

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of

**RENZENBERGER, INC.,
Respondent,**

and

**UNITED ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA (UE),
Petitioner,**

**Case Nos.: 31-RC-8850
31-RC-8851
31-RC-8852
31-RC-8853
31-RC-8854**

and

**NATIONAL PRODUCTION WORKERS UNION,
LOCAL 707,
Intervenor.**

**REQUEST FOR REVIEW ON BEHALF OF PETITIONER UNITED
ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)**

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ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)**

Pursuant to Section 102.67 of the National Labor Relations Board (hereinafter “Board”) Rules and Regulations, Petitioner United Electrical, Radio and Machine Workers of America (hereinafter “UE”) submits this Request for Review of the Regional Director’s March 23, 2011 Decision and Order Dismissing Petitions in Cases 31-RC-8850, 31-RC-8851, 31-RC-8852, 31-RC-8853 and 31-RC-8854. For the reasons stated herein, the Regional Director’s Decision should be reversed and the petitions should be remanded to the Regional Director for further processing.

I. INTRODUCTION AND BACKGROUND

A. The parties

Respondent Renzenberger, Inc. (hereinafter “the Employer”) is a transportation company

that primarily services the railroad industry by transporting rail crews to and from their work locations and other places they may need to go. (Tr. 101-02¹). The UE and Intervenor National Production Workers Union, Local 707 (hereinafter “Local 707”) are both labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (hereinafter “the Act”). (B-2, pg.1)².

B. Procedural history

On February 10, 2011, the UE filed five separate petitions seeking to represent units of drivers employed by the Employer working at our out of various locations in Southern California. On February 10, 2011, the Regional Director of Region 31 issued an order consolidating the five cases and scheduling them for hearing on February 17, 2011. On February 16, 2010, the Regional Director issued an order rescheduling the hearing for February 24, 2011. The hearing commenced on February 24, 2011 and closed on March 4, 2011. The parties submitted briefs, and on March 23, 2011, the Regional Director issued a Decision and Order dismissing all five of the UE’s petitions. The UE now files a Request for Review of the Regional Director’s Decision and Order.

C. The Regional Director dismissed the UE’s petitions because they were not coextensive with the Employer’s recent voluntary recognition of Local 707.

On December 22, 2010, the Employer voluntarily recognized Local 707 as the bargaining

¹ “Tr. 101-02” refers to pages 101 through 102 of the hearing transcript. The testimony upon which the assertion is based can be found on those pages of the hearing transcript. Similar notation is used throughout this document.

² “B-2, pg. 1” refers to page 1 of Board Exhibit 2. Throughout this document the exhibits will be identified as “B” for Board Exhibits, “J” for Joint Exhibits and “P” for Petitioner’s Exhibits.

representative of the Employer's employees working at or out of all of its rail yards in the State of California. (B-2, pg. 4). The Employer's voluntary recognition of Local 707 covered all of the workers petitioned for by the UE in the present matter. (B-2, pg. 5). The Employer's recognition of Local 707 encompassed workers at other yards in California not petitioned for by the UE. The Regional Director dismissed the UE's petitions because the petitioned-for units were not identical to the voluntarily recognized statewide unit.

D. Basis for this Request for Review

Under Section 102.67(c) of the Board's Rules and Regulations, the Board will only grant a request for review for "compelling reasons." 29 C.F.R. § 102.67(c). In the present matter, the Board should grant the UE's Request for Review because "a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent," and because the Regional Director's decision "is clearly erroneous on the record and such error prejudicially affects the rights of" the UE. 29 C.F.R. § 102.67(c)(1) and (2). Specifically, the Regional Director's Decision that the UE could not petition for units that were smaller than the voluntarily recognized statewide unit contradicts the Board's holding in *American National Can, Inc.*, 321 NLRB No. 159 (1996), and its progeny. Moreover, the Regional Director's holding that the voluntarily recognized statewide unit is an appropriate unit is not supported by the record evidence.

II. THE UE WAS NOT REQUIRED TO PETITION FOR A UNIT THAT WAS IDENTICAL TO THE VOLUNTARILY-RECOGNIZED STATEWIDE UNIT

Notwithstanding the Regional Director's Decision and Order, the UE was not required to petition for a unit that was coextensive with the voluntarily-recognized statewide unit. The Board has consistently held that, in situations where a voluntary recognition does not bar an election, a rival unit is free to petition for *any appropriate unit*. See *Am. Nat'l Can, Inc.*, 321 NLRB No.

159 (1996); *Smith's Food & Drug Ctrs.*, 320 NLRB 844 (1996); *Rollins Transp. Sys.*, 296 NLRB 793 (1989). In the present matter, as the Regional Director recognized, the Employer's voluntary recognition of Local 707 was not a bar to the UE's petition under *Dana Corp.*, 351 NLRB 434, 441 (2007). See *Regional Director's Decision and Order*, pg. 10. As such, the UE was free to petition for a unit different than the voluntarily recognized unit. *Am. Nat'l Can, Inc.*, 321 NLRB No. 159 (1996); *Smith's Food & Drug Ctrs.*, 320 NLRB 844 (1996).

In *American National Can*, the employer voluntarily recognized a union as the bargaining representative of a large unit of 397 production, maintenance and skilled craft employees. 321 NLRB at 1164. The Board held that the recognition was not a bar to a petition filed by a rival union seeking a smaller unit of just 24 mold makers.³ *Id.* The Board specifically noted that the fact "that the Petitioner seeks a smaller unit than that urged by the [recognized union] does not alter our conclusion" that the recognition did not constitute a bar. *Id.* As long as the other circumstances required to limit the recognition bar are present, a rival union can petition for "a separate appropriate unit for bargaining." *Id.* As such, in this matter, the UE's petitions should not have been dismissed merely because they sought units different than the voluntarily recognized unit.

Despite the plain holding in *American National Can*, the Regional Director's Decision and Order cited certain passages in *Dana Corp.*, 351 NLRB 434 (2007), as standing for the proposition that a rival union may only petition for a unit that is coextensive with a recently

³ Under *Smith's Food & Drug*, a rival union's petition was barred unless it was supported by the requisite 30% showing of interest which had been obtained *prior to* the recognition. The modification of the recognition bar in *Dana* overruled *Smith's Food & Drug* only insofar as it barred rival union petitions where the showing of interest was gathered within 45 days after a recognition notice posting. See *Dana*, 351 NLRB at n. 33.

recognized unit. The Regional Director's Decision misreads *Dana* and improperly discounts *American National Can*.

There has been little guidance on exactly how *Dana* should work, especially in the case of a rival union's representation petition. The facts in *Dana* itself involved a decertification petition. The case simply states that "any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures." *Dana Corp.*, 351 NLRB at 443. Under normal Board procedures, a union can petition for any unit with a 30% showing of interest from that unit, and the Board can certify any appropriate unit in which a majority of the workers support the union. See *An Outline of Law and Procedure in Representation Cases*, §§ 5-100, 5-700, 12-100. As such, the UE's petitions would be appropriate.

The Regional Director cited certain passages in *Dana* that he contended overturned *American National Can* and somehow establish that a rival union must petition for a unit identical to a recognized unit. All of the cited passages vaguely indicate that a rival unit's petitions must be supported by 30 percent or more of "the unit" employees. The Regional Director's Decision concludes when referring to "the unit", the Board must have been referring to the voluntarily recognized unit. However, under another possible reading of the cited passages, which would be consistent with Board precedent, "the unit" would refer to the petitioned-for unit—not the recognized unit. As such, the Board would process a rival union's petition for any appropriate unit so long as it had a sufficient showing of interest.

This conclusion is also supported by the requirement that the Board only certify an appropriate unit. It is entirely possible that an employer could recognize a union as the bargaining representative of a unit that would not be found appropriate by the Board. Generally,

where an employer and union have agreed on a unit, the Board will not intercede. However, in the case of a petition filed under *Dana*, the Board necessarily becomes involved. In a case where the newly-recognized unit was not an appropriate unit, the Board would have to either hold an election in an inappropriate unit, or disallow the petition on the grounds that the recognized unit was not appropriate, rendering *Dana* completely ineffective. Despite the Regional Director's holding, a California statewide unit would not be appropriate in the present matter. *See* Section III, *infra*.

The decision in *Dana* simply added to the Board's already existing limitations on the recognition bar. The fact that the Board did not articulate any specific limitation on the units that may be petitioned for during the 45-day window implemented by *Dana*, suggests that these cases should be treated like any other petition filed in the face of a voluntary recognition. The Board has consistently taken the position that, where a petition is supported by a showing of interest in an appropriate unit and is not blocked by a recognition bar, the fact that it seeks a smaller unit than the one recognized will not invalidate it. Therefore, since the UE has petitioned for separate appropriate bargaining units and the petitions are not barred by the recognition (pursuant to *Dana*), the fact that the petitioned-for units are smaller than the recognized unit, does not invalidate the petitions.

III. THE VOLUNTARILY-RECOGNIZED STATEWIDE UNIT IS NOT AN APPROPRIATE UNIT.

The Regional Director's Decision determined that the voluntarily-recognized statewide unit is an appropriate unit. *See Regional Director's Decision and Order*, pg. 12. However, the record facts clearly establish that a California statewide unit would be an arbitrary grouping of

the Employer's drivers based merely on a geographic boundary, which is not a sufficient basis for establishing an appropriate bargaining unit. *Bashas' Inc.*, 337 NLRB 710 (2002); *Acme Markets, Inc.*, 328 NLRB 1208 (1999) .

In determining if a multi-facility unit is appropriate, the Board evaluates the following factors: (1) employees' skills and duties; (2) terms and conditions of employment; (3) employee interchange and functional integration; (4) geographic proximity; (5) centralized control of management and supervision; and (6) bargaining history. *Bashas' Inc.*, 337 NLRB 710, 711 (2002), citing *Alamo Rent-A-Car*, 330 NLRB 897 (2000) and *NLRB v. Carson Cable TV*, 795 F.2d 879, 884 (9th Cir. 1986). For a multi-location unit to be appropriate, not only must the employees share a community of interest, "that interest must be separate and distinct from that which they share with other employees at other facilities of the same employer." *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004). See also *Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999); *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000).

In the present matter, employees in the recognized unit do not share a community of interest with one another. The unit employees have different supervision, wage rates and service areas than other drivers in California. Moreover, they work at, or out of, locations that are more than 500 miles from one another, and they would never cross paths with these other California drivers. Furthermore, there is nothing that so distinguishes California drivers from drivers outside of California so as to make a statewide unit an appropriate unit. Regional Managers that supervise the work of California drivers also supervise the work of drivers at yards outside of California. Drivers all over the country have the same job skills and duties. Drivers outside California have the same basic fringe benefits as drivers within California. Work rules and

procedures are very similar for drivers across the country. California employees regularly interact with drivers out of state. Likewise, the Employer transfers drivers into and out of California. Finally, despite the Regional Director's Decision, the Employer's extensive bargaining history both within California and outside California establish that a statewide unit is not an appropriate unit. The Employer has substantial history bargaining with both single-yard units (such as those petitioned for in Case Nos. 31-RC 8850, 31-RC-8852 and 31-RC-8854) and multi-yard units (such as those petitioned for in Case Nos. 31-RC-8851 and 31-RC-8853). However, until the recent recognition of Local 707, the Employer has no history bargaining on a statewide basis anywhere in the country.

A. Supervision and control of labor relations

The Employer's supervisory and labor relations structure establishes that a California statewide unit would not be an appropriate unit. *Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999) (Statewide units found inappropriate where "there is no administrative structure corresponding to the...separate statewide units" and "none of...States has separate supervision at the state level."); *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000) (Multi-location unit was not appropriate where it did "not conform to any administrative function or grouping of the Employer's operations" and employees did not "share common supervision apart from the employees at the other...facilities."); *Stormont-Vail Healthcare, Inc.*, 340 NLRB 1205, 1208 (2003); *Bashas' Inc.*, 337 NLRB 710, 711 (2002).

Under the Employer's supervisory structure, Regional Managers directly supervise (in some instances, in cooperation with Site Supervisors) all classifications of employees at issue in this matter. (Tr. 94-97, 490-94). The Regional Managers are responsible for the operation and

day-to-day employee relations at the yards they oversee, including hiring and firing, disciplining, granting time off and awarding employees. (Tr. 94-101). Under the current grievance procedure, Regional Managers are responsible for attempting to resolve drivers' grievances at the first two steps. (B-2, attachment A, pg. 11). Regional Managers exert a high level of local autonomy over the yards they supervise.

Seven different Regional Managers supervise drivers in California. (J-1). As such, across California drivers have different supervisors. However, in the California statewide unit recognized by the Employer, the drivers would not have common supervision. (J-1). Moreover, California Regional Managers are responsible for the labor relations at yards outside of California. For example, Regional Manager Daniel Mhoon supervises drivers in California, as well as drivers in two yards in Nevada. Similarly, Regional Manger Tonya Martin supervises drivers in California, as well as drivers in three yards in Arizona. (J-1; 293-295). Those California drivers supervised by Daniel Mhoon and Tonya Martin would arguably have a greater community of interest with the drivers in Nevada and Arizona supervised by their Regional Manager than they would with other drivers in California.

As such, a California statewide unit does not comport to the Employer's own administrative structure. Regional managers supervise employees that are both in California and outside of California. Under Board law, a multi-location unit that does "not comport with any of the Employer's administrative divisional or regional groupings" is not appropriate. *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1082 (2004). *See also Acme Markets, Inc.*, 328 NLRB at 1209; *Alamo Rent-A-Car*, 330 NLRB at 898; *Stormont-Vail Healthcare, Inc.*, 340 NLRB at 1208; *Bashas' Inc.*, 337 NLRB at 711. As such, the recognized California statewide

unit is not appropriate.

B. Terms and conditions of employment

The terms and conditions of employment for drivers shows that a California statewide unit is not an appropriate unit.

1. Wages

The recognized classifications of drivers have vastly different wage rates within the State of California. Drivers in the Bay Area of California (Oakland, San Jose, Richmond, Newark and Ozol) make substantially more than drivers in other parts of the state. (Tr. 282; B-2, attachment B). As such, a statewide unit cannot be an appropriate unit for bargaining. *Miller & Miller Motor Freight Lines*, 101 NLRB 581, 581-82 (A multi-location unit was not appropriate where “[t]here is a substantial difference in pay scales as between the various terminals.”); *Groendyke Transport, Inc.*, 171 NLRB 997, 997-98 (1968) (A multi-location unit was not appropriate where drivers’ “[w]ages vary from terminal to terminal....”).

The starting wage rate for Yard and Radius Drivers (and the hourly wait time rate for Road Drivers) who work at or out of some yards in California is \$8.25 per hour. (B-2, attachment B). However, the starting wage rate for Yard and Radius Drivers (and the hourly wait time rate for Road Drivers) who work out of yards in the Bay Area of California is \$10.00. (B-2, attachment B). That means that the starting wage rate for Yard Drivers and Radius Drivers in the Bay area is more than 21% higher than the starting wage rate for Yard Drivers and Radius Drivers in other parts of California.

Prior to the recent collective bargaining agreement with Local 707, the difference in drivers starting hourly rate was even more stark. Wages for drivers in the El Centro Yard started

at \$8.00 per hour, while drivers in some Bay Area Yards made \$10.00 per hour. (J-4). As such, prior to February 1, 2011, the starting wage rate for drivers in the Bay Area was 25% higher than the starting wage rate for drivers of the same classification in other parts of California.

Road Drivers in the Bay Area also are paid a substantially higher mileage rate than Road Drivers in other parts of California. (Tr. 282; B-2, attachment B). The starting mileage rate for Road Drivers who work out of some yards in California is \$0.18 per mile. (B-2, attachment B). However, the starting mileage rate for Road Drivers who work out of yards in the Bay Area of California is \$0.20 per mile. That means that the starting mileage rate for Road Drivers in the Bay Area is more than 11% higher than the starting mileage rate for Road Drivers in other parts of California.

Prior to February 1, 2011, when the collective bargaining agreement with Local 707 went into effect, the difference in Road Drivers' mileage rate across California was even greater. The starting mileage rate for Road Drivers in Needles, California was \$0.16 per mile, while the starting mileage rate for Road Drivers in the Bay Area was \$0.20 per mile. As such, prior to February 1, 2011, the starting mileage rate for Road Drivers in the Bay Area was 25% higher than the starting mileage rate for Road Drivers of the same classification in other parts of California.

With such vastly different wage rates for workers in the same classifications, the Employer's drivers across California do not constitute an appropriate unit for collective bargaining. *Miller & Miller Motor Freight Lines*, 101 NLRB 581, 581-82.

2. Benefits

California drivers all have the same fringe benefits; they are offered the same retirement,

medical, dental, vision, life insurance benefits. (J-8; J-9). However, the Employer also offers all of its drivers nationally these same benefits. (Tr. 232, 236). As such, any community of interest that California drivers would share as a result of their fringe benefits is in no way “separate and distinct from that which they share with other employees at other facilities of the same employer.” *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004). Since California drivers’ fringe benefits are the same as the Employer’s drivers in other parts of the country, they do not weigh in favor of a statewide unit being an appropriate unit. *Id.*

3. Work rules, policies and procedures

Although the Employer has a separate Employee Handbook for California drivers (J-3), it is very similar to the Employee Handbook establishing the work rules, policies and procedures given to the Employer’s drivers in other parts of the state. (J-11). Almost all of the differences between work rules, policies and procedures outlined in the California Employee Handbook and the Employee handbook given to workers in other states are to comply with California regulatory requirements. (Tr. 311-18). The Board has consistently held that local legal differences regulating conditions of employment are not sufficient to base a unit determination. *Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999) (Statewide units of pharmacy workers not appropriate despite “the existence of separate state regulation of pharmacies and separate licensing of individual pharmacists who must interact with state officials in order to comply with state laws....”); *Bashas’ Inc.*, 337 NLRB 710, 711 (2002) (A multi-location unit covering all of an employer’s grocery stores within a county was not appropriate even though “counties have separate food-handling laws that grocery store employees must observe.”).

The only difference in the work rules, policies and procedures between California

workers and workers in other states not resulting from state regulation is that in California drivers are not to be on duty more than 60 hours in a five day period, while in other states drivers can be on duty for up to 70 hours in an eight day period. (Tr. 316; J-3, pg. 26; J-11, pg. 27). Surely this minor difference in maximum working hours cannot be enough to render a California statewide unit an appropriate unit. Since California drivers' work rules, policies and procedures are the same as the Employer's drivers in other parts of the country, they do not weigh in favor of a statewide unit being an appropriate unit.

C. Employee interchange

The level and significance of employee interchange for drivers both within California and outside of California militates towards a finding that a California statewide unit is not an appropriate unit. California drivers often interchange with drivers in other states. Moreover, California drivers would never have contact with drivers at many other yards within the State.

1. California drivers interchange with drivers in other states.

To accommodate the needs of its railroad customers, the Employer sometimes is required to transfer Employees to work at or out of other yards. (Tr. 134). However, the Employer does not just transfer California drivers to other locations within California; the Employer regularly transfers California drivers out-of-state. (Tr. 134). The Employer also occasionally permanently transfers drivers from out-of-state into California. (J-15; Tr. 239).⁴

⁴ Joint Exhibit 15 shows four current employees in California who had been permanently transferred into the State from outside of California. (Tr. 239). Based on the volume of documents, the Employer could only produce documents showing those drivers who had been transferred into California and are still working for California; there certainly could be more drivers who had transferred into California but no longer work for the Employer. (Tr. 243). Since Joint Exhibit 15 only shows drivers currently working in California, it also does not show drivers who have permanently transferred from California to some other state. (Tr. 376).

James Maestas, a driver for the Employer for 11 years, testified in detail regarding his out-of-state transfers. Mr. Maestas testified that, at various times in his employment with the Employer, he had been temporarily transferred to Denver, Colorado; Yuma, Arizona; the State of Texas; Tuscon, Arizona; and Winslow, Arizona. (Tr. 9-10, 10-11, 33). During Mr. Maestas' temporary transfer to Denver, he drove rail crews to Kansas. (Tr. 14). In his 11 years working for the Employer, Mr. Maestas was never transferred to work out of another yard in California. (Tr. 32).

Even when California drivers have not been transferred and are working out of their home yards, they often come in contact with drivers from other states. In the thirty days leading up to the hearing, California road drivers had driven from their home yards in California to rail yards in Yuma, Arizona; Winslow, Arizona; Sparks, Nevada; Winnemucca, Nevada; and Kalamath Falls, Oregon.⁵ (J-2). From these out-of-state yards, California Road Drivers could then drive to other out-of-state rail yards. (Tr. 305; J-14). Additionally, California employees drive to out-of-state locations other than rail yards. (Tr. 384). Finally Road Drivers from outside of California drive to yards within the State. (Tr. 305; J-2).

Whether due to transfers or normal trips taken by Road Drivers from their home yards, California drivers regularly interact with drivers from other states. The Employer places no restrictions on contacts between drivers in different states. (Tr. 306-07). As a result, when California drivers go to yards out-of-state, or out-of-state drivers go to yards in California, their interactions with out-of-state drivers is the same as California drivers' interactions with drivers

⁵ Additionally, long-time Employer driver James Maestas testified that the Employer has had him drive rail crews to and from Los Vegas, NV from his home yard, the Barstow, California Yard. (Tr. 23, 28, 73-74).

from other California yards. (Tr. 306-07). Because of the regular interchange and contact between drivers in California and drivers outside of California, a California statewide unit is not an appropriate unit. *Laboratory Corp. of America Holdings*, 341 NLRB at 1082-83.

2. California drivers have no contact or interchange with drivers from much of the State.

There is no contact between California drivers for the vast majority of the Employer's locations within California. Yard Drivers and Yard Coordinators primarily stay within their own yard; they sometimes drive up to 25 miles from their home yard. (Tr. 102). Radius Drivers only drive about 50 miles from their home yard. (Tr. 103, 136). Road Drivers drive the farthest distances—up to 250 miles from their home yard. (Tr. 144, 297). However, California has yards much farther than 250 miles from one another. *See* Section III(D) *infra*. For example, the San Diego Yard is approximately 650 miles from the Dunsmuir, CA Yard. Based on the sheer size of California, and the 250 mile maximum the Employer places on its longest-haul drivers, it is clear that drivers from any particular yard would never have contact with drivers from many yards. (Tr. 77-78). So not only do California drivers have regular contact with drivers from other states, but they do not interact with drivers from all portions of California. As such, California cannot be an appropriate unit for collective bargaining. *Sumo Container Station, Inc.*, 317 NLRB 383, 392 (1995) (Drivers from different terminals had different service areas, and as such had no community of interest.).

Several employees testified regarding Employer safety meetings. The Employer conducts safety meetings for drivers every three months. (Tr. 11-12, 489, 426-27). Generally only drivers from a single yard at safety meetings for the petitioned-for units. (Tr. 426-27). Of the

petitioned-for yards, the only exceptions on record are that drivers from the Barstow Yard have safety meetings with drivers from only the Yermo Yard, and drivers from the Hobart Yard occasionally have drivers from only the Watson Yard at their meetings. (Tr. 11-12, 29-30, 489).

Since drivers across California have no interaction with one another, and drivers in California have significant interchange with drivers in other States, a California statewide unit cannot be an appropriate unit.

D. Geographic proximity

Tremendous distance separates many of the Employer's yards in California. The Employer operates out of 42 rail yards in 33 California cities. (B-2, pg. 4). These rail yards run nearly the entire length of California from San Diego to Dunsmuir, CA—about 650 miles. (J-13). The distance from Dunsmuir, CA to Needles, CA, both cities the Employer operates out of, is even farther—about 761 miles. Moreover, the distance between many California Yards and out-of-state yards is much less than the distance between California Yards. For Example, Needles, CA is more than eight times farther from Dunsmuir, CA than it is from the Employer's basing location in Kalamath Falls, Oregon. (J-2). Likewise, the Employer's yard in Portola, CA is more than 600 miles from its yard in San Diego, CA—that is twelve times farther than the 50 miles separating it from the yard in Sparks, NV. The massive geographic distances between the Employer's California yards, and the close proximity of California yards to out-of-state yards clearly shows that a California state-wide unit could not possibly be an appropriate unit for collective bargaining. *Bashas' Inc.*, 337 NLRB 710, 711 (2002).

E. Employees' skills and duties

All drivers in each classification have the same job duties everywhere in the country.

Yard Drivers in California have no different job duties than Yard Drivers outside of California. Road Drivers in California do the exact same thing as Road Drivers everywhere else the Employer operates. Yard Coordinators' duties are the same in California as they are for Yard Coordinators everywhere else in the country. Quite simply, there is nothing in the drivers' job duties that distinguishes California drivers from anywhere the Employer operates. As such, there is nothing unique about California to make a statewide unit an appropriate grouping for collective bargaining. *Laboratory Corp. of America Holdings*, 341 NLRB 1079.

F. Bargaining history

In determining the appropriateness of a bargaining unit, the Board gives substantial weight to prior bargaining history; the Board considers bargaining history at both the units at issue and at other employer locations around the country. *Canal Carting, Inc.*, 339 NLRB 969 (2003); *Spartan Department Stores*, 140 NLRB 608, 610 (1963) (Where a retail chain bargained in citywide units in other cities, this fact was accorded considerable weight in arriving at a the unit determination.). In the present matter, the Employer has a long established history, both within California and outside California, of both single-yard and multi-yard collective bargaining units, as petitioned-for in cases 31-RC-8850, 31-RC-8851, 31-RC-8852, 31-RC-8853 and 31-RC-8854. However, prior to the recent recognition of Local 707 in California, the Employer has never bargained on a statewide basis anywhere.

1. The history of collective bargaining establishes that multi-yard units, such as those petitioned for in 31-RC-8851 and 31-RC-8853, are appropriate.

Within the State of California, the Employer has bargained with labor organizations in multi-yard units, such as those petitioned for by the UE in Case Nos. 31-RC-8851 and 31-RC-

8853. (J-10(a); J-10(q); J-17). The Employer also has an extensive history of bargaining collectively with other similar multi-yard units outside the State of California. (J-10(d); J-10(f); J-10(g); J-10(h); J-10(j), Tr. 337-38; J-10(n); J-10(o); J-10(s); J-18(a); J-18(b); J-18(c); P-3, Tr. 344). As such, the Employer's bargaining history, both within California and outside California, establishes that multi-location units, such as those petitioned for in cases 31-RC-8851 and 31-RC-8853, can be appropriate.

2. The history of collective bargaining establishes that single-yard units, such as those petitioned for in 31-RC-8850, 31-RC-8852 and 31-RC-8854, are appropriate.

The Employer also has significant collective bargaining history, both within California and outside California, with single yard units, such as those petitioned for by the UE in Case Nos. 31-RC-8850, 31-RC-8852 and 31-RC-8854. Within California, the Employer has a history of bargaining collectively with single-yard units of drivers at the Barstow Yard and the Bakersfield Yard. (J-10(b); J-10(c)). Indeed, these units are identical to the units petitioned for by the UE in Case Nos. 31-RC-8850 (J-10(b)) and 31-RC-8852 (J-10(c)). As such, the direct bargaining history in Barstow and Bakersfield would make the units in Case Nos. 31-RC-8850 and 31-RC-8852 presumptively appropriate. Outside of California, the Employer also has an established, significant history of bargaining with single-yard units. (J-10(e); J-10(i); J-10(k); J-10(l); J-10(m); J-10(p); J-10(r); P-1, Tr. 340-41; P-2, Tr. 342-344). As such, the Employer's bargaining history, both within California and outside California, establishes that single-yard units, such as those petitioned for in cases 31-RC-8850, 31-RC-8852 and 31-RC-8854, can be appropriate.

3. The history of collective bargaining establishes that a California statewide unit is not an appropriate unit.

The Employer's history of collective bargaining, both within California and outside California, establishes that a statewide unit is not an appropriate unit. Prior to the recent recognition with Local 707, the Employer had never bargained in California on a statewide basis. Moreover, despite the Employer's extensive history of collective bargaining, it has never bargained collectively on a statewide basis outside the State of California either.⁶

Since just December 2010, the Employer has voluntarily recognized Local 707 as the bargaining representative at: a single-yard unit in St. Louis, Missouri; a single-yard unit in Allentown, Pennsylvania; a multi-yard unit in Pennsylvania; a multi-yard unit in Ohio; and a multi-yard unit in Indiana. None of these voluntarily recognized units is a statewide unit. (Tr. 341-347; P-1; P-2; P-3). According to the Employer, Road Drivers at all of these recently voluntarily recognized units drive up to 250 miles from their home yard, just as California Road Drivers. As such, road drivers in these recently recognized units can drive to rail yards within their state (and outside of their state) to yards not covered by the voluntary recognition. The drivers' interactions with other drivers would be no different than California drivers' interactions with drivers at other yards within (and outside of) California. (Tr. 358-360). Although Road Drivers at all of these units voluntarily recognized in the past few months have the same duties, responsibilities, and interactions as California drivers, the Employer determined that non-statewide units were appropriate. The Employer's recent recognition of Local 707 on a non-

⁶ The Employer's Chief Administrative Officer Sandra Walker testified that the Employer had a history of bargaining with a labor organization at a single-yard unit in Wisconsin. Ms. Walker was not sure, but indicated that the single yard may have been the Employer's only location in the State of Wisconsin at the time. (Tr. 350-351).

statewide basis at numerous other locations around the country shows that a statewide unit is not an appropriate unit for the Employer's drivers.

While the Employer has no history of bargaining on a statewide basis prior to the recent recognition of Local 707 in California, the Employer actually has an established history of bargaining collectively across state lines. In California, the Employer has historically bargained with units that included both California employees together with those employees in other states. (See J-10(a) and J-17 where units of California drivers were co-mingled with drivers from Nevada). The Employer's history of bargaining with a units of California and non-California employees shows that there is nothing so unique about its operations in California as to make a statewide unit an appropriate unit for bargaining. The Employer has also bargained with units of Employees in multiple states outside of California, including units with drivers in: Kansas and Missouri (J-10(n); J-10(j), Tr. 337-38); Texas and Louisiana (J-18(a); Tr. 347-8); and Illinois and Indiana (J-10(d), Tr. 335-36).

The Employer's extensive history of collective bargaining, both within California and outside California, clearly establishes that a statewide unit is not an appropriate unit for bargaining.

IV. CONCLUSION

For all of the foregoing reasons, the UE respectfully requests that the Board grant the UE's Request for Review, rule that the UE's petitions should not have been dismissed because they are not coextensive with the voluntarily-recognized statewide unit and remand the instant petitions to the Regional Director for further processing.

Dated at Pittsburgh, Pennsylvania, this 5th day of April, 2011.

Respectfully submitted,

/s/ Joseph Cohen /s/

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing REQUEST FOR REVIEW ON BEHALF OF PETITIONER UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) has been sent this 5th day of April 2011 by email and overnight delivery to: Scott Gore, Counsel for the Respondent at <sgore@lanermuchin.com> and Laner, Munchin, Dombrow, Becker, Levin and Tominberg, Ltd., 515 N. State Street, Suite 2800, Chicago, IL, 60654; Maria Myers, Counsel for the Intervenor at <mmyers@rsglabor.com> and Rothner, Segall & Greenstone, 510 South Marengo Avenue, Pasadena, California 91101-3115; and James McDermott, Regional Director of Region 31 at <james.mcdermott@nlrb.gov> and 11150 West Olympic Blvd, Suite 700, Los Angeles, CA 90064-1824.

_____/s/ Joseph Cohen /s/_____
Joseph Cohen