

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34

SLEEPY'S INC.

Employer

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 919

Petitioner

Case No. 34-RC-2317

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, and the briefs of the parties, I find that: the hearing officer's rulings are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Petitioner seeks to represent a unit of approximately 66 full-time and part-time mattress professionals and store managers (herein called sales employees) employed by the Employer at 32 retail mattress stores located in Southwestern Connecticut. Although otherwise in accord as to the composition of the unit, the Employer, contrary to the Petitioner, contends that that a unit limited to the sales employees at the 32 stores in Southwestern Connecticut is not appropriate for purposes of collective bargaining, and that the only appropriate unit must include 305 sales employees at its 156 retail mattress stores in its "New England Market", which covers the states of Connecticut, Massachusetts, Rhode Island, Vermont and New Hampshire. There is no collective-bargaining history for the employees sought by the petition, and the Petitioner is willing to proceed to an election in any unit found appropriate. For the reasons set forth below, I find that the petitioned-for unit is appropriate for the purposes of collective bargaining.

**I. FACTS**

**A. Overview of Operations**

The Employer, headquartered in Bethpage, New York, operates approximately 700 retail mattress stores in 11 Northeastern states. The executive team consists of David Aker, President; Joe Graci, Executive VP and CFO; John Rowley, Executive VP and CIO; Irena Bookbinder, Executive VP of Sales; and Adam Blank, COO and General Counsel. Working under the executive team are five regional vice presidents (RVPs), including John Pergolizzi. Pergolizzi is the RVP for the New England market. In the four years that Pergolizzi has been RVP for the New England market, it has grown from 55 stores to its current level of 156 stores.

The stores in the New England market are divided among five regional managers (RMs), who are each assigned to a particular geographic area within the New England market. Jack Edmunds is the RM assigned to R-37, which consists of the 32 stores and the 66 employees sought in the petitioned-for-unit.<sup>1</sup> Three district managers (DMs) are assigned to each RM. The DMs working under Edmunds in R-37 are Paul Eisenman, Bob Trommer, and Mark Hearn.<sup>2</sup> Each of the five RMs in the New England market is responsible for overseeing 32-35 stores, and each DM is responsible for 7-8 of those stores. Pergolizzi determines how many stores are in each of the five regions. Typically, he bases that decision on the stores proximity to each other and the ability of the RM to manage all the stores in their assigned region. In assigning stores to RMs, Pergolizzi attempts to keep the number of stores assigned to each RM relatively equal. Recently, for economic reasons, the Employer reduced the number of RMs and DMs in each market. Prior to September 2008, the New England market had nine RMs and, as noted above, it now has five. As a result of downsizing, Pergolizzi had to reassign stores so that each RM was assigned a relatively equal number of stores. In this regard, as of August 2008, R-37 consisted of 22 stores, only 7 of which are presently included in R-37. As of October 2008, R-37 consisted of

<sup>1</sup> The Employer asserts that R-37 does not designate a region, but rather simply refers to Jack Edmunds as a person. For clarity of this analysis, I will refer to the 66 employees working at the 32 stores petitioned-for and supervised by Jack Edmunds as R-37.

<sup>2</sup> Although the Employer contends that the DMs have no supervisory authority, no party has sought their inclusion in the petitioned-for unit.

<sup>3</sup> The store at issue is designated WE. It is unclear from the record whether the store was transferred to another market or whether the store was closed.

<sup>4</sup> Although the Employer claims that applications are not available at any of its retail stores, a former sales employee testified that applications were available at his store.

<sup>5</sup> It is unclear from the record whether Pergolizzi also approves all written warnings and other less severe discipline, or whether the RM may institute such discipline without Pergolizzi's approval.

<sup>6</sup> In reaching this number, I did not consider any temporary transfer to the store designated WE because that store was under R-37 in January 2009.

<sup>7</sup> An email from Joe Kilty, RM for R-77, similarly shows five days involving four sales employees who regularly work in R-37 who were temporarily assigned to stores in R-77 since January 2009.

<sup>8</sup> One of those individuals worked a total of 43 days at the same store.

<sup>9</sup> Kilty's e-mail shows that since January 9, 2009, there were approximately 11-14 days—involving 6 employees—in which an employee assigned to R-77 worked in stores designated R-37.

<sup>10</sup> As noted above, the Employer admits that it assigns RMs and DMs to work in its retail stores in the absence of any available sales employees. In addition, there are a number of stores that are geographically close to the stores in R-37 but that are not considered part of the New England market.

<sup>11</sup> Thus, I find no merit to the Employer's contention in its post-hearing brief that the petitioned-for unit is precluded by Section 9(c)(5) of the Act.

At most stores, only one sales employee is assigned to work each day. This is in accord with what the Employer in its post-hearing brief describes as the “one sales employee per store” business model. The sales employee assigned to each store is required to work from the opening of the store at 10:00 am to its closing at 9:00 pm (11:00 am to 7:00 pm on Sundays). Although not entirely clear, it appears that certain high-volume stores may have more than one assigned sales employee, but the record does not reflect the number of such stores or whether any of these stores are located in R-37.

## **B. General Terms and Conditions of Employment**

The Employer maintains common labor relations policies and has centralized management over all stores. The Human Resources Department is located in Bethpage, NY at the Employer's corporate office. Lisa Savastano is the human resources professional assigned to the New England market, although she also covers a portion of an adjoining market. All sales employees' personnel files are maintained at the corporate office. In addition, all sales employees are subject to the same benefits, wage and commission structure, vacations, holidays, hours of work, dress code, and employee handbook. They all perform the same duties, utilizing the same equipment and forms, and work under the same terms and conditions of employment at each store.

With regard to training, all sales employees are required at the outset of their employment to attend a 4-week "Sleepy's University" training program in Farmingdale, NY. In the New England market, Pergolizzi expects that each DM will spend 2 days a month for approximately 3 hours each day training the sales employees assigned to their area. In addition, Pergolizzi holds "town hall meetings" twice a year for sales employees in the New England market. The meetings are held at various locations throughout the New England market, and all sales employees from all regions within the New England market may attend. The record does not reflect whether these "town hall meetings" are mandatory or voluntary. The rosters from the town hall meetings show that employees from R-82 and R-77 attended a town hall meeting with employees from R-37. The record does not reflect either the length or nature of any work-related contacts between the sales employees from R-37 and sales employees from other regions in the New England market during these town hall meetings. Finally, each RM is responsible for holding a continuing education class once a week. However, there is no record evidence showing whether any sales employees from R-37 attended a continuing education class with sales employees from another region.

Commission disputes between sales employees are determined by a “rules committee”, which is established and administered by corporate. Paychecks are centrally processed by corporate, and sales employees directly contact corporate in the event of a paycheck problem.

Recruitment of new sales employees is also centralized in corporate. In this regard, Loren Rant is the recruiter assigned by corporate to recruit for all stores in the New England market. Such recruiting is ongoing, because there is always a need for new sales employees in light of the Employer’s “one sales employee per store” business model. In this regard, Rant checks monster.com, careerbuilder.com and other resume search engines looking for candidates. In addition, if a specific geographic area needs new sales employees, the Employer will advertise in local newspapers. Regardless of the source, all applicants must complete an application at the Employer’s website, identifying the geographic area in which they wish to work, rather than a particular store.<sup>4</sup> Rant then does a phone interview with the applicant, and if she is satisfied that the applicant is a good candidate for employment, she sends the applicant for a face-to-face interview with the RM in whose region the applicant would work. The RM then conducts an interview and makes a recommendation to Pergolizzi, who makes the final hiring decision.

Disciplinary issues are typically first identified by either an RM or a DM. The RM may report the issue to Human Resources, along with a disciplinary recommendation. Human Resources may initiate an investigation based upon the information from the RM’s report. After the investigation is complete, Human Resources reports the matter to Pergolizzi, who makes the final disciplinary decision with regard to terminations.<sup>5</sup> Similarly, RMs can recommend an employee for promotion, but the final decision is made by Pergolizzi.

Corporate makes all decisions regarding advertising, store set-up, merchandise, and sales goals. After corporate sets the sales goal, the goals are sent to the RM for feedback. Although RMs may adjust the sales goals, such adjustments are subject to Pergolizzi’s approval.

Call-outs from work are made by the sales employee to their RM or DM. The RM is then responsible for finding a replacement sales employee, who may come from within the same region or from another region. If no other sales employee is available that day, the RM or DM will have to work at the affected store.

**C. Work related contacts and interchange**

As noted above, only one sales employee is assigned to work at each retail store. As a result, daily work-related contacts between and among sales employees appears to be limited to those occasions when a sales employee from one store needs to contact a sales employee from another store to locate merchandise for a potential sale. In this regard, sales employees may utilize the Employer's centralized computer system to effectuate that transaction, and/or may telephonically contact the sales employee at another store. Regardless of the manner in which this is done, there is no evidence as to the frequency or regularity that such inter-store contacts occur. There is also no evidence that sales employees have any regular contacts with other sales employees during their lunch or break times, or before or after work.

With regard to interchange and transfer of sales employees between retail stores, the record consists of the schedules of the 32 stores and 66 employees in R-37 covering the period from August 2008 to the end of May 2009, and emails from New England market RMs to Pergolizzi, prepared specifically for the hearing in the instant case, setting forth those sales employees who have been transferred into or out of stores in R-37 during the same period of time. However, as noted above, the Employer significantly downsized the number of RMs and DMs between October and December 2008, which in turn significantly affected those stores that were included in R-37. As detailed above, between August and December 2008, many stores were removed from R-37 and many were added. Since those changes were fully effectuated in early January 2009, only one store has been removed from R-37, and none were added, and there is no evidence that the Employer contemplates making any significant changes to the make-up of R-37 in the near future. Accordingly, I have limited my analysis of the interchange and transfer of sales employees to the period since January 9, 2009.

In this regard, the schedules of the 66 sales employees in R-37 reveal that, since January 9, 2009, they worked the overwhelming majority of their time in stores within R-37, with the average employee working in about 8 different stores. This ranged from a low of one store to a high of 21 different stores. In contrast, there were a total of only six days in which a sales employee regularly assigned to a store in R-37 worked in a store outside R-37.<sup>6</sup> Inasmuch as the Employer's retail stores are open every day of the week, the percentage of days that at least one individual from R-37 worked in a store outside of R-37 amounts to only 4% during that period of time.<sup>7</sup> There is no evidence or claim that when a sales employee from R-37 was temporarily assigned to a store outside of R-37, they had any work-related contacts with any other sales employee during that temporary assignment. In addition, the record does not reflect who supervises or even directs an R-37 sales employee who is temporarily assigned to a store outside R-37.

With regard to the temporary transfer of sales employees from other stores in the New England market to stores in R-37 since January 9, 2009, the store schedules reveal that 11 individuals from outside R-37 were assigned to work a total of 74 days in stores located within R-37.<sup>8</sup> Thus, the percentage of days that at least one individual from outside R-37 worked in at least one store within R-37 amounts to 52% during that period of time.<sup>9</sup> However, the schedules do not reflect whether those individuals who worked in R-37 on those occasions are actually sales employees from other stores in the New England market.<sup>10</sup> Once again, there is no evidence or claim that when a sales employee from outside R-37 was temporarily assigned to a store within R-37, that they had any work-related contacts with any other sales employee during that temporary assignment. In addition, the record does not reflect who supervises or even directs a sales employee from outside R-37 who is temporarily assigned to a store within R-37.

An email from RM Edmunds identifies three sales employees who recently permanently transferred out of R-37 to other regions in the New England market. The email also identifies two employees who permanently transferred into R-37 from other regions in the New England market. Finally, the email identifies a number of employees from other regions who have temporarily filled in for call-outs in R-37, and one employee from R-37 who has filled in for call-outs in another region. However, Edmunds' e-mail does not identify the dates of these permanent and temporary transfers, nor does it identify the number of actual days that sales employees were temporarily transferred either into or out of R-37. Finally, the email does not indicate whether the transfer of employees was mandatory or voluntary.

## **II. ANALYSIS AND CONCLUSION**

It is well-established that where there has been no bargaining on a broader basis, the Board will find appropriate a geographic grouping of retail chain stores that is less than chain-wide in scope, particularly where the grouping of stores coincides with the employer's administrative grouping. *Lawson Milk Co.*, 213 NLRB 360 (1974); *White Cross Discount Centers, Inc.*, 199 NLRB 721 (1972); *Mott's Shop Rite of Springfield, Inc.*, 182 NLRB 172 (1970). See also *See's Candy Shops, Inc.*, 202 NLRB 538 (1973). The Board, in evaluating the community of interests among employees working at more than one location, considers several factors, including (1) similarity in employee skills, duties, and working conditions, (2) functional integration of the business, including employee interchange, (3) centralized control of management and supervision, (4) geographical separation of facilities, (5) collective bargaining history and extent of union organization, and (6) employee choice. *NLRB v. Carson Cable TV*, 795 F.2d 879, 884 (9th Cir. 1986). Where an employer seeks a unit larger than the multi-facility unit that was petitioned-for, the employer must show that the employees in the petitioned-for unit do not share a community of interest distinct from that shared with employees in the larger unit requested by the employer. *Mott's Shop Rite of Springfield, Inc.* supra, at 173; *Lawson Milk Co.*, supra, at 362; Cf. *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1082 (2004).

Based on the forgoing and the record as a whole, I find that a unit of sales employees at the 32 stores designated R-37 constitutes an appropriate unit for the purposes of collective bargaining. In this regard, although all of the sales employees in the New England market have the same skills, duties, and responsibilities, share common terms and conditions of employment, and are subject to common overall supervision, the employer has failed to establish that the employees in R-37 do not share a community of interest distinct from that shared with employees in the New England market.

More particularly, I note that R-37 is a distinct Employer-designated geographical grouping of stores, all of which are under the direct supervision of RM Edmonds. <sup>11</sup> See *Lawson Milk Co.*, supra; *White Cross Discount Centers, Inc.*, supra; Cf. *Storemont-Vail Healthcare, Inc.*, 340 NLRB 1205, 1209 (2003); (Board found that a petitioned-for multi-facility unit that did not comport with any of the employer's administrative groupings was not an appropriate unit); *Laboratory Corp. of American Holdings*, supra, at 1082 (same). In addition, all of the stores in R-37 are geographically located within close proximity to each other in the Southwestern portion of Connecticut. Such close geographical proximity is necessary to effectively carry out the Employer's "one sales employee per store" business model, which requires the flexibility to re-assign sales employees (or managers) from one store to another on very short notice. In contrast, many of the stores in the New England market are hundreds of miles away from many of the stores in R-37. The significance of R-37's geographical grouping is confirmed by evidence of the substantial number and regularity of the temporary transfer of R-37 sales employees between stores assigned to R-37, contrasted by the infrequent and irregular number of temporary transfers of R-37 sales employees to stores outside of R-37.

I further note that the sales employees in R-37 share common immediate supervision that is different from the other employees in the New England market. In this regard, RM Edmunds can recommend discipline and promotions, conduct training, approve call-outs, and temporarily transfer employees from store to store to cover call-outs. Although the number of stores included in R-37 was significantly changed by the Employer last year for economic reasons, there have been almost no changes to the stores included in R-37 since January of this year, and there is no evidence in the record that the Employer has any concrete future plans to change the supervisory structure of either the stores or the employees assigned to R-37. Cf. *Laboratory Corp. of America Holdings*, supra, at 1082. (Board found that unit under common supervisor was not appropriate where there was evidence that the employer was in the process of changing the supervisory structure).

I further note that the evidence of temporary and permanent interchange between the sales employees in R-37 and the rest of the New England market is insufficient to show that the employees in the petitioned-for unit do not share a community of interest distinct from the employees in the New England market. In this regard, I note particularly the absence of any evidence showing that when sales employees are transferred to other stores, that they have any significant work-related contacts with other sales employees. This is simply an aspect of the Employer's "one sales employee per store" business model. Under such circumstances, regardless of the extent of such temporary interchange, it is insufficient to overcome the distinct community of interest shared by the sales employees in R-37.

Moreover, even assuming arguendo that the interchange of employees resulted in work-related contacts between sales employees in R-37 and sales employees from other stores in the New England market, the instances of such interchange revealed by the record since January 2009 involving sales employees from R-37 working in other stores in the New England market does not approach the degree of interchange typically present in cases where the Board found it to be significant. *Lawson Milk Co.*, supra, at 361-362. Although the degree of interchange by individuals from outside R-37 temporarily transferring to stores within R-37 since January 2009 is far greater, I do not believe it is significant enough to render inappropriate a unit limited to R-37, particularly in the absence of evidence showing that such individuals were actually sales employees from other stores in the New England market and that they had any work-related contacts with R-37 sales employees while working in an R-37 store. *Id.*

Finally, I note that there is no history of collective bargaining for any of the Employer's employees, and that no labor organization seeks to represent the sales employees in a broader unit than that requested by the Petitioner. *Mott's Shop Rite of Springfield, Inc.* supra, at 173.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and part-time mattress professionals and store managers employed by the Employer at its retail stores located within the geographical area designated as R-37; but excluding field operations managers, district sales managers, regional sales managers, and guards, professional employees and supervisors as defined in the Act.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

**Eligible to vote:** those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

**Ineligible to vote:** employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers, Local 919.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before **June 24, 2009**. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

**Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found under "E-gov" on the Board's web site at [www.nlr.gov](http://www.nlr.gov). This request must be received by the Board in Washington by **July 1, 2009**.

Dated at Hartford, Connecticut this 17th day of June, 2009.

/s/ Jonathan Kreisberg

Jonathan Kreisberg, Regional Director  
National Labor Relations Board  
Region 34