

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

FEDEX FREIGHT, INC.,	:	
	:	
Employer	:	
	:	
and	:	Case No. 22-RC-134873
	:	
INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS LOCAL 701,	:	
	:	
Petitioner	:	
	:	
	:	

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION
TO THE NATIONAL LABOR RELATIONS BOARD

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**EMPLOYER’S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S
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I. INTRODUCTION

A. Statement of the Case

FedEx Freight, Inc. (“the Company” or “the Employer”), by its undersigned counsel, submits this brief in support of its Request for Review of Regional Director Dennis P. Walsh’s October 7, 2014 Decision and Direction of Election finding that the unit petitioned for by the International Brotherhood of Teamsters, Local 701 (“the Petitioner” or “the Union”) consisting of city drivers and road drivers employed by the company at its South Brunswick Terminal located in Monmouth Junction, New Jersey is appropriate. The Employer makes this Request for Review (1) because a substantial question of law and policy is raised by the Regional Director’s departure from officially reported Board precedent, (2) because the Regional Director’s decision on a number of substantial factual issues is clearly erroneous on the record, and these errors prejudicially affect the rights of the Company, and (3) there are compelling reasons for reconsideration of important Board rules or policies. *See* 29 C.F.R. 102.67(c).

At the outset, the Regional Director’s Decision and Direction of Election¹ contains a glaring error. It states: “The Employer does not seek to include in the unit the part-time Dockworkers known as ‘Supplemental Dockworkers’ ...” Decision at 1, fn. 4. This is not correct. The Employer’s position at all times has been that any unit found appropriate must include, at a minimum, all full-time and part-time dockworkers employed at South Brunswick.

¹ Citations to pages in the Decision and Direction of Election are “Decision at ___.”

Moreover, the Regional Director's Decision incorrectly found, *inter alia*:

- that a unit limited to city drivers and road drivers – excluding dockworkers – is appropriate²;
- that the employees petitioned for by the Union are “readily identifiable as a group”;
- that the petitioned-for classifications do not spend a substantial amount of time performing dockworker functions;
- that the petitioned-for drivers are not integrated into the larger unit including dockworkers;
- that the record did not establish dockworkers share an “overwhelming community of interest” with the city and road drivers; and
- that the petitioned for unit is not a “fractured” and “arbitrary segment” of the unit truly appropriate.

Moreover, the Regional Director failed to find that the only appropriate unit for purposes of collective bargaining is one that includes all full-time and part-time employees working on the dock at the South Brunswick terminal including city drivers, road drivers, and dockworkers.

As fully discussed below, the Board should grant the Employer's Request for Review because the Regional Director's Decision ignored and misapplied controlling precedent. In addition, the Regional Director made findings that were either unsupported by, or contrary to, the testimony and documentary record evidence. Contrary to the conclusions reached in the Regional Director's Decision, as the record and controlling case law demonstrate, any unit that includes the petitioned-for employees must include, at a minimum, all dockworkers employed at South Brunswick, with whom the petitioned-for employees share an overwhelming community of interest.

² The petition also sought “shuttle and line haul drivers,” but the Regional Director's decision correctly found that “city drivers” and “road drivers” are the only driver classifications at the facility. Decision at 1, fn.3.

B. The Record Below

The hearing in this case was limited to the admission into evidence of stipulated facts and exhibits. Decision at 1.³ The parties' Joint Stipulation of Facts adopts relevant portions of the record of the hearing in FedEx Freight, Inc., 4-RC-133959 – a similar representation proceeding involving the Employer's terminal at Cinnaminson, New Jersey. (Stip. at 1). The parties also stipulated that the post-hearing briefs filed in case 4-RC-133959 should be treated as part of the record herein. (Stip. at 5). The Regional Director accepted these stipulations. Decision at 1.

II. SUMMARY OF ARGUMENT

A. The Petitioned-for Unit Is Inappropriate Under Established Board Law

The Regional Director's conclusion that a unit limited to city and road drivers ignores record evidence that the dockworkers are not only integrated into the work of the petitioned-for drivers, but utterly essential to the facility's operations. Their exclusion is illogical and functionally unworkable.

The South Brunswick terminal has three job classifications at issue: city drivers, road drivers, and dockworkers. The Regional Director has carved out the dockworkers on the claim that the drivers are, alone, a "readily identifiable group" – a finding premised on the thinnest of distinctions and in plain disregard of the *absence* of any departmental divisions. Further, the Decision differentiates the dockworkers from the drivers largely because the Employer does not require dockworkers to possess a CDL license, dockworkers are not issued security keys, and because they are not required to wear uniforms. These facts are simply insufficient to outweigh

³ "Cinnaminson Decision at ___" refers to the Decision and Direction of Election in case number 4-RC-133959. "(Tr. ___" refers to pages in the official transcript of the representation proceeding in case number 4-RC-133959. "(Bd. Ex. ___)," "(Er. Ex. ___)" and "(U. Ex. ___)" refer to the Board's, the Employer's and the Union's exhibits, in case number 4-RC-133959, respectively. "Stip. at ___" refers to the Joint Stipulation of Facts in this proceeding. "Stip. Ex. ___" refers to the exhibits referenced in the Joint Stipulation of Facts in this proceeding.

the functional integration and daily interaction between the drivers and dockworkers. The Regional Director does not dispute that the Employer's operation could not function without the dockworkers. The Decision does, however, significantly understate the extent to which the drivers perform the same exact functions as dockworkers.

The Decision and Direction of Election does not dispute that all three positions – city drivers, road drivers, and dockworkers – are subject to the same hiring process, the same personnel policies and procedures, and that they receive similar training. All are paid on an hourly rate. They receive the same benefits, share the same break rooms, and utilize the same time clock. They are supervised by exactly the same supervisors and managers. The company's dock-to-driver program results in dockworkers transferring to either a city driver or road driver position.

As a result, the city drivers, road drivers and dockworkers share such a strong and significant community of interest with one another that it is impractical and functionally unworkable to exclude dockworkers from any unit found appropriate. Further, requiring the Company to recognize such a bargaining unit would result in obviously untenable situations, promoting tension between the represented drivers and unrepresented dockworkers routinely performing the same work, side by side. As the Board has often pointed out, the purposes and policies of the Act are to minimize industrial strife, not promote it. *See* 29 U.S.C. §§ 151(1).

B. The Regional Director's Finding Is Inconsistent with the Test Articulated in *Specialty Healthcare and Progeny*

The unit found by the Regional Director is inappropriate under the standards of Specialty Healthcare and Rehabilitation Center, 357 NLRB No. 83 (2011). The Regional Director said

Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. It is only where the petitioned-for unit is not

appropriate that the Board will consider alternative units, which may or may not be units suggested by the parties....

In determining whether a proposed unit is appropriate, the focus is on whether employees share a community of interest. To make this determination, the Board examines such factors as employee skills and job functions; common supervision; contact and interchange; similarities in wages, hours and other terms and conditions of employment; functional integration; and bargaining history, if any.

Decision at 3, citations omitted. Further, the Decision states

In Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83, slip op. at 10-13 (2011), the Board clarified the framework to be applied in making unit determinations where a party seeks a unit that is broader than the petitioned-for unit. Pursuant to this decision, the Board first looks at whether the petitioner seeks a unit consisting of employees “who are readily identifiable as a group,” based on job classifications, departments, functions, work locations, skills, or similar factors, and whether these employees share a community of interest. In Macy’s, Inc., 361 NLRB No. 4, slip op. at 8 (2014) and Bergdorf Goodman, 361 NLRB No. 11, slip op. at 2 (2014), the Board made it clear that whether the employees are “readily identifiable as a group” and whether they share a community of interest are two separate inquiries. If both standards are met, the party seeking a broader unit must demonstrate “that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.” [Emphasis added]. Additional employees share an overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. On the other hand, the Board will not approve a petitioned-for fractured unit that seeks “an arbitrary segment” of what would be an appropriate unit.

Decision at 3-4, some citations omitted. Taking the Specialty Healthcare⁴ model first, the Regional Director analyzed whether the city and road drivers are “readily identifiable as a group.” He concluded that they are. Decision at 2, 8. The Decision states

The petitioned-for unit is a clearly identifiable group because, among other things, it “tracks a dividing line drawn by the Employer.” Macy’s, 361 NLRB No. 4, slip op. at 12 (2014). Here, although the Employer insists that the Dockworkers and drivers are not part of separate departments, there is no question that the

⁴ The Employer posits that Specialty Healthcare was decided erroneously, largely for the reasons cited in Member Hayes’ dissent therein. However, on the assumption that Board will not now revisit its decision there, the Employer alternatively contends that the case at bar was decided incorrectly even under the rule of Specialty Healthcare and its progeny.

Employer treats the driver classifications differently in many operational and administrative aspects.

Decision at 8. The Regional Director here ignores the undisputed evidence that the two driver classifications are *not* in any separate group from the dockworkers. Tr. 18, 71. Note that although unstated here, the Regional Director, in his decision in the related representation case based on the same record, acknowledged the uncontroverted evidence that the sole indicia of a “department” was the Company’s Kronos timekeeping system – whose software segregates records by arbitrarily creating “departments” of different job classifications. Cinnaminson Decision at 2.

Although the Regional Director explained that the concepts of “a readily identifiable group” and the “community of interest” are “separate inquiries” (Decision at 3), the Decision selected a few facts relevant to the community of interest analysis in order to create an artificially identifiable group limited to drivers:

The Employer tracks drivers’ work separately from that of the Dockworkers. It also keeps separate seniority lists for each of the driver positions. The drivers also wear uniforms that distinguish them from Dockworkers, who are allowed to perform their job duties in street clothes. As Class A CDL holders, city and road drivers are uniquely qualified employees dedicated to the operation of particular equipment.

Decision at 8. Thus, the Regional Director – who claims that the petition “tracks a dividing line drawn by the employer” and argues that “there is no question that the Employer treats the driver classifications differently in many operational and administrative aspects” – explains those differences are really only limited to clothing, licenses, and time records.

The Employer itself drew no “dividing line” Rather, the petitioned-for unit certainly does not coexist along any departmental line. To the contrary, the petitioned-for unit carves out two of the three positions that are responsible for performing the work in the dock area at the South

Brunswick terminal. Indeed, the three positions are part of the same organizational group, with the same organizational goal: loading, unloading, and transporting freight. They interact and work with one another on a daily basis on the dock. They all are supervised and disciplined by the same rotating group of Operational Supervisors. The *only* unit that is coextensive with a departmental line is a unit including all three positions – including the dockworkers.

C. The Record Facts Do Not Support the Decision’s Finding that the City and Road Drivers Are a “Readily Identifiable Group” Under the Very Test Cited by the Regional Director

The Decision explains that under Specialty Healthcare the proper assessment of whether the petitioned-for employees are a “readily identifiable as a group,” where (as here) the unit does not track a “dividing line drawn by the Employer,” includes consideration of the employees’

- job classifications,
- departments,
- functions,
- work locations,
- skills, or similar factors, and
- whether these employees share a community of interest⁵

Decision at 3. The record evidence clearly demonstrates that in many ways – *in most of these categories* – there is no justification for finding the unit of petitioned-for employees to be “readily identifiable as a group.”

As described in more detail below, the petitioned-for city and road drivers have *different* job classifications and the work they perform is not the same. As acknowledged, but ignored by

⁵ The test cited by the Regional Director to determine whether the petitioned-for employees are “readily identifiable as a group” includes, *inter alia*, an assessment of whether the employees share a community of interest. Yet the Decision states the community of interest and the “identifiable group” analyses are “separate inquiries.” Decision at 3. The elements of the “group” analysis are also all elements of a community of interest assessment. It appears the Region wants to have it both ways: manipulating the tests to yield a desired result.

the Decision, there is no “driver” department. The functions they serve are similar, but performed differently – and the dockworkers are very much a part of their functions. The two driver classifications work in different locations – but are tethered together by their co-workers, the dockworkers. The drivers’ skills are not exclusive, as dockworkers drive as well, and the drivers perform dock work – as noted by the Regional Director.

That the city and road drivers share a community of interest is quite clear. *All* employees, including the dockworkers, share the *same* community of interest. It appears here that the Board’s test as applied by the Regional Director blurs the distinctions: is the community of interest the *same* as a “readily identifiable group?” The Decision says it is not, yet it utilizes the same community of interest factors to support the “identifiable group” finding. Under this analysis, any employees who share a community of interest could presumptively be an “identifiable group.” Indeed, if this is so, then the dockworkers – who share virtually *all* the community of interest factors with the drivers – should clearly be included in the “group.”

III. THE PROPOSED UNIT IS AN ARBITRARY SEGMENT OF AN APPROPRIATE UNIT AS DEMONSTRATED BY THE OVERWHELMING COMMUNITY OF INTEREST BETWEEN THE DRIVERS AND DOCKWORKERS

Proper analysis of the community of interest standard results in the ineluctable conclusion that the Employer’s dockworkers share an overwhelming community of interest, overlapping virtually entirely with that of the petitioned-for unit. To exclude the dockworkers is to create an arbitrary segment of an appropriate unit, and a “fractured unit” within the meaning of Specialty Healthcare and longstanding Board law.

A. The Record Facts Conclusively Establish an Overwhelming Community of Interest

1. The South Brunswick Terminal

FedEx Freight, Inc. provides LTL (Less-Than-Truckload) pick-up and delivery services for customers across the country. The Company operates numerous terminals including the South Brunswick terminal located in Monmouth Junction, New Jersey. (Stip. at ¶ 26). The dock has 120 operational doors and one ramp door which are used for loading and unloading freight onto the trucks. (Stip at ¶ 7). Working on the dock at South Brunswick are 81 city drivers, 33 road drivers, 20 dockworkers and 32 part-time supplemental dockworkers. (Stip. at ¶ 4).

It is undisputed that at the South Brunswick Terminal, the Service Center Manager, three Operational Managers, and 12 Operational Supervisors supervise *all* employees on the dock including city drivers, road drivers and supplemental dockworkers. (Stip. at ¶¶ 6, 8; *see also* Tr. 39-40, 43, 62-66).

Although Operational Supervisors are generally assigned to the dock or dispatch, they have the authority and do regularly issue discipline to any and all employees working at the terminal including city drivers, road drivers and dockworkers. (Stip. at ¶¶ 20-22; Tr. 40-43).

2. City Drivers, Road Drivers and Dockworkers Have Virtually the Same Terms and Conditions of Employment

Part-time and full-time dockworkers, city drivers and road drivers are eligible to receive the same health benefits, personal time and participate in the Company's 401(k) plan. (Stip. at ¶ 24; Tr. 46, 49, 59-60).

City drivers, road drivers and dockworkers are all paid an hourly rate. (Stip. at ¶ 32; Tr. 45). The hourly rate paid to part-timer dockworkers is slightly less than that of drivers. City drivers are paid their hourly rate whether they are driving or working on the dock, including

hostling.⁶ (Stip. at ¶¶ 23, 32; Tr. 45-46). Road drivers receive a mileage rate for driving but are paid an hourly rate for working on the dock, including hostling. (Tr. 45-46).

City drivers, road drivers and dockworkers all share the same break room and locker rooms. (Stip. at ¶ 36; Tr.74). Dockworkers are not required to wear a uniform but can order a FedEx uniform similar to a city driver or road driver to wear while working on the dock. (Stip. at ¶ 37; Tr. 73-74). City drivers, road drivers and full-time dockworkers all receive a uniform allowance. *Id.* Likewise, drivers are not required to wear uniforms while working the dock but can and do wear the same Company T-shirts as the dockworkers while working on the dock. *Id.*

3. The Company Cannot Provide Its Service Without the Thorough Functional Integration of the Dockworkers and Drivers

As found by the Regional Director, Dockworkers transport freight across the dock to and from trailers for loading and unloading. Decision at 6. Importantly, part-time dockworkers are referred to as “supplemental” because they supplement road drivers and city drivers *who themselves work on the dock* to ensure the company can meet its operational needs. (Stip. at ¶ 11; Tr.14-15). City or road drivers who want to work on the dock, can bump a part-time dockworker, or can be required to perform dock work depending on the Employer’s needs. (Stip. at ¶¶ 14, 16; Tr. 14-17, 31-32, 47, 69).

Road drivers are responsible for picking up and delivering trailers with freight between Service Centers and/or turn-point locations via tractor-trailer combinations. (Tr. 48). Road drivers require a class A Commercial Driver's License (CDL) and operate tractor-trailer combinations, including doubles and/or straight trucks. Road drivers may be required to perform

⁶ “Hostling” is staging trailers in the yard by moving an empty trailer to a specific door on the dock for loading, or moving a trailer that was just unloaded away from the dock. (Tr. 12-13).

the job duties of a city driver or a dockworker where operationally necessary. (Tr. 16-17; U Ex. 1).

City drivers are responsible for picking up and delivering freight from customers with occasional pick-ups and delivery to Service Centers. (Tr. 48; U. Ex. 2). City drivers also require a class A CDL and operate tractor-trailer combinations, including doubles and/or straight trucks. (Stip. at ¶ 27). City drivers may be required to perform the job duties of a road driver or a dock employee where operationally necessary. (Stip. at ¶ 25; Tr. 17; U Ex. 2).

The dockworker position is a springboard to a driver position. The Employer encourages dockworkers to train to become drivers through its “Dock-To-Driver” program which includes a five week training course to assist dockworkers in getting their CDL. (Stip. at ¶¶ 12, 23; Tr. 15). Those dockworkers who participate in the Program work as a full-time dockworkers but are also referred to as driver apprentices. (Stip. at ¶ 4; Tr. 15-16). 13 out of the 81 city drivers (16%) and 8 out of 33 road drivers (almost 25%) graduated from the Program. (Stip. at ¶ 19, Stip Ex. 2; Tr. 33-38). This means 21 current city drivers and road drivers (which is roughly 19% of all drivers) worked as dockworkers before transferring to a driver position. *Id.* Additionally, there are currently 10 dockworkers in the Program who have permits and are being cross-trained to drive. (Stip. at ¶ 19). Once they are added to the drivers’ group the percentage of drivers graduated from the Program will increase to 25%.

a. **The Record Established that Drivers and Dockworkers Share Vital Responsibilities and Frequently Perform Work Within Each Others’ Classifications**

Although downplayed by the Decision, the record evidence is conclusive: city drivers and road drivers regularly perform many of the same job functions as dockworkers. In fact, most of

the essential job functions of a dockworker are the same or similar to those of a city driver, such as:

- Perform freight handling using appropriate motorized and manual equipment, including but not limited to: forklift, pallet jack and hand truck.
- Secure freight inside trailers using appropriate tools and supplies, including but not limited to: pallets, straps and rope.
- Recoup/repair damaged freight when necessary.
- Verify and complete required documentation and reports.
- Comply with all applicable laws/regulations, as well as company policies/procedures.
- Perform other duties as required.

(Stip. at ¶¶ 14, 16, 25; Stip. Ex. 3; Tr. 33-38; U. Exs. 1, 2, and 3).

The essential functions of road drivers listed on the Employer's job description also include many of the same essential functions of a dockworker: road drivers must verify and complete required documentation and reports, load and unload freight, comply with all applicable laws and regulations, as well as company policies and perform other duties as required. (Stip. at ¶ 25; Stip. Ex. 3; U. Exs. 1, 2, and 3). In fact, one of the essential job functions of a road driver is to perform the job duties of a dock employee. Id.

All three job descriptions include, as an "essential function," the performance of dockwork. (Stip. at ¶ 25; Stip. Ex. 3; U. Exs. 1, 2, and 3). The essential job functions that all three positions have in common is work relating to the dock, including hostling. An employee hostling can use regular trucks or a special hostler truck. (Tr. 13). To operate a hostler, an employee must be trained and certified to operate it. (Tr. 13). There are 18 full-time Dockworkers and 10 part-time Supplemental Dockworkers who are certified to perform hostling duties. (Stip. at ¶ 10). In fact, city drivers and road drivers performed almost 900 hours of hostling and one of the city drivers bid is for hostling. (Stip. Exs. 1-2).

Most significantly, city drivers and road drivers consistently perform dock work, including hostling and are working side-by-side with the full-time and part-time dockworkers assisting with the loading and unloading of freight.

When a city driver or road driver performs work on the dock, the driver must swipe into the Kronos system as a dockworker. (Stip. at ¶ 17; Stip. Ex. 2). The record includes an Employer report detailing the hours worked by city drivers, road drivers and dockworkers in each respective position for the time period of February 1, 2014 to July 31, 2014 (six months). (Stip. Ex. 2).

This report demonstrates there is a significant interchange and functional integration regularly occurring between the drivers and dockworkers. In fact, the report shows that of the 90 out of 114 drivers (almost 80%) performed dock work. (Stip. Ex. 2). The record evidence reveals that *only eight* of the 81 city drivers (less than 10%) did *not* perform dock work – thus more than 90% of city drivers perform dock work. Fully 55% of all road drivers perform dock work. (Stip. Ex. 2). Many of these drivers put in over one hundred hours on the dock in just a six-month period of time. *Id.*

As evidence that such work is not on an isolated or sporadic basis, the record shows that the bid slots for runs specifically include dock work either as an option or as a requirement – establishing that 17 of the 30 bids (over 56%) include a dock work requirement. (Stip. Ex. 1). Thus, on a daily basis, these road drivers are working with, next to and assisting dockworkers and other drivers load and unload freight onto the trucks. *Id.*

Perhaps the best evidence of the total integration of the city drivers, road driver and dockworkers is the total percentage of dock work conducted by the drivers. During the six month period addressed in the record evidence, there was a total of approximately 33,757 hours

worked on the dock by all employees. The drivers worked a total of 4,753 hours on the dock. This means over 14% of all dock work was performed by drivers. (Stip. Ex. 2).

The mere fact that many dockworkers are called “supplemental” further supports a finding the three job positions are inseparable. Dockworkers supplement the work the drivers cannot complete. In other words, drivers are responsible for performing dock work and, as set forth in their job description, may be required to perform dock work. Put simply, road drivers and/or city drivers must work the dock to ensure the continued, efficient operation of the Service Center.

It is inescapable that drivers at South Brunswick regularly perform the work of dockworkers.

B. The Regional Director’s Myopic View of Community of Interest Factors – Limited to Those Supporting a “Readily Identifiable Group” – Ignored the Overwhelming Overlap of Interests Between Drivers and Dockworkers

The Decision considers the traditional community of interest factors, but only to the extent that they supported the petitioned-for unit. As to the dockworkers, the Regional Director stated

As the Board has explained, “additional employees share an overwhelming community of interest with the petitioned-for employees only when there ‘is no legitimate basis on which to exclude [the] employees from’ the larger unit because the traditional community-of-interest factors ‘overlap almost completely.’” The Employer has failed to meet this burden.

Decision at 9, citations omitted. Further, the Regional Director refused to include the dockworkers because

(1) Dockworkers and the petitioned-for drivers have distinct classifications, job functions, and skill sets; (2) the groups earn strikingly dissimilar wages; and (3) there is only limited, one-way interchange between the Dockworkers and the employees in the petitioned-for unit. The “mere fact” that the driver classifications may also share a community of interest with the Dockworkers is insufficient to render the smaller petitioned-for unit inappropriate.

Decision at 11. The Regional Director cites that classes of employees at issue have different classifications. That is plainly so, but not any basis to divide the appropriate unit. To cite the difference in “functions” and “skills sets” *ignores* the record evidence that all the employees share in dock work (including hostling) to a highly significant degree. Yes, the wage scales of the positions differ – but that is merely one of the multiple factors of the traditional community of interest test. The Decision misses the undisputed fact that upon completion of the present Dock-to-Driver Program, fully 25% of the drivers will have graduated from dock work (and its concomitant wage scales) to the same wages as other drivers.

Further, the Regional Director misses the point of the Dock-to-Driver Program and its substantial record of dockworker advancement to driving positions. (Stip. at ¶ 12; Stip. Ex. 2).

The Regional Director failed to assess the similarities between employees and the significance of their functional integration to the Company. The Decision *de facto* assessed the community of interest factors and found the two classes of drivers shared many of them, but ignored the fact that the dockworkers do, too. Decision at 7-8.

- Employee skills and job functions; similar among drivers, but not to the exclusion of dockworkers.
- Common supervision; same among drivers, but the same among dockworkers.
- Contact and interchange; the record shows as much or more interchange and contact between dockworkers and drivers as it does between driver classifications.
- Similarities in other terms and conditions of employment; driver do share similar terms, but almost entirely the same as dockworkers.
- Functional integration; unmistakably, the road and city drivers are essential functions for the company to provide its service – but the dockworkers are absolutely essential to the work of both driver classes .

In sum, the Regional Director erred in using the factors above to find that the road and city drivers – alone – constitute a “readily identifiable group” and in *not* finding the petitioned-for unit to be a fragment of an appropriate unit.

IV. THE REGIONAL DIRECTOR MISCONSTRUED AND FAILED TO FOLLOW CONTROLLING PRECEDENT

A. The Petitioned-For Unit Is Inappropriate Under Established Board Law

As described above, the unit limited to the city drivers and road drivers is not an appropriate unit for bargaining because the evidence established there is a significant and overwhelming community of interest among all employees who regularly work on the dock.

The Board has long recognized in the trucking industry “the functional relationship of employees classified as truckdrivers to the occupation of other employees or to the particular operation of the employer as a whole has been shown to be so integrated as to substantially minimize, if not eradicate, any real interests separate from those of other production employee, and truckdrivers are therefore included in the production and maintenance units.” E.H. Koester Bakery Co., Inc., 136 NLRB 1006, 1009-1010 (1962).

Historically, the Board automatically included truck drivers in a unit if there was a disagreement over unit configuration. *Id.* at 1011. The Board, however, abandoned this automatic inclusion rule and returned to an analysis of community of interest factors. In E.H. Koester Bakery, the Board considered the following factors:

- (1) Whether [drivers] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and
- (2) whether [drivers] are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities.

136 NLRB at 1011. Applying these factors, the Board has repeatedly held drivers and dockworkers (or even warehouse employees) must be included in the same unit. For instance, in Calco Plating, Inc., 242 NLRB 1364, 1365 (1979), the Board applied the E.H. Koester Bakery rule to conclude that drivers shared a sufficient community of interest with the production and maintenance employees to “require” their inclusion in the unit. The Board's decision was based

on the fact the drivers spent a substantial amount of time working with the production employees or in close proximity of one another, and had the same supervision, comparable wages and fringe benefits. 242 NLRB at 1365; *see also* Standard Oil Company. 147 NLRB 1226 (1964) (drivers did not constitute a separate appropriate unit because drivers regularly spent a substantial amount of their time in the performance of the same functions as other employees at the terminal, had common supervision, the same employee benefits and were paid on the same basis); Transway, Inc., 153 NLRB 885 (1965) (applying the principles of E.H. Koester Bakery. the Board held drivers must be included in a unit of loaders because drivers had such a close community of interests based on the fact that drivers and loaders spent a substantial portion of their time performing identical functions under common supervision and the degree of integration); Olinkraft, Inc., 179 NLRB 414 (1969) (drivers were not a functionally distinct group because they spent a substantial part of their regular work time performing work identical to that of other employees, including fork lift drivers and loaders); Atchison Lumber and Logging Co., 215 NLRB 572 (1974)(unit limited to drivers was inappropriate); *compare* Overnite Transportation Company. 331 NLRB 662 (2000) (petitioned-for unit of dockworkers and jockeys excluded city and road drivers because there was no common supervision, drivers performed a separate function, possessed special skills, worked away from the facility most of the day and the only evidence of interchange was a paltry 68 hours of loading by city drivers as compared to over 20,000 hours of driving).

The Regional Director cited E.H. Koester Bakery, but stood the Board's holding on its head by naysaying the clear and conclusive facts establishing contact between positions and the complete integration of the three job titles in the flow of production. (Decision at 10).

Even in situations where there was no interchange/integration of functions, the Board has held there is an *inherent* community of interest between drivers and production employees in relation to the flow of materials into and out of the plant which was sufficient to find units including drivers and production employees appropriate. See International Bedding Company, 356 NLRB No. 168 (2011) *citing* Marks Oxygen Co., 147 NLRB 228, 230 (1964).

Here, it is beyond cavil that the Employer's day-to-day dock operations and the individuals responsible for such operations are a highly integrated and functionally complete unit. City drivers, road drivers and dockworkers work closely together as a team on a daily basis to ensure the operational needs of the terminal are met. There is a common goal to load, unload and deliver freight. Cooperation and daily contact among these three positions on the dock is essential to the smooth operation of the Employer. As a result, the evidence overwhelmingly establishes a regular interchange of positions/responsibilities to ensure the overall objective of the Employer is met.

The common goal of moving freight is one of the reasons why the responsibilities of city drivers, road drivers, and dockworkers substantially overlap. This is evidenced by the "essential" job functions listed in each job description. City drivers and road drivers are required to perform many of the same essential job functions as dock workers. In fact, most of the essential job functions of a dockworker are listed as essential functions on the job descriptions of city drivers and road drivers.

The Regional Director took a constrained view of the dock work performed by drivers. Rather than acknowledge the extensive evidence that drivers routinely and regularly perform work on the dock, the Decision diminishes the documented record by simply saying it is "insufficient." Decision at 10. As described below, the record unequivocally demonstrated that a

major proportion of dock work was performed by drivers, and that a major proportion of drivers have dock work responsibilities.

Moreover, the actual day-to-day work performed by city drivers and road drivers on the dock also establishes the functional integration of the city drivers and road drivers to the dockworkers. Specifically, the evidence establishes over 85% of the employees in the three positions perform dock work. (Stip. Ex. 23). Some drivers perform dock work on a *daily* basis and are working with, next to and assisting dock workers and other drivers load and unload the freight onto the trucks.

The mere fact some dockworkers are called “supplemental” further supports a finding that the three job positions are inseparable. Dockworkers supplement the work the drivers cannot complete. In other words, drivers are responsible for performing dock work and, as set forth in their job description, may be required to perform dock work. As over 55% of the drivers perform dock work, it is clear the South Brunswick terminal would not be able to operate efficiently without the drivers working on the dock on a regular, daily basis. Put simply, road drivers and/or city drivers must work the dock to ensure the continued, efficient operation of the terminal.

The drivers and dockworkers also share common training and skills. Drivers and dockworkers all receive training for dock work upon hire and get certified to operate a fork lift.

Many road drivers, city drivers and dockworkers have received training and certification for hostling. While road drivers and city drivers are required to have a CDL license, the drivers are not using their CDL license when working on the dock.

Road drivers, city drivers and dockworkers have common supervision. Operational Supervisors oversee all three positions and can issue disciplinary actions against any of the

positions. There are no set supervisors for drivers or dockworkers. Instead, the Operational Supervisors work together as a team overseeing the dock work.

Road drivers, city drivers and dock workers also share the same or similar wages, benefits and other terms and conditions of employment. All are paid on an hourly basis, receive the same health benefits and personal days, participate in the same 401(k) plan, have the same break rooms and attend the same employee functions/gatherings. Of note, road drivers are typically paid solely on a mileage basis. However, here, road drivers are assigned an hourly rate because of the expectation/requirement that road drivers perform either dock work or city driving or both. While there are some differences in benefits, the reason is due to the “part-time” designation, not the underlying position. Supplemental dockworkers are not being denied benefits because they are dockworkers; it is because they are only part-time.

Based on a review of the community of interest factors found relevant in driver unit cases, the nature of the business and the manner in which drivers and dockworkers work together on a day-to-day basis to ensure the timely delivery of freight, the drivers and dockworkers share such a strong a community interest, it is self-evident that the only appropriate unit is a unit including all full-time and part-time city drivers, road drivers and dockworkers.

The Regional Director downplayed these facts, emphasizing the relatively less significant differences between drivers and dockworkers. Although it is beyond question that a significant portion of driver work occurs *as dock work*, the Decision prefers to focus on the dockworkers’ lack of the drivers’ “unique” qualifications (no CDL). Decision at 8. Likewise, the Regional Director relies on the drivers’ off-site duties but ignores the routine – often daily – duties they have when working on the dock. *Id.*

The Decision also diminishes the importance of common supervision. Finding that the drivers are somehow their own independent and separate unit the Regional Director ignores this inconvenient fact. Finally, the Decision simply naysays the extraordinarily high degree of dock work engaged in by drivers and the common interchange of employees between job categories. Decision at 7-8.

B. **The Petitioned-for Unit Is Inappropriate Regardless of the Rule of *Specialty Healthcare***

As the Regional Director cited, recently, the Board, in Macy's, Inc., 361 NLRB No. 4 (2014), explained the principles of Specialty Healthcare as follows:

...when a union seeks to represent a unit of employees “who are readily identifiable as a group (based on job classification, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit ... if the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an “overwhelming” community of interest with the petitioned-for employees, such that there “is no legitimate basis upon which to exclude certain employees from “the larger unit because the traditional community of interest factors ‘overlap almost completely.’”

361 NLRB, slip op. at 7. Applying Specialty Healthcare to the facts of this case does not change the conclusion that the Union’s petitioned-for unit is inappropriate and the smallest appropriate unit must include all part-time and full-time city drivers, road drivers and dockworkers.

1. **The Petitioned-For Unit Is Not a “Readily Identifiable Group”**

As detailed by the facts above, city drivers and road drivers are not themselves a “readily identifiable group” absent the dockworkers. Rather, the proposed unit is an “arbitrary segment” of an appropriate unit, and a “fractured unit” within the meaning of Specialty Healthcare and longstanding Board law.

A key consideration as to whether a petitioned-for unit is a “readily identifiable group” is

whether the unit is “coextensive with a departmental line that the Employer has drawn.” Macy’s, 361 NLRB, slip op. at 8. *See also Bergdorf Goodman*, 361 NLRB No. 11, slip op at 3 (2014) (despite commonalities, Board held employees within petitioned-for unit did not share a sufficient community of interest to render the unit appropriate, in part, because the “boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the Employer.”). As described above, the Decision embraced this concept and found the petitioned-for unit to be such “a clearly identifiable group because, among other things, it ‘tracks a dividing line drawn by the Employer.’” Decision at 8. This is plainly not accurate.

The petitioned-for unit is not coextensive along a departmental line. To the contrary, the petitioned-for unit carves out two of the three positions that are responsible for working in the dock area at the South Brunswick terminal. It is acknowledged by the Regional Director that there is no record evidence stating drivers and dockworkers have separate departments. Rather, the three positions are part of the same organizational group, with the same organizational goal-to load, unload and transport freight. They interact and work with one another on a daily basis on the dock. They all are supervised and disciplined by the Operational Supervisors. The only unit that is coextensive with a departmental line is a unit including all three positions.

The Board also must consider whether the petitioned-for employees share a community of interest. In Macy’s, the Board said it would examine the following factors:

Whether 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 the classification; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised.

361 NLRB, slip op. at 8. As described in detail above, an analysis of these factors establishes the petitioned-for unit cannot be found to share a community of interest that is separate and apart from the dockworkers. Thus, the city drivers and road drivers are not a readily identifiable group but an “arbitrary segment” of an appropriate unit, and a “fractured unit” within the meaning of Specialty Healthcare.

The Regional Director incorrectly dismissed the significance of the Board’s rule in Levitz Furniture Company of Santa Clara, Inc., 192 NLRB 61, 63 (1971), in which the Board held drivers did not constitute a “separate identifiable unit” with special interests sufficient to warrant their separate representation. Why? Because the Levitz drivers were under the same supervision as other employees, received substantially similar benefits, worked the same hours, and were paid on the same basis. *Id.* Importantly, the fact there was regular and frequent interchange with other employees outweighed drivers spending a majority of time away from the plant. *Id.*

The facts in the case at bar are even more compelling than in Levitz:

- **Separate Department:** As noted above, the road drivers and city drivers are in the same department as the dockworkers. There is no separate driver and dock departments.
- **Distinct Skills and Training:** All three positions are trained to perform dock work upon hire, including operating a fork lift and loading and unloading freight. Many of the employees were trained and certified as hostlers.
- **Distinct Job Functions/Perform Distinct Work:** All three positions perform dock work. Many of the essential functions of drivers are identical to those of dockworkers. In fact, road drivers and city drivers are specifically advised that an essential function of their job is the performance of dock work.
- **Functionally Integrated:** city drivers and road drivers regularly perform dock work on a weekly and daily basis. As previously noted, over 40% of drivers (94% of city drivers) perform dock work; many road drivers’ routes include working on the dock; and drivers perform dock work on a daily basis.
- **Frequent Contact with Other Employees:** city drivers and road drivers have daily contact with dockworkers and often are working directly with or next to dockworkers.

- **Distinct Terms and Conditions of Employment:** All positions share the same break room, locker room, medical benefits, personal days and 401(k). All full-time positions share the same vacation benefits.
- **Separately Supervised:** All three positions are supervised by Operational Supervisors and can be disciplined by any Operational Supervisor.

In short, the city drivers, road drivers and dockworkers are in the same department, have common supervision, perform the same or similar functions and skills, all work on the dock and interact/intermingle and work together on a daily basis towards a common goal/objective – to load, unload, and timely delivery freight. Due to the Company’s organizational structure and the complete integration of road drivers, city drivers, and dockworkers on the dock, it cannot be concluded that city drivers and road drivers are a “readily identifiable group.” The only readily identifiable group must include city drivers, road drivers, and dockworkers.

The Regional Director disputed application of Levitz Furniture Company of Santa Clara, because that case did not consider the Specialty Healthcare test of “whether the disputed employees share an overwhelming community of interest with the unit employees.” Decision at 11, *citing DTG Operations, Inc.*, 357 NLRB No. 175 (2011), slip op. at 8, fn. 23. However, the Regional Director did not address the numerous cases (cited above) regarding unit composition in the trucking industry (in which dockworkers were regularly included in a drivers’ unit). Those cases, as well as Levitz Furniture are controlled by footnote 29 in Specialty Healthcare in which the Board specifically stated that its decision was not intended to “disturb any rules applicable only in specific industries.”

2. The Dockworkers Share an Overwhelming Community of Interest With the Petitioned-For Unit

As the Board stated in Macy’s, two groups share an *overwhelming* community of interest when their community-of-interest factors “overlap almost completely.” Macy’s, 361 NLRB, slip op. at 9. Here, the facts establish the petitioned-for city drivers and road drivers’

community-of-interest factors overlap almost completely with dockworkers. In fact, city drivers and road drivers actually have more in common with dockworkers than with one another. This renders the Union's petitioned-for unit inappropriate even under the analysis set forth in the Specialty Healthcare decision.

In the few cases decided after Specialty Healthcare, the emphasis by the Board in determining whether petitioned-for employees have an overwhelming community of interest with additional employees has been on whether the petitioned-for employees worked in a separate department, reported to different supervisors, worked in separate physical spaces, and had functional integration. See Grace Industries, 358 NLRB No. 62 (2012); DTG Operations, Inc., 357 NLRB No. 175 (2011); Guide Dogs for the Blind, Inc., 359 NLRB No. 151 (2013). This reached its current peak in Macy's, in which the Board held that a key component of a contested, petitioned-for unit is whether the unit sought "tracks a dividing line drawn by the employer." Despite the glib finding by the Regional Director that the drivers here do track an organizational line of the Employer, the record conclusively holds the opposite. There is no "drivers only" department. Rather, the operational structure is more akin to grouping work associated with the dock which includes the drivers. Thus, the petitioned-for unit is contrary to the organizational structure of the Employer because it is excluding the dockworkers. This factor weighs heavily against a finding that the petitioned-for unit is appropriate.

Moreover, the factors, discussed more fully in the sections above, further prove the overwhelming community of interest factors amongst city drivers, road drivers and dockworkers. Unlike the cases decided after Specialty Healthcare, here, there is common supervision, skills, benefits, and wages as well as substantial integration and almost daily interaction and

interchange with each other. *See Calco Plating, Inc.*, 242 NLRB 1364, 1365 (1979) and *Standard Oil Company*, 147 NLRB 1226 (1964).

The Board has made clear that the decision in *Specialty Healthcare* did not create a new community of interest test. Nor did it abandon “various presumptions and special industry and occupational rules” or rules applicable only in specific industries. 357 NLRB, slip op. at 13, fn. 29.⁷

Consequently, the extensive precedent regarding appropriate units in the trucking industry remains very much in effect. Accordingly, under any standard applied by the Board, the facts warrant a finding that the petitioned-for unit of only city drivers and road drivers is inappropriate. Rather, the smallest appropriate unit must include city drivers, road drivers, and dockworkers, including driver apprentice.

V. CONCLUSION

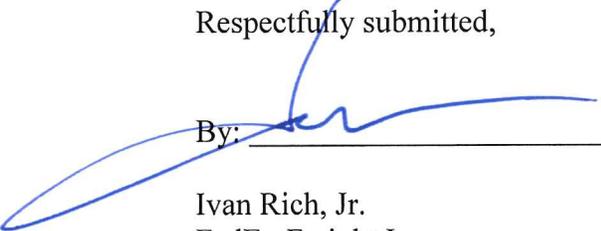
As the foregoing demonstrates, the Union has petitioned for a unit of employees who do not share a separate community of interest. The petitioned-for unit is a fractured unit, an arbitrary segment of what would be an appropriate unit— a unit including city drivers, road drivers, and dockworkers (and including driver apprentice). The arbitrary cobbling together of

⁷ In an order denying review in *Fedex Freight, Inc.*, 4-RC-134614, a similar case concerning Fedex Freight employees in the Employer’s East Philadelphia, Pennsylvania, Member Johnson opined that the extent of integration between the drivers and dockworkers was not adequate to create an all inclusive unit because the extent to which drivers in the workplace at issue there performed dockworker duties did not rise to the “30-40%” level found in *Home Depot USA*, 331 NLRB 1289 (2000), *cited at* 4-RC-134614, Order dated 10/14/14, fn. 1. The Board’s articulation in *Home Depot USA* did not establish a numerical guide for determining the percentage of similar work needed to trigger a finding of unit inclusion. Indeed, in that case, the Board reviewed the traditional criteria for unit inclusion, applying the broad review of *Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61 (1971). 331 NLRB at 1291. Moreover, the record evidence in the case at bar demonstrated that over 40% of the drivers performed dock work, establishing at the very least that a significant portion of petitioned-for employees performed dock work – a proportion consistent with the spirit and intention of the *Home Depot* holding.

two job titles who do not themselves work together, but also share an overwhelming community of interest with dock employees is inappropriate. The two job classifications petitioned for simply do not share a mutuality of interests that are not shared by other terminal employees, and, accordingly, do not constitute an appropriate bargaining unit.

Contrary to the Regional Director's conclusion, based upon the overwhelming and essentially unrefuted record evidence. The Regional Director should find the Petitioner's requested unit is inappropriate and smallest appropriate unit must include all full-time and part-time city drivers, road drivers, and dockworkers, including driver apprentices. Accordingly, the Employer respectfully requests that the Board grant its Request for Review of the Regional Director's Decision.

Respectfully submitted,

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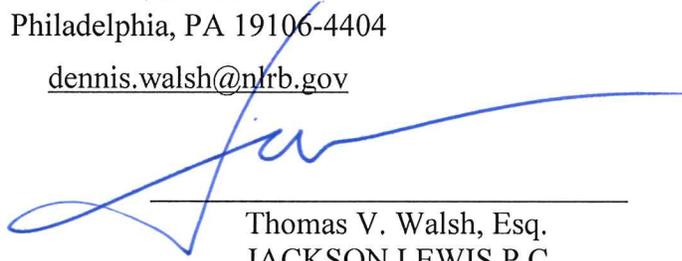
Dated: October 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2014, I caused a true and correct copy of the EMPLOYER'S REQUEST FOR REVIEW to be served upon all interested parties, via e-mail and also by Federal Express, next day delivery, by depositing a true copy into an official Federal Express depository addressed to:

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