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# Sleepy's Inc. and United Food and Commercial Workers Local 919, Petitioner. Case 34–RC– 2317

March 26, 2010

### DECISION ON REVIEW AND ORDER

## BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On June 17, 2009, the Regional Director for Region 34 issued a Decision and Direction of Election in which he found appropriate the petitioned-for multifacility unit of sales employees at the Employer's 32 retail mattress stores located in southwestern Connecticut. Thereafter, in accordance with Section 102.67 of the Board Rules and Regulations, the Employer filed a timely request for review. The Employer contends that the petitioned-for multifacility unit is inappropriate and that the unit should include the sales employees at all 156 stores in its New England market, rather than the sales employees at just 32 of the stores in that market. The Petitioner filed an opposition.

On July 30, 2009, the Board granted the Employer's request for review.

Having carefully considered the entire record in this proceeding, we reverse the Regional Director's finding that the sales employees at the 32 stores in question constitute an appropriate unit, and remand the case to the Regional Director to determine whether some unit smaller than the entire New England Market might be appropriate.<sup>2</sup>

### I. FACTS

The Employer sells mattresses directly to consumers from the 700 retail stores it operates in 11 northeastern States. For organizational purposes, the Employer has broken down its operations into five regional markets, each of which is headed by a regional vice president (RVP). The Employer's New England market covers part of Connecticut, Massachusetts, Rhode Island, Vermont, and New Hampshire. There are approximately 156 retail stores staffed by 305 sales employees in the New England market. John Pergolizzi is the RVP for the New England market, and is responsible for its operations.

The stores in the New England market are divided among 5 regional managers (RMs), each of whom is responsible for between 30-35 stores. RMs can cover stores located in more than one State. Jack Edmunds is one of the five regional managers currently assigned to the New England market. At the time of the hearing, he was responsible for the 32 stores in the petitioned-for unit in southwestern Connecticut. The Regional Director found that some 66 sales employees work at those 32 The distance between the southernmost and northernmost stores along the Connecticut coastline that are currently assigned to RM Edmunds is approximately 60 miles, which is greater than the distance between some stores assigned to Edmunds and some stores assigned to other RMs. The Regional Director referred to the group of 32 stores at issue as "R-37."

The Employer also assigns three district managers (DMs) to work with each RM, and each DM is responsible for 7 to 12 stores. According to RVP Pergolizzi, the RMs and DMs provide sales support to the sales employees, with DMs working to close the most difficult sales.<sup>3</sup>

The Employer frequently opens (and closes) stores and therefore the number and location of stores in the New England Market do not remain constant. The Employer also reassigns stores from one regional market to another. For example, although stores in Danbury, Connecticut, at one time fell within RVP Pergolizzi's New England market and were assigned to RM Edmunds, by the time of the hearing the Danbury stores fell within another RVP's territory. RVP Pergolizzi testified without contradiction that store assignments are fluid and constantly change, and that he expects the Danbury stores to return to his regional market at some future date.

<sup>&</sup>lt;sup>1</sup> The Employer also contested the Regional Director's decision to conduct the election by mail ballot. Because we have reversed the Regional Director's unit determination, we need not pass on the mail ballot issue.

<sup>&</sup>lt;sup>2</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Teamsters Local 523 v. NLRB, 590 F.3d 849 (10th Cir. 2009); Narricot Industries, L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir.

<sup>2009),</sup> petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

<sup>&</sup>lt;sup>3</sup> No party sought the inclusion of the RMs or DMs in the unit.

Similarly, the Employer also frequently changes the stores that are assigned to a RM. RVP Pergolizzi tries to balance several factors in deciding which stores to assign to which RM. On the one hand, he tries to "even out" the number of stores assigned to his five RMs. He also tries to assign stores to RMs that are close to where the RMs live, so that the RMs can easily travel to the stores they oversee. Accordingly, the list of stores assigned to RMs changes when the Employer opens or closes stores, and hires or fires RMs. In the last 4 years, the number of stores in RVP Pergolizzi's market has grown from 55 to 155 stores, necessitating a significant number of changes in store assignments. For example, the Regional Director found that "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 37 stores, 24 of which are presently included in R-37." While RVP Pergolizzi strives to even out the number of stores assigned to each RM, he also takes performance into account in making store assignments, and will reassign underperforming stores to those managers whose stores are performing more strongly.

Employees perform the same tasks using the same skills regardless of which store they work at in the New England market. Employees enjoy the same terms and conditions of employment and are subject to the same work rules regardless of which store they work at in the New England market. The Employer maintains common labor relations policies and has centralized management over all stores. New hires who wish to work at stores assigned to one RM are trained alongside new hires who wish to work at stores assigned to a different RM.

A customer can purchase a mattress at one of the Employer's stores, and arrange to pick it up at another one of the Employer's stores. For example, parents of college students can purchase mattresses near their homes in New York, and their children can pick the mattresses up at stores near their colleges in Massachusetts. Customers may also return mattresses purchased at one store to a different store location. Accordingly, employees at one store can access the inventory at other company stores via the Employer's computer system. Employees also have telephone and email contact with their counterparts at other stores. If a sales employee at a store currently overseen by RM Edmunds needs a computer code or delivery authorization to close a sale and cannot reach Edmunds, the employee is free to contact a different RM or RVP. One of the Employer's distribution centers services some of the stores overseen by Edmunds; a different distribution center furnishes the remainder of the stores overseen by Edmunds.

At most stores, only one sales employee is assigned to work each day. The single sales employee is required to work from the opening of the store at 10 a.m. to its closing at 9 p.m. (11 a.m. to 7 p.m. on Sundays). Since the Employer desires to staff each store with only one employee, the Employer needs maximum flexibility to move employees around from store to store in case an employee initially scheduled to work cannot do so. According to RVP Pergolizzi, 50 percent of the employees who work in Connecticut are "floaters," who travel between stores overseen by a particular regional manager and between stores overseen by different regional managers.

The Regional Director concluded that an individual "from R-37 worked in a store outside of R-37 . . . only 4% . . . of [the] time" between January 9, 2009 and the hearing date. On the other hand, he concluded that during the same time period "at least one individual from outside R-37 worked in at least one store within R-37 . . . 52% . . . of [the] time." The Regional Director also found that "three sales employees . . . recently permanently transferred out of R-37 to other regions in the New England market," while two employees "permanently transferred into R-37 from other regions in the New England market."

RMs can make recommendations regarding promotions and terminations, but RVP Pergolizzi makes the final decisions regarding those matters. Pergolizzi testified without contradiction that he had overruled RM requests to promote sales employees to district manager positions, though he was not asked, and did not volunteer, specifics. RMs try to secure replacements in the event an employee calls in sick. The record does not disclose whether a RM can require an off-duty employee to cover for an absent employee. The RD found that it was unclear whether RMs such as Edmunds can issue written warnings without RVP Pergolizzi's approval.

<sup>&</sup>lt;sup>4</sup> 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 them fall within the petitioned-for unit.

<sup>&</sup>lt;sup>5</sup> Because only one employee works at each store, there is no one at a store to let in a substitute employee if the employee originally scheduled to work there cannot show up for work on a given day. To ensure that a substitute employee will be able to open a store in such a situation, the Employer furnishes the New England market employees with cyber keys that allow employees to access any store in the New England market.

<sup>&</sup>lt;sup>6</sup> The Regional Director also concluded, however, that it was unclear whether these individuals from outside R–37 were sales employees or regional managers and district managers. The Employer claims that the Regional Director erred in this regard because it uses different designations for employees, DMs, and RMs. Our review of the record satisfies us that the Employer is correct.

<sup>&</sup>lt;sup>7</sup> The parties did not enter into any stipulation regarding the supervisory status of the RMs.

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However, when asked about discipline, RVP Pergolizzi testified that he "sign[s] off on verbal, written, final warnings, terminations." Corporate officials screen job applicants and refer them to the RMs, who then interview applicants and make recommendations to Pergolizzi. Pergolizzi sometimes conducts interviews himself, and makes all final hiring decisions.

### II. ANALYSIS

The Regional Director found that the petitioned-for unit of sales employees at 32 of the Employer's stores in southwestern Connecticut is appropriate. He emphasized that those stores constitute a distinct Employer-designated geographical grouping of stores known as "R-37," and are under the direct supervision of RM Edmunds. We find, contrary to the Regional Director, that the petitioned-for unit is not an appropriate unit for bargaining.

When a union petitions for a multilocation bargaining unit, the presumption in favor of a single facility unit has no applicability. See NLRB v. Carson Cable TV, 795 F.2d 879, 887 (9th Cir. 1986); Capital Coors Co., 309 NLRB 322, 322 fn. 1 (1992). Instead, the Board applies its traditional community-of-interest analysis. where, as here, a union petitions for a unit that is greater than a single location, but less than chain-wide in scope, the Board considers a variety of factors to determine whether the employees in the petitioned-for unit share a community of interest distinct from the employees at the excluded facilities. We consider similarity of employee skills, duties and working conditions; functional integration of business operations, including employee interchange; centralized control of management, supervision and labor relations; whether the petitioned-for unit conforms to an administrative function or organizational grouping of the employer's operations; geographic cohesiveness and proximity; and collective-bargaining history. Bashas', Inc., 337 NLRB 710, 711 (2002); Alamo Rent-A-Car, 330 NLRB 897, 897 (2000); NLRB v. Carson Cable TV, supra at 884–885.8

Applying the foregoing factors, we find that a unit limited to the sales employees at the 32 stores currently assigned to RM Edmunds is not appropriate. While we recognize that the employees who work at the 32 stores perform the same work, use the same skills, and enjoy identical terms and conditions of employment, the Regional Director acknowledged that employees at the Employer's stores *outside* the proposed unit also perform the

same work, use the same skills, and enjoy the same terms and conditions of employment. See Alamo Rent-A-Car, supra at 897–899 (unit that consists of only two of the employer's four San Francisco facilities is not appropriate in part because employees at the excluded facilities perform the same work under the same terms and conditions as employees who work at the included facilities). Thus, the factor of similarity of employee skills, duties, and working conditions does not support a finding that the unit may be limited to the 32 stores at issue. Nor is there any history of collective bargaining at just those 32 stores

The 32 stores in the petitioned-for unit are functionally integrated with other stores outside the proposed unit and there is significant employee interchange with employees at stores outside the proposed unit. Thus, during the period from January 2009 to the date of the hearing, an employee who worked at a store assigned to an RM other than Edmunds also worked at one of the stores assigned to Edmunds approximately 52 percent of the time. Such frequent interchange is not de minimis.

Further, there is centralized control of management and labor relations in the New England Market, and RM Edmunds does not have substantial autonomy over the stores currently assigned to him. Rather, it is Pergolizzi, the RVP for the New England Market, not RM Edmunds, who makes the decisions regarding hiring, firing, promotions, and discipline at the 32 stores in question.

As to the geographical cohesiveness of the 32 stores at issue, in finding the 32 store unit to be appropriate, the Regional Director emphasized that "R-37 is a distinct Employer-designated geographical grouping of stores, all of which are under the direct supervision of RM Edmunds." However, the Regional Director provided no explanation for how he reached that conclusion, and we find it to be unsupported by the record. No witness testified that "R-37" is a distinct Employer-designated geographical grouping of stores. RM Edmunds was not called as a witness at the hearing. And, RVP Pergolizzi testified several times that R-37 is simply a "number" assigned to Jack Edmunds for identification purposes, and does not designate a geographical area or grouping of stores. RVP Pergolizzi further testified that if Edmunds were to quit his job and a new regional manager were to become responsible for all 32 stores that Edmunds oversaw, the new regional manager would not have the designation of R-37. Accordingly, we find, contrary to the Regional Director, that the proposed unit does not conform to one of the Employer's organizational groupings. Nor does the proposed unit conform to one of the Employer's administrative functions. See Bashas', Inc., supra at 711 (finding inappropriate a unit that

<sup>&</sup>lt;sup>8</sup> While extent of organizing may also be a factor in the analysis, that factor is not in issue here because the Regional Director did not rely on it in finding that the 32 stores in "R-37" constituted an appropriate unit, nor have we considered it in finding that a unit limited to those 32 stores is not appropriate.

does not conform to any employer administrative function or organizational grouping); Alamo Rent-A-Car, supra at 898 (same). But see White Cross Discount Centers, Inc., 199 NLRB 721, 722 (1972) (distinct cluster of eight stores, which are all situated within a radius of one-half mile, "constitute in effect an administrative division within the [e]mployer's organization in that they are supervised collectively by two supervisors who oversee no other stores").

In finding the proposed unit appropriate, the Regional Director also relied on the fact that all of the stores in the proposed unit are geographically located within close proximity to each other in southwestern Connecticut. However, our review of the record persuades us that the petitioned-for unit is neither geographically coherent nor stable. Thus, some of the stores that are excluded from the proposed unit are also located in Connecticut and are in close proximity to some of the Connecticut stores that are included in the proposed unit. See Bashas', Inc., id. (proposed countywide unit does not constitute a coherent geographic unit because an excluded store is in close geographic proximity to other stores in the proposed unit). Moreover, the stores assigned to each RM frequently change. Pergollizi testified without contradiction that he has "ten stores that are on the books to open" just in his market between the June 1 hearing date and the end of the year. The addition of those 10 stores may result in further changes to Edmunds' "jurisdiction." In the circumstances, "meaningful collective bargaining would be rendered difficult, if not impossible, by the shifting" store assignments among the regional managers. Burlington Food Store, Inc., 235 NLRB 205, 206 (1978). Accord: Laboratory Corp. of America Holdings, 341 NLRB 1079, 1082 (2004) (if employer frequently changes supervisory assignments, then a grouping of facilities based on common supervision does not form a sufficiently stable collection of facilities for collective bargaining purposes).

In sum, based on the particular circumstances of this case, we find that the petitioned-for unit of sales employees at the Employer's 32 stores located in southwestern Connecticut is not appropriate. However, the mere fact that the proposed unit is inappropriate does not necessarily mean, as the Employer contends, that the only appropriate unit must include the employees at every store in the New England market. Thus, depending upon the circumstances, a unit that is larger than the proposed unit but which is smaller than the entire New England market—such as a Connecticut statewide unit—could be appropriate. Cf. *Motts Shop Rite of Springfield, Inc.*, 182 NLRB 172, 172–173 (1970) (although a unit of all 12 stores in Connecticut and Massachusetts would be ap-

propriate, a unit consisting of two stores in Massachusetts is also appropriate in part because it includes all the stores in Massachusetts, the stores fall within a distinct labor market, and the number of permanent transfers between the two Massachusetts stores exceeds the number of permanent transfers between those Massachusetts stores and the Connecticut stores); See's Candy Shops, Inc., 202 NLRB 538, 538-539 (1973) (Board rejects employer's claim that the appropriate unit must consist of all shops in southern California, and instead finds appropriate a unit consisting of 55 shops located in Los Angeles County). Although the Petitioner indicated that it might be willing to proceed to an election in an alternative unit, it did not propose, and the Regional Director did not discuss, possible alternative units. Accordingly, we shall remand the case so that the Regional Director can determine whether some unit smaller than the entire New England Market would be appropriate.

#### ORDER

The Regional Director's Decision and Direction of Election is reversed. This case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. March 26, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

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