SHEILA K. SEXTON, SBN 197608
BEESON, TAYER & BODINE, APC
483 Ninth Street, 2nd Floor
Oakland, CA 94607
Telephone: (510) 625-9700
Facsimile: (510) 625-8275
Email: ssexton@beesontayer.com

Attorneys for Petitioner
Teamsters Local 70

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

TEAMSTERS LOCAL 70, Petitioner, v. ODWALLA, INC., Respondent.	Case No. 32-RC-5821 **PETITIONER'S ANSWERING BRIEF TO THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS**

INTRODUCTION

The Employer, Odwalla, Inc., is in the business of producing, selling and distributing various juice and food products throughout the nation. (Tr. 58.)[1] The parties stipulated to the following bargaining unit:

> All full-time and regular 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, all other employees, guards and supervisors as defined in the Act.

[1] References to the reporter's transcript are designated as "Tr"; the Employer's brief in support of its exceptions is referred to as "Er. Br."

The parties could not agree on the appropriateness of including the merchandiser employees in the bargaining unit, with the Employer contending that they should be included and the Union contending to the contrary.

The election was conducted on June 3, 2011, with 15 votes for the Union and 14 against. The ballots of three voters challenged by the Union were the subject of a hearing held on July 6, 2011 before Hearing Officer Gary M. Connaughton. Pertinent here, the Hearing Officer found that the challenge to merchandiser Roberto Rivera's ballot should be sustained because the merchandiser classification did not share such a strong community of interest with the other classifications in the petitioned-for unit that their inclusion was required. The Employer's Exceptions and supporting brief fail to provide a basis for overturning the Hearing Officer's is legally and factually well-grounded conclusion.

THE UNION IS NOT REQUIRED TO SEEK THE MOST APPROPRIATE OR MOST COMPREHENSIVE UNIT, BUT ONLY *AN* APPROPRIATE UNIT; THE PETITIONED-FOR BARGAINING UNIT THAT EXCLUDES THE EMPLOYER'S MERCHANDISERS IS AN APPROPRIATE UNIT

In unit determination questions, the Board first considers the Union's petition and whether that unit is appropriate. *Boeing Co.*, 337 NLRB 152, 153 (2001); *P. J. Dick Contracting*, 290 NLRB 150, 151 (1988). It is well settled that the Board requires a Union to seek not the most appropriate or comprehensive unit, but only *an* appropriate unit. *Overnite Trans. Co.*, 322 NLRB NLRB 347 (1996). Indeed, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001). The central test is whether the workers share a "community of interest," that is, "substantial mutual interests in wages, hours and other conditions of employment." *Allied Chemical & Alkali Workers*, 404 U.S. 157, 172 (1971). The Board considers several factors, but there are no *per se* rules to resolve unit determinations. The desires of the petitioner are a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228 (1964).

In the instant case, the Hearing Officer concluded that the merchandisers did not have a sufficient community of interest with the classifications in the stipulated bargaining unit, so as to require their inclusion in the unit. The Decision was supported by facts establishing that the

merchandisers have little to no interaction or interchange with the stipulated bargaining unit, as well as other factors, such as that they drive their own cars, instead of Company vehicles and are not required to comply with DOT requirements, unlike the route sales representatives. Significantly, there is no history of collective bargaining in the Employer's facility; nor is there another labor organization seeking to represent a more comprehensive unit. Thus, the sole issue to be determined is whether or not the unit requested by the Petitioner is an appropriate one. Here, a unit excluding merchandisers is clearly appropriate and it simply does not matter whether a larger unit is similarly or more appropriate. *Lonergan*, 194 NLRB 742 (1972), *citing Tallahassee Coca-Cola Bottling Co.*, 409 F.2d 201.

Belying the Employer's assertion that the merchandisers are an "indispensable part of node[2] operations," the Employer's organizational charts fail to list the merchandiser classification, though they do list the stipulated classifications. (*See*, Er. Br., p. 4; Tr. 95-96; Un. Exhs. 1, 2.) The fact is that the Company uses many temporary agency workers, and only a handful of employees, to perform the merchandising work. (Tr. 104.) Indeed, Roberto Rivera, the merchandiser whose ballot is at issue herein, has worked as a merchandiser for ten years, but only the last one year was as an Odwalla employee. (Tr. 64-65, 91-92.) For his first nine years, Mr. Rivera worked through a temporary agency. (*Id*.) There was no evidence that the stipulated bargaining unit is ever sourced through temporary agencies prior to being directly hired by the Employer.

The Employer's Exception to the Hearing Officer's findings that the merchandisers have little to no interaction or interchange with the stipulated bargaining unit is not supported by the evidence. The only direct evidence on interaction and interchange was proffered by route sales representative ("RSR"), Cary Tanaka, who testified that he was completely unfamiliar with the merchandisers prior to shortly after the election when he heard Rivera's name at a mandatory monthly meeting. (Tr. 27, 47.) Tanaka has never directly interacted with any merchandiser. There is simply no interaction whatsoever. The Employer presented no direct testimony or evidence to rebut Tanaka. Notably,

[2] The term "node" is used by the Employer to refer to its individual facilities, such as the one at issue herein.

neither Rivera nor any other merchandisers attend these mandatory meetings that are attended by all other members of the stipulated bargaining unit. (Tr. 27-28, 80, 207-08.)

The Employer's assertion in its Exceptions Brief that "one of Rivera's primary job duties is to communicate with RSRs and managers" is not supported by the cited testimony. (*See*, Er. Br., p. 4.) Instead, the manager testified that Rivera communicates *either* with a manager or a route sales representative. (Tr. 67:22-68:6.) This generalized, indirect testimony must be squared with the direct testimony of RSR Tanaka, whose unrebutted testimony established that the merchandisers do *not* communicate with the RSRs.

In *Publix Supermarkets, Inc.*, cited by the Employer in its brief, the Board found functional integration based on facts showing "a significant amount of work-related contact among employees" and "a significant number of permanent transfers" between classifications. *See*, 343 NLRB 1023, 1025-26 (2004). The instant case, to the contrary, evidences a near complete absence of any interaction and interchange between the merchandisers and the stipulated bargaining unit.

The Employer asserts that the merchandisers share a community of interest with the RSRs because the merchandisers' work can potentially impact the RSR's income. It is true that various employee classifications will frequently impact the income of other classifications, particularly when pay is by commission. For example, the product labeling work of the Company's graphic artist can impact how much product is sold, but this does not mean that the graphic artist has a community of interest with the route sales representative in any sense relevant to the instant inquiry. Instead, the salient inquiry is whether there is true integration of two classifications.

The evidence in the instant case supports a finding that the two classifications lack any community of interest. First, merchandisers do not participate in the same bonus plan as the RSRs. (Tr. 65-66.) Instead, the merchandisers are included in the bonus plan applicable to warehouse employees. (Tr. 65-66.) If there were truly functional integration between the RSRs and the merchandisers, it is reasonable to assume that they would be part of the same bonus pool. Also - unlike the RSRs - the merchandisers receive only hourly pay, with no commission structured into their wages. (Tr. 66, 100.) The salience of the fact that merchandisers share some terms and conditions of employment with the stipulated bargaining unit is undermined by the fact that the

similar terms and conditions are applied to all non-exempt Odwalla employees nation-wide. (Tr. 197, 215, 226.)

The absence of functional integration is also shown by the following facts:

- Merchandisers drive their own personal, non-refrigerated vehicles, which means that they are unable to carry any of the Company's juices for delivery. (Tr. 76-77.) RSRs make deliveries in the Company's fleet of refrigerated, 14-foot vehicles. (Tr. 76, 108.)
- The RSRs are required to be DOT compliant, while the merchandisers do not face such a requirement. (Tr. 100.)
- Merchandisers have never served as back-up for either RSRs or swing reps.[3] (Tr. 109-10.)
- There is no requirement that merchandisers come to the node. (Tr. 111.) Two of the merchandisers "never" come to the facility. (*Id.*) RSR's and swing reps are required to come to the facility every working day.
- The San Leandro node has monthly meetings that are attended by the RSRs and the swing reps, with the warehouse associates and cooler technicians attending for the first part of the meeting. No merchandisers are required to attend these meetings, despite that Mr. Neu testified that the safety portion of the meeting is a nationwide Company requirement. (Tr. 27-28, 80, 207-08.)

The law is clear that the Petitioner is not required to petition for the most appropriate unit, but only *an* appropriate unit. The evidence is clear that merchandisers are not so functionally integrated with the stipulated bargaining unit that the only appropriate unit is one that includes them. Consequently, the Union's challenge to Roberto Rivera's ballot should be upheld and the merchandisers should be excluded from the bargaining unit.

[3] The Employer's manager, Somer Rodden, testified that a couple of RSR's or swing reps have relieved merchandisers on a few occasions, but it was only voluntary, never forced. (Tr. 114.)

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Regional Director uphold the Hearing Officer's Report and Recommendations on Challenged Ballots.

Dated: August 10, 2011

BEESON, TAYER & BODINE, APC

By: /s/Sheila K. Sexton
SHEILA K. SEXTON
Attorneys for Teamsters Local 70

PROOF OF SERVICE

NATIONAL LABOR RELATIONS BOARD

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Ross House, 2nd Floor, 483 Ninth Street, Oakland, CA 94607. On this day, I served the foregoing Document(s):

PETITIONER'S OBJECTIONS TO THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Robert G. Hulteng, Esq.
Littler Mendelson, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108-2693
Fax No.: (415) 399-8490
Email: rhulteng@littler.com

Mark W. Schneider, Esq.
Littler Mendelson, P.C.
80 South 8th Street, Suite 300
Minneapolis, MN 55402
Fax No.: (612) 630-9626
Email: MSchneider@littler.com

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, August 10, 2011.

/s/Esther Aviva
Secretary to Sheila K. Sexton