International Bedding Company (IBC of Pennsylvania) *and* United Food and Commercial Workers, Local 1776. Case 4–RC–21705

May 31, 2011

DECISION AND DIRECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on June 22, 2010, and the administrative law judge's decision recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of votes showed 67 votes in favor of the Petitioner and 66 votes against, with 10 challenged ballots, a sufficient number to affect the results of the election. At the hearing, the parties agreed that one of the challenged ballots would be counted and one would be excluded, leaving eight determinative challenged ballots to be resolved.

The Board has reviewed the record in light of the Petitioner's exceptions and briefs[1] and has adopted the judge's findings[2] and recommendations only to the extent consistent with this Decision and Direction.[3]

The Petitioner seeks to represent the Employer's production and warehouse employees, drivers, and yard jockeys (jockeys) in a single collective-bargaining unit. Before the election, the Employer objected to the inclusion of the drivers and jockeys in the unit, and the parties agreed that those employees would vote subject to challenge, which they did. The judge recommended sustaining the challenges, finding that the drivers and jockeys lack a community of interest with the production and warehouse employees. For the reasons stated below, we find, contrary to the judge, that the petitioned-for unit is an appropriate one. We therefore overrule the challenges to the drivers' and jockeys' ballots and direct that those ballots be opened and counted.

[1] The Employer filed an opposition to the Petitioner's exceptions, but it was rejected by the Executive Secretary as untimely. Accordingly, we have not considered it in this decision.

[2] The judge was sitting as a hearing officer in this representation proceeding.

[3] The Employer originally filed eight objections to the conduct of the election. At the hearing, however, the Employer elected to proceed on only five. The judge recommended that the Board overrule all of the Employer's objections in their entirety. In the absence of exceptions, we adopt pro forma the judge's recommendations concerning those objections.

In agreement with the judge, we reject the Employer's argument that the drivers and jockeys were ineligible to vote because the Petitioner's original RC petition did not specifically seek to represent them.

I.

The Employer manufactures and distributes mattresses and bedding foundations from its facilities in Barnesville and Frackville, Pennsylvania. There are approximately 147 employees in the petitioned-for unit; about 8 are either drivers or jockeys, with the remainder being production and warehouse employees.

Drivers are mainly responsible for delivering finished mattresses and bedding foundations to customers. They also assist in unloading cargo at the delivery location, and keep track of damaged or returned goods. Jockeys are primarily used to transfer raw materials from the Frackville facility to the Barnesville facility. They also move trailers around the plant grounds and transport vehicles for maintenance. Jockeys occasionally substitute for drivers, and they have the same responsibilities as drivers when they work in that capacity. Both drivers and jockeys must comply with United States Department of Transportation regulations, which include submitting to a background check and passing a drug screen. The Employer requires that all drivers and jockeys have at least 2 years of driving experience and possess a valid commercial driver's license. They are also subject to random drug tests.

Production and warehouse employees participate in product assembly. They construct mattresses and foundations from raw materials delivered by the jockeys. They also prepare mattresses for delivery and may be assigned to load or unload trailers. No experience is required for these positions, and the employees are not subject to drug testing.

The production and warehouse employees, drivers, and jockeys all enjoy the same benefits, including vacation leave and paid holidays. They are all subject to the same work rules, are invited to the same employee meetings, and share common break rooms. Moreover, like production and warehouse employees, jockeys are paid hourly and work the same schedule. Drivers are compensated by a predetermined rate or mileage and do not have set schedules.

There is some evidence of common supervision. The same shipping and logistics manager who supervises the drivers and jockeys also supervises the warehouse loaders, and jockeys receive directions from managers of multiple production departments. There is also some evidence of interaction between the production employees and jockeys. Although it is not an assigned task, the jockeys often assist production employees with loading and unloading trailers. There is no evidence of interchange of the production and warehouse employees with the drivers and jockeys.

II.

Taking the record as a whole, we find, contrary to the judge, that the drivers and jockeys share a sufficient community of interest with the production and warehouse employees to permit including both groups in a single unit. It is well established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). Indeed, "[i]t is irrelevant that some other larger or smaller unit might also be appropriate or most appropriate." *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037, 1038 (1967), enfd. 409 F.2d 201 (5th Cir. 1969). The Board determines appropriateness by evaluating whether the employees have a sufficient community of interest. *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996). This analysis involves weighing such factors as whether the employees have comparable or divergent duties, qualifications, compensation, hours, supervision, and conditions of employment. Id. The petitioner's position regarding the scope of the unit is also a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964).

The Board's application of these principles in *Marks Oxygen* is particularly instructive with respect to the present case. There, the union petitioned for a unit composed of truckdrivers and production employees. 147 NLRB at 229. Like the drivers and jockeys in this case, the truckdrivers in *Marks Oxygen* had different job functions from the production employees and spent most of their time away from the plant, and there was no interchange between the two groups. Id. The Board nevertheless concluded that the petitioned-for unit was appropriate. Id. at 229–230. The Board pointed out that there was some interaction between the two groups of employees when the production employees assisted the truckdrivers in loading certain trucks. Id. at 229. The Board also noted that there was an inherent community of interest between truckdrivers and production employees in relation to the flow of materials into and out of the plant. Id. at 230. In finding the unit appropriate, the Board further relied on the fact that the union had petitioned to represent both groups of employees. Id. at 230.

As in *Marks Oxygen*, we find the petitioned-for unit in this case appropriate. As described, the drivers and jockeys have much in common with the production and warehouse employees, including shared benefits (such as vacation leave and paid holidays), work rules, employee meetings, and break rooms. In addition, production and warehouse employees and jockeys are all paid on an hourly basis and work the same schedule. There is also some evidence of common supervision as well as interaction between production employees and jockeys. Further, it is significant that the Petitioner seeks to represent the drivers and jockeys as part of a comprehensive unit at the Frackville and Barnesville facilities. See *Marks Oxygen*, supra at 230. Last, excluding the eight drivers and jockeys from the larger unit would create a small residual unit, which the Board tries to avoid where possible. See *Airco, Inc.*, 273 NLRB 348, 349 (1984). In these circumstances, we find, applying community-of interest principles, that a unit including the production and warehouse employees and the drivers and jockeys is an appropriate unit.

Alternatively, we would find the petitioned-for unit appropriate on the ground that the Petitioner seeks to represent the drivers and jockeys as part of a plantwide unit, and their interests are not so disparate from the production and warehouse employees that they cannot be represented in the same unit. See *Airco*, 273 NLRB at 349. The petitioned-for unit encompasses all of the employees at the Barnesville and Frackville facilities except clericals and supervisors, and the record evidence indicates that the Respondent operates the two facilities, which are 6 miles apart, as a single plant. Accordingly, the burden is on the Employer to rebut the presumptive appropriateness of the unit by showing that the interests of the drivers and jockeys are so disparate that they cannot be represented in the same unit as the warehouse and production employees. Id. Given the inherent community of interest between the two groups of employees in relation to the flow of materials into and out of the plant, *Marks Oxygen*, 147 NLRB at 230, the Employer cannot meet that burden.

For those reasons, we reverse the judge and overrule the challenges to the ballots of the drivers and jockeys.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days of this Decision and Direction, open and count the ballots of Raymond Brinckman III, Harvey Floray, Robert Heister, Randy Huber, Stephen LePera, Ronald Roth, William Smith, and Luis Vasquez. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HAYES, dissenting.

Unlike my colleagues, I agree with the administrative law judge that the drivers and yard jockeys do not share a sufficient community of interest with the production and warehouse employees to be included in the petitioned-for unit. Accordingly, I would adopt the judge's recommendation to sustain challenges to the ballots cast by 8 drivers and yard jockeys,

In determining the community of interest among unit employees, the Board traditionally considers a number of

factors, such as functional integration, frequency of contact with other employees, interchange, degree of skill and common functions, commonality of wages and working conditions, and common supervision. See, e.g., *Publix Super Markets*, 343 NLRB 1023, 1024 (2004). Applying these factors, the judge found that there is "little to no integration" of drivers and jockeys with the work functions of the production and warehouse employees, no interchange among the employees, and "infrequen[t] or even a lack of contact" between the drivers or the jockeys and the production and warehouse employees. Additionally, the judge found that the drivers and jockeys have "substantially dissimilar qualifications, training, and skills" as compared to the production and warehouse employees. Further, the judge found that the drivers, and the yard jockeys when acting as drivers, are subject to a different wage structure than the production and warehouse employees.

The majority appears to acknowledge that there is limited or no evidence of integration, interchange, or contact between the drivers or the yard jockeys and production and warehouse employees, and that the drivers and yard jockeys are subject to different qualifications and skill requirements than the production and warehouse employees. Notwithstanding the notable lack of evidence relative to these factors, the majority points to common benefits, as well as "some evidence" of common supervision and interaction, to find that the employees share a sufficient community of interest. But, as the judge found after considering these exact arguments when presented by the Petitioner, I am not persuaded that this limited evidence of a community of interest among the employees is sufficient to outweigh the almost total lack of evidence regarding the integration, interchange, contact, and degree of skill and common functions factors.

The majority further supports its conclusion by finding it significant that the Petitioner seeks to represent the drivers and jockeys and by asserting that their exclusion from the petitioned-for unit would create a residual unit. While the Petitioner's desire for a particular unit may be considered, it does not obviate the need for a demonstration of a community of interests in order to find the unit appropriate for bargaining. See *Airco, Inc*., 273 NLRB 348 fn.1 (1984). Further, while I acknowledge the Board's preference for avoiding residual units, I find the majority's argument less compelling where the drivers and yard jockeys together have such a substantial community of interest among themselves that they would likely constitute a separate appropriate unit in any event. Finally, I question whether the majority has correctly applied Board precedent holding that a plantwide unit is presumptively appropriate as an alternative basis for its conclusion that the production and warehouse employees, drivers, and yard jockeys constitute an appropriate unit. This case involves employees working in, or out of, two facilities, not a single plant. Even assuming, arguendo, that the plantwide unit presumption should apply, I would find that evidence concerning a lack of community of interests is sufficient to rebut the presumption.

In sum, I agree with the judge that the drivers and jockeys should be excluded from the production and maintenance unit and that their ballots should not be counted.