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Odwalla, Inc. and Teamsters Local 70, International Brotherhood of Teamsters, Petitioner. Case 32–RC–5821

December 9, 2011

DECISION AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The National Labor Relations Board has considered determinative challenges in an election held June 3, 2011,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for and 14 against the Petitioner, with 3 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations² only to the extent consistent with this Decision and Direction.

Background

The Employer produces and sells juice drinks and fruit bars throughout the United States. At issue in this case is its San Leandro, California facility, consisting of two adjoining buildings: a distribution center (which the Employer refers to as a "node"), from which it sells and delivers its products to stores throughout the San Francisco Bay Area, and a divisional refurbishment center, at which it repairs the coolers in which the Employer's products are kept.³ At the time of the election, the facility employed about 26 route service representatives (RSRs), who are essentially sales and delivery drivers; an unspecified number of swing representatives, or "swing reps,"⁴ who work as relief drivers and warehouse fill-ins as needed; 3 warehouse associates; 4 cooler technicians; and 5 merchandisers. Three of the cooler technicians worked at or out of the refurbishment center, and the

merchandisers worked mainly away from the facility;⁵ all other employees worked at or out of the node.

After the Union filed an election petition, the parties stipulated to an election in a unit that included "[a]ll 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."⁶ Because the parties could not agree on whether the merchandisers should be included, with the Union taking the position that they should be included and the Employer that they should be excluded, the parties stipulated that the merchandiser employees could vote subject to challenge.⁷

During the election, the Union challenged three ballots: (1) warehouse associate Charles Jones, who the Union alleged was a supervisor; (2) refurbishment center cooler technician Kenneth Ignatowicz, who it claimed was not employed at the node; and (3) merchandiser Roberto Rivera, consistent with the stipulated election agreement.⁸ In addition, both parties filed objections to the election. The Regional Director, recognizing that resolution of the determinative challenged ballots would likely moot one party's objections, held the objections in abeyance and ordered that a hearing be held to address the challenged ballots.

The hearing officer overruled the challenges as to Jones and Ignatowicz, finding that Jones was not a supervisor and that the parties intended to include Ignatowicz and the other refurbishment center cooler technicians in the unit, despite the stipulation's reference to the address of the node only. The hearing officer sustained the challenge to Rivera's ballot, finding that the merchandisers, as a group, lacked a sufficient community of interest with the unit employees.

Only the resolution of Rivera's eligibility and the underlying analysis of the merchandisers' status were accepted to; thus, only these issues are before us. Applying our recent decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), we conclude that the merchandisers share an overwhelming community of interest with the employees the parties

¹ All dates are in 2011 unless otherwise indicated.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the challenges to the ballots of Charles Jones and Kenneth Ignatowicz be overruled and their ballots be opened and counted.

³ The refurbishment center serves a broader geographic area than the node, extending to all of the western United States.

⁴ A full complement of swing reps would be five, but not all positions were filled at the time of the hearing.

⁵ On occasions when certain merchandisers are present in the facility, they work out of the node.

⁶ The address stated in the stipulation is that of the node; the refurbishment center is at 2994 Alvarado Street.

⁷ Additional merchandisers, who were employed through a temporary employment agency, were not eligible to vote. The stipulated unit also expressly excluded "all managerial and administrative employees, salespersons, office clerical employees, and all other employees, guards, and supervisors as defined in the Act."

⁸ It appears that Rivera is the only merchandiser who voted.

agreed should be in the unit, and therefore a unit excluding the merchandisers is not an appropriate unit.⁹

General Facts about the Facility

At the Employer's San Leandro facility, RSRs, who are in the sales department, and merchandisers, who are in the "field operations" department, report to district sales managers (DSMs). Other operations personnel, including the warehouse associates, the node-based cooler technician, and the swing reps,¹⁰ report to Operations Support Manager Tamitha Tomasello. Tomasello and three of the five merchandisers (including Rivera) report to DSM Somer Rodden, who oversees the Employer's San Francisco area. The 2 remaining merchandisers and the other 17 or 18 RSRs report to the other 2 DSMs at the facility, who oversee the East Bay and Peninsula areas.¹¹ Refurbishment center cooler technicians, as explained below, are part of a separate structure with completely separate supervision.

All employees at the facility have the same health and vacation benefits, but they are subject to differing compensation plans, as explained in detail below. Most employees at the node and refurbishment center attend the Employer's monthly safety and sales meetings, but the warehouse associates and cooler technicians stay only for the safety portion of the meetings. Merchandisers do not attend these meetings and are apparently not expected to attend.¹² Cooler technician Ignatowicz does not regularly attend because he is on the road, but his supervisor, Cooler Service Coordinator Joseph Neu, provides him

⁹ Member Hayes agrees that the recommended unit is not appropriate for the reasons discussed *infra* at fn. 29. However, he adheres to his dissenting position in *Specialty Healthcare*, *supra*, slip op. at 15–20, and thus does not rely on that case's holding, which imposes on the proponent of a larger-than-petitioned-for unit the burden of demonstrating that any additional employees sought to be included share an "overwhelming community of interest" with the employees in the petitioned-for unit. See *id.*, slip op. at 12–13.

¹⁰ The Employer's job descriptions identify each of these positions as being in the "delivery operations" department, even though swing reps' primary role is to fill in for RSRs.

¹¹ Rodden and the other DSMs report to the Director of Sales and Operations for Northern California, who is the highest-ranking official at the node.

¹² Rodden testified that Rivera has sometimes attended these meetings, however.

with a document containing the safety-related information discussed in the meetings.¹³

Employee Classifications at Issue

RSRs

RSRs start and end each workday at the node; on average, they spend about 10 percent of their worktime there, during which they mainly perform tasks incident to their store visits, such as loading, unloading, cleaning, and inventorying their trucks; gathering equipment and supplies needed for the route; and ordering product and completing required paperwork. RSRs spend the other 90 percent of their worktime driving refrigerated company trucks on specified routes or at the premises of customers that sell the Employer's product. On those routes, RSRs serve and bill customers; sell, deliver, and rotate product; return expired and unsold product to the node; build and manage displays; and maintain customer relationships. RSRs use the hand-held computers assigned to each route to manage account sales and inventory data, perform inventories, and generate invoices and reports. RSRs must maintain their Department of Transportation (DOT) compliance.¹⁴ RSRs work on weekdays; they begin each day between 3 and 5:30 a.m., and they finish between 9:30 a.m. and 3 p.m., depending on how long it takes to complete the route on a particular day. They are paid an annual base salary¹⁵ plus a 5-percent commission on their sales, with the commission comprising a significant portion of their overall compensation. RSRs are also eligible for bonuses based on their annual review scores, which depend partly on sales-related factors, and they can earn additional sales incentives throughout the year.

Swing Representatives

Swing reps substitute for RSRs on their routes when the RSRs are absent, and they assist RSRs on particularly

¹³ According to Neu, it is "corporate/company policy that each employee must go through a monthly training session on the current safety topic of the month."

¹⁴ According to Rodden, DOT compliance requires that the employee have a physical exam and receive a medical examiner's card. The record contains no further explanation of DOT compliance.

¹⁵ The salary starts at \$18,000 per year and increases based on an RSR's experience.

busy days. As needed, swing reps also work in the warehouse, clean coolers at customer locations, and work on special projects. Swing reps will also sometimes fill in, on a voluntary basis, for absent merchandisers.¹⁶ As Rodden explained, swing reps are similar to merchandisers, in that both are “in the stores when the RSR is not there[,] representing the company at that point[,] working the product[,] and maintaining the relationship.” Swing reps are paid on an hourly basis,¹⁷ and they are eligible for incentives, but the record does not reveal whether they are covered by the RSRs’ incentive program or the operations incentive program (described below) that covers merchandisers, warehouse associates, and the node-based cooler technician.

Merchandisers

Merchandisers are assigned various customer accounts to maintain, which entails driving to customer locations; stocking and rotating product, using excess supplies delivered in advance by RSRs; removing expired and unsold product; building and managing displays; hanging price tags as necessary; maintaining customer relationships; and communicating any service issues to the appropriate RSR or manager. Merchandisers need not be DOT compliant. They work from home and drive their personal vehicles, rather than the company-owned refrigerated trucks driven by RSRs and swing reps.¹⁸ Rivera has occasionally driven a company bulk truck to make a specific delivery, however.¹⁹ Merchandisers, unlike RSRs and swing reps, do not use the hand-held computers assigned to each route; however, Rivera has been trained to use them. Rodden testified that this training, which would position Rivera to fill in for an RSR or swing rep, was motivated by the Employer’s need for “more depth”; however, none of the merchandisers has ever actually been used as a backup RSR or swing rep.²⁰

Merchandisers typically work weekends with some weekday afternoon work: Rivera works Saturday through Wednesday, and the two other merchandisers

¹⁶ Merchandisers fill in for other merchandisers if possible; however, on weekends (when all merchandisers are already scheduled to work), RSRs and swing reps can volunteer to cover an absent merchandiser’s shift. Rodden named three RSRs or swing reps who had each voluntarily substituted for absent merchandisers “over a dozen” times during the prior 3 years. RSRs who do so are paid an hourly wage in addition to their regular RSR pay, while swing reps are paid their regular hourly wage plus applicable overtime.

¹⁷ Their hourly wage is not specified, but Rodden testified that it is within 5 percent of Rivera’s hourly pay.

¹⁸ Merchandisers are reimbursed for their mileage, unlike RSRs and swing reps.

¹⁹ The record does not reflect whether Rivera is DOT compliant.

²⁰ The Employer had planned to use Rivera as a backup swing rep, but it has not needed to do so because a warehouse associate recently transferred to a vacant swing rep position.

reporting to Rodden, Bernardo Xavier and Camilo Malivar, work Thursday through Sunday and Saturdays and Sundays, respectively. According to Rodden, Rivera visits the node “maybe a couple times a month” when he is called on to help with a special project, such as assisting an RSR on an account, completing a physical inventory in the field for a large customer, or delivering pallets to a customer location. Merchandiser Xavier visits the node weekly, and Malivar and the other two merchandisers, Isaac and Myra Molina, who cover the East Bay, never visit at all.²¹ Merchandisers (along with warehouse associates and the node-based cooler technician) are paid on an hourly basis²² and qualify for an operations incentive program based on how the node’s operating expenses compare to the company budget.

Warehouse Associates

Warehouse associates at the node work staggered shifts: one starts at 5:30 a.m.; another starts at 7:30 or 9:30 a.m. depending on the day; and the third starts at 11 a.m.²³ Because of their varied hours, each warehouse associate has somewhat different tasks. All warehouse associates perform such functions as driving forklifts, working with RSRs to load and unload trucks and to verify weekly inventory audits, building pallets for RSRs, operating the baling machine, and keeping the warehouse clean, but one also runs errands, while another uses a hand-held computer to track product transfers within the warehouse²⁴ and fills out paperwork related to returned product. Warehouse associates’ hourly pay and incentive eligibility are comparable to those of merchandisers and the node-based cooler technician.

Node-Based Cooler Technician

One cooler technician, Sam Rosette, works at, and for, the node. That is, Rosette repairs coolers for Bay Area customers on routes served by the node’s RSRs, swing reps, and merchandisers. He performs some repair work at the node but spends approximately 70 percent of his time on the road, picking up and delivering coolers and doing cooler maintenance at customer locations. None-

²¹ The record does not specify why Xavier visits the node weekly, but there is no evidence that his visits are required for performance of his merchandiser duties. Malivar never visits, according to Rodden, because he works at another job on weekdays. Rodden does not supervise the Molinas, but she stated that they cover the East Bay area and never visit the facility.

²² Rodden testified that merchandisers (or at least Rivera), warehouse associates, and the node-based cooler technician are all paid about \$14–\$15 per hour.

²³ The ending times of the warehouse associates’ shifts are not specified, except insofar as the warehouse associate who starts at 11 a.m. “does the operational needs in the evening—late afternoon/evening.”

²⁴ All warehouse associates are trained to perform this task, but at the time of the hearing only Charles Jones was doing so.

theless, like the RSRs, swing reps, and warehouse associates, Rosette is apparently at the node regularly enough to record his worktime by punching a timeclock there. His hours are generally from about 5:30 a.m. to 2 p.m., and his hourly pay and incentive eligibility parallel those of the merchandisers and warehouse associates.

Refurbishment Center Cooler Technicians

Adjoining the node is the Employer's divisional refurbishment center, in which the other cooler technicians work and punch in and out. Two of them, each classified as Cooler Tech I, work Monday through Friday, from 7 a.m. to 3:30 p.m. In contrast, Kenneth Ignatowicz, who is classified as Cooler Tech II, works Tuesday through Saturday, starting between 5 and 6:30 a.m. and working for 8 hours, plus overtime as needed. Ignatowicz is at the facility only 1–2 days per week, during which time he mainly trains the other refurbishment center cooler technicians, tracks inventories, and orders parts. Because Ignatowicz spends 70 percent of his worktime away from the facility, he records his time by faxing a weekly timesheet to the Employer. The refurbishment center cooler technicians are paid by the hour²⁵ and have the same benefits as the node-based employees; however, they are covered by a separate incentive plan that is based on companywide performance. The refurbishment center cooler technicians are separately supervised from the node employees (including the node-based cooler technician), reporting directly to Cooler Service Coordinator Joseph Neu, who is responsible for major cooler repairs in 32 nodes covering the entire western United States.²⁶ The refurbishment center is a separate profit-and-loss center from the node, with a separate function (more significant repairs) and a significantly larger service area. The node and refurbishment center have separate street addresses, as stated above, but there is an opening in the wall between the buildings so that both buildings' employees can access the shared loading dock attached to the refurbishment center. According to RSR Cary Tanaka, his interaction with the refurbishment center cooler technicians primarily consists of exchanging pleasantries. Neu testified that node-based employees sometimes seek out refurbishment center-based cooler technicians for assistance when Rosette (their designated service person) is not available, although this is not supposed to happen.

²⁵ The parties stipulated to the annual base pay of each refurbishment center cooler technician. Based on the stipulations, the employees classified as Cooler Tech I appear to earn about \$18–\$19 per hour, while Ignatowicz earns about \$24 per hour. As a Cooler Tech II, Ignatowicz, unlike his coworkers, is licensed to work with refrigerants.

²⁶ Neu reports to the Employer's national director of sales operations, rather than to any official at the node.

Analysis

The Board's recent decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), set forth the principles that apply in cases like this one, in which a party contends that the smallest appropriate bargaining unit must include additional employees (or job classifications) beyond those in the petitioned-for unit.²⁷ As explained in that decision, the Board first assesses, as in the usual case, whether the petitioned-for unit is an appropriate bargaining unit: the "employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria."²⁸ *Id.*, slip op. at 11 fn. 25; see also *id.*, slip op. at 8–9. If the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an "overwhelming community of interest" with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Id.*, slip op. at 11–13, and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008)). Applying this

²⁷ The fact that this issue arises in the context of Rivera's challenged ballot rather than as a preelection unit determination does not alter the applicability of *Specialty Healthcare*. As the stipulated election agreement makes clear, what is at issue here is the inclusion or exclusion of the merchandisers as a group, not simply of Rivera. Further, while *Specialty Healthcare* refers to the "petitioned-for" unit, here, after the petition was filed, the parties stipulated to a unit (leaving the merchandisers in dispute), the hearing officer subsequently found that both parties had intended to include in the stipulated unit the cooler technicians working in the Employer's adjoining building, and the Union did not except to the finding. The outstanding issue is whether an additional group of employees must be added to the unit sought by the petitioner in order for the unit to be appropriate. This is precisely the issue addressed in *Specialty Healthcare*; that it arises in a somewhat different procedural context does not affect the underlying principles of unit determination. In applying *Specialty Healthcare* to cases like this one, in which the parties stipulated to a unit and the Union has accepted an interpretation of the stipulated unit, we treat the stipulated unit, as construed, as the petitioned-for unit for purposes of the analysis.

²⁸ The Board has held that "the petitioner's desire concerning the unit 'is always a relevant consideration.'" *Specialty Healthcare*, supra, slip op. at 8 (quoting *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964)). Nonetheless, pursuant to *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965), "the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit." *Specialty Healthcare*, supra, slip op. at 9.

Although not relying on *Specialty Healthcare*, supra, Member Hayes agrees that a "[p]etitioner's desire for a particular unit may be considered, [provided that] it does not obviate the need for a demonstration of a community of interests in order to find the unit appropriate for bargaining." See *International Bedding Co.*, 356 NLRB No. 168, slip op. at 3 (2011) (Hayes, dissenting).

framework here, we find that even assuming the employees in the various classifications that form the hearing officer's recommended unit are readily identifiable as a group and share a community of interest, the Employer has carried its burden of proving that the merchandisers share an overwhelming community of interest with the included employees. Accordingly, we find that the recommended unit is not appropriate.²⁹

In *Specialty Healthcare*, supra, slip op. at 13, we explained:

employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a "fractured" unit. A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit. *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). "[T]he Board does not approve fractured units, i.e., combinations of employees that . . . have no rational basis." *Seaboard Marine*, 327 NLRB 556, 556 (1999).

For the reasons we now explain, we find that the unit here, excluding the merchandisers, is a fractured unit. That is, we find that the Employer has carried its burden of proving that there is no rational basis for excluding the merchandisers while including all the other classifications in the unit. Here, none of the Board's traditional community-of-interest factors suggests that all the employees in the recommended unit share a community of interest that the merchandisers do not equally share, such that the community-of-interest factor would reasonably support drawing the unit's boundaries to include the RSRs, swing reps, warehouse associates, and cooler technicians, but *not* the merchandisers. In the language of the District of Columbia Circuit in *Blue Man Vegas, LLC v. NLRB*, supra at 421, which was cited with approval in *Specialty Healthcare*, supra, slip op. at 10, there is "no legitimate basis upon which to exclude" the

²⁹ Member Hayes concurs with his colleagues that the recommended unit constitutes a "fractured unit" and is therefore inappropriate as a matter of law. As noted supra at fn. 9, he adheres to his dissenting position in *Specialty Healthcare*, supra, slip op. at 15, and thus does not rely on that case. Accordingly, he does not regard the mere fact that a petitioned-for unit tracks lines of job classification, department, or function as dispositive of the appropriate-unit analysis. Rather, Member Hayes relies on longstanding precedent holding that a petitioner cannot seek to represent "an arbitrary segment" of an otherwise appropriate unit, *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999), and that "the Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis." *Seaboard Marine*, 327 NLRB 556, 556 (1999). Applying these precedents, Member Hayes agrees that the recommended unit excluding merchandisers is arbitrarily constructed and lacking any rational basis for the reasons discussed below.

merchandisers while at the same time including all the other classifications in the recommended unit.

First, the recommended unit does not track any lines drawn by the Employer, such as classification, department, or function. It is not a classification-based unit because it aggregates varied classifications: RSR, swing rep, warehouse associate, and cooler technician.³⁰ Nor is the recommended unit drawn along departmental lines. It consists of employees in the sales department—RSRs—as well as those in the node's operations department—swing reps, warehouse associates, and the cooler technician. Moreover, as modified by the hearing officer, the recommended unit also includes the three refurbishment center cooler technicians, who are an entirely different—and structurally separate—part of the Employer's business. Finally, the recommended unit is not drawn along functional lines. The merchandisers' functions are very similar to those of the RSRs and swing reps; as Rodden explained, merchandisers' closest analogue among the other classifications are swing reps, because of their common functions. Significantly, the RSRs' and swing reps' functions are much more like the functions of the excluded merchandisers than they are like those of the included warehouse associates and cooler technicians.

The recommended unit is also not structured along lines of supervision. As explained above, RSRs and merchandisers report directly to DSMs, while swing reps, warehouse associates, and the node-based cooler technician report to the operations support manager. The refurbishment center cooler technicians are within an entirely separate supervisory structure, reporting to Cooler Service Coordinator Neu, who reports to the national director of sales operations rather than to anyone at the node. Thus, in regard to supervision as well, the RSRs have more in common with the merchandisers than they do with the swing reps, warehouse associates, and cooler technicians.

Nor is the recommended unit drawn in accordance with methods of compensation. The RSRs receive a base salary, potentially significant commissions, and sales-based bonuses and incentives. The RSRs' compensation scheme is thus fundamentally different from the merchandisers', warehouse associates', and the node-based cooler technician's hourly wages and operations bonus, as well as from the swing reps' hourly wages and unspecified bonus.³¹ The RSRs' compensation scheme is

³⁰ In contrast, the proposed unit in *Specialty Healthcare* was expressly defined by classification: it consisted of all certified nursing assistants.

³¹ Even if the swing reps are covered by the RSRs' bonus program, their compensation differs materially from that of the RSRs: the swing

even more distinct from the refurbishment center cooler technicians' hourly wages and bonus based on companywide performance. The merchandisers are compensated virtually identically to the warehouse associates and the node-based cooler technician, and similarly to the swing reps. Yet the warehouse associates, swing reps, and both types of cooler technicians are included in the recommended unit with the RSRs, while the merchandisers are not.

Indeed, several of the factors that distinguish the RSRs from the merchandisers likewise distinguish the RSRs from all or most of the other employees included in the recommended unit. These include compensation, as discussed above; the use of company-owned trucks and hand-held computers;³² and the requirement of DOT compliance. The RSRs alone would constitute *an* appropriate unit,³³ but the recommended unit includes additional employees who have more in common with the merchandisers than with the RSRs, and who have less in common with the RSRs than the merchandisers do.

Arguably, the recommended unit could be seen as being drawn along lines based on the included employees' work location, given that all employees except the merchandisers are required to spend at least some of their worktime at the facility. But the facts here sharply reduce the significance of this consideration. First, the refurbishment center cooler technicians work in a different building from the other included employees and the two groups do not interact as part of their regular duties.³⁴ Second, and more importantly, the RSRs themselves spend 90 percent of their worktime away from the facility, and during that time, the RSRs are performing

reps receive hourly wages, rather than a salary, and no party claims that they are eligible for additional commissions or sales incentives, as the RSRs are.

³² One warehouse associate does use a hand-held computer to track product transfers within the warehouse, however.

³³ We thus do not agree with the Employer's contention that its operation is so "fully integrated" that only a wall-to-wall unit "that includes all Odwalla employees involved in bringing the Employer's products to market" would be appropriate. We do agree, however, that such a wall-to-wall unit would be *an* appropriate unit.

Member Hayes notes that the Employer's wall-to-wall unit contention is inconsistent with the stipulated election agreement, leaving only the unit status of merchandisers in dispute. He does not pass on whether, absent the stipulation, only a wall-to-wall unit would be appropriate.

³⁴ Although node-based employees sometimes seek repair assistance from the refurbishment center cooler technicians, Neu stated that they have been informed that they are not supposed to do so. As Tanaka testified, the RSRs interact with the refurbishment center cooler technicians primarily by exchanging greetings in passing on the loading dock.

very similar work to that of the merchandisers, in the same off-site locations as the merchandisers. And, since the RSRs start their routes before two of the three warehouse associates arrive and return to the node at widely varying times, their interactions with individual warehouse associates would likely be sporadic at most.³⁵ Moreover, other employees also spend significant portions of their worktime away from the facility: cooler technicians Ignatowicz and Rosette both spend 70 percent of their worktime away from the facility. As a result, Ignatowicz faxes his timesheets to the Employer just as the merchandisers do, and, also like the merchandisers, he rarely attends even the safety-related portion of the monthly meetings.³⁶ Finally, of the five employee merchandisers, two are at the facility fairly regularly:³⁷ Xavier visits every week for unspecified reasons, and Rivera himself visits about twice per month, performing work on special projects such as assisting RSRs. In doing so, Rivera appears to be present at the facility and working in tandem with RSRs to a greater extent than some of the employees included in the recommended unit.

For the reasons discussed above, we conclude that the Employer has carried its burden of proving that the merchandisers share an overwhelming community of interest with the employees in the recommended unit because none of the traditional bases for drawing unit boundaries used by the Board supports excluding the merchandisers while including all the remaining employees.³⁸ Accord-

³⁵ Although warehouse associates sometimes help RSRs with various tasks when the RSRs return to the node after completing their routes, different warehouse associates would be present depending on what time the RSRs returned. In any event, because they spend only 10 percent of their worktime at the facility, the RSRs have limited workplace interaction with *any* other employees in the recommended unit.

³⁶ Ignatowicz receives the meetings' safety lessons in writing; there is no evidence that the merchandisers do so. But this is hardly a basis on which to exclude the merchandisers from the unit. And, in any event, if the safety lessons are mandated for all employees on a companywide basis, as Neu testified they are, it would seem that employee merchandisers may also be receiving the lessons in written form.

³⁷ At least one merchandiser who never visits the facility is precluded from doing so by his work schedule at another job.

³⁸ We emphasize that our conclusion does not rest on the fact that the merchandisers' exclusion would leave a small residual unit. In our view, the merchandisers alone would constitute an appropriate unit and, if the recommended unit had been found appropriate and employees in it had voted to be represented, the merchandisers could also have been added to the existing unit through a self-determination election or by other lawful means. Rather, our conclusion rests on a finding that, given the facts of this case, no rational basis exists that would support drawing the line between included and excluded employees where it was drawn here.

In finding that the recommended unit improperly creates a fractured unit, Member Hayes expresses no opinion on the merits of any potential argument that excluding the merchandisers would create a residual unit.

ingly, we shall direct the Regional Director to open and count Rivera's ballot. Additionally, in any further proceedings in this case, the unit description shall be modified to expressly include the merchandiser classification.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 32 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Roberto Rivera, Charles Jones, and Kenneth Ignatowicz, and thereafter prepare and serve on the parties a revised tally

of ballots and take further appropriate action based on the revised tally.

Dated, Washington, D.C. December 9, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD