

NATIONAL LABOR RELATIONS BOARD

In the Matter of

H P HOOD LLC (Heluva Good),

Employer,

Case No. 3-RC-11971

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 118,

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, Employer HP Hood LLC (Heluva Good) (herein "Hood" or the Company") hereby requests review of the Regional Director's Decision and Direction of Election, dated, June 30, 2010 (referred to as the "RD Decision"). Review is requested pursuant to Sections 102.67(c)(2) on the basis that the RD Decision on substantial factual issues is clearly erroneous on the record.

PRELIMINARY STATEMENT

A. Background

Hood is a Massachusetts corporation engaged in the manufacturing and processing of various dairy and non-dairy products. In Sodus, New York, the Company processes and sells products under the brand name – Heluva Good. The Company's integrated operations take place at three facilities – the Pratt Road facility, the Barclay Road facility and the Wolcott facility –

located within 5 to 15 miles from one another. All three facilities operate under the direction and management of Plant Manager, Scott Wagner.

The petition filed on May 18, 2010 by the International Brotherhood of Teamsters, Local 118 (herein the “Teamsters” or the “Union”), as clarified at the hearing, sought to represent a unit consisting of only ten (10) “full time and part-time hourly warehouse employees,” thus excluding all production and transportation employees, and Direct Store Delivery (“DSD”) drivers, as well as two warehouse employees, specifically the customer service representative (the warehouse clerk) and the facilities maintenance/warehouse employee.¹

B. The Hearing

A representation hearing was held before Hearing Officer Christina Bryan on June 3, 2010 to determine whether the Union’s petitioned-for unit consisting of ten full-time and regular part-time warehouse employees constitutes an appropriate unit, or alternatively whether the appropriate unit is the petitioned-for unit, plus the warehouse clerk and the facilities maintenance / warehouse employee, as well as all production and transportation employees at the Company’s Pratt Road, Barclay Road and Wolcott, NY facilities for purposes of collective bargaining.

C. The Regional Director’s Decision

Through her Decision and Direction of Election, dated, June 30, 2010, Regional Director Rhonda Ley properly found that the Union’s petitioned-for unit of ten warehouse employees was inappropriate. See RD Decision, pp. 2-3, 25. Regional Director Ley concluded that any appropriate unit must also include Hood’s warehouse clerk and the facilities maintenance / warehouse employee – as these two individuals share a community of interests with the ten other warehouse employees. Id. Notwithstanding the record evidence, Regional Director Ley also

¹ Of the ten employees the Union seeks to represent, nine work at Hood’s Pratt Road facility and the tenth works at the Barclay Road facility. One of the nine warehouse employees, spends 2-3 days at the Barclay Road facility and the remainder of his time at the Pratt Road facility. Tr. 19. 38-41.

found that the warehouse employees share a community of interests separate and distinct from Hood's transportation and production employees to "warrant their establishment in a separate unit". See RD Decision, p. 22. In support of this position, the Regional Director relied upon several factual inaccuracies and misstatements of the record evidence, including but not limited to the following:

- Employee Contact: "There is little work-related contact between a majority of the warehouse employees and the production employees. Warehouse and production employees...leave or pick up product in staging areas in the cooler. There is little contact between the warehouse and production employee when this occurs." RD Decision, p. 17.
- Employee Contact: Ignoring daily contact between certain production employees who perform "quality control" duties in the Storage area of the warehouse, but are nonetheless part of the production department under the same supervisor as all other first shift production employees. RD Decision, p. 11.
- Employee Interchange: "A warehouse employee has been temporarily reassigned to production for two or three days per year; and, on occasion, a production employee uses the forklift to bring cheese down from the rack when a warehouse employee is on break. The Board places little weight on temporary interchange where, as here, it is relatively infrequent and irregular..." RD Decision, p. 18.
- Employee Interchange: "There are no occasions when production employees are temporarily transferred to perform warehouse duties." RD Decision, p. 10.
- Supervision: "Recently, the Employer hired a second-shift supervisor to supervise the 15 production and 2 warehouse employees on the second shift. He is being trained on the first shift by the production supervisor...There is no indication in the record that Hood's PM Facility Supervisor [second shift supervisor] is being trained regarding supervision of warehouse functions. It appears that supervision of the two warehouse employees on the second shift is incidental to his main function on the second shift, *i.e.*, supervision of the production room." RD Decision, p. 18.

In addition, the Regional Director also ignored germane testimony presented by Hood conclusively establishing that Hood's warehouse employees share a community of interests with the Company's production and transportation employees, and DSD drivers. Instead, Regional Director Ley either erroneously rejected or consciously omitted credible evidence conclusively

establishing that Hood's warehouse employees share a strong community of interests in many aspects of the terms and conditions of employment – *i.e.*, similar working conditions, identical labor relations policies and procedures, similar pay, same benefits, the same annual review process, some common supervision, similar skills, common break room (Pratt Road), etc. – with the Company's production and transportation employees. Especially with respect to the Pratt Road facility, the Regional Director completely ignored the record evidence regarding the size of the facility, the total functional integration of the production and warehouse operations and the very close work and non-work-related interaction among the 45 employees at the facility. For example, she concluded that warehouse and production employees have “different work schedules at the Pratt Road facility,” despite the fact that their work hours overlap almost 90% of the time. See RD Decision, p. 8.

In addition, the Regional Director acknowledged that the employees use a common break room, the same designated outside smoking area, and a common locker room. See RD Decision, pp. 10-12. Given the small size of the Pratt Road facility (*i.e.*, 44,000 square feet), coupled with the fact that less than 38,000 square feet used for actual production and warehouse functions, there is simply no basis to support a finding that there is little employee contact or interaction between warehouse and production workers. Tr. 134.

Hood respectfully submits that the Regional Director erred in failing to find that the only appropriate unit is a wall-to-wall unit that encompasses all warehouse, production and transportation employees, including Hood's DSD drivers. The evidence proffered at the hearing clearly establishes that there is a very substantial community of interests to support a wall-to-wall unit among these employees or, at a very minimum, among the warehouse and production employees at Pratt Road.

Hood, therefore, requests a review of these errors set forth in the Regional Director's Decision and requests an Order dismissing the petition. In the alternative, Hood seeks a finding that the only appropriate unit is a wall-to-wall unit, or, at a minimum, a finding that the only appropriate unit must include all warehouse and production employees at the Company's Pratt Road and Barclay Road facilities.

ARGUMENT

The Regional Director Erred by Misapplying the Board's Community of Interests Principle for Determining the Appropriate Composition of the Bargaining Unit in this Case

The record evidence sufficiently establishes that Hood not only demonstrated how the Union's petitioned-for fractional unit of warehouse workers is inappropriate, but further showed that, contrary to the Regional Director's decision, there is a strong community of interests between all of the Heluva Good employees to justify a wall-to-wall unit. In reaching her conclusion that a wall-to-wall unit was not supported by the record evidence, the Regional Director relied heavily upon the following community of interest factors: interchange among the groups of employees, employee contact and shared supervision. See RD Decision, p. 15. However, as noted above and as explained in further detail below, the Regional Director's Decision that these community of interest factors were not satisfied in this case is based upon factual misstatements and/or omissions of evidence set forth in the record.

Supervision

In her Decision, Regional Director Rey incorrectly states that the majority of production and warehouse employees are supervised on a daily basis by separate individuals. This statement, however, is factually inaccurate. The Record in the present case clearly demonstrates

that Mr. Tim Perry, PM Facility Supervisor, supervises all 2nd shift production and warehouse employees. Regional Director Rey seems to acknowledge this fact in her Decision, but proceeds to dismiss Mr. Perry's immediate supervisory authority over the production and warehouse employees on the basis that Mr. Perry moved into the PM Facility Supervisor position in April 2010 and is being trained "on the first shift by the production supervisor [Ms. Heffernan] and by a former production employee who was moved into quality control." See RD Decision, p. 18. Based upon this information, the Regional Direction assumes and/or concludes, that Mr. Perry must, therefore, be receiving little to no training regarding warehouse functions (emphasis added). The Regional Director further assumes that because there are currently only two warehouse employees on the second shift that warehouse supervisory duties are merely "incidental" to the main functions occurring within the production room. This conclusion is not only factually incorrect, more importantly, there is nothing in the record to support or substantiate the Regional Director's assumptions regarding either of these points. Rather, the record evidence substantiates Hood's overall premise – that Mr. Perry was hired in April 2010 to supervise both warehouse and production employees scheduled to work on the second shift. In this regard, he is responsible for overseeing all employees and administers one set of policies to all employees. There is no basis in Board law to diminish the significance of this common supervision.

In addition, the record evidence is undisputed that Mr. Perry currently performs managerial/supervisory functions, including but not limited to managing his shift employees, handling absenteeism² and scheduling issues, addressing quality and clean-up issues, and

² For reasons unexplained, the Regional Director noted that the record does not disclose whether second shift employees have been instructed to contact Mr. Perry when calling off work. See RD Decision, p. 7, ft. 12. Given Mr. Wagner's testimony that Mr. Perry is responsible for managing all second shift employees, the Regional Director's questioning of this fact is inconsistent with the record evidence.

attending to disciplinary matters. Tr. 156-157. In her Decision, the Regional Director noted that “[a]s of the date of the hearing,³ [Mr.] Perry had issued one disciplinary notice to an employee on the second shift. The record does not indicate whether the employee who received the discipline was a production or warehouse employee.” See RD Decision, p. 7. It is irrelevant whether the disciplinary notice issued by Mr. Perry was given to a production employee or a warehouse employee. The salient fact is that Mr. Perry is vested with the authority to supervise and discipline *any* employee on the second shift. This fact was unrefuted by the Union! Moreover, Mr. Perry has, in fact, exercised that managerial authority. Tr. 156-157. The Regional Director’s desire to distinguish between whether the recipient of the disciplinary notice was a production or warehouse employee is not only misplaced, but should also have no bearing upon any bargaining unit determination in this case. The fact remains, all discipline, regardless of the receiving employee, is administered pursuant to Hood’s policy.

In sum, the record evidence supports a finding that first shift warehouse employees and transportation employees share common supervision (*e.g.*, Mr. DePuy), while all second shift employees at the Pratt Road facility – including warehouse and production employees – share common supervision (*e.g.*, Mr. Perry). Because there is some overlap in supervisors among the employees, there is further evidence of a community of interests between the warehouse, transportation and production employees to warrant a finding that a wall-to-wall unit is appropriate for collective bargaining purposes. Stated differently, Hood contends that the Regional Director erred in her decision when she concluded that certain production, warehouse and transportation workers did not share immediate common supervision.

³ Mr. Perry had been in his position for approximately six (6) weeks, and less than two (2) weeks since he actually began working on the second shift. Tr. 154-157.

Furthermore, the applicable Board precedent clearly establishes that a community of interests may exist even in the absence of the shared *common immediate supervision*, provided that the employees are subject to *common ultimate supervision*. See Huckleberry Youth Programs, 326 NLRB 1274 (1998) (finding for the employer on the community of interest issue despite lack of common immediate supervision, where employer demonstrated that the employees were subject to common secondary and overall supervision). See also Unisys Corporation and International Union, 354 NLRB 5, 6 (2009) (concluding that community of interests existed even though employees were supervised by separate immediate supervisors but shared common second-level supervision); Underwriter Salvage Company of New York, 99 NLRB 337, 339 (1952) (stating that sufficient community of interest to constitute a single appropriate unit existed where the employees were subject to common ultimate supervision); C. Pappas Company, Inc., 80 NLRB 1272, 1273 (1948) (same); Tin Processing Corporation, 80 NLRB 1369, 1374 (1948) (same); Aerojet General Corporation, 131 NLRB 1094, 1095 (1961) (same).

In the present case, the record evidence clearly establishes that Mr. Wagner, as Plant Manager, retains overall management and supervisory responsibility for all production and warehouse employees at the Pratt Road facility. Moreover, Mr. Wagner's office is located at the Pratt Road facility, and he is directly involved in all significant disciplinary actions that take place at the Heluva Good operations. Tr. 16, 69-70. Based on the above facts, it cannot be disputed that production and warehouse employees are subject to common ultimate supervision. Accordingly, the common supervision factor weighs in favor of finding that production and warehouse employees share a community of interests (especially at Pratt Road) sufficient to include them in a single unit for collective bargaining purposes.

Employee Interchange

The Regional Director found “little interchange between the warehouse and production employees.” See RD Decision, p. 17. In reaching this conclusion, the RD Decision relied upon a small number of permanent transfers (*e.g.*, two from the production to the warehouse department and one from warehouse to a DSD driver within the past five years), and further cited a few instances of temporary interchange, including but not limited to, production employees “occasionally” using forklifts “to bring cheese down from the rack when a warehouse employee is on break.” See RD Decision, p. 18. The Regional Director also found that there are “[n]o occasions when production employees are temporarily transferred to perform warehouse duties.” See RD Decision, p. 10. This conclusion is simply wrong and is not supported by the record. To the contrary, the Regional Director blatantly disregarded ample record evidence that not only demonstrated the interchange – both temporary and permanent – between warehouse and production employees, but also between the three Heluva Good (Pratt Road, Barclay Road and Wolcott) facilities.

First, Mr. DePuy provided undisputed testimony that he has directly witnessed multiple production employees going into the warehouse and using a forklift to obtain blocks of cheese, corrugated cardboard, film/shrink wrap or other supplies while warehouse employees are on break. At the representation hearing, Mr. DePuy provided the following undisputed testimony:

- Q: ...Adam, I think you testified that five to eight people roughly are trained in production to operate a forklift.
A: Correct.
Q: Have you ever seen these folks use a forklift in –
A: Yes.
Q: -- the warehouse?
A: Yes.
Q: Okay. And when do you recall that happening?
A: Like when one of the guys is on, one of the employees is on lunch or break or something, they'll go out. And they

don't want to wait for the warehouse employee to come back we'll all pull film down, pull giant blocks down.

Q: Where do they get forklift to do that?

A: Just on the floor wherever it is parked.

Q: Okay.

...

Q: And who have you seen do that?

A: Don Veistreat, Chris Prossis, Bryan Skinner, Wayne Prossis, those are the ones that I've seen do it a lot you know. They do it on a daily basis...numerous times a month.

Tr. 209 (emphasis added). There is nothing to indicate that Mr. DePuy's observations were an isolated incident. The record also indicates that warehouse employees drive Heluva Good product back and forth between various facilities on an as-needed basis in a Company truck. Tr. 144.

Second, contrary to the Regional Director's finding that there have been no instances when production employees have been temporarily assigned to perform warehouse duties, the record tells a very different story. Both Mr. Wagner and Mr. DePuy testified that Ms. Heffernan, the 1st shift production supervisor, will routinely send production employees to the warehouse department to perform work if there are equipment problems, plant slowdowns or production employees are overscheduled. Tr. 54, 197, 206-207, 222. This temporary interchange of employees occurs on an as-needed basis, but as Mr. DePuy stated, this occurs "a couple of times per month...depending on what season it is..." Tr. 222. This testimony was not refuted!

Mr. DePuy confirmed that when production employees are called upon to assist in the warehouse, they do, in fact, work along side the warehouse employees. Tr. 207. In this regard, Mr. DePuy specifically noted that in February 2010, for instance, the facility was shutdown for one week while a new AC unit was being installed; rather than have production employees take the week off, "they came in and they cleaned and they painted..." along side other warehouse

employees. Tr. 206-207. Moreover, Mr. DePuy further explained that in May 2010, the production supervisor sent production employees to the warehouse department on at least two different occasions looking for extra work. The production employees performed “general cleaning, sweeping...running the floor scrubber up and down the aisle, cleaning the walls” at the Pratt Road and Barclay Road facilities. Tr. 222.

Based upon these facts, Hood submits that the Regional Director erred in finding that there is no significant interchange – either permanent or temporary – among the warehouse and production employees to support the community of interest analysis.

Employee Contact

Finally, Regional Director Ley found there to be “little work-related contact between a majority of the warehouse employees and the production employees.” See RD Decision, p. 17. This conclusion, especially as it applies to the Pratt Road facility, is totally contrary to the record evidence and ignores the day-to-day reality of 47 employees working within the small confines of the Pratt Road facility. In reaching this conclusion, the Regional Director relied heavily upon the testimony of Eric Bornheimer, the Union’s only witness. Mr. Bornheimer, who formerly worked in the production department until he bid and transferred to the warehouse department, testified that he had limited conversations with warehouse employees when he worked as a 640-cutter in the production department approximately *five* years ago. Tr. 160-161.

The record evidence substantiates that, unlike Mr. Wagner and Mr. DePuy, Mr. Bornheimer is not present at the Pratt Road facility on a daily basis – since it was unrefuted that he spends 2-3 days per week at the Barclay Road facility – and, therefore, he is not privy to the *current* frequency of interactions between production and warehouse employees. Both Mr. Wagner and Mr. DePuy credibly testified that production employees make approximately 20-50

trips to the aging - cooler “per shift” – not “per day”, as incorrectly reported by the Regional Director – in order to obtain bulk cheese. Tr. 104-105. In addition, production employees frequent the warehouse an unspecified number of times per shift to obtain corrugated cardboard, wrapping film and other packaging materials needed for cheese packaging production. Tr. 198-199. As Mr. Wagner testified, production employees are in and out of the warehouse “all day.” Tr. 31. These critical facts, however, were omitted from the Regional Director’s decision.

Regional Director Ley’s Decision also excluded reference to the fact that production and warehouse employees interact, work together and share workspace on a daily basis in the “Storage” section of the warehouse. Specifically, the record evidence establishes that warehouse employees use this area for storage, while production employees use this same area to uncrate and inspect the cheese. Tr. 22-24. The Regional Director also erred in concluding that a “quality control” employee was not a production employee. See RD Decision, p. 17, fnt. 23. Mr. DePuy provided clear, undisputed testimony that two production employees – Keba Webb and Terry Morgan – are typically responsible for interacting with the warehouse department on a routine / daily basis (*i.e.*, at least 13-15 times per day) for purposes of quality control. Both of these employees are members of the production department. Tr. 205-206. Finally, there can also be no dispute that there is constant daily contact between the production and warehouse departments to determine which batch and/or lot number(s) of cheese will be processed on a given day. Tr. 27-28.

In addition to ample contact between the production and warehouse employees, the Regional Director’s Decision completely disregards any evidence of employee contact between warehouse, production and transportation employees (including DSD drivers) throughout the three Heluva Good facilities in general. For example, it is interesting to note that the Regional

Director, on the one hand, credits the lack of employee contact solely to Mr. Bornheimer's testimony (*i.e.*, "an employee who actually performed the 640 cutter job in production, testified that he only had limited conversation with the warehouse employee when performing this function"), yet affords no such credit to the testimony proffered by Mr. Bornheimer with respect to his interactions as a warehouse employee interacting with DSD drivers and other transportations employees who routinely stop at the Barclay Road facility "every day of the week" and "on a regular basis". As the record evidence indicates, the Barclay Road facility serves as a dry storage facility for the Wolcott facility and warehouse distribution center for the DSD drivers. Tr. 37-41. Thus, warehouse employees maintain frequent contact with transportation employees and DSD drivers that frequent the Barclay Road facility, the production employees that staff the Wolcott facility, and individuals from the Pratt Road facility who bring materials and make deliveries to the facility. Transportation employees routinely communicate with the warehouse clerk regarding deliver orders, routes and schedules. Tr. 85-88. Finally, all drivers stop by the Pratt Road facility to return delivery paperwork to the warehouse clerk, socialize in the break rooms with both warehouse and production employees and routinely gather in the receiving dock area with warehouse employees. Tr. 165, 211-213. In sum, the Regional Director's finding that there is little work-related contact between the various Hood employees simply does not ring true, nor is it supported by the record evidence.

Other Community of Interest Factors

Though the Regional Director focused on factors that Hood allegedly failed to establish, there were a number of community of interest factors that the Company did, in fact, satisfy in this case. First, in her Decision, the Regional Director acknowledged that Hood has common control with respect to Labor Relations. As Human Resources Manager, Kathy Baker is

responsible for hiring and overseeing general disciplinary issues at all three Heluva Good facilities. See RD Decision, p. 6. The Regional Director also conceded that Mr. Wagner works with Ms. Baker on the overall labor relations management of the Company. Id.

Second, the Regional Director recognized that all Hood employees were provided with the same Employee Guidebook which contains the Company's work policies and outlines many of the Company's employee benefits. Specifically, she noted as follows: "All employees, once hired, complete orientation at the Pratt Road facility, and serve a 90-day probationary period. All employees are subject to the company policies outlined in the Employee Guidebook and are offered the same benefits, including health and disability insurance, vacation, holiday pay, sick time and bereavement time." See RD Decision, p. 9.

Third, the Regional Director's Decision noted that "warehouse and production employees have the same basic skill level." See RD Decision, 7. In this regard, Hood "prefers to hire employees with a high school diploma or GED, but it is not required." Id. Finally, and quite significantly, the Regional Director acknowledged the "functional integration of the warehouse and production operations at the Employer's Pratt Road facility." See RD Decision, 16.

Based upon the community of interest factors noted above that the Regional Director found in the Company's favor – functional integration, centralized control over labor relations, common personnel policies, common overall management and supervisory responsibility, common skills and common benefits – there is a sufficient community of interests to warrant a finding that the only appropriate bargaining unit is a wall-to-wall unit that includes warehouse and production employees. See Mercy Hospitals of Sacramento, Inc., 217 NLRB 765 (1975); Lutheran Welfare Services of Northeastern Pennsylvania, Inc., 319 NLRB 886 (1995).

Summary

The Regional Director's Decision must be dismissed. As noted throughout this Petition for Review, the Regional Director' Decision erroneously failed to take into consideration relevant record evidence that would have supported a sufficient community of interests among production, warehouse and transportation employees to support a wall-to-wall unit. The Decision is also based on several factual misstatements and/or several significant omissions of the record testimony. Hood submits, however, that when the record evidence is accurately viewed in its entirety, the record supports a finding of a wall-to-wall unit comprised of warehouse, production and transportation employees, just as the Board has upheld in prior cases. See BASF Systems Division of BASF Wyandotte Corporation, 222 NLRB 712 (1976), Publix Super Markets, Inc. 343 NLRB 1023 (2004), HP Hood, LLC Case 3-RC-10667 (Apr. 9, 1998), Abdow Corporation, 271 NLRB 1269 (1984).

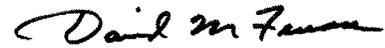
CONCLUSION

For the reasons set forth above, Hood respectfully requests that its Request for Review be granted, that the RD Decision be reversed, and that the Board issue an Order defining the scope of the unit as a wall-to-wall unit including warehouse, production and transportation employees located at all three Heluva Good locations, or, in the alternative, an Order defining the scope of the unit as including warehouse and production employees.

Dated: July 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Caroline M. Westover, hereby certify that a copy of the foregoing Request for Review of the Regional Director's Decision and Direction of Election was electronically served on Robert G. McCarthy, Esq., counsel for the International Brotherhood of Teamsters, Local 118, and on Ms. Rhonda Ley, Regional Director, National Labor Relations Board (Region 3), on July 14, 2010, at the following addresses:

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