

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

KOCH FOODS OF FAIRFIELD, INC.

Employer
and

Case 9-RC-078964

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 75

Petitioner

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all research and development employees, excluding all other employees and all professional employees, guards and supervisors as defined by the Act, employed by the Employer at its Fairfield, Ohio facility, where the Employer processes and prepares chicken products for its customers. The Employer maintains that the election is barred by the election in Case 9-RC-076793. A hearing officer of the Board held a hearing in this matter and the parties subsequently filed briefs with me.

As described below, I find that based on the record and relevant Board cases, including the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), the petitioned-for unit limited to the Employer's 10 research and development employees, excluding all other employees and all professional employees, guards and supervisors as defined by the Act, is appropriate and that the instant petition is not barred by the election recently conducted in Case 9-RC-076793.

The Employer's Operations

The Employer produces chicken, beef, pork and veal products for customers such as Nestle, Pinnacle, Kroger, Wal-Mart, Meijer's, Wendy's, McDonald's and Yum. The Employer has various manufacturing locations nationwide and has divided its operation into seven departments: Research and Development (R&D), Supply Chain, Quality Assurance, Manufacturing, Sanitation, Maintenance and Warehouse. Each of these departments is headed by a general manager. Vice President Ted Davis is over the R&D department and reports directly to the Employer's owner, Joe Grundy, who is located at the Employer's headquarters in Chicago, Illinois. Reporting to Davis are Directors of R&D, Ed Roche and Vince Metzcar; Pilot Plant Manager Pierre Calle; Regulatory Affairs Manager Andy Butler; and Continuous Improvement Manager Dwight Moody.

Board Law

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). The Board first determines whether the unit proposed by a petitioner is

appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an “overwhelming community of interest” with those in the petitioned-for unit. *Specialty Healthcare*, supra, slip op. at 7.

Thus, the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group and share a community of interest. In doing so, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and, are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002); see also, *Specialty Healthcare*, supra, at 9. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there “is no legitimate basis upon which to exclude the employees from” the larger unit because the traditional community-of-interest factors “overlap almost completely.” *Specialty Healthcare*, supra, at 11-13, and fn. 28 (quoting *Blue Man Vegas, LLC. V. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip. op. at 3, fn. 8 (2011).

Application of Board Law to the Facts of this Case

The Unit Sought By Petitioner is a Readily Identifiable Group and They Share a Community of Interest

In concluding that the employees in the petitioned-for unit are “readily identifiable as a group,” I note that they are all employed in the same department and that they share a unique function – supporting the creation of new products. While other employees in the facility perform similar functions with regard to existing product lines, the Employer maintains a strict delineation between the R&D employees who develop new products and the other employees who work on existing products. ^{1/}

Moreover, the petitioned-for employees share a community of interest under the Board’s traditional criteria. Besides working in the same department, they are under common supervision: they all report to various R&D managers and supervisors and ultimately to Vice President of R&D Ted Davis. Their work has a shared purpose and is functionally integrated.

^{1/} Although primarily symbolic, this delineation is demonstrated by the R&D lab coats that the employees wear when customers are present at the facility.

All of the R&D employees are dedicated to the creation and support of new products. When customers desire a new product, they typically direct the request to the Employer's sales department, which, in turn, will relay the request to Davis. If Davis approves the request, it goes to one of the R&D directors, Metzcar or Roche, who will either create the product or give the product to a technologist to create with the assistance of the R&D technicians in the R&D department's kitchen. The pilot plant employees, who are part of the R&D department, manufacture the product on the department's pilot line. R&D employees go into the plant or to the warehouse to get ingredients for the new products, but take the materials back to R&D for assembly. After the new products are created, R&D employees package them for shipment. Lead Sample Technician Edgardo Cardona is key to this role. Cardona monitors a computer located in the Employer's R&D department where he receives e-mails from the sales department personnel and other personnel telling him which samples created by the R&D department need to be shipped out. Cardona and Sample Technician Jesus Reyes then go to the warehouse to ship out the required samples. There is not, however, a strict delineation of functions within the R&D department and the employees assist one another in the performance of their duties according to the flow of the work. Cardona, for instance, assists the R&D kitchen employees and R&D pilot line employees when he lacks sufficient shipping work and vice versa. In the performance of the duties detailed above, the R&D employees necessarily have extensive contact with one another. Although some of the R&D employees are certified to use equipment such as forklifts and others are not, even those who operate forklifts will also help in the kitchen and pilot lines; thus R&D employees are largely interchangeable with one another, possess similar skills and functions, and work under similar terms and conditions of employment. *DTG Operations, Inc.*, 357 NLRB No. 175 (2011); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011).

Accordingly, the employees in the petitioned-for unit are a readily identifiable group and share a community of interest and the petitioned-for unit is appropriate for the purposes of collective bargaining. Although the Employer has not explicitly argued that any other job classifications must be included in the R&D unit, I will address this issue since the Employer's election bar argument suggests that the R&D employees share a community of interest with its other production employees.

The Classifications Sought By Petitioner Do Not Share an Overwhelming Community of Interest with any other Employees

The R&D employees do not share an overwhelming community of interest with the any other employees. In reaching this conclusion, I find that the R&D employees largely work separately from other employees and perform distinct tasks; are separately supervised; and, have infrequent and limited interchange with the other job classifications.

A. The Employees Sought By Petitioner Are In a Separate Department and Have Separate Supervision from the Other Employees

It is significant to my analysis that the Employer has organized its managerial hierarchy and its physical layout of its facility in a manner that emphasizes the separateness of the R&D department. The R&D department is under a Vice President of R&D, who does not appear to have any other responsibilities outside of R&D. There are also several managers and directors under Davis whose responsibilities are largely confined to the R&D Department, with the exception of Manager of Continuous Improvement Dwight Moody, who occasionally substitutes

as plant manager when the facility is short-handed – most often on weekends. It is notable that, unlike the other production employees, R&D employees do not work on weekends. Thus, most of the time that Moody is supervising non-R&D employees, the R&D employees are not on the premises. The Employer's physical structure of its plant also serves to emphasize the separateness of R&D. R&D has its own kitchen on the second floor and its own pilot line on the first floor (located under the R&D kitchen) and neither of these facilities are routinely used by the Employer's other employees. During the rare occasions when the Employer's other employees need to use the pilot line, the R&D employees vacate the area. Also, as discussed above, R&D employees even perform their own ancillary tasks such as shipping their products to customers.

B. The Employees Sought By Petitioner Do Not Have Frequent Contact with the Other Employees and the Degree of Functional Integration Differs Significantly Between the Unit Sought by Petitioner and Other Potential Units

The Employer's hierarchical and physical structuring of its facility leads to limited contact between the R&D employees and other employees. With few exceptions, the R&D department functions almost entirely on its own. R&D employees may visit the warehouse to get ingredients, but they take the materials back to the R&D work areas to prepare and assemble the product. Maintenance employees will bring a dicing machine to the R&D area and instruct R&D employees on how to use the machine, but this does not happen regularly – only for isolated instances when the R&D employees need to use the dicing machine. Similarly, about once a month, production personnel will assist R&D employees in using the injecting machine located in the production area. R&D employees get thermometers and scales from a common location (although they keep separate weigh logs). R&D employees also have some contact with the Quality Assurance department when those employees perform FDA-mandated inspections. On occasion R&D employees work on an item manufactured by the regular production line when a new product sells unexpectedly well, but this only happens 6 or less times per year out of thousands of orders and, even then, the R&D employees continue to work in their own location, separate from the production employees.

Although the R&D employees and regular production employees perform similar job functions, they usually perform these functions separately. For instance, although the R&D and Production departments both must set up their lines prior to the start of work, this function in the R&D department is performed entirely "in house" by the R&D associates, technicians and pilot line manager, while sanitation employees and maintenance personnel set up the lines for the production department. The separation is maintained in other aspects of the Employer's operation as well. R&D employees even use their own label machine to label products for shipping and package and ship their sample products. Although R&D employees may encounter and interact with employees from other departments when working in the warehouse freezer, R&D only utilizes less than 5 percent of the total freezer space and has its own pallets that are used for storing its products, which are kept separately from products made by the other departments. If a pallet falls in the freezer and is damaged, all employees in the area, including R&D, will work together to clean the spill to quickly eliminate any hazards, but absent such special circumstances, the R&D employees and Production employees do not help one another to perform routine duties such as loading trucks. Although all departments are subject to the same safety and cleanliness procedures and training, the R&D Employees attend training classes separately from the other departments.

C. *The Employees Sought By Petitioner Do Not Interchange With the Other Employees*

The Employer's separate hierarchical and physical structuring of its facility leads to limited interchange between R&D employees and employees in other departments. No warehouse employees work in R&D and it has been years since any R&D employees were assigned to work in production. The record disclosed limited incidences of permanent interchange as well with evidence of only one employee being permanently transferred from the Production department to R&D to replace an R &D employee who had left.

In weighing all of the factors, I find that the Employer has failed to demonstrate that any other employees share an overwhelming community of interest with the R&D employees, even though the Employer's other employees have similar job duties (such as operating equipment, picking, mixing, blending and bagging product); qualifications and training; share the same benefits and break room; are paid on an hourly basis and within similar pay ranges; and, have some functional integration insofar as R&D employees and production and maintenance employees interact with one another in certain limited circumstances discussed above. While it may be established that a broader unit would be *an* appropriate unit, the evidence is insufficient to establish that other employees share such an overwhelming community of interest as to *require* their inclusion in the unit.

The Election Bar Issue

On March 29, 2012, the Employer and Petitioner entered into a stipulated election agreement in Case 9-RC-076793, which was approved by the Region, for an election to be conducted on May 3, 2012 in a unit consisting of:

All employees employed by the Employer at its facility located in Fairfield, Ohio, including production employees, packing employees, inventory employees, warehouse employees, sanitation employees, line leads, general labor employees, utility employees and housekeeping employees, excluding all truck drivers, temporary employees, administrative employees, office clerical employees, warehouse clerical employees, confidential employees, research and development employees, quality assurance employees, maintenance employees, and all professional employees, guards and supervisors as defined in the Act.

On April 17, 2012, the Petitioner filed a petition in the instant case seeking to represent the Employer's "hourly research and development employees including machine operators, labelers, pickers, mixers, production and packing employees." On April 24, 2012, the Employer filed a Motion to Dismiss Petition with the Region arguing that these employees were already included in the unit in Case 9-RC-076793 and any election of the employees in the proposed unit in the instant case would be barred by the election in Case 9-RC-076793 pursuant to Section 9(b)(3) of the Act. On April 26, I denied the Motion to Dismiss Petition on grounds that this matter would

be more properly dealt with at hearing. On April 26, 2012, the Petitioner amended its petition in the instant matter to seek a unit of “all research and development employees employed at the Employer’s facility in Fairfield, Ohio.” An election subsequently was held in Case 9-RC-076793 and Petitioner failed to obtain a majority of votes cast.

In analyzing this issue, I note that the stipulated election agreement in Case 9-RC-076793 clearly and unequivocally excludes the research and development employees from the unit. As discussed above in my analysis of the appropriateness of the unit under *Specialty Healthcare*, the R&D employees are a readily and easily identifiable group of employees. This conclusion is highlighted by the fact that the Employer did not list any of the R&D employees petitioned for on its *Excelsior* list for the election in Case 9-RC-076793. Inasmuch as the R&D employees were clearly excluded from the unit in Case 9-RC-076793, I find that there is no election bar that would prevent them from voting in the instant case.

Exclusions From The Unit

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of the Act: Jeff Long, Manager of R&D Industrial and Retail Accounts; Mike Coco, Ass. Fd. Tech. Ret. & Indus. Accts; Michael Granko, Fd. Tech. Nat. & Fd. Svc. Accts; John Scott, Mgr. Nat. & Fd. Svc. Accts; Ed Roche, Dir. Of R&D Natl. & Fd. Svc. Accts; Vince Metzcar, Dir. Of R&D Ret. & Ind. Accts; Pierre Calle, Pilot Plant Mgr.; Dwight Moody, Mgr. Cont. Imp.; Ted Davis, VP, R&D; Andy Butler, Mgr. Regulatory Affairs; and, Marcel Winia, Pkging Coord. The parties also agree, the record shows, and I find that employees Lou Guthrie and Georgia Townsend do not work at the facility in question and thus are properly excluded from the unit.

Conclusions

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer’s rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and it claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All research and development employees, excluding all other employees and all professional employees, guards and supervisors as defined by the Act, employed by the Employer at its Fairfield, Ohio facility.

Direction Of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 75. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began.

Employer To Submit List Of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list and if the conditions set forth above to warrant an election are satisfied, I will make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **May 17, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Because the list will be made available to all parties if it is determined to proceed to an election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office. *To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.*

Notice Of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer, if an election is subsequently ordered, must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **May 24, 2012**. The request may be filed electronically through the Agency's website, www.nlr.gov^{2/}, but may not be filed by facsimile.

Dated at Cincinnati, Ohio this 10th day of May 2012.


Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
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^{2/} To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.