

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

VM TRANSIT INC.

Employer

and

Case 04-RC-113080

UNITED INDEPENDENT UNION

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, VM Transit, provides transportation services for disabled people in and around Philadelphia. The Petitioner, United Independent Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's drivers.¹

Despite repeated notification, the Employer did not appear at a hearing conducted by a Hearing Officer of the Board. The hearing dealt with the issues of whether the Employer is subject to the Board's jurisdiction, whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and whether the petitioned-for unit is appropriate. Neither party filed a brief.

I have considered the evidence, and, as discussed below, I have concluded that: the Employer is engaged in interstate commerce sufficient to support the Board's exercise of its jurisdiction; the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; and the petitioned-for unit is appropriate. Accordingly, I have directed an election in this unit.

I. NOTICE OF HEARING TO THE EMPLOYER

On September 12, 2013,² the date the petition was filed, Region 4 of the National Labor Relations Board (the Region) served the Employer with a Notice of Representation Hearing and related documents by first-class mail at the business address listed on the petition and also sent

¹ The petition sought a unit of "drivers and escorts." At the hearing, the Petitioner amended the petition to remove the classification of escorts.

² All dates are in 2013 unless otherwise indicated.

copies of these documents to the Employer by facsimile transmission. The Notice of Hearing set a hearing date of September 20.

On September 13, the Hearing Officer telephoned the Employer at the number listed on the petition, which is also displayed on the Employer's vehicles, and asked to speak to the Employer's owner, Nabil Mossad. The woman who answered the phone did not identify herself, but confirmed that Mossad was the correct person with whom to discuss the petition. Mossad did not return the Hearing Officer's call.

The Hearing Officer telephoned the Employer again on September 17 and September 18. On both dates, she spoke to an unidentified individual and asked to speak with Mossad and/or Office Manager Anthony Leonard. The person who answered the phone stated that Mossad was not at the office and Leonard was in a meeting. They did not return her calls.

A report from the Office of Corporations, Pennsylvania Department of State, of which I take administrative notice, confirms that the Employer is a corporation registered in Pennsylvania, but lists the Employer's registered office address as an address that differs from the address on the petition. On September 18, the Region mailed the original Notice of Hearing and related documents to the corporation's registered office address and, for the second time, mailed these documents to the address shown on the petition. On that day, the Hearing Officer also sent a letter by fax and first-class mail to Mossad and Anthony at both addresses advising the Employer of the upcoming hearing, requesting a completed commerce questionnaire, and noting that commerce would be litigated at the scheduled hearing if necessary. The Employer did not respond. On September 19, an Order Rescheduling the Hearing from September 20 to September 26 was served on the Employer by first-class mail at both addresses. The Employer did not contact the Region at any time and did not appear at the hearing on September 26.

II. JURISDICTION

Facts

Mark Warner, a full-time driver employed by the Employer since it began operations in mid-January, testified concerning the Employer's operations. Warner had been previously employed by Marco Peter Transit at the same location for about a year prior to January. Marco Peter Transit was also owned by Mossad and performed the same services using the same vehicles as the Employer.

Warner testified that the Employer currently employs about 24 drivers and owns approximately 20 vehicles, including cars, minivans, 15-passenger vans, wheelchair-lift vans, and wheelchair-lift buses. The Employer maintains an office for dispatchers and other office personnel, as well as a yard for vehicle storage and maintenance. Two yard jockeys are responsible for vehicle maintenance and for transporting the vehicles to and from local gas stations each night. Some vehicles run on gasoline while others, generally the larger vehicles, have diesel engines. Most drivers work five days per week, but a few, including Warner, work six days.

The Employer is closely connected to a company called LogistiCare, which according to its website, “pioneered the broker model of non-emergency medical transportation” and is “the largest and most experienced broker of non-emergency transportation programs in the country.”³ The website indicates that LogistiCare “coordinates over 26 million trips each year” using local networks of professional transportation companies. LogistiCare requires its providers to meet various requirements for insurance coverage, licensing, drivers, and vehicles, and its credentialing process includes a review of the provider’s finances.

According to Warner, the Employer obtains all of its passengers through LogistiCare. When Warner reports for work in the morning, Mossad gives him a passenger manifest showing the names, addresses and pick-up times for the day’s passengers. The manifest shows the name “LogistiCare” at the top and lists the Employer as the “provider.”

Warner’s manifest for the day preceding the hearing shows 20 passenger pick-ups, and he testified that on an average day he handles 20 to 22 pick-ups. There are two dispatchers at the Employer’s offices, with whom the drivers communicate during the course of the day. The dispatchers inform the drivers of any scheduling changes, and drivers advise the dispatchers of any problems or delays they encounter. Warner testified that the dispatchers have at times communicated unexpected schedule changes with an explanation that the changes were requested by LogistiCare.

Some riders are accompanied by escorts, who may be family members or home health aides. LogistiCare must approve all escorts before they are permitted to ride in the Employer’s vehicles.

The Employer’s dispatchers are on duty until 7 p.m. each weekday, but Warner testified that he sometimes does not finish his runs until 8 p.m. or 9 p.m. After 7 p.m., drivers telephone LogistiCare dispatchers about any issues that arise. The LogistiCare dispatch center has contact information for each of the Employer’s drivers.

When Warner was hired by Marco Peter Transit in 2012, he received eight hours of on-line training by LogistiCare, culminating in a test and the issuance of a training certification by LogistiCare. He did not need to be recertified when the current Employer began operations in mid-January 2013 following a three-week hiatus in operations. The Employer’s new hires are now trained by LogistiCare personnel at a LogistiCare facility located in central Philadelphia. On occasion, LogistiCare conducts inspections of the Employer’s vehicles, either at transportation service points or at the Employer’s yard. Some vehicle inspections are routine, while others are performed in response to passenger complaints about matters such as defective air conditioning or inoperative seat belts. Signs posted within the Employer’s vehicles direct passengers to contact the Public Utilities Commission (PUC) regarding vehicle problems or complaints. Either PUC inspectors or LogistiCare personnel address these complaints by inspecting the vehicle.

³ I take administrative notice of the information on LogistiCare’s website. See *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 669 (2007); *Neptco, Inc.*, 346 NLRB 18, 23-24 (2005).

A Dun & Bradstreet Business Report concerning LogistiCare,⁴ of which I take administrative notice, indicates that it is a limited liability corporation registered in Georgia with operations in virtually every state, and that its annual sales exceed \$1 million. Warner testified that during a yard inspection, he asked a LogistiCare inspector what the Employer is paid for its services. The LogistiCare inspector said that the Employer receives \$80 for ambulatory passenger runs and \$125 each way for wheelchair runs.

Analysis

The Board's statutory jurisdiction extends to all enterprises whose operations affect interstate commerce, as defined in Sections 2(6) and (7) of the Act. As construed by the Supreme Court, the Board's jurisdiction applies to all conduct that might be regulated under the commerce clause, subject only to the rule of de minimis. *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939). However, in the exercise of administrative discretion, the Board has limited its broad statutory jurisdiction to cases which have a substantial effect on commerce. See *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684-685 (1951).

In *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958), the Board held that jurisdiction may be asserted in any case in which an employer has refused, upon reasonable request by Board agents, to provide information relevant to the Board's jurisdictional determinations, where the record developed at a hearing, duly noticed, scheduled, and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the Employer's operations satisfy the Board's discretionary jurisdictional standards. In *Tropicana* cases, secondary evidence may be adduced at the hearing and relied upon by the Board. *Mr. Window, Inc.*, 288 NLRB No. 24 (1988); *George E. Masker, Inc.*, 261 NLRB 118, 123 fn. 2 (1981).

The Employer was clearly and repeatedly notified of the hearing. Notices of Hearing and Rescheduled Hearing were served upon the Employer at the address where its dispatch office is located, as well as the corporate office address registered with the Pennsylvania Corporations office. The Hearing Officer sent a letter to both addresses confirming the hearing date and requesting commerce information. The Hearing Officer also left several telephone messages for the Employer, but its representatives never spoke with her or returned her calls. The Employer's failure to appear at the hearing despite adequate notice, or to respond to the Hearing Officer's inquiries, constitutes a refusal to provide information sufficient to invoke the *Tropicana* rule.⁵

The Employer is clearly engaged in interstate commerce at a level sufficient to satisfy the Board's statutory jurisdictional requirement. The Employer regularly employs about 24 drivers who transport passengers on behalf of LogistiCare in 20 vehicles. The drivers average from 20 to 22 runs per day, for which the Employer receives either \$80 or \$125 each. This revenue is received from LogistiCare, a large nationwide company headquartered in Georgia. As the Employer derives significant gross revenues directly from points outside the Commonwealth of

⁴ The corporate name listed on the Report is "LogistiCare Solutions, LLC." The Report also refers to "LogistiCare Inc.," in connection with a court proceeding.

⁵ See also *Continental Packaging Corp.*, 327 NLRB 400 (1998).

Pennsylvania, it meets the test for statutory jurisdiction.⁶ I therefore find that the Employer is an employer engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

III. LABOR ORGANIZATION STATUS

Section 2(5) of the Act defines a “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” See *Polaroid Corp.*, 329 NLRB 424 (1999); *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-852 (1962).

The Petitioner’s Executive Vice President, Alexander Maldonado, testified that the Petitioner exists for the purpose of dealing with employers concerning employees’ working conditions. It has 1200 members and collective-bargaining agreements with 27 employers. Members participate in the organization by attending meetings and training sessions and by voting in internal union elections. In addition, the Board has previously found the Petitioner to be a labor organization. *United Independent Union, Local 1, (Marjo Food Stores)*, 236 NLRB 1075, 1076 (1978). Based on the record evidence and the Board’s prior ruling on this issue, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

IV. APPROPRIATENESS OF THE UNIT

Facts

The Petitioner seeks to represent a unit limited to the Employer’s drivers. In addition to its 24 drivers, the Employer employs two dispatchers and two yard jockeys. The drivers report to the office each morning and obtain their manifests, which list passenger pick-ups and drop offs for the day. Drivers pick up passengers at their residences, take them to their destinations, and transport them back to their homes the same day. Throughout the day, drivers keep in contact with dispatchers for route changes and updates. Each driver handles 20 to 22 pick-ups per day and then returns his or her vehicle to the yard. Then, the yard jockeys service and refuel the vehicles. Dispatchers do not drive the vehicles, and yard jockeys only drive the vehicles for purposes of maintenance and refueling.

Analysis

In determining an appropriate unit under Section 9(b) of the Act, the Board first examines the petitioned-for unit. If that unit is appropriate, the inquiry ends. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), slip op. at 8; *Wheeling Island*

⁶ The Employer also has an effect on commerce through its purchases, as it has a large fleet of vehicles, which were almost certainly manufactured out of state, and purchases gasoline and diesel fuel for its vehicles each night.

Gaming, Inc., 355 NLRB No. 127, slip op. at 1, fn. 2 (2010); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). When a party contends that a unit should be expanded beyond an otherwise appropriate petitioned-for unit, the burden is on that party to show that there is “an overwhelming community of interest between the included and excluded employees.” *Specialty Healthcare*, above, slip op. at 11.

In determining whether a group of employees share a community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, employee contact and interchange, and similarities in wages, hours, benefits, and other terms and conditions of employment. *Home Depot USA*, 331 NLRB 1289 (2000); *Esco Corp.*, 298 NLRB 837 (1990). The Board has found units limited to drivers appropriate where they lack substantial interchange with other employees, perform significantly different functions, and possess different skills. *Home Depot USA, Inc.*, above; *Rinker Materials Corp.*, 294 NLRB 738, 739 (1989).

The Employer’s drivers receive their assignments from the dispatchers and have daily contact with them. Drivers also presumably have contact with the yard jockeys for a brief period when they drop off their vehicles each evening. The drivers spend little time at the office or the yard, and the hours for drivers differ from those of the dispatchers. Dispatchers and yard jockeys do not transport passengers, and there is no evidence that drivers ever perform the work of the dispatchers or yard jockeys. Thus, the functions of the dispatchers and yard jockeys are entirely separate from the responsibilities of the drivers. The record is silent as to the compensation, benefits, and supervision of the three positions. However, as the job functions and skills differ among the three positions, and in the absence of interchange among the positions, I find that the drivers lack an overwhelming community of interest with the dispatchers and yard jockeys. No party seeks to include the dispatchers or the yard jockeys in the unit and I find no basis for doing so.

Accordingly, I find that the drivers are a readily identifiable group that shares a community of interest and that the petitioned-for unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
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 in this case.
3. The Petitioner is a labor organization that claims to represent certain employees of the Employer.

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.

5. The following employees of the Employer constitute a unit appropriate for the purposes 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 facility at 1609 S. 52nd Street, Philadelphia Pennsylvania, **excluding** yard jockeys, dispatchers, guards, and supervisors as defined in the Act.

VI. 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 the purposes of collective bargaining by **United Independent 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. Eligible Voters

The eligible voters shall be unit employees 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 were 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, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees who are 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 after the designated payroll period for eligibility; (2) employees engaged in a strike 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 engaged in an economic strike which began more than 12 months before the election date 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.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Thursday, October 31, 2013**. No extension of time to file this list shall 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 by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at **www.nlr.gov**. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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 a minimum of 3 working days prior to 12:01 a.m. of the date 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 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 non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Thursday, November 7, 2013, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of

the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁷ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED: October 24, 2013



DENNIS P. WALSH
Regional Director, Region Four
National Labor Relations Board

⁷ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.