

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ODWALLA, INC.,

Employer,

and

TEAMSTERS LOCAL 70,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner.

Case 32-RC-5821

**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING
OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED
BALLOTS**

LITTLER MENDELSON
A Professional Corporation
ROBERT G. HULTENG
MICHAEL G. PEDHIRNEY
ARTURO M. TAFOLLA
650 California Street, 20th Floor
San Francisco, CA 94108
Tele: 415.433.1940
Fax: 415.399.8490

August 3, 2011

Attorneys for the Employer
ODWALLA, INC.

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE.....	1
II. INTRODUCTION	2
III. BACKGROUND AND SUMMARY OF ARGUMENT	3
IV. STATEMENT OF FACTS	6
A. Rivera Is A Full-Time Employee Subject To The Same Pay Structure And Benefits As Employees In the Petitioned-For Unit.....	7
B. Rivera’s Work Duties Have Significant Overlap With RSRs And Swing Reps	8
V. ARGUMENT	9
A. The Legal Standard	9
B. The Petitioned-For Unit Is Inappropriate Because This Segment of Employees Does Not Share A Separate And Distinct Community Of Interest	9
1. A High Degree Of Functional Integration Exists Between Rivera And The Petitioned-For Employees.....	11
2. Rivera And The Petitioned-For Employees Maintain Consistent Contact With One Another	12
3. There Is A High Degree Of Interchange And Common Functions Between Rivera And Employees In The Petitioned-For Unit	12
4. Rivera Has Nearly Identical Wages, Hours, And Benefits To Employees In The Petitioned-For Unit.....	13
5. Rivera Is Commonly Supervised With Employees of The Petitioned-For Unit	14
C. The Smallest Appropriate Unit In The Employer’s San Leandro Node Is A Unit Of Employees That Includes Rivera	14
VI. CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Allied Gear & Machine Co.</i> , 250 NLRB 679 (1980)	10, 15
<i>Atlanta Hilton & Towers</i> , 273 NLRB 87 (1984)	11
<i>Avon Products</i> , 250 NLRB 1479 (1980)	11
<i>Bill Heath, Inc.</i> , 89 NLRB 1555 (1949)	9
<i>Buckhorn, Inc.</i> , 343 NLRB 201 (2004)	11, 16
<i>Dow Chemical Company</i> , 202 NLRB 17 (1973)	10
<i>Greenspan Engraving Corp.</i> , 137 NLRB 1308 (1962)	9
<i>Gulf States Asphalt Co.</i> , 106 NLRB 1212 (1953)	9
<i>La Z Boy Chair Co.</i> , 235 NLRB 77 (1978)	10
<i>Mallinckrodt Chemical Works</i> , 162 NLRB 387 (1966)	10
<i>Monsanto Co.</i> , 183 NLRB 415 (1970)	16
<i>NCR Corp.</i> , 236 NLRB 215 (1978)	11
<i>Plymouth Towing Co.</i> , 178 NLRB 651 (1969)	9
<i>Publix Super Markets, Inc.</i> , 343 NLRB 1023 (2004)	passim

Table of Authorities
(continued)

Page(s)

<i>Purity Supreme, Inc.</i> , 197 NLRB 915 (1972)	11
<i>Reade Mfg. Co.</i> , 100 NLRB 87 (1951)	9
<i>Seaboard Marine, Ltd.</i> , 327 NLRB 556 (1999)	10
<i>Sweetener Supply Corp.</i> , 349 NLRB 1122 (2007)	9
<i>TDK Ferrites Corp.</i> , 342 NLRB 1006 (2004)	16
<i>The Boeing Co.</i> , 337 NLRB 152 (2001)	10, 15
<i>Turner Industries Group</i> , LLC, 349 NLRB 428 (2007).....	10

I. STATEMENT OF THE CASE

This case comes before the National Labor Relations Board (hereinafter “the Board” or “the NLRB”) pursuant to Exceptions filed by Odwalla, Inc. (hereinafter “the Employer,” “the Company,” “Respondent,” or “Odwalla”) to Hearing Officer Gary M. Connaughton’s Report and Recommendations issued in the above referenced case on July 20, 2011.

This proceeding arises from a representation election held on June 3, 2011 involving certain employees of Odwalla at its facility (the “node”) in San Leandro, California. In the election, employees voted on whether they wished to be represented by Petitioner Teamsters Local 70, International Brotherhood of Teamsters (“the Union”).

The Employer and the Union stipulated to a unit which consisted of: “All full-time and part-time route sales drivers, relief drivers, warehouse associates, and cooler technicians, employed by the Employer at or out of its 2996 Alvarado Street, San Leandro, California facility; excluding all managerial and administrative employees, salespersons, office clerical employees, and all other employees, guards, and supervisors as defined in the Act.” (Bd. Exh. 1(a))¹ Attachment ‘A’ to the Stipulated Election Agreement identifies one unresolved unit issue: the Employer contends merchandisers should be included in the voting unit while the Union contends they should be excluded. (Bd. Exh. 1(a))

The election was conducted by Region 32 of the National Labor Relations Board (“the Region”) and resulted in 15 votes in favor of representation, 14 votes against representation, and 3 ballots challenged by the Union. (Bd. Exh. 1(b)) The Union challenged the vote of Kenneth Ignatowicz on the basis that he does not work out of the Employer’s San Leandro node. (Bd. Exh. 1(c)) A second voter—Charles Jones, Jr.—was challenged on the grounds that he is a statutory supervisor. Finally, the Union

¹ References to the Hearing Officer’s Report and Recommendations on Challenged Ballots will be referred to as “Rep. ___”. References to the transcript of the July 6, 2011 hearing will be referred to as “Tr. ___”. References to the Board’s Exhibits at the hearing will be referred to as “Bd. Exh. ___”. References to the Employer’s exhibits introduced at the hearing will be referred to as “Er. Exh. ___”.

challenged Roberto Rivera's vote on the basis that he is a merchandiser employee and the Union disputes the inclusion of merchandisers. (Bd. Exh. 1(c)) Because the challenged ballots were determinative, the Region set a hearing to resolve the challenges. (Bd. Exh. 1(c))

On July 6, 2011, the challenged ballot hearing took place. Gary M. Connaughton, Hearing Officer, presided over the hearing in Oakland, California. On July 20, 2011, the Hearing Officer issued his Report and Recommendations on Challenged Ballots, in which he recommended that the Union's challenges to the ballots of Kenneth Ignatowicz and Charles Jones, Jr. be overruled and their ballots counted. The Employer agrees that these recommendations are well-supported in the record. However, the Hearing Officer went on to recommend that the Union's challenge to Roberto Rivera's ballot be sustained, and, more broadly, that the merchandiser classification be excluded from the unit.

The Employer excepts to the Hearing Officer's recommendation to sustain the challenge to Roberto Rivera's ballot on that basis that it departs from, if not wholly ignores, established precedent of the Board.

II. INTRODUCTION

The Hearing Officer improperly recommends a wholesale exclusion of every employee in a classification that is a critical component to the success of the Employer's San Leandro node, which necessarily maintains a highly integrated operation. Indeed, employees in the merchandiser classification perform a majority of the exact same duties as those in the petitioned-for unit and are functionally integrated with the stipulated unit.

Although the record establishes that every merchandiser should be included in the petitioned-for unit, Roberto Rivera is really the sole issue before the Board, as he is the only merchandiser who voted in the election. Thus, the inquiry confronting the Hearing Officer was straightforward: whether the employees in the petitioned-for unit necessarily share a community of interest separate and distinct from Roberto Rivera. (Tr. 110:19-16) Again, Rivera is the only individual in question here, as the record clearly established that

Rivera's schedule, job duties, and interaction or interchange with employees in the petitioned-for unit all differed significantly from those of other merchandisers. (Tr. 67:8-69:18, 73:22-77:6)

However, instead of addressing the individualized inquiry, the Hearing Officer erred by neglecting to give due consideration to the particularities of Rivera's position as a merchandiser. If the appropriate deference had been given by the Hearing Officer, these particularities would have undoubtedly tipped the community-of-interest factors in favor of including Rivera as a part of the unit.

The Hearing Officer's recommendation must also be overturned as it departs from and makes no attempt to distinguish the consistent line of NLRB authority which finds a single bargaining unit to be appropriate in highly integrated facilities such as the node at issue here. As explained by the Board, it is "particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit." *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004). The need to overturn the Hearing Officer's recommendation is even more compelling when the trivial distinctions relied upon by the Hearing Officer are read in the context of the entire record.

III. BACKGROUND AND SUMMARY OF ARGUMENT

Odwalla produces, sells, distributes, and/or merchandises juices and fruit bars that are sold in grocery stores, natural health food stores and "mom and pop" accounts across the United States. (Tr. 58:11-23) To that end, Odwalla manages a fully integrated operation at its San Leandro, California facility (internally known as a "node"), from which it sells and delivers Odwalla products to customers throughout the Bay Area. (Tr. 11:22-12:13) The San Leandro node has been open since February 18, 2011. (Tr. 132:22-132:16) Prior to this, the employees in San Leandro, for the most part, had previously worked at an Odwalla node in Berkeley, California. (Tr. 132:8-10)

The Hearing Officer found appropriate the bargaining unit sought by the Union in the Stipulated Election Agreement. (See Bd. Exh. 1(a)) That bargaining unit is comprised of route sales drivers, relief drivers, warehouse associates, and cooler technicians. The unit found appropriate is a *subpart* of a highly integrated node of the Employer. An indispensable part of node operations is Roberto Rivera, who provides support to route sales representatives, swing reps, and Odwalla accounts in the field as well as working directly with other unit employees when he is at the San Leandro node. (Tr. 67:8-69:18, 73:22-77:6)

In addition to finding that a fragment of the San Leandro node constitutes an appropriate unit, the Hearing Officer's decision cuts out Rivera (as well as the rest of the merchandisers) whose job duties indisputably overlap with those employees found to be in the petitioned-for unit. In particular, Rivera's duties overlap with those of route sales representatives (RSRs) and swing reps. (Tr. 71:6-72:10) Further, the Hearing Officer's recommendation is at odds with the fact that Rivera not only assists and communicates with RSRs but has been trained to do all of the functions of the RSRs as well. (Tr. 67:12-21, 68:15-20, 108:25-109:2).

Moreover, the Hearing Officer made several erroneous conclusions that go to the heart of whether Rivera's vote should be counted. First, the Hearing Officer incorrectly concluded that merchandisers, which include Rivera, do not transport any product to customer locations. (Rep. 11) Yet, Rivera's supervisor explicitly testified that Rivera has been asked to deliver product to customer locations and has in fact delivered product for Odwalla to specific customers. (Tr. 68:18-20, 76:23-77:4)

Second, the Hearing Officer erred in finding that Rivera, as a merchandiser, has little interaction or contact with employees at the node. (Rep. 11) The record clearly demonstrates this is not the case. In fact, one of Rivera's primary job duties is to communicate with RSRs and managers. (Tr. 67:22-68:6) The undisputed evidence also demonstrates that Rivera has consistent interaction with RSRs on issues relating to

stocking and merchandising. Rivera has even directly assisted RSRs by aiding in completing the inventory of substantial amounts of product and lending additional support whenever extra assistance is needed. (Tr. 74:1-74:24)

Third, the Hearing Officer erroneously found that Rivera, unlike RSRs, always drives his personal vehicle and cannot operate a handheld computer. (Rep. 11) Yet, the record does not support this finding. Instead, the record is clear that there are occasions on which Rivera has driven a Company vehicle or has been trained to drive a Company vehicle. For instance, Rivera would use a Company vehicle when he needs to deliver product. (Tr. 76:23-77:4) Further, Rivera has been trained to operate the handheld devices and, as a result, is capable of driving the same vehicles and performing the same functions as RSRs. (Tr. 68:21-69:9, 77:4-77:6, 108:25-109:2)

In making a recommendation to exclude Rivera from the unit, the Hearing Officer ignores the fact that employees in the petitioned-for unit do not share a separate and distinct community of interest apart from Rivera. As a full-time member of the node team, Rivera plays a central role in ensuring that Odwalla's products are adequately stocked on customer's shelves and, ultimately, purchased by consumers in the Bay Area. In fact, the Hearing Officer acknowledges the integration of the operation, which is underscored by the following evidence, all of which was credited by the Hearing Officer:

- Merchandisers share many of the same duties as the RSRs and swing reps.² (Rep. 10)
- Merchandisers stock shelves from inventory left in the back of the stores by the RSRs, rotate stock, pull outdated stock, build and maintain promotional displays and interact with store personnel. (Rep. 10)

² As indicated above, the unfounded nature of the few distinctions found by the Hearing Officer between Rivera and employees in the petitioned-for unit only strengthens the conclusion that the Union's challenge to Rivera's vote should be overruled.

- The Employer and the RSRs rely on the merchandisers to make sure that the Employer's products are well stocked. (Rep. 10)
- The merchandisers are fully integrated into the Employer's system of bringing its products to market. (Rep. 10)
- Like nearly all of the employees in the petitioned-for unit, the merchandisers are paid hourly and their range of pay is in line with the pay rates of all of the other hourly employees in the petitioned-for unit. (Rep. 10-11)
- Merchandisers share the same health and vacation benefits as employees in the petitioned-for unit and the same bonus or incentive plan as the warehouse associates and node-based cooler technician, both of which are part of the petitioned-for unit. (Rep. 11.)

While the Union's proposed unit is nothing but an arbitrary alienation of a vital part of the San Leandro node's employees, the Employer proposes a bargaining unit that includes all Odwalla employees involved in bringing the Employer's products to market. Such a unit should, at the least, include Roberto Rivera if not the entire merchandiser classification. The Employer's proposed bargaining unit appropriately reflects the integrated nature of the Employer's operations.

Board precedent discussed in this brief firmly establishes that while a petitioner's desire as to a unit is a relevant consideration, it is not dispositive where the employees are engaged in a fully integrated operation. In this case, overwhelming evidence demonstrates that Rivera, if not the entire merchandiser classification, is a part of the smallest appropriate unit in San Leandro.

IV. STATEMENT OF FACTS

Odwalla produces, sells, distributes, and/or merchandises juices and fruit bars that are sold in grocery stores, natural health food stores and "mom and pop" accounts across the United States. (Tr. 58:11-23) Odwalla has a node located in San Leandro, California, from which it sells and delivers Odwalla products to customers throughout the San

Francisco Bay Area. (Tr. 11:22-12:13) This particular location has been open since February 18, 2011. (Tr. 132:22-132:16) Prior to that time, most of the employees in San Leandro had worked at a node in Berkeley, California. (Tr. 132:8-10)

The Union challenged the ballot cast by merchandiser Roberto Rivera on the ground that employees in that classification should be excluded from the bargaining unit. (Bd. Exh. 1(c)) Rivera was the only merchandiser who voted in the election.

A. Rivera Is A Full-Time Employee Subject To The Same Pay Structure And Benefits As Employees In the Petitioned-For Unit.

Roberto Rivera has been a full-time merchandiser at Odwalla's San Leandro node since July 2010. (Tr. 65:4-65:5) Rivera is supervised by Somer Rodden, Odwalla's District Sales Manager. (Tr. 52:15-52:16, 53:21-23, 91:2-91:6) Rodden also supervises eight (8) route sales representatives ("RSRs") and two (2) other merchandisers aside from Rivera. (Tr. 53:21-23, 91:2-91:6) Rivera works an 8-hour shift from Saturday through Wednesday, which ensures that at least three of his five work days coincide with the actual days worked (Monday through Friday) by the RSRs on his routes. (Tr. 67:8-67:14) He is also eligible for and receives overtime. (Tr. 87:5-87:6)

Rivera, as well as the rest of the merchandisers, is paid an hourly wage for his services, as are all of the other employees in the petitioned-for unit, except for the RSRs, who are paid on a salary and commission basis. (Tr. 65:25-66:7, 66:9-14, 67:6-67:7, 101:18-102:6) Like warehouse associates, cooler technicians and swing representatives, Rivera and the other merchandisers in San Leandro are eligible for bonuses on top of their regular compensation. (Tr. 65:14-65:21, 106:22-108:18, 128:3-130:12; U. Exh. 3) In addition, merchandisers are eligible for the same benefits available to employees in the petitioned-for unit, including warehouse associates, cooler technicians, and RSRs. (Tr. 65:9-65:13) Merchandisers are also eligible for overtime and subject to the same Company policies and procedures applicable to those employees. (Tr. 80:9-80:19, 87:5-87:6, 108:1-108:9)

B. Rivera's Work Duties Have Significant Overlap With RSRs And Swing Reps.

As a merchandiser, Rivera is responsible for performing many of the same tasks that RSRs and swing representatives routinely perform. (Tr. 71:6-72:10; Er. Exh. 1) Specifically, Rivera drives to customer sites, stocks and merchandises Odwalla products at the customer sites, rotates Odwalla products at the customer sites, builds and maintains Odwalla promotional displays and plan-o-grams, and sells secondary product placement. (Tr. 71:6-72:10, 77:1-78:2; Er. Exh. 1) Moreover, Rivera's position has the same educational requirements as the swing rep position. (Er. Exhs. 1, 3)

Rivera assists and works together with RSRs in the course and scope of his regular job duties. (Tr. 67:15-21, 74:1-74:24) Indeed, according to Rodden's testimony, Rivera's job performance has a tremendous impact on the compensation of RSRs, and Rivera plays an integral role in fulfilling the RSR's job of stocking and displaying Odwalla products at retail locations. (Tr. 75:3-75:7). For example, he works together with RSRs in determining the need for additional product at specific accounts. Rivera also ensures that the shelves of the stores on the RSRs' routes are adequately stocked with product. (Tr. 75:7-75:10, 76:12-76:19)

Moreover, the record establishes that Rivera, like RSRs, has delivered product for Odwalla to specific customers. (Tr. 68:18-20, 76:23-77:4). Rivera's job similarities with RSRs do not end there. The record is clear that occasions have arisen on which Rivera has driven a Company vehicle, similar to RSRs. (Tr. 76:23-77:4) Rivera has also been trained to operate the handheld computers that RSRs typically use in the course of performing their daily job duties. The rationale behind training Rivera was to add more depth so that he could perform more of the duties that are typically associated with RSRs, such as ordering product or producing invoices. (Tr. 68:21-69:9, 77:4-77:6, 108:25-109:2)

The only potentially consequential differences in the job duties of RSRs and Rivera are that: (1) RSRs are required to actively pursue sales opportunities on behalf of Odwalla³ and (2) RSRs deliver refrigerated products from the Company's facility to the customers' sites.⁴ (Er. Exhs. 1, 2) Notably, several of the employee classifications that are undisputedly part of the petitioned for bargaining unit – specifically the warehouse associates and cooler technicians – have no direct role whatsoever in sales, nor do those employees deliver products to customers. (Er. Exhs. 9, 11, 12) Indeed, the merchandisers' job functions are more similar to the RSRs' job functions than the warehouse associates' and cooler technicians' job functions are to the RSRs' job functions. (Er. Exhs. 1, 2, 9, 11, 12)

V. ARGUMENT

A. The Legal Standard

To be eligible to vote in a Board election, an employee must be (1) in the appropriate unit on the established eligibility date, *and* (2) in employee status on the date of the election. *See, e.g., Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf States Asphalt Co.*, 106 NLRB 1212 (1953); *Reade Mfg. Co.*, 100 NLRB 87 (1951); *Bill Heath, Inc.*, 89 NLRB 1555 (1949). The burden of proof generally rests on the party asserting ineligibility to vote. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007).

B. The Petitioned-For Unit Is Inappropriate Because This Segment of Employees Does Not Share A Separate And Distinct Community Of Interest.

The Hearing Officer's Report and Recommendation cites evidence that overwhelmingly establishes the Employer's operations are highly integrated. However, while recognizing the interrelated duties of employees, the Hearing Officer does not so

³ Rivera does not "sell" product at customer sites, but he does impact the sales by his display and merchandising of product.

⁴ Rivera does not deliver juices, because his vehicle lacks refrigeration. However, he does deliver signage and "POS" (promotional materials at the point of sale). (Tr. 77:15:78:2)

much as acknowledge the long line of Board decisions that strictly prohibit the arbitrary unit sought by the Union.

It is well established that the Board will not approve “fractured units,” *i.e.*, combinations of employees that are too narrow in scope and have no rational basis. *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999). In order for a second unit within an integrated operation to be appropriate, the employees in that unit must share a community of interest separate and distinct from the other employees directly involved in the process. *See Allied Gear & Machine Co.*, 250 NLRB 679, 680 (1980); *The Boeing Co.*, 337 NLRB 152, 153 (2001); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004). Thus, the Union must show that the RSRs, swing representatives, warehouse associates, and cooler technicians have a separate and distinct community of interest apart from Rivera.

In determining whether a separate community of interest exists, the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) common supervision. *Publix*, 343 NLRB at 1024; *Turner Industries Group, LLC*, 349 NLRB 428, 430 (2007).

The Board has consistently held that while groups of employees may have a separate community of interest by reason of their skills and training, these differences may be submerged in the broader community of interest shared by the employees, particularly where there exists a high degree of integration of the work performed. *See Dow Chemical Company*, 202 NLRB 17, 20 (1973); *Mallinckrodt Chemical Works*, 162 NLRB 387, 399 (1966); *see also La Z Boy Chair Co.*, 235 NLRB 77, 78 (1978) (holding that the work of production employees is functionally dependent upon the work of tool and die employees whose primary job is to assure that new and used dies and tools needed for production are available and in working order).

As the following discussion demonstrates, when the community of interest factors are considered in light of the record in this case, it is evident that the Union has failed to make the necessary showing of a separate community of interest.

1. A High Degree Of Functional Integration Exists Between Rivera And The Petitioned-For Employees.

In determining which unit is appropriate, the Board places a premium on the functional integration of employees. *Atlanta Hilton & Towers*, 273 NLRB 87, 90 (1984) (finding it is a valid principle that “if functions and mutual interests are highly integrated, an overall unit alone is appropriate”); *NCR Corp.*, 236 NLRB 215 (1978).

In this regard, the evidence is undisputed that an integral component of bringing the Employer’s product to market is for Rivera to engage in meaningful communication with other employees in the petitioned-for unit, such as RSRs and swing reps, on a consistent basis. *Purity Supreme, Inc.*, 197 NLRB 915 (1972) (high degree of integration found to be a significant factor to overcome geographic separation). The RSRs depend upon the work of merchandisers, such as Rivera. (Tr. 67:15-21, 74:1-74:24) In fact, Rivera’s job duties have a tremendous impact on the compensation of RSRs because merchandisers are an integral part of the RSRs’ job. (Tr. 75:3-75:7). As a result, Rivera works with RSRs to ensure that the shelves at stores on the RSRs’ routes are adequately maintained with product and that product is properly placed. (Tr. 75:7-75:10, 76:12-76:19) Without Rivera, the RSRs would fail to prosper at Odwalla and the distribution/sales process would be incomplete. (Tr. 76:12-76:19)

The Board consistently finds that groups of employees share a community of interest where the employer’s operations are functionally integrated. *Buckhorn, Inc.*, 343 NLRB 201, 203 (2004); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004); *Avon Products*, 250 NLRB 1479 (1980). Odwalla is engaged in an integrated, continuous process of selling, delivering, and merchandising its fresh products in the Bay Area. This process begins with the warehouse associates, who receive and load trucks with Odwalla

products, continues with cooler technicians, who ensure that Odwalla products remain fresh and sellable prior to sale, and ends with the RSRs, swing representatives, and merchandisers like Rivera, who ensure that the Employer's products remain on customer shelves and are sold to consumers. (Er. Exhs. 1, 2, 3, 9, 11, 12) All of the employees in the various classifications work together to accomplish the sale of Odwalla products throughout the Bay Area.

Each stage of the process is dependent on the others. For example, the RSRs need the assistance of Rivera to ensure that Odwalla products remain on customer shelves and are rotated properly and displayed in a manner which maximizes sales. (Tr. 75:7-75:10, 76:12-76:19) Also, the RSRs often rely on Rivera to work side by side with them to do inventory of a substantial amount of product. (Tr. 74:1-74:3)

2. Rivera And The Petitioned-For Employees Maintain Consistent Contact With One Another.

The Hearing Officer's Report disregards the undisputed evidence that Rivera has ongoing interactions with RSRs in performance of his job duties. One of Rivera's primary job duties is to communicate with RSRs and managers. (Tr. 67:22-68:6) At the hearing, Rivera's supervisor testified that these interactions are frequent and relate to stocking and merchandising. In fact, Rivera assists RSRs directly in various ways, such as aiding in completing the inventory of a substantial amount of product and providing direct support any time extra assistance is needed. (Tr. 74:1-74:24)

3. There Is A High Degree Of Interchange And Common Functions Between Rivera And Employees In The Petitioned-For Unit.

The Hearing Officer erred in finding that there was not a significant interchange between Rivera and employees in the unit. This is especially surprising because the Hearing Officer explicitly recognized in his Report that Rivera, as well as the rest of the merchandisers, "share many of the same duties as the RSRs and swing reps. Thus, the

role of the merchandiser is to perform many of the functions of the RSRs and the swing reps at customer locations[.]” (Rep. 10)

Furthermore, Rivera – like an RSR – drives to customer sites, stocks Odwalla products at the customer sites, rotates Odwalla products at the customer sites, builds and maintains Odwalla promotional displays and plan-o-grams, and sells secondary product placement. (Tr. 71:6-72:10, 77:1-78:2; Er. Exh. 1). All of these functions are or can be performed by the RSRs or swing reps.

Rivera’s supervisor testified without contradiction that Rivera has been asked to deliver product to customer locations and has in fact delivered product for Odwalla to specific customers. (Tr. 68:18-20, 76:23-77:4) This function is typically performed by the RSRs. The record is also clear that there are occasions on which Rivera has driven a Company vehicle, like an RSR. (Tr. 76:23-77:4) Finally, Rivera has been trained to operate the handheld devices and, as a result, has the ability to drive the same vehicles and perform the same functions as RSRs. (Tr. 68:21-69:9, 77:4-77:6, 108:25-109:2)

4. Rivera Has Nearly Identical Wages, Hours, And Benefits To Employees In The Petitioned-For Unit.

The Hearing Officer acknowledges that Rivera, along with the rest of the merchandisers, shares similar and even identical terms and conditions of employment. (Rep. 10-11) Specifically, the terms and conditions of employment among the merchandisers and the petitioned-for classifications are, for all practical purposes, identical. (80:9-80:19, 108:1-108:9) Rivera is eligible for overtime pay. (Tr. 87:5-87:6) Moreover, all warehouse associates, swing representatives, and cooler technicians go through the same annual review period as Rivera and the rest of the merchandisers and have similar written reviews. (Tr. 108:5-108:9) Rivera is paid an hourly wage for his services, as are all the employees in the petitioned-for bargaining unit, with the exception of the RSRs, who are compensated on a salary and commission basis. (Tr. 65:25-66:7, 66:9-14, 67:6-67:7, 101:18-102:6) Like warehouse associates, cooler technicians, and

swing representatives, Rivera and the other merchandisers are eligible for bonuses on top of their regular compensation. (Tr. 65:14-65:21, 106:22-108:18, 128:3-130:12; U. Exh. 3) Lastly, merchandisers are eligible for the same benefits available to the other employees in the putative unit, such as warehouse associates, cooler technicians, and RSRs. (Tr. 65:9-65:13) *See Turner*, 349 NLRB at 431 (holding that a larger bargaining unit was appropriate where all of the employees received the same disability and health benefits, and 401(k) savings plan; were subject to the same discrimination policy and alcohol contraband policy; brought complaints to the same personnel representative; and parked in the same parking lot).

5. Rivera Is Commonly Supervised With Employees of The Petitioned-For Unit.

As the Hearing Officer found, the supervision of Rivera and the rest of the merchandisers favors including them in the unit. (Rep. 11) Like the RSRs, the merchandisers are directly supervised by district sales managers. Rivera, for example, is supervised by Somer Rodden, who supervises a total of eight (8) RSRs and three (3) merchandisers. All of the employees Ms. Rodden supervises work on routes in San Francisco, California. Thus, not only are they commonly supervised, but they work in close proximity. (Tr. 53:21-23, 91:2-91:6).

C. The Smallest Appropriate Unit In The Employer's San Leandro Node Is A Unit Of Employees That Includes Rivera.

Numerous Board decisions have established the principle that where an employer maintains an integrated process, and there is no history of bargaining in the facility, the smallest appropriate unit is the unit that encompasses all of the employees actively involved in the process. The only exception permitted by the Board arises in cases where the union petitions for a craft unit, or for a unit of maintenance employees who are readily identifiable as a group whose similarity of functions and skills create a community of interest that warrants separate representation. This case does not involve a petition for such a unit.

In *Allied Gear & Machine Co.*, 250 NLRB 679, 680 (1980), the Board held that a unit comprised solely of the employer's "pattern and plate" department was inappropriate, because the employees in this department did not "possess a sufficiently separate community of interest from other production and maintenance workers to warrant separate representation." The Board emphasized that the pattern and plate department performed work which was "closely integrated" with activities performed by the employer's other departments. *Id.* at 681. The fact that the pattern and plate department was separately supervised (as are the various departments here) was not enough to overcome the impact of the functional integration of the departments. See *id.* As a result, the Board found that the only appropriate unit included employees involved in the integrated process. *Id.*

Similarly, in *The Boeing Co.*, 337 NLRB 152, 152 (2001), the Board held that "the smallest appropriate unit" must include all of the employees involved in the integrated production and maintenance process at the employer's facility. In that case, the union petitioned for a unit consisting solely of a single department of recovery and modification (RAM) employees. *Id.* This department worked in conjunction with the employer's engine support equipment (ESE) group and repair of repairables (ROR) groups to repair aircraft engines for the Air Force. *Id.* In holding that the petitioned-for unit was inappropriate, the Board relied on the fact that the work of the RAM employees was "highly integrated" with that of the ESE and ROR groups. *Id.* at 153.

More recently, in *Publix*, the Board held that the smallest appropriate unit was a unit encompassing the entire production and maintenance process. *Publix*, 343 NLRB at 1023. The employer in *Publix* was a grocery distribution facility. The union originally petitioned to represent three separate units at the facility: two units of warehouse distribution employees, and a unit of fluid processing ("milk plant") employees. *Id.* at 1024. The Regional Director found that two separate units were appropriate: a unit of all of the distribution employees, and a unit consisting of the milk plant employees. *Id.* The

Board disagreed. In holding that the milk plant employees did not possess a separate community of interest from the other employees at the distribution center, and that an overall production and maintenance unit was the smallest appropriate unit, the Board relied on the fact that a number of the employees in the distribution unit sought by the union performed duties that were “functionally integrated with all aspects of the plant,” including the milk plant. *Id.*

In *Buckhorn, Inc.*, 343 NLRB 201 (2004), the Board found that a separate unit of maintenance employees in a plastic manufacturing plant was not appropriate, as it did not constitute a distinct, homogenous group of employees that would warrant a separate unit. 343 NLRB at 203. The Board focused on the “highly integrated” nature of the manufacturing process, and found that the only appropriate unit included all production employees as well as maintenance employees. *Id.*; see also *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 (2004) (holding that a unit consisting of maintenance employees was not an appropriate unit, noting that, because of the highly integrated nature of the employer’s manufacturing process, “[t]he production and maintenance employees share a broad community of interest that outweighs any nominal community of interest that may be enjoyed solely by the petitioned-for employees.”).

Furthermore, the Board has found that a facility-wide process unit was the smallest appropriate unit where the employer maintained a highly integrated manufacturing operation. In *Monsanto Co.*, 183 NLRB 415, 415 (1970), the employer was engaged in the production of silicon semiconductor material, and employed multiple steps and highly sophisticated equipment in its production process. The union petitioned for a unit consisting solely of the employer’s maintenance classifications. *Id.* The Board held that a separate unit of maintenance employees was inappropriate as “any separate community of interest which the maintenance employees might enjoy has been largely submerged in the broader community of interest which they share with the production employees.” *Id.* at 416.


As these cases illustrate, where the employer's enterprise is highly integrated -- as it is here -- the Board routinely finds that a unit that includes only a portion of an enterprise is inappropriate. As a result, the smallest appropriate unit is a unit that encompasses all of the employees involved in the integrated process. As the Board noted in *Publix*, it is "particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit." *Publix*, 343 NLRB at 1027. Given the facts at issue, the Hearing Officer's Report and Recommendation limiting the appropriate unit to one that excludes Rivera is contrary to Board precedent and cannot stand.

VI. CONCLUSION

In light of the foregoing, the NLRB should reject those portions of the Hearing Officer's Report and Recommendations to which the Employer has excepted. The Union's challenge to the ballot of Rivera should be overruled. In accordance with longstanding Board precedent, the NLRB should determine that the smallest appropriate unit in the Employer's facility is a unit of all employees involved in the process of bringing the Employer's product to market.

The record as a whole leads to one inevitable conclusion: RSRs, swing representatives, warehouse associates, and cooler technicians do not share a separate and distinct community of interest from Rivera. In fact, RSRs share a greater community of interest with merchandisers than they do with warehouse associates and/or cooler technicians. In sum, the petitioned-for bargaining unit must include merchandisers, and thus, Rivera's ballot should be counted.

Dated: August 3, 2011

By: 
ROBERT G. HULTENG
LITTLER MENDELSON
Attorneys for Employer
ODWALLA, INC.

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On August 3, 2011, I served the within document(s):

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS

- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document to be sent to the person, Sheila K. Sexton, at the e-mail address on the below service list on the date and at the time stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is rhulteng@littler.com.

Sheila K. Sexton, Esq.
Beeson, Tayer & Bodine
1404 Franklin Street, Fifth Floor
Oakland, CA 94612
Email: ssexton@beesontayer.com

Mr. William A. Baudler
Regional Director
National Labor Relations Board
Oakland Federal Building
1301 Clay Street, Room 300N
Oakland, CA 94612-5211

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery

service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 3, at San Francisco, California.


LINDA K. CAMANIO

Firmwide:103109095.1 068009.1008