

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

PITCO FOODS¹

Employer

and

Case 20-RC-073804

TEAMSTERS LOCAL 150

Petitioner

DECISION AND DIRECTION OF ELECTION

Pitco Foods (Employer) is a wholesale retailer and distributor of grocery, liquor, cigarettes and other general merchandise products with a place of business in West Sacramento, California. By its amended petition, Teamsters Local 150 (Petitioner) seeks to represent a unit comprised of all full-time and regular part-time drivers, lead drivers, and clericals; and excluding all other employees, managers, supervisors and guards as defined by the Act. The petitioned-for unit is comprised of about 12 persons. The parties stipulated, and I find, that the drivers should be included in any unit found appropriate. The Employer contends that Transportation Supervisor Douglas Frakes is a statutory supervisor who must be excluded from the unit, and that two clericals whom Petitioner seeks to include in the unit should be excluded as office clericals who lack a community of interest with other employees in the petitioned-for unit. Petitioner takes contrary view on these issues. For the reasons explained below, I find that Frakes is a statutory supervisor who must be excluded from the unit, and that the two clericals share a sufficient community of interest with the drivers to support their inclusion in the unit.

¹ The record does not disclose the Employer's form of business organization.

Witnesses: The following witnesses testified at the hearing: General Manager James Phillips, Transportation Supervisor Douglas Frakes and Clerical Judy Frakes.

FACTS

The Employer's Locations & Managerial Hierarchy. The Employer facility herein is located in West Sacramento. The Employer also has another facility located in San Jose, California.² General Manager James Phillips heads the Employer's operation at its West Sacramento facility. Phillips spends 2 1/2 days a week at the West Sacramento facility and 2 1/2 days a week at the San Jose facility. On the days Phillips works at the West Sacramento facility, he arrives at work between 7 and 7:30 a.m.

Reporting directly to Phillips at the West Sacramento facility is Transportation Supervisor Douglas Frakes, whose supervisory status is disputed. Also reporting directly to Phillips are a sales manager; an inventory control manager; a night warehouse manager; a warehouse manager; and two clericals, Judy Frakes and Debbie Lynch, whose unit placement is disputed. Douglas Frakes and the two clericals are hourly paid and Phillips and the other managers are salaried.

The Employer's Operation & Employees. As indicated above, the Employer is a wholesale distributor of grocery and general merchandise products. Its West Sacramento operation is housed in a single warehouse facility. Phillip's office is located in a corner of the facility and Clericals Judy Frakes and Debbie Lynch sit at desks outside Phillips' office. Transportation Supervisor Douglas Frakes has a cubical in the same area.

The Employer services small independent accounts under two models: "cash and carry" and delivery. Under the cash and carry portion of its operation, retail customers purchase and carry out products from its facility. The Employer employs cashiers who work at check stands to handle these customers. The cashiers work eight to ten hour staggered shifts to cover the hours of the cash and carry operation, which are from 7 a.m. to 6 p.m.

Under the delivery portion of its operation, the Employer employs about nine sales persons assigned to different territories. The sales persons visit customers and take

² I take administrative notice that West Sacramento and San Jose are about 117 miles apart.

their orders, which are transmitted to the facility. The sales orders are processed by Clericals Frakes and Lynch, who create pick tickets and invoices for products. The Employer employs order pullers who work eight to ten-hour staggered shifts from Sunday through Thursday, starting between 4 and 6 am. The order pullers use the pick tickets created by the clericals to determine what products to pull from the shelves to fill orders, and they wrap the orders in plastic wrap and place them on pallets for delivery. Drivers load the pallets onto their trucks and make the deliveries. The Employer also employs warehouse employees to stock shelves and handle inventory control. All employees are hourly paid and receive the same health benefits.

The Drivers. The Employer employs nine drivers who typically work eight to ten hour shifts, Monday through Friday, making deliveries to customers. Drivers also occasionally work on Saturdays. Drivers are paid between \$17.50 and \$20.50 an hour and they receive the same health benefits as other employees. They are required to have a Class A (Commercial) driver's license, authorizing them to drive tractor-trailer trucks. There is no evidence that any person other than the drivers and Transportation Supervisor Frakes possess Class A licenses or drive trucks and make deliveries.

Drivers arrive at work between 4:30 and 6 a.m., and are given their paperwork by Transportation Supervisor Frakes. They spend about 30 minutes loading their trucks. Generally, all of the drivers are on the road to make their deliveries by 7 a.m., and they spend most of their work day away from the facility. Occasionally, drivers will return to the facility to take out another delivery. For some of the Employer's larger customers, drivers drop off pallets and only count the cigarette cartons in an order; for other customers, drivers break down pallets and verify a complete case count. Drivers use various documents in their work, such as manifests and invoices. They also fill out discrepancy forms if there are discrepancies in orders, and they call the Employer's office if an order is short on cigarettes, which are typically the most expensive item in an order. Drivers collect checks or money orders from customers. As discussed more fully below, drivers call the office and speak to Transportation Supervisor Frakes or Clericals Frakes or Lynch about any questions that arise in making their deliveries. They pick up authorized returns and load them onto their trucks and return to the Employer's facility.

At the end of their work day, drivers spend about 20 minutes at the facility unloading their trucks, checking in their returns, giving their paperwork to Clericals Frakes and Lynch, hanging up the truck keys in the office area, and clocking out.

Transportation Supervisor Douglas Frakes

Douglas Frakes was employed by the Employer as a driver for about four years prior to being promoted to his current position in February 2009.³ Nine drivers report to Frakes. Since February 2009, Frakes has continued to act as a relief driver, filling in for other drivers while they are on vacation. He also at times assists other drivers on their routes. According to Frakes, he decides whether he will assist other drivers.⁴

Frakes is paid \$21.50 an hour, about \$1 more an hour than the highest paid driver.⁵ He receives the same health benefits as drivers and all other employees. Other than the hours that Frakes spends driving a truck, he works in the loading area and at a cubicle in the office area.

Frakes' Role in Hiring. Frakes does not have independent authority to hire drivers but makes hiring recommendations to General Manager Phillips who has ultimate authority to make hiring decisions. During the six months preceding the hearing, Frakes

³ The record contains no written job description for Frakes' position. Frakes testified that he was promoted to his current position in February 2009, when the person occupying that position left the job. According to Frakes, at the time of his promotion, he was told by General Manager Phillips that he would be the "lead driver," and not transportation supervisor. Phillips testified that Frakes is the Employer's transportation supervisor. Frakes testified, and the record supports, that since February 2009, Frakes has signed many Employer documents in connection with his work on which his title is indicated as "transportation supervisor," and Frakes has even handwritten in that title after his name on some documents. Therefore, for purposes of this Decision, I am referring to Frakes as transportation supervisor, although his title is not determinative of his supervisory status.

⁴ Frakes testified that recently he had been driving about once or twice a week and had driven three days during the week of the hearing. He estimated that he spends about five months out of the year driving while other drivers are on vacation. The Employer provided records to show that from November 28, 2011, to January 20, 2012, Frakes had only spent about 68 hours driving or about 16% of his work time for that period. However, the records introduced by the Employer apparently do not include hours that Frakes has accompanied other drivers on their routes.

⁵ Frakes testified that when he was initially promoted to his current position, he was not given any pay increase and was still being paid \$18.50 an hour. According to Frakes, after being in the new position for a couple of months, he asked Phillips for a raise and was given a raise to \$20 an hour, which was 50 cents below the highest paid driver. Frakes testified that about a year and a half later, he asked Phillips for another raise and was given an increase to his current wage rate of \$21.50 an hour, a dollar an hour higher than the highest paid driver.

had interviewed, road-tested and recommended for hire three driver job applicants to General Manager Phillips.⁶ Phillips hired all three of these applicants, although he had only interviewed two of them. Phillips testified that he hired the applicant whom he had not interviewed based on Frakes' recommendation. There is no evidence that any other persons interviewed the drivers who were hired. Nor is there evidence that Phillips has ever declined to follow any hiring recommendations made by Frakes or has hired any drivers without Frakes' recommendation.

Frakes' Role in Disciplining Drivers. Frakes has no independent authority to discipline drivers. He brings driver misconduct to Phillips' attention and he makes recommendations regarding the disciplining of drivers to Phillips, who has the ultimate authority to make disciplinary decisions.

The record includes a disciplinary notice ("final written warning"), dated November 14, 2011, issued to Driver Oscar Orozco. The notice is signed by Phillips and Frakes, who are both identified on the notice as a "manager approving" the discipline. On the notice, Frakes states that Orozco took leave on Thursday, November 3, 2011, and was supposed to return to work on Friday, November 4, but failed to do so. According to Frakes' statement on the notice, he was unable to reach Orozco by phone on November 4, despite leaving a phone message for him, and Orozco did not contact Frakes until four days later, when Orozco texted Frakes and admitted that he had "screwed up." Frakes' statement on the notice indicates that Orozco's absence on Friday, November 4, resulted in a customer canceling a \$3200 order and in Frakes having another driver "come in on Saturday, on overtime and do [Orozco's] route." In the notice, Frakes states: "My recommendation at this time is 3 days suspension with no pay." Frakes testified that he had recommended the three-day suspension as stated on the notice and that Phillips had suspended Orozco. Phillips testified that he followed Frakes' recommendation in suspending Orozco.

The record also contains an earlier written warning issued to Orozco on May 16, 2011, signed only by Phillips as the approving manager. The statement on the notice is

⁶ The three drivers hired were Fred Bettencourt, Luke Mahon and Manny Singh. Mahon was hired on August 10, 2011, without being interviewed by Phillips.

again by Frakes, although he was not directly involved in the incident. The statement indicates that Orozco refused a customer's request to break down a pallet of water because the customer was not paying the Employer to break down pallets. The customer was dissatisfied and called and complained to Phillips. Phillips then spoke to Orozco on the phone and directed him to break down the pallet, telling Orozco that they would work out the issue with the customer later on. In the notice, Frakes states:

Oscar not knowing who he was talking to told [Phillips] that he would not break it down unless he heard from me [Frakes] first. [Phillips] said his attitude and tone was unprofessional and he should not be talking to anyone that way. This is a written warning and any further incidents of this kind will result in suspension and or termination.

Phillips testified that he had notified Frakes about his conversation with Orozco; they had decided that Orozco should be issued a written warning; Frakes had prepared the warning; and Phillips had signed it. As indicated above, Frakes' signature is not on this warning notice.

Frakes has also verbally counseled drivers. For example, in response to a concern raised with him by a salesperson in December 2011, Frakes advised a driver to be more careful about not losing his paperwork.

Lastly, Frakes testified that if a driver ever refused to deliver extra stops added to his route by Frakes, the driver could be subject to discipline.

Frakes' Role With Regard to Drivers' Routes. Frakes testified that most of the drivers have had the same routes since prior to his promotion to his current position. According to Frakes, he does not unilaterally change drivers' routes except with regard to the temporary adjustments described below. However, Frakes testified that at times when a new driver is about to be hired, he has offered drivers the opportunity to change their routes if they wanted to do so. According to Frakes, drivers have rarely opted to change their routes.

Daily routes are computer-generated based on the drivers' standard routes and orders that have come in from sales persons. The Employer's policy is to try and deliver orders the day after they are made or at the latest during the same week they are made.

Frakes' testimony shows that his primary responsibility is to ensure that deliveries to customers go out each morning. In order to carry out that responsibility, Frakes frequently makes temporary adjustments to drivers' routes and loads based on his decisions involving a variety of factors that change on a daily basis. These factors include overloaded or out-of-balance trucks, concerns that a truck will not get through the DMV weigh scale, driver or truck shortages, the value of certain deliveries, the distances to customer locations, the locations of customers relative to other stops on a route, special delivery requests made by customers or sales persons,⁷ holidays, and the need to train drivers on a new route. In responding to such factors, Frakes may add or delete products and/or stops from a route, re-arrange a route, assign two drivers to the same route,⁸ and/or decide not to make a requested delivery. As indicated above, such changes are made frequently.⁹ Frakes acknowledged that his daily decisions to make such changes to drivers' loads and routes can affect the number of hours worked by the drivers. There is no evidence that Frakes consults with Phillips or with any other manager in making these decisions, which are made between the hours of 4 and 7 a.m., prior to the time Phillips arrives at work during the three days he is at the facility.

⁷ The record includes several emails from salespersons to Frakes asking for route adjustments to accommodate customer requests. Frakes has authority to determine whether the requested adjustments can be made and/or how they will be fit into the Employer's delivery schedule. The record reflects that the Employer has a sales policy of not delivering orders that are under \$2000, and that Frakes has refused to make a delivery when an order was for \$568.61, in keeping with this policy. However, the record also shows that Frakes has refused to include requested deliveries for several other reasons, including because the delivery did not fit in with the existing routes; because there were too few drivers or trucks available to handle the delivery; and because it was a busy holiday weekend.

⁸ Frakes had independently assigned two drivers to work on the same truck on about four occasions during the past six months. On two of these occasions he did so in order for the drivers to learn a new route. On another occasion it was to enable a driver to learn how to drive a particular type of truck. On another occasion it was done during a busy holiday period to enable the drivers to get their routes done and get off work earlier

⁹ With regard to the frequency of such adjustments, the testimony of Phillips and manifests included the record show that during the week of January 16 to 20, 2012, approximately 28 different route changes were made by Frakes to driver routes.

Notifying Drivers Not to Report Due to Lack of Work. Frakes testified that on about six occasions during the six months preceding the hearing, he had notified drivers not to come to work because of a lack of work.¹⁰

Frakes' Role With Regard to Time Cards & Leave Requests. Frakes approves the drivers' timecards but he does not have access to the Employer's payroll system. Frakes testified that he authorizes paid time off if a driver gives two weeks advance notice as required by Employer policy. According to Frakes, he has never denied a request for paid time off when a driver has given such advance notice. However, Frakes testified that he has authority to deny a leave request if the driver's absence would "affect the operation." The record contains a driver's time off request dated November 14, 2011, for time off on November 10 and 11. Frakes signed the form on the line designated as "supervisor," and he indicated on the form that the requested leave was excused but unpaid. Frakes explained that on this occasion the driver had called in sick so the time off was excused, but the driver had not given the two weeks advance notice required in order to be paid for the time off.

Frakes' Role With Regard to Scheduling & Overtime. As indicated above, drivers work Monday through Friday, usually on eight hour shifts. Prior to about May 2010, drivers had worked four ten-hour shifts each week. Frakes testified that the four/ten schedule had often resulted in shortages of drivers on Mondays, particularly when there were drivers on vacation, so he brought the problem to Phillips' attention and they discussed having the drivers switch to a five/eight schedule. According to Phillips, after he and Frakes discussed the change, Phillips made the final decision to change the drivers' schedule and the new five/eight schedule was adopted in about May 2010.

Frakes testified that the drivers' start times have remained pretty much the same since before he was promoted to his current position. Drivers report to work on a staggered basis between 4:30 and 6 a.m., and each driver usually reports at the same time each day. Frakes testified that drivers are allowed to arrive any time during the window

¹⁰ The record reflects that the driver who substituted for Frakes during the week of the hearing had also instructed another driver not to report due to lack of work.

period between 4:30 and 6 a.m., but drivers with the longest routes usually arrive the earliest. According to Frakes, he has never ordered a driver to report to work at a different time than the driver's customary start time. Frakes testified that the staggered arrival times of the drivers help to reduce congestion on the loading dock.

Frakes' Assignment of Overtime Work on Saturdays. Frakes testified that he occasionally assigns overtime work on Saturdays to drivers and had done so about twice during the six months prior to the hearing. According to Frakes, Saturday work is not mandatory. Two of the drivers are usually willing to work on Saturdays and he offers such work to them; if they are unavailable, Frakes offers it to the other drivers; and if there is no driver who wants to do the Saturday work, Frakes handles it himself.

Frakes' Role In Rewarding Drivers. There is no evidence that Frakes is involved in preparing performance evaluations or in giving input on pay increase decisions involving other drivers. The record indicates that the Employer instituted an "Employee of the Month," award program in January 2012, and that Frakes and managers of other employee groups each recommended an employee in their group for this award, which involved receiving a \$25 gift card and having their picture hung on the wall at the Employer's facility. Frakes recommended that Driver Fred Bettencourt be given this award and Bettencourt received it.

Accountability. Frakes testified that he has never been counseled or disciplined concerning driver performance nor has he ever been informed that he is accountable for the work of the drivers. Phillips testified that Frakes is accountable for the work of the drivers although Frakes has never been disciplined for such work. According to Phillips, Frakes' accountability is shown by the fact that Phillips and Frakes confer regularly about driver and delivery issues, and by Phillips referral of such issues to Frakes to handle. In the latter regard, the record shows that when sales persons have emailed Phillips to raise concerns about a driver or a delivery, Phillips has forwarded their emails to Frakes for response, and sometimes followed up with Frakes to see what has been done.

Handling Driver Concerns. Frakes testified that drivers bring their concerns to him about their paychecks, customers, pallets, plastic wrapping on products, trucks and other equipment. According to Frakes, he has no independent authority to resolve their

issues but takes them to Phillips, or payroll or sales persons for resolution. He does not directly contact customers. The record shows one example where a driver complained to Frakes that he had not been paid for eight hours he had worked in December 2009; Frakes notified payroll and the driver was ultimately paid for the time. The email exchange regarding the incident shows that the payroll clerk asked for Phillips' approval to make the payment to the driver, which Phillips provided.

Frakes' Administrative Duties. Frakes is responsible for collecting and filing drivers' time sheets, vehicle inspection reports, log sheets and other Department of Transportation (DOT) forms. He is also responsible for dealing with the companies that lease trucks and trailers to the Employer and he arranges for preventative maintenance work on the trucks and for replacement trucks while the work is being done.

Clericals Judy Frakes and Deborah Lynch

Judy Frakes and Deborah Lynch are full-time clerical employees. Their desks are outside of Phillips' office and they report directly to Phillips. Judy Frakes works from about 11 a.m. until 7 p.m., and Lynch works from 4 a.m. until about noon. Both Frakes and Lynch are hourly paid and receive the same health benefits as drivers and other employees.

Judy Frakes receives orders for products from sales persons and inputs the orders into the Employer's computer system and creates pick tickets, which she transmits to the night warehouse manager. The night warehouse manager oversees the order pullers who use the pick tickets to pull and stage products for delivery. After the products have been pulled and staged on pallets, Deborah Lynch prepares the invoices for the products to be sold to customers. Lynch also checks the invoices for errors and makes any changes to them necessary to ensure that all of the product that has been ordered is delivered to customers that day. Lynch inputs the invoices into daily computerized truck routes.

Judy Frakes testified that her primary duties are to support the sales persons, drivers, cash-and-carry customers and all other employees at the facility. She further testified that she and Lynch print pick tickets and invoices, process the opening of new customer accounts, answer phone calls from drivers, sales persons and customers, and file paperwork.

With regard to her interactions with drivers, Frakes testified that she interacts with the drivers throughout every work day. Drivers call her asking about customer credits, pick up requests, returned items, etc. Drivers also bring their paperwork to the clericals at the end of their shifts and the clericals separate the invoices and document any checks received by the drivers.

Neither of the clericals has a Class A drivers license and neither drives or makes deliveries for the Employer. Drivers do not perform clerical work. The clericals spend 100% of their work time at the Employer's facility. They use a lunchroom in the office area that is not used by the drivers.

ANALYSIS

Whether Douglas Frakes Should be Excluded from the Unit as a Statutory Supervisor. As indicated above, the Employer contends that Transportation Supervisor Douglas Frakes must be excluded as a statutory supervisor and Petitioner takes a contrary position. I find that Frakes is a statutory supervisor who must be excluded from the unit for the reasons stated below.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and, their authority is held "in the interest of the employer." Supervisory status may be shown by demonstrating that the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Croft*

Metals, Inc., 348 NLRB 717 (2006); *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB 747 (2006) .

Further, whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). The Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C.Cir. 1971); *Chevron, USA*, 309 NLRB 59, 62 (1992). The burden to prove supervisory status is on the party asserting it. See *Oakwood, supra*; *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n. 8 (1999).

In the instant case, the record establishes that Douglas Frakes is a statutory supervisor based on his authority to effectively recommend the hiring and disciplining of drivers and based on his authority to assign drivers in their work.

With regard to hiring, the evidence establishes that Frakes interviewed and recommended the hire of Driver Luke Mahon on August 10, 2011, after interviewing Mahon and giving him a driving test. Phillips did not interview Mahon but rather followed Frakes' recommendation in hiring Mahon. I find that Frakes' recommendation to hire Mahon was an effective recommendation within the meaning of Section 2(11). In my view, this effective hiring recommendation made by Frakes cannot be discounted as merely a sporadic or isolated exercise of such authority given the limited number of drivers employed and the short period of time that Frakes has been transportation supervisor. Furthermore, Frakes' substantial role in the hiring process is also shown by the fact that he interviewed, administered driving tests and made recommendations to hire two other drivers, Fred Bettencourt and Manny Singh, who were ultimately hired by Phillips. Lastly, there is no evidence that Frakes has ever made any hiring recommendations rejected by Phillips or that Phillips has ever hired any drivers without Frakes' recommendation. Therefore, I find that Frakes possesses the authority to make effective hiring recommendations.

With regard to Frakes' authority to discipline drivers, I find that the final warning/three-day suspension issued to Driver Orozco on November 14, 2011,

demonstrates that Frakes has effective authority to recommend the discipline of drivers. Thus, Frakes' statement on the face of this disciplinary notice, as well as his own testimony, establishes that it was his recommendation to suspend Orozco for three days without pay. Phillips testified that he followed Frakes' recommendation in suspending Orozco. As with the evidence regarding Frakes' hiring authority, I do not find that the effective recommendation made by Frakes with regard to Orozco's suspension can be discounted as only a sporadic or isolated exercise of Frakes' authority in this regard, given the small number of drivers and short period during which Frakes has been transportation supervisor. Further, as with the evidence of hiring authority, the record shows that Frakes was also involved in the issuance of an earlier written warning notice to Orozco on May 16, 2011. Finally, as with hiring, there is no evidence that Phillips has ever disciplined drivers without first consulting with Frakes or that Phillips has ever rejected a recommendation from Frakes regarding the disciplining of a driver.

I also find that Frakes assigns drivers within the meaning of Section 2(11) of the Act. In *Oakwood*, the Board determined that the phrase "to assign" in Section 2(11) means: "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties. . . ." See also *Croft Metals, Inc.*, 348 NLRB at 722. The exercise of "independent judgment" in regard to the authority to assign must involve a degree of discretion that rises above the "routine and clerical" and is done in more than a perfunctory or sporadic manner. *Oakwood, supra*, 348 NLRB at 693. To establish the authority to assign, it must be shown "that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken." *Golden Crest Healthcare Center, supra*, 348 NLRB at 729.

In the instant case, I find that Frakes possesses the authority to assign based on his authority to frequently change the routes and delivery schedules of the drivers based on his independent assessment of numerous factors that change on a daily basis, as described above. The record shows that Frakes' decision-making in this regard is largely done within his own discretion without consulting Phillips, who is not present at the facility

when such decisions are being made. Further, Frakes acknowledged that the numerous daily changes that he makes to the drivers' routes and loads can affect the number of hours that drivers work and thus affect their pay. Frakes' authority to discipline and his own testimony, as well as that of Phillips, demonstrates that drivers are subject to discipline if they disobey Frakes' work assignments. Frakes also testified that he possesses authority to deny time off requests if a driver's absence would affect the operation. Thus, the record supports that Frakes can *require* drivers to obey his assignments. For these reasons, I find that he possesses the authority to assign within the meaning of Section 2(11). See *Golden Crest Healthcare Center, supra*, 348 NLRB at 729.¹¹

In sum, I find that Frakes possesses authority to effectively recommend the hiring and disciplining of drivers and also the assignment of work to the drivers, and I therefore conclude that he is a statutory supervisor who is properly excluded from the unit.¹² In reaching this conclusion, I have considered certain secondary indicia which could support a finding that Frakes is not a statutory supervisor, such as that Frakes drives during a portion of his work time; is not salaried; is paid only \$1 more per hour than the highest paid driver; and lacks access to the payroll system. However, I find such secondary indicia not to be controlling given the evidence establishing primary indicia of Frakes' supervisory authority.

¹¹ With regard to assignment authority, in *Oakwood, supra* 348 NLRB at 695, the Board found that the charge nurses' assignment of patients to nursing personnel or geographic locations within the emergency room fell within the definition of "assign" for purposes of Section 2(11), because such assignments determined what would be the required work of the employee during the shift, thereby having a material effect on the employees' terms and conditions of employment. Similarly, in the instant case, Frakes' assignment of work to the drivers has a material effect on the drivers because it can affect their hours and pay. In *Golden-Crest, supra*, 348 NLRB at 729, the Board found that the charge nurses did not "assign" employees because the record did not support the employer's assertions that the charge nurses had authority to require CNAs to go home early; to stay past the end of their shifts; to come into work from home; or to work on a particular floor if it was understaffed. By contrast, in the instant case, the record supports that Frakes possesses the authority to make changes in drivers' routes on a frequent basis that can affect their hours and pay.

¹² I do not find that Frakes possesses the authority to direct drivers under Section 2(11), given the lack of clear evidence of actual accountability to prove responsible direction. See *Oakwood, supra*, 348 NLRB at 691-692; *Rockspring Development, Inc.*, 353 NLRB 1041, 1042 (2009) (and cases cited therein).

Accordingly, I find that Frakes is a statutory supervisor and he is excluded from the unit.

Whether Clericals Judy Frakes and Deborah Lynch Should be Included in the Unit. Petitioner seeks to include Clericals Frakes and Lynch in the petitioned-for unit, and the Employer contends that they lack a community of interest with the drivers and should be excluded from the unit. For the reasons set forth below, I have decided that they are properly included in the unit.

It is longstanding Board policy that a unit need only be *an* appropriate for collective-bargaining and there is no requirement that a Petitioner petition for the most appropriate unit. *Overnite Transportation*, 322 NLRB 723 (1996) citing *Black & Decker Mfg.*, 147 NLRB 825, 828 (1964). When an issue of the appropriateness of unit is raised, the Board begins with the petitioned-for unit and considers alternate proposals for units only if the petitioned-for unit is deemed inappropriate for collective-bargaining purposes. *Overnite Transportation, supra*, citing *P.J. Dick Contracting*, 280 NLRB 150, 151 (1988).

The Board generally applies a “community of interest” analysis to determine whether employees in a petitioned-for unit constitute an appropriate unit. Such an analysis includes reviewing such factors as the skills and functions of employees, supervision, employee interchange, working conditions and bargaining history to determine the appropriateness of a petitioned-for unit. *Overnite Transportation, supra* at 724; *Canal Carting*, 339 NLRB 969 (2003). Further, based on such community of interest criteria, the Board generally excludes office clericals from units of production and maintenance and other employees, but will include plant clerical employees. Plant clerical employees are generally those whose duties are related to the production process while the duties of office clericals are related to general office operations. See *Cook Composites & Polymers Co.*, 313 NLRB 1105 (1994). Typical office clerical duties involve handling billing, payroll, phone and mail. *Mitchellance, Inc.*, 314 NLRB 536 (1994); *Dunhams Athleisure Corp.*, 311 NLRB 175 (1993). Typical plant clerical duties include transcribing sales orders to facilitate production. See *Kroger Corp.*, 342 NLRB

202 (2004); *Caesars Tahoe*, 337 NLRB 1096 (2002); *Hamilton Halter*, 270 NLRB 331 (1984).

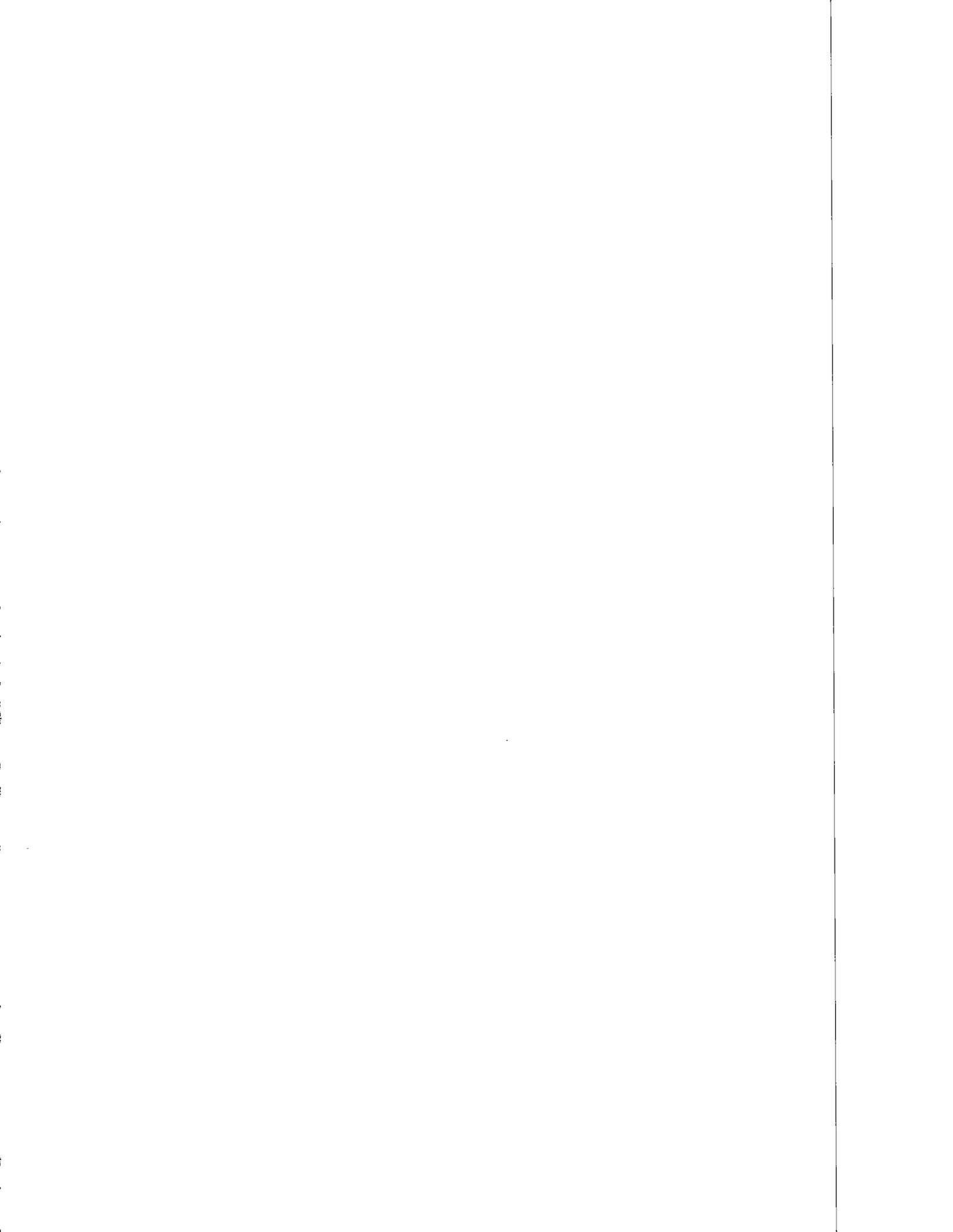
In the instant case, the parties have stipulated, and I have found, that the drivers should be included in any unit found appropriate. I find that Clericals Frakes and Lynch share a community of interest with the drivers that supports their inclusion in the unit. The work of Frakes and Lynch in setting up customer accounts, issuing pick tickets and invoices, answering drivers' questions throughout the day, and processing drivers' paperwork, is more plant than office clerical in nature. While Frakes and Lynch do not have Class A licenses or make deliveries for the Employer, their work is functionally integrated with the work of the drivers and they regularly interact with the drivers in doing their jobs. Thus, they print out the pick tickets and invoices used by drivers; they answer driver's questions about delivery issues throughout the day; and the drivers turn in their paperwork to the clericals for processing at the end of each work day. In addition, like the drivers, the clericals are hourly paid and receive the same health care benefits. Although the clericals have separate immediate supervision from the drivers, both the drivers and clericals have the same general manager.

Accordingly, I find that a unit comprised of the drivers and clericals is an appropriate unit for collective-bargaining purposes.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

- 1) The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
- 2) The Employer is an employer as defined in Section 2(2) of the Act, and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
- 3) Teamsters Local 150 is a labor organization within the meaning of the Act.
- 4) A question affecting commerce exists within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.



5) I find that the following unit is an appropriate unit for collective-bargaining purposes:

All full-time and regular part-time drivers and clericals employed at the Employer's West Sacramento, California facility; and excluding all other employees, the transportation supervisor, managers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 150 or by no union. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 20, 901 Market Street, Suite 400, San Francisco, CA 94103, on or before **March 6, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹³ by mail, or by facsimile transmission at (415) 356-5156. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Because the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by electronic filing, facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

¹³ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

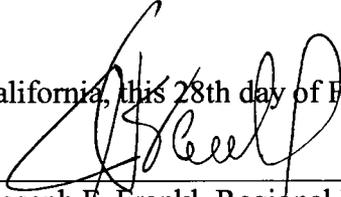
C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 13, 2012**. The request may be filed electronically through the Agency's web site, www.nlr.gov,¹⁴ but may not be filed by facsimile.

DATED AT San Francisco, California, this 28th day of February 2012.



Joseph F. Frankl, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

¹⁴ To file the request for review electronically, go to www.nlr.gov, select *File Case Documents*, enter the NLRB Case Number, and follow the detailed instructions.