

elsewhere in a week or so and to hire local craftsmen as requested. He also proposed, in an effort to adjust the dispute, to divide the work between the two groups. But all this is further indication that even if a further hearing were directed now in this particular proceeding, the very parties involved would not litigate it fully, as the case requires.

Given the long period of time that has elapsed since the events, now almost 2 years, the fact that the project itself has long been completed, the absence from Florida now of the Charging Employer itself, and the serious important impact upon employer-employees relations in the construction industry generally which a determination of the merits of the dispute in this case would be considered as having, we do not believe the true underlying objectives of Section 10(k) of this statute would be furthered by attempting now to hear and determine adequately the dispute which long ago gave rise to this proceeding. Accordingly, we shall quash the notice of hearing.

[The Board quashed the notice of hearing.]

E. H. Koester Bakery Co., Inc.¹ and American Bakery and Confectionery Workers International Union, Local No. 68, AFL-CIO, Petitioner. *Case No. 5-RC-3455. April 12, 1962*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Upon the entire record, the Board finds:²

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization named below claims to represent certain employees of the Employer.

3. 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.

4. The appropriate unit: The Employer, a Maryland corporation, is engaged in the manufacture of bakery products with its plant at Baltimore and distribution centers at Easton, Salisbury, Waldorf, and Silver Spring, Maryland. Products baked at the Baltimore plant are shipped daily via company-owned transport trucks for distribu-

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

² The Petitioner's request for oral argument is denied as in our opinion the record and briefs adequately present the positions of the parties.

tion at these locations. The Employer also operates two surplus (stale products) stores in Baltimore, one of which is situated at the Employer's plant and the other situated approximately 10 blocks from the plant. There is no history of collective bargaining at any of the locations involved.

The Petitioner seeks a unit of production, sanitation, and inside maintenance employees at the Baltimore plant. It would exclude driver-salesmen, truckdrivers, garage employees, and store clerks, as well as distribution center employees—all of whom the Employer would include. At the hearing, counsel for the Employer stated that the Employer has no salesmen as such but has driver-salesmen, and that it employs no employees classified as timekeepers, time-study employees, guards, watchmen, or professional employees, classifications also named in the petition. The parties stipulated that inside maintenance employees include mechanics, mechanic helpers, engineers, painters, carpenters, and carpenter helpers, and should, with sanitation employees, be included in the unit. On the record as a whole we construe "inside maintenance" to mean maintenance employees other than garage employees. They also stipulated that leadmen do not have the power to hire or discharge and should be included. Both would exclude office clerical employees.

Distribution center employees: The four distribution centers whose employees the Employer would include are the following distances from Baltimore: Easton, 54 miles; Salisbury, 116 miles; Waldorf, 50 miles; and Silver Spring, 35 miles. In addition to their geographical separation from the main plant, the work differs at the distribution centers, there is no employee interchange with plant employees, the distribution center employees have separate supervision, and they are hired in the locality. On these facts, including the fact that there has been no bargaining for any of the employees and no union seeks to represent the broader unit including distribution center employees, we find that a unit of employees limited to the Baltimore plant is appropriate.³

Driver-salesmen: The Employer has 175 driver-salesmen. As previously stated, it has no salesmen other than driver-salesmen.⁴ It appears that approximately 50 work out of the distribution centers which we exclude from the unit. The remainder work out of the plant where the production and maintenance employees are located. These driver-salesmen are supervised by the sales manager and his assistants. This sales manager hires and discharges them. Unlike plant employees, they are paid on a commission basis, with \$90 a week

³ See *Foremost Dairies, Inc.*, 118 NLRB 1424, 1427; see also *Barr's Jewelers*, 131 NLRB 235.

⁴ In testifying concerning the duties of the clerical employees discussed below and their contacts with driver-salesmen, the Employer's president used "salesmen" and "driver-salesmen" synonymously.

guaranteed salary. Individually their annual compensation varies from \$4,800 to \$10,200. The Employer admitted on cross-examination that they "are allowed to call on new accounts." Many of them have selling experience when hired.

The driver-salesmen spend approximately half an hour in the plant each morning, part of it in checking the loads which have already been placed on their trucks by the loaders. Some return during the day for additional products, which they load. At the end of the day they return with approximately 10 percent of their load and spend about 45 minutes in the stale room unloading the balance.⁵

The Employer would include the driver-salesmen in the unit, stressing the interdependence of selling and production functions in its business. It also contends that there is interchange between driver-salesmen and other classifications, and that all have common fringe benefits. It minimizes the selling functions of the driver-salesmen and emphasizes their daily contact with stale-room employees, pointing out that some have become stale-room employees, and that the latter employees also do some driving in making deliveries to institutions. However, we are not persuaded that the contact of the driver-salesmen with the stale-room employees and the fact that both make deliveries has significance in the context. The record shows that the few driver-salesmen who have transferred to stale-room work have done so at reduced pay in order to have less rigorous jobs after long service with the Employer. There is no indication that stale-room employees are employed because of their selling abilities. We also note that the record does not support the contention of interchange between driver-salesmen and production and maintenance classifications.

On the record as a whole we conclude that these driver-salesmen promote the sale of the Employer's products as an essential part of their work. Based on this record we find that not only have these driver-salesmen little contact with production and maintenance employees, but that their interests by reason of their selling duties are materially different from those of employees in the production and maintenance unit. Accordingly, we shall exclude them from the unit.⁶

Truckdrivers: The Employer has three truckdrivers who transport products from the plant to the distribution centers. They report to the plant, pick up their loaded trucks, and depart. They maintain a log of their activities each day indicating time of departure and

⁵ The parties agree, and we find, that the stale-room employees, of whom there are 10 or 11, should be included in the unit.

⁶ See *Plaza Provision Company (PR)*, 134 NLRB 910; see also *Caskey Baking Company*, 80 NLRB 374, where the Board, despite bargaining history on an all-employee basis, recognized that driver-salesmen, transport drivers, and mechanics have interests apart from bakery employees.

arrival at their destination. At two of the distribution centers they help unload or transfer their loads to the trucks of the drive-salesmen operating from such locations. The other distribution centers have leaders who perform this work. On these trips the truckdrivers also carry documents and communications between the plant and the distribution centers. They are presently paid on an hourly basis, recently changed from a trip basis. As most of their time is spent away from the plant, they have little contact with bakery employees. Organizationally, they are under the supervision of the loading platform foreman.

The Petitioner does not seek to represent the transport truckdrivers. The Employer urges their inclusion in the production and maintenance unit. In several recent cases,⁷ the Board reserved for further study and consideration the policy of including truckdrivers in more comprehensive industrial type units when the parties are in disagreement as to their unit placement, and no union is seeking to represent them separately.⁸

Self-organization among employees of a given employer is generally based upon a community of interest in their occupation, more particularly in their common experience, duties, wages, hours, and other working conditions. In determining the appropriate unit, the Board takes into consideration and evaluates the various factors which tend to show the presence or absence of this community of interest. The above and related factors, as well as the organization of their employer's business and the history of collective bargaining among the employees involved, are all entitled to weight in that determination. However, the precise weight to be given to any of the relevant factors cannot be mathematically stated. Generally, several considerations enter into each decision.

The problem of the unit placement of truckdrivers arises when they have a dual community of interest, which is created on the one hand by their particular occupation with its special identifying factors distinguishing them from other classifications of employees generally, and on the other hand by their functional relationship to the operations of their employer and the common employment and working conditions shared with fellow employees.

In a few industries, 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 employees, and truckdrivers are therefore included in the production and maintenance

⁷ See *Ballentine Packing Company, Inc.*, 132 NLRB 923, footnote 7; *Ben Pearson's*, 133 NLRB 636, footnote 5.

⁸ See *Thomas Electronics, Inc.*, 107 NLRB 614; *Challenge-Cooke Bros., Incorporated*, 129 NLRB 1235

units.⁹ In others, the nature of the production operation is such that the interests of the production employees are completely different from those of truckdrivers who are therefore excluded.¹⁰

However, the complexity of modern industry, with its many variables, precludes, for the most part, the application of fixed rules for the unit placement of truckdrivers. For case experience has demonstrated that a wide variation in conditions of employment governing mutuality of interests exists both with respect to local and over-the-road drivers of a given employer, and as between the various industries and from plant to plant within a given industry. Thus, in a particular set of circumstances the truckdrivers' interests could be sufficiently separate and distinct from those of other employees as not to require their inclusion in a broader unit, whereas in other circumstances such interests could be, and we have held them to be, so closely related to those of production employees as to warrant denial of their severance from an overall unit.

It is for these reasons that the Board recognizes and accords substantial weight to an established course of dealings between an employer and his employees, as well as to the agreement of the parties, in determining the unit placement of truckdrivers. For where a successful history of their inclusion in a broader collective-bargaining unit has been established, this fact gives rise to a presumption that their community of interest with other employees is substantial. Similarly, when the employer and the union involved have agreed either to inclusion or exclusion of truckdrivers, there is a fair indication that such agreement reflects the parties' collective experience and first-hand knowledge of the particular operation involved as well as the experienced judgment of the employees themselves as to the existence of the mutual interests in working conditions shared by them which should be present among the members of an appropriate unit.

However, when the parties are in disagreement as to the unit placement of truckdrivers, there is no bargaining history, and no union is seeking to represent them separately, it is incumbent upon the Board to consider the pertinent factors present in order to determine wherein the predominant interests of truckdrivers are vested. In treating with this type of situation, the Board has, over the years, considered various criteria as guides in its determinations. In large part, such determinations were based upon the evidence presented in each case bearing upon the factual situation as it reflected the existence of a

⁹ See *Nettleton Timber Company*, 87 NLRB 1319 (logging industry). Also see *Benner Tea Company*, 88 NLRB 1409; *Aster Packing Company*, 80 NLRB 302 (including truckdrivers where driving was merely incidental to other skills involved in the production process).

¹⁰ See *Ad-Press Corporation*, 119 NLRB 564; *Jack Gordon et al. d/b/a Ivy Hill Lithograph Company*, 121 NLRB 831 (excluding truckdrivers from lithographic production units).

community of interest or lack thereof.¹¹ In more recent times, however, the Board instituted and applied an automatic rule for the disposition of this issue, holding that in cases of disagreement by the parties when no union was then seeking to represent truckdrivers separately, they would be included with employees in the more comprehensive unit.¹² This policy presently obtains.

We have carefully reexamined the treatment accorded truckdrivers in unit placement cases. We are convinced that application of the present automatic rule amounts to a refusal to consider on its merits an issue, the resolution of which the parties have been unable to reach based upon their collective experience and knowledge, and one which is basic to a determination of the unit placement of truckdrivers. We have therefore decided to abandon the blanket policy of including truckdrivers in more comprehensive units and to return to the approach of predicating their unit placement in each case upon a determination of their community of interest.¹³ In so doing, we shall continue to accord to the history of collective bargaining and to the agreement or stipulation of the parties the substantial weight which has been given to these factors and which we find justified. Similarly, where their representation in a separate unit is requested we shall determine whether they may appropriately constitute a separate unit.¹⁴ However, in the absence of such a request, we shall no longer hold that inclusion is automatically required.

In our evaluation we shall consider, among others, the following factors: (1) Whether they have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether they 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. If the interests shared with other employees is sufficient to warrant their inclusion, we shall include the truckdrivers in the more comprehensive unit. If, on the other hand, truckdrivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them.

We turn now to the specific issue presented in the instant proceeding with respect to the truckdrivers. As noted above, there is no history of collective bargaining; the parties are in disagreement as to whether truckdrivers should be included in the production and maintenance

¹¹ See, however, *Kingan & Co. Incorporated*, 61 NLRB 1222, and cases immediately following it, when for this short period between 1945 and the enactment of the Taft-Hartley Act, the Board applied a policy of excluding truckdrivers from more comprehensive units whenever their unit placement was in dispute.

¹² See footnote 8, *supra*.

¹³ *Thomas Electronics, Inc.*, 107 NLRB 614, and *The Valley of Virginia Cooperative Milk Producers Association*, 129 NLRB 785, stating a contrary policy, are hereby overruled.

¹⁴ See *Ballentine Packing Company, Inc.*, *supra*, footnote 7.

unit requested; and no labor organization is seeking to represent truckdrivers separately. Considering the duties and conditions of employment of truckdrivers and of the other employees included in the appropriate unit, we find that: The truckdrivers are functionally engaged in the transportation of the Employer's product rather than its production; in performing these duties truckdrivers are subject to regulations affecting both their hours and working conditions not experienced by plant employees; they thereby spend practically all of their working time away from the plant and have little if any contact with the bakery employees; and there is no interchange between plant employees and truckdrivers. In these circumstances, we find that the interests of truckdrivers are dissimilar to those of the production and maintenance employees and shall exclude them from the unit requested by the Petitioner.

We do not, as charged by our dissenting colleagues, herein hold that agreement by the parties somehow changes the quantum of employees' mutuality of interest. On the contrary, we have given recognition to the validity of an established Board policy¹⁵ which encompasses a presumption that such agreement, whether contained in a stipulation or given expression by bargaining history, and whether for inclusion or exclusion, reflects the mutuality of interest as it exists. The circumstance giving rise to the issue before us is the fact that we have no such agreement. Accordingly, we have confined our decision, as the Board has in similar situations in the past, to a determination of the issue upon which there is disagreement.

With respect to the assertion that our determination gives controlling weight to "the desires of the Petitioner" and considers "only the desires of some of the parties—particularly the unions," we must point out that in representation proceedings the unit named by the Petitioner is always a relevant consideration.¹⁶ And where there is no agreement on the matter, the appropriateness of the unit requested in the petition is necessarily an issue before the Board. This is true

¹⁵ In *The Baker and Taylor Co.*, decision (109 NLRB 245, 247), the Board, Member Rodgers participating, stated "Consideration of the desires of the parties as to the composition of a bargaining unit always has been recognized by the Board as an important factor in promoting collective bargaining and in stabilizing labor management relations. Thus it is not only because of their value in saving the expenditure of effort and time by the Government, but also because of their tendency to promote stability in labor management relations, and to expedite the settlement of labor disputes, that consent-election agreements have become a well-recognized device in the administration of the Act."

¹⁶ In connection with this elementary principle, we would merely point to the language, to which our dissenting colleagues subscribed, in the Board's decision in *United Butchers Abattoir, Inc.*, 123 NLRB 946, 954: "If, however, the Union's proposed unit is, in part, based on the extent of its organizational efforts, it does not follow that such unit is necessarily defective. The Board has held that the effect of Section 9(c)(5) is to preclude the Board from giving *controlling* weight to the extent of the Union's organization in determining the appropriateness of a requested unit. If the appropriateness of the proposed unit, as in the instant case, is indicated by other clear and decisive factors, there is no reason why the Union's decision to seek representation of employees on a narrower basis, should preclude the Board from finding the smaller unit appropriate."

whether the petitioner is the employer, an individual, or a union. Beyond this, the only significance attributable to the fact that the Petitioner herein wishes to exclude and the Employer would include truckdrivers is that it establishes that disagreement as to their unit placement exists between the parties and therefore the Board must make this determination for them. As our analysis shows, we have made that determination on the basis of the record evidence before us.

The garage mechanics: The garage is located in a separate building approximately a block away from the bakery. It is separately operated and supervised by a garage superintendent. Garage mechanics repair, maintain, and inspect all company vehicles operated by the driver-salesmen and truckdrivers. They operate tow trucks used to perform repair work on the road or to bring in broken-down equipment. They also deliver replacements for broken-down trucks and help the driver transfer his load. Occasionally they may substitute for a transport driver. Repair of production machinery is performed by employees in the plant maintenance department, and there is no interchange between garage mechanics and maintenance employees. As the garage is a separately located and distinct operation from the plant and garage mechanics have interests and working conditions separate and distinct from those of production and maintenance employees, we shall, in accordance with Petitioner's request, exclude them from the unit found appropriate herein.

The Employer contends that the following employees are plant clericals who should be included in the unit; the Petitioner that they are office clericals.

Meade, Hanrahan, Solomon, Graves, Ashmenskas, and Pedone: Meade and Hanrahan translate the salesmen's orders into total amounts and kinds of dough. Miss Solomon and Miss Graves receive the salesmen's order sheets from the distribution centers, total them, and turn them over to Meade and Hanrahan. Miss Ashmenskas is classified as a cashier. She also receives a copy of the salesmen's order sheets as well as their reports on stale-room returns, and correlates these documents and the cash turned in by the salesmen. All these employees work in the general office area on the plant's second floor, physically separate from the plant, and there is no evidence that they perform any tasks in the plant proper or have contact with the production workers. Pedone's work as inventory and purchasing clerk takes him into the plant to check inventory from time to time, but his office is in the same general office area and his duties include the purchase of supplies and the keeping of a daily inventory. All these employees we exclude as office clerical employees.¹⁷

Widner: Widner's duties consist of scheduling the production facilities of the plant for the products required each day. He prepares

¹⁷ See *International Furniture Company*, 119 NLRB 1462, 1465.

time schedules for the production department to show when a product should be started and at what rate it should move. Although listed on the payroll as an office employee, he is frequently in the plant checking on schedules and seeing that they are adhered to, and is thus in contact with production employees. We find that his duties are those of a plant clerical employee and shall include him in the unit.¹⁸

Druery: Miss Druery is shown on the payroll as an office secretary but works in the production manager's office on the first floor of the plant, and assists in keeping a record of the usage of ingredients. There is no indication that her work takes her into the plant proper. As the clerical work she does necessitates no contact with plant employees, we find that she is an office clerical employee.¹⁹

Franz: Franz works with sales records exclusively, having no office as such but working primarily in the settlement room where the salesmen come in daily to settle their accounts. He files order sheets and return sheets and has them ready for the drivers when they come in. Based upon his duties as shown in the record, we find he is an office clerical employee.²⁰

Retail store clerks: The Petitioner would not include the retail store clerks. These clerks work under the supervision of the stale-room foreman, one at the major store which is at the plant, and one at the store some blocks away. As these employees work different hours from many plant employees and have dealings with customers, we find that their interests differ from those of plant employees and shall exclude them from the unit.²¹

We find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All production and maintenance employees of the Employer at its Baltimore, Maryland, plant, including sanitation employees, stale-room employees, plant clerical employees, and lead-men, but excluding office clerical employees, driver-salesmen, truck-drivers, garage employees, retail store clerks, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

MEMBERS RODGERS and LEEDOM, dissenting in part:

We disagree with so much of the decision herein as does not include the truckdrivers and garage mechanics in the unit which is being established. Our colleagues, at the request of the Petitioner and

¹⁸ See *Fairbanks, Morse & Company*, 117 NLRB 1449, 1452.

¹⁹ See *Hickory Chair Company*, 116 NLRB 1105, 1110.

²⁰ See *Hawthorne School of Aeronautics*, 98 NLRB 1098, 1099.

²¹ See *Eastern Iron & Metal Company*, 106 NLRB 1261, 1264; compare *Archer Mills, Inc.*, 115 NLRB 674, 676.

contrary to the request of the Employer, are excluding these employees from the unit because in their view their interests are "dis-similar" or "separate and distinct" from those of the production and maintenance employees. In reaching this conclusion they state in effect that with respect to the truckdrivers (and presumably, although they do not so state, with respect to the garage mechanics) they have considered various factors for the purpose of determining whether "the interests shared with other employees is sufficient to warrant their inclusion" or whether they "are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups" and thus to require their exclusion.

As our colleagues are excluding the truckdrivers and garage mechanics from the unit, they must on their own theory, although they do not say so specifically, have concluded that the evidence negates *any* mutuality of interest between them and the employees in the unit. To say that the truckdrivers and garage mechanics have certain interests which are diverse from the interests of the other employees in the plant is to belabor the obvious. But to say that they share no interests with the other employees is to ignore the facts in the record and the realities of industrial life.

Moreover, we fail to perceive how the agreement of the parties can change the quantum of employees' mutuality of interest. Our colleagues say these truckdrivers and garage mechanics share no interests with the other employees. Yet it is abundantly clear from our colleagues' rationalization of their result that, if the parties here had agreed to include these truckdrivers and garage mechanics in the unit, our colleagues would have included them; then they would have recognized, as they have properly recognized with respect to the categories the parties have agreed to include, that despite the obvious differences which might warrant their separate representation if they were separately sought, these employees do have sufficient interests in common with other employees to permit their representation in the same unit when the alternative is no representation.

Notwithstanding their rationale, what the majority are doing here, in effect, is to make the inclusion or exclusion of these employees turn on the desires of the Petitioner. This case involves truckdrivers and garage mechanics, but our colleagues' logic is equally applicable to other craft and departmental groups traditionally included in production and maintenance units. What also troubles us is that we cannot tell what result would be reached when the logic of this rationale would compel a decision not sought by a petitioning union. If the positions of the parties here were reversed, with the Petitioner wishing to include these employees and the Employer desiring their exclusion, the logic of our colleagues' rationale would require the exclusion of the

employees, but the logic of our colleagues' action in this, and other cases, would dictate their inclusion. Thus, in view of their decisions in the *Ballentine Packing* and *Intercontinental Engineering* cases, in which they also followed the logic of their action here,²² it would be hazardous to predict that the logic of their instant rationale will be applied evenly in the future.

It is not an answer to characterize past Board policy as a blanket policy or as an application of an automatic rule. Past Board policy in this area has required application of such valid considerations as the skills involved and the desires of *all* the parties. Our colleagues, however, although they rationalize otherwise, seem to be considering only the desires of some of the parties—particularly the unions.

Nor is there any warrant for our colleagues' assertion that the existing rule amounts to a refusal to consider an issue basic to unit placement which the parties cannot resolve through collective experience and knowledge. In providing a ready guide to employer and union in situations where they cannot themselves agree upon unit placement, we are not only taking into account the respective positions of each party but, unlike our colleagues, are establishing a measure of certainty in an area where certainty is desirable, particularly in view of the delegation to Regional Directors of authority in representation cases. For, viewing the situation as we do, that the truckdrivers and garage mechanics are not so lacking in a community of interest with production and maintenance employees that they may not be included in a production and maintenance unit, it then follows logically and reasonably that if the parties cannot agree as to their unit placement, as here, and no one seeks to represent them separately, they should not be left unrepresented but should be included in the overall unit. To do otherwise, as our colleagues do, necessarily results in an unsettling effect on the Board's unit policy to the detriment of sound labor relations.

Accordingly, we would, contrary to our colleagues, include the truckdrivers and garage mechanics in the production and maintenance unit.

²² *Ballentine Packing Company, Inc.*, 132 NLRB 923, and *Intercontinental Engineering-Manufacturing Corporation*, 134 NLRB 824. In those cases, involving truckdrivers and machinists, respectively, the records revealed the presence of factors which, under our colleagues' rationale herein, established that such employees shared a community of interest with other employees in production and maintenance units. Yet our colleagues refused to permit those truckdrivers and machinists to vote whether they wished to be represented as part of a production and maintenance unit because one union sought them separately and the other union wished them excluded from its production and maintenance unit. See also *Kalamazoo Paper Box Corporation*, 136 NLRB 134, in which our colleagues deny certain truckdrivers the right to sever from a production and maintenance unit, even though there appear to be no substantial differences between their duties and interests and the duties and interests of the truckdrivers to whom our colleagues in the *Ballentine* case, *supra*, denied the opportunity to join a production and maintenance unit.