

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

ATKINS DESSERTS, LLC

and

Case 25-RC-10517

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 700

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 April 8, 2011, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.¹

I. ISSUES

The Petitioner, United Food and Commercial Workers Local 700, seeks an election within a unit comprised of the approximately 35 employees employed by the Employer, Atkins Desserts, LLC, in its baking, mousse, packaging, dish room and second shift baking/sanitation departments at its Noblesville, Indiana facility (hereinafter the facility). The Employer contends that an appropriate unit should be comprised of all hourly non-clerical employees, which would include the aforementioned 35 employees and five employees who perform work in maintenance, dock and quality assurance on the grounds that they share a substantial community

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. 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.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

of interest. The Petitioner argues to the contrary that this group of five employees does not share a substantial community of interest with the petitioned-for unit.

II. DECISION

For the reasons discussed in detail below, including that the employees engaged in production, maintenance, quality assurance and dock functions share a substantial community of interest, it is concluded that the non-clerical hourly employees employed at the Employer's facility located in Noblesville, Indiana, constitute a unit appropriate for purposes of collective bargaining.

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 non-clerical hourly employees employed in baking, mousse, packaging, dish room, second shift, maintenance, dock and quality assurance employed by the Employer at its facility located in Noblesville, Indiana; BUT EXCLUDING all professional employees, office clerical employees, guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 40 employees for whom no history of collective bargaining exists.

A. Statement of Facts

The Employer is engaged in the manufacture of cheesecakes and other baked goods at its facility in Noblesville, Indiana. The overall operation is the responsibility of the Head of Operations. Reporting to him are the Production Manager, the Quality Assurance Manager and the Maintenance Manager. The Production Manager oversees all of the production employees. He has two production floor supervisors that report to him and there are also three line supervisors that report to the production floor supervisors.

The Employer operates two 10-hour shifts from Monday through Thursday. The first shift works from 5:00 AM to 3:00 PM and the second shift works from 5:00 PM to 3:00 AM, except on Thursdays when it works from 3:00 PM to 1:00 AM. There are about 7 regular employees in the baking department, about 8 regular employees in the mousse department, about 13 regular employees in the packaging department, 3 regular employees in the dish room department, and about 7 regular employees in the second shift baking/sanitation department.²

² At the hearing, the parties agreed that the petitioned-for unit had approximately 35 employees. The sole witness at the hearing testified that there were about 11 to 12 temporary employees working in the production departments. It is undisputed that these temporary employees are not eligible to vote. There is a discrepancy between the 35 unit employees estimated by the parties and the 38 employees listed in the above text pursuant to the witness' testimony. This minor discrepancy is immaterial.

There are 2 employees in the dock department, 2 in maintenance and 1 quality assurance employee. All of the above employees work during the first shift except for the second shift baking/sanitation employees and one of the maintenance employees, who works a split shift that starts at 1:00 PM.

The baked goods are manufactured in a production line that is set up in a straight line starting at one end of the building with the baking department and ending at the other end of the building with packaging. The baking department employees prepare the cheesecake and cake mixes, make the crust, load the cakes into ovens, and load them into coolers after baking is done. The next step in the process is to move the cakes to the mousse-topping department where the cheesecakes and cakes are iced or toppings are added and then placed into coolers. The packaging department employees operate cutting machines to cut any cakes as needed, shrink-wrap some of the products, place collars around some of the cakes, and label and package all of the finished goods. The dish room department is located in the middle of the production line. The dish room employees are responsible for washing and sanitizing all the trays, racks and utensils utilized in production. The second shift sanitation department employees are responsible for cleaning and for finishing the production of a type of New York style cheesecake that takes longer hours to bake. The baking and the packaging department employees report to one of the floor supervisors. The mousse and the dish room department employees report to a lead person who reports to one of the floor supervisors. The second shift employees report to a second shift supervisor. All of the above production supervisors report to the Production Manager.

The maintenance employees are responsible for setting up production equipment at the beginning of the shift and spend about 75% of their time on the production floor fixing equipment or performing preventive maintenance work. The maintenance employee whose shift starts at 1:00 PM is additionally responsible for cleaning out pumps used in production and getting weights ready for the following day. The current maintenance employees were hired with previous HVAC specialized training. The maintenance employees report to the Maintenance Manager. If a maintenance employee is absent, the Maintenance Manager will cover the work.

Dock employees are responsible for setting out the ingredients needed on the production line before production begins and assist in continuing to supply the line with materials throughout the work day. Dock employees also load and unload trucks coming in and out of the facility and load freezers with packaged goods after weighing them. One of the current dock employees was previously a mixer in the baking department and one of the current mixers was previously a dock employee. The dock employees report to the Production Manager or one of the Floor Supervisors, and also may report to a purchasing employee, who is not in the unit, for purchasing related work. If a dock employee is absent, the work is covered by the mixer in the baking department who has previous dock department experience.

The quality assurance employee sets up the production line with specification sheets, weight sheets, and weighs used in the production process. She walks around the production floor throughout the day overseeing the production process and weighing materials used in the process. The quality assurance employee reports to the Quality Assurance Manager. When she is absent, the Quality Assurance Manager covers this function. The quality assurance function

during second shift is performed by the second shift manager. The current quality assurance employee previously worked in packaging. She has on occasion worked in production on the line to help out. It is unknown how often this has happened.

All of the regular hourly employees have the same health benefits, vacation benefits, and are covered by the same employee handbook. They also share an employee break room and are provided with lockers. All of the hourly employees are required to take the same initial orientation training, safety trainings, and good manufacturing practices (GMP) training.

All of the regular hourly employees discussed above are paid on a weekly basis. They all swipe a card using a computerized time card system to record their work times. The payroll function at the facility has been outsourced to a company called Orbis. The facility's receptionist is responsible for gathering payroll information and sending it to Orbis for processing. The record does not reflect the wage scales used for the hourly employees at the facility. However, some hourly employees are paid a premium over their regular hourly wage if they are in a "classified" position. The Employer identified that mixers in the bakery and mousse departments, dish room positions, dock and maintenance positions are considered classified and thus are paid a premium. It is unknown whether the quality assurance employee is a classified position. The second shift employees are paid a shift differential. Hourly employees are hired as temporary employees through a company called Elwood Staffing at a starting hourly wage of about \$8 an hour. Employees who have been with the company longer receive raises and generally make more money. It is not known how many employees are in classified positions or are making more money based on their seniority.

The Human Resources function is performed at the Employer's office in Livonia, Michigan. Human Resources functions such as disciplining employees are performed by strictly following the employee handbook. The purchasing function is also performed in Livonia although there is a local employee that performs local purchases.

The production employees are cross-trained among the different departments but it is unknown how often they work on a different production line from their assigned one, i.e., a mousse department employee working in baking. Maintenance employees do not get cross-trained to perform production work. Neither do dock employees although one dock employee is an experienced mixer. The quality assurance employee is trained in production work and has performed work on the production line on occasion but it is unknown in which specific production job.

B. Discussion

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act," NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-97 (1985). It is well established that the Act does not require the bargaining unit to be the optimum, or most appropriate unit, but only an appropriate unit. See Overnite Transportation Co., 322 NLRB 723 (1996). In deciding whether a petitioned-for unit is an appropriate unit, the Board's focus is on whether the employees share a community

of interest. Id. The Board considers several factors in determining a community of interest among employees, including: (1) similarity in wages or compensation; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in job functions; (4) degree of similarity in qualifications, skills, and training; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; and (12) extent of union organization. Kalamazoo Paper Box Corp., 136 NLRB 134 (1962) and Home Depot USA, 331 NLRB 1289 (2000). No one factor has controlling weight. Kalamazoo Paper Box, supra. The desires of the Petitioner are given relevant consideration, but the Board has held that it is not a controlling factor. E.H. Koester Bakery Co., 136 NLRB 1006, 1012 (1962).

In the instant case, the Employer would include in the appropriate unit the plant-wide non-clerical hourly employees while the Petitioner seeks a separate production department unit and would exclude five employees in the maintenance, dock and quality assurance departments. Although the Petitioner here seeks a production-only unit, Board cases concerning maintenance-only units provide a useful analytical framework. The Board has historically found petitioned-for separate maintenance department units appropriate when the facts of the case demonstrate the absence of a more comprehensive bargaining history and the maintenance employees involved have a community of interest separate and distinct from other employees. Buckhorn, Inc., 343 NLRB 201 (2004) and TDK Ferrites Corp., 342 NLRB 1006 (2004) citing American Cyanamid Co., 131 NLRB 909 (1961). There is no bargaining history in this case. However, as in TDK, the record does not support a finding that the production unit sought is composed of a distinct and homogenous group of employees with interests separate and apart from the five employees the Petitioner seeks to exclude. As in Buckhorn and TDK, the operation here is highly integrated and there is a significant degree of contact and interdependence among the hourly non-clerical employees. The production employees in the baking, mousse, packaging, dish room and second shift sanitation departments depend on the maintenance, dock and quality assurance employees to perform their jobs. The maintenance, dock and quality assurance employees are essential in setting up the production line for the beginning of the first shift and also continue to have daily interaction with the production line throughout the shift; overseeing that the equipment is running efficiently, that production employees have the materials needed for production and that they are following product specifications and other quality assurance standards. It is clear that the maintenance, dock and quality assurance employees have daily interaction with the production employees on the first shift. In fact, the evidence reflects that the maintenance and quality assurance employees work on the production floor most of the time. Additionally, the second shift employees have daily interaction with one of the maintenance employees.

Additionally, all of the non-clerical hourly employees work in the same building and in the same work area. In all significant respects, all hourly non-clerical employees share identical terms and conditions of employment including work rules and policies. The same employee handbook, benefits, vacation policy, and hiring practices apply to all of these employees. In addition, the labor and human resources policies are all centralized and apply identically to all of the regular hourly employees. All of these hourly employees share the same payday and follow the same timekeeping procedure. Although there was insufficient evidence to establish whether

wages are similar among the employees in the petitioned-for unit and the employees being excluded, there is evidence that certain hourly employees are paid a premium either because they are in a classified job or work on the second shift. The record reflected that there are classified positions in the baking, mousse, dish room, maintenance, and dock departments. Thus, employees paid at the higher level can be found in both the petitioned-for unit and the positions the Petitioner seeks to exclude. The first shift production employees share the same work schedule as the dock, quality assurance, and one maintenance employee. The split-shift maintenance employee shares work hours with both the first and second shift production employees' schedule.

Although the quality assurance employee and the dock employees have no daily interaction with the second shift production employees, the same can be said of the first shift production employees having no daily contact with second shift production employees. With regards to the reporting structure, the quality assurance employee and the maintenance employees report to different managers than the hourly production employees. However, the dock employees report to the Production Manager just as the production employees. Moreover, all of the employees in the facility work under the direction of the Head of Operations. Production employees are hired through a temporary agency and are converted to regular employees after a probation period. These employees do not require any specific previous experience or training. The record reflected that the dock employees receive specific training in order to have a license to drive a forklift. The maintenance employees were hired with previous training in HVAC and the quality assurance employee was trained by the Quality Assurance Manager in specific quality standards. However, all of the hourly employees receive the same orientation training, safety training and GMP training. It is unknown how much time the dock employees and maintenance employees spend performing work using their specialized training. Although the employees in the petitioned-for unit report to a different manager than three of the five employees the Petitioner seeks to exclude from the unit, this factor does not outweigh the other factors that clearly demonstrate the substantial community of interest that these employees share. Similarly, the modest difference in training is not significant enough to find that there is not a substantial community of interest shared among all hourly non-clerical employees.

The Petitioner's reliance on Lawson Mardon U.S.A., Inc., 332 NLRB 1282 (2000) is misplaced. In that case, the Board affirmed the Regional Director's finding that the petitioned-for unit of production employees excluding the production employees at another operation of the employer and the maintenance employees, was appropriate. In that case, the 20 maintenance employees maintained and repaired production machinery for both operations; they were in a separate department with their own supervision; held separate meetings; performed some of their work at a maintenance shop enclosed by a fence physically separate from production; and spent the majority of their time responding to service calls throughout the facility including at the other physically-separate employer operation. It was found that the community-of-interest factor between these maintenance employees and production employees was not so substantial as to mandate their inclusion in the production unit. However, in the instant case, the maintenance department consists of only 2 employees. Although they have separate supervision, there is no evidence that they hold separate meetings or that their work is performed in a physically separate maintenance shop. They perform 75% of their work on a daily basis side-by-side with the production employees on the production floor. The same considerations prevail with regards to

the quality assurance and dock classifications. All of these 5 employees have daily interaction with the production employees in a fairly small highly integrated operation.

Accordingly, it is concluded that the non-clerical hourly employees employed at the Employer's facility located in Noblesville, Indiana, constitute a unit appropriate for purposes of collective bargaining.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Petitioner. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which 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 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

(overall or by department, etc.). This list may initially be used by the undersigned to assist in determining an adequate showing of interest. In turn, the list shall be made available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577 **on or before May 16, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov,³ by mail, or by facsimile transmission at (317)226-5103. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. 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 20570-0001.

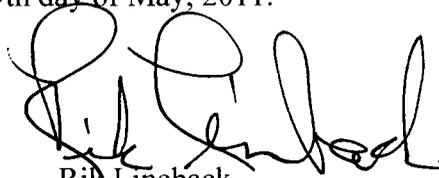
Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **May 23, 2011**, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished**

³ To file the list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁴ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED AT Indianapolis, Indiana, this 9th day of May, 2011.



Rik Lineback
Regional Director
National Labor Relations Board
Region 25
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, IN 46204

RL/rr

⁴ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.