The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman *and* Local 1102 Retail, Wholesale Department Store Union. Case 02–RC–076954

July 28, 2014

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

In this representation case, the Regional Director found that a petitioned-for bargaining unit of all women's shoe sales associates at the Employer's retail store was appropriate under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. The Employer argues that the petitioned-for unit is not appropriate under established law and, moreover, that the petitioned-for employees share an overwhelming community of interest with other selling employees. As a result, the Employer contends that an appropriate unit must include, at a minimum, all selling employees, including not only all sales associates, but also personal shoppers and sales assistants. Alternatively, the Employer asserts that a storewide unit is appropriate. By Order dated May 30, 2012, the Board granted the Employer's request for review. An election was held on June 1, 2012, and the ballots were impounded.

Having carefully considered the record, including the request for review, the Employer's supplemental brief, the briefs of interested amici,[1] and the answering brief submitted by the Petitioner, we adopt the Regional Director's findings and recommendations only to the extent consistent with this Decision on Review and Order Remanding.

FACTS

The Employer is a luxury retailer in Manhattan. Its operation consists of a Women's store at 754 Fifth Avenue and a Men's store at 745 Fifth Avenue. The Employer employs a total of approximately 354 sales associates at these stores. The stores are organized into various departments. As relevant here, the petitioned-for women's shoes sales associates are located in two separate departments within the Women's store. Salon Shoes, hereinafter "Salon shoes," is located on the second floor and is its own department. Contemporary Footwear, hereinafter "Contemporary shoes," is located on the fifth floor and is part of the larger "Contemporary Sportswear" department, which sells ready-to-wear women's apparel. There are 35 shoe sales associates in Salon shoes and 11 in Contemporary shoes.

Bill Brobston is senior vice president and general manager with responsibility for both the Men's and Women's stores. Three directors of sales covering both the Women's and Men's stores report to Brobston. Each director of sales is responsible for several departments throughout the stores. One director is responsible for the Contemporary Sportswear department, including Contemporary shoes, and another director is responsible for Salon shoes. Each floor of the Women's store has a floor manager who reports to one of the directors and various department managers who report to the floor manager. Because Salon shoes and Contemporary shoes are located on different floors, they have different floor managers. In addition, as Salon shoes is its own department, it has its own department manager. Contemporary shoes, as part of a larger department, is managed by the Contemporary Sportswear department manager.

Sales associates in Salon shoes and Contemporary shoes share the same terms and conditions of employment. Sales associates in both groups work 38.75 hours per week, have the same vacation and holiday benefits, are covered by the same health plans, and are subject to the same employee handbook. They both have personal lockers and access to an employee cafeteria. Sales associates in both groups receive monthly productivity goals and are evaluated on these goals, as well as the "soft skills" of creating a welcoming environment, exceeding customer expectations, and business development/statistics.

Sales associates in Salon shoes and Contemporary shoes are paid on a "draw versus commission basis," meaning that at the end of each week, the associate's sales are calculated and the associate receives either the commission rate on those sales or the "draw rate," whichever is higher. Sales associates working in Salon shoes earn a 9 percent commission; sales associates in Contemporary shoes earn a 10 percent commission. All other sales associates in the store earn a 3 to 5 percent commission and are paid on a "salary plus commission"

[1] Amicus curiae briefs were submitted by: (1) The Chamber of Commerce and HR Policy Association; (2) The Coalition for a Democratic Workplace, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, National Council of Chain Restaurants, International Foodservice Distributors Association, and International Council of Shopping Centers; and (3) Retail Industry Leaders Association and Retail Litigation Center.

basis, meaning that they are guaranteed a base salary and additionally earn a commission on the merchandise they sell.

There is no requirement that sales associates in either Salon shoes or Contemporary shoes have prior experience selling shoes (or any product) in the retail industry, although most hires do have such experience. Newly hired sales associates in the petitioned-for unit attend a 3-to-5-day orientation class and are subject to a 6-month probationary period. There is no formal training program after the initial orientation.

The Employer encourages all sales associates to make sales outside of their "home base," meaning outside of the department where they work. This arrangement is known as "interselling." Interselling includes escorting a customer from one department to another and ringing up her transaction in that other department. It also includes situations where a customer picks up a product in one department, walks to another department, and simply asks a sales associate in that department to ring them up there. Sales associates from other departments have made sales in both of the shoe departments, and associates from Salon shoes and Contemporary shoes have sold products from different departments, including the other shoe department.

The Employer holds morning meetings each day to enhance product knowledge. All employees are invited to attend, but some of the meetings are department-specific. In addition to the morning meetings, the Employer holds designer and vendor meetings for employees from multiple departments. There are also monthly storewide meetings for all employees, as well as monthly meetings for sales associates only.

There have been approximately 38 transfers between departments since 2000. There were four transfers into the Women's shoe departments, and none out. None of the transfers involved women's shoe sales associates moving from one shoe department to the other, and sales associates in Salon shoes and Contemporary shoes do not substitute for one another or otherwise interchange.

ANALYSIS

Specialty Healthcare, above, 357 NLRB No. 83, sets forth the principles that apply in cases in which a party contends that the smallest appropriate bargaining unit must include additional employees (or job classifications) beyond those in the petitioned-for unit. As explained in that decision, the Board must first assess, as in the usual case, whether the petitioned-for unit is an appropriate bargaining unit: the "employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria[.]" Id., slip op. at 11 fn. 25; see also id., slip op. at 8–9. If the petitioned-for unit satisfies this standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an "overwhelming community of interest" with the petitioned-for employees. Id. at 11–13.[2]

In determining whether a petitioned-for unit is appropriate, the Board weighs various community-of-interest factors, including whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; 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. Id. at 9, quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002). More than one appropriate bargaining unit can usually be defined from any particular factual setting, and the petitioned-for unit need only be an appropriate unit, not necessarily "*the* single most appropriate unit." Id., quoting *American Hospital Assn.*, 499 U.S. 606, 610 (1991) (emphasis in original).

In this case, the petitioned-for employees are readily identifiable as a group by virtue of their function: they comprise all sales associates at the Employer's retail store who are dedicated to selling women's shoes.[3] However, we find, contrary to the Regional Director, that the petitioned-for unit is inappropriate because sales associates in Salon shoes and Contemporary shoes lack a community of interest.

As an initial matter, we acknowledge that the record shows that the petitioned-for employees share some community-of-interest factors. Specifically, the work of sales associates in Salon shoes and Contemporary shoes has a common purpose, in that they are the only employ-

[2] Member Miscimarra agrees that the employees in a petitioned-for unit must be readily identifiable as a group and must share a community of interest based on the Board's traditional criteria. However, Member Miscimarra would not apply *Specialty Healthcare* or the "overwhelming community of interest" standard to determine whether the petitioned-for unit must include additional employees. Rather, he would ask "whether the interests of the group sought are *sufficiently distinct* from those of other [excluded] employees to warrant establishment of a separate unit." *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 2 (2010 (quoting *Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980)). In addition, he believes bargaining unit determinations should be circumscribed and guided by industry-specific standards where applicable. See generally *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 22–33 (2014) (Member Miscimarra, dissenting).

[3] In *Specialty Healthcare*, the Board made clear that a petitioned-for unit may be readily identifiable as a group "based on job classifications, departments, functions [as here], work locations, skills, or similar factors." 357 NLRB No. 83, slip op. at 12.

ees in the store who specialize in selling women's shoes. In addition, the shoe sales associates in Salon shoes and Contemporary shoes are the only employees in the store to be paid on a "draw against commission" basis, and they receive the highest commission rates of any sales associates. Further, along with all other employees, the petitioned-for employees share the same hiring criteria, receive the same employee handbook, and have the same appraisal process.

Notwithstanding these commonalities, the balance of the community-of-interest factors weighs against finding that the petitioned-for unit is appropriate. The boundaries of the petitioned-for unit do not resemble any administrative or operational lines drawn by the Employer. As the Board explained in *Specialty Healthcare,*

> [i]t is highly significant that, except in situations where there is prior bargaining history, the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace. As the Board has recognized, "We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co*., 96 NLRB 295, 298 fn. 7 (1951).

357 NLRB No. 83, slip op. at 9 fn. 19 (emphasis in original). Thus, in finding the petitioned-for unit appropriate in *Macy's, Inc.,* 361 NLRB No. 4 (2014), we found it particularly significant that the unit conformed to the departmental lines established by the employer in comprising all of the sales employees in the cosmetics and fragrances department.[4] Similarly, in *Northrup Grumman Shipbuilding, Inc.,* 357 NLRB No. 163, slip op. at 4 (2011), enf. denied on other grounds sub nom. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), petition for writ of cert. filed, No. 13-671 (2013), the Board emphasized that the employer had "placed all [the petitioned-for employees] in a separate department, under separate supervision," in finding the petitioned-for unit appropriate. And in *Specialty Healthcare*, the petitioned-for unit consisted entirely of all the employees in one particular job classification.

Here, while the Salon shoes employees constitute the whole of their department, the petition carves the Contemporary shoes employees out of a second department, Contemporary Sportswear, excluding the other sales associates in that department. The carved-out Contemporary shoes employees are then grouped with the Salon shoes employees, who are located on a separate, nonadjacent floor.

The petition's departure from any aspect of the Employer's organizational structure might be mitigated or outweighed by other community-of-interest factors. For example, if the Salon shoes and Contemporary shoes employees shared common supervision despite being located in different departments, that would show that the departmental distinctions were relatively less important in the organization of the work force. No such facts, however, are present here. Rather, Salon shoes and Contemporary shoes sales associates have different department managers, different floor managers, and even different directors of sales. It is only at the highest level of management at the store (the general manager) that the petitioned-for employees can be said to share supervision.

Similarly, significant interchange between the Salon Shoes department and the carved-out Contemporary shoes group could support a finding of community of interest notwithstanding the division of the Contemporary Sportswear department. However, sales associates in Salon shoes and Contemporary shoes do not interchange with each other on either a temporary or a permanent basis and have only limited contact. There is no evidence that any sales associates in Salon shoes have been asked to work in Contemporary shoes, or vice versa, and none of the four employees who have transferred into one of the shoe areas since 2004 was a shoe sales associate moving between the two areas. In addition, contact among the petitioned-for employees is limited to attendance at storewide meetings and daily incidental

[4] Member Miscimarra dissented in *Macy's* based on his view that the petitioned-for unit (consisting of salespersons in the cosmetics and fragrances department) was not appropriate under the Board's traditional community-of-interest standard. As noted above, Member Miscimarra in *Macy's* also expressed his disagreement with the "overwhelming community of interest" standard articulated in *Specialty Healthcare*. Unlike *Macy's* and *Specialty Healthcare*, however, the Board here finds that employees *within* the petitioned-for unit do not share a sufficient community of interest to render the unit appropriate. Therefore, the Board does not decide whether the petitioned-for unit inappropriately excludes *other* employees, nor does the Board's disposition depart from standards the Board has historically applied to the retail industry. Member Miscimarra joins in the Board's decision here, but he does not join in those parts of the decision that discuss different facts that might make the petitioned-for unit appropriate.

Member Johnson concurs in finding that the petitioned-for unit is not appropriate for collective bargaining. He did not participate in *Macy's* and finds no need here to express his opinion whether that case or the *Specialty Healthcare* decision upon which the *Macy's* majority relied were correctly decided. Further, like Member Miscimarra, Member Johnson does not join in those parts of the current decision that discuss different facts that might make the petitioned-for unit appropriate.

contact related to sharing the same locker room, cafeteria, etc. We recognize that the Employer encourages sales associates to sell merchandise in departments other than their own through the interselling process. However, the extent of contact that the sales associates have with one another, as part of the interselling process, is unclear. Further, the record before us shows that the sales associates in Salon shoes and Contemporary shoes make less than one percent of their overall sales in the other shoe department.[5]

In conclusion, while some factors favor a finding of community of interest, they are ultimately outweighed, on these facts, by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the Employer (such as departments, job classifications, or supervision), combined with the complete absence of any related factors that could have mitigated or offset that deficit. Accordingly, the petitioned-for unit is not appropriate, inasmuch as the petitioned-for employees lack a community of interest. It is therefore unnecessary for us to examine whether any of the other employees whom the Employer proposes including in the unit share an overwhelming community of interest with petitioned-for employees. The petition is dismissed.

[5] Other factors that might serve to justify dividing the Contemporary Sportswear department to group its shoe sales associates with the Salon Shoes department are shared skills and training. Again, however, there is no evidence in the record establishing that sales associates in Salon shoes and Contemporary shoes share any distinct skills or have received any specialized training. The Employer does not require that associates in either department have shoe-selling experience or prior training. All newly hired employees attend the same orientation program that the petitioned-for employees attend, and there is no formal ongoing training program. When asked how he was trained in the women's shoe department, a sales associate in Salon shoes (the only employee who testified), said that he attended orientation meetings and then "I wasn't trained, really. Basically, you learn by yourself. No one trains you to sell shoes."

ORDER

IT IS ORDERED that the election held on June 1, 2012, be vacated, and that the case be remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. July 28, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD