

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 15-RC-076271

US FOODS, INC.,

Employer,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 612,

Petitioner.

**EMPLOYER'S REQUEST FOR REVIEW TO THE
NATIONAL LABOR RELATIONS BOARD**

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**EMPLOYER’S REQUEST FOR REVIEW
TO THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board, US Foods, Inc. (“US Foods” or “Employer”), files this Request for Review of the Decision and Direction of Election (“DDE”) issued on April 23, 2012, by the Regional Director for Region 15. This Request should be granted based upon the following grounds:

- A substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of Employer.
- A substantial question of law or policy is raised because of a departure from officially reported Board precedent.
- There are compelling reasons for reconsideration of an important Board policy.

I. STATEMENT OF THE CASE/BASIS FOR REVIEW

On March 9, 2012, the Petitioner, International Brotherhood of Teamsters Local Union No. 612 (the “Union” or “Petitioner”),¹ filed a representation petition in Case No. 15-RC-076271, seeking certification as the collective bargaining representative in the following unit

¹ At the hearing, the Petitioner amended its name on the petition to “Teamsters Local 612, Affiliated with the International Brotherhood of Teamsters.” (Tr. 8-9.)

connected to US Foods' "broadline" food distribution facility located at 2850 Selma Highway, Montgomery, Alabama (the "Montgomery Division"):

Included:

"All full-time and regular part-time truck drivers, fuelers, spotters, and truck mechanics at the following [US Foods] locations: Montgomery, Birmingham, Tuscaloosa, Decatur, Dothan, Saraland, AL, and Pensacola, [and] Crestview, FL."

Excluded:

"Warehouse, Managers, Janitors, Office Clericals and all other employees, Guards and Supervisors as defined in the Act."

(Bd Ex. 1.)²

At the hearing, the parties disputed the scope of the petitioned-for unit. The Employer took the position that the only appropriate unit must include all employees and leadspersons in the following classifications: delivery driver, shuttle driver, backhaul driver (both those locally assigned to the Montgomery facility in the Montgomery Division and those assigned to one of seven satellite locations reporting into the Montgomery Division), fleet mechanic, fueler, yard jockey (spotter),³ cycle counter, forklift operator, loader, maintenance mechanic, receiver, sanitation worker (custodian), selector, stocker (this job classification includes not only stockers but also positions routinely referred to as the return door clerk and the will call selector), and including various clerical employees including administrator (transportation/maintenance clerk), driver check-in clerk, inbound logistics assistant, inventory control clerk, operations clerk (night warehouse clerk), operations coordinator (also called a night warehouse clerk), quality control

² References to the hearing transcript will be referred to as "Tr.," followed by the appropriate page number(s). References to exhibits introduced into evidence at the hearing are designated by the exhibit number, preceded by "Bd. Ex." for the Board's exhibits, "USF Ex." for US Foods' exhibits, and "U. Ex." for Petitioner's exhibits.

³ The official job title is followed by the commonly or alternately used title in parentheses. In this Brief, the Employer will normally refer to employees by their commonly used titles.

clerk, shipping/receiving clerk - and that the unit proposed by the Petitioner was not an appropriate unit.

The Petitioner took the position that the petitioned-for unit was an appropriate unit. On April 23, 2012, the Regional Director issued the DDE in this case. The Employer respectfully requests review of the DDE because:

- The Regional Director clearly erred in deciding substantial factual issues related to the job duties of employees and their interactions with one another – the basis upon which the Regional Director issued the DDE.
- The Regional Director departed from officially reported Board precedent and dismissed contrary precedents without discussion or clear justification.
- A substantial issue of policy is created based on the Regional Directors decision to adopt the union’s altered position which it took in its brief but had not previously stated and without giving the Employer the opportunity to respond.

II. ISSUES

- A. Whether the petitioned-for unit, which is composed of employees who do not share a distinct community of interest apart from the other Montgomery Division employees, is appropriate.
- B. Whether the petitioned-for unit, which excludes many employees in many classifications who have a close community of interest with, interact with, and are functionally integrated with the work of, employees in the petitioned-for unit, is appropriate.

III. SUMMARY OF THE ARGUMENT

In this brief, US Foods will demonstrate four things. First, US Foods will show that the petitioned-for unit is inappropriate because it is a fractured unit. The petitioned-for employees do not share a sufficiently distinct community of interest apart from the disputed employees and, therefore, the grouping sought by the Union is an arbitrary one.

Second, US foods will show that the petitioned-for unit, which is purportedly based on departmental lines, is inappropriate because it includes two employees who report to and are

supervised by the warehouse supervisors and managers and excludes four transportation employees.⁴

Third, US Foods will show that the petitioned-for unit is inappropriate because it excludes many plant (production) clericals who share the requisite community of interest with the petitioned-for employees.

Fourth, US Foods will show that the petitioned-for unit is inappropriate because it excludes many warehouse and finance employees that share the requisite community of interest with petitioned-for employees.

IV. STATEMENT OF FACTS

A. General Background

The Montgomery Division is a “broadline” distributor within the US Foods system. (Tr. 31.) As a broadline facility, the Montgomery Division sells food and grocery-related products to anybody and everybody, which is a different function than US Foods’ “systems house” distribution operations that primarily supply national or regional chain customers. (Tr. 31.) From the Montgomery Division, customers have their products delivered directly to them. (Tr. 31-33.)

The Montgomery Division is headed by Rick Combs, Montgomery Division President. (USF Ex. 1.) Mr. Combs has several executives reporting directly to him, including, but not limited to, Alan Finley, Vice President of Operations; Ken German, Human Resources Manager; and Robert Henry, Finance Manager. (USF Ex. 1.) Mr. Finley, as Vice President of Operations, is responsible for all transportation, maintenance, warehouse, and logistics. (Tr. 23; USF Ex. 1.)

⁴ In Employer’s Post-Hearing Brief, US Foods argued that the petitioned-for unit was inappropriate because it carved out two transportation employees. The Union has since switched its position on the van drivers, such that it now argues the van drivers should be excluded. Thus, the Union has carved out two more transportation employees since the hearing closed. US FOODS contends it was error for the Regional Director to allow the Union to do so.

As such, all employees in the petitioned-for unit report up to Mr. Finley either through the warehouse department, the transportation department, or the fleet maintenance department. (USF Ex. 1.) The transportation department employees including the delivery drivers (local delivery, domiciled, and local van),⁵ the shuttle drivers, the backhaul drivers, and two of the four US Foods spotters, all report to Joey Johnson, Transportation Manager. The fleet mechanics, fuelers, and the two spotters on the dayshift report to Tommy Hutchins, Fleet Maintenance Manager. (USF Ex. 1.) The two nightshift spotters report to Mike Pearce, Night Warehouse Manager. (USF Ex. 1.)

In regards to the disputed employees, the inbound logistics assistant reports to Joey Morris, Assistant Transportation Manager. (USF Ex. 1.) The transportation/maintenance clerk reports directly to Alan Finley. (USF Ex. 1.) The forklift operators, loaders, maintenance mechanics, receivers, custodians, selectors, stockers (except the return door clerks), night warehouse clerks, and shipping/receiving clerks report to the warehouse managers. (USF Ex. 1.) Again, the night spotters report to the warehouse managers as well. (USF Ex. 1.) The driver check-in clerks report to a manager in the finance department and thus are not in either the transportation or warehouse department. (USF Ex. 1.) Finally, the quality control clerk, inventory control clerks, cycle counter, and return door clerks report to Jennifer Howlett, Inventory Control Supervisor, who is also in the finance department. (Tr. 214; USF Ex. 1.)⁶

⁵ The local delivery drivers are drivers that are based at the Montgomery Division's Montgomery, AL warehouse who make daily runs in a commercial truck to deliver product to customers. Domiciled delivery drivers are based at one of the Montgomery Division's seven remote domicile yards and make daily runs in a commercial truck to various customers from the domicile locations. Local van delivery drivers are based at the Montgomery Division's Montgomery, AL warehouse facility who use a non-commercial vehicle to make special will call runs, local backhauls, or special runs in near proximity to Montgomery. (Tr. 58-61.)

⁶ The return door clerks are supervised through the finance department because of federal Sarbanes-Oxley requirements that require separation of certain inventory monitoring functions to decrease the possibility of fraud. (Tr. 52.) However, until November 2011, they were supervised by the warehouse management. (Tr. 52.)

B. The Montgomery Division's Outbound Product Workflow

1. The "Normal" Order-Filling Process

The Montgomery Division's product process is driven by its customers and, thus, the distribution process begins with an order from one of those customers. (Tr. 31-32.) After the orders are inputted into Tandem,⁷ they start a cycle of route planning, truck load planning, order selection, truck loading, delivery, customer returns, and inventory replenishment – processes that involve significantly all the employees the Employer believes comprise the only appropriate unit. (USF Ex. 2.)

The majority of the order selection from "pick slots" (as well as a significant amount of replenishing those pick slots from "reserve slots") occurs on nightshift. (Tr. 445-46.) In addition, the majority of truck loading and prepping of routes and trucks occurs on this shift. (Tr. 446.) This work is performed by nightshift selectors, loaders, forklift operators, shipping/receiving clerks, spotters, and custodians. (Tr. 445-48.)

The beginning step in the night warehouse operation, through use of common sales and inventory data in Tandem, is the creation of truck routes through a computer system called Roadnet. (Tr. 62-64.) Once the routes are built, the routes and order information are then uploaded back to Tandem from Roadnet and then from Tandem into another application called Truck Builder. (Tr. 63.) Truck Builder takes the routes and orders and determines, with manual input, what loads will exist on which pallets for each truck. (Tr. 63-64.)

The output of the Tandem/Roadnet/Truck Builder process is ultimately a truck manifest, an invoice (a/k/a pick sheet), and a load map. These documents are prepared by one of the night warehouse clerks so that the drivers know what items the night warehouse shift should have loaded on the trailer. (Tr. 183-84.) The night warehouse clerks' main function is to process the

⁷ Tandem is the computerized product control system used by the Montgomery Division. (Tr. 34-35.)

driver checklist documents, which include a trailer load sheet, hazardous materials manifest, and customer invoice. (Tr. 109, 183-84.)⁸ A shipping/receiving clerk prints off the pick labels for the selectors to use to start creating the pallets for loading on the trailers for the next day's deliveries.(Tr. 56-57.)⁹ In addition to the printing of labels for use in order selection, the Tandem/Roadnet/Truck Builder information is also used by the loaders. (Tr. 63-65.) Once the routes are completely selected by the selectors – who use a system called Voxware that ties them into Tandem via the Montgomery Division's wireless network and thus allows them to keep Tandem up-to-the-minute, the load sheets are turned in, and the invoices and manifest printed, a night warehouse clerk collates this information and gets the necessary paperwork to the drivers. (Tr. 109.)

For the loaders, the Truck Builder provides a "load sheet." The same nightshift warehouse clerk who prepares the driver paperwork also prints off the load sheets and gives them to the lead loader, who in turn distributes the information to the other loaders. (Tr. 573-74.) The load sheet tell the loaders where and what to load. (Tr. 573-74.) The loaders take the load sheet (a/k/a load map) and proceed to organize the trailers pursuant to that sheet. (Tr. 577; USF Ex. 55.) Frozen and refrigerated products are loaded first. (Tr. 577.) When that is complete, the loader will contact one of the spotters, members of the petitioned for unit, via two-way radio to come move the trailer to the dry docks. (Tr. 577.)¹⁰ Once the trailer is moved, a loader on the dry dock will load the goods that are stored at room temperature. (Tr. 577.) Once

⁸ The driver checklist documents are all taken to transportation for pick-up and direct use by the drivers. (Tr. 184.)

⁹ One of the shipping/receiving clerks performs dual functions. (Tr. 53.) He spends half of his eight-hour shift printing labels in the warehouse and the other half in the transportation department performing dispatching and route planning functions. (Tr. 53-54.)

¹⁰ The spotters (also known as yard jockeys) are responsible for moving trailers on and off the warehouse dock doors. There are spotters on the day shift who are supervised by the fleet maintenance manager and there are spotters on the night shift who are supervised by the night warehouse management. (Tr. 66, 604.)

the dry dock loading is done, the loaders once again contact the spotters who then move the trailers to stage them for pick-up by the drivers. (Tr. 577.) When the loaders are finished, they turn in their completed paperwork to the same night warehouse clerk who provided the original load list. (Tr. 582.)¹¹ At this point, the driver paperwork is complete, the trailers are staged for the drivers, and the trailers are ready for delivery.

Now the drivers become involved.¹² Each delivery driver, upon reporting to work is required to carry out certain functions with respect not only to the truck but to the load itself. (Tr. 409-10, 480.) More specifically, the driver has responsibility for coming behind the loaders and ensuring that the product is loaded properly onto the truck before leaving on a route. (Tr. 480.)

The delivery drivers then set out to make their sequence of customer stops where they unload the products and move on to the next stop. (Tr. 520.) As part of the process to track the status and location of product at all times, delivery drivers use Proof of Delivery (“POD”) CN50 radio frequency (“RF”) scanners to scan the product as it is delivered. The scanners operate (across Tandem) on either a cellular network that is tied into the wireless network at the Montgomery Division or directly to the wireless network itself. (Tr. 37, 44-46.) The drivers are also required to maintain exception delivery document (“EDD”) forms that they use as they

¹¹ Once the loading is complete, the lead loader takes the load sheet to the computer room, and the night warehouse clerk hands him an invoice. (Tr. 582.) The lead loader then gives the invoice to the driver. (Tr. 582.) The driver and lead loader work together to resolve any issues with regard to the layout of the pallets on the trailers. (Tr. 583.) This could be that the pallets need to be rearranged on the trailer to accommodate the driver or the customers’ requests. (Tr. 583.) Another problem might be that there is a technical problem with the trailer and the pallets must be loaded on another trailer. (Tr. 583-84.)

¹² The Montgomery uses shuttle drivers bring empty trailers to the Montgomery Division and return to the remote domicile locations with full trailers ready to be picked up and delivered by the domicile drivers. (Tr. 70.) Often, the trailer is loaded with returns and refusals that the domiciled delivery drivers have consolidated into a shuttle trailer. (Tr. 129.) These returns are unloaded at the Montgomery Division and the goods are placed into the inventory at the warehouse through the return door by the return door clerks and stockers. (Tr. 129.)

deliver products to customers when those scanners malfunction. (Tr. 487-88; USF Ex. 50, 51.) These sheets allow the delivery driver to track (throughout the delivery day) any missing, damaged, mis-picked, incorrectly labeled, or refused product on that driver's truck. (Tr. 487-88.) Upon their return, all the delivery drivers interact with the return door clerk whose job is to check in any returns and refusals, and handle the paperwork and ensure the errors or changes get back into the Tandem system through an RF scanner, integrated into the Montgomery Division's wireless network and Tandem – just like the delivery driver's POD. (Tr. 547-49.) The return door clerk and other stockers¹³ stage the returned (and still usable) product for replenishment into the pick slots in the warehouse. (Tr. 58.) Also upon return, the delivery drivers must visit the driver check-in clerks who receive checks and money orders from the drivers as they return from their routes. (Tr. 76, 105, 110.) The driver check-in clerks also take the COD manifests from the drivers that outline what customers have paid for the items that were delivered. (Tr. 110)¹⁴ The information from the cash sheets is then entered into the company's computer database tracking customer activity. (Tr. 76.)

2. The "Will Call" Order-Filling Process

In addition to the "normal" workflow described above, the Montgomery Division also meets the demands of its customers by having a "will call" system. (Tr. 59-60.) By way of its analogous relationship to the "normal" selection and delivery process, the will call operation demonstrates the integrated nature of the Montgomery Division's operation and thus the inter-

¹³ The day stockers' function is to verify the quality of the returned goods from the drivers, i.e., whether it can be returned to the inventory or not, and then to physically take the goods that can be re-distributed back to the appropriate pick slot. (Tr. 58.)

¹⁴ The driver check-in clerks also take the EDD forms from the returning shuttle drivers that the shuttle drivers have gotten from the domicile delivery drivers. (Tr. 105.)

relationships and dependent duties of many of the disputed employees with the petitioned-for employees.

Will call allows a customer to obtain products “on demand” and pick up those orders at a local retail store. (Tr. 60.) This occurs through the efforts of various employees, employees who basically mirror the “normal” workflow functions that occur in the warehouse and transportation. The first is the will call selector, whose main function is to pull items for petitioned-for employees, namely the van drivers (who are delivery drivers).¹⁵ (Tr. 60.) Then, the will call selector and the van driver load the product on the van at the appropriate loading dock, and the van driver makes the delivery to the customer or the retail store. (Tr. 60.) This is the functional, “manual” equivalent of the more automated process conducted by the selectors, who get the product for the trailers, and the loaders who load the product on the trucks.

C. The Inbound Product Process

As orders are selected to go out to customers, the inventory in the warehouse is reduced. This in turn generates, through Tandem’s integrated process, the purchase of product from vendors to replenish the warehouse. (Tr. 40-41.) The process begins with the purchase of product by US Foods and then the receipt of the same by the Montgomery Division. (Tr. 40-41.)

1. The Normal Receiving and Replenishment Process

The majority of inbound product receiving occurs on the dayshift, along with replenishment of the reserve slots in the warehouse. This process is performed by forklift

¹⁵ The van drivers mainly perform the function of making smaller, supplementary deliveries to customers who call in and fill special requests or through will call; they also retrieve local backhauls. (Tr. 61.) The van drivers take orders picked and staged in the will call area, and load them onto the truck, often with the help of warehousemen. (Tr. 61-62.) The van drivers are also responsible for delivering orders in will call in situations where the customer neglected to place an order in time or items that were out of stock when the regular delivery driver began his route and had to be delivered to the customer that day. (Tr. 60-61.)

operators¹⁶ and stockers. (Tr. 58, 436.) As forklift operators move the product, Tandem is kept updated via an RF gun, physically attached to the forklift and electronically integrated with Tandem via the site's wireless network. (Tr. 35-38.) In addition, the shipping/receiving clerks are vital to the receiving and replenishment process as they perform the necessary paperwork and label printing. (Tr. 53-56.)

Product is brought to the Montgomery Division several different ways: deliveries direct from vendors or over-the-road carriers, collectively referred to as OTR drivers,¹⁷ backhauls by designated backhaul (or logistics) drivers,¹⁸ backhauls picked up by local delivery drivers after their normal customer deliveries, and finally, locally recurring backhauls by a van driver. (Tr. 504.)

As this product comes in, receivers and the shipping/receiving clerks' job is to work together on all inbound deliveries and produce the paperwork used in the process. (Tr. 40-41, 56-57, 372.) This paperwork is of two primary types. There are the actual receiving documents, created by the shipping/receiving clerk from Tandem (Tr. 48) and used by the shipping/receiving

¹⁶ The day forklift operators do replenishments, i.e., lowering pallets into pick slots to be retrieved by the selectors. and put away inventory contained on pallets coming into the warehouse. (Tr. 436.) When a forklift operator picks up a pallet to move to a pick slot in the warehouse, he scans the pallet's label using a scanner (a/k/a RF gun) mounted to the forklift. (Tr. 37.) Night forklift operators primarily do replenishments; in other words, they keep the pick slots stocked for the selectors during the selection process at night. (Tr. 62.) Their main responsibility is to move pallets from reserve locations to the pick slots. (Tr. 39.) Like the day forklift operators, the night forklift operators scan the labels on the pallet and the label on the pick slots to ensure the pallets are put in the right place and the move is recorded in Tandem. (Tr. 37.)

¹⁷ These OTR drivers are not US Foods employees. (Tr. 379.)

¹⁸ The backhaul (or logistics) drivers drive long haul routes throughout the region and across state lines. (Tr. 71.) Their assignment is to pick up goods, from other US Foods facilities and outside vendors, goods to satisfy the Montgomery Division's customer orders. (Tr. 71.) The backhaul drivers do not handle the product like the delivery drivers and van drivers. (Tr. 71.) The backhauls are coordinated by the inbound logistics clerk whose only function is to schedule and coordinate the appointments of US Foods' nine dedicated logistics/backhaul drivers. The inbound logistics assistant calls ahead to the outside vendors where the logistics/backhaul drivers will pick up their backhaul loads and make sure they have an appointment. (Tr. 633.) Drivers call the inbound logistics coordinator with any problems they may encounter while dealing with pickups. (Tr. 632.) When drivers returns, they come to the inbound logistics assistant and deliver their backhaul bills of lading and enter information into a tracking log. (Tr. 637.)

clerk, drivers, and receivers to manage the receipt of the product. (Tr. 55-56.) There are also the labels. (Tr. 56-57.) The receiver's job is to place these labels on incoming product and, with use of his radio frequency ("RF") gun, verify the count of what is received and simultaneously input the same into Tandem via the Montgomery Division's wireless network. (Tr. 40-41.) If a "short" (missing or wrong product) is verified to exist, the receiver inputs the correct information into his RF gun so that the Tandem system is accurate. (Tr. 41.)

Once the receiving process and its associated paperwork, including the updating of Tandem, are complete, the product is available to physically replenish inventory in the warehouse. The replenishment is conducted by day forklift operators who "put away" received product in the warehouse reserve slots. (Tr. 66-67.) As with the night forklift operators, the day forklift operators keep Tandem updated through use of the RF guns attached to the lifts. (Tr. 37.) In addition, based on the flow of product out of the warehouse, the day stockers will also place cases of product into the pick slots, all in order to prep the warehouse for the nightshift selecting process. (Tr. 58.) As with the forklift operators, the stockers perform these putaways and letdowns, they update the location and counts of the product as they move in the Tandem system by use of an RF gun, physically attached to their forklifts. (Tr. 37.)

2. The Returns and Refusals Process

In addition to product purchased from vendors, product is "received" into the warehouse as returns or refusals from a customer, which occur for various reasons: mis-picks, damaged product inventory issues, refusals of any sort, etc. (Tr. 487-88, 549-52.) These errors are normally tracked by the delivery drivers on their POD scanners, which are then synchronized with the return door clerk's scanner. (Tr. 547.)

The return door clerk and the re-stockers work in conjunction with one another to get the product off the truck and into the proper staging areas, if it can be resold. (Tr. 543-44, 548, 550, 552-53.) The return door clerk uses a handheld RF scanner to physically check and scan the labels on each case of returned product that the driver has and count the product returned by the driver. (Tr. 549.) There are some situations when the driver was not able to update Tandem using the POD scanner system and the material being returned must be tracked and documented manually through the use of an Exceptions Delivery Document (“EDD”) form. (Tr. 549-52.) Thus, the EDD form is filled out by the driver when either the POD scanner malfunctions, there was an unscheduled pick up, the product was returned because the truck contained an overage of product, or the product was returned due to a cancelled order. (Tr. 549-52.) As part of this process the return door clerk actually interviews the driver about the returns. (Tr. 552.) When the driver brings back an EDD form, there are several pieces of information that must be filled out and the accuracy must be confirmed by the return door clerk before the driver can leave the warehouse dock. (Tr. 553.)

Once the returns and refusals have been received and scanned by the return door clerk, the product is automatically uploaded from the return door clerk’s RF scanner to Tandem via the Montgomery Division’s wireless network. If the driver has an EDD form, the return door clerks manually key in the information which goes into Tandem. (Tr. 553.) After the product is checked back into Tandem, the return door clerk takes part in the start of the replenishment of the goods back into the warehouse, primarily by physically segregating the product onto pallets designated for dry, refrigerated, and frozen goods that will later be taken by the clerk to those areas of the warehouse for restocking. (Tr. 546.) Given that the return door clerk is segregating the product, the delivery drivers do not have to do so.

D. Managing and Monitoring the Process

1. Tandem

Tandem is the system on and through which employees (both within and without the petitioned-for unit) work and which integrates the distribution operation. The shipping/receiving clerks verify that inbound product orders match up with what was expected and key that information into Tandem. (Tr. 41.) The receivers scan the product to make sure the count is right. (Tr. 40.) The forklift operators use a RF gun attached to the forklifts to let Tandem know when product has been “put-away” to replenish the reserve slots. (Tr. 35, 37-38.) They will use the same scanning gun to let Tandem know when product has been letdown into one of the pick slots and is ready for selection. (Tr. 37-38.) The selectors let Tandem know when product leaves a pick slot by use of Voxware, a voice activated system through which the selectors directly input the product information into Tandem. (Tr. 91.) The night warehouse clerks provide the loaders with the load lists from Tandem via Truck Builder and when those loads are complete, prepare the packages for the delivery drivers. (Tr. 183-84.) Drivers track the product delivered and any errors on their RF scanners or EDD forms. (Tr. 487-88, 549-52; USF Ex. 50 & 51.) The drivers’ RF scanners update Tandem via the cellular network or wireless network. (Tr. 44-47.) Similarly, the return door clerk identifies count issues represented by the EDD forms and input the data into Tandem. (Tr. 549-52.)

2. Errors and Quality Control

As the above cycle occurs day in and day out, errors obviously occur and are identified. These errors are called shorts or cuts. (Tr. 41.) One of the main functions of the cycle counter and inventory control clerks is to cycle count, that is, investigate, the driver shorts. (Tr. 41-42.) They are all responsible for physically going into the warehouse to do cycle counts

for the purpose of verifying the Montgomery Facility's inventory. (Tr. 211.) The job duties of these employees is predicated on the information coming via a computer system called Airclick from the drivers and the drivers' scanners to the handheld scanners used by the cycle counter and inventory control clerks. (Tr. 212.) Another primary function of the inventory control clerks is to cycle count (investigate) the driver shorts. (Tr. 41-42.)

When the Airclick program identifies that the drivers have a shortage, the cycle counter and inventory control clerks investigate the issue and physically go into the warehouse to inspect the pick slot. (Tr. 41-42.) This process allows them to locate missing inventory and identify why the delivery driver's inventory is incorrect. (Tr. 43.) To resolve these drivers shorts and to perform their normal inventory duties, the inventory control clerks use a RF gun (just like receivers) to put information into Tandem. (Tr. 42-43.) The Montgomery Division also has a quality control clerk who is responsible for ensuring that perishable inventory is not out-of-date. (Tr. 658.) The quality control clerk receives notifications via computer that indicate when a particular product may be approaching its expiration date. (Tr. 658.)

E. The Drivers and the Montgomery Division's Remote Locations

The Montgomery Division operates seven satellite drop locations: Birmingham, AL, Tuscaloosa, AL, Decatur, AL, Dothan, AL, Saraland, AL, Pensacola, FL and Crestview, FL. (Tr. 7-8.) From these locations, the Montgomery Division provides deliveries to customers through domiciled delivery drivers out-stationed at the seven facilities. (Tr. 105-06.) These domiciled drivers receive the product from shuttle drivers who originate from and transfer the loaded trailers from the Montgomery Division to the satellite drop locations for pickup by the domiciled drivers. (Tr. 105.) After dropping off the loaded trailers at the remote locations, the shuttle driver returns the trailers used the previous day by the domiciled drivers. With these

trailers, the shuttle drivers bring back the driver error sheets along with the returns and refusals just like a local delivery driver. (Tr. 105, 129.) In essence, between the product and the paperwork (hard-copy and electronic) the shuttle drivers are “taking the warehouse” to the delivery drivers working out of the seven domicile locations.

In addition to delivery drivers (local, domiciled, and van/hotshot) and shuttle drivers, the Montgomery Division utilizes backhaul drivers. (Tr. 71-74.) These drivers do not make deliveries to customers; instead they retrieve loads of product from third-party suppliers and other US Foods locations. (Tr. 71-74.) Upon their return to the Montgomery Division, they go through the returns and refusals process just like a local delivery driver making a backhaul. (Tr. 144-45.)

F. Maintenance

The Montgomery Division utilizes several job classifications dedicated to maintenance that keeps the whole integrated process working. The fleet mechanics job is to maintain the trucks and trailers. (Tr. 611-12.) However, the drivers have little personal interface with the fleet mechanics on these issues. (Tr. 611-12.) Some of the fleet mechanics have special certifications that allow them to work on refrigeration units and all are certified to work on air brakes. (Tr. 612.) The fleet mechanics work a set three-shift schedule and are paid by the hour at a rate of \$18.62 to \$25.46¹⁹ with no incentive components to their pay. (Tr. 605-06; USF Ex. 19.) The fleet mechanics share a pick-up truck, scissor lift, and a forklift with the maintenance mechanics. (Tr. 614-15.) The fleet mechanics wear a uniform that is unique at the facility – as it is worn only by the fuelers and fleet mechanics. (Tr. 613.)

The facility also has maintenance mechanics who spend their time in all areas of the warehouse and truck shop and are tasked with performing all maintenance on the

¹⁹ This is the exact same top end compensation rate for the maintenance mechanics. (USF Ex. 19.)

warehouse infrastructure and equipment. (Tr. 178.) They are primarily charged with repairing and maintaining warehouse equipment including the pallet jacks, forklifts, dock levelers, and hand trucks as well as warehouse and mechanic shop lighting, refrigeration, eye wash station, and fire extinguishers. (Tr. 178-81, 621.) The maintenance mechanics share a pickup truck, scissor lift, and a forklift with the fleet mechanics. (Tr. 614-15.)

The Montgomery Division's has several fuelers. (Tr. 78.) The fuelers' duties vary. Three of the fuelers' main duty is to fill up the trucks and trailer refrigeration units as they return from their routes. (Tr. 607.) One of the fuelers spends only 20% of the time fueling trucks and trailers and spends the remainder of the time washing trucks and trailers (inside and out) and performing general custodial duties around the maintenance shop. (Tr. 607.) The fuelers spend their day stationed on the fuel island. (Tr. 607.) The fuelers are supervised by the truck maintenance manager. (Tr. 604.)

The Montgomery Division employs two sanitation workers (also known as custodians) at the Montgomery warehouse facility. The sanitation workers perform general cleaning and supply duties including the clean up of spills around the warehouse and dock area, the gathering and baling of cardboard from discarded product packaging, and assisting the transportation department with paper and other needed supplies. (Tr. 347, 537, 597.)

There is one transportation/maintenance clerk at the Montgomery Facility, and that person works in both the warehouse department and the transportation department. First, she spends 60% of her time assisting the Vice President of Operations with the warehouse reporting requirements. (Tr. 79-81.) Second, she spends 40% of her time conducting a physical parts inventory of the truck maintenance shop using a program called ShopFax. (Tr. 79-81.)

G. The Montgomery Division's Pay, Policies, and Training

1. Hiring/Orientation

US Foods posts all its job openings internally before opening up the hiring process to the public. (Tr. 696.) All Montgomery Division employees can apply internally for these openings. (Tr. 231.) New hire orientation for all employees is essentially the same, except for some job-specific requirements. (Tr. 283; USF Ex. 26.) Employees in different job classifications, such as drivers and warehouse employees, attend orientation together. (Tr. 285; USF Ex. 21.) Items covered include benefits, policies, the employee handbook, clock-in procedures, pay procedures, ethics training, food safety, and accident prevention. (Tr. 283-84, USF Exs. 21, 26.)

2. Position Transfers

The Montgomery Division has had numerous and ongoing job transfers of employees to and from various positions throughout the operation. Furthermore, the Employer identified 10 employees who have gone from positions at the Montgomery Division outside the petitioned-for unit and into positions inside the petitioned-for unit. (Tr. 232-264; USF Ex. 6-15.)

3. Employee Policies

All employees at the Montgomery Division are subject to the same terms and conditions of employment and receive the same handbook. (Tr. 269-79; USF Ex. 17.) For example, the complaint procedure and business conduct policy apply to all employees. (USF Ex.17.) The holiday policy, vacation policy, sick leave policy, and FMLA policy are all applicable to the disputed employees as well as the petitioned-for employees. (Tr. 278-79.) Disputed employees and petitioned-for employees alike are subject to the attendance policy, workplace violence policy, and drug and alcohol-free workplace policy. (Tr. 277.) There is also the safety shoe policy, which applies to employees (regardless of department) who are in a safety sensitive position. (Tr. 288-89.)

4. Employee Events

From time to time, the Montgomery Division may organize events that all employees are encouraged to participate in. For example, the Montgomery Division usually conducts safety incentive competitions throughout the year. (Tr. 150-53; USF Ex. 5.) Employees from many different classifications, both inside and out of the petitioned-for unit, can participate. (Tr. 150-53; USF Ex. 5.)

5. Employee Pay and Benefits

Employees in most of the petitioned-for job classifications and most of the disputed job classifications are hourly employees. The selectors, forklift operators, and delivery drivers are paid with a performance incentive component. Their hourly wage rates for recordkeeping purposes are, therefore, determined by how they perform under the applicable pay-for-performance plan. (Tr. 331-32; USF Exs. 45, 46.) All the petitioned-for employees as well as disputed employees are non-exempt employees eligible for overtime. The hourly wage rates for all these employees are in the same general range. (USF Ex. 19.) All the employees clock in and out each day. The drivers clock in on the XATA system, the selectors clock in through Voxware, and all other employees, both petitioned-for and disputed, clock in on a time clock. (Tr. 167.) All the hourly employees are eligible for a pension plan separate from the 401(k) plan. (USF Ex. 17.) All employees are offered the same medical, prescription, dental, vision, life insurance, short- and long-term disability, and flexible spending account plans. (USF Ex. 17.)

6. Training

In addition to the training that occurs at new employee orientation, all employees receive annual ethics training. (Tr. 129, 347.) Also, both the petitioned-for employees and the disputed employees receive yearly training on safety topics such as HAZCOM, 3E Company, spill

response, emergency preparedness, fire prevention, severe weather, electrical safety, personal protective equipment, storm water awareness, lock out/tag out, bloodborne pathogens, back/lifting safety, slips trips and falls, accident prevention, transitional duty, and the safety footwear policy. (USF Ex. 22, 23.) Finally, every employee in the warehouse, transportation department, inventory control department, and any function that has contact with product are trained in food safety. (Tr. 98, 129.)

V. ARGUMENT

A. The Regional Director Clearly Erred in Resolving Substantial Factual Issues and such Error Prejudicially Affects the Rights of Employer

1. *The Regional Director clearly erred in finding that “[a]ll employees in the petitioned-for unit have similar skills and training”*

To support the conclusion that the petitioned-for employees “share a community of interest,” the Regional Director erroneously stated that “[a]ll of the employees in the petitioned-for unit have similar or related skills and training.” (DDE 27). This finding has no support in the record evidence and amounts to a results-driven over-generalization. In an attempt to lend credence to this baseless contention, the Regional Director simply recited the following unique skills of each employee classification in the petitioned-for unit:

- (1) “All of the drivers are trained to operate tractor/trailers and must have a CDL”; (DDE 27.)
- (2) “All of the fleet mechanics are trained to work on tractor/trailers and receive a certification from the Employer based on their skills”; (DDE 27.)
- (3) “. . . [T]he spotters must know how to operate a yard dog and know how to hook up the trailers to the yard dog”; (DDE 28.) and

- (4) “. . . [T]he fuelers “must possess a minimum understanding of tractor/trailers to perform their job.” (DDE 27.)

However, the Regional Director conceded that no special training or licensing was needed to be a spotter or fueler. These recitations show nothing more than the fact that these classifications have no overlap in job skills or training. Repairing a truck is in no way similar to driving it to a customer and unloading products. Putting fuel in a truck or trailer is in no way similar to driving a truck, in no way similar to backing a trailer up to door,²⁰ and in no way similar to repairing the truck.²¹

Just because all of the employees in these job classifications touch one part or another of a tractor trailer, that does not mean they have “similar or related skills and training.” (DDE 27.) It would be equally as absurd to say that because airline pilots, airline fuelers, airline tow drivers, and airline mechanics all touch the airplane, they have similar training and skills. The Regional Director essentially rubber stamped the union’s attempt to cherry pick the groups they want in order to accommodate the “unit sought” rather than truly analyzing the job classifications based on traditional community of interest factors.

2. *The Regional Director clearly erred in finding that “[n]o other employees perform the same work as those in the petitioned-for unit.”*

As a basis to provide additional support the finding that the petitioned-for employees share a community of interest, the Regional Director erroneously stated that “[n]o other employees perform the same work as those in the petitioned-for unit.” (DDE 28.) The Regional

²⁰ In fact, one witness stated that the yard jockeys “they can’t drive out on the road, so in terms of certification, they’re treated the same as a forklift or pallet jack, in that they have to be certified to operate equipment, but they do not have to possess a CDL.” (Tr. 187-88.)

²¹ The Regional Director also stated that the fuelers “must possess a minimum understanding of tractor/trailers to perform their jobs.” (DDE 28.) There is no record evidence to support this statement. The statement is just an arbitrary conclusion. The record shows that fuelers put fuel into trailers and trucks – this requires no more minimum understanding about the truck or trailer than the loaders who put products into the trailers.

Director went on to say that “[n]one of the employees in the petitioned-for unit regularly share work or perform the work of other employees outside of the petitioned-for unit.” (DDE 28.)

These oversimplified statements only tell half of the story.

What the Regional Director fails to point out is that the various classifications of employees in the petitioned-for unit do not perform the duties of *any* of the other petitioned-for classifications. Although it is true that none of the petitioned-for drivers (delivery, shuttle, and backhaul) regularly perform the job duties of the disputed positions of selector, inventory control specialist and loader, (DDE 28) it is equally true that none of the petitioned-for drivers perform the duties of the other petitioned-for classifications of fueler, fleet mechanic, and spotter.

The Regional Director also points out that the fleet mechanics and fuelers “alone work on tractor/trailers and only on tractor/trailers.” (DDE 28.) Again, none of the petitioned-for drivers perform any of this work either. Yet, the Regional Director nevertheless finds that because mechanics and fuelers work on tractor/trailers, they somehow have “distinct job functions and work” that they share with the petitioned-for drivers and spotters who only drive trucks and yard dogs. (DDE 28.) This argument makes no sense. Logic dictates that the fleet mechanics who turn wrenches on tractor trailers have far more “job functions and work” in common with the maintenance mechanics who turn wrenches on forklifts than they do with employees whose primary job duty is to drive and unload food.

3. The Regional Director clearly erred in misrepresenting the job duties and supervisory structure of the night shift spotters

The Regional Director makes several misstatements regarding the petitioned-for night shift spotters in an attempt to find a way to support the Union’s claim that the spotters share a distinct community of interest with the petitioned-for drivers apart from other Montgomery Division employees. First, the Regional Director erroneously states that the day spotters perform

the exact same function as the night spotters. (DDE 31.) The record does not support this finding. The function of the night shift spotters is different from the function of the day shift spotters. (Tr. 199.) At night, the spotters are moving trailers between loading docks to be loaded. (Tr. 199.) During the day, the spotters are moving trailers around for the purposes of doing preventative maintenance or repairs or moving the trailers to unload the backhauls. (Tr. 199-200.) Second, the Regional Director erroneously states that although the night spotters do not share common supervision with any of the remaining petitioned-for classifications, “that supervision appears to be limited to providing the night spotters with their trailer assignments at the beginning of the shift.” (DDE 31.) The Regional Director completely ignores the fact that the night warehouse supervision have hiring and discipline responsibilities for the night spotters. (Tr. 449-452; USF Exs. 47 & 48.)

4. The Regional Director’s errors regarding substantial factual issues prejudiced the Employer

The Regional Director repeatedly relies on these mistaken findings of fact as a basis for the conclusions made. To create the impression that all the petitioned-for employees constitute a “readily identifiable group” and share a community of interest, the Regional Director relies on the broad and erroneous factual generalization that “[a]ll the employees in the petitioned-for unit have similar skills and training” and “perform the same work.” (DDE 27-28.) The fact is the various groups in the petitioned-for unit have no more in common with one another than they do with disputed employees. The Regional Director has relied on these erroneous and misleading factual findings to evade the well-founded argument that the unit sought is inappropriate because it is fractured and simply cherry picks those classifications where the Union finds its support. As a consequence, the DDE is a results-driven decision that does not follow the community of interest analysis required under Board law – rather it simply accepts the unit drawn up by the

Union's petition. See 29 U.S.C. § 159(c)(5) ("In determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling.")

B. A Substantial Question of Law or Policy Exists Because the Regional Director Misapplied and Ignored Board Precedent

1. The Regional Director misapplied the Board's recent holding in Specialty Healthcare

The Regional Director's decision results in a blatant misapplication of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (2011). *Specialty Healthcare* establishes that, if the petitioned-for unit is not presumptively appropriate, the first step in determining the appropriateness of a petitioned-for unit is to assess whether the employees are "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors)." *Id.*

Nothing about the grouping of classifications for which the Union has petitioned suggests that they constitute a readily identifiable group. The Regional Director either misstates or ignores the record evidence to support the community of interest analysis and then leans on the Union's focus on the tractor trailer rig to prop up an otherwise weak alignment of the traditional community of interest factors. (DDE 27.) Moreover, if the focus were truly on the tractor trailer, any unit must include the loaders and return door clerk. The loaders perform their jobs *inside* the trailer. Likewise, the return door clerk enters the trailer to let down the dock leveler, remove pallets, and remove product from the trailer – not to mention check-in a driver with returns.

2. The Regional Director ignored longstanding Board precedent regarding fractured units

The Regional Director's decision results in a fractured bargaining unit, such units having long been disapproved by the Board. As the Board stated in *Seaboard Marine, Ltd.*, 327 N.L.R.B. 556 (1999), "it is well established 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." *Id.*

(citing *Colorado National Bank of Denver*, 204 N.L.R.B. 243 (1973)). In *Seaboard Marine*, the Board held that the petitioned-for unit of employees was inappropriate because the employees “d[id] not share a sufficiently distinct community of interest from other employees to warrant a separate unit and, therefore, that the unit grouping sought by the Petitioner is an arbitrary one.” *Id.* (citing *Brand Precision Services*, 313 N.L.R.B. 657 (1994); *Transerv Systems*, 311 N.L.R.B. 766 (1993)).

As the Board held in *TDK Ferrites Corp.*, 342 N.L.R.B. 1006, 1008 (2004), a union’s attempt to selectively petition for “maintenance department employees, production technicians, tool specialists, and set-up specialist” separate from the rest of the employer’s production employees in their “highly integrated” operation, was inappropriate. *Id.* The Board held that, based on the high degree of interaction of petitioned-for employees with non-petitioned-for employees and other shared community of interest factors, the unit was not “composed of a distinct and homogeneous group of employees with interests separate and apart from other employees at the Employer’s plant” and, therefore, such a unit could not be justified. *Id.*

As the Board recently stated in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 83 (2011):

A petitioner cannot fracture a unit, seeking representation in “an arbitrary segment” of what would be an appropriate unit. *Pratt & Whitney*, 327 N.L.R.B. 1213, 1217 (1999). “[T]he Board does not approve fractured units, i.e., combinations of employees that ... have no rational basis.” *Seaboard Marine*, 327 N.L.R.B. at 556 (1999).

The Board also recently held that when there is no rational basis for excluding groups of employees from other petitioned-for employees who share little or no more community of interest than those petitioned for, the unit is inappropriate. *Odwalla, Inc.*, 357 N.L.R.B. 132 (2011). The Board in *Odwalla, Inc.* cited the language of *Blue Man Group, LLC v. NLRB*, 529

F. 3d 417, 421 (2008), stating there is “no legitimate basis upon which to exclude” the [non-petitioned-for employees] while at the same time including all the other classifications in the recommended unit.” *Odwalla, Inc.*, 357 NLRB No. 132 (2011).

As the following discussions clearly demonstrate, the petitioned-for unit in this case suffers the same malady as those petitioned-for units found inappropriate by the Board under the fractured unit principle: there is no rational basis for combining just drivers, spotters, fuelers and maintenance mechanics into a unit at the exclusion of the disputed employees. As a result, the petitioned-for unit is inappropriate.

Furthermore, as a means to justify the exclusion of the van drivers, who perform exactly the same essential job functions as the delivery drivers only they use a box truck rather than a tractor trailer, the Regional Director states that the van drivers perform those same functions under a “different regulatory scheme” in that the van drivers are not required to have CDLs (although one of the two does) (Tr. 216) and their trucks are not subject to DOT regulations. (DDE 32.) The Regional Director says that this regulatory distinction alone is a “significant enough distinction” to justify their exclusion. If DOT and CDL requirements were enough draw lines around a “readily identifiable group” the spotters (not to mention the fuelers and fleet mechanics) would be excluded from the unit. Spotters are not required to have a CDL and the “yard dog” is not a DOT public-road-compliant vehicle. (Tr. 187-88.) In fact, it is illegal to drive trailers on public highways using the yard dog. *Id.* Likewise, the fuelers and fleet mechanics have no DOT oversight. The Regional Director’s use of these unbalanced distinctions reinforces that fact that this decision is a results-driven rubber stamp of the Union’s desired unit.

Finally, the Regional Director erroneously attempts to erect a barrier between the petitioned-for employees and the disputed employees. For example, the Regional Director stated

that “[w]hile there is a certain degree of integration in the workflow, there is little integration of the work [of the petitioned-for employees and the disputed employees].” (DDE 29.) On its face, this statement would certainly indicate a degree of separation from the petitioned-for employees and the disputed employees. However, again only half of the story is conveyed by the Regional Director’s statement because the same could be said for all of the various classifications petitioned-for by the union. The drivers have no more “work integration” with the fleet mechanics than they do with the return door clerks; the fleet mechanics have no more “work integration” with the fuelers than they do with the maintenance mechanics; the spotters have no more “work integration” with the drivers than they do with the loaders.

C. A Substantial Issue of Policy Is Created Based On The Regional Director’s Decision To Adopt The Union’s Position on the Van Drivers Even Though the Union Took the Contrary Position at the Hearing

At the hearing, the Union asserted on the record that it was seeking the van drivers for inclusion in the unit²² and it never modified this position.²³ However, in its Post-Hearing Brief, the Union argued that they should be excluded. The Regional Director accepted the Union’s argument in this regard and excluded the van drivers. This constitutes prejudicial error to the Employer because it was not afforded the opportunity to fully offer evidence in this regard.

Specifically, the Employer was deprived of the opportunity to present evidence and argument proving the van drivers share an overwhelming community of interest with the petitioned-for drivers and thus must be included in the unit. Indeed, any such evidence was unnecessary based on the Union’s assertions that it considered the van drivers a part of the petitioned-for unit. Clearly, the van drivers do indeed share an overwhelming community of

²² " I would just add that the spotters and the van drivers are part of our group we're trying to petition for." (Tr. 171-72.)

²³ Section II.15 of The Guide for Hearing Officers in NLRB and Section 10(K) Proceedings (September 2003) establishes that, in order for the record to be properly complete it must contain “the exact final position of the parties regarding unit contentions, inclusions or exclusions or remaining issues raised during the hearing.”

interest with the drivers. Both perform deliveries from the Montgomery Division employees and both interact constantly with US Foods' customers.

In sum, the Union should be estopped from arguing the van drivers are not part of the unit when it argued at the hearing they were in the unit. At the very least, the Regional Director should have disregarded this argument, as it is contrary to the Union's stated position and not supported by the record evidence. The Regional Director's acceptance of this argument is further evidence of a results-driven DDE that amounts to a rubber stamp of the Union's positions

D. The Petitioned-For Unit Purportedly Based on Departmental Lines is Inappropriate

The Regional Director's adopted the union's petitioned-for unit, which was purportedly based on departmental lines, (Tr. 14) but actually excludes two transportation clerical employees and the van drivers who report to transportation. The petitioned-for unit also includes two spotters who report to the warehouse, and improperly excludes numerous other employees who work in the warehouse and who are functionally integrated with and dependent upon employees within the petitioned-for unit. Departmental units are not favored,²⁴ and the Petitioner's attempt to exclude certain employees from the same department of the petitioned-for employees further illustrates the inappropriateness of the petitioned-for unit – and the desire of the Region to reach a result contrary to the law and the facts.

The National Labor Relations Act ("Act") requires that the Board find that a petitioned-for unit to be "an appropriate unit" Before permitting an election in the same. *The Boeing Company*, 227 N.L.R.B. 152 (2001). While it is true that the Act does not require the unit be the "only appropriate unit" or the "most appropriate unit," the Board must nonetheless determine that the unit is "appropriate." *Id.* In making the determination as to whether the petitioned-for

²⁴ See *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418 (1954) (Board requires "strict proof" that the departmental group is "functionally distinct and separate" and Board will not approve petitioners efforts to "seek[] severance to use this concept as a basis for establishing extent-of-organizing units or for fragmentizing").

unit is, indeed, appropriate, the Board principally considers whether the petitioned-for employees share a community of interest that sets them apart from other employees. In *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962), the Board enumerated factors to be assessed in determining whether a community of interest sets a group of employees apart from other employees:

1. a difference in method of wages or compensation;
2. different hours of work;
3. different employee benefits;
4. separate supervision;
5. the degree of dissimilar qualifications, training, and skills;
6. differences in job functions and amount of working time spent away from the employment or plant situs;
7. the infrequency or lack of contact with other employees;
8. lack of integration with the work functions of other employees or interchange with them; and
9. history of bargaining.

The Board has also stated that “organization by department or classification is not favored.” *American Publishing Company of Michigan*, 308 N.L.R.B. 563 (1992) (citing *Airco, Inc.*, 273 N.L.R.B. 348 (1984)). In fact, as the Board held in *Overnite Transportation Co.*, 322 N.L.R.B. 723 (1996), its purpose in determining what unit constitutes an appropriate unit was intended by Congress “to prevent fragmentation of appropriate units into smaller inappropriate units.” *Id.* at 725.

In this case, the Union attempts to define its petitioned-for unit as a purported departmental unit (transportation), albeit one that specifically carves out employees in that department and includes other employees from another department. The Union’s efforts - and

the Region's approval thereof - are clearly contrary to established Board precedent of "prevent[ing] fragmentation" of employees as outlined in *Overnite Transportation, supra*. To allow the Union to pick and choose two employees outside the purported department while denying inclusion of departmental employees whose job duties are even more integrated with the brunt of the petitioned-for employees, is improper.²⁵

E. Because The Duties of the Disputed Employees are Functionally Integrated With the Montgomery Division Workflow and the Disputed Employees Have Routine Daily Contact with the Petitioned-For Employees, the Disputed Employees are Production (Plant) Clericals

1. The Regional Director failed to properly apply the production clerical analysis

Employees who perform clerical duties in association with the production process are considered production clericals and should be included in the same unit as the employees they support. *Goodman Mfg. Co.*, 58 N.L.R.B. 531, 533 (1944); *Brown & Root, Inc.*, 314 N.L.R.B. 19, 23 (1994). The Regional Director dismissed the Employer's argument that the disputed employees are production clericals because there was no evidence of contact between the disputed employees and the petitioned for employees. (DDE 29, 34). The Regional Director essentially determined that the production clerical line of cases did not apply here because the disputed employees spend most of their day inside, while the petitioned-for employees work outside. Such a determination oversimplifies the community of interest analysis and also ignores the evidence presented at the hearing that these employees interact constantly at the return door, at the loading docks, in the transportation office, and via two-way radios. In sum, the Regional Directors decision on this issue is clearly erroneous because working side-by-side is not the dispositive factor in plant clerical cases, rather the "indispensable and conclusive element is that the asserted [production] clericals perform functions closely allied to the production process or to

the daily operations of the production facilities at which they work.” *Gordonsville Industries*, 252 N.L.R.B. 563, 591 (1980), quoting *Fisher Controls Co.*, 192 N.L.R.B. 514 (1971).

In the instant case, the return door clerks, transportation/maintenance clerk, inbound logistics coordinator, shipping/receiving clerks, cycle counter, inventory control clerks, quality control clerk, driver check-in clerks, and night warehouse clerks are all production clericals since they are integral to the Employer’s complex and fully integrated distribution operation. These clericals’ job functions directly relate to and are mutually dependent on the job functions of the petitioned-for employees.

2. The Regional Director ignored the evidence that the disputed employees indeed have daily contact with petitioned-for employees

As mentioned above, the Regional Director erroneously found that there is little daily contact between the petitioned-for employees and the disputed employees and uses that finding to determine that the disputed employees do not share an overwhelming community of interest with the petitioned-for employees. (DDE 29.) Contrary to the Regional Director’s observation, the Employer presented testimony showing that the disputed employees have consistent daily contact with the petitioned-for employees. The transportation/maintenance clerk spends 40% of her time physically in the truck shop with the fleet maintenance employees. (Tr. 80-81.) The driver check-in clerks work in the transportation office where they are in constant contact with drivers. (Tr. 140-42.) The inbound logistics assistant speaks with the drivers constantly and receives paperwork from them. (Tr. 632, 637.) The loaders contact the spotters via two-way radio to coordinate movement of the trailers on the docks. (Tr. 577.) The return door clerks spend 90% of their time in face-to-face contact with drivers. (Tr. 215.)

3 The return door clerks are production clericals

The return door clerks should be included in the unit because those employees have daily contact with the petitioned-for employees and their duties are functionally integrated with operations at the Montgomery Division. In deciding to exclude the return door clerks from the unit, the Regional Director did not even address the Board precedent cited by the Employer holding that employees who routinely interact with petitioned-for employees on the back end of the workflow should be included in the unit as production clericals. *See Federal Express Ground Package Sys., Inc.*, 2001 N.L.R.B. Lexis 1088 (2001) (check-in clerks and data entry clerks should be included in a unit of package handlers). This was clear error.

The return door clerks pull data, inputted by drivers in the field, to reconcile the information in a centralized system. (Tr. 547.) They also work directly with the drivers to correct errors, which occur frequently. (Tr. 552-53, 564.) This evidence clearly contradicts the Regional Director's unsubstantiated assertion that there is "little contact between the employees in the petitioned-for unit and the employees that the Employer proposes to add." (DDE 29.) Without a doubt, the return door clerks interact with the drivers on a daily basis. As such, the return door clerks are production clericals and should be included in the unit.

4. The transportation/maintenance clerk is a production clerical

The transportation/maintenance clerk should be included in the unit because that employee has daily contact with the petitioned-for employees and her duties are functionally integrated with the Montgomery Division operations. Furthermore, the transportation/maintenance clerk is one of only two transportation department employees that the Regional Director excluded from the unit. This was clearly error.

The transportation/maintenance clerk works in both the warehouse department and transportation department. (Tr. 79-80.) She is responsible for the warehouse reporting requirements and for conducting a parts inventory of the truck maintenance shop. (Tr. 79-80.) Her work in the truck shop requires her to come into constant contact with the fleet mechanics, who the Board held should be included in the unit. While the fact the transportation/maintenance clerk works in two departments illustrates the functional integration of the Montgomery Division as a whole, it also clearly indicates that she shares an overwhelming community of interest with employees in the petitioned-for unit. As such, the transportation/maintenance clerk is a production clerical and should be included in the unit.

5. The inbound logistics coordinator is a production clerical

The inbound logistics coordinator should be included in any unit found appropriate because this employee has daily contact with the petitioned-for employees and her duties are functionally integrated with the Montgomery Division operations. Furthermore, the inbound logistics coordinator is one of only two transportation department employees that the Regional Director excluded from the unit.

In its Post-Hearing Brief, the Employer cited *Desert Palace, Inc.*, which found that “coordinators” are production clericals and should be included in a unit consisting of the workers they support. 337 N.L.R.B. 1096, 1099 (2002) (dispatching duties performed by engineering coordinator are production clerical in nature). Nevertheless, the Regional Director excluded the inbound logistics coordinator from the unit. The Regional Director completely disregarded *Desert Palace* providing no explanation as to why that case did not control the analysis here.

The duties of the inbound logistics coordinator are similar to the duties performed by the engineering coordinator that were found to be plant clerical in nature in *Desert Palace*. The

inbound logistics coordinator creates the schedule for the backhaul drivers and delivery drivers performing backhauls and addresses any logistical problems they may encounter while carrying out their job. (Tr. 632.) Also, backhaul drivers bring their paperwork to the inbound logistics coordinator for processing. (Tr. 637.)

These facts indicate that the inbound logistics coordinator shares an overwhelming community of interest with the backhaul drivers and the delivery drivers performing backhauls. Thus, the inbound logistics coordinator is a plant clerical and should be included in the unit.

5. The shipping/receiving clerks are production clericals

The shipping/receiving clerks perform similar functions to the functions performed by the inbound logistics coordinator. The shipping/receiving clerks create the schedules and address any logistical problems for the outside carriers that deliver products to the Montgomery Division. Also, one shipping/receiving clerk works in both the warehouse and transportation department. (Tr. 53.) He spends half the night performing clerical work for the warehouse, and the other half of the night he is working in transportation as a dispatcher. (Tr. 53-54.)

Again, the Board's decision in *Desert Palace, Inc.*, indicates that employees who perform these dispatching or coordinating duties should be included in a unit consisting of the employees they support. Nevertheless, the Regional Director excluded these employees from the unit. And again, the Regional Director provided no explanation why *Desert Palace* did not control the plant clerical analysis related to the shipping/receiving clerks. This was clearly error

6. The driver check-in clerks are production clericals

The driver check-in clerks should be included in any unit found appropriate because those employees have daily contact with the petitioned-for employees and their duties are functionally integrated with the operations at the Montgomery Facility. In deciding to exclude

the driver check-in clerks, the Regional Director did not even address the Board precedent cited by the Employer holding that employees who collect and process paperwork on the back end of the workflow should be included in the unit as production clericals. *See Federal Express Ground Package Sys., Inc.*, 2001 N.L.R.B. Lexis 1088 (2001) (check-in clerks and data entry clerks should be included in a unit of package handlers).

The driver check-in clerks process the paperwork coming from field employees. Specifically, the driver check-in clerks at the Montgomery Division collect checks and money orders from the drivers returning from their routes. (Tr. 76, 105, 110.) The driver check-in clerks routinely interact with drivers at their window. (Tr. 140-42.) As such, the driver check-in clerks, like the check-in clerks in *Federal Express*, are production clericals and should be included in the unit.

7. Other plant clericals should be included in the unit as well

The duties of the cycle counter, inventory control clerks, quality control clerk, and night warehouse clerks are necessary to the petitioned-for employees' ability to perform their work and, as a result, they should be included in the bargaining unit.

The cycle counter, inventory control clerk, and quality control clerk ("inventory control employees") should be included in any unit found appropriate because their duties are functionally integrated with the operations at the Montgomery Facility. The Employer cited two cases holding that inventory control employees are frequently required for inclusion in a unit consisting of the employees they support. *Avon Products, Inc.*, 250 N.L.R.B. 1479 (1980) (inventory clerks at products receiving and distribution facility must be included in a unit of petitioned-for production and maintenance employees); *Brown & Root, Inc.*, 314 N.L.R.B. 4 (1994) (material take-offs and toolroom/warehouse clerks should be included in a construction

and maintenance unit). However, the Regional Director completely ignored this Board precedent in excluding the inventory control employees. This was clearly error.

The inventory control employees count inventory and enter information into a system that tracks on-hand inventory. The work done by the inventory control clerks ensure the drivers can make their deliveries with minimal error. As such, the duties of the inventory control employees are functionally integrated with the work of the petitioned-for employees, and thus, the inventory control clerks are production clericals and should be included in the unit.

The night warehouse clerks should be included in any unit found appropriate because their duties are functionally integrated with the operations at the Montgomery Facility. The night warehouse clerks receive and process paperwork that is essential to the functioning of the facility's operations. Specifically, the night clerks are responsible for producing all the paperwork that the drivers need in order to make their deliveries. (Tr. 183-84.)

The Employer cited *Brown & Root*, in which the Board held that employees with job duties similar to the duties of the night warehouse clerks at the Montgomery Division should be included in a unit of construction employees. 314 N.L.R.B. 19 (1994) (including document control clerks that received, date-stamped, and distributed blueprints in a unit consisting of employees they supported). Nevertheless, the Board excluded the night warehouse clerks without explanation. This was clearly error.

F. An Appropriate Unit Must Include the Many Warehouse and Finance Employees that the Union Attempts to Exclude

The forklift operators, loaders, receivers, selectors, day stockers, return door clerks, and will call selector (“warehouse and finance department employees”) share an overwhelming community of interest with the petitioned-for employees as a part of the Employer’s integrated operation and thus should be included in the unit.

The Board has said that “the manner in which a particular employer has organized his [operation] and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the [operation] and is thus an important consideration in any unit determination.” *International Paper Co.*, 96 N.L.R.B. 295, 298 fn. 7 (1951). Therefore, when a company sets up its business in a manner such that all positions are equally co-dependant and the entire operation’s output is a result of a singular integrated process, the strong community of interest of all employees in the operation is inherent. *See Potter Aeronautics*, 155 N.L.R.B. 1077 (1965).

The Board has, on many occasions, found the strong community of interest and compelling functional integration of an operation’s warehouse or other production employees require their inclusion together in a unit with truck drivers. In *Standard Oil Co.*, 147 N.L.R.B. 1226 (1964), the drivers spent “their time in the performance of the same functions as other employees at the terminal.” Further, even though the drivers, unlike the other plant employees, were required to wear uniforms and were subject to governmental regulations unique to drivers, the Board found that the truck drivers should not be included in a unit separate and apart from the other plant employees. 147 N.L.R.B. at 1228.

The facts in this case are well in line with the facts in *Standard Oil*. The Montgomery Division’s local delivery drivers all spend a substantial amount of their time performing the loading and unloading of their trucks, just like the employees in the warehouse. (Tr. 508.) In fact, the amount of time a driver spends on the road can be minimal. (Tr. 508.) Additionally, the drivers have the same level of direct supervisory oversight to both the dayshift and nightshift warehouse employees as do the dayshift and nightshift warehouse employees to one another.²⁶

²⁶ The dayshift warehouse employees at the Montgomery Division report to their dayshift Supervisor and Manager, who report to the Vice President of Operations. The nightshift warehouse employees report to their nightshift

In another case, the Board yet again required the inclusion of drivers with other production and maintenance employees even though they spent the vast majority of their time delivering products to customers. *Calco Plating, Inc.*, 242 N.L.R.B. 1364, 1365 (1979). There, the Board found that because the drivers and production and maintenance employees were “directly supervised, in part, by the Employer’s vice president [although they did not have the same “immediate” supervision], ha[d] the same working conditions; comparable wages based on same pay scale; and the same mode of compensation, pay raises, and fringe benefits,” they were required to be included in the unit. Truly, the determinative factor is not whether employees spend time on the road or at the Montgomery Division warehouse facility. Time on the road is unique to the drivers and van drivers (who notably the Union and Regional Director would exclude from the unit). The petitioned-for fuelers, spotters, and fleet mechanics and the disputed employees alike all spend their entire day at the Montgomery Division.

In *Atchison Lumber & Logging Co.*, 215 N.L.R.B. 572 (1974), the Board mandated the inclusion of all production, maintenance and truck drivers in a unit where the petitioned-for unit only included drivers. There, the Board based its decision on the fact that the “drivers have regular contact with other employees at the landing where the logs are loaded onto their trucks” just as the loaders at the Montgomery Division do. *Id.* Additionally, the Board found compelling the fact that drivers had occupied other job classifications, had the same benefits as other employees, were paid from a common payroll, even though the drivers’ pay was computed differently. *Id.* Finally, the Board considered the following as a basis for its decision to require the inclusion of drivers in the petitioned-for unit of maintenance and production employees:

Warehouse Supervisors and Manager, who report to the Vice President of Operations. The drivers report to the Transportation Supervisors and Manager, who report to the Vice President of Operations. Therefore, the dayshift warehouse, nightshift warehouse, and drivers, all receive common supervisory oversight from the same level in management – the Vice President of Operations.

[I]n performing the overall function of the Employer, the work of each job classification is *dependent* on the operation of the other classifications in such a way that *any termination or slowdown of work in one part of the logging operation will affect the balance of the operation.*

215 N.L.R.B. at 572 (emphasis added). The record in this case indicates that similar integrated dependence exists at the Montgomery Division – for drivers, production clericals, and Warehouse Employees alike.

Other cases where the Board has found that drivers must be included in any appropriate unit of production employees include: *Donald Carroll Metals, Inc.*, 185 N.L.R.B. 409 (1970) (employees spent the vast majority of their time delivering and returning goods to employer’s facility”); *Boyden Logging, Inc.*, 164 N.L.R.B. 1069 (1967) (where employer’s drivers, who spent as little as 5% to as much as 25% of their time not behind the wheel of the truck,²⁷ and who had “integration of functions” were found to share a strong community of interest with other production employees such that a separate unit was not allowed by the Board); *Philco Corp.*, 146 N.L.R.B. 867 (1964) (where driver ferried goods between employer’s warehouse and plant buildings was found to share a sufficient community of interest with petitioned-for material handling and warehouse employees).

Furthermore, the fact that the Regional Director included the spotters in the unit, while excluding the disputed employees is improper because: (1) the nearly constant contact of the nightshift spotters and the loaders in the warehouse; (2) the similar hours and working conditions spotters share with other nightshift and dayshift warehouse and finance department employees; (3) the fact that the spotters receive on-shift supervision from the nightshift warehouse supervisors; and (4) the existence of other community of interest

²⁷ The Montgomery-based and domicile delivery drivers spend only approximately 25% of their time driving, the rest is spent unloading product at the customers’ location or at the warehouse. (Tr. 73.)

factors. The spotters have an overwhelming community of interest with the warehouse employees and thus the warehouse employees must be included in any unit containing the spotters.

VI. CONCLUSION

For the above reasons, the Regional Director erred in approving the petitioned-for unit. The only appropriate unit at the Montgomery Division for the purposes of the present petition is all full-time and part-time employees in the following classifications: delivery driver, shuttle driver, backhaul/logistics driver (both those locally assigned to the Montgomery facility in the Montgomery Division and those assigned to one of seven satellite locations reporting into the Montgomery Division), fleet mechanic, fueler, spotter, cycle counter, forklift operator (both day and night), loader (including lead), maintenance mechanic (including lead), receiver (including lead), sanitation worker, selector, stocker (day and night), will call selector, transportation/maintenance clerk, driver check-in clerk, inbound logistics assistant, inventory control clerks, operations clerk (a/k/a night warehouse clerk), quality control clerk, shipping/receiving clerk, and any leadperson(s) in any of the above classifications.

Dated this the 7th day of May 2012.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

_____)	
US FOODS, INC.,)	
Employer,)	
and)	Case No. 15-RC-076271
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS LOCAL UNION NO. 612,)	
Petitioner.)	
_____)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served via Electronic Mail the following Post-Hearing Brief for US Foods, Inc., on the following:

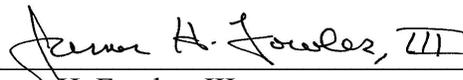
Paul Stuart
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This is to certify that I have this day served via Electronic Filing the Request for Review for US Foods, Inc., on the following:

Regional Director M. Kathleen McKinney
National Labor Relations Board – Region 15

This the 7th day of May 2012.

OGLETREE, DEAKINS, NASH,
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