Section I.C. each of the three locations serves a completely different customer or set of customers, based on specific contracts with those customers. The different customer relationships and contracts create significant differences between and among the Facilities. For example, the routes for each facility are completely different from those for any other facility, there is no overlap in routes between Facilities, and there is no commingling of routes such that buses from one facility transport students from another facility. Similarly, drivers from the Laguna Beach Facility attend a meeting once a year with the Laguna Beach school district to ensure they are acquainted with any special requirements of that area and drivers from the Irvine Facility receive specific training from the Irvine School District. Also, the employees' daily start and end times, as well as the length of the work year itself, are different at each of the Facilities, as those times are dependent on the specific school district(s) serviced by each facility.

Management and supervision, particularly in regard to labor relations, the power to hire, discharge, or affect the terms and conditions of employment are centralized at each of the separate facilities. The supervisor for each facility exercises significant control over the labor

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presumption offer significant incite into what should be considered for each of these factors.

relations issues that arise at her own facility. Specifically, each supervisor exercises independent discretion and judgment with respect to issuing discipline, hiring and terminating employees, granting and denying leaves of absence, resolving payroll issues, investigating and resolving employee disputes such as discrimination and harassment, and setting and enforcing company policy. Durham presented significant evidence at the hearing establishing each supervisors' responsibilities for each of those areas at their respective facility. *See, e.g.*, Er. Exs. B-O (establishing that the supervisor for each facility has independent authority and discretion with respect to disciplining and terminating employees at their specific facility); Er. Exs. P-R, Y-Z (establishing that the supervisor for each facility has independent authority to set policy for their own facility; Er. Exs. S-T (establishing that the supervisor for each facility has the authority to require attendance at mandatory meetings applicable only to drivers at their particular location). The evidence presented established that there is no centralized control of labor relations among the Facilities to warrant a finding that a multiple location unit is appropriate.

The evidence presented at the hearing established that the amount of employee transfers among the facilities is minimal at best, and clearly not sufficient to establish a multiple location unit. As Union failed to put on its own case, the only record evidence that exists on this issue is Durham's evidence that transfers are extremely rare. Indeed, no evidence exists of transfers among all the facilities improperly combined by the Regional Director. Rather, the only record evidence consists of rare occasions where a driver from one facility, the Santa Ana Facility, was asked to go to another facility to cover for an absent driver. The evidence further showed that such transfers did not take place in the normal course of business, but only occurred in emergency situations where a driver was absent to ensure that all routes are covered. An employee from one facility covering an emergency situation at another of the Facilities simply

does not constitute the “interchange” required by Board law to support a multi-location unit. *See National Cash Register Co.*, 166 N.L.R.B. 173, 173-74 (1967) (dismissing interchange that only occurs in “emergencies”); *J. Ray McDermott & Co., Inc.*, 240 N.L.R.B. 864, 867-68 (1979) (interchange occurring “occasionally” militated against appropriateness of multi-location unit).

Equally flawed is the Regional Director’s reliance on Durham’s use of a shuttle bus to transport drivers who live in the Santa Ana area to the Laguna Beach Facility. How employees commute to work for *their own convenience*, does not affect their terms and conditions while at work, the *sine qua non* for the community of interest analysis. Indeed, the Regional Director’s overreaching in his attempt to cast this basic transportation issue as a interchange of employees issue demonstrates how much the record fails to support his conclusions.

With regard to similarity of skills, again, this issue illustrates convincingly the overreaching nature of the Regional Director’s decision. No dispute exists that the employees at issue are bus drivers and aides and that many of the skills required of those employees are similar across the Facilities. What is surprising is that in a multi-location analysis the Regional Director would focus on such a secondary and minor issue. In doing so the Regional Director exposes further the lack of evidence to support a multiple location unit.

Even with respect to the similarity of skills, the Regional Director erred. What is notable about the record is the differences it demonstrates even in a job that sounds similar in title. Important distinctions exist between drivers for each facility. For example, the Laguna Beach routes are so significantly difference from the Irvine and Santa Ana routes that special training is required for every driver who operates from the Laguna Beach Facility.

The terms and conditions of the drivers’ and aides’ employment are also significantly different at each of the three Facilities. To begin, the rates of pay are different and drivers

receive varying amounts of guaranteed pay. Drivers at the Irvine Facility are subject to more stringent uniform requirements and are also subject to the terms and conditions of a separate handbook. Drivers obtain their work assignment differently at each location, and dispatching is handled differently at each facility. Drivers receive different training depending on which facility they operate out of, and the Employer does not conduct any type of joint meetings for drivers from all three Facilities. Starting and ending times also are different at each facility as they are dependent upon the starting and ending times of the school district(s) serviced by that facility. The different school districts also have different school calendars, resulting in drivers and aides from one facility working different periods of time from those in another facility.

Finally, there is significant geographical separation among the three Facilities. The Santa Ana Facility is approximately 12 miles from the Irvine Facility and approximately 19 miles from the Laguna Beach Facility, the Irvine Facility is approximately 10 miles from the Laguna Beach Facility. More importantly, given the fact that there is no overlap among the three Facilities in terms of routes, each facility is completely separated from the others.

As the above demonstrates, on comparable facts as are present here, the Regional Director's unit determination is wholly inconsistent with Board decisions and lacks support in the record. The evidence makes clear that the only appropriate unit is a single location unit for each of the Santa Ana Facility, the Irvine Facility, and the Laguna Beach Facility. The Region's Decision cannot stand.

**C. The Multiple Location Unit is Inappropriate Because it is Based Solely or Essentially on the Union's Extent of Organization.**

The Regional Director's error in failing to apply the single location presumption in this case is compounded by the paucity of record evidence to support a multi-location unit. Indeed, Union did not even present a case in chief. Even when reading the Region's Decision, the most

striking aspect is how the recitation of the facts make it clear that a multiple location unit is inappropriate. Yet, the Regional Director reached the contrary conclusion.

Based on the lack of persuasive legal or factual support for the Regional Director's unit determination, the only compelling inference from the record is that the Regional Director improperly allowed the "extent of organization" to control his decision. Indeed, the Regional Director effectively concedes that the only rational basis for his determination is that Union got the multi-facility unit that it petitioned for – a rationale that directly contravenes Section 9(c)(5) of the Act. *See May Dep't Stores v. NLRB*, 454 F.2d 148, 153 (9th Cir. 1972).

Section 9(c)(5) expressly limits the Board's discretion in determining the appropriateness of bargaining units. Specifically, "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). As set forth by the Supreme Court, Section 9(c)(5) precludes Board decisions "where the unit determined could only be supported on the basis of the extent of organization." *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965). Further, "giving the petitioning union precisely what it wants just because it asks for it is the same as giving controlling weight to the extent the union has organized a group of employees," both violate Section 9(c)(5). *May Dep't Stores*, 454 F.2d at 153.

Where the Regional Director fails to articulate the basis for its unit determination, or if its unit determination is inconsistent with other determinations on comparable facts, an inference arises that extent of organization was improperly made the controlling factor. *See Metro. Life*, 380 U.S. at 442-43; *May Dep't Stores*, 454 F.2d at 150-51. And, the Regional Director may not "evade Section 9(c)(5) by purporting to base its decision on other factors when in truth it has been controlled by the extent of employee organization." *NLRB v. Sun Drug Co.*, 359 F.2d 408,

412 (3rd Cir. 1966). Under these principles, the Region’s Decision that a single unit comprised of drivers and aides at all three Facilities contravenes the Board’s Section 9(c)(5) mandate.

First, despite longstanding Board and Courts of Appeal precedent, the Regional Director flatly rejected application of the single location presumption, on grounds that “because the petitioned-for unit in this case is a multi-facility unit, not a single-facility unit, this presumption does not apply.” (Decision, 16.) The Regional Director’s blanket rejection of the presumption in this case effectively accords controlling weight to the Union’s request for a combined unit comprised of all three Facilities. Absent persuasive evidence to rebut the single location presumption, there is little logical support for the Regional Director’s unit determination other than its acquiescence to the Union’s request.<sup>8</sup> That rationale directly contravenes the mandate of Section 9(c)(5) and cannot stand. *See May Dep’t Stores*, 454 F.2d at 153.

Second, the Regional Director’s unit determination is wholly inconsistent with Board decisions on analogous facts and lacks support in the record. On comparable facts as are present here, the overwhelming weight of Board precedents hold that only a single-facility unit is appropriate for the purposes of collective bargaining. This lack of factual or legal underpinnings for the Regional Director’s unit determination leads to the conclusion that the petitioning Union “got what it asked for,” a justification that directly contravenes the mandate of Section 9(c)(5) and cannot stand. *See May Dep’t Stores*, 454 F.2d at 153.

#### **IV. CONCLUSION**

The Regional Director’s determination regarding the appropriateness of the petitioned-for, multiple location unit is clearly erroneous as it ignores well-established Board law and the

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<sup>8</sup> Union did not even argue that the single location presumption was not applicable or request that the Regional Director not apply it. Quite to the contrary, Union recognized that the single location presumption was applicable and argued that the evidence presented rebutted it.



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Request for Review of Regional Director's Decision and Direction of Election was served by e-mail this 17th day of February, 2011, upon:

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/s/  
Jamie M. Konn