

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

Draper Trucking,
Employer,

and

International Brotherhood of Teamsters,
Local 449,
Union,

Case 03-RD-177325

and

William M. Brehm, JR.,
Petitioner.

PETITIONER'S REQUEST FOR REVIEW

INTRODUCTION

William Brehm ("Brehm") is employed by Draper Trucking ("Employer"), a small trucking company with approximately ten employees in Buffalo, New York. Brehm is employed within a bargaining unit represented by Teamsters Local 449 ("Union" or "Local 449"). On June 1, 2016, Brehm filed a petition seeking to decertify Local 449 as the collective bargaining representative of all Draper Trucking employees. As would be expected under these circumstances, Brehm's petition defines the unit as limited to employees of Draper Trucking. Brehm's

petition was supported by the signatures of almost all of Draper Trucking's approximately ten employees.¹

Unbeknownst to Brehm, however, twenty years ago his Employer entered into an informal, unwritten agreement with five other dump truck firms for the purpose of negotiating with the Union. While each company signs individual contracts with the Union, the contracts are negotiated by the six companies in concert with each other and the Union. Current National Labor Relations Board ("Board" or "NLRB") law indicates that the appropriate unit for a decertification petition at Draper Trucking must include the drivers employed by *all* employers comprising this informal multi-employer group. Accordingly, to dislodge the Union at Draper Trucking, Brehm must not only convince those employees with whom *he* works and has a community of interest, but also the employees of *five other companies* he does not know or interact with.

Section 102.67(c) of the Board's Rules and Regulations mandates "[t]he Board will grant a request for review only where compelling reasons exist" and provides that review may be granted when "there are compelling reasons for reconsideration of an important Board rule or policy." This is such a case, and there are compelling reasons to reconsider Board precedent in this area.

¹ While the petition is not part of the record, the Region possesses the petition and the Board can take administrative notice of the signatures.

First, the highest and primary purpose of the National Labor Relations Act (“Act”) is employee free choice. 29 U.S.C. §157. Requiring employees of a single employer to obtain the consent of employees of other companies, with whom there is no interaction or common interest, undermines employee free choice.

Second, Board law concerning decertifications in multi-employer bargaining units premises employee free choice on an *employer’s* unilateral actions. Assuming, *arguendo*, that Brehm and his co-workers are actually in a multi-employer bargaining unit, that serendipity occurs only because of their employer’s informal choice made decades ago. The Board currently allows only unions and single employers to unilaterally withdraw from multi-employer agreements, and only when that withdrawal occurs before bargaining for a new contract commences. Employees of one company, meanwhile, have no right to unilaterally withdraw from the union, but must convince employees of *other employers*, who they do not even know, to decertify as well. Practically speaking, the only way for employees of a single employer to exercise their own right to decertify the union is to ask their employer to withdraw from the multi-employer unit. But this places employer rights and convenience above employee free choice. This diminishes Section 7 rights while allowing unions and employers to trap employees in unwanted agreements with unwanted unions.

The Board should grant review and determine that employees of a single employer in a multi-employer unit have the right to dissociate from the Union on their own, in a manner not dependent upon their employer's unilateral choices and desires. *See, e.g., Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016).

FACTS

The Employer operates a dump truck business and has engaged in collective bargaining with the Union for several decades. Prior to the mid-1990s, the Employer bargained on an individual basis with the Union. Around 1998, however, it began negotiating agreements with the Union in informal concert with five similar businesses. These employers do not sign one master agreement, but sign individual, separate agreements. The most recent pattern agreement was effective from June 1, 2013 to May 31, 2016. On May 18, 2016, the Union met with representatives of the multiple employers, including Draper Trucking, to negotiate a new contract. A second meeting was held on June 9, 2016.

On June 1, 2016, Brehm filed a petition seeking to decertify the Union as the collective bargaining representative of his co-workers at Draper Trucking. He filed the petition on behalf of himself and a large majority of his fellow employees at Draper Trucking. (See footnote 1). The Region held a hearing, at which the Union contended the petition should be dismissed because the petitioned-for-unit was not appropriate.

On June 27, 2016, the Acting Regional Director for Region 3 dismissed the petition. (Copy attached hereto). He found that because *the Employer* “manifested a willingness to be bound by group bargaining,” *the employees’* petition had to be dismissed because it was not coextensive with the existing unit – meaning all six trucking companies.

ARGUMENT

I. Sections 7 and 9 of the Act require the Board to uphold employees’ free choice.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, grants employees “the right to self-organization, to form, join, or assist labor organizations” or to “refrain” from doing so. The Act grants employees a concomitant and equal right to organize for and against unionization. While the Act “protect[s] and facilitate[s] employees’ opportunity to organize unions to represent them in collective-bargaining,” *American Hospital Ass’n v. NLRB*, 499 U.S. 606, 609 (1991), it also “guards with equal jealousy employees’ selection of the union of their choice and their decision not to be represented at all.” *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (“employee ‘free choice’ . . . is a core principle of the Act”) (citation omitted).

Section 9 of the Act, 29 U.S.C. § 159, concerns employees’ right to elect or remove a union as the exclusive bargaining representative. Section 9(b)

specifically requires the Board, when presented with a petition, to decide the proper unit for an election while “assur[ing] to employees the fullest freedom in exercising the rights guaranteed by this [Act].” 29 U.S.C. 159(b). Indeed, as the Board has famously noted, it “need find only that the proposed unit is *an* appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace.” *Specialty Healthcare*, 357 NLRB 934, 940 (2011).

The Board must also remember that it is not just an umpire to referee a game between an employer and union. Its primary function under Sections 7 and 9 is to serve as the guardian of individual employees. The employees’ voice, though smaller, deserves the largest amplification under the Act because “[b]y its plain terms, . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers.” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original). The interest of employees in selecting or rejecting a union has been analogized to electing a political representative. *Shoreline Enters of Am., Inc. v. NLRB*, 262 F.2d 933, 944 (5th Cir. 1959). (“The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen’s interest in selecting a political representative.”). Moreover, the right to be free of an unwanted union is itself protected by the First Amendment. *Mulhall v. UNITE HERE, Local 355*, 618

F.3d 1279, 1286-87 (11th Cir. 2010) (finding imposition of an unwanted exclusive representative is a First Amendment injury because employees are “thrust unwillingly into an agency relationship”).

Trapping a discrete group of employees of one employer into an unwanted union because of unilateral decisions their employer makes abridges their Section 7 rights and undermines the purpose of Section 9(b)—assuring employees “the fullest freedom” to choose or reject their own representative. “There could be no clearer abridgment of § 7 of the Act, assuring employees the right ‘to bargain collectively through representatives of their own choosing’ or ‘to refrain from’ such activity” than to grant exclusive representation status to a minority union. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 737 (1961). Accordingly, every decision made by the Board must further employee free choice.

II. Multi-employer bargaining undermines employees’ free choice by binding them to the whims of those who are strangers to their workplace.

Multi-employer bargaining has long been accepted under the Act. While the Act does not explicitly authorize multi-employer bargaining, the Supreme Court has construed the Act to allow for multi-employer units. *Shipowners’ Ass’n of the Pac. Coast*, 7 NLRB 1002, 1024-25 (1938), *review denied sub nom. AFL v. NLRB*, 103 F.2d 933 (D.C. Cir. 1939), *aff’d*, 308 U.S. 401 (1940); *see also NLRB v. Truck*

Drivers Local 449, 353 U.S. 87, 95-96 (1957) (concluding that Congress intended the Board to certify multi-employer units after Taft-Hartley amendments).

It is axiomatic that a multi-employer unit must be consensual in nature. The only requirement to form a multi-employer unit is the unequivocal manifestation by each member of the group that all be bound in collective bargaining by group, rather than individual, action. *Kroger Co.*, 148 NLRB 569 (1964). The unit must be entirely voluntary, and the assent of the union is required. The Board does not approve of any multi-employer unit over the objection of either the union or employer. *Artcraft Displays, Inc.*, 262 NLRB 1233, *clarified*, 263 NLRB 804 (1982); *United Fryer & Stillman, Inc.*, 139 NLRB 704 (1962).

The Board's current rules, however, trample and ignore individual employees' consent and rights when it comes to decertification of an unwanted union. Employees of a single employer in a multi-employer unit cannot obtain a decertification election, even where, as here, their Employer entered the informal multi-employer agreement without intending to bind his employees or undermine their rights under NLRA Sections 7 and 9.

Because decertification petitions must be filed on behalf of *all* employees in the multi-employer unit, *see, e.g., Am. Consol'g Co.*, 226 NLRB 923 (1976) and *Alston Coal Co.*, 13 NLRB 683 (1939), a serious impediment is created to employees' Section 7 right to refrain from unionization. In order for employees of

one small employer to decertify and disassociate from a union, those employees have to organize against the union with employees from many different employers, who they do not know and with whom they do not share a community of interest. “Given their isolation from one another, those employees may face near-insurmountable challenges in attempting to organize, and even if they do, it may prove extremely difficult for them to have their collective voice heard” *Miller & Anderson*, 364 NLRB No. 39, slip op. at 12 (July 11, 2016).²

Here, Brehm must not only organize against the Union in his own small workplace, but at five other workplaces as well, based on an off-hand decision his employer made twenty years ago. But forcing an employee of one company to petition the unknown employees of competitors, who work under different conditions and have different relationships with different employers, does nothing “to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] [Act]” *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 532 (9th Cir. 1968) (citation omitted). It does nothing but elevate employer and union

² Unlike *Specialty Healthcare*, 357 NLRB at 940, which recognizes that there may be *many* appropriate units in one workplace (at least when a union is being certified), the Board’s cases seem to find, asymmetrically and unfairly, that “the multiemployer bargaining unit is the *only* appropriate bargaining unit” when a decertification election is sought. *Am. Consolidating Co.*, 226 NLRB at 924 (emphasis added).

convenience over employees' right to free choice in the selection of their representatives.

In fact, the current rules appear to be a one-way ratchet, making it very easy for employees to bring in a union but very difficult for those same employees to remove that same union if it outlives its usefulness. While employees of a single employer have to seek the consent and approval of a majority of employees in other companies in order to decertify, employers and unions are held to a different standard.

For example, single employers may unilaterally leave a multi-employer unit upon adequate written notice at the end of a contract period and prior to the commencement of negotiations for a new contract. *Retail Assocs, Inc.*, 120 NLRB 388 (1958). Even after bargaining begins, an employer is afforded some opportunity to withdraw from bargaining, generally when there are “unusual circumstances.” *Hi-Way Billboards, Inc.*, 206 NLRB 22, 22 (1973). Employees, meanwhile, have no such rights and have to ask permission of their own employer and competitors' employees in order to decertify the union in their own small workplace.

An example proves the point. Assume a group of five employers, with five pre-existing bargaining units, forms a multi-employer unit. Each employer has 20 employees, or 100 employees total in the bargaining unit. During an “open period”

100% percent of the employees of one employer sign a petition to decertify the union at their company. Under current Board precedent, that decertification petition from the employees of one company must be summarily dismissed because it lacks the required 30% support from *all* employees in the multi-employer unit. Accordingly, the employees of one company would either have to convince ten or more employees from other employers to sign the decertification petition, or they would have to beg and persuade their employer to withdraw from the multi-employer unit before bargaining commences on a new agreement. This cannot possibly protect and nurture employee free choice under NLRA Sections 7 and 9.

Allowing employers and unions the choice to dissolve any multi-employer bonds, while simultaneously forcing employees to decertify with isolated, unknown, or unfamiliar counterparts at other companies, undermines the purpose of the Act. “A key aspect of the right to ‘self-organization’ is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude.” *Specialty Healthcare*, 357 NLRB at 941 n.18. The Board’s current standard for decertifications in multi-employer units violates this principle. It requires a discrete group of employees to convince their employer to withdraw from the multi-employer unit at the prescribed time, so they can then set about having a decertification election. In essence, it requires “employees to obtain

employer permission before they may organize in their desired unit.” *Miller & Anderson*, 364 NLRB No. 39 slip op. at 8.

The Act does not contemplate giving *employers* greater power than *employees* concerning the *employees*’ free choice. *Id.* Indeed, the Board and the federal courts have resoundingly rejected the notion of an employer serving as the “vindicator of its employees’ organizational freedom.” *Corrections Corp. of America*, 347 NLRB 632, 638 n.3 (2006) (citing *Auciello Iron Works*, 517 U.S. 781, 792 (1996)). Accordingly, “[t]he Board is . . . entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union” *Id.* This holds true even when dealing with employers who are ostensibly acting on “good faith beliefs” about their employees’ preferences, as reliance on the employer “would place in *permissibly careless* employer . . . hands the power to completely frustrate employee realization of the premise of the Act [, which is] to assure freedom of choice and majority rule in employee selection of representatives.” *Int’l Ladies’ Garment Workers’*, 366 U.S. at 738–39 (emphasis added).

In reality, however, this is what is required of employees who are involuntarily thrust into a multi-employer unit. “Requiring employees to obtain employer permission to organize in such a unit is surely not what Congress envisioned when it instructed the Board, in deciding whether a particular

bargaining unit is appropriate to assure to employees to the fullest freedom in exercising the rights guaranteed by th[e] Act.” *Miller & Anderson*, 364 NLRB No. 39 slip op. at 12 (quotation and citation omitted). This obstacle, requiring employees to seek permission from outsiders or directly encouraging the employer to withdraw from the multi-employer unit, is not consistent with the premise of the Act: guaranteeing employee free choice.

Lastly, limiting decertification petitions to the entire multi-employer unit sacrifices individual employees’ free choice in favor of employer and union bargaining interests. Multi-employer bargaining is generally used by small employers to offset the bargaining strength of a powerful union. *Truck Drivers Local 449*, 353 U.S. at 94-95. Small employers want multi-employer bargaining because they realize such associations can eliminate wage competition and achieve other economies of scale. Unions, meanwhile, favor multi-employer bargaining because a decertification petition becomes less practical—if not impossible—as the size of the unit expands. But employees of a single employer who become dissatisfied with representation have no practical recourse. Forcing them to seek permission from their own employer or from unknown employees at other companies is the antithesis of free choice. The Board’s current rules use the ephemeral goal of “labor peace” to improperly subjugate employee free choice.

CONCLUSION

The Board should grant review of the Regional Director's decision dismissing the petition, and summarily overturn it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Request for Review was filed electronically with the NLRB Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties by e-mail or overnight delivery:

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/s/ Glenn M. Taubman

Glenn M. Taubman

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

DRAPER TRUCKING, LLC

Case No. 03-RD-177325

EMPLOYER

and

WILLIAM M. BREHM, JR.

PETITIONER

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 449**

INTERVENOR

DECISION AND ORDER

On June 1, 2016, William M. Brehm Jr. (Petitioner) filed a petition seeking to decertify the International Brotherhood of Teamsters, Local 449 (Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit described below.¹ Petitioner identifies the unit as limited to a single-employer, Draper Trucking, LLC (Employer). The Union contends that the petition should be dismissed because the petitioned-for unit is not appropriate. Rather, it contends that the employees at issue are part of a multiemployer bargaining unit comprised of dump truck drivers employed by six different firms. It asserts that the only appropriate unit must include the drivers employed by all dump truck operators within the

¹ The parties stipulated that the bargaining unit (Unit) is comprised of:

Dump truck drivers; excluding mechanics, office clerical employees, guards, and professional employees and supervisors as defined in the Act.

multiemployer group.² The Employer contends, as does Petitioner, that it is not part of any multiemployer group and that a bargaining unit comprised of just its employees is appropriate. As discussed below, based on the record, and relevant Board law, I conclude that the Employer's employees are part of a multiemployer bargaining unit and that therefore, the unit sought by the Petitioner is not an appropriate unit. Accordingly, I shall dismiss the petition.

I. FACTS

The Employer operates a dump truck business that has contracts with construction companies to transport aggregates, such as stone, asphalt, and sand.³ The Employer has been party to a series of collective bargaining agreements with the Union for several decades. The most recent agreement to which the Employer was a party was effective from June 1, 2013 to May 31, 2016. The record reveals that five other dump truck operators: Pariso Trucking, Inc., B. Pariso Transport, Inc., AT&A Trucking,⁴ Iroquois Bar,⁵ and LCA Development, also have been party to the same agreement with the Union with the most recent also being effective from June 1, 2013 to May 31, 2016. Approximately 90 drivers are covered by a contract covering the Employer and the other five dump truck operators.

George Harrigan, the principal executive officer, secretary treasurer, and a business agent for the Union, has negotiated six collective-bargaining agreements with the dump truck operators over the past 18 years. According to the Harrigan, the six operators identified above have formed

² The parties stipulated there is no contract bar to this proceeding.

³ The Employer was formerly known as Howgen Transportation Co. The testimony concerning the nature of the Employer's operations establishes that the Employer is not engaged in the construction industry. The record reflects that the Employer delivers materials to construction jobsites, and does not perform on-site construction work. The Board has long held that such employers are not themselves construction industry employers. *See Teamsters Local 291 (Lone Star Industries)*, 291 NLRB 581, 584 (1988). Although no party has raised the issue, I note that as the Employer is not engaged in the construction industry, the presumptions that recognition is achieved via Section 8(f) of the Act and that a single-employer unit is appropriate do not apply here. *See John Deklewa & Sons*, 282 NLRB 1375, 1377-1378 (1987).

⁴ AT&A Trucking is also referred to as Tripi.

⁵ Iroquois Bar was formerly known as Oneida Trucking.

an informal association for the purposes of bargaining with the Union over those 18 years. Harrigan refers to the six operators as the “Dump Truck Operators Association,” or simply “the association.” The association does not have bylaws or dues. Harrigan testified that he is currently negotiating the seventh agreement with the dump truck operators, including the Employer.

The agreements with the six operators, all effective from June 1, 2013 to May 31, 2016, were identical, differing only in the signature block. Each of the six 2013 to 2016 agreements provide that, “[t]he term “Employer” shall be construed to mean the Company or Firm employing truck drivers.” Each agreement is titled “Agreement between Dump Truck Operators and Truck Driver Local Union No. 449 of Buffalo and Vicinity.” The names of the six separate companies are not indicated on the 2013-2016 agreements. The five prior sets of agreements previous were also identical.

In the prior six rounds of negotiations-the sixth being for the 2013 to 2016 period, the Union sent out notices to all six operators’ truck drivers announcing a general meeting in advance of negotiations. Harrigan solicited contract proposals from the general meeting and then sent letters to the operators presenting proposals and inviting them to negotiations. For the previous three sets of negotiations, not including those occurring in 2016, the operators appointed a single spokesperson, the late Louis Tripi, owner of AT&A Trucking, to negotiate with the Union.⁶ In these instances, Harrigan met and negotiated directly with Tripi. Once Harrigan and Tripi reached a tentative agreement, the Union presented the agreement to its membership from each of the operators and held a general ratification meeting at which the votes from all drivers were pooled. Once the agreement was ratified, Harrigan sent it out to each of the operators to sign and return.

⁶ Prior to the past three sets of negotiations, each operator attended negotiations instead of appointing a spokesperson.

Most recently, on April 1, 2016, the Union sent a notice to its members employed by all six operators announcing that there would be a contract proposal meeting on April 17, 2016. After the meeting, Harrigan combined the contract proposals from members into a single document. On May 18, 2016, a bargaining session was held which the Union, and representatives of the Employer, Pariso Trucking, Inc., LCA Development, Iroquois Bar, and AT&A Trucking were present. No representative of B. Pariso Transport, Inc. attended. The Union presented the contract proposals to the operators and the parties negotiated. Harrigan asked the operators if a spokesperson would be appointed for them and they responded that they would get back to the Union on that question. On June 7, 2016, Arnold Collier of Iroquois Bar conveyed the employer group's counter proposals to the Union by e-mail.

A second bargaining session was held on June 9, 2016 and all six employers were represented at the meeting. The parties exchanged counter proposals and the record is unclear about the status of negotiations at the conclusion of this meeting.

According to the Employer, prior to 1998, (perhaps in the 1970s and 1980s), bargaining was conducted on an individual basis and the Employer has never executed any document forming a bargaining association between it and any other operator. It acknowledges that there has been group bargaining since at least 1998, but asserts that it was done for convenience only and not to form a multiemployer unit. The Employer referred to the arrangement as a "multiemployer negotiating unit," but not as a multiemployer bargaining unit.⁷

II. ANALYSIS

If, as the Union argues, the Employer has manifested a willingness to be bound by group bargaining and the bargaining is comprised of all dump truck drivers employed by the six employers that constitute the informal "Dump Truck Operators", then the unit sought by the

⁷ The Employer and Petitioner did not call any witnesses or offer any exhibits at hearing.

Petitioner is not coextensive with the existing unit and the petition must be dismissed. In examining whether to process the petition, the sole issue presented is whether the petitioned-for unit is a single-employer unit comprised of dump truck drivers employed solely by the Employer, as argued by Petitioner and the Employer, or a multiemployer bargaining unit, as asserted by the Union.

Whether the appropriate unit is a single-employer unit or a multiemployer unit determines the appropriateness of processing the petition, as the unit set forth in a decertification petition must be coextensive with the previously existing appropriate unit. As the Board explained, in *Arrow Uniform Rental*, 300 NLRB 246 (1990):

It is well established that a decertification petition must be coextensive with the recognized or certified bargaining unit. Thus, as a general rule, a decertification petition for a single-facility location will be dismissed if that location's bargaining history has occurred within a *multilocation unit* of the employer's employees for more than a year.

Id. at 247. (Citations omitted).

See also, *West Lawrence Care Center, Inc.*, 305 NLRB 212 (1991) (A petitioned-for unit in a decertification election must be coextensive with the certified or recognized unit).

In *Kroger Co.*, 148 NLRB 569 (1964), the petitioner and employer sought to decertify the union at a chain of the employer's retail stores as a single-employer unit. The union argued that only a multiemployer unit was appropriate. There, the employer and other retail stores had bargained together with the union on a group basis for approximately 17 years when the dispute arose. The employer and other retail stores had no formal association, constitution, dues, fees, or binding rules of procedure, but one representative assumed the role of spokesperson for the entire group. *Id.* at 570-571. The petitioner argued that the bargaining history showed that the employer never delegated to the group the power to negotiate for it, had not manifested a desire

to be bound by group action, and that the existence of a multiemployer group was belied by the fact that some of the employers had negotiated individual contract adjustments over the years.

The Board disagreed with the petitioner and explained:

We have repeatedly held that a multiemployer unit is appropriate in circumstances such as are here present, even though the employer may not have specifically delegated to an employer group the authority to represent it in collective bargaining or given the employer group the power to execute final and binding agreements on its behalf, or where some of the contracts have not been signed by all members of the group. What is essential is that the employer member has indicated from the outset an intention to be bound in collective bargaining by group rather than by individual action.

Id. at 573. (Citations omitted).

In holding the single employer unit to be inappropriate, the Board also found significant the employer's failure to manifest any intent to withdraw from the group or give any clear indication that the group was not bargaining on behalf of the employer. *Id.* at 574.

More recently, in *Resort Nursing Home*, 340 NLRB 650 (2003) the Board adopted the administrative law judge's analysis on the following aspects of multiemployer bargaining units:

It should be noted that although multiemployer bargaining units generally take the form of membership associations, this is not a sine qua non for such a unit. It is not critical that there be a formal organization to which individual employers belong or pay dues. Whether an employer is or is not a member of an association is not controlling. What is controlling is whether the individual employers have each manifested unequivocally an intention to be bound by group bargaining rather than by individual action.

Id. at 654.

Here, there is no dispute that a formal membership association among the dump truck operators never existed. Nevertheless, as stated in *Resort Nursing Home*, such a membership association is not required to establish a multiemployer bargaining unit. Where employers have banded together only informally to bargain, the Board has "often inferred the presence of the requisite intention [to be bound by group action] from the facts that the employers have

participated for a meaningful period of time in joint bargaining negotiations and have adopted substantially uniform contracts resulting therefrom.” *Van Eerden*, 154 NLRB 496, 499 (1965). Such factors for such an inference are evidenced here.

First, the parties have negotiated six collective bargaining agreements in the fashion described above over the last 18 years, and thus have participated in joint bargaining for a meaningful period of time. Second, the 2013 to 2016 contract adopted by the operations is not only substantially uniform as a result of joint negotiations, but is also identical aside from the signature blocks. The previous five sets of agreements, from 1998 to 2013, were more than substantially uniform, as within each set they were identical to each other.

With those two criteria met, the ultimate question is the actual intent of the parties to bind themselves to each other for bargaining purposes. *Id.* at 499. Here, in addition to the meaningful period of time for joint bargaining sessions and the substantially uniform contract, for the past three agreements leading up to 2016, the dump truck operators designated a single spokesperson, Louis Tripi of AT&A Trucking, to represent them for the last three rounds of bargaining.⁸ The Employer participated in both the May 18 and June 9, 2016 group bargaining sessions, responded and seemingly supported the initial proposal and counter proposal offered by the employer group. It has never indicated that it wished to abandon group bargaining and continued to participate in group bargaining at the June 9 session even after Petitioner filed the instant petition. Accordingly, I find that the Employer through a pattern of behavior over many years and continuing until at least June 2016, manifested an intent to bind itself with the other dump truck operators for bargaining in a multiemployer bargaining unit and has never acted inconsistent with that intention. Finally, the Union’s use of general meetings at which the drivers

⁸ The operators did not appoint a spokesperson as of the May 18, 2016 session. The record does not indicate that they declined to appoint a spokesperson, but only that they did not designate anyone to replace Tripi after he passed away.

of all six employers formulate proposals prior to negotiations and ratify the contract through a pooled voting process are consistent with the existence of a multiemployer bargaining unit. Therefore, I find the single-employer bargaining unit sought by the petition is inappropriate and dismiss the petition.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings 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.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. No 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.

IV. ORDER

It is hereby ordered that the petition is dismissed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **July 11, 2016**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATED the 27th day of June, 2016.

/s/Paul J. Murphy

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