Overnite Transportation Company *and* Teamsters Local Union No. 375, Petitioner. Case 3–RC–10453

December 13, 1996

DECISION DENYING MOTION FOR RECONSIDERATION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On October 4, 1996, the Board issued a Decision on Review and Order in which it reversed the Regional Director's Decision and Direction of Election which found that three mechanics shared a sufficient community of interest to require their inclusion in a petitioned-for unit of drivers and dock workers at the Employer's Tonawanda, New York facility. *Overnite Transportation, Inc.*, 322 NLRB No. 52. Based on the Regional Director's undisputed findings, the Board found that the petitioned-for unit of drivers and dock workers, excluding the mechanics, is an appropriate unit. The election was conducted on October 10, 1996.

On October 9, 1996, the Employer filed a motion for reconsideration. The Board, by a three-member panel, has considered the Employer's arguments and has decided, for the reasons fully explicated below, to deny the motion as lacking in merit. The Employer argues that the Board's decision reversing the Regional Director, along with other cases recently decided by the Board involving other facilities of the Employer, are inconsistent. The Employer contends that when the union seeks to exclude mechanics, and the Employer objects, the Regional Director finds for the petitioner and the Board denies the Employer's request for review, citing Cases 9–RC–16504 and 9–RC–19605 (1996); 9–RC–16524; 22–RC–11058; and 9–RC–16514 (1995). The Employer further argues, however, that when the union seeks to include mechanics, and the Employer seeks to exclude the mechanics, the Regional Director agrees with the petitioner and the Board again denies the Employer's request for review, citing Cases 26–RC–7703 (1995) and 26–RC–7831 (1996). In the instant case, the Regional Director found, contrary to the Petitioner, that mechanics should be included in the unit but the Board reversed that decision. The Employer contends that these cases have been decided contrary to the facts or the law, particularly Section 9(c)(5) of the Act. The Employer alleges that these decisions reflect an "accommodation" by the Board to the International Brotherhood of Teamsters' nationwide organizing efforts at the Employer's individual terminals.

The Employer's arguments reflect a fundamental misapprehension of the Board's "appropriate" unit principles, and ignore our well-settled decisions involving the appropriateness of units for drivers, dock employees, and mechanics.

Section 9(b) of the Act provides that the Board "shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The plain language of the Act clearly indicates that the same employees of an employer may be grouped together for purposes of collective bargaining in more than one appropriate unit. For example, under Section 9(b), the same employees who may constitute part of an appropriate employerwide unit also may constitute an appropriate unit if they are a craft unit or are a plantwide unit. The statute further provides that units different from these three, or "subdivisions thereof," also may be appropriate. It is well-settled then that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. See, e.g., *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962).

In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988).[1] The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964). "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be '"appropriate."' *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951); see *Staten Island University Hospital v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994); see also *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991), interpreting the language of Section 9(a) as suggesting that "employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit." A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless "an appropriate unit compatible with that requested unit does not exist." *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963); accord: *Ballentine Packing Co.*, 132 NLRB 923, 925 (1961). Nor is a petitioner compelled to seek a narrower appropriate unit

[1] If the petitioner's unit is not appropriate, the Board may consider an alternative proposal for an appropriate unit. *P.J. Dick*, 290 NLRB at 151.

if a broader unit also is appropriate. See *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986).

In deciding whether a petitioned-for unit is "appropriate" under Section 9(b), "[t]he Board's discretion in this area is broad, reflecting Congress' recognition 'of the need for flexibility in shaping the [bargaining] unit to the particular case.'" *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944)). In defining the appropriate bargaining unit, the Board's focus is on whether the employees share a "community of interest." *NLRB v. Action Automotive*, supra at 494. In arriving at an appropriate unit determination, the Board weighs various community-of-interest factors, including the following:

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962); *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647–648 (2d Cir. 1996).

This broad delegation of authority to determine appropriate units under Section 9(b) is limited, however, by Section 9(c)(5), which provides that "in determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." The Supreme Court has explained that the proper statutory test of this provision is that "'[a]lthough extent of organization may be a factor evaluated, under section 9(c)(5) it cannot be given controlling weight.'" *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 fn. 4 (1965), quoting 28 NLRB Ann. Rep. 51 (1964). The Court found further that although Congress intended to overrule Board decisions in which the unit found appropriate could only be supported on the basis of the extent of organization, Congress did not prohibit the Board from considering extent of organization as one factor, though not the controlling factor, in unit determinations. *NLRB v. Metropolitan Life Insurance Co.*, supra at 441–442.

The Employer argues that the Board's decision in this case to permit the exclusion of the mechanics is inconsistent with other Board decisions including mechanics in units found appropriate at other locations of the Employer. The Employer posits that it is "near impossible" to discern a consistent rationale for the Board's unit decisions in these cases. Thus, the Employer questions how a unit of drivers and dock workers *excluding* mechanics at its Tonawanda terminal can be an appropriate unit, while a unit of drivers and dock employees *including* the mechanics at its Memphis terminal also can be an appropriate unit.[2]

Based on the principles outlined above, the answer to the Employer's contention is that either unit is *an* appropriate unit under Board precedent. *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (petitioned-for unit of drivers excluding mechanics found appropriate);[3] *Indiana Refrigerator Lines*, 157 NLRB 539, 551 (1966) (petitioned-for unit of drivers including mechanics appropriate). There is no inconsistency between these unit findings because Section 9(b) and settled Board and court precedent permit the Board to find different units to be appropriate at the Employer's various terminals. The Board does not require a union to seek the same unit at different locations of the same employer, even where there is a collective-bargaining history in a broader unit at the other locations. See, e.g., *Big Y Foods*, 238 NLRB 855, 857 (1978), enfd. 651 F.2d 40, 46–47 (1st Cir. 1981). "[I]t is not the Board's function to compel all employees to be represented or unrepresented at the same time or to require that a labor organization represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist." *Mc-Mor-Han Trucking*, supra at 701, quoting *Ballentine Packing Co.*, 132 NLRB at 925.

The Employer further argues that the unit findings cannot be explained by reference to the facts of each case because the facts in this case are "at least as strong as those [facts] which led to the inclusion of the Memphis mechanics [in a unit of drivers, dock employees and building maintenance employees]." We disagree. The appropriateness of each unit is supported by the facts of the particular case. In this case, the Board found, based on the Regional Director's own undisputed factual findings, that the excluded mechanics were separately supervised, did not regularly interchange with drivers and dock employees, had specialized skills and training, and had separate terms and conditions of employment including paid uniforms and different hours of work. These facts substantially outweighed the evidence cited by the Regional Director in support of a broader unit.[4] In the Memphis case cited

[2] *Overnight Transportation Co.*, Case 26–RC–7831 (1996). On September 13, 1996, the Board denied the Employer's request for review of the Regional Director's Decision and Direction of Election in which he found this unit to be appropriate at the Employer's Memphis "hub."

[3] See *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898 (7th Cir. 1991); *NLRB v. Gogin Trucking*, 575 F.2d 596 (7th Cir. 1978); *NLRB v. Overland Hauling*, 461 F.2d 944 (5th Cir. 1972); *Alterman Transport Lines*, 183 NLRB 18, 24 (1970).

[4] The Regional Director found that the terminal was smaller than the Employer's other terminals, employees had a high degree of work-related contact, employees were subject to common work rules

by the Employer, the Acting Regional Director found that unit appropriate because there was significant interaction between the drivers and mechanics, interchange between shop employees and drivers/dock workers existed, and the Board in several decisions had found that the work of drivers and mechanics "is functionally related and interdependent." See *Mayflower Contract Services v. NLRB*, 982 F.2d 1221 (8th Cir. 1993); *Indiana Refrigerator Lines*, 157 NLRB at 551; see also *Carpenter Trucking*, 266 NLRB 907 (1983).

We recognize, however, the Employer's principal contention that these cases present very similar facts, and yet the Board found different units appropriate. And since the unit found appropriate in each case was the same as that requested by the petitioner, the Employer argues that the controlling factor in those cases must be the extent of each petitioner's organizing, contrary to Section 9(c)(5).

We reject this contention. We note first, that in each case, the unit found appropriate was consistent with well-settled Board precedent, enforced by the courts, holding that such a unit was *an* appropriate unit. Further, each decision was supported by facts demonstrating that employees in the requested unit shared a sufficient community of interest to be included in the same unit. Neither case specifically relied on the petitioner's extent of organization as a factor supporting the petitioned-for unit, much less as a controlling factor. Stated differently, it is well established that a determination of any particular petitioned-for unit depends on the evaluation of *that group's* community of interest in light of applicable criteria. That in the same factual setting the Board may find different units appropriate does not, therefore, mean that its decision was based on the petitioner's desires or on the extent of its organizing. See *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037, 1038 (1967), enfd. 409 F.2d 201 (5th Cir. 1969). In any event, while the statute forbids the *Board* to make extent of organization controlling, it does not forbid a *union* to seek a particular unit that is otherwise appropriate, as petitioners did here. See Gorman, *Basic Text on Labor Law* 73 (1976).

To accept the Employer's contention that a union may not seek different appropriate units at the Employer's various terminals would stand on its head the statutory concept of *an* appropriate unit; it would require the Board to decide which is the *best*, or *most* appropriate unit at each terminal. We do not believe that Congress intended such an outcome, especially since Congress set forth more than one appropriate unit in Section 9(b). Moreover, the purpose of Section 9(c)(5) was not to prohibit the Board from choosing between two appropriate units, as the Employer would interpret that section; it was intended to prevent fragmentation of appropriate units into smaller inappropriate units.[5] Here, the requested units are not fragmented or inappropriate groupings of a larger appropriate unit; they are units which the Board historically has found appropriate. Not even the Employer contends that the units requested are an arbitrary or capricious grouping of its employees.

Moreover, the Employer's quest for consistent units clashes with its own oscillating position on appropriate units at its facilities. Although the Employer contends that the Board has been inconsistent in its unit findings among terminals, the Employer itself has argued for different units at its various terminals. For example, in this case the Employer argued that only a unit of drivers, dock employees, and mechanics at the Tonawanda terminal was appropriate. In the Memphis case, however, the Employer argued that only separate units of shop employees and of drivers, dock employees, and building maintenance employees were appropriate. It appears that in most, if not all of these cases, the Employer argued for a different unit from that sought by petitioners. What is important, however, is that the Petitioner here and in the Memphis case sought appropriate units, and the fact that the Employer's alternative units also were appropriate did not preclude the Board from choosing from among these appropriate units. See *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991).

This case is not controlled by *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), cert. denied 116 S.Ct. 2551 (1996), in which the court denied enforcement of a Board Order because it found that the bargaining unit determination in *Lundy Packing Co.*, 314 NLRB 1042 (1994), violated Section 9(c)(5). The court found, contrary to the Board, that certain quality control employees and lab technicians (collectively referred to herein as quality control employees) shared a sufficient community of interest with employees in a production and maintenance unit (P&M unit) to include them in that unit. The court faulted the Board's finding that the quality control employees were not required to be included in the production and maintenance unit because they lacked an "overwhelming community of interest" with the production and maintenance employees. *NLRB v. Lundy Packing*, 68 F.3d at 1581, citing 314 NLRB at 1043. The court found that "given the community of interest between the included and excluded employees here, it is impossible to escape the conclusion that the [quality control employees'] ballots were excluded 'in large part because

and periodic wage increases, and the wage rates of mechanics were only few cents per hour higher than those of drivers.

[5] See the legislative history of Sec. 9(c)(5) explained in Hall Jr., *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 Case W.Res. L. Rev. 479, 503–504 (1967).

Petitioners do not seek to represent them.''' Id., citing Member Stephens' dissent.

We respectfully disagree with the court's conclusion in *Lundy Packing*, but even accepting the court's reasoning, we do not believe that it affects the outcome of this case. In *Lundy*, the court and the Board disagreed over whether the quality control employees' inclusion in the P&M unit was required. The court in *Lundy* determined that the violation of Section 9(c)(5) was underscored by an unexplained departure from prior Board cases which, ''in an effort to avoid workplace fragmentation . . . consistently included quality control personnel in P&M units.'' 68 F.3d at 1582. The court explained its reference to ''fragmentation'' by stating that ''the fact that . . . the union wanted a smaller unit . . . could not justify the Board's certifying such a unit if it were otherwise inappropriate.'' Id. at 1581, quoting *Continental Web Press v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984). The disagreement between the Board and the court, therefore, then, was over whether the quality control employees could constitute a separate appropriate unit. The Board believed that the quality control employees could constitute a separate appropriate unit, and thus that their inclusion in the broader unit was not required because they did not share an ''overwhelming community of interest'' with the other employees; the court did not agree, and thus found that they *must be* included in the overall production and maintenance unit.

The Employer's argument regarding extent of organizing does not present the same issue that confronted the court in *Lundy*. The Employer does not argue that the Board's established practice is to include mechanics in petitioned-for units of drivers. Also, unlike *Lundy*, there is no dispute that units both including and excluding mechanics may be found appropriate; as noted above, even the Employer has argued, at different terminals, that each of these units is appropriate. The Employer's contention then is not that the Board excluded mechanics contrary to Board law; the Employer's argument is that the Board is acceding to petitioner's extent of organization by finding different units appropriate at different terminals, notwithstanding the absence of distinctive facts. For the reasons described in detail above, since the petitioner is only required under Section 9(b) to seek *an* appropriate unit at each terminal, which petitioners have done in these cases, the Board is not faced with the issue that troubled the court in *Lundy*.

Nevertheless, even if the Employer had raised the issue facing the court in *Lundy*, we still would find that Section 9(c)(5) was not violated. Although in *Lundy* the court and the Board disagreed whether quality control employees shared such a close community of interest with other employees to require their inclusion in the broader unit, inclusion of the mechanics here clearly is not required as they could constitute a separate appropriate unit. See *Dodge City of Wauwatosa*, 282 NLRB 459 (1986); *Walker-Roemer Dairies*, 186 NLRB 430 (1970). The mechanics have specialized skills and training to repair and maintain the Employer's vehicles (tractors and trailers) and equipment, are separately supervised, do not regularly interchange with drivers and dock employees, work different hours, and are the only employees on call. Moreover, drivers and dock employees perform no major mechanical work, such as engine, transmission, or brake repairs. Similarly, mechanics perform minimal driving, and even then usually only in connection with emergency repairs. Therefore, unlike the quality control employees in the court's construction of *Lundy*, the mechanics in this case could constitute a separate appropriate unit and do not share such a close community of interest with drivers and dock workers as would *mandate* their inclusion in the petitioned-for unit.

In conclusion, the Employer's motion indicates a fundamental misunderstanding of the Board's decision-making regarding appropriate units, and the broad discretion accorded the Board by Section 9(b). ''As the Board has stated in a number of cases, with approval of the courts, more than one unit may be appropriate among the employees of a particular enterprise.'' *Motts Shop Rite of Springfield*, 182 NLRB 172 fn. 3 (1970). Stated otherwise, ''[m]ore than one appropriate bargaining unit logically can be defined in any particular factual setting.'' *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 848–849 (D.C. Cir. 1979); see also *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037, 1038–1039 (1967), enfd. 409 F.2d 201 (5th Cir. 1969).[6] As the unit sought by the Petitioner in the instant case constitutes *an* appropriate unit, the Board has not acted inconsistently with prior cases involving the Employer or contrary to Section 9(c)(5).[7]

[6] No more clearly are these principles illustrated than in cases where the Board has found a petitioned-for single location unit appropriate, even though a broader unit may be the *most* appropriate unit. See *Dixie Belle Mills*, 139 NLRB 629, 631 (1962); see also *McCoy Co.*, 151 NLRB 383 (1965) (although some factors supported a statewide unit, the appropriateness of such a unit did not establish inappropriateness of a smaller unit). Even though the Board applies a presumption that a single location unit is appropriate, that presumption is not applicable when a broader multilocation unit is sought by the petitioner. See *Carson Cable TV v. NLRB*, 795 F.2d 879 (9th Cir. 1986). This illustrates that it is the Board's appropriate unit principles, not petitioner's desires, which control unit determinations.

[7] We reject the Employer's unsupported claim that the Board's actions reflect an accommodation to the Teamsters organizing efforts against the Employer, and that the Board's actions indicate ''naked favoritism'' as the only grounds for the Board's decision. The Employer presented no evidence to support these claims, and the facts and law explained in this decision amply support the results reached in these cases.