

**Frito-Lay, Inc. and Sales Drivers & Helpers Local 274, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,<sup>1</sup> Petitioner. Case 28-RC-2390**

April 9, 1973

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Harroliese Brown. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Acting Regional Director for Region 28, the case was transferred to the Board for decision.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.<sup>2</sup>

Upon the entire record in this case, the Board finds:

1. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization as defined in the Act and claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Employer manufactures various snack products and distributes them throughout the United States. The Employer's administration structure, for purposes of sales and distribution, is organized geographically by zone, division, region, and district, in order of decreasing size.

The Petitioner seeks to represent a unit of approximately 29 route salesmen in Districts 51, 53, and 54 of the Employer's Region 2 of Division 4 of the Western Sales Zone and a single warehouseman located at the Employer's distribution center in Phoenix, Arizona. One of the route salesman sought by the Petitioner operates out of a distribution center in Casa Grande, Arizona, about 50 miles southeast of Phoenix, and the remaining route salesmen operate out of the Phoenix warehouse or distribution center.

The Employer contends that the smallest appropri-

ate unit is one comprising all of the route salesmen in Region 2, including the employees sought by the Petitioner and those assigned to Districts 52 and 60 in the Tucson, Arizona, vicinity, and District 55 in Las Vegas, Nevada. There is no history of collective bargaining.

Major overall sales programs for the corporation, such as product promotions and sales contests, are planned at the corporate headquarters level in Dallas, Texas. The administration of those programs, employee compensation, and fringe benefits are all handled at the zone and division levels.

The record reveals that implementation of the Employer's sales effort is effectuated at the regional level. All products are manufactured outside the region and are shipped to the various distribution centers within the region to be picked up by the route salesman to be delivered to the various retail stores which are the Employer's product outlets. The regional sales manager is responsible for determining how these products are allocated within his region. He is also responsible for the profits from his region and for expense planning for the region, which includes salesmen's compensation, truck expenses, purchasing, warehouse expansion, and locations. Although each district has a district sales manager who is concededly a supervisor, the record reveals that the district sales managers have no authority in these matters. Indeed, the record shows that, under the Employer's method of operation, it is not possible to determine expenses at any level below that of the region, and that profits are not broken down by district.

All route salesmen assigned to Region 2 are recruited, screened, and hired by the regional sales manager, and again the district sales managers have no authority in this area. Although district sales managers may participate in the initiation of disciplinary procedures, the record reveals that decisions concerning disciplinary measures and terminations are solely within the province of the regional sales manager. The only specific instance in the record of a district sales manager's recommendation concerning discharge or hire of an employee is one recommending termination which was resolved by the regional sales manager by declining to terminate the employee.<sup>3</sup>

Although the route salesmen operating out of Tucson and Las Vegas (and indeed the individual who works out of Casa Grande) are widely separated from those utilizing the Phoenix distribution center,

regional sales manager conducts hiring interviews or is "usually" present when he issues verbal warnings falls far short of establishing that the district sales manager plays a "significant role in hire, discharge, and discipline" as the dissent claims.

<sup>1</sup> The names of the parties appear as amended at the hearing.

<sup>2</sup> The Employer's motion to permit oral argument is hereby denied as, in our opinion, the record in this case adequately presents the issues and positions of all the parties.

<sup>3</sup> That the district sales manager is present "in some cases" when the

Tucson is only 90 minutes from Phoenix by automobile and Las Vegas is only 45 minutes distant by air. Eighty percent of the regional sales manager's time is typically spent traveling throughout his region, a total of approximately 50,000 miles a year. Thus, the regional sales manager testified that he is well acquainted with each of the route salesmen in the region and is able to closely observe the work performance of each. The record reveals that the regional sales manager conducts frequent inspections of routes, discusses problems directly with the route salesmen, observes their work, appraises them, and evaluates them for promotion to district sales manager openings. All such promotions are made by the regional sales manager and are made without regard to district boundaries. Only the regional sales manager has access to the route salesmen's personnel records and files, which are maintained by him.

Work rules, dress codes, and vehicle maintenance standards are all established by the regional sales manager. Recompense for route salesmen's out-of-pocket expenses must be approved by the regional sales manager. Trucks are purchased regionally by the Employer. Title is vested in the Employer, but the trucks are garaged by the individual route salesmen at their homes. It is the policy of the Employer to assign new trucks to route salesmen in the most outlying areas where maintenance is more difficult and to reassign older trucks to routes in urban areas.

When the Employer obtains a new retail outlet customer, the regional sales manager is responsible for establishing the relationship and authorizing any promotions concomitant therewith. Likewise, all sales promotions are regionwide, are established by the regional sales manager, and customers are informed of such events by him. Customers are also notified of price changes by the regional sales manager who is also responsible for collecting from delinquent customers and for obtaining the best space available in the customers' stores.

It is clear from the record that district sales managers have no authority or function with regard to any of the above, with the exception of their minimal role in the early stages of disciplinary action. The functions of the district sales manager are limited to aiding the route salesmen in training, to building displays, and to covering routes throughout the region which are open due to absence or vacations. Specifically, it is clear that district sales managers have little or no authority over any terms or conditions of employment, and could not represent the Employer in collective bargaining.

In determining whether the unit petitioned for in a

particular case is appropriate, the Board has traditionally looked to the community of interest among the employees sought to be represented: whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision, previous history of bargaining, and the geographic proximity of various parts of the Employer's operation. Also, it is well settled that there may be more than one way in which employees of an employer may appropriately be grouped for purposes of collective bargaining. *Metropolitan Life Insurance Company*, 156 NLRB 1408.

The factual considerations discussed above support the Employer's contention that the smallest appropriate unit is one encompassing all of Region 2. While the record also reveals that, in addition to the geographical considerations, there is little or no employee interchange either on a temporary or permanent basis among the districts in Region 2, there is substantial product transfer among districts, the district sales managers are utilized on a need basis throughout the region, and the four relief salesmen in the region are assigned and utilized on a regional basis. The fact that the route salesmen sought by the Petitioner, with the exception of the Casa Grande salesman,<sup>4</sup> all operate out of the Phoenix distribution center, would in other circumstances be a factor tending to support the appropriateness of a unit limited to those employees. But the record indicates that they spend only about 1 hour a day picking up supplies at the distribution center, and it does not even affirmatively appear that they are all present at the distribution center at the same time.

In view of the factors enumerated above, and particularly in light of the almost total lack of autonomy at any level below the region, the high degree of authority at the regional sales manager level over hiring, transfer, promotion, discipline, discharge, and other terms and conditions of employment, the fact that the Phoenix employees' contacts with one another are limited, and the lack of common supervision in the requested unit, we find the unit sought by the Petitioner is inappropriate. We further find that the smallest appropriate unit is one comprised of all six districts in the Employer's Region 2. In so finding, we are not unmindful that the Board has previously found appropriate a unit almost identical to the one sought herein.<sup>5</sup> However, that case was predicated upon a different corporate organization which existed until 1969, and under which authority was diffused among the district and

<sup>4</sup> Presumably our dissenting colleagues would include the Casa Grande salesman in the unit they found appropriate, undeterred by the fact that he operates out of and utilizes warehouse facilities located in Casa Grande, a

town which is located almost halfway between Phoenix and Tucson.

<sup>5</sup> *Frito-Lay, Inc.*, 170 NLRB 1678.

regional levels and a subsequently abolished intermediary "Area" level of authority. Since the Employer's 1969 reorganization, the Board has found inappropriate a unit limited to three districts in a region composed of six districts.<sup>6</sup>

We are at a loss to understand our dissenting colleagues' expressions of surprise with respect to our reliance on these factors, and are totally baffled by their view that characterizes the evidence as to the lack of authority of district managers as "irrelevant." In the case in Volume 177, *supra*, involving this same employer, a majority of this Board, including one of our now-dissenting colleagues, found that the former existence of this local autonomy had been "the essential factor" in finding appropriate a unit such as is sought here. *Frito-Lay, Inc.*, 177 NLRB 820, 821.<sup>7</sup> Admittedly, that case involved different geographic considerations. However, in view of the clear holding of the Board therein, our dissenting colleagues are, in our view, in serious error when they fail now to even consider relevant what this Board considered as "the essential factor."

The autonomy over day-to-day operations which is so totally lacking at the local level (and which we consider very relevant) is to be found herein vested in the regional sales manager. Many of the terms and conditions of employment, which taken together create a community of interest among employees, derive from such control. Of course, this factor is "employer-controlled," as the dissent points out. But then, so are almost all of the indicia for determining where the community of interest lies. Employers determine the location, size, and nature of their facilities, choose the method and amount of wage payments, establish hours, choose those employees who shall be paid overtime and bonuses, control employee interchange between facilities, determine lines of progression, enforce dress and behavior codes, and establish and enforce disciplinary procedures. To characterize these factors as "employer-controlled" is merely to recognize a fact of industrial life, and does not serve to destroy their relevancy as unit determinants. Thus, our decision does not constitute a move "to a new administrative theory calculated to insure unit control by employer organization," but rather represents reliance upon those time-tested factors which establish what unit is appropriate for collective bargaining.

In the last analysis, we believe, the dissent is

<sup>6</sup> *Frito-Lay, Inc.*, 177 NLRB 820; see also *Frito-Lay, Inc.*, 4-RC-9702 (not published).

<sup>7</sup> In that case, the Board stated:

It is evident that the essential factor which made a unit of three Districts appropriate, in a Region comprised of six Districts, was the Area Manager's "considerable autonomy in the day-to-day operations within his (A)rea," and it was for that reason that the Board denied review of the Regional Director's unit finding. But since it is clear that

reduced to reliance solely on the one factor of the geographic proximity of the Phoenix-based employees—a consideration which is certainly relevant in determining units generally. But this factor is of substantially less importance in this instance than it would be in a case concerning employees who work in close and steady contact in a plant or on a selling floor. Here, the employees sought spend their working day on the road, separate and apart from one another. Although they work out of Phoenix, their workday contacts with one another are limited to the approximately 1 hour they spend at the warehouse in the morning picking up supplies, and there is no showing that they all come together there even at that time. Indeed, the record indicates that some of them do not go into the warehouse in the morning at all.

As we have found that the unit sought by the Petitioner is inappropriate and as Petitioner has indicated no interest in the larger unit found appropriate herein, we shall dismiss the petition.

#### ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.

MEMBERS FANNING and JENKINS, dissenting:

The smallest appropriate unit here, say our colleagues, must encompass the Employer's Region 2 (of Division 4, Western Zone). This means a two-state unit of route salesmen working in widely separated locations in Arizona and Nevada. It would include 49 route salesmen instead of the 29 now sought who work out of the Phoenix distribution center.

Since 1947, in making its unit findings, the Board has had the statutory responsibility not to give controlling weight to the extent of employee organization.<sup>8</sup> This provision is a Taft-Hartley addition to Section 9 of the Act, designed to overrule a unit theory which prior to that time had been used in some cases by the Board. The change was opposed in Congress by those who feared it would prevent small operational units, particularly in businesses with widespread operations. We have before us such a business. Senator Taft, in analyzing the section from that standpoint, saw no problem in light of numerous tests evolved by the Board to determine appropriate units, "such as community of interest of employees involved, extent of common supervision, interchange

the administrative changes brought about by Respondent's reorganization of its operations eliminated the "considerable autonomy" of the Area Manager completely, the essential factor which made a unit of three Districts in an administrative and geographical grouping of six (now five) Districts is missing.

<sup>8</sup> Sec. 9(c)(5) of the Act provides: "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

of employees, geographical considerations, etc. *any one of which* may justify the finding of a *small unit*.” (Emphasis supplied.)<sup>9</sup>

In the intervening 25 years the cases are legion in which the Board has implemented the spirit of that interpretation. Now, however, our colleagues select among the factors mentioned by Senator Taft one which is wholly employer-controlled—common supervision—and apply it in a manner that requires a two-state unit. This means six districts, each with its own district manager, three based in Phoenix, two based in Tucson, 120 miles to the southeast, and one based in Las Vegas, 293 miles to the northwest. Thus, they move from the statutory prohibition of unit control by extent of employee organization to a new administrative theory calculated to insure unit control by employer organization. Based on this organization a regional sales manager who has ultimate hire and discharge authority, and recognizes his 49 route salesmen on those occasions when he sees them, becomes the focal requirement for a viable bargaining unit. It matters not at all that the geography being what it is, the 49 are brought together only once a year.

Quite explicitly our colleagues say that because “a different corporate organization” now exists, there is no longer validity in a Phoenix-based unit though admittedly almost identical to one found appropriate by the Board in April 1968.<sup>10</sup> They see the organizational elimination of a former area level of authority, between district and region, as elimination of meaningful common supervision. They also see the corporate reorganization of this Employer as having received carte blanche Board sanction for unit purposes in another case, a refusal-to-bargain proceeding involving Southern California route salesmen of this Employer.<sup>11</sup> Brushing aside the virtually unchanged working conditions for Phoenix-based employees since the 1968 Phoenix case, emphasizing the intervening corporate reorganization, and ignoring highly significant factual variations in the California case, the majority here disposes of time-honored criteria like employee community of interest, lack of interchange, and obvious geographic cohesiveness. “Any one” of these, and certainly the three in combination, dictates a contrary result.

*The earlier case involving Phoenix:* In 1968 the Employer urged a unit consisting of all route salesmen in Arizona and the southern part of

California. There was no employee interchange among the three districts then existing in Arizona. One was at Tucson, and the other two, which were petitioned for, were at Phoenix. The Phoenix-based salesmen worked out of the Phoenix warehouse. Their district managers shared the Phoenix district office and “frequently” held their weekly meetings with route salesmen on a joint basis for the Phoenix districts. Now, these same salesmen have been grouped in three districts based in Phoenix, operate out of the same common warehouse, and cover the same geographical area of “Phoenix and the immediate area outside of Phoenix.”<sup>12</sup> “Some” joint meetings of all Phoenix-based salesmen are still held. Interchange is still nonexistent.<sup>13</sup>

“Areawide meetings” in 1968 were said to number only two or three per year. Now, it appears that the only occasion when more than Phoenix salesmen get together is the annual regional sales meeting for route salesmen of the six districts. Unlike the weekly district meetings held on company premises, the annual regional meeting is held at a motel.

Tucson is still the nearest warehouse to Phoenix out of which other route salesmen operate. Now there is also a warehouse at Las Vegas, 293 miles away.<sup>14</sup> Referring, as the majority does, to Las Vegas as only 45 minutes “by air” from Phoenix is meaningless to suggest community of interest on a regional basis among route salesmen who drive trucks. For that matter, 90 minutes “by auto” from Tucson to Phoenix, which implies nonstop driving, is hardly meaningful.

In 1968 the area manager for the two Phoenix districts supervised the district managers, attended weekly district sales meetings, and was responsible for making chainstore contracts. He exchanged trucks within the area to equalize their mileage and made recommendations concerning route changes and district boundaries. He also recommended hiring and discharge although, as the Board noted, the regional manager usually made the final decisions.

The district managers trained and directed route salesmen, prepared reports of sales and inventory, held weekly sales meetings, and made calls on major accounts. They assisted route salesmen with difficult collections, display work, and complaints and relieved sick or vacationing route salesmen. They “usually” recommended the hiring and firing of route salesmen, but their recommendations required

<sup>9</sup> 93 Cong. Rec. 7002; Leg. Hist. of the Management Relations Act of 1947, Vol. II, p. 1625.

<sup>10</sup> *Frito-Lay, Inc.*, 170 NLRB 1678 (Case 28-RC-1732).

<sup>11</sup> *Frito-Lay, Inc.*, 177 NLRB 820, growing out of Case 31-RC-787, unpublished.

<sup>12</sup> Only two witnesses testified: Clegg, the Employer's vice president for labor relations, and Ellery, the regional sales manager for Region 2 from 1968 until shortly before the hearing.

<sup>13</sup> An “area relief man” was included in the Phoenix unit in 1968. Now there are three relief men stationed at Phoenix, and one at Tucson.

<sup>14</sup> Bin-type storage is provided at Tucson and Las Vegas; no warehouseman is stationed at either location. At Las Vegas distribution of product was formerly accomplished by a contract distributor. Currently in Arizona there are eight independent distributors serving areas not covered by employees based at Phoenix and Tucson. Distributors receive product deliveries direct from California.

the approval of both the area and the regional manager. Now, according to the testimony of Vice President Clegg, the primary function of district managers is to train new employees pursuant to a 3-week formalized program. He also testified, however, that they make sure the routes are run each day and make recommendations in regard to hire and discharge, with the ultimate decision still made by the regional manager. It also appears that district managers are present "in some cases" when the regional sales manager conducts his own hiring interview, and "usually" present when he issues a verbal warning. Taken in conjunction with admitted recommendations of hire and discharge, which our colleagues choose to ignore, we view this record as showing that the district manager plays a significant role in personnel matters, with the regional sales manager engaging largely in "paper work" approval. We note that the record instance of discharge recommended by a district manager—which the majority would minimize because the regional manager "declined" to discharge—has the ring, as described in the record, of a higher echelon supervisor talking a lesser one out of his recommendation, after a three-way discussion with the salesman. In our view it fails to establish that the district managers do not make effective recommendations.

Taken as a whole, the record here reflects the fact that regional managers took on functions such as expense planning, forecasting, and chainstore contracts when area managers were eliminated, but that district managers and their route salesmen continued to operate as before. Regional managers already had ultimate approval of hire and discharge which the elimination of area managers did not change. The majority emphasizes irrelevant matters when it speaks of district managers having no authority to function with respect to sales programs, price changes, terms and conditions of employment, such as work rules and dress codes, and not representing the Employer in collective bargaining. District managers are admittedly supervisors working in close conjunction with route salesmen and holding weekly meetings for them (some of which are jointly held for all route salesmen in the three Phoenix-based districts), often checking out merchandise to route salesmen when the Phoenix warehouseman is not at the warehouse, and playing a significant role in hire, discharge, and discipline.<sup>15</sup> We do not say that a regional unit is inappropriate. We do say that, on the record here made, a Phoenix-based unit of "geo-

graphically contiguous districts" is no less appropriate than it was in 1968. *Frito-Lay, Inc.*, 170 NLRB 1678, 1679. The Board there said:

Thus, the two-district unit requested by the Petitioner includes all of the route salesmen in geographically contiguous districts, who are engaged in the same work under the same working conditions; operate out of the only warehouse in the metropolitan area of Phoenix; and who have separate immediate supervision and are geographically separated from other route salesmen, with whom they do not interchange, by at least 120 miles. Accordingly, we find that a unit composed of all route salesmen in the two districts who work out of the Phoenix warehouse is appropriate.

We agree with our colleagues that implementation of the Employer's sales effort is effectuated at the regional level, but note that they fail to say that the regional sales manager spends only 20 percent of his time in Phoenix where the regional office is located. We suggest that they ponder the limited time spent in Phoenix by the regional sales manager and the largely sales promotion and economic planning functions he necessarily performs there, rather than the lack of specific evidence that all route salesmen converge on the Phoenix distribution center at the same time each day. It is clear that they normally load their trucks in the morning. Their opportunity for daily contact among themselves while loading needs no amplification, but the regional sales manager's opportunity for change contact with salesmen at Phoenix could be just 1 day a week, or 1 week in 5 weeks; the record does not show. In fact there is no evidence that such contact occurs at all unless he attends a district sales meeting in the building. And, as to that, there is no evidence as to frequency. While traveling, it appears from the record that the regional sales manager makes spot checks, which may develop into a personal contact with a salesman if he finds a problem.<sup>16</sup> Regular supervisory contact, of this frequency much less this type, has often been viewed by the Board as too little to negate autonomy at a lower supervisory level.<sup>17</sup> It appears that our colleagues prefer to ignore the true implications here concerning the limitations on regional supervision and to focus upon the ultimate approval of hire and discharge even though that factor is unchanged since the earlier case which granted the Phoenix unit. In the final analysis they are setting up separate rules for route salesmen, on

<sup>15</sup> According to this record district managers also have some responsibility for proper truck appearance and maintenance.

<sup>16</sup> The record hardly supports a finding that regional sales managers are "well acquainted" with each salesman, but rather that he "knows them . . . can identify them by sight." And the majority finding that he "closely observes the work performance of each" must surely be based to a great

extent on the weekly sales reports sent in by the various district managers, which result in a chart for each salesman on the regional office wall.

<sup>17</sup> See *Walgreen Co.*, 198 NLRB No. 158, where once a month visits by central management were termed infrequent, and *Big N Department Store No. 333*, 199 NLRB No. 28, where once a week visits were similarly viewed.

the flimsy distinction that they have no selling floor or plant for mutual contact.

*The earlier case involving Southern California:* In this case the Employer, after its corporate reorganization eliminating area managers, refused to bargain for a three-district unit of route salesmen. It appears that our colleagues misjudge the true purport of that Board dismissal. Although the Board found that the corporate reorganization was undertaken for legitimate business purposes, following which the essential factor of area supervision supporting a three-district unit in Southern California was missing, it specifically found in addition that the three-district group was "not a well defined and separate geographic unit," noting that the dispersion of the warehouses showed one "substantially closer" to a warehouse which served the remaining districts than it was to other warehouses serving the three districts specifically sought. *Frito-Lay, Inc.*, 177 NLRB 820, 821. The geographical considerations of the instant case are

<sup>18</sup> The regional sales manager may at times conduct any of these meetings, though they are basically the responsibility of the district manager. Contrary to the majority's implication that covering routes throughout the region is a function of district managers is the following pertinent testimony: "They work within their district, primarily, unless there is a need for them to be assigned somewhere else. They are riding with salesmen and relieving them for sick leave when we have no relief man available. Other than that they are running, riding routes with the salesmen." Could it be otherwise when it is clear that district managers have a sales quota for their districts as a base for the incentive bonus which they receive?

<sup>19</sup> Mesmerized by three words—"the essential factor"—which appear in the majority's quote at fn. 7, words which we obviously considered relevant and used in analyzing the Southern California decision as a whole, our colleagues insist upon ignoring three whole sentences which immediately follow their quote, to wit:

... There is nothing in the record to show that the employees in

entirely different. The three Phoenix districts utilize a common Phoenix warehouse at which the route salesmen have daily opportunity for contact before starting on their routes, and weekly opportunity for contact at meetings, some of which are three-district meetings. Tucson and Las Vegas each has its own warehouse and conducts its own sales meetings.<sup>18</sup> A more appropriate setup for separate geographic units than exists in this Arizona-Nevada Region 2 is hard to imagine. This was not true in Southern California, as the Board specifically found. It ill behooves the majority to shut its eyes to these significant facts and assume that a 1969 corporate reorganization has rendered regional units alone appropriate for the route salesmen of this Employer, with no regard for the scope of the region or the almost total lack of employee contact on a regional basis.<sup>19</sup>

We would direct an election in the Phoenix-based unit sought.

Districts 08, 09, and 10 enjoy a community of interest separate and apart from the employees in the remaining Districts in the Region. Nor can we say that the three Districts in question constitute a well defined and separate geographical unit. Thus, the Bloomington warehouse in Region II serving some of the employees in the three Districts involved herein (08, 09, and 10) is actually substantially closer to the Glendora warehouse, serving employees in the other two Districts (06 and 07) than it is to the other warehouses in Districts 08, 09, and 10 which the Union sought as part of the three District unit . . . .

We cannot conveniently disregard these sentences. The record in the instant case supplies precisely what was lacking in the above-cited case to establish the appropriateness of the proposed unit in view of the discontinuance of area managers. If the simple management device of employer organization or reorganization is to be determinative regardless of record facts concerning employee community of interest and pertinent geographical considerations, then clearly the trend is to remove unit findings from the Board's control.