

R.D. # 03-12
South Hackensack, New Jersey

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

DORA'S NATURALS, INC.¹

Employer

and

CASE 22-RC-070173

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 701²

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner, International Brotherhood of Teamsters, Local 701 ("Petitioner or Union"), pursuant to Section 9(c) of the National Labor Relations Act, seeks to represent a bargaining unit consisting of all full-time and regular part-time truck drivers employed by Dora's Naturals, Inc. ("the Employer"), at its South Hackensack, New Jersey location. The Employer contends that the Petition should be dismissed because for the unit to be appropriate, it must also include all full-time and regular part-time warehouse employees working at the same location.

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Union appears as corrected at the hearing.

I have considered the evidence and the arguments presented by the parties,³ and I find, for the reasons discussed *infra*, that that the petitioned-for unit of drivers constitutes an appropriate unit in scope. Accordingly, the petition should not be dismissed and I hereby order an election as set forth herein.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;⁴
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein;⁵
3. The labor organization involved claims to represent certain employees of the Employer;⁶
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act;

³ A Brief filed by the Employer has been duly considered.

⁴ The hearing officer correctly rejected Employer's Exhibit 2, a collective bargaining agreement covering the period February 1, 2003 to February 1, 2006 between the Employer and a different union, Teamsters Local 584, on the grounds that this agreement has no relevance to the instant proceeding. Given that the parties stipulated that there is no current collective bargaining agreement covering any of the employees in the unit sought and that there is no contract bar to this proceeding, the fact that Local 584 may have represented a combined unit of drivers and warehouse employees at a previous time is not relevant to my conclusion that the petitioned for unit is appropriate.

⁵ The parties stipulated, and I find, that the Employer is a New York corporation engaged in the distribution of organic milk and dairy products from its South Hackensack, New Jersey facility, the only facility involved herein. During the preceding twelve months, the Employer sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of New Jersey.

⁶ The parties have stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following unit of employees constitutes an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers employed by the Employer at its South Hackensack, New Jersey location, but excluding sales employees, office clerical employees, dispatchers, supervisors and guards as defined in the Act and all other employees.

I. FACTS

The Employer operates a 44,000 square foot warehouse located at South Hackensack, New Jersey. This facility is used to warehouse and distribute organic dairy products and other perishable food items to customers located within and outside the State of New Jersey. There are approximately 95 employees employed at the facility including supervisors, sales and customer service employees, drivers and warehouse workers.

Brian Lee is the Employer's Vice President of Operations and is responsible for the oversight of the entire warehouse operation. Other supervisors include Office Manager Rene Smallsrober (Customer Service), Janet Lindholm (Route Reconciliation Manager), Fred Brehon (Day Shift Warehouse Manager), Edgar Clavel (Night Shift Warehouse Manager), Luis Torres (Route Manager) and Weder Lizama (Training Manager).

The Employer's warehouse has two shifts. The day shift starts anywhere between 6 a.m. and 7 a.m., and ends anytime between 2 p.m. and 4 p.m. Unlike drivers, warehouse workers use time clocks to record hours worked. It is the responsibility of the day shift workers to receive and unload inventory on the products that arrive each day.

Due to the highly perishable nature of the products, the day shift must continuously rotate products based on expiration dates. Newly received inventory is moved towards the back of the warehouse and older inventory is moved toward the front. Essentially, the day shift is in charge of preparing the inventory for the night shift.

The night shift warehouse workers start at 4 p.m. and end anywhere between midnight and 3 a.m. The night shift is responsible for selecting and loading the ordered products onto pallets, labeling the products with the appropriate destination information, and loading these pallets onto the trucks. After the truck is loaded and the back doors are closed, the warehouse workers place a numbered government seal on the back doors of the truck and record that number in a log.

The Employer's drivers arrive at the warehouse anywhere from 4:00 a.m. to 6:00 a.m. A driver's start time will vary, depending on that driver's delivery route and schedule and, unlike warehouse workers, drivers set their own hourly schedule. When a driver arrives to work, he is greeted by one of three team leaders,⁷ who logs in the driver's start time, reviews all information that the driver may need relating to that specific driver's delivery truck, product being delivered, and route. The team leader then provides the driver with all paperwork and information needed to complete that day's deliveries. A driver spends about 15 minutes in the warehouse before leaving for his delivery route. When making a delivery, the driver meets with the customer's receiver, unloads product from the truck onto the receiving dock, and obtains the necessary signatures to establish receipt of the product by the customer. After completing their delivery, drivers return to the warehouse anywhere from 11 a.m. to 3 p.m. or 4 p.m., again, depending on their route and the time of the last delivery. Once the driver returns

⁷ The parties have stipulated, and I find, that team leaders are not supervisors under the Act.

to the facility, the pallets, crates and returned products are taken off of the truck by the warehouse employees. Thereafter, the driver will report to the main office and hand in all of his paperwork to the Employer's receptionist. The return process takes approximately 30 minutes. Overall, the entire amount of time drivers are in the warehouse each day is no more than 45 minutes.

As previously mentioned, warehouse workers are also responsible for unloading the empty pallets, cases and returned products off of the trucks. However, if all the warehouse workers are busy unloading other trucks, a driver may not want to wait and will go ahead and unload his own truck, leaving the empty pallets and cases on the loading dock. In order to complete this task, the drivers will use a power jack or hand truck. Drivers can not use a forklift as only warehouse workers are certified to do so.

With respect to interchange between the warehouse employees and drivers, the record reflects four isolated instances. The first occurred eight years prior to the hearing date when the Employer transferred warehouse worker Javier Orregio to a driving position. According to the testimony of Brian Lee, Vice-President of Operations, Orregio approached Lee about becoming a driver. Lee gave Orregio an opportunity and it was only after Orregio completed the necessary training, passed the required road tests, and obtained the required Commercial Drivers License, that Orregio was transferred to a driving position. The second incident occurred two years prior to the hearing date, when driver David Gallego was transferred to a warehouse position. In that case, Gallego's driver's license was suspended for two years. Given that Gallego could no longer be employed as a driver, and the Employer deemed him to be a good worker, Gallego was transferred to a warehouse position.

In addition to the two instances described above, Vice-President Lee testified that there is one warehouse worker employed by the Employer who also holds a "Class A" Commercial Drivers License. This worker, on an "as needed" basis, is tasked with moving, parking, or backing-up the Employer's trucks. If the need arises when the Employer's leasing company is unable to send out a repair person to the Employer's facility, this employee will drive the truck directly to the leasing company facility in Newark, New Jersey. However, there is no evidence that this worker either transports or delivers the Employer's products.

Vice-President Lee also testified of one occasion that occurred approximately one year prior to the hearing date, when the warehouse was short-handed due to a snow storm. Drivers were unable to start their delivery route because their trucks were not loaded. As a result, there were drivers that "pitched in" and loaded their own truck. There was a second incident which occurred approximately two weeks before the hearing where a driver's truck was not operating and the driver had to move the entire product from his truck to another truck that was working.

With respect to day-to-day supervision, as previously discussed, Clavel and Bredhon supervise the warehouse workers and Torres supervises the drivers. Lee testified that there have been occasions when Torres directed a warehouse worker to change a loading procedure for a specific route. There is no evidence on the record of either Clavel or Bredhon directly instructing a driver. Instead, the record reflects that if either Clavel or Bredhon have an issue with a driver, they will discuss that problem directly with Torres.

With respect to the hiring process, although the Employer has used newspaper advertisements and employment agencies to attract applicants, its primary hiring source is employee referrals. Lee testified that if the Employer is in need of a driver, he will go directly to his drivers to solicit referrals. Lee uses the same process with his warehouse and, when the need arises to hire, Lee will ask his warehouse workers for a referral.

All employees, including the office staff, are subject to drug testing as well as a physical examination. However, unlike any other employee, drivers' physical exams and drug testing are regulated by the Department of Transportation. Also, unlike the other workers, drivers are required to take bi-annual physical examinations.

There are differences between the two groups with respect to wages. First, warehouse workers are hourly paid employees and receive overtime pay after 40 hours of work. Drivers are salaried employees, Monday through Friday. If a need arises for a driver to work on a Saturday, he will receive overtime pay for that day.

With regard to benefits, the record reflects that the Employer provides all of its employees, without distinction, with the following benefits: 401(k), health insurance, life insurance, the option to purchase long term disability insurance, paid vacation, sick days, leave for jury duty, paid bereavement leave, and the opportunity to participate in an education assistance program. All employees are subject to the same policies and procedures concerning promotions, discipline, layoff and discharge as delineated in the employee handbook. Both drivers and warehouse workers are also eligible for an "attendance bonus" where they are paid for unused sick or vacation days. However, only drivers receive a "fulfillment incentive bonus" in order to entice the drivers to take on and complete certain driving routes.

II. LEGAL ANALYSIS

In determining an appropriate bargaining unit, the Board seeks to fulfill the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining and advancing industrial peace and stability. It is well settled that the Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be *an* appropriate unit. *American Hosp. Ass'n. v. NLRB*, 499 U.S. 606, 610 (1991); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1998); *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). The Board also has broad discretion in this area, reflecting Congress' recognition of the need for flexibility in shaping the bargaining unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. *See Specialty Healthcare and Rehabilitation of Mobile*, 357 NLRB No. 83 (2011). Generally, the Board attempts to select a unit that is the smallest appropriate unit encompassing petitioned-for employee classifications. *Bartlett Collins Co.*, 334 NLRB 484 (2001).

Recently, in *Specialty Healthcare & Rehabilitation Center of Mobile*,⁸ the Board reaffirmed its traditional principles of unit determination. In determining whether employees in a proposed unit share a community of interest, the Board examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with

⁸ 357 NLRB No. 83, slip op. at 8-9 (2011).

other employees; have distinct terms and conditions of employment; and are separately supervised.⁹

Specialty Healthcare & Rehabilitation not only reiterated the principles of unit determination, but for the first time the Board imposed a heightened burden of proof on the proponent of the more encompassing unit. The proponent of the larger unit must now demonstrate that the employees in the more encompassing unit share “an overwhelming community of interest” such that there “is no legitimate basis upon which to exclude certain employees from it.” *Specialty Healthcare and Rehabilitation*, citing, *Blue Man Vegas, LLC v. NLRB*, 529 F.3D 417 (D.C. Cir. 2008). Indeed, the Court explained that, two groups have an “overwhelming community of interest” when the traditional community of interest factors “overlap almost completely.”¹⁰

In the instant case, I find that the Employer has failed to meet its burden, and that the Employer’s warehouse workers do not share an “overwhelming community of interest” with its drivers.

It cannot be disputed that both drivers and warehouse workers work out of the same facility, with the same product, and that drivers rely on warehouse workers to load the trucks so that they can proceed with their deliveries. However, this degree of integration is not only marginal, it is but one of the elements to consider when analyzing community of interest. Indeed, as the Board in *Specialty Healthcare & Rehabilitation* has announced – “an overwhelming community exists when the community of interest standards overlap almost completely.” *Id.* Here, the degree of interchange between drivers and warehouse workers is

⁹ *Id.*, slip op. at 9, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

¹⁰ *Id.*, slip op. at 11, citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

extremely limited. In this regard, although drivers work out of the same facility as the warehouse workers, the record clearly establishes that drivers have very little direct contact with the warehouse workers. In fact, the Employer's own witness testified that drivers spend no more than 45 minutes each day at the warehouse, with the remainder of their work time spent delivering product to customers. The record also establishes that by the time the drivers arrive to work to start their day, the warehouse workers have already loaded and sealed the trucks.

With respect to interchange between drivers and warehouse workers, the Employer presented only four isolated instances over an eight year time frame. The first involved is a warehouse worker who, approximately eight years ago, became a driver only after requesting a transfer, successfully completing all requisite training and testing associated with the driving position and obtaining a CDL. Another example was no more than an act of benevolence by the Employer when, approximately two years ago, it transferred a driver to the warehouse after he lost his driver's license. Record evidence also demonstrates that there is only one warehouse worker who holds a CDL. However, the record is devoid of any evidence establishing that this worker either transports or delivers customer products. Instead, the record establishes that this worker gets behind the wheel of a truck for the limited purpose of parking or moving trucks at Employer's facility, or to drive a truck to Newark, New Jersey for repairs – if and when the need arises.

Additionally, there is scant evidence of drivers performing warehouse work. Indeed, the Employer's supporting evidence is limited to an occasion when drivers "pitched in" and loaded their own truck during a snow storm. Or when, on occasion, a driver is in a hurry and unloads the empty cases from his truck, leaving them on the loading dock. These examples

do not even come close to evidencing that the warehouse employees' job functions and duties overlap with that of the drivers.

The Employer maintains that its drivers and warehouse workers share common employment benefits including health insurance, life insurance and a 401(k) plan, and that they are also subject to the same policies and procedures concerning hiring, firing, layoffs and discipline. However, this evidence is insignificant in that the same benefits, policies and procedures are also shared by the entire company – without distinction.

Record evidence also shows separate supervisory channels for drivers and warehouse workers. With one exception, where Route Manger Torres directed a warehouse worker to change the loading procedure of a specific route, there is no evidence of cross supervision. Instead, the record reflects that day-to-day immediate supervision and control of matters that are of interest to the warehouse employees are handled by different supervisors than those to whom the drivers report to on a day-to-day basis, and vice versa.

The lack of significant interchange, lack of common supervision, lack of common skills and functions, nominal daily contact and the lack of common hours and other working conditions outweigh any minimal similarities that the two groups of workers may have in common. In that regard, I find that the lack in commonality between the two groups demonstrates that the warehouse workers do not share an overwhelming community of interest with the petitioned for unit of drivers.

Accordingly, I find that the unit of drivers constitutes an appropriate unit apart from warehouse workers. See *Overnite Transportation Co.*, 325 NLRB 612 (1998) (Board found that mechanics did not need to be included in a unit consisting of drivers where the employer argued the existence of functional integration between drivers and mechanics, drivers

reported problems to mechanics, and mechanics performed limited driving); *Triangle Building Products Corp.*, 338 NLRB 257 (2002) (Driver unit found appropriate where drivers spent a majority of time away from the Employer's facility; contact with other employees is limited; joint supervision was limited); *Mc-MorHan Trucking*, 166 NLRB 700, 701 (1967) (Board found drivers had a sufficient community of interest separate and apart from a group of mechanics); *Overnite Transportation Co.*, 331 NLRB 662 (1999) (Drivers excluded from plant-wide unit where they spent most of their time away from the facility; limited evidence that drivers performed work at the facility; limited evidence that other employees performed driving); *Office Depot, Inc.*, 184 F.3d 506 (6th Cir. July 2, 1999) (Driver unit found appropriate where drivers spend their time away from the facility; drivers have their own training; drivers do not perform work of warehouse employees except when placed on light duty; and interchange was rare).

For the reasons outlined above, I conclude that the petitioned-for unit consisting of all full-time and regular part-time drivers employed at the Employer's South Hackensack, New Jersey location constitutes an appropriate unit.

III. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. 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 an economic strike who have retained their status as strikers and have not

been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that 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. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **International Brotherhood of Teamsters, Local 701.**

IV. LIST OF VOTERS

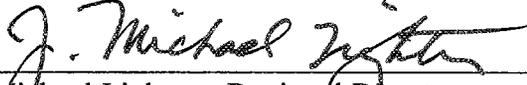
In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB

Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **January 25, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

V. **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, D.C. 20570-0001. The Board in Washington must receive this request by **February 1, 2012**. The request may be filed electronically through E-Gov on the agency's website, www.nlr.gov, but may not be filed by facsimile¹¹.

Signed at Newark, New Jersey this 18th day of January, 2012.



J. Michael Lightner, Regional Director
National Labor Relations Board
Region 22
20 Washington Place - 5th Floor
Newark, New Jersey 07102

¹¹ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.

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DECISION AND DIRECTION OF ELECTION

I, the undersigned employee of the National Labor Relations Board, state under oath that on January 18, 2012, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

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January 18, 2012

Date

Designated Agent of NLRB

Name



Signature