

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SEVEN

BREAD OF LIFE, LLC, )  
 )  
 )  
 Employer )  
 )  
 -and- ) Case No. 7-RC-072022  
 )  
 LOCAL 70, BAKERY )  
 CONFECTIONERY, TOBACCO & )  
 GRAIN MILLERS INTERNATIONAL )  
 UNION, AFL-CIO, )  
 )  
 Union )

**REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION**

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The Employer, Bread of Life, LLC (“BOL”), pursuant to National Labor Relations Board (“NLRB” or “Board”) Rules & Regulations Section 102.67, now files its Request for Review of the Acting Regional Director’s Decision and Direction of Election that was issued on February 24, 2012 (the “Decision”).<sup>1</sup>

**I. STATEMENT OF THE CASE**

**A. Introduction.**

The issue in this case is whether a unit composed of the Bakers working in six (6) arbitrarily selected “bakery/cafés” (“cafés”) within the “West Michigan Market” of BOL is an appropriate unit – as sought by the Local 70, Bakery, Confectionery, Tobacco Workers and

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<sup>1</sup> BOL moves that the entire record of the proceeding, including the transcript of testimony and all exhibits, be submitted to the Board for a full and proper review of this case.

Grain Millers International Union (“Union”) – or whether a Bakers-unit composed of all seventeen (17) cafés in BOL’s West Michigan Market is appropriate.

A review of the record evidence and applicable NLRB precedent leaves only one conclusion: Given the strong community of interest that exists among the Bakers group within the entire West Michigan Market and the fact the Union failed to establish the Bakers at the six (6) cafés its seeks to represent enjoy a separate community of interest, the only appropriate unit in this case is one comprised of all BOL Bakers across all West Michigan Market cafés. Because the Acting Regional Director failed to properly apply long-established Board precedent and made findings of fact that are clearly erroneous, BOL respectfully requests that the Board overrule the Acting Regional Director’s Decision, as discussed more fully below.

**B. Procedural Background.**

By its petition, the Union seeks to represent BOL’s full-time and regular part-time bakers, lead bakers, and lead training bakers (“Bakers”) who work in what the Union labels the “I-94 Corridor” district, but excluding all other non-bakery employees, clerks, managers, supervisors, and guards.<sup>2</sup> In reality, the “I-94 Corridor” is a *retail* (not Bakery) management district for BOL that includes the six petitioned-for cafés described as the Kalamazoo, Gull Road, Portage, Battle Creek, Jackson, and St. Joseph locations.

Pursuant to the Union’s petition and the Board’s procedures, a hearing was held on January 25, 2012 to determine the scope of the appropriate unit for collective bargaining. On February 24, 2012, the Acting Regional Director issued his Decision on the petitioned-for unit. In that Decision, the Acting Regional Director concluded, among other things, that a unit consisting of all full-time and regular part-time bakers, lead bakers, and lead training bakers who

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<sup>2</sup> As noted by the Acting Regional Director in his decision, the Parties both agreed that Bakery Training Specialists were not properly included in the unit.

work in BOL's "I-94 Corridor" district is appropriate for bargaining. BOL timely filed this Request for Review and the matter is now before the Board for its decision on the scope of the appropriate unit.

## II. GROUNDS FOR REVIEW

BOL seeks review of the Decision on two separate and distinct grounds, either of which is independently sufficient to warrant reversal of the Decision.

### A. The Acting Regional Director's Decision Marks A Departure From Established Board Precedent.

First, the Acting Regional Director's Decision marks a departure from established, officially reported Board precedent. Indeed, under longstanding Board precedent, a "single-facility unit" is presumptively appropriate. *See J & L Plate, Inc.*, 310 NLRB 429 (1993). When a union petitions for a multi-location bargaining unit, however, the presumption in favor of a single facility unit has no applicability. *See NLRB v. Carson Cable TV*, 795 F.2d 879, 887 (9th Cir. 1986); *Capital Coors Co.*, 309 NLRB 322, 322 fn. 1 (1992). Thus, where, as here, a union petitions for a unit that is greater than a single location, but less than market-wide in scope, it must be established that the "employees in the petitioned-for unit share a community of interest distinct from the employees at the excluded facilities." *Sleepy's Inc.*, 355 NLRB No. 21; 2010 NLRB LEXIS 85, \*10-11 (2010).<sup>3</sup> *See also Bashas', Inc.*, 337 NLRB 710, 711 (2002) ("Evaluating [relevant] factors, we find that a unit limited to the [stores petitioned-for by the union] is an arbitrary grouping of employees inasmuch as *the evidence fails to establish* that the

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<sup>3</sup> While *Sleepy's* is a "2-member" decision, it was never revisited by the Board after it was remanded to the Region. That is, the Board has never overruled this 2-member decision or otherwise indicated it does not constitute valid precedent. Moreover, the Board states on its website that these decisions represent cases "on which [former Members Liebman and Schaumber] could agree, setting aside deadlocked or potentially precedent setting cases for additional Board members." *See* <http://www.nlr.gov/news-media/backgrounders/background-materials-two-member-board-decisions>. In other words, *Sleepy's* and other 2-member Board cases represent the "state of the law." Thus, BOL believes the rationale from *Sleepy's* is instructive in this matter.

employees in the unit share a community of interest distinct from that shared by employees [across the entire market]”) (emphasis added).

Despite this clear standard that is to be used for cases such as this, the Acting Regional Director ignored this precedent and instead relied exclusively on *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83; 2011 NLRB LEXIS 489 (2011) – a case that dealt with the burden of proof in *single-site unit determination cases* where parties dispute what classifications of employees should be included in a unit. 2011 NLRB LEXIS at \*58. Importantly, *Specialty Healthcare* did not deal with – or even mention – a multi-facility unit analysis. *Id.* Thus, that case is inapposite to this matter because the Parties here agreed on what classifications of employees should be included in any unit: the Bakers, and no other employees who work at BOL’s cafés.

**B. The Acting Regional Director’s Decision On – Or Analysis Of – Several Factual Issues Is Clearly Erroneous.**

Second, the Acting Regional Director’s decision on – or analysis of – several factual issues is clearly erroneous. Specifically, the Acting Regional Director failed to adequately consider the following facts when determining that gerrymandering six (6) cafés out of BOL’s West Michigan Market is appropriate:<sup>4</sup>

- The Bakers at *all* the cafés across the West Michigan Market have the same skills, produce the same products, and can fill in for one another at any café within the Market without having to undergo additional training. [Tr., 135-136].<sup>5</sup>

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<sup>4</sup> A more thorough discussion of the facts underlying the Acting Regional Director’s Decision and his erroneous analysis and findings is included *infra*.

<sup>5</sup> Record citations are to the Union’s January 9, 2012 Petition seeking to represent certain of the Employer’s employees (“Petition”), the transcript of the January 25, 2012 hearing (“Tr.”), and exhibits introduced by the Employer at the January 25, 2012 hearing (“ER Ex. \_\_\_\_”), exhibits introduced by the Union at the January 25, 2012 hearing (“Union Ex. \_\_\_\_”), exhibits introduced by the Board at the January 25, 2012 hearing (“Bd. Ex. \_\_\_\_”), and the Acting Regional Director’s February 24, 2012 Decision (“Decision”).

- *All* of the Bakers in the West Michigan Market work the third shift, receive the *same* pay rates, are eligible under a *market-wide* bonus program, and are otherwise subject to the *same* terms and conditions of employment. [Tr., 20-21, 89, 97, 134-136, 137, 201; ER Ex. 1].
- The *same* manager has hired *every* Baker that currently is in the West Michigan Market. [Tr., 127-128].
- There is central control over labor relations policies for *all Bakers* within the West Michigan Market. [Tr., 137].
- All of the Bakery Operations within the West Michigan Market are functionally integrated because they are all overseen by one manager. [Tr., 14-15].
- There are cafés **not** petitioned-for by the Union that actually are closer geographically to several of the petitioned-for cafés than some of the petitioned-for cafés are to one another. [Tr., 173-174; ER Ex 2].
- BOL's management structure for the Bakers in the West Michigan Market is in flux. [Tr., 60].
- There is Baker interchange among the various cafés within the West Michigan Market when needs arise (*e.g.*, absences due to injury, etc.), including interchange across the "retail districts." [Tr., 61, 98, 106-108, 111, 119, 137-138, 150-151]. Furthermore, some Bakers split their shifts between cafés that are in different "retail districts." [Tr., 111].

Moreover, the Acting Regional Director's finding that the six (6) petitioned-for cafés conform to an administrative grouping of BOL is not supported by the record evidence and thus is clearly erroneous. [Tr., 19-20]. Because the Acting Regional Director failed to account for record evidence and made incorrect findings of facts, his Decision is clearly erroneous and must be overruled.

### III. SUMMARY OF THE EVIDENCE

#### A. Overview Of BOL's Operations And The West Michigan Market.

BOL acquired its West Michigan Market cafés in August, 2011 from former Panera Bread franchisee Trigo Bread Company. [Tr., 12]. Prior to purchasing the West Michigan Market cafés, BOL's parent corporation did (and still does) own and operate Panera Bread

franchised cafés throughout Southern California. [Tr., 12, 47, 53, 58, 62]. Since its acquisition of the West Michigan Market, BOL now operates seventeen (17) cafés in Michigan.<sup>6</sup> [Petition 07-RC-072022 (“Petition”); Tr., 11-12, 17, 32; ER Ex. 2]. Each café employs full-time and regular part-time Bakers, Lead Bakers, and Lead Training Bakers – the sole employees at issue in this matter – as well as retail food service associates and other personnel, who are not seeking to be represented in this case. [Tr., 7, 73; Bd. Ex. 2]. All of the cafés provide the *same* bakery items (*e.g.*, bread, cookies, etc.) as well as “ready-to-serve” food items (*e.g.*, sandwiches and soup) to customers for immediate consumption. [Tr., 11, 14, 16, 17, 20, 32, 129-130, 135-136; ER Ex. 6]. In other words, there is no difference among any of the seventeen (17) West Michigan Market cafés in terms of the products they provide. [Tr., 135-136]. Furthermore, when Panera Bread (the franchisor) conducts bakery audits of BOL, it reviews the West Michigan Market in its entirety (*i.e.*, there are no distinct, discrete segments within the market for which it conducts a review). [Tr., 76-79; ER Ex. 9]. There is no collective bargaining history among any of the cafés within the West Michigan Market. [Tr., 9].

**1. The Cafés Comprising The West Michigan Market**

The following seventeen (17) cafés constitute BOL’s West Michigan Market:

- |                    |                      |
|--------------------|----------------------|
| 1) Alpine          | 3150 Alpine Ave.     |
| 2) Battle Creek    | 2810 Capital Ave.    |
| 3) Cascade         | 6080 28th St. SE     |
| 4) Gaines Township | 1699 Marketplace     |
| 5) Grandville      | 32 44th St. SW       |
| 6) Grand Haven     | 1099 S. Beacon Blvd. |

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<sup>6</sup> In addition to the West Michigan Market, BOL also acquired five (5) stores in Ohio, but it has since sold those franchises and thus they are not at issue in this matter. [Tr., 13]. A café in Standale, MI was opened in November 2011. [Tr., 38-39].

- |                   |                                 |
|-------------------|---------------------------------|
| 7) Gull Road      | 5627 Gull Rd.                   |
| 8) Holland        | 3067 West Shore Dr.             |
| 9) Jackson        | 1285 Boardman Rd.               |
| 10) Kalamazoo     | 5119 W. Main                    |
| 11) Kentwood      | 3770 28th St. SE                |
| 12) Knapps Corner | 2044 Celebration Dr.            |
| 13) Muskegon      | 1710 E. Sherman Ave.            |
| 14) Portage       | 5970 S. Westnedge               |
| 15) Rivertown     | Rivertown Mall – 3700 Rivertown |
| 16) Standale      | 4400 Lake Michigan Dr.          |
| 17) St. Joseph    | 3260 Niles Rd.                  |

[ER Ex. 2]. All of the cafés are in the State of Michigan and relatively close in geographic proximity. [*Id.*]. For example, the St. Joseph café is 49.9 miles from the Portage café, and the Gaines Township café is 49.6 miles from the Gull Road café. [Tr., 39-40, 165; ER Ex. 2]. In sum, many of the cafés are within a short driving distance of one another. [Tr., 39-40].

## **2. The Bakery Operations Versus Retail Districts Within BOL**

BOL organizes its West Michigan Bakery Operations and Retail Districts separately and distinctly. [Tr., 7-8, 19-20, 35, 54-55, 57-58, 60, 90]. For instance, the retail-side of the business is broken down into three (3) “districts” of cafés with a District Manager over each district. [Tr., 12, 18, 90]. The District Managers oversee *retail* operations and *retail* personnel within their respective districts. [*Id.*]. The three retail districts in the West Michigan Market are the Lakeshore District (which includes the Grandville, Grand Haven, Holland, Muskegon, and Rivertown cafés), the Grand Rapids District (which includes the Alpine, Cascade, Gaines

Township, Kentwood, Knapps Corner, and Standale cafés), and the I-94 Corridor (which includes the Battle Creek, Gull Road, Jackson, Kalamazoo, Portage, and St. Joseph cafés). [Tr., 19, 33-34]. The districts are fluid in that cafés can be (and are) transferred between the districts because they are arranged based on the skill level of the district managers. [Tr., 19, 38-40]. That is, if a district manager is able to take on more responsibility, then more cafés will be shifted into his/her district and placed under his/her control. [Tr., 19, 38-39]. For example, when the Standale café recently was opened in November 2011, the Muskegon café was transferred from the Grand Rapids to the Lakeshore retail district. [Tr., 38-39]. Geographic considerations play a minor role in district determinations, but some cafés in the retail districts actually are closer to the cafés of another district, such as Gaines Township (Grand Rapids district) being closer to Gull Road (I-94 Corridor) than St. Joseph (I-94 Corridor) to Portage (I-94 Corridor). [Tr., 44, 64; ER Ex. 2]. Thus, the retail districts change based on the addition of cafés and the skill set of the responsible District Manager.

Additionally, there are General Managers (a.k.a. Café Managers), Assistant Managers, and Shift Supervisors below the District Managers at each café, all of whom have some supervisory responsibility over *retail* operations and *retail* employees. [Tr., 18, 34]. However, the District Managers, General Managers, Assistant Managers, and Shift Supervisors, have **no** formal authority or responsibility over the Bakers or the Bakery Operations. [Tr., 18-20, 34-35, 41-42, 57-58, 89-90, 163].

Conversely, there are no “districts” or “districts managers” for the Bakery Operations of BOL. [Tr., 14-15, 19-20, 90, 149].<sup>7</sup> In other words, the Lakeshore, Grand Rapids, and I-94

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<sup>7</sup> While Union witness Dan Wood testified there “always” has been an I-94 Corridor – including for BOL’s Bakery Operations – he has only been with the company for four (4) years so he has no knowledge of operations prior to his arrival. More importantly, as a **non-management** employee, he has no personal knowledge of future plans for BOL’s organizational structure for the West Michigan Market. [Tr., 157]. Wood’s testimony is further undercut by

Corridor retail districts are only administrative groupings with respect to the retail operations and are not applicable to BOL's Bakery Operations; there is no "I-94 Corridor" within the Baking operations. [Tr., 19-20, 90]. BOL Director of Operations Greg Collins confirmed this fact at the hearing as follows:

*Q. Okay. Why don't you describe to Mr. Ray how these retail café districts are set up. I mean, could you just describe to me -- to him, in round terms, how you've divided them up at this point?*

*A. Yeah, they're assigned by, really, ability and skill level. If the current configuration is what you'd like to hear about or --*

*Q. Yeah, let's just talk about that. We'll kind of back up from there.*

*A. Prior to opening our last café, we had a district manager that managed four cafés. That was due to his limited results and ability with those cafés. We opened another café in December and needed to expand responsibilities, so we assigned him a fifth café and gave the other district manager a sixth café. And then we have another district manager that has six cafés, as well.*

*Q. Just describe, you know, in loose terms, geographically, how those are currently broken up?*

*A. Currently, we define them as the Lakeshore area, Grand Rapids area, and I-94 corridor, and we have the three district managers that are assigned to each of those.*

*Q. Now, those retail district managers, do those sync up with how you manage the baking operations in west Michigan?*

*A. No, no, they do not.*

*Q. And why not?*

*A. The retail -- I'm sorry, the baking operations are managed by Rodney Alman. Rodney Alman is kind of like our district manager of baking. You*

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the fact that when BOL's predecessor initially hired former Bakery Training Specialist ("BTS") Trudy Grownin, she was responsible for the Bakery Operations in the current "I-94 Corridor" retail district, but she also oversaw the Holland and Grand Haven cafés (Lakeshore retail district cafés) for approximately four (4) years. [Tr., 84-85]. However, as the West Michigan Market grew along with her skill level, her café assignments changed. [*Id.*]. And now, BOL currently is considering adding a third BTS to its West Michigan Market, which will affect the cafés the other two (2) BTSs oversee. [Tr., 59, 60]. In short, the current BTS café assignments are likely to change with the addition of new cafés and BOL's application of its preferred staffing model for the cafés it recently acquired.

*know, he is responsible for the 43 bakers that we have in the area, just as our district managers are responsible for the teams of managers that they have in each of their cafés.*

[Tr., 19-20].

Thus, for the Bakery Operations, there is one Bakery Market Manager (“BMM”) who hires and oversees all Bakers in the West Michigan Market, a role currently filled by Rodney Alman (“Alman”). [Tr., 14-15, 20, 23, 39, 67, 72, 74, 103, 128, 149].

### **3. Administrative And Organizational Changes Are Underway In The West Michigan Market**

Because BOL just recently acquired the West Michigan Market in August 2011, many administrative changes are planned and being evaluated. [Tr., 53-54, 60-62]. These plans include the opening of new cafés, the reassignment of cafés to different Districts (on the retail side) and to different BTSs (on the Bakery side), and bringing the BOL West Michigan Market into overall alignment with the structure of BOL’s franchises in California. [Tr., 38-39, 40-41, 53-54, 60, 62]. Thus, the West Michigan Market is in a fluid state due to BOL’s recent acquisition of the territory and ongoing evaluation. In sum, because the management structure of the entire West Michigan Market is in flux and historically has changed over time, there are no set, established “administrative groupings” within the Market with respect to the Bakery Operation.

### **4. The BMM Has Hired All Of The Bakers In The West Michigan Market And Has Ultimate Responsibility For All Baking Operations In The Market**

As initially discussed above, Alman is the sole BMM over the entire West Michigan Market. [Tr., 14-15]. As the BMM, Alman has ultimate authority to hire Bakers and, in fact, he personally has hired *all* of the Bakers currently in the West Michigan Market. [Tr., 127-128]. In addition, Alman makes or signs off on all Baker disciplinary decisions in the Market, approves

all schedules for the Bakers across the Market, conducts evaluations for all the Bakers in the Market, and otherwise controls all human resources and labor relations matters for all of the Bakers in the Market. [Tr., 23, 26-27, 31, 41, 52, 65-67, 72, 92, 112-113, 126-127, 134-137; Union Ex. 5]. Thus, the BMM is responsible for the performance of the Bakery Operations throughout the Market. [Tr., 26, 39].

**5. The BTSs Assist The BMM In Overseeing The Market, But The Cafés They Oversee Are Dependent On Their Ability And Skill Level**

Bakery Training Specialists (“BTS”) assist the BMM in overseeing the various cafés, but they do not have the ability to hire bakers or make final disciplinary decisions. There currently is only one BTS working in the West Michigan Market, April Kibby (“Kibby”), with the other BTS position being vacant. [Tr., 15]. Kibby primarily oversees the eleven (11) cafés that comprise the retail districts known as “Lakeshore” and “Grand Rapids,” but she also has worked with the cafés in the retail district known as the “I-94 Corridor.” [Tr., 86-87]. The vacant BTS position currently is being covered by Alman and Kibby, so they are handling the six (6) cafés in the retail district known as the “I-94 Corridor.” [Tr., 159].

The cafés to which BTSs are assigned are dependent on a BTS’s level of skill as well as – to a lesser extent – geographic considerations. [Tr., 54-55]. In other words, BTSs’ café assignments are fluid and can change as they are able to take on more cafés, just like the retail districts. [Tr., 54, 60, 85]. For example, when BOL’s predecessor initially hired former BTS Trudy Grownin, she was responsible for the Bakery Operations in the current “I-94 Corridor” retail district, but she also oversaw the Holland and Grand Haven cafés (Lakeshore retail district cafés) for approximately four (4) years. [Tr., 84-85]. However, as the West Michigan Market grew along with her skill level, her café assignments changed. [*Id.*]. And now, BOL currently is considering adding a third BTS to its West Michigan Market, which will affect the cafés the

other two (2) BTSs oversee. [Tr., 59, 60]. In short, the current BTS café assignments are likely to change with the addition of new cafés and BOL's application of its preferred staffing model for the cafés it recently acquired.

BTSs' duties consist of filling in for Bakers at cafés that are short staffed; training Bakers to ensure they are able to produce baked goods consistent with BOL standards; ensuring equipment is properly maintained and running; and otherwise supporting BMMs in overseeing the bakery operations and Bakers in the Market. [Tr., 11, 14-15, 26-27, 31-32, 93, 103, 126-127, 146-148, 166; ER Ex. 3]. BTSs are salaried positions, in contrast to the hourly Bakers positions, and have different job duties than the Bakers. [Tr., 26, 31, 147-148; ER Ex. 3].

## **6. The Bakers**

There are approximately forty-one (41) Bakers in the West Michigan Market, all of whom have been hired by Alman. [Tr., 128, 155]. Bakers are only responsible for preparing the baked goods to be served the next day and do not have overlapping responsibilities with the retail employees, such as having direct contact with customers. [Tr., 20]. In fact, Bakers work the third shift in order to prepare the baked goods and thus have little to no interaction with the retail employees on a daily basis. [Tr., 20-21, 89]. *All* Bakers at *all* cafés work the third shift and are subject to the *same* pay rates, bonus program, social events, labor relations policies, and all other terms and conditions of employment.<sup>8</sup> [Tr., 20-21, 89, 97, 103, 134-136, 137, 201; ER Ex. 1]. Alman provided the following testimony regarding the uniform terms and conditions of employment for the Bakers across the West Michigan Market:

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<sup>8</sup> In an attempt to downplay the uniformity among all seventeen (17) cafés in the West Michigan Market, Union witness Daniel Wood testified that the schedules for each store are divided among "districts." [Tr., 160-161]. However, this testimony was expressly refuted by the testimony of BMM Rodney Alman where he described how schedules were grouped by administrative convenience (*i.e.*, divided so all schedules could fit on one page). [Tr., 105-106, 116-117; ER Ex. 7].

*HEARING OFFICER RAY: And the same Labor Relations policy applies to all 17 of the stores, not -- there's no difference amongst the Employer's policies when it comes to employee conduct or labor relations, whether it's I-94, Lakeshore, or Grand Rapids; is that correct?*

*THE WITNESS: Yes.*

*HEARING OFFICER RAY: Do all of the bakers have this, regardless of whether they're in the Grand Rapids, Lakeshore, or I-94, do they all have the same opportunities for training or advancement?*

*THE WITNESS: Yes.*

[Tr., 137].

In addition, the duties and skill set required of Bakers are the same across all seventeen (17) cafés in the West Michigan Market. [Tr., 135-136]. In other words, a Baker at *any* café in the West Michigan Market could fill in at any other café within the Market without any additional training. [*Id.*]. Indeed, at the hearing, Alman testified as follows:

*HEARING OFFICER RAY: Okay, all right, thank you. Is it fair to say though that given that things are standardized, that everyone is making the same thing, that a baker from Jackson could leave today and go to Grand Rapids and bake, and there would be no problem? Is that fair to say?*

*THE WITNESS: Other than familiarizing themselves with the surroundings, they would be able to create that bake in both stores or both cafés.*

*HEARING OFFICER RAY: Okay, there wouldn't be any special skill they would need to know outside of what they already know?*

*THE WITNESS: No.*

[*Id.*].

Accordingly, Bakers have been required to fill in at other cafés in the event of an emergency (e.g., vacation, injury, etc.), and some even split their shifts between cafés. [Tr., 61, 98, 106-107, 111, 119, 137-138, 150-151]. When Baker interchange occurs, it includes interchange across cafés in different “retail districts.” [Tr., 106-107, 111, 119, 137-138]. Alman provided testimony on this point:

*Q. And can you just describe to Mr. Ray any situations that you can recall right now where, you know, bakers have been temporarily assigned to cafés, you know, that are outside of these retail districts?*

*A. Marty Kik out of Battle Creek has traveled to Gaines Township, which is Grand Rapids, to fill in a couple of shifts because of an injury.*

*Q. To a baker?*

*A. To a baker? [sic]*

*Q. Okay.*

*A. Gary Clinger has traveled to Gull Road. Gary Clinger is out of Holland, traveled to Gull Road, and I can't remember whether that was sickness or vacation. Becky Jensen, out of RiverTown, has traveled to Gull Road, again, for the same reasons. Gary Clinger*

*Q. Becky's out of RiverTown?*

*A. Out of RiverTown.*

*Q. Okay, sorry. I wasn't listening. My fault.*

*A. Gary Clinger also has taken a position down in St. Joe in the past -- he's out of Holland -- to try to bring that team, you know, to success.*

[Tr., 106]. Mr. Clinger worked in the St. Joseph café for nearly one (1) year before returning to Holland. [Tr., 107]. Tim Butler also has worked temporarily at Gull Road from Kentwood. [Tr., 107-108]. Finally, when a Baker position opens, it is posted across the *entire* West Michigan Market (*i.e.*, not just within “retail districts” or specific cafés). [Tr., 28-29, 67].

**B. The Union Petitions To Represent The Bakers At Only Six (6) Of The Seventeen (17) Cafés In BOL's West Michigan Market.**

The Union petitioned to represent the Bakers at six (6) of BOL's seventeen (17) cafés in the West Michigan Market on January 9, 2012. [Petition]. Contrary to the Union and the Acting Regional Director, BOL does not believe gerrymandering six (6) cafés out of its West Michigan Region Market is appropriate for a bargaining unit. Rather, due to the strong community of interest that exists among all of its Bakers, BOL believes the only appropriate unit in this case is

a Bakers unit comprised of the Bakers from all seventeen (17) of its cafés in the West Michigan Market. [Tr., 7-9]. In sum, the six (6) cafés sought by the union do not share a separate, distinct community of interest and the Acting Regional Director’s Decision must be set aside.

#### IV. ARGUMENT

A. **The Acting Regional Director Failed To Apply The Proper Legal Standard Applicable To Multi-Facility Unit Cases Where A Union Seeks To Represent Employees At More Than One But Less Than All Facilities In A Market.**

The Acting Regional Director’s application of *Specialty Healthcare*, 357 NLRB No. 83, 2011 NLRB LEXIS 489 to this case is clearly erroneous. Under longstanding Board precedent, a “single-facility unit” is presumptively appropriate. *See J & L Plate*, 310 NLRB 429. When a union petitions for a multi-location bargaining unit, however, the presumption in favor of a single facility unit has no applicability. *See Carson Cable TV*, 795 F.2d at 887; *Capital Coors*, 309 NLRB at 322 fn. 1. Thus, where, as here, a union petitions for a unit that is greater than a single location but less than chain-wide in scope, it must be established that the employees in the petitioned-for unit “share a community of interest distinct from the employees at the excluded facilities.” *Sleepy’s Inc.*, 355 NLRB No. 21; 2010 NLRB LEXIS 85, \*10-11. *See also Bashas’, Inc.*, 337 NLRB 710, 711 (2002) (“Evaluating [relevant] factors, we find that a unit limited to the [stores petitioned-for by the union] is an arbitrary grouping of employees inasmuch as the evidence fails to establish that the employees in the unit share a community of interest distinct from that shared by employees [across the entire market]”) (emphasis added).

When evaluating whether evidence establishes a union’s arbitrary selection of multiple sites meets this standard, the Board considers the similarity of employee skills, duties and working conditions; functional integration of business operations, including employee interchange; centralized control of management, supervision and labor relations; whether the petitioned-for unit conforms to an administrative function or organizational grouping of the

employer's operations; geographic cohesiveness and proximity; and collective-bargaining history. *Sleepy's Inc.*, 355 NLRB No. 21; 2010 NLRB LEXIS 85, \*10-11. *See also Bashas'*, 337 NLRB at 711; *Alamo Rent-A-Car*, 330 NLRB 897, 897 (2000). In addition, if an employer frequently changes supervisory assignments or administrative groupings of facilities, then a grouping of facilities based on common supervision does not form a sufficiently stable collection of facilities for collective bargaining purposes and the Board must look for a larger, more stable unit. *Lab. Corp. of America Holdings*, 341 NLRB 1079, 1082 (2004) (“Based on these changes [in management structure] (both past and future), when viewed in the light of the other facts set forth herein, we find that the seven [employees] currently under [a particular supervisor’s] supervision do not constitute a *sufficiently stable* collection of facilities forming a cohesive, coherent unit”) (emphasis added); *Burlington Food Store, Inc.*, 235 NLRB 205, 206 (1978).

Despite this clear, long-standing precedent applicable to cases where a union seeks to represent more than one site but less than an entire market, the Acting Regional Director invoked and exclusively relied upon the Board’s recent decision *Specialty Healthcare*, 357 NLRB No. 83, 2011 NLRB LEXIS 489. *Specialty Healthcare*, however, is not applicable to this case. *Specialty Healthcare* only dealt with the burden of proof in single-site unit determination cases where parties dispute the *classifications of employees who should be included in a unit*. 2011 NLRB LEXIS at \*58. *Specialty Healthcare* did not deal with – or even mention – a multi-facility unit analysis where a union seeks to represent more than one but less than all stores in a market. *Id.*

Furthermore, as of the date of this brief, the Board has not applied the principles set forth in *Specialty Healthcare* to any multi-site unit cases. *Specialty Healthcare* explicitly recognized that it was *not* intended to disturb presumptions and rules in other contexts:

We note that the Board has developed various presumptions and special industry and occupation rules in the course of adjudication. *Our holding today is not intended to disturb any rules applicable only in specific industries other than the rule announced in Park Manor.*

*Id.* at \*55, 56 n29 (emphasis added).

Moreover, the Board specifically stated in *Specialty Healthcare* that “A petitioner cannot fracture a unit, seeking representation in ‘an arbitrary segment’ of what would be an appropriate unit.” *Id.* at \*56. Based on that rationale, *Specialty Healthcare*’s standard as applied by the Acting Regional Director simply is unworkable in this case. The West Michigan Market’s administrative organization historically – and, in fact, currently – is very fluid and subject to change. In 2000, there were two Panera franchised cafés in West Michigan, and now there are seventeen cafés in the Market. [Tr., 12-13]. During this period of growth, Bakery Operations Management changed. [Tr., 15, 38]. BOL now has two café openings specifically planned and expects to open two new cafés within the West Michigan Market each year. [Tr., 39-41]. As a result of the continued expansion of the Market, BTS assignments must be fluid, including at the six petitioned-for cafés. *See, supra*, Fn7 at pgs. 8-9. Allowing the Union to carve out an “arbitrary segment” would tie the hands of BOL and unfairly limit it from implementing market-wide changes in its Bakery Operations.

In addition, with respect to the Bakery Operations, there is only one “market” that is overseen by one BMM. [Tr., 19-20]. That is, all Bakers within the Market are managed as a “whole.” By definition, the Union’s attempt to only represent the *Bakers* at six (6) cafés constitutes an “arbitrary segment” that would fracture the West Michigan Market and such a unit is not proper under *Specialty Healthcare*. *See Odwalla, Inc.*, 357 NLRB No. 132 (2011) (noting *Specialty Healthcare* and finding a “fractured unit” to be inappropriate where, among other things, excluded employees shared common supervision with employees included in the unit).

*Specialty Healthcare* was never meant to apply to multi-facility unit cases such as this where it would result in fracturing a unit and impede the dynamic realities of the retail environment.

Because *Specialty Healthcare* was never meant to apply to multi-site cases – particularly cases where a union is trying to cherry-pick only several stores out of a market – its holding and theories regarding discrete, single-site units in the healthcare context do not apply to this case.<sup>9</sup> Thus, *Specialty Healthcare* was improperly invoked by the Acting Regional Director and his Decision must be overruled.<sup>10</sup>

**B. The Acting Regional Director’s Decision On – Or Analysis Of – Critical Factual Issues Is Clearly Erroneous.**

The Acting Regional Director’s failure to account for critical record evidence and his finding with respect to the “I-94 Corridor” retail district further renders his Decision clearly erroneous. Indeed, the record establishes that the Bakers across the *entire* West Michigan Market share an overwhelming community of interest because they are managed and operated as a homogenous group. The Union failed to present sufficient evidence to meet *its* burden to arbitrarily select seventeen (17) bakers from the forty-one (41) across the Market. In fact, the Board has found similar attempts by unions to gerrymander multi-facility units less than market-wide in scope to be inappropriate.

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<sup>9</sup> In addition, the Board specifically noted in an August 30, 2011 press release that:

In a decision made public today [*Specialty Healthcare*], the National Labor Relations Board has adopted a new approach *for determining what constitutes an appropriate bargaining unit in health care facilities other than acute care hospitals* (which are covered by the Board’s Health Care Rule).

In addition, the Board clarified the criteria used in cases where a party argues that a proposed bargaining unit is inappropriate because it excludes certain employees. *The Board did not create new criteria for determining appropriate bargaining units outside of health care facilities.* (emphasis added).

See <https://www.nlr.gov/news/board-issues-decision-appropriate-units-non-acute-health-care-facilities>. As such, all of the multi-site unit cases and precedent cited by BOL remain controlling.

<sup>10</sup> BOL notes that the Union did not argue *Specialty Healthcare* provided the proper legal test for this matter. In fact, the Union cited largely the same cases as BOL in its Post-Hearing Brief.

One such case is *Sleepy's Inc.*, 355 NLRB No. 21; 2010 NLRB LEXIS 85 (2010). In that case, the union sought to represent the sales employees only at the company's thirty-two (32) stores in Southwestern Connecticut while the employer contended the only appropriate unit consisted of all of its one hundred and fifty-six (156) stores in its New England Market. *Id.* at \*1. In concluding that the Southwestern Connecticut Stores-only unit was *inappropriate*, the Board noted the following facts:

- The employees at the excluded stores in the division had the same skills and performed the same functions as the employees in the stores petitioned-for by the union. *Id.* at \*12.
- There was evidence of some employee interchange among stores within the petitioned-for stores as well as interchange among the stores outside the petitioned-for unit. *Id.* at \*12.
- There was central control over labor relations by a Regional Vice President (*i.e.*, he made the final calls on discipline, hiring decisions, etc. throughout the New England Market). *Id.* at \*13.
- There was no evidence that the employer considered the petitioned-for stores to be an administrative grouping. *Id.* at \*13.
- Many excluded stores were close geographically to the petitioned-for stores, including some that were as close to one or more of the stores in the union's carve-out. *Id.* at \*15.
- The stores frequently changed management or district-alignment, which meant that the unions petitioned-for stores were not a "stable unit" for purposes of bargaining. *Id.* at \*15-16.

Based on these facts, the Board held the union's petitioned-for unit of only several stores was inappropriate. *Id.* at \*16. As discussed further below, BOL's Bakery Operations in the West Michigan Market share all of the identical facts found in *Sleepy's*.

*Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004), is another case where the Board found a union's attempt to "cherry-pick" only a few facilities from a market to be inappropriate. There, the union petitioned to represent seven (7) of a company's twenty-two (22)

sites within its Southern New Jersey Region. *Id.* In agreeing with the employer that the smallest appropriate unit consisted of all the facilities in its Southern New Jersey Region, the Board noted that the petitioned-for stores did not conform to any administrative grouping by the company; the supervisor structure was *in flux, partly based on the fact that the company was considering hiring a new supervisor which would affect which employees the current supervisors were overseeing*; there was employee interchange between facilities; there was no coherent geographic grouping to the petitioned-for stores, which was evidenced by the fact that *at least one* of the excluded facilities was closer to one of the petitioned-for facilities than some of the petitioned-for facilities were to one another; the terms and conditions of employment were the same for all employees across all of the facilities in the Southern New Jersey Region; and there was no collective bargaining history. *Id.* at 1082-1083. *See also Bashas'*, 337 NLRB 710 (finding union's attempt to represent employees at only several stores was inappropriate because there were centralized control over labor relations by the corporate office; the skills and duties of the employees between all the stores was largely the same; the petitioned-for unit did not conform to any employer administrative grouping; and the proposed county-wide unit did not constitute a coherent geographic unit because an excluded store was in close geographic proximity to other stores in the proposed unit); *Alamo Rent-A-Car*, 330 NLRB 897 (2000) (Board holding that the union's petitioned-for unit consisting of only 2 of 4 San Francisco sites was inappropriate because, among other things, there was centralized control over labor relations and the employees at the excluded facilities performed the same work under the same terms and conditions as employees who worked at the included facilities).

This case parallels *Sleepy's, Laboratory Corporation*, and other Board precedent analyzing multi-facility unit determinations. The record here establishes that:

- The Bakers at *all* the cafés across the West Michigan Market have the same skills, produce the same products, and can fill in for one another at any café within the Market without having to undergo additional training. [Tr., 135-136].
- *All* of the Bakers in the West Michigan Market work the third shift, receive the *same* pay rates, are eligible under a *market-wide* bonus program (*i.e.*, awarded to nine Bakers *regardless* of retail district), and are otherwise subject to the *same* terms and conditions of employment. [Tr., 20-21, 89, 97, 134-136, 137, 201; ER Ex. 1].
- Alman – the current BMM – has hired *every* Baker that currently is in the West Michigan Market. [Tr., 127-128].
- There is central control over labor relations policies for *all Bakers* within the West Michigan Market. [Tr., 137].
- All of the Bakery Operations within the West Michigan market are functionally integrated because they are all overseen by one BMM. [Tr., 14-15].
- There are cafés **not** petitioned-for by the Union that actually are closer geographically to several of the petitioned-for cafés than some of the petitioned-for cafés are to one another. [Tr., 173-174; ER Ex. 2].
- The cafés to which a BTS are assigned are based solely on the ability of the specific BTS (*i.e.*, a highly-skilled BTS will take on more cafés than a new or less-skilled BTS). [Tr., 54-55]. Indeed, BTS café assignments have changed over time, including with regard to the petitioned-for cafés. [Tr., 84-85]. Moreover, BOL currently is considering hiring a third BTS for the West Michigan Market, which will affect the cafés the current BTSs oversee. [Tr., 60]. In sum, the BTS assignments are not stable (*i.e.*, fluid) and are in the midst of change, or “in flux,” at this very moment. *See, e.g., Lab. Corp.*, 341 NLRB at 1082-1083.
- There is Baker interchange among the various cafés within the West Michigan Market when exigent circumstances arise (*e.g.*, absences due to injury, etc.), including interchange across the “retail districts.” [Tr., 61, 98, 106-108, 111, 119, 137-138, 150-151]. For example, Baker Tim Butler has worked between cafés in the Grand Rapids and I-94 Corridor Retail districts. [Tr., 107-108]. In addition, Bakers have taken interim assignment across the “retail districts,” such as Baker Gary Clinger who went on a temporary assignment from Holland (Lakeshore) to St. Joseph (I-94) for nearly a year. [Tr., 150]. Furthermore, some Bakers split their shifts between cafés that are in different “retail districts.” [Tr., 111].<sup>11</sup>

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<sup>11</sup> While the Acting Regional Director attempted to downplay the amount of Baker interchange that occurs, that does not support a finding the petitioned-for six (6) stores constitute an appropriate unit for bargaining. *See, e.g., Alamo*, 330 NLRB at 898 (finding that where there was no evidence of any interchange, it did not support the union’s contention that a unit of only several facilities was appropriate).

- While the Retail operations within the West Michigan Market are administratively grouped into three (3) districts which are overseen by three (3) District Managers, there are no formal “districts” within the Bakery Operations and one (1) BMM is responsible for all Bakery Operations within the Market. [Tr., 7-8, 14-15, 19-20, 35, 54-55, 57-58, 60, 90, 149]. Furthermore, corporate Panera Bread only views all seventeen (17) cafés as a single market. [Tr., 76-79; ER Ex. 9].
- There is no collective bargaining history among any of the cafés within the West Michigan Market. [Tr., 9].

Thus, based on the record evidence, it has not been established that the six (6) petitioned-for cafés share a community of interest “separate and distinct” from the Bakers across the West Michigan Market as a whole. *See Lab. Corp.*, 341 NLRB 1079 at 1083 (“Although it is clear that the employees in the petitioned-for unit share a community of interest, we find that *the evidence fails to establish that it is separate and distinct from the community of interest they share with other employees of the Employer’s Southern New Jersey Region.*”) (emphasis added).

In his Decision, the Acting Regional Director inexplicably ignored this binding precedent and abundance of corresponding record evidence establishing the overwhelming community of interest that exists among all the Bakers in the West Michigan Market.<sup>12</sup> Indeed, the Acting Regional Director relied exclusively on his finding that the I-94 Corridor conforms to an administrative grouping of BOL. This finding of fact, however, is clearly erroneous because his finding that the “I-94 Corridor” exists with respect to BOL’s Bakers is not supported by the record evidence; the I-94 Corridor only exists as an administrative grouping with respect to BOL’s retail-side. [Tr., 19-20, 90]. Indeed, while the Acting Regional Director found a single BTS has, at least for a time, overseen the petitioned-for cafés, the cafés to which the BTSs are

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<sup>12</sup> The Acting Regional Director inappropriately found the facts of this case are distinguishable from those in *Sleepy’s, Bashas’*, and *Lab. Corp.* solely based on his finding that the “I-94 Corridor” constitutes an administrative grouping with respect to BOL’s Bakery Operations. [Decision, pp. 8-9]. As discussed more fully herein, that finding is clearly erroneous, and – even if it was proper – that finding does not outweigh the entirety of the facts that support the Bakers within the West Michigan Market constitute one, homogenous group that share identical employment terms and supervision.

assigned are on the verge of change, and have changed historically. Thus, this case is akin to *Lab. Corp.* where the Board found the supervisor structure was *in flux, partly based on the fact that the company was considering hiring a new supervisor which would affect which employees the current supervisors were overseeing. Lab. Corp.*, 341 NLRB at 1082-1083.<sup>13</sup>

Moreover, even if the Acting Regional Director's finding that the "I-94 Corridor" does constitute an administrative grouping by BOL is supported by the record evidence, its significance is diluted beyond relevance by the following facts: 1) *all* the Bakers within the West Michigan Market were hired by the same BMM, and the BMM is ultimately responsible for Baker discipline, performance, and scheduling across the entire West Michigan Market [Tr., 14-15, 20, 23, 39, 67, 72, 74, 103, 128, 149]; 2) the Bakers at all the cafés across the West Michigan Market have the same skills, produce the same products, and can fill in – *and have filled in* – for one another at any café within the Market without having to undergo additional training [Tr., 135-136]; 3) *all* of the Bakers in the West Michigan Market work the third shift, receive the same pay rates, are eligible under a market-wide bonus program, and are otherwise subject to the same terms and conditions of employment [Tr., 20-21, 89, 97, 134-136, 137, 201; ER Ex. 1]; 4) BTS assignments are based solely on the skill level of the BTS and thus subject to change (*i.e.*, the districts within the Market that the BTSs oversee – including the cafés within the I-94 Corridor *retail* district – have and will continue to change) [Tr., 54-55]; and 5) BOL currently is considering hiring a third BTS for the West Michigan Market, which will alter the café assignments of each BTS and result in more BTS interchange across the entire West Michigan Market [Tr., 60]. Thus, the facts do not support a finding that the Bakers at the six (6)

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<sup>13</sup> The Acting Regional Director's finding that the lack of interchange supported a finding that the petitioned-for cafés constitute an appropriate unit likewise is erroneous. *See, e.g., Alamo*, 330 NLRB at 898 (finding that where there was no evidence of any interchange, it did not support the union's contention that a unit of only several facilities was appropriate).

petitioned-for cafés share a community of interest separate and distinct from the other cafés in the market and the Acting Regional Director’s Decision must be overruled.

C. **Assuming, Arguendo, Specialty Healthcare Did Set Forth The Proper Analytical Framework For This Case, The Record Evidence Establishes The Bakers Across The Market Share An “Overwhelming Community Of Interest.”**

Assuming, *arguendo*, the Acting Regional Director is correct in applying the standard set forth in *Specialty Healthcare* to this case, the record evidence establishes that all the Bakers across the West Michigan Market share an “overwhelming community of interest” and thus the Acting Regional Director’s decision must be overruled in any event.

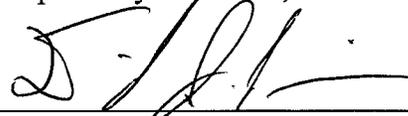
As thoroughly detailed above, the facts of this case clearly establish that the Bakers across the West Michigan Market share a similarity of skills, duties and working conditions; that there is functional integration of the cafés, including Baker interchange among the cafés; centralized control of management, supervision and labor relations by the BMM; fluidity in the management of the Bakery Operations within the Market; and geographic cohesiveness of all the cafés. Furthermore, allowing a carve-out of the six (6) cafés from the Bakery Operations would result in the type of “fractured unit” *Specialty Healthcare* explicitly noted to be inappropriate. Thus, the Acting Regional Director’s finding that all Bakers across the Market do not share an overwhelming community of interest is clearly erroneous under the standard prescribed by *Specialty Healthcare*.

## V. CONCLUSION

A unit comprised of *all* Bakers in *all* cafés within the West Michigan Market is the **only** appropriate unit in this case. Indeed, given the Bakers’ uniform skills and duties, common supervision, same terms and conditions of employment, geographic proximity of cafés, and overall overwhelming community of interest, there is no basis for carving out the six (6)

petitioned-for cafés. Therefore, the Acting Regional Director's Decision to gerrymander a unit from six (6) cafés is clearly erroneous and must be overruled.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on the following counsel of record, the Regional Director, and the Acting Regional Director by electronic mail and depositing same in the Federal Express, Overnight, this 9th day of March, 2012:

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