

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

WENNER BREAD PRODUCTS, INC.

Employer<sup>1</sup>

and

Case No. 29-RC-11480

UNITED ASSOCIATION OF WORKERS OF  
AMERICA, LOCAL 528, affiliated with  
NATIONAL ORGANIZATION OF INDUSTRIAL  
TRADE UNIONS (NOITU),  
INTERNATIONAL UNION OF JOURNEYMEN  
AND ALLIED TRADES

Petitioner<sup>2</sup>

**DECISION AND DIRECTION OF ELECTION**

Wenner Bread Products, Inc. (“the Employer”) produces various bread products at its facilities in Bayport and Bohemia, New York, for sale and distribution to supermarkets and other commercial customers. On July 6, 2007, the United Association of Workers of America, Local 528, affiliated with National Organization of Industrial Trade Unions (NOITU), International Union of Journeymen and Allied Trades (“the Petitioner”) filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of approximately 370 production, maintenance, shipping and receiving employees

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<sup>1</sup> The Employer’s name appears as amended at the hearing. (See Board Exhibit 2.)  
References to the record will herein be abbreviated as follows: “Tr. #” refers to transcript page numbers; “Bd. Ex. #” and “Er. Ex. #” refer to Board and Employer exhibit numbers, respectively.

<sup>2</sup> The Petitioner’s name appears as amended at the hearing. (See Bd. Ex. 2.)

employed at the Employer's six facilities, including "group leaders" and "assistant group leaders," but excluding quality assurance employees, drivers, office clerical employees, guards and supervisors.<sup>3</sup> However, the Employer contends that the group leaders and assistant group leaders must be excluded from the unit as supervisors under Section 2(11) of the Act. The Employer further contends that the quality assurance employees and drivers share a sufficient community of interest that it would be inappropriate to exclude them from the unit. The Petitioner disagrees on both counts, contending that the group leaders and assistant group leaders are non-supervisory employees, and that the petitioned-for unit is appropriate without the quality assurance employees and drivers. Nevertheless, the Petitioner expressed willingness to proceed in any unit found appropriate herein.

A hearing was held before David Stolzberg, a Hearing Officer of the National Labor Relations Board. In support of its contentions, the Employer called its director of operations, David Drake, to testify. The Petitioner did not call any witnesses. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

For the reasons described in detail below, I reject the Employer's contention that group leaders and assistant group leaders are statutory supervisors, and include them in the unit. I also reject the Employer's contentions that it would be inappropriate to exclude drivers and quality assurance employees from the unit.

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<sup>3</sup> The petitioned-for unit is described as amended during the hearing. An attachment to the original petition (Bd. Ex. 1(a)) was inadvertently omitted from the formal papers. It is attached hereto as Appendix A.

## **FACTS**

The following summary of the facts is based on the testimony of David Drake (which was not contradicted by any other testimony) and on documentary evidence in the record.

### **General description of the Employer's operations**

As described above, the Employer produces bread products. They include frozen dough products, partially-baked dough and fully-baked products. The Employer has five facilities in Bayport and one in Bohemia, for a total of six. The five facilities in Bayport, located within a few hundred feet of each other at the intersection of Rajon Road and Sylvan Avenue, consist of the following:

- 1) a frozen dough plant, plus a frozen storage facility, at 33 Rajon Road;
- 2) a “par-bake” plant at 1000 Sylvan Avenue;
- 3) a warehouse for dormant equipment at 960 Sylvan Avenue;
- 4) a warehouse for packing materials, plus corporate offices, at 44 Rajon Road;
- 5) a warehouse for raw ingredients, plus office space for the quality assurance department, managers and the purchasing department, at 34 Rajon Road.

The sixth facility, called “Wenner North,” is located on Orville Drive in Bohemia, three miles north of the Bayport facilities, and produces both frozen dough and fully-baked products.

Employees in the petitioned-for unit include scalers, who hand-weigh and assemble “minor” ingredients (e.g., salt), as opposed to “major” ingredients (e.g., flour and water) which are delivered to the mixing machines by conveyors and pipes. The scalers label their different “sub-assemblies” for the different kinds of dough to be

produced. Mixers put all the major and minor ingredients into the mixing machine, set the machine for the proper mixing speed, and then verify the quality of the mixed dough. Machine operators use machines, for example, to divide the dough into pieces, and to round the pieces into balls. They also set up various stations on the production line for further processing, such as cutting, sheeting and rolling the dough. Other line employees then manipulate the dough into various shapes. Drake explained that different products require different numbers of employees per line. A “low labor” product (e.g., hamburger bun) may require only two or three employees, whereas a “high labor” product (like a knot roll or challah bread needing to be twisted manually) may require up to 14 employees. Bakers set up the pans and racks necessary for baking, and set the ovens and steam boxes to the proper settings.

Other classifications in the petitioned-for unit include packing (a.k.a. packaging) employees, who wrap the products, put them into bags and boxes and label them; sanitation employees who clean the facilities and wash the utensils; material handlers who work in the warehouses, unloading deliveries of raw ingredients, picking orders for customers, and loading the trucks for delivery; maintenance employees who repair and maintain the production machines, and who also work on “dormant equipment” at the warehouse at 960 Sylvan Avenue.

Although production employees used to work in three 8-hour shifts, the Employer changed the schedule in early 2007 to two 12-hour shifts. However, the maintenance and sanitation employees still work in three shifts. The record does not indicate the material handling department’s shifts. The quality assurance and research and development employees generally work five 8-hour days.

Wenner Bread is owned and operated by the Wenner family. Its upper management includes president and chief executive officer Richard Wenner, senior vice president Larry Wenner; vice president of bakery operations Daniel Wenner, vice president of human resources William Wenner, and vice president of information systems John Wenner.

As noted above, witness David Drake is the director of operations, who reports to Daniel Wenner and Larry Wenner. There are many layers in the company's hierarchy, including managers, Supervisors and foremen.<sup>4</sup> Under the Supervisors and foremen are the group leaders and assistant group leaders, whose supervisory status is in dispute. Not all departments have all the layers, however.

There are four departments reporting to Drake: production, maintenance, sanitation and quality assurance. The production manager (Anthony Lupo) is responsible for at least seven production Supervisors, including four Supervisors in the frozen dough department (one Supervisor for bread and one for rolls, for each of two shifts), plus three Supervisors in the par-bake department. Below those Supervisors fall some foremen,

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<sup>4</sup> The classification known as "Supervisors" will be capitalized herein, to distinguish it from the catch-all word "supervisors." For example, Drake sometimes referred to Supervisors and foremen collectively as "supervisors." The parties stipulated that Supervisors and foremen are excluded from the proposed bargaining unit as statutory supervisors.

The word "foremen" herein may include both male and female forepersons.

then at least 14 production group leaders<sup>5</sup> and 10 production assistant group leaders. The production manager is also directly responsible for the packing foreman (Alex Arroyo), but there is no Supervisor position in packing. There are 15 group leaders who work under the packing foreman.

The maintenance department, which also reports to Drake, has a maintenance manager and three maintenance Supervisors (one for each of three shifts), but no group leaders. The sanitation department has three Supervisors, and also three sanitation group leaders (one for each of three shifts). Finally, as described in more detail below, the quality assurance department has a manager (Henry Ellis), but no Supervisors, foremen or group leaders. The manager supervises a relatively small group of technicians, engineers and an administrative assistant.

The material handling department, which does not report to Drake, consists of a material handling manager (also called the logistics manager) and assistant manager, but no foremen or group leaders. Those managers supervise the material handlers and drivers who perform warehouse, shipping and receiving duties from the Employer's three warehouses.

There is no history of collective bargaining among the Employer's employees.

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<sup>5</sup> There is a total of 45 group leaders on a list provided by the Employer (Bd. Ex. 3), who are employed in the three production facilities (not the warehouses). Drake testified that there are seven production group leaders for each shift, one for each of the seven production lines, in the frozen dough department. Since there are two shifts, that means there are at least 14 production group leaders in frozen dough. It appears that at least three group leaders also work in the par-bake plant. It is not clear from the record how many group leaders work with the fully-baked products at Wenner North.

Drake also testified that, since the conversion from three shifts to two shifts, the Employer has needed fewer group leaders. Some former group leaders have retained their title, even though they do not work as group leaders on a day-to-day basis. (They work on the production lines, and may fill in for group leaders during vacations and other absences.) Therefore, not all of the 45 group leaders listed on Board Exhibit 3 actually work as group leaders on a regular basis.

### **General comment about Drake's competency as a witness**

It should be noted generally that Drake's competency<sup>6</sup> as a witness was challenged by the Hearing Officer at several points during the hearing. Although Drake has had a long career with Wenner Products (starting 25 years ago as a janitor, and moving through various rank-and-file jobs before his promotion to group leader, then production Supervisor, production manager, director of bakery operations, and director of operations), he had limited first-hand knowledge of recent events involving the contested classifications. With a few exceptions noted below, Drake did not have first hand-knowledge of the various documents submitted by the Employer, testifying only to what the documents said on their face. For example, although he testified about employee evaluations (including Er. Exs. 4, 5 and 6), he conceded that evaluations are no longer brought to his attention in his current role as director of operations. Rather, it is the production manager's job to review evaluations.

Furthermore, when asked by the Hearing Officer to substantiate his assertions on particular points, Drake often did not have specific examples. Drake explained generally that, although he is no longer in a position to know *recent* details, the group leaders' duties have not changed since the time when he was more directly involved as production manager, approximately 1993 to 2001.<sup>7</sup>

At the end of the first day of Drake's testimony, and again at the beginning of the second day, the Hearing Officer asked the Employer's attorney to produce witnesses who

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<sup>6</sup> As required by Rules 601 and 602 of the Federal Rules of Evidence, a witness is not "competent" to testify about a matter unless the person has "personal knowledge" of the matter.

<sup>7</sup> An assertion in the Employer's post-hearing brief (p. 5) that Drake was a Production Supervisor as recently as 3 years ago, is inaccurate.

have current, first-hand knowledge of these matters, including group leaders to testify about day-to-day operations, and the various supervisors who signed the evaluations and warnings in the record. However, the Employer declined to do so.

## **FACTS REGARDING THE SUPERVISORY ISSUES**

### **Group leaders**

As noted above, the Petitioner seeks to include group leaders in the petitioned-for unit, whereas the Employer contends they must be excluded as statutory supervisors.<sup>8</sup>

Drake testified that all group leaders work in the Employer's production facilities, not the warehouses. A document from the Employer (Bd. Ex. 3) indicates that there are as many as 45 group leaders. Drake's specific testimony enumerated that there are at least 14 group leaders in production, 15 group leaders in packing, and three group leaders in sanitation. Although those specific numbers do not add up to 45, Drake also testified that some individuals retained the group leader title when the Employer changed from three to two shifts, even though they do not work as group leaders on a day-to-day basis. Some of these "extra" group leaders fill in during the regular group leaders' vacations or other absences.

### **Job descriptions**

The production group leaders' job description (Er. Ex. 1)<sup>9</sup> includes the following duties: helping enforce safety policies and the Food and Drug Administration's "good

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<sup>8</sup> The Employer agreed that group leaders and assistant group leaders share a close community of interest with the rank-and-file employees in the production facilities. Therefore, there is no dispute that their inclusion in the unit would be appropriate **if** they are found not to be supervisors.

<sup>9</sup> This particular job description is for the group leader of Line 1, one of the lines for producing rolls in the frozen dough facility. However, Drake testified that the group leaders' job description for other lines (breads, etc.) are similar.

manufacturing practice” (GMP) regulations; assigning particular tasks and break times to production line employees; overseeing and inspecting their work; helping resolve employees’ problems; reporting any problems to their supervisors; training new employees; keeping various records (e.g., freezer temperatures); and performing actual production line work.

The packing group leaders’ job description (Er. Ex. 2) includes the following duties: conferring with production supervisors to ascertain packing requirements; assigning, overseeing, inspecting and correcting the packing employees’ work; enforcing safety regulations; reporting problems to management; and performing actual packing work.

The sanitation group leaders’ job description (Er. Ex. 3) includes a long list of cleaning-related duties, plus the following “supervisory responsibilities”: training employees; planning, assigning and directing work; appraising performance; rewarding and disciplining employees; addressing complaints and resolving problems.

*Assignment and direction of work; temporary “transfers” or re-assignments*

Drake testified that the manufacturing process for each type of item is pre-determined by design, as developed in research and development. Certain things must happen at certain times (depending, e.g., on when the dough is ready), and the machines have to work a certain way, to insure consistency in the product. Group leaders and assistant group leaders are not “empowered” to change the process as designed. Furthermore, the specific details of which products must be made during a certain shift are pre-determined by management, based on the customers’ orders.

Each production employee is generally hired to fill a particular vacancy in a production line, and trained for the particular type of dough manipulation, which Drake called the employee's "core functionality." In the frozen dough plant at 33 Rajon Road, there are seven production lines: lines 1 through 4 for rolls, lines 5 and 6 for bread, and line 7 for items which require sheeting of the dough (e.g., crescent rolls). Each group leader generally stays on his or her own line, although there may be rotation due to absences. Drake stated that there is some "redundancy" among those lines, especially for the low-labor items, and an employee could be assigned to work at any line where his/her functionality is needed. For example, an employee may be reassigned to a different line requiring the same functionality when there are employee absences or changes in the production schedule. However, a "sheeter" from line 7 who works on high-labor products is not going to be assigned to work on line 4 where sheeting is not required, because it does not require his "core functionality."

All employees on a particular production line perform the same basic task, i.e., manipulating the dough into the proper shape for the particular item. The dough moves down a conveyor belt at a certain speed (pre-determined by the production schedule), and the line employees must process a certain number of pieces per minute. The group leader generally stands at the last position on the line, to inspect the finished products before they go into the freezer. Drake testified that the group leader may also assign a more experienced employee near the end of the line, to help catch any defective products, because a relatively new employee would be less likely to notice defects. But, other than that, the line positions are "equal" and line employees all perform the same shaping tasks. Drake also testified that, if a line employee has trouble keeping up with the production

speed, group leaders may have to help or train the employee to speed up, or have the employee transferred to another line for the day.

Group leaders and assistant group leaders, along with the production Supervisors and foremen, attend a 5 – 10 minute meeting at the beginning of each shift, to review that shift's production schedule and to decide how to assign employees. Drake testified that production Supervisors lead the meetings, explaining what items must be made during that shift; which items require low, medium or high labor; how many people are needed for each line; and what type of skills are needed. The group leaders and assistant group leaders plan which employees will be assigned to which tasks on their line, although the plan may have to be revised once they see how many employees are actually present or absent for that shift. Drake further testified that the Supervisor may help in making the assignments. For example, if lower-level labor is needed for a particular shift at a particular facility, the facility may have more line employees than necessary, and the group leaders may ask a Supervisor what to do with the "extra" employees. A Supervisor may then call the other production facilities to see if they need help. The Supervisor would tell the group leaders how many employees to send to other facilities and the group leaders, in turn, decide whom to send. Group leaders do not have independent authority to transfer employees to a different shift.

Drake testified that these short-term "transfers" or reassignments among various lines or even various facilities happen every day. Sometimes when a customer makes an unexpected "emergency" order, group leaders may need to re-assign employees among the various lines during the shift. (Drake did not say how often such emergency orders happen, or describe the re-assignment process in detail.) A group leader may be

disciplined for failing or refusing to re-assign employees, as directed by the group leader's supervisor. (See Er. Ex. 7(e), written warning dated 5/16/2002 for line 5 group leader Dakshaben Patel, who refused to send line employees to line 7 and the par-bake facility, as instructed by her supervisor.)

Permanent transfers

Drake further testified that group leaders and assistant group leaders have authority to recommend transferring employees on a permanent basis. In general, when a Supervisor tells a group leader that a certain number of employees need to be transferred to another facility, the group leader asks particular employees if they are willing. For example, he recalled that, two months before the hearing, a group leader asked a line employee at 33 Rajon Road to transfer to the Wenner North facility. The employee agreed, and was transferred. Drake also stated that the human resources department makes the final decision on transfers. However, Drake did not have any first-hand knowledge of how the decision was made, such as witnessing any discussion between the group leader and human resources. There was no evidence of involuntary transfers.

Whether group leaders are held "responsible" for directing employees' work

As noted above, production group leaders generally stand near the end of each production line to inspect the shaped dough before it goes in the freezer. In response to a leading question as to whether group leaders are "held responsible for the work performance of the employees who work on their line," Drake answered affirmatively. He went on to describe the various types of inspections that group leaders perform, including visually inspecting the products, testing dough samples for "yeast activity," and verifying the product quantities. However, upon further questioning by the Hearing

Officer, Drake clarified that group leaders are responsible for their own inspection and verification duties, but not for the duties of other people like the mixers and machine operators.

Drake testified that all employees must follow the federal Food and Drug Administration's "good manufacturing practice" regulations (GMP), and they all receive the same GMP training.<sup>10</sup> Section 110.10(d) of the regulations also requires "competent supervisory personnel" to be responsible for compliance with the regulations. (*See* Er. Ex. 8.) Drake testified that he considers group leaders, as supervisors, to be responsible for employees' compliance with the GMP regulations. Their job descriptions require group leaders to "follow" the GMP regulations, although they do not expressly assign group leaders responsibility for ensuring employees' compliance. There were no examples of group leaders being held responsible for employees' failure to follow the GMP regulations specifically.

The Employer introduced almost 40 written warnings that were issued *to* group leaders (Er. Ex. 7(a) through 7(a)(p)), some of which purport to show that group leaders are held responsible for their direction or misdirection of employees' work. For example, in Er. Ex. 7(a)(e), packing foreman Rafael Parada wrote a warning to group leader Rafael Zea in 2001. Parada wrote that when he asked Zea and a packing employee why there was dough all over the floor, Zea started "yelling" at Parada. Zea was warned for (1) leaving dough on the floor, (2) creating a safety hazard and (3) his bad attitude in yelling at the foreman. In Drake's testimony, he claimed that Zea was disciplined for "the

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<sup>10</sup> Although the record does not contain employees' job descriptions (other than group leaders), they are evaluated on their "ability to follow all GMP regulations." (*See* Er. Exs. 4, 5 and 6.)

performance of the employee, Moises Santos,” but such language does not appear anywhere on the warning document itself. Most of the other warnings are for various production and packing mistakes, although they do not expressly reprimand for failing to properly direct employees on their line.

Er. Exhibits 7(a)(i) through 7(a)(l) involve a warning issued to production group leader Carmen Fernandez. In 2002, production Supervisor Mynor Bethancourth told Fernandez to send an employee to a certain ladder to check on a problem, even though Drake had informed group leaders *not* to send employees to the ladder. Fernandez protested that this was against the safety rules and Drake’s instructions, but the Supervisor insisted she do it anyway. Fernandez directed line employee Amada Manan to go to the ladder and, in fact, Manan’s hand was injured in the machine. Drake (who was director of bakery operations at the time) investigated the incident, and told Fernandez that she should have refused to follow the Supervisor’s direction, and gone straight to him (Drake). Drake’s written narrative also said: “Anyone working in this bakery or on your line is your responsibility[,], we have a policy of having no one on the ladder.” Fernandez received a warning, signed by William Wenner for insubordination (i.e., not following the company’s safety policy) and carelessness. (Supervisor Bethancourth was also disciplined.) The warning does not expressly cite Fernandez for poor “supervision” or “direction” of the line employee’s work, although the warning’s narrative does hold Fernandez “responsible” for her safety.

#### *Training and preliminary evaluation of new employees*

Although group leaders do not have any role in the initial interviewing and hiring

of employees, Drake testified about group leaders' subsequent training and evaluation of new employees, and their participation in deciding whether new employees become "permanent."

There seems to be no dispute that group leaders and assistant group leaders provide training for new employees, for 60 days or more if necessary. The safety department also provides some training. The Employer uses evaluation forms at 15-day intervals (i.e., at 15, 30, 45 and 60 days) to assess each new employee's progress in training and to determine whether s/he is qualified for the position. The group leaders base their assessments on direct observation of the new employees (e.g., noticing whether dough is piling up because the employee is too slow, noticing whether the dough is properly shaped, testing whether the employee knows how to turn off the machine if necessary). Drake described the evaluation process as a "group effort" (including the involvement of group leaders; foremen or Supervisors; managers; the training coordinator; and human resources), although it primarily relies on the group leaders' day-to-day observation of the employee's progress.

The forms contain a grid with 11 different qualities (skills, motivation, safety, attendance) listed vertically, and four different ratings (poor, fair, good and excellent) going across horizontally. Drake initially testified that group leaders, foremen and Supervisors can all fill out the ratings, checking the grid boxes as appropriate. However, he later stated that only group leaders fill out the ratings, because they are the only people who observe new employees' work closely enough to make a judgment. Toward the bottom of the form, there is also space for narrative comments, and three signatures lines for the "Trainer" [group leader], "Supervisor" and "Manager." If the narrative comments

are written in Spanish, training coordinator Ray Pena translates them into English. Drake stated that, at some point, Pena puts the ratings from the grid into a computer program, which generates an overall numerical score which, in turn, determines whether the employee is ready to proceed to the next level. The Supervisor signs the form after reading it and conferring with the group leader. Sometimes the training coordinator meets with both the employee and the group leader, to make sure there is a “complete understanding” between them. Drake further stated that the final decision regarding the employee’s employment status is made by the human resources department.

Er. Ex. 4 is a set of evaluations, from late 1998 to early 1999, for new production line employee Maribel Colon. In the first four evaluations, group leader Pastor Lozo filled out most of the ratings and the narrative comment, and signed the form as the “trainer.” Training coordinator Pena filled out the attendance rating, and translated the comments into English. The forms were also signed by Supervisors and managers, including Drake, who was production manager at the time. Drake testified that he did not perform any independent investigation of Colon’s performance, since he assumed that Lozo had filled it out properly. He signed the form only after making sure that all the required ratings and signatures appeared. The 15-day and 30-day ratings were good enough to allow Colon to proceed to the next level of training, although Lozo complained that she needed to do the egg twists and challahs faster. The first 45-day evaluation form states: “As per David Drake’s request on 2/03/99, this employee will re-enter remedial training for another 15 days.” Colon had to take 45-day remedial training two more times. (The signature and titles of “trainers” who filled out subsequent 45-day evaluations were not identified.) A memo regarding the second 45-day remedial training

was signed by Pena. Drake stated that, eventually, Colon completed her training and became a “permanent” employee, although the 60-day evaluation does not appear in the exhibit.

Er. Ex. 5 is a set of evaluations, dated in late 2006, for new packing employee Ramon Cepeda. Drake claimed that the ratings must have been done by a group leader, since that is “the process,” although he could not identify the signature of the group leader. The forms were also signed by packing Supervisor Alex Arroyo and production manager Anthony Lupo. The documents show that Cepeda needed some remedial training at the 30-day level, but then improved enough to become a permanent employee. The final document was prepared by packing foreman Gerber Lopez, and approved by David Drake.

Er. Ex. 6 is a set of evaluations for new packing employee Victor Estrella, in August and September 2006. The 15, 30 and 45-day evaluations were signed by packing group leader Elmer Alberto and packing foreman Arroyo, and also initialed by Madeleine Moyia, whom Drake delegated to review it for him. The final document, on its face, identifies production Supervisor Jose Molina as the “reviewer,” and does not identify any group leader. Nevertheless, Drake insisted that a group leader must have filled it out because Molina could not possibly observe all 100 employees on his shift so closely. Both Molina and Drake noted their approval at the end of the form.

Drake testified generally about the effectiveness of the new-employee evaluations, but without giving specific examples. For example, he said there have been cases when a new employee was not allowed to continue training (i.e., terminated), but did not describe any such specific cases. He also stated generally that there is a process for an employee

to dispute a negative evaluation (including a meeting with the employee, group leader, Supervisor, training coordinator and possibly the manager), and that Supervisors do not conduct any independent investigation *unless* the employee disputes the group leader's assessment. However, Drake did not know the last time it happened, nor describe in detail *any* time it happened. He conceded that he (as director of operations) is no longer directly involved in that process, although he hears reports from human resources. Finally, Drake testified that the evaluations directly affect the employee's wage rate upon becoming a permanent employee (from zero to 7%), but there were no specific examples. Thus, on this record, with regard to wage rates, it is difficult to determine the "effectiveness" of group leaders' recommendations on their own, versus their superiors making an independent review and determination.

#### Annual evaluations

Drake also testified that group leaders have input into employees' annual evaluations, which determine whether they will get a wage increase. Group leaders may fill out a form with various ratings, and they "work with" the Supervisor and the human resources department to complete the evaluation. No specific examples were submitted to show the group leaders' involvement in the annual evaluation process.

Drake also testified that group leaders have authority to recommend a bonus or a "merit increase" for employees, but did not know of any examples.

#### Recommending promotions

Drake testified that group leaders know when group leader or assistant group leader positions become vacant, and may ask a qualified line employee if s/he is interested in applying. If so, a meeting is set up with the employee, group leader and

foreman or Supervisor. There was no specific example of a group leader initiating such a promotion.

Sometime within the past year, Drake asked a group leader (whose name he could not remember) and the Supervisor what they thought about promoting Magda Luzuriaga (who worked as a packing employee at Wenner North) to a research and development technician. Both the group leader and Supervisor responded positively, and Luzuriaga was eventually promoted. However, Drake's testimony did not describe in detail the decision-making process of promoting Luzuriaga, such as the extent of the decision-maker's investigation or consideration of other criteria. It is therefore impossible to determine the actual "effect" of the unnamed group leader's input.

Drake asserted that there is "no way" an employee would be promoted if the group leader objected. However, he did not know of any specific situations where a group leader was able to stop a promotion proposed by someone else. He also stated, conversely, that if a Supervisor did *not* agree with a group leader's positive recommendation for promotion, the group leader could take it over the Supervisor's head to the manager and human resources department. Drake said that such a process exists, although he did not recall any specific instances of a promotion over the Supervisor's objection.

*Scheduling breaks, time off and overtime*

During each 12-hour shift, employees are entitled to a 15-minute break, a 30-minute meal break, and then another 15-minute break. The breaks occur at set times. Drake testified that group leaders tell employees when it is break time. If there are enough employees to continue production, the group leader may rotate the breaks (one

employee at a time). S/he usually asks who wants to go first, and they work it out. Group leader Dakshaben Patel received a verbal warning (Er. Ex. 7(d)) because she failed to give employees their breaks.

Drake testified that group leaders have authority to recommend granting time off. S/he recommends it to the Supervisor who, in turn, recommends it to the manager. The manager may grant requests of up to two days off. Requests for more time off must be approved by the human resources department. Drake also testified that group leaders and assistant group leaders do not necessarily know how many employees will be needed for the next day until the schedule is printed in mid-day, so it is not entirely clear from the record what their recommendation is based on. Drake did not know of any specific disputes regarding time off, to illustrate how much weight the group leaders' recommendations carry.

Whenever the Employer needs employees to work overtime, management gives group leaders a form indicating how many employees will be needed. The group leaders then solicit volunteers for the overtime, within certain parameters. The employee must be able to do the particular type of work (functionality) needed, and for safety reasons, it must be an employee who has not already worked 60 hours that week. But other than those parameters, the group leader can ask any employee. There is no alphabetized list, or seniority list used for overtime. If not enough employees volunteer for overtime, the group leader and Supervisor must assign mandatory overtime. Drake testified that a group leader cannot mandate overtime without the Supervisor's "support." If an employee is assigned to work overtime but does not show up, s/he will be marked as absent.

Recommending discipline and termination

Drake testified that group leaders have authority to correct or verbally reprimand employees. If the problem is not corrected, s/he writes an incident report to the foreman or Supervisor. Group leaders do not write disciplinary warnings on their own. Drake also stated that group leaders have authority to recommend suspension or even termination, but he did not provide any specific examples.

Adjusting employees' grievances

Drake testified that group leaders have authority to adjust employees' grievances. He did not initially recall any specific examples. He subsequently described a situation where an employee complained to the group leader about another employee's body odor. However, Drake did not remember the names or dates of when this happened and, in any case, stated that the group leader was unable to resolve the situation.

Layoff, recall

There is no evidence that group leaders have authority to lay off or recall employees.

Secondary indicia of supervisory status

There is no dispute that group leaders and assistant group leaders perform some of the same work (production, packing, sanitation) that the petitioned-for employees perform. Drake initially declined to estimate how much time group leaders spend doing this rank-and-file work, stating that it depends on so many factors. For example, if a group leader is busy training new employees, that may take up virtually the whole day. When pressed, Drake eventually estimated that production group leaders spend about

50% of their time doing rank-and-file work. He did not know about the packing and sanitation group leaders.

Wages start at \$7.50 per hour, and employees generally earn a higher rate as they achieve seniority. Assistant group leaders and group leaders are paid on an hourly basis. They receive an increase of between 3% and 7% when they are promoted into those positions. Thus, assistant group leaders and group leaders earn a higher rate than employees with the same seniority as them, although they might earn less than an employee with more seniority. Drake testified that assistant group leaders and group leaders are paid for overtime, whereas foremen are paid on a “daily” basis.

At the time of the hearing, the Employer offered a health insurance plan which required payment from both the Employer and employees. The Employer did not pay a greater portion for group leaders than other employees, although the Employer paid a greater portion for Supervisors and managers. By contrast, Drake thought that the Employer’s contribution to the 401(k) plan was the same for rank-and-file employees, supervisors and managers. Drake also stated that everyone accumulates sick days equally.

The Employer issues uniforms to new employees if they successfully complete their 60-day training and become permanent employees. The uniforms have a tag indicating the person’s job classification or title. The Employer used to use different colors to distinguish between the rank-and-file employees (all white shirts and white pants) and the higher positions (assistant group leaders, group leaders, foremen and Supervisors, who wear white shirts and blue pants). However, after the female employees complained that the white pants were too “see through,” the Employer gave them blue

pants. Thus, the uniform for females, regardless of rank, is the same white shirt and blue pants. The rank-and-file *male* employees continue to wear all white, while the assistant group leaders and above wear white shirts and blue pants. However, for some reason not explained on the record, the packing group leaders wear white pants.

Group leaders have access to some areas that rank-and-file employees do not have. For example, group leaders can go to the office areas to get forms and use the photocopiers. Also, production group leaders may enter the packing area, whereas production line employees do not. Those areas are not physically locked, but employees have been told not to go there because they do not need to go there. Drake stated that group leaders could theoretically eat lunch in the office lunch room but that, in reality, the group leaders and foremen usually eat in the employees' lunch room.

As noted above, low labor products may require only two or three production employees per line, whereas "high labor" products may require up to 14 employees. Thus, a group leader may have up to 14 employees working on his/her line, although the number could be lower. (If there is an assistant group leader working on the same line, then the ratio would be one to seven.) Drake testified that between 60 and 70 employees work under each Supervisor, although the number could be as high as 100.

#### **Assistant group leaders**

Drake's testified mostly about group leaders although, where noted above, he sometimes mentioned the 10 assistant group leaders as well. For example, he said that both group leaders and assistant group leaders attend the pre-shift meetings to discuss the production assignments for the upcoming shift. A comparison between a production group leader job description and assistant group leader job description (both parts of Er.

Ex. 1) shows very similar job duties, although group leaders have a few additional duties (e.g.,” rotat[ing] with co-workers at different intervals to maintain uniformity,” and “attend[ing] company-scheduled meetings when applicable). The Employer did not produce any other evidence specific to the assistant group leaders. However, the Petitioner’s attorney and the Hearing Officer elicited some additional information.

Drake explained generally that assistant group leaders are training to become group leaders, and that they are “next in line” for such a promotion. He stated that the company wanted to create this additional step in its hierarchy, to provide employees with more chances for upward mobility. He said assistant group leaders generally perform the same duties as group leaders, although their wage range is lower. If assistant group leaders encounter a problem, they may correct the problem and report it to the group leader. Assistant group leaders may also fill in when group leaders are absent. Drake also stated that assistant group leaders could recommend the discipline or termination of employees, but did not know of any such examples.

## **DISCUSSION OF SUPERVISORY ISSUES**

### **Legal Principles**

Section 2(11) of the Act defines a supervisor as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered

supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Co., Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001)("Kentucky River"); Tucson Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not "merely routine or clerical" in nature.

*Oakwood Healthcare: assigning; responsibly directing; independent judgment*

In the Oakwood line of cases,<sup>11</sup> the Board recently refined its analysis of the terms "assign," "responsibly direct" and "independent judgment" within the meaning of Section 2(11). Specifically, the Board interpreted "assign" to mean the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Oakwood, 348 NLRB No. 37, slip op. at 4. To "assign" for purposes of

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<sup>11</sup> Oakwood Healthcare, Inc., 348 NLRB No. 37, Croft Metals, Inc., 348 NLRB No. 38, and Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center, 348 NLRB No. 39 ("Golden Crest"), all issued on Sept. 29, 2006.

Section 2(11) means the “designation of significant overall duties to an employee, not to the ... *ad hoc* instruction that the employee perform a discrete task.” Id.

By contrast, “directing” employees means generally overseeing them, deciding what task shall be undertaken next and who shall do the task, including *ad hoc* instructions to perform discreet tasks. Id., slip op. at 5, 6. The Board interpreted the phrase “*responsibly* to direct” to include an element of accountability. That is, an individual whom an employer has delegated authority to direct employees’ work and to take corrective action (if necessary) “responsibly” directs those employees *only if there is a “prospect of adverse consequences* for the putative supervisor if he/she does not take these steps.” Id., slip op. at 7, emphasis added. *See also Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2nd Cir. 2000)(charge nurses found to be supervisory, in part, because they were disciplined for failing to direct the assistants properly in providing patient care).

Furthermore, the Board in Oakwood interpreted “independent judgment” as follows:

[T]o exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.... [W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.... On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.... Thus, ... [t]he authority to effect an assignment, for example, must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’

Croft Metals, 348 NLRB no. 38, slip op. at 5, citing and summarizing Oakwood, slip op. at 8 (internal citations omitted). As one example, a nurse who must weigh employees' different skill levels and training in assigning them to patients uses independent judgment. Oakwood, slip op. at 8. *See also* American Commercial Barge Line Co., 337 NLRB 1070 (2002)(towboat pilots' assessment of crew skills and experience required independent judgment). By contrast, assignments when there is "only one obvious and self-evident choice" (e.g., a charge nurse assigning the one available nurse who knows American Sign Language to a patient who required ASL to communicate), or when the assignment is made solely on the basis of "equalizing workloads," are merely routine or clerical. Oakwood, slip op. at 8-9. *See also* Franklin Hospital Medical Center, 337 NLRB 826 (2002)(equalizing workloads as routine).

Finally, the Board affirmed the principle that conclusory statements by witnesses, without specific evidence to support those statements, do not demonstrate supervisory status. In Golden Crest Healthcare Center, *supra*, 348 NLRB No. 39, slip op. at 5, the employer claimed that charge nurses "responsibly directed" employees because their evaluations included a rating for how well they directed CNAs. However, without any evidence of actual or prospective consequences to charge nurses as a result of this factor, the Employer's claim was found to be "merely speculative" and insufficient to prove accountability. *Id.* at p.5, citing Sears, Roebuck & Co., 304 NLRB 193 (1991). *See also* Franklin Hospital, *supra*, 337 NLRB at 830 ("concrete evidence" required to show how assignment decisions are made).

Effectively recommending

As stated above, the statutory definition of supervisor includes those who “effectively” recommend such actions as hiring, disciplining and discharging employees. The Board has consistently required that recommendations by alleged supervisors be shown to have some independent effect. For example, in Reliance Insurance Co., 173 NLRB 985 (1968), although “unit leaders” could recommend salary increases and dismissals, the manager did not automatically accept those recommendations but, rather, decided such matters on the basis of his own judgment. Id. at 986. By contrast, the manager accepted such recommendations automatically when they were made by admitted supervisors, without his independent review. In Brown & Root, Inc., 314 NLRB 19 (1994), safety inspectors who issued safety “citations” were found not to be supervisors because the acknowledged supervisors independently investigated the incidents before deciding whether to take disciplinary action. Therefore, the inspectors’ citations were found not to have any independent disciplinary effect. In Children’s Farm Home, 324 NLRB 61 (1997), although the team leaders’ evaluations of employees sometimes recommended whether to grant a wage increase, the undisputed supervisors conducted their own independent investigation before deciding on an increase. In Training School at Vineland, 332 NLRB 1412 (2000), the group home managers sometimes recommended that discipline be imposed on employees. However, the record showed that, in many instances, the employer either chose not to adopt the recommendations, or simply ignored the recommendations altogether. In those circumstances, “it cannot be said that the group home managers’ recommendations are effective.” Id. at 1417. Thus, in order for the Board to find recommendations to be

“effective,” there must be some evidence that the recommendations have some independent effect or, at the very least, that they are normally followed. *See also* Fred Meyer Alaska, Inc., 334 NLRB 646 (2001)(stores’ meat manager and seafood managers found supervisors because they (1) interviewed candidates on their own and made recommendations that were accepted by the food managers *without independent investigation*, or (2) attended interviews with the food manager, and their resulting recommendations were “*typically followed*” (emphasis added); Wal-Mart Stores, Inc., 335 NLRB 1310 (2001) (store’s department manager “effectively” rewarded employees because the ratings he assigned in their evaluations *directly effected* their pay increase, *without independent investigation by superiors*); Williamette Industries, Inc., 336 NLRB 743 (2001) (leadmen not supervisors because no evidence of *what weight, if any*, their recommendations carried regarding retention of probationary employees.

Thus, it is well established that evidence of actual effectiveness is required to prove supervisory status based on the authority “effectively to recommend” personnel actions such as disciplining, discharging, hiring and rewarding employees. On one hand, if management completely ignores an employee’s recommendations, or acts on them only after completing its own investigation from scratch, the recommendations cannot be seen to carry much weight. On the other hand, if there is evidence that the recommendations are usually followed, or that they have independent effect without substantial investigation and review by management, then a finding of supervisory status would be warranted.

### Application to the instant case

Based on the foregoing, I conclude that the Employer has not met its burden of proving that group leaders and assistant group leaders are supervisors as defined in Section 2(11) the Act.

Drake testified at length regarding the group leaders' role in assigning and directing employees, including temporary re-assignments or "transfers." The testimony clearly shows that upper management determines the number and type of employees needed for each shift, based on its manufactured process as designed, and based on the customers' orders. During the meeting before each shift, the *Supervisors* determine the number of employees needed for each particular line that shift, and what employee functionalities are needed.<sup>12</sup> Thereafter, the group leaders simply "plug in" the employees who have been trained for the functionality of their line, and all employees on a particular line perform the same type of task. There is no evidence that this "assignment" process requires the type of independent judgment required under the Oakwood cases, i.e., free of detailed instructions and parameters established by superiors, or requiring a significant "discerning and comparing" of data. Croft Metals, *supra*, slip op. at 5. I find, rather, that the process of merely "plugging in" the number and types of employees needed, as pre-determined by the Supervisors, requires only routine or common-sense judgment. That group leaders are disciplined for failing to re-assign

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<sup>12</sup> Repeated assertions in the Employer's post-hearing brief -- that group leaders have sole authority to mandate overtime, to "call in" more employees as needed, to transfer them to other facilities, etc. (pp. 9 - 10, 13, 18 - 20, 22) with no involvement of Supervisors -- are not supported by the record evidence.

employees *as directed by the Supervisor* (Er. Ex. 7(e)) further underscores their lack of independence.<sup>13</sup>

Furthermore, there is no evidence that group leaders have authority to transfer employees to a different building or shift without the involvement of Supervisors. Although Drake testified that group leaders have authority to make permanent transfers, he gave no specific example to demonstrate the group leaders' independent authority to do so, without the review of higher authorities (supervisors, managers and human resources). As noted above, conclusory statements by witnesses, without specific evidence to support those statements, do not demonstrate supervisory status. Golden Crest Healthcare Center, *supra*, 348 NLRB No. 39, slip op. at 5, citing Sears, Roebuck & Co., 304 NLRB 193 (1991).

Similarly, Drake's testimony regarding group leaders' role in scheduling break times, time off and overtime failed to demonstrate the use of independent judgment. The break times are pre-established and, even when employees must rotate their breaks to continue production, the group leaders simply initiate a group decision as to who goes first, second, etc. Their authority to recommend granting time off is extremely limited in time (one or two days only) and subject to review by the manager in any event. Finally, group leaders' involvement in "assigning" overtime is limited to requesting volunteers for

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<sup>13</sup> Arguably, the warnings issued to group leaders (Er. Ex. 7) for various mistakes and problems on their line may demonstrate that group leaders are held responsible for the directing employees on their line. However, given my conclusion that the direction does not require independent judgment, this accountability alone does not meet the definition of supervisor. See Croft Metals, *supra*, slip op. at p. 6 (lead persons held not to be supervisors, although they were responsible for their crew members' work, because the direction did not require independent judgment).

the number of additional employees needed, as determined by management. Group leaders do not have authority to mandate involuntary overtime without the Supervisor.

The Employer asserts that group leaders' role in evaluating new employees indicates supervisory status because it directly affects their employment status (i.e., whether the new employees will be retained as "permanent" employees) and their wage rates. It is true that evaluations may show supervisory status where they have a direct or independent impact on the employees. Williamette Industries, *supra*, 336 NLRB at 743; Franklin Hospital, *supra*, 337 NLRB at 831; Dean & Deluca New York, Inc., 338 NLRB 1046 fn. 13 (2003). However, the evidence in this case falls short of proving such a direct or independent impact. The record shows that group leaders initially fill out the specific ratings for each category, at least for the 15-day, 30-day and 45-day intervals. They may recommend further training for an employee, but they do not expressly make any recommendations regarding the employee's status or wage rate. In fact, the evaluations admitted into the record contain such recommendations only from higher authorities (*e.g.*, Er. Ex. 4, manager Drake ordering another 15 days of remedial training). The documents also indicate that higher supervisors prepare the final document determining the new employee's status after the 60-day training period. (*See* Er. Ex. 5, final document prepared by packing foreman Lopez; Er. Ex. 6, final document prepared by Supervisor Molina). Thus, the evidence does not indicate that group leaders actually make recommendations regarding the employees' status.

Nevertheless, even if the group leaders' ratings are construed to be recommendations, the evidence does not indicate the "effectiveness" of such recommendations, as defined above. The whole evaluation process is clearly a group

effort, involving the Supervisor, the training coordinator, the manager and the human resources department as well. Drake testified that the Supervisor signs the form after reading it and conferring with the group leader. The Supervisor may conduct his own investigation if the employee disagrees with a negative evaluation. Sometimes the training coordinator meets with both the employee and the group leader, to make sure there is a “complete understanding” between them. Drake further stated that the final decision regarding the employee’s employment status is made by the human resources department. The record contains no examples showing that the group leaders’ ratings alone had a direct or automatic effect on the employee’s status, without meaningful review by superiors. Thus, even if group leaders’ ratings are construed to be “recommendations,” the evidence is insufficient to prove that such ratings are “effective” in determining the employees’ status, as defined in such cases as Williamette Industries, *supra*.

The Employer further asserts that group leaders and assistant group leaders have authority to effectively recommend the promotion of rank-and-file employees. However, here again, the actual evidence falls short of proving the assertion. The only specific example in the record was that Drake asked an unnamed group leader and the Supervisor what they thought about promoting Magda Luzuriaga to a research and development technician; that both the group leader and Supervisor responded positively; and that Luzuriaga was eventually promoted. However, Drake’s testimony did not describe in detail the decision-making process of promoting Luzuriaga, such as the extent of his investigation or consideration of other criteria. And, not only was a group leader asked for an opinion of Luzuriaga’s performance, but a Supervisor was also asked the same.

There were no other specific examples in the record. For the reasons described above, this evidence is insufficient to prove that group leaders “effectively recommend” the promotion of employees.

Drake generally testified that group leaders also have authority to recommend disciplining and terminating employees, and to adjust their grievances. However, these assertions were not substantiated by any specific examples, and clearly do not suffice to prove supervisory status. Sears, Roebuck, *supra*. I note that the Employer does not rely on these factors in its post-hearing brief, and they need not be discussed in detail here. Finally, there is no dispute that group leaders do not have authority to lay off or recall employees.

Without evidence of such “primary” indicia of supervisory status, any evidence of “secondary” indicia (such as a higher wage rate) is irrelevant. Training School at Vineland, *supra*, 332 NLRB at 1417. In any event, the secondary indicia in this case are somewhat inconclusive. For example, although group leaders earn a higher wage rate, the Employer does not pay a greater portion of their health plan. Most male group leaders wear uniforms that are different than male employees, whereas female group leaders wear the same uniform as female employees.

Accordingly, based on the foregoing and the record as a whole, I conclude that the Employer has not met its burden to prove that group leaders are supervisors as defined in Section 2(11). Inasmuch as there is even less evidence of supervisory authority for the assistant group leaders,<sup>14</sup> I further conclude that the Employer has not proven them to be

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<sup>14</sup> The record contains no specific examples of any action taken by assistant group leaders that would demonstrate supervisory authority.

statutory supervisors either. I will therefore include both group leaders and assistant group leaders in the unit, for the election directed below.

### **FACTS REGARDING THE COMMUNITY-OF-INTEREST ISSUES**

#### **Quality assurance, research and development employees**

As noted above, the parties dispute the unit placement of two technicians in the quality assurance department and one technician in the research and development department. (Since Drake testified that research and development generally falls “under the quality assurance umbrella,” these three technicians will sometimes be referred to collectively as the quality assurance technicians.)

#### **Quality assurance technicians**

The Employer’s quality assurance department employs two hourly-paid “test bakers” or “technicians” – Gregory DiNapoli and Rosa (last name not indicated on the record) – who bake samples of the Employer’s products. The quality assurance department also includes manager Henry Ellis, two salaried engineers, and an administrative assistant.<sup>15</sup> There are no intermediate-level supervisors or leadpersons in this small department. Thus, the technicians are supervised directly by Ellis who, in turn, reports to Drake.

Drake testified that the technicians work primarily in a test kitchen (a.k.a. laboratory) at the par-bake plant at 1000 Sylvan Road in Bayport. They take dough samples, which are pulled throughout the day from the packing department, and delivered to the test kitchen by group leaders, foremen or their designees. Then they actually bake

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<sup>15</sup> The parties stipulated that those positions are excluded from the unit.

the samples according to the instructions on the package, i.e., the same as the end consumer would do, to test their quality. They perform these tests every day when samples are available, although samples are not always available when the week starts on Monday.

When there are no samples to test, the quality assurance technicians may perform miscellaneous tasks in their area, such as “housekeeping.” Drake said that when they are done, they may work on the production lines. Specifically, Gregory works in the baking department, from which he was promoted, and Rosa works in packaging, from which she was promoted. Drake stated that their production work (typically on Mondays) could take up a portion of their shift, or even their entire eight-hour shift. Drake could not give an overall estimate how much time they spend on the quality assurance work, versus the production work.<sup>16</sup> There is no evidence that production employees perform the quality assurance technicians’ work in their absence.

Rosa wears the same uniform as other female employees and supervisors, i.e., a white shirt and blue pants. Gregory wears the same uniform as rank-and-file male employees, i.e., a white shirt and white pants.

The quality assurance technicians generally work five eight-hour days. Drake did not know their hourly wage rate. They get paid time-and-a-half for overtime work. They receive the same holidays, sick days and health benefits as other employees.

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<sup>16</sup> Contrary to assertions in the Employer’s post-hearing brief, there is no evidence that the technicians are in “constant” or “continuous” contact with petitioned-for employees, or even “frequent daily contact.”

Research and development technician

As noted above, Magda Luzuriaga was promoted within the past year from a packing employee, to her current role as the research and development (R & D) technician.

The R & D department is located at 34 Rajon Road in Bayport, a facility which also houses the raw ingredient warehouse, the purchasing department, and some supervisory and management offices. This small department consists of Luzuriaga (who is hourly-paid); a salaried food scientist technician/dietician named Rachel Bartick; and a salaried R & D supervisory technician, Jack Spataro, who reports to Drake.<sup>17</sup> Drake testified that other people serve on R & D “teams” as needed, although they do not actually work for the R & D department. Luzuriaga shares a desk with Bartick in the R & D office.

The R & D department generally devises new products and improvements to the company’s existing products. This process includes conducting experiments to test if the new products actually work. As the R & D technician, Luzuriaga’s specific duties include performing small-scale experiments, to make a prototype to show to a commercial customer. She performs the small experiments in the par-bake plant’s test kitchen, i.e., the same one used by the quality assurance technicians.

If a customer is interested in a new product, then the R & D department conducts a full experiment on the production line, to see if the process actually works as designed for large-scale manufacturing. Luzuriaga’s duties in this regard include helping the production manager to schedule the experiments; e-mailing the specific experiment

schedule to the relevant people; distributing the written specifications to (unspecified) “personnel” on the production lines; and physically going through the production areas to monitor the experiment as it occurs. Finally, at the end of this process, she takes some samples, to be reviewed by the R & D team and the customer.

Drake stated that the company performs an average of six experiments per week, sometimes as many as 13. Each experiment takes between one and three hours. Therefore, it appears that Luzuriaga typically spends between six and 15 hours per week on the production floor during the experiments. Drake said that if there were 13 experiments, she might spend her entire week on the production floor, although he did not say how often this occurs.

Drake testified that Luzuriaga may wear “street clothes” in her office. When conducting experiments, she may wear the same uniform as female employees and supervisors, i.e. white shirt and blue pants. Alternatively, she also has a lab coat that she may wear over her street clothes.

Luzuriaga generally works five eight-hour days, although she may have to work an entire 12-hour shift if required by the experiment schedule. Drake did not say how often she works a 12-hour shift.

Drake stated that Luzuriaga’s wage rate is \$13 per hour, although he could not say how it compares with production employees’ wage rates. He stated that Luzuriaga gets paid time-and-a-half for overtime work, and the same benefits as other petitioned-for, hourly-paid employees.

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<sup>17</sup> The parties stipulated that Bartick and Spataro are excluded from the unit.

## **Drivers**

Wenner Bread employs approximately six drivers who work for the material handling department, which is located at the 33 Rajon Road storage facility. The Employer's trucks are kept there. The drivers report to work there in the morning, and also receive their assignments for the day there.

The material handling department has a manager and an assistant manager, although no intermediate supervisors, foremen or group leaders. The manager and assistant manager supervise the drivers, as well as the material handling employees who are in the petitioned-for unit. It appears that material handling employees work at both the main storage facility at 33 Rajon Road and the raw ingredient warehouse at 34 Rajon Road. The record does not indicate to whom the material handling manager reports, but it is not director of operations Drake.

Drake testified that the drivers' duties include picking up raw ingredients from suppliers and delivering them to the Employer's raw ingredient warehouse; transporting items among the Employer's six facilities (such as bringing finished products from the Employer's three production plants to its main storage area); and transporting finished product to an "outside" warehouse (i.e., not owned by Wenner Bread) in New Jersey and directly to customers up to 250 miles away. All drivers perform the same functions.

Material handling employees work in the warehouses. Their duties include unloading the deliveries of raw ingredients; picking orders for customers; and loading trucks for delivery elsewhere.

Drake testified that whenever a load is delivered to the warehouse (e.g., raw material), drivers must "verify" the load with the material handling employees who are

unloading it, and also check the paperwork with them. Similarly, Drake stated that whenever finished products are being loaded onto a truck for transportation within the Employer's facilities, the driver monitors the truck being loaded, and also checks the paperwork with material handling employees. However, when drivers arrive in the morning to deliver finished products to customers, the trucks are usually already loaded. Drake testified that drivers do not actually have to load and unload their trucks, although they may choose to help do so. If they have some free time while waiting at the Employer's facilities, they may also perform miscellaneous tasks such as sweeping their truck or the floor.

Drake declined to estimate how much time drivers spend at the Employer's facilities, versus time they spend on the road. He said that one time, about three weeks before the hearing, when he spent about two or three hours at an Employer facility, a driver was there the whole time. Drake observed the driver doing something on the computer, sweeping and helping with some "menial tasks." However, he said he could not estimate an average for the entire group of drivers. Upon re-direct examination, Drake pointed out that drivers who spend the day transporting items among the Employer's facilities obviously spend more time at the facilities, waiting for their truck to be loaded in between trips, etc., than the drivers who spend the day driving to the New Jersey warehouse or customer locations.

As noted above, drivers may choose to help load or unload trucks. However, there is no evidence that drivers perform material handlers' work on a regular basis.<sup>18</sup>

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<sup>18</sup> Contrary to an assertion in the Employer's post-hearing brief (p. 38), there is no evidence that drivers perform material handlers' work on a "regular if not daily basis."

The drivers never perform production or maintenance work. Conversely, production employees never work as drivers.

Drivers must have a commercial drivers' license (CDL), which other employees are not required to have.

Drake testified that drivers wear the same uniform (tan colored shirt, brown pants) as most material handlers, although the material handlers who work in the freezer simply wear a freezer coat over their clothes.

Finally, Drake testified that drivers work five days per week. They are paid a flat rate per day, regardless of the number of hours. They get the same benefits as other employees, such as sick days, vacation and medical benefits.

There seems to be no dispute that the three quality assurance technicians and six drivers are the only other non-supervisory employees employed at the Employer's six facilities, other than the petitioned-for classifications, and except for office clerical employees and security guards.

### **DISCUSSION OF COMMUNITY-OF-INTEREST ISSUES**

It is well established that a certifiable bargaining unit need only be an appropriate unit, not the most appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950), *enf'd.* 190 F.2d 576 (7th Cir. 1951); Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, 283 NLRB 475 (1987); P.J. Dick Contracting, 290 NLRB 150 (1988); Dezcon, Inc., 295 NLRB 109 (1989). The Board's task, therefore, is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the only appropriate unit or the "ultimate" unit. The Board has stated that, in making unit determinations, it looks "first to the unit sought by the petitioner. If it is appropriate, our

inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposal." Dezcon, Inc., *supra*, 295 NLRB at 111. Thus, the unit requested by a petitioning union is the starting point for any unit determination. In assessing the appropriateness of any proposed unit, the Board considers such community-of-interest factors as employee skills and functions, degree of functional integration, interchangeability and contact among employees, and whether the employees have common supervision, work sites, and other working terms and conditions.

Bearing these principles in mind, I find that the petitioned-for unit of production, maintenance, shipping and receiving employees constitutes an appropriate bargaining unit, even though it excludes the quality assurance technicians and the drivers. I find that the Employer has not shown those excluded classifications to share such a strong community of interest so as to render the petitioned-for unit inappropriate and to mandate their inclusion with the petitioned-for employees.

The record indicates that quality assurance technicians work primarily at different sites (the test kitchen and the R & D office) than the petitioned-for employees. They perform different tasks (testing products, participating in R & D experiments) which require different equipment and skills. They also have separate immediate supervision (quality assurance manager and the R & D supervisory technician), although their departments ultimately report to the same director of operations, Drake. Furthermore, they usually work different shifts (eight-hour shifts) than the production employees (12-hour shifts). Although quality assurance technicians Gregory and Rosa perform some production work when there are no samples to test, the evidence does not demonstrate that they spend a substantial portion of their time on such work. There is no evidence that

R & D technician Luzuriaga actually performs bargaining-unit production work, although she spends some time on the production floor during experiments.

The Board sometimes finds production and maintenance units appropriate with quality assurance employees, and sometimes without them, depending on all the specific community of interest factors in each case. *Cf. Blue Grass Industries*, 287 NLRB 274, fn. 10 (1987) and *Lundy Packing Co.*, 314 NLRB 1042 (1994).<sup>19</sup> One relevant consideration is the petitioner's desire or extent of organization, although under Section 9(c)(5) of the Act it cannot be a controlling factor. In this case, based on *all* of the above factors (different work sites, supervision, duties, shifts, lack of substantial time spent on production work or even in production areas, plus the fact that the Petitioner does not wish to represent the technicians), I conclude that it is not inappropriate to exclude the quality assurance and R & D technicians.

Cases cited in the Employer's brief are distinguishable or irrelevant. In *Magnetic Specialties, Inc.*, 320 NLRB No. 141 (1996), *enf'd in unpublished opinion*, 127 F.3d 1102 (6<sup>th</sup> Cir. 1997), the quality assurance employees, whom the union wanted to include, spent almost all their time on the production floor (only 30 minutes per day in the office) and worked the same hours as production employees. *Bennett Industries, Inc.*, 313 NLRB 1363 (1994) did not even involve any issue of quality assurance employees' unit placement. In *Virginia Mfg. Co.*, 311 NLRB 992 (1993), the parties agreed to include quality assurance employees in the unit; the only issue was whether a particular

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<sup>19</sup> Although the Fourth Circuit Court of Appeals disagreed with the Board's conclusion in *Lundy Packing*, and denied enforcement, 68 F.3d 1577 (4<sup>th</sup> Cir. 1995), the facts of that case are distinguishable. For example, the Court found that the quality assurance employees spent 80 percent on their time on the production floor, far more than has been shown in the instant case.

challenged voter fell into that classification.

For similar reasons, I find that the drivers do not share such a strong community of interest to mandate their inclusion in the petitioned-for unit. Although they share the same supervision as the material handling employees, drivers spend a significant portion of their time away from the material handlers while they are driving their trucks. Drivers' work requires different skills and licensing than other employees. Other employees do not perform the drivers' work, and drivers do not have to perform other employees' work, although they may choose to help load and unload the trucks. They are paid on a different basis (flat per-day rate) than the hourly-paid employees. Finally, although it is not a controlling factor, I note that the Petitioner does not seek to represent the drivers.

Based on all of the above factors, I find that exclusion of the drivers does not render the petitioned-for unit inappropriate.

The Employer essentially argues that the only appropriate unit would be a "wall-to-wall" unit including all of the Employer's production, maintenance, shipping and receiving employees; and that to exclude the quality assurance employees and drivers would create disfavored "residual" units. Although it is true that a wall-to-wall unit would be appropriate, the Act does not require unions to choose the ultimate unit, or the largest possible unit. Overnite Transportation Co., 322 NLRB 723 (1996). The Petitioner here has chosen an appropriate unit, and the Employer has not proven it to be inappropriate. Contrary to the Employer's assertion that the remaining employees would create inappropriate "residual" units, I find that the quality assurance employees and drivers could each constitute separate appropriate bargaining units.

Based on the foregoing, I conclude that the petitioned-for unit of production, maintenance, shipping and receiving employees share a sufficiently distinct community of interest from the quality assurance technicians and drivers to constitute *an* appropriate bargaining unit. By contrast, the Employer's evidence has failed to demonstrate such a close community of interest among those classifications to render the petitioned-for unit inappropriate.

In sum, I have found that the group leaders and assistant group leaders are not supervisors as defined in Section 2(11) of the Act, and may be appropriately included in the petitioned-for unit. I have further found that the petitioned-for unit is appropriate for collective bargaining, and need not include the quality assurance technicians or drivers. I will therefore direct an election in the petitioned-for unit below.

### **CONCLUSIONS AND FINDINGS**

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that the Employer is a domestic corporation, with its principal place of business located at 44 Rajon Road, Bayport, New York, and other facilities located in Bayport and Bohemia, New York. It is engaged in producing various bread products for supermarkets and other commercial customers. During the past year, which period represents its annual operations generally, the Employer purchased and received goods, supplies and materials at its New York facilities valued in excess of \$50,000 directly from entities located outside the State of New York.

Based on the parties' stipulation, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that the Petitioner is a labor organization as defined in Section 2(5) of the Act. It claims to represent certain employees of the Employer.

4. A question concerning 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. I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining:<sup>20</sup>

All full-time and regular part-time production, maintenance, shipping and receiving employees employed at the Employer's six facilities in Bayport and Bohemia, New York, including production line workers, scalers, mixers, machine operators, oven workers, packing employees (in par-bake, frozen, bread and rolls), material handling employees, mechanics, sanitation employees, group leaders and assistant group leaders, but excluding all office clerical employees, quality assurance technicians, research and development technicians, drivers, guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by the United Association of Workers of America, Local 528, A/W National Organization of Industrial Trade Unions (NOITU), International Union of Journeymen and Allied Trades. The date, time, and

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<sup>20</sup> I have modified the unit description to comport with amendments and findings herein, and to reduce certain redundancies in the Petitioner's listing of classifications.

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, 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. Those in the military services of the United States who are employed in the unit 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 more than 12 months before the election date and who have been permanently replaced.

**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, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **November 5, 2007**. 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 (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **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.

#### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer 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 5 p.m., EST on **November 12, 2007**. The request may **not** be filed by facsimile.

The parties are advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described Request for Review electronically, please refer to the guidance which can be found under "E-Gov" on the National Labor Relations Board website: [www.nlr.gov](http://www.nlr.gov).

Dated: October 29, 2007.

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Alvin Blyer  
Regional Director, Region 29  
National Labor Relations Board  
Two MetroTech Center, 5th Floor  
Brooklyn, New York 11201