UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region Twenty-One

Frutarom USA Employer and Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters Petitioner	Case 21-RC-067799

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all full-time and regular part-time hourly production employees, including quality control employees, hourly research and development employees, hourly maintenance employees, and hourly shipping and receiving employees employed by the Employer at its 790 East Harrison Street, Corona, California facility; excluding all other employees, salaried research and development employees, customer service employees, temporary employees, professional employees, office clerical employees, guards and supervisors as defined in the Act, as amended. The Employer agrees that the unit sought by Petitioner is appropriate except that it maintains that the hourly research and development employees and quality control employees should be excluded from the unit.

Based on the record and relevant Board law, I find that the hourly research and development and quality control employees should be excluded from the unit.[1]

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer, Frutarom USA**,** is a New Jersey corporation engaged in the marketing, sales and production of dietary supplements, functional foods and food flavors at its Corona, California facility. During the past 12 months, a representative period, the Employer derived gross revenues in excess of $500,000 and purchased and received at its Corona facility goods valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, 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.

[1] Initially in dispute was the eligibility of the driver. However, the Employer argued and presented evidence that the current driver is a temporary employee, and that it did not employ a permanent employee in the classification. As the hearing progressed, Petitioner agreed that the current driver is a temporary employee. For reasons that are unclear to me, while the Employer argued that because the driver was temporary, therefore the driver classification should not be included in the unit, it also argued that the driver should be specifically excluded from the unit. Petitioner then stipulated to the exclusion of the driver. In view of the testimony, I decline to either include or exclude the driver classification because there are currently no permanent employees in the position. However, since the record clearly establishes that the current driver is a temporary employee, he is not eligible to vote.

Additionally, the Employer contends that the petition should be dismissed because before any union can file a petition it *must* request voluntary recognition from the involved employer. The Employer supports this contention by pointing to the fact that Box 7A on the Board's petition form asks whether unions have requested recognition. Further, the Employer points to the fact that Petitioner in this matter stipulated that it did not request recognition prior to filing this petition. I know of no Board law that supports the Employer's claim and I reject it.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. 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.

Board Law

When determining an appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time, it creates the context within which the process of collective bargaining must function. Therefore, each unit determination must foster efficient and stable collective bargaining. *Gustave Fisher, Inc*., 256 NLRB 1069 (1981). On the other hand, the Board has also made clear that the unit sought for collective bargaining need only be an appropriate unit. Thus, the unit sought need not be the ultimate, or the only, or even the most appropriate unit. *Overnite Transportation Co*., 322 NLRB 723, at 723 (1996). As a result, in deciding the appropriate unit, the Board first considers whether the unit sought in a petition is appropriate. Id.

When deciding whether the unit sought in a petition is appropriate, the Board focuses on whether the employees share a "community of interest." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). In turn, when deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the

Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc*., 338 NLRB 123 (2002). Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc*., supra at fn. 5. With regard to organization of the plant, the Board has made clear that it will not approve of fractured units – that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine,* 327 NLRB 556 (1999). However, *all* relevant factors must be weighed in determining community of interest.

The Employer's Operation and Supervisory Hierarchy

The Employer's Corona operation consists of one two-story building. On the first level are its manufacturing, warehouse and laboratory functions. The Employer's administrative, office clerical and managerial functions are on the second level.

Peter McLaughlin, Vice President of Operations, is Acting Plant Manager for the Corona facility. As Vice President of Operations, McLaughlin is responsible for all manufacturing facilities of the Employer located in the Americas, as well as engineering, quality control, quality assurance and materials support groups. Corporate offices are located in New Bergen, New Jersey. As Acting Plant Manager, McLaughlin supervises the production and maintenance employees. He has been at the Corona facility every other week to every three weeks in 2011.

Reporting to McLaughlin are lead operators in power blending, spray drying, liquid flavors, warehouse and maintenance – all areas that both parties agree are in the unit. The roles of the lead operators are not further developed in the record. In

addition, the Employer employs a material manager, who sets production schedules, who ensures inventory is correct, and who orders and purchases material.

Also reporting to McLaughlin is Jay Harris. Harris supervises all research and development employees and the quality control employees. It is some of the employees supervised by Harris who are in dispute in this matter.

The Employer works closely with its customers in the development of products. The Employer's sales department brings in leads; the Employer's research and development department develops flavors and then sends the flavors to customers for further testing; when the customer approves the flavor, the Employer's production employees manufacture and provide support services for manufacturing; and the manufactured product is tested by the quality control employee prior to delivery of the product to the customer. The product is delivered to customers by common carrier, Federal Express, or the driver in the employ of the Employer.

The Employer's Production Process

The Employer's production process is not continuous. Rather production employees manufacture a batch, then clean out the equipment and start a new batch. The manufacturing area consists of a number of small manufacturing rooms, with the warehouse area in the middle. Equipment used by machine operators includes mixing kettles, homogenizers, spray dryers, blenders, roasters, extractors and milling. The warehouse employees load and unload trucks – both receiving raw materials and shipping out product. The one maintenance employee maintains and repairs equipment, runs the water treatment plants, and is involved in designing projects.

The Employer's production, warehouse and maintenance employees are hourly paid and keep track of their hours worked. All employees – including managers and the employees in dispute – use the same lunchroom. While not entirely clear, it appears that at least all employees (if not managers) share the same benefits.

The Employer's Research and Development Area

The Employer's R&D operation is physically separate from the production area. The R&D area consists of four rooms. There are a total of four R&D employees – two are salaried and two are hourly paid. Petitioner seeks to include in the unit the two hourly paid R&D employees.

Three of the four R&D employees have degrees in science or related fields, and they are "professional flavorists." Their job is to develop new flavors (or lower cost flavors) of Frutarom. In doing so they work closely with customers – in fact sometimes customers sit next to the flavorists as they experiment. On the other hand, production employees have no work-related contact with customers. These three employees are assigned desks with computers. They also utilize chromatographs and meters, and they work with chemicals. While one of the flavorists is hourly paid, her job is no different than the salaried flavorists. According to the Employer, she will eventually be promoted and made a salaried employee.

The fourth R&D employee is Isaac Cervantes. He is hourly paid. Unlike the other three R&D employees he does not have a degree. Cervantes assists Jay Harris, obtains samples, and makes flavors once they are formulated. He cannot, however, formulate flavors.

Production employees never perform the work of R&D employees, and R&D employees never perform the work of production employees. There is minimal interaction between other unit employees and R&D employees. Generally R&D employees work only in the lab area, although one of the salaried R&D employees goes to the production area to oversee the initial batches of new formulas. The Employer maintains that the R&D employees are paid significantly more than other unit employees (other than the maintenance employee) although the testimony in this regard is conclusionary.

The Employer's Quality Control Area

The Employer employs one full-time and one part-time quality control technicians. The part-time technician spends roughly 20 hours each week in the quality control area, and the other 20 hours as a warehouse employee. The full-time technician is Mari Carmen Villarreal. Her sole job is to test product to determine whether it meets the specifications of the formulas. In doing so she tastes product and runs tests on it. Samples are brought to Villarreal by production employees when batches are completed, along with a card identifying the product. Villarreal can pass or reject batches. If Villarrreal rejects a batch, then Jay Harris and R&D employees get involved and attempt to salvage the product by adding ingredients. If it cannot be salvaged, the product is destroyed.

Villarreall rarely visits the production area. She never performs the work of production employees, and they never perform her work. She receives training and is required to demonstrate proficiency in her job every two years. She is evaluated and subject to discipline by Harris. Villarreall is hourly paid.

The part-time quality control technician is Fermin Mata. He tests raw material coming into the plant to ensure it meets the Employer's standards. He performs his work in the quality control lab, which is across the hallway from the R&D area. He is supervised by Harris when performing this work, and is hourly paid.

Application of Board Law to the Facts of this Case

Organization of the Plant

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. Thus, for example, generally the Board would not approve a unit consisting of some, but not all employees, of a particular department. See, *Check Printers, Inc*. 205 NLRB 33 (1973). In this case, the fact that Petitioner is seeking to represent two of the four R&D employees is arbitrary in that it does not conform to an administrative grouping**.** This is particularly evident insofar as Petitioner seeks to represent the hourly-paid "professional flavorist" whose job is exactly the same as the two salaried "professional flavorists." *Seaboard Marine, Ltd*., supra.

Interchangeability and Contact Among Employees

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange "may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills." *Hilton Hotel Corp*., 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single

bargaining unit. *Executive Resource Associates*, 301 NLRB 400, 401 (1991), citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1081). In this case, the record fails to reveal *any* evidence of employee interchange.

Also relevant for consideration with regard to interchangeability is whether there are permanent transfers between employees in the unit sought by a union and employees an employer seeks to add to the unit. However, the existence of permanent transfers is not as important as evidence of temporary interchange. *Hilton Hotel Corp.*, supra. In this matter the record reveals no evidence of permanent transfers between the classifications that the parties agree are in the unit and the classifications in dispute.

Finally, also relevant is the amount of work-related contact among employees, including whether they work beside one another. Thus, it is important to examine the amount of contact unit employees have with disputed employees. See, for example, *Casino Aztar*, 349 NLRB 603, 605-606 (2007). There is little evidence of work-related contact between the two groups of employees. The only evidence of work-related contact between unit employees and R&D employees involves a salaried R&D employee (whom Petitioner does not seek to represent). On the other hand, it appears that the full-time quality control employee has regular contact with production employees – albeit limited to when the production employees bring batches to her for testing.

Common Supervision

Another community-of-interest factor is whether the employees in dispute are commonly supervised. In examining supervision, most important is the identity of

employees' supervisors who have the authority to hire, fire or discipline employees (or effectively recommend those actions) or to supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work, and providing guidance on a day-to-day basis. *Executive Resources Associates*, supra at 402; *NCR Corporation*, 236 NLRB 215 (1978). Common supervision weighs in favor of placing the employees in dispute in one unit. However, the fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact or functional integration. *United Operations*, supra at 125. Similarly, the fact that two groups of employees are separately supervised weighs in favor of finding against their inclusion in the same unit. However, separate supervision does not mandate separate units. *Casino Aztar,* supra at 607, fn. 11. Rather, more important is the degree of interchange, contact and functional integration. Id. at 607.

In this case the record reveals that the employees in dispute are separately supervised from employees that the parties agree are in the unit. Significantly, all of the employees in dispute are supervised by the same person – Jay Harris.

The Nature of Employee Skills and Functions

This factor examines whether disputed employees can be distinguished from one another on the basis of job functions, duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew support a finding of similarity of functions.

Evidence that disputed employees have similar requirements to obtain employment, that they have similar job descriptions or licensure requirements, that they participate in the same Employer training programs, and/or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar,* 349 NLRB 603 (2007); *J.C. Penney Company, Inc*., 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992). Where there is also evidence of similar terms and conditions of employment and some functional integration, evidence of similar skills and functions can lead to a conclusion that disputed employees must be in the same unit, in spite of lack of common supervision or evidence of interchange. *Phoenician*, supra.

In this case the record reveals that employees in the unit agreed upon by the parties have separate job functions, duties and skills from the disputed employees. With regard to the hourly paid flavorist, the record reveals that she has a degree, that she works closely with customers and uses different equipment, and that the Employer considers her a professional or technical employee. With regard to the full-time quality control employee, the record reveals that she is subject to training and testing of skills every two years, that she uses different skills and testing in performing her job, and that her job never overlaps with unit employees.

Degree of Functional Integration

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. Thus, for example, functional integration exists when unit employees and additional disputed employees work on different phases of the same product or, as a group, provides a service.

Another example of functional integration is when the Employer's work flow involves both employees in the unit sought by a union and employees in dispute. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Transerv Systems*, 311 NLRB 766 (1993). On the other hand, if functional integration does not result in contact between employees in the unit sought by a union and employees an employer contends must be in the unit, the existence of functional integration has less weight.

Petitioner argues that the R&D employees, production employees, and quality control employees are functionally integrated. Petitioner is correct insofar as each group of employees works on different phases of the same product. However, as noted above, that functional integration does not result in significant contact between production employees and disputed employees.

Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion (for example hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies, and other terms of employment that might be described in an employee handbook. However, the fact that employees share common wage ranges and benefits, or are subject to common work rules, does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically separate area. *Bradley Steel, Inc*., 342 NLRB 215 (2004); *Overnite Transportation Company*, 322 NLRB 347 (1996). Similarly,

sharing a common personnel system for hiring, background checks and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. *American Security Corporation*, 221 NLRB 1145 (1996).

In the instant case the record reveals that production employees and the disputed employees share common benefits. However, some terms and conditions of employment differ simply because they work in different locations, are separately supervised, and have different skills.

Conclusion

In determining that the unit should exclude all R&D and the quality control employees[2], I have carefully weighed the community-of-interest factors cited in *United Operations*, supra. Other than functional integration, which exists because all of the employees work on different phases of the same product, and some similarity in terms and conditions of employment because they share the same benefits, all other community-of-interest factors point to a conclusion that R&D employees and quality control employees do not

[2] I emphasize that the part-time quality control employee may be eligible to vote as a dual-function employee. His status as an eligible voter as a dual-function employee was neither litigated nor argued by the parties.

share a community of interest with production, warehouse and maintenance employees.[3]

DIRECTION OF ELECTION

An election by secret ballot will be conducted by Region 21 among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently by Region 21, subject to the Board's Rules and Regulations. The appropriate collective-bargaining unit is:

> All full-time and regular part-time hourly production employees, hourly maintenance employees, and hourly shipping and receiving employees employed by the Employer at its 790 East Harrison Street, Corona, California facility; excluding all other employees, quality control employees, research and development employees, customer service employees, temporary employees, professional employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

A. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. 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. Those in the military services of the United States may vote if they

[3] The Employer also contends that the R&D employees are either technical or professional employees, and that the quality control employees are technical employees. Because of my conclusion that these employees do not share a community of interest with other employees sought by Petitioner, I do not reach any conclusions on their professional or technical status.

appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4]

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters.**

B. Employer to Submit List of Eligible Voters

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

[4] To ensure that all eligible voters 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 that may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with Region 21 within seven (7) days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). Region 21 shall make the list available to all parties to the election. In order to be timely filed, this list must be received in Region 21's Regional Office, 888 South Figueroa Street, Los Angeles, California, 90017-5449, on or before close of business **December 5, 2011**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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. This request must be received by the Board in Washington by **December 12, 2011**. *The request may be filed electronically through the Agency's website, www.nlrb.gov,*[5] *but may not be filed by facsimile.*

Signed at Minneapolis, Minnesota, this 28th day of November, 2011.

/s/ Marlin O. Osthus

Marlin O. Osthus, Acting Regional Director[6]
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[5] To file the request for review electronically, go to www.nlrb.gov, select ***File Case Documents***, enter the NLRB Case Number, and follow the detailed instructions.

[6] This case was transferred to me, pursuant to the interregional assistance program, for purposes of issuing a decision only. All further processing of this case, including scheduling and conducting an election, will be performed by Region 21.