

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NESTLE PURINA PETCARE CO.)	
)	
Employer,)	
)	
and)	CASE NO. 10-RC-265325
)	
)	
BAKERY, CONFECTIONERY, TOBACCO)	
WORKERS AND GRAIN MILLERS UNION)	
LOCAL 42)	
Petitioner.)	

**PETITIONER’S RESPONSE IN OPPOSITION TO THE EMPLOYER’S REQUEST FOR
IMMEDIATE STAY OF MAIL BALLOT ELECTION**

COMES NOW, Petitioner in the above-captioned case, the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 42 (the “Union”) and submits this response in opposition to the request for immediate stay of mail ballot election (the “Request for Immediate Stay”) filed by Nestle Purina Petcare Company (the “Employer”). The Request for Immediate Stay should be denied because there is no basis for the extraordinary relief sought by the Employer, and because extraordinary circumstances exist for a mail ballot election in this case due to the COVID-19 pandemic.

1. Petitioner has argued for a mail ballot election throughout the proceedings, and the Employer misrepresented Petitioner’s position on a manual election in its Request for Immediate Stay

Petitioner has repeatedly requested a mail ballot election in this case. This position was made abundantly clear in the RC Petition¹, in Petitioner’s responsive statement of position², at

¹ Enclosed as “Attachment 1”

² Enclosed as “Attachment 2”

the hearing held on September 22, 2020³, and in its post-hearing brief filed on September 29, 2020⁴. In its post-hearing brief, Petitioner stated the following regarding the election method:

As argued at the September 22, 2020 hearing and in its Responsive Statement of Position ... the Union prefers a mail ballot election due to the extraordinary circumstances created by the COVID-19 pandemic in the State of Georgia and Hart County.^[FN] *See e.g.* Sea World of Florida, LLC, Case No. 12-RC-257917, 2020 WL 5658311 (Sep. 22, 2020). However, because the Employer made assurances at the hearing that it would meet the safety protocols for an in-person election outlined in Memorandum GC 20-10, (Tr. 169), the Union will go forward with a manual election if one is directed.

^[FN] As of September 28, 2020, there were 315,281 confirmed cases of COVID-19 in Georgia, and 510 in Hart County (1953.5 cases per 100k residents). Georgia Department of Public Health Daily Status Report, <https://dph.georgia.gov/covid-19-daily-status-report> (last visited Sep. 29, 2020).

The Union repeatedly made it clear in this case that a mail ballot election should be directed. In its post-hearing brief, the Union stated it would go forward with a manual election if one was directed to not delay an election in this case if the Acting Regional Director determined that a manual election was appropriate. However, the Acting Regional Director did not direct a manual election, instead he ordered a mail ballot election because - as the Union has repeatedly argued - extraordinary circumstances created by the COVID-19 pandemic warrant a mail ballot election.

2. Conditions at the Plant and the COVID-19 data in Georgia show that extraordinary circumstances presently exist for a mail ballot election

On the date of the Representation hearing, there were at least two unit employees with confirmed COVID-19 cases out of 54 warehouse employees. That is almost 4% of the bargaining unit. The Employer's proposed manual election accommodation for these infected employees is to have them drive to the Plant and deposit their ballots in the ballot box.⁵ The potentially

³ See September 22, 2020 Representation Hearing Transcript, pages 181-183, enclosed as "Attachment 3"

⁴ Enclosed as "Attachment 4"

⁵ See Transcript, page 170, enclosed as "Attachment 5"

contaminated ballots deposited by the infected employees would be commingled with the other ballots which could spread the virus to everyone who comes into contact with the ballots, including election observers, Board agents, and party representatives. It is completely unnecessary to subject multiple individuals to the risks of contracting COVID-19 through a manual election when a perfectly safe and effective mail ballot alternative is available.

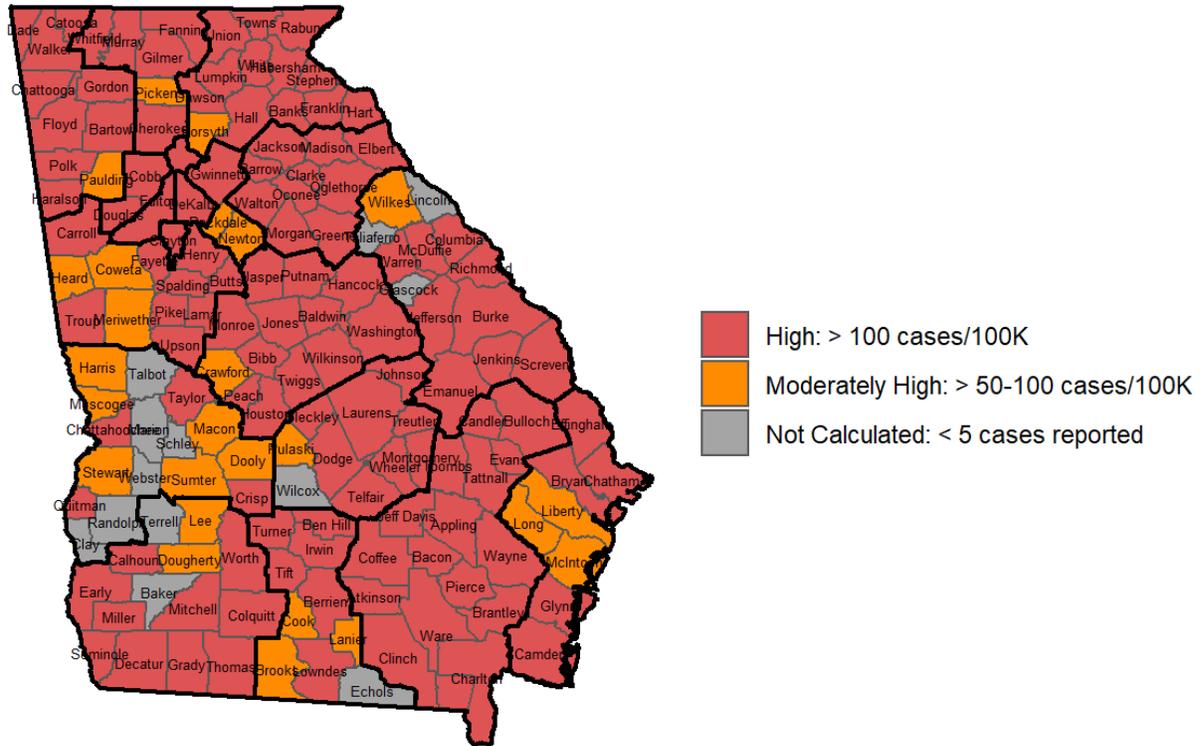
Furthermore, while Hart County may have recently been removed from the Georgia Department of Public Health's list of "Counties with High Transmission Indicators", several unit employees - and likely salaried employees as well - reside in the surrounding counties that remain on the "High Transmission" list, including Elbert, Stephens, and Habersham Counties. *See Employer's Request for Immediate Stay* at p. 10. Therefore, employees who live in high-risk COVID-19 counties commute to the Plant, bringing a high risk of COVID-19 transmission with them.

Finally, just because Hart County is not presently on the "High Transmission" list, it remains unsafe to hold an election at the Plant. Hart County (and most of the State of Georgia) is in the "High" category of confirmed COVID-19 cases, with over 100 confirmed cases per 100,000 residents⁶:

⁶ https://countyindicatorreport.s3.amazonaws.com/county_indicator_report_201012.html#supplemental-maps-1 (last visited October 13, 2020).

14-Day Case Rate by Category, Confirmed COVID-19 Cases

09/26 to 10/09



CONCLUSION

For the aforementioned reasons, and the reasons set forth in the DD&E, a mail ballot election should be conducted due to the extraordinary circumstances caused by the COVID-19 pandemic. Accordingly, Petitioner respectfully requests that the Board deny the Employer's Request for Immediate Stay and deny the Employer's request for a manual election.

This 13th day of October, 2020.

s/ Michael B. Schoenfeld
Stanford Fagan LLC
2540 Lakewood Ave. SW
Atlanta, Georgia 30315
404-622-0521, ext. 2244
michaels@sfglawyers.com
Attorney for Petitioner

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NESTLE PURINA PETCARE CO.)	
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Employer,)	
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BAKERY, CONFECTIONERY, TOBACCO)	
WORKERS AND GRAIN MILLERS UNION)	
LOCAL 42)	
Petitioner.)	

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I submitted the foregoing **PETITIONER’S RESPONSE IN OPPOSITION TO THE EMPLOYER’S REQUEST FOR IMMEDIATE STAY OF MAIL BALLOT ELECTION** to the National Labor Relations Board via the NLRB e-filing system, and served a copy of the same on the following via e-mail:

Scott Thompson
National Labor Relations Board
Subregional Office 11
4035 University Parkway, Suite 200
Winston-Salem, NC 27106-3325
Scott.C.Thompson@NLRB.gov
Acting Regional Director, NLRB Region 10

Bernard J. Bobber
Ogletree, Deakins, Nash, Smoak & Stewart, P.C
Pabst Boiler House
1243 North 10th Street, Suite 200
Milwaukee, WI 53205
bernard.bobber@ogletree.com
Counsel for the Employer

By: s/ Michael B. Schoenfeld

ATTACHMENT

1

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 10-RC-265325	Date Filed August 27, 2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer: Nestle Purina PetCare	2b. Address(es) of Establishment(s) involved (Street and number, City, State, ZIP code): 266 Industrial Park Rd, Hartwell, GA 30643
---	---

3a. Employer Representative - Name and Title: Alicia Mack-HR Manager	3b. Address (if same as 2b - state same): Same
--	--

3c. Tel. No.	3d. Cell No. 678-414-2074	3e. Fax No.	3f. E-Mail Address Alicia.Mack@purina.nestle.com
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4a. Type of Establishment (Factory, mine, wholesaler, etc.) Factory	4b. Principal Product or Service Pet Food	5a. City and State where unit is located: Hartwell, Ga
---	---	--

5b. Description of Unit Involved: Included: All Full time and Part time Distribution Employees Excluded: All other employees, temporary, professional, office clerical, managers, guards, supervisors	6a. Number of Employees in Unit: 50	6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
--	---	---

Check One: 7a. Request for recognition as Bargaining Representative was made on (Date) 8-27-20 and Employer declined recognition on or about (Date) No Reply (If no reply received, so state).
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (if none, so state) N/A	8b. Address: N/A
--	----------------------------

8c. Tel. No. N/A	8d. Cell No. N/A	8e. Fax No. N/A	8f. E-Mail Address N/A
----------------------------	----------------------------	---------------------------	----------------------------------

8g. Affiliation, if any: N/A	8h. Date of Recognition or Certification N/A	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)
--	--	--

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of Labor Organization) _____, has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (if none, so state)
N/A

10a. Name None	10b. Address N/A	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts and election in this matter, state your position with respect to any such election: Due to COVID-19 the Unions position is by mail
11a. Election Type: Manual Mail Mixed Manual/Mail

11b. Election Date(s): September 25, 2020	11c. Election Time(s):	11d. Election Location(s):
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12a. Full Name of Petitioner (including local name and number): Bakery, Confectionery, Tobacco Workers and Grain Millers Local Union 42	12b. Address (street and number, city, State and ZIP code): 1030 Dill Ave SW Atlanta, GA 30310
---	--

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state):
Bakery, Confectionery, Tobacco Workers and Grain Millers International Union. AFL-CIO, CLC

12d. Tel. No. 240-271-8319	12e. Cell No. 240-271-8319	12f. Fax No. 404-753-8111	12g. E-Mail Address d3copeland@gmail.com
--------------------------------------	--------------------------------------	-------------------------------------	--

13a. Name and Title: Darrell Copeland-International Organizer	13b. Address (street and number, city, State and ZIP code): 1030 Dill Avenue SW Atlanta, GA 30310
---	---

13c. Tel. No.	13d. Cell No. 240-271-8319	13e. Fax No.	13f. E-Mail Address d3copeland@gmail.com
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I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Darrell Copeland	Signature 	Title BCTGM International Organizer	Date 8-27-20
----------------------------------	--	--	-----------------

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

ATTACHMENT

2

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RESPONSIVE STATEMENT OF POSITION - RC OR RD PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 10-RC-265325	Date Filed August 27, 2020

INSTRUCTIONS: If a party has submitted and served on you a timely Statement of Position to an RC or RD petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner.

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

Nestle Purina PetCare, ,

1a. Full Name of Party Filing Responsive Statement of Position Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 42	1c. Business Phone 240-271-8319	1e. Fax No. 404-753-8111
	1d. Cell No. 240-271-8319	
	1f. E-Mail Address d3copeland@gmail.com	

1b. Address (Street and Number, City, State, and ZIP Code)
1030 Dill Avenue SW, Atlanta, GA 30310

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:
a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position: **See Attachment A**

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position: **See Attachment A**

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position: **See Attachment A**

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]
 No Dispute (no further response required) Dispute (response required below)
Response to Statement of Position: **See Attachment A**

Full Name and Title of Authorized Representative Michael B. Schoenfeld, Attorney	Signature of Authorized Representative s/ Michael B. Schoenfeld	Date 9/14/20
--	---	------------------------

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT
Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.
Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

ATTACHMENT A

PETITIONER'S RESPONSIVE STATEMENT OF POSITION 10-RC-265325

2c & 2d - Appropriateness of Unit & Individual Eligibility

The Union disputes the Employer's proposed unit of production and warehouse workers and asserts that the following description of employees constitutes an appropriate bargaining unit:

Included: All full-time and regular part-time distribution employees.

Excluded: All other employees, temporary employees, professional employees, office clerical employees, managers, guards and supervisors as defined in the Act.

The Union submits that community-of-interest evidence and other evidence presented at the hearing set for September 22, 2020 will demonstrate that a unit of distribution employees is an appropriate unit for collective bargaining under Board law and does not constitute an "arbitrary, irrational, or 'fractured'" unit. *PCC Structural, Inc.*, 365 NLRB No. 160 at *7 (2017).

2f - All Other Issues

The Union submits that a mail ballot election is appropriate in this case due to the danger posed by the COVID-19 pandemic. Conducting the election by mail is the safest option and will better facilitate maximum participation by eligible voters. The Board has long delegated to Regional Directors the authority to unilaterally designate election procedures. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). This discretion includes the ability to direct a mail ballot election where appropriate. *Id.* at 1144-45; *National Van Lines*, 120 NLRB 1343, 1346 (1958). While the Board's general policy is that elections should generally be conducted manually, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.*

The impact of COVID-19 on daily life throughout the country, in Georgia, and at the Employer's Hartwell, Georgia facility present "extraordinary circumstances" warranting a mail-in ballot. Throughout the current pandemic, Regional Directors across the nation have routinely made the decision to utilize mail ballots to conduct elections in areas affected by COVID-19. When parties have appealed these decisions, the Board - citing to the various local, state and federal directives and guidance, and the extraordinary circumstances overall presented by the widespread pandemic - has routinely found that it is not an abuse of discretion to order a mail-ballot election during the current pandemic. *See e.g., Brinks Global Services*, 29-RC-260969 (unpublished Order July 14, 2020), *TDS Metrocom LLC*, 8-RC-260318 (unpublished Order June 23, 2020); *Vistar Transportation, LLC*, 09-RC-260125 (unpublished Order June 12, 2020); *Roseland Community Hospital*, 13-RC-256995 (unpublished Order May 26, 2020).

The COVID-19 pandemic is still raging in Georgia and in Hart County. Presently, Georgia ranks as one of the most highly infected states in the nation. As of September 13, 2020,

there were 294,314 confirmed cases of COVID-19 in the State.¹ As of September 13, Hart County had 465 confirmed COVID-19 cases at a rate of 1781.13 cases per 100,000 residents. *Id.* Moreover, there have been numerous confirmed COVID-19 cases among workers in the Hartwell distribution center and the plant.

Adopting the Board's standard mail-ballot process all but eliminates the inherent safety risks, and equally ensures that employees can conveniently and freely exercise their right to vote. For example, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there is no absentee ballot or remote voting options under the Board's manual election rules. Similarly, eligible voters, observers, and Board representatives - especially those that are at an elevated risk of experiencing complications from COVID-19 due to preexisting health conditions - may be loath to enter and dwell in an enclosed area. Conducting the election using a mail ballot system eliminates any risk of disenfranchisement and ensures that all eligible employees have an opportunity to vote regardless of their exposure to COVID-19 or health status.

Finally, it bears noting that the restrictions on mass gatherings and the dangers presented by COVID-19 do not have a known expiration date and are instead anticipated to continue well into 2021². As such, the only way to safely and expediently hold the instant election is through a mail-ballot which will allow for the holding of the election "at the earliest date practicable" consistent with Section 102.67(b) of the Board's Rules and Regulations.

2g - Election Details

The Union requests that the Regional Director schedule an election by mail ballot at the earliest date practicable.

¹ <https://dph.georgia.gov/covid-19-daily-status-report> (last visited September 14, 2020)

² Amanda Watts, *Fauci says normal life may not be back until the end of 2021*, CNN Health, <https://www.cnn.com/2020/09/11/health/fauci-normal-life-2021/index.html> (last visited September 14, 2020).

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

NESTLE PURINA PETCARE)	
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Employer,)	
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and)	CASE NO. 10-RC-265325
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)	
BAKERY, CONFECTIONERY, TOBACCO)	
WORKERS AND GRAIN MILLERS UNION)	
LOCAL 42)	
Petitioner.)	

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, I submitted the foregoing **RESPONSIVE STATEMENT OF POSITION** to the National Labor Relations Board, Region 10 via the NLRB e-filing system, and served a copy of the same on the following via e-mail:

Nicole Dietman
NLRB, Region 10
233 Peachtree St N.E.
Harris Tower – Suite 1000
Atlanta, GA 30303
nicole.deitman@nlrb.gov
NLRB Region 10 Field Examiner

Bernard J. Bobber
Ogletree, Deakins, Nash, Smoak & Stewart, P.C
Pabst Boiler House
1243 North 10th Street, Suite 200
Milwaukee, WI 53205
bernard.bobber@ogletree.com
Counsel for the Employer

By: s/ Michael B. Schoenfeld

ATTACHMENT

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1 position indicates that you are willing to provide the required
2 suggestive certifications from GC 2010. These certifications
3 occur both before the election and then after the election. Is
4 that still your position that you're willing to provide those
5 certification?

6 MR. BOBBER: Yes, we -- yes, it is.

7 HEARING OFFICER DEITMAN: Okay. All right. That was my
8 list of questions. Mr. Schoenfeld, if you would like to begin.

9 MR. SCHOENFELD: Yes, thank you.

10 All due respect to Mr. Bobber, I appreciate his position,
11 but I think the Employer's proposed accommodations for manual
12 election highlights how doing so just presents an unnecessary
13 safety risk to everybody present. I mean, there's no dispute
14 that we currently have two warehouse employees on quarantine
15 confirmed COVID cases. There's not -- there's not quarantine
16 because of -- because of suspected or because of potential
17 risks. They have COVID, right?

18 Or -- and the Employer's proposed accommodation to not
19 disenfranchise them is have them drive up and deposit a ballot
20 somewhere. The only way to ensure the secret ballot process
21 here would be to commingle those ballots with the other ones.
22 And so we're going to have somebody that has COVID drop a
23 ballot into a box, and have that ballot shaken up with a bunch
24 of other ballots, and have those ballots handled by a Board
25 Agent. That just seems like that is a recipe for disaster if

1 we're -- we're potentially exposing a whole number of people,
2 two confirmed virus cases. And that -- that alone presents
3 extraordinary circumstances for the Regional Director to order
4 a mail ballot election in this case.

5 In addition, I'm not going to reiterate the Union's
6 response to statement of position, but I incorporate it herein.
7 I -- I've just checked the Department of Health numbers for
8 COVID in Georgia, and they are currently at -- and now I can't
9 find them. So now it's currently at confirmed cases 300 -- 300
10 thousand -- 308,221, which is an increase of almost a thousand
11 from yesterday. So when I checked this morning, the cases as
12 of 9/21 was 307,339. And now I just checked it 10 minutes ago,
13 and they have updated cases, so it's 308,221. So that's almost
14 a thousand more cases in a day.

15 And I understand Mr. Bobber's arguments about trending but
16 it's -- it's just because we're not as bad as we used to be
17 doesn't mean we're not bad. It's still hundreds of thousands
18 of confirmed cases in this state. In a whole county, we're
19 still at 1,869 cases per 100,000.

20 Again, trend lines may be going down which is obviously a
21 good thing, and everybody is happy about that, but it -- we
22 have to look at where we came from to get the whole picture.
23 And it's still extremely dangerous. And we have at our
24 disposal a procedure to eliminate these dangers, and that's a
25 mail ballot election which has been employed throughout this

1 pandemic and we think that is the appropriate procedures to be
2 used.

3 Understood that the Hartwell employees do go to work, and
4 they're very brave to do so, and we appreciate that, and
5 obviously respect that, but this involves not only them, but it
6 involves Board agents, representatives of the Union,
7 representatives of the company, that have to enter this
8 facility, and we believe would be unnecessarily exposed to
9 safety risks which are the highest priority for us.

10 And we think that that -- that the risks that are
11 presented in this case meet the extraordinary circumstances
12 criteria to issue a mail ballot. Thank you.

13 Oh, one other -- I forgot, I'm sorry.

14 And then, in terms of for the USPS, there's adequate
15 safeguards already in place for employees if they haven't
16 received the ballot to -- to request another one.

17 And the Postmaster General, I can cite this in the brief,
18 said under oath in front of Congress that the Postal Service is
19 safe and efficient. And I think there's really been no hard
20 data showing there's -- there's been any real delay in the mail
21 process, and all of that -- all of that can be handled through
22 the procedures that are already in place.

23 Thanks.

24 HEARING OFFICER DEITMAN: All right. Thank you both.

25 I would now like to explore election details in the event



ATTACHMENT

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

NESTLE PURINA PETCARE CO.)	
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Employer,)	
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and)	CASE NO. 10-RC-265325
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BAKERY, CONFECTIONERY, TOBACCO)	
WORKERS AND GRAIN MILLERS UNION)	
LOCAL 42)	
Petitioner.)	

PETITIONER’S POST-HEARING BRIEF

COMES NOW, Petitioner in the above-captioned case, the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 42 (the “Union”) and submits this post-hearing brief to the Regional Director of NLRB, Region 10. As argued below, the petitioned-for unit of all full-time and regular part-time warehouse employees of Nestlé Purina PetCare Company (the “Employer”) working at its Hartwell, Georgia facility, is appropriate because all warehouse employees share a community of interest, and production operators have meaningfully distinct interests in the context of collective bargaining that outweigh their similarities with warehouse employees.

I. STATEMENT OF FACTS

The Employer’s Hartwell, Georgia facility (the “Plant”) opened in May 2018 as solely a distribution center. (Tr. 20)¹. Approximately a year ago, the Company began to produce wet cat

¹ The transcript of the hearing is cited as “Tr.(page)”. Board exhibits are cited as “BX(#)”. Employer exhibits are cited as “EX(#)”. Union exhibits are cited as “UX(#)”.

food at the Plant. (*Id.*). The Plant currently has 2-3 production lines running. (Tr. 20-21, 23). The Plant currently employs approximately 145 hourly production operators, (Tr. 37), and approximately 54 forklift operators² that work in the warehouse³ of the Plant. (Tr. 30.) Approximately 15 maintenance technicians also work at the Plant. (Tr. 138). The maintenance technicians are represented by the Union in a separate bargaining unit and are covered by their own collective bargaining agreement. (UX1; 2; 8).

The Plant is comprised of four groups/departments⁴: production, maintenance, warehouse, and quality (Tr. 91-92). The warehouse is located on the north-west side of the Plant. (EX6). The warehouse has its own entrance identified as the “Distribution Center Employee and Visitor Entrance.” (UX5). The production lines are located on the eastside of the Plant. (EX6). Production and maintenance employees enter the Plant through the “Employee Center” on the eastside of the Plant. (Tr. 27, 122). Warehouse employees generally park in a parking lot south of the distribution center, (Tr. 23), and production and maintenance employees park in a separate lot adjacent to the Employer Center entrance. (Tr. 101). However, a new parking lot is under construction, and when it is completed, forklift operators will park in the same lot as the production operators. (Tr. 24).

Forklift operators clock-in for work on a timeclock that is near the entrance of the Distribution Center, (Tr. 103), while production and maintenance employees use a timeclock near the Employer Center entrance. (Tr. 104, 122). There are also two separate break rooms with locker rooms – one in the Employer Center and one in the warehouse. (Tr. 29). Production and maintenance employees primarily use the break room in the Employee Center, and forklift

² The official job title of employees working in the Plant’s warehouse is “forklift operator” or “FLO”. (Tr. 90).

³ The terms “warehouse” and “distribution center” are used interchangeably herein.

⁴ Supply Chain Manager Cy Gilbreth used the term “department” to refer to production, maintenance, and/or warehouse on multiple occasions in his testimony. (*See e.g.* Tr. 16, 43, 58, 60, 64, 65, 73, 74, 75).

operators use the break room in the distribution center. (Tr. 104). There is an area of the Plant called “Variety Pack” that is adjacent to the warehouse. (EX6). In Variety Pack, different flavors of pet food are repackaged into a special variety pack product. (Tr. 17). Three production operators work in Variety Pack and they take their breaks in the distribution center breakroom, (Tr. 104), and clock-in on the distribution center time clock. (Tr. 103-104).

The three Variety Pack employees are distinguishable from the other production operators because they are qualified (as opposed to “certified”)⁵ forklift operators like the warehouse employees. (Tr. 108). They drive their packaged product into the warehouse themselves for storage and are the only production employees that regularly enter the warehouse. (Tr. 42-43, 123). The Employer’s Supply Chain Manager Cy Gilbreth testified that the three operators in Variety Pack are eligible for overtime in the distribution center, (Tr. 108), but forklift operator Richie Kopf - who has worked at the Plant for approximately eighteen months - testified that the last time he observed a Variety Pack operator work overtime in the warehouse was five to six months ago. (Tr. 157-158).

Hourly plant employees (production, maintenance, and warehouse) are assigned to work either the red or blue (day), or gray, green, yellow, or orange (night), shifts. (Tr. 112-113; *see also* UX6). Variety Pack currently runs only during day shift Monday through Friday. (Tr. 31). There is one Human Resources Department for production, maintenance, and warehouse employees (Tr. 124). All hourly employees receive the same standard employee benefit package. (Tr. 124-125). All hourly employees are required to wear the same uniforms, safety shoes, and protective eyewear. (Tr. 127; EX11).

⁵ Qualified was explained as “proficient” in forklift operation. (Tr. 110-111).

Forklift operators begin their workday with a shift handoff meeting. (Tr. 90). The meeting is normally attended only by forklift operators and their direct supervisor, known as a “Coordinator”. (Tr. 90). There are no production operators present in the warehouse pre-shift meetings. (Tr. 90-91). Forklift operators have three main functions: 1) case picking, 2) unloading trucks, and 3) line haul/line pull. (Tr. 32-33). Case picking involving pulling products from slots in the warehouse and assembling pallets with the products. (Tr. 32-33). Unloading involves pulling products from trucks arriving from other Purina facilities and loading them into the warehouse. (Tr. 33). Warehouse employees have virtually no interaction with production employees when performing case picking and truck unloading duties. (Tr. 33). The only interaction that forklift operators have with production operators occurs during line haul work. (Tr. 33). Line haul involves driving a forklift to the production floor, picking up products, and bringing them to the warehouse for storage. (Tr. 118). Forklift operators are scheduled to perform line haul duties on a rotation, and each forklift operator works the line haul shift approximately once every two weeks. (Tr. 33-34; EX15). The Employer has plans to automate the line haul process on at least two production lines with an automated guided vehicle (“AGV”). (Tr. 118). When the AGV’s are fully operational, the line haul process for the production lines on which the AGV is utilized will be eliminated. (Tr. 119).

Unlike forklift operators, maintenance employees have regular daily interaction with production operators because they work directly on the production floor. (Tr. 123). Production and maintenance employees work side-by-side when equipment goes down and mechanics are called to perform repairs. (Tr. 123-124). Production employees are also required to perform some low-level maintenance work, such as oiling and preventative maintenance tasks. (Tr. 124). Both production and maintenance employees carry a “lock” that is used to turn off machinery when it

is being repaired. (Tr. 164-165). Forklift operators are not provided with a lock at work. (Tr. 165).

Occasionally, forklift operators or production operators are pulled from their respective jobs to perform “handfeeding” work in Variety Pack. (Tr. 83). Handfeeding involves physically taking cans out of a case and putting them onto a conveyer belt so that the machine can case them into a variety pack of products. (Tr. 83). It is a “general laborer” function that involves simply pushing cans of cat food down a conveyor belt. (Tr. 83, 119). Gilbreth testified that since he has worked at the plant, warehouse employees have performed handfeeding in Variety Pack “six or seven times.” (Tr. 49-50).

Forklift operators do not fill-in for Variety Pack or other production operators, or vice versa, because employees are trained for their specific job and different skill sets and qualifications are required for the respective positions. (Tr. 120-121). To be hired to work in the warehouse, an applicant must have at least one year of “forklift experience within a high volume distribution center, manufacturing or military environment.” (EX12). For a production operator job, “6 months+ experience working in a manufacturing, production, agriculture, warehouse, military or related environment”, is required. (EX13).

All new hires at the Plant (salaried and hourly) undergo a week-long orientation together. (Tr. 58, 114). They are then split-out to undergo group-specific hands-on training. (Tr. 58-59, 114). Forklift operators receive approximately four weeks of hands-on forklift training in the warehouse partnered with a trainer, (Tr. 114-115), and then four more weeks of independent work with close supervision and support. (Tr. 115). Production operators do not receive four weeks of hands-on forklift training. (Tr. 115). Instead, production operators receive four weeks of hands-on training on the equipment that they are assigned to operate, and they also receive

cross-training on the other production lines. (Tr. 115-116). Production operators receive a day-long forklift training, which is much less intensive than the forklift training received by warehouse employees. (Tr. 115). Gilbreth testified that forklift operators receive safety training on production equipment (emergency stop and lock out/tag out), (Tr. 117), but forklift operator Kopf testified that he never received safety training on production equipment and does not know of any warehouse employee who has received safety training. (Tr. 157).

Forklift operators are directly supervised by a “Supply Chain Coordinator”. (UX7). Coordinators are stationed in the warehouse and only supervise forklift operators. (Tr. 97). The next line of supervision are the “Supply Chain Facilitators.” (UX7). Facilitators are also stationed in the warehouse and only supervisor forklift operators. (Tr. 97-98). The warehouse has its own Manager, currently Brian Saunders. (UX7). As his title suggests, Saunders’ primary responsibility is management of the warehouse. (Tr. 98). Cy Gilbreth is currently the Supply Chain/Logistics Manager, (UX7), and his main responsibility is overseeing the warehouse. (Tr. 16). Gilbreth is not involved in day-to-day supervision of production operators. (Tr. 99). Production operators have their own Facilitators and Production Managers. (UX7). Winston Silva is the Factory Manager over the entire Plant. (Tr. 31; UX7).

Forklift operators and production operators have different pay progressions. Forklift operators start at \$20.60/hour (Phase I) and increase to \$21.63/hour after 180 days (Phase II). (EX10 at p. 1). To receive the highest wage rate of \$22.66/hour (Phase III), forklift operators must achieve an average of 85% efficiency in loading, unloading, and case picking for eight consecutive weeks. (*Id.*) Production operators also start at \$20.60/hour (Phase I). (EX10 at p. 2). Production operators then can advance to \$21.63 (Phase II), \$22.66 (Phase III), \$23.69 (Phase IV), and \$24.72 (Phase V), “based on competency matrix completion.” (EX10 at p. 2). Gilbreth

testified that the pay progression for warehouse and production is different because warehouse employee pay increases are based on a “labor management system” that calculates efficiency, while production operators receive wage increases based on the completion of a competency matrix which involves completing job trainings. (Tr. 34, 48, 57). Maintenance technicians previously received wage increases “[b]ased on completion of competency matrix.” (EX10 at p. 2). However, in their collective bargaining agreement, a new wage scale was established. Maintenance technicians are now classified into categories of “A”, “B”, “C”, or “D”, and receive annual across-the-board wage increases based on their category placement. (UX8 at p. 16).

All hourly employees are eligible for a quarterly performance bonus, which is known as the “PIP.” (Tr. 72). The PIP amount is based on whether each group/department reaches a quarterly goal. As Gilbreth explained, each group/department has a different quarterly goal:

[A]ll hourly employees are eligible for what's called a PIP, and so once a quarter there is certain goals that we have to hit for each month of that quarter. We [] set those goals out with the management's teams for each group, but it's separated out, so warehouse has different goals from production, and production different from quality, and stuff like that. But as a whole, 60 percent of the PIP is going to be factory-wide, and then for your individual teams it's 40 percent spread of how well did we contribute to the overall goal. And that's for [] each department.

(Tr. 72-73).

Each employee within a group/department receives from 0 to 7.5% of their quarterly pay as a PIP bonus. (Tr. 73). Each production operator receives the same percentage and each forklift operator receives the same percentage, but the percentage that production operators receive may be more or less than what the warehouse employees receive, because 40% of the PIP bonus is determined by group/department specific goals. (Tr. 73, 91-92). For example, in September 2020, all forklift operators received a 2.25% PIP bonus and production operators received a

1.75% PIP bonus. (Tr. 92). For the 40% of the bonus that is specific to the warehouse, Gilbreth testified that it is based on factors such as “inventory accuracy” and “man-hours-per-unit-load sold.” (Tr. 93). For production, their 40% is calculated based on entirely different factors, such as a “Quality Monitoring System check” and “asset intensity”. (Tr. 94).

Hourly employees can apply for a position in a different group/department. The record reflects that approximately 6-7 forklift operators have applied for, and accepted, jobs in production. (Tr. 65). For an employee to transfer to another group/department, there must first be a vacancy in that group/department and a job posted. (Tr. 125). An applicant then must fill-out a form and undergo an interview for the position. (Tr. 125-126). Management has the right to select their preferred candidate for the open job. (Tr. 126).

There was some testimony about planned expansion at the Plant, but the Employer did not provide any specific details other than that a new parking lot is under construction. (Tr. 82, 128-129). Although there are plans for the forklift operators to park in the same parking lot as production operators, all other aspects of the forklift operator daily job functions, as discussed above, will remain the same. (Tr. 129).

II. ARGUMENT

When a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the three-step analysis set forth in *The Boeing Company*, 368 NLRB No. 67 (2019) applies. The record evidence in this case shows that under the *Boeing* test, the petitioned-for unit of forklift operators is appropriate, because the forklift operators all share a community of interest, production operators have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with forklift operators, and there are no industry-specific guidelines that bar the petitioned-for unit.

The Board's decision in *Boeing* did not alter the well-established rule that "a proposed unit need only be *an* appropriate unit and need not be *the most* appropriate unit." *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 12 (2017) (emphasis in original). Also, it remains general Board policy to attempt to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. *See e.g. R & D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967), *enfd.* 411 F.2d 356 (7th Cir. 1969). Under *Boeing*, when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board will: (1) evaluate whether the members of the petitioned-for unit share an internal community of interest with each other; (2) consider whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members; and (3) consider guidelines the Board has established for appropriate unit configurations in specific industries. *Boeing*, 368 NLRB No. 67, slip op. at 3-4. As argued below, the petitioned-for unit meets the tests for an appropriate unit.

A. Forklift operators at the Plant share an internal community of interest

Under the first step of the *Boeing* analysis "shared interests among members of the petitioned-for unit" must be identified. *Id.*, slip op. at 3. That is, "the analysis logically begins by considering whether the petitioned-for unit has an internal community of interest using the traditional criteria."⁶ *Id.* Here, the record evidence makes clear that the petitioned-for unit of all warehouse employees/forklift operators is appropriate. All the petitioned-for employees work

⁶ The traditional community of interest criteria are "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *PCC Structural*, 365 NLRB No. 160, slip op. at 5.

in the warehouse and all share the job title of forklift operator. The warehouse is organized into its own separate group/department at the Plant. (Tr. 91). The forklift operators have distinct skills and training. Applicants for a warehouse position must have “at least one year of forklift experience within a high volume distribution center, manufacturing or military environment.” (EX12). They receive 8 weeks of on-the-job forklift training, (Tr. 114-115), and are required to be proficient and efficient in forklift operation based on their performance on the Employer’s labor management system. (Tr. 34, 57). They have distinct job functions and perform distinct job duties as well; they are the only employees at the Plant that perform case picking, truck unloading, and line haul/line pull. (Tr. 32-33).

The forklift operators have frequent contact with each other because they all work in the warehouse, park in the same parking lot, use the same entrance, clock-in on the same timeclock, take their breaks in the same breakroom, and use the same locker room. (Tr. 23, 29 103, 104; UX5). Forklift operators all work either the red or blue (day), or gray, green, yellow, or orange (night), shifts. (Tr. 112-113; *see also* UX6).

Forklift operators share distinct terms and conditions of employment. They are subject to the same pay progression, (EX10 at p. 1), and receive the same quarterly performance bonus. (Tr. 73, 91-92). Forklift operators share the same Human Resources Department, (Tr. 124), receive the same standard employee benefit package, (Tr. 124-125), and are required to wear the same uniforms, safety shoes, and protective eyewear. (Tr. 127; EX11).

Finally, forklift operators share common supervision. Cy Gilbreth is currently the Supply Chain/Logistics Manager, (UX7), and his main responsibility is overseeing the warehouse. (Tr. 16). The warehouse also has its own Manager, Brian Saunders. (Tr. 98). All forklift operators are directly supervised by a Coordinator and a Facilitator. (Tr. 97-98; UX7).

The record evidence shows that forklift operators undoubtedly share an internal community of interest based on the Board's traditional community of interest criteria. Furthermore, they share identical interests in the context of collective bargaining. As a result, the petitioned-for unit is appropriate at the first step of the *Boeing* analysis.

B. Production operators have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with forklift operators

Under the second step of the *Boeing* analysis, “the Board must determine whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. If those distinct interests do not outweigh the similarities, then the unit is inappropriate.” *Id.*, slip op. at 4 (citations and quotations omitted, emphasis in original). The Board must “analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit.” *Id.* Thus, in this case, the question is whether production operators have meaningfully distinct interests in the context of collective bargaining that outweigh the similarities between production operators and forklift operators. As explained below, the record evidence shows that production operators possess significant distinct interests that do outweigh their shared interests with forklift operators, and therefore the petitioned-for unit is appropriate at the second step of the *Boeing* analysis.

As Supply Chain Manager Gilbreth testified on direct examination, “Obviously, the [production and warehouse] jobs are different.” (Tr. 69). Production operators possess distinct interests in the context of collective bargaining. First, production operators are subject to a completely different pay progression than forklift operators and are evaluated on their job ability based on completely different performance standards. Production operators have five wage phases that are reached “based on competency matrix completion.” (EX10 at p. 2). In contrast,

forklift operators have three wages phases. (*Id.*). Indeed, Supply Chain Manager Gilbreth testified that the pay progression for warehouse and production is different. (Tr. 34, 48, 57).

Warehouse employee pay increases are based on a “labor management system” that calculates efficiency in loading, unloading, and case picking. (EX10 at p. 1). Production operators receives wage increases based on completely different criteria; the completion of a competency matrix which involves trainings on job aspects. (Tr. 48).

Next, the criteria used to calculate the quarterly PIP bonus received by production operators is distinct from the criteria used for forklift operators. Gilbreth testified that 40% of the PIP is determined by whether each group/department archives a department-specific goal that is set by the management team of the department:

[O]nce a quarter there [are] certain goals that we have to hit for each month of that quarter. We [] set those goals out with the management's teams for each group, but it's separated out, so warehouse has different goals from production [...]

(Tr. 72). The percentage of the PIP bonus that is specific to each department is calculated based on distinct criteria. For production, their 40% is calculated based on factors such as a “Quality Monitoring System check” and “asset intensity”, (Tr. 93), while the warehouse PIP is based on “inventory accuracy” and “man-hours-per-unit-load sold.” (Tr. 94). Thus, the record evidence shows that the interests of production operators related to compensation - arguably the most meaningful collective bargaining interest⁷ - are distinct.

Production operators also have meaningfully distinct skills, training, and job functions. It is undisputed that production operators perform an entirely different job on different equipment that requires different training than forklift operators. (Tr. 115). Production operators do not fill-

⁷ See *Barrentine v. Arkansas–Best Freight System, Inc.*, 450 U.S. 728, 738 (1981) (explaining that wages and hours are “subjects at the heart of the collective-bargaining process.”)

in for forklift operators because different skill sets and qualifications are required for the respective positions. (Tr. 121-122). To be hired as a production operator, “6 months+ experience working in a manufacturing, production, agriculture, warehouse, military or related environment”, is required. (EX13). Indeed, the only evidence in the record of interaction between forklift operators and production operators on the production floor occurs when forklift employees perform line-haul duties, picking up products from the production floor and bringing them to the warehouse for storage. (Tr. 33, 118). However, the Employer has plans to automate the line haul process on at least two production lines by using an AGV. (Tr. 118). When the AGV’s are fully operational, the line haul process for the production lines on which the AGV is utilized will be eliminated. (Tr. 119). Production operators also use their own entrance, (Tr. 27, 122), time clock, (Tr. 104, 122), and break room. (Tr. 104, 122).

There is some evidence that the three production operators that work in Variety Pack do interact with forklift operators, but the record shows that the interaction is *de minimus* when viewed in the context of production at the Plant as a whole. Production operators working in Variety Pack enter the warehouse to store their product, (Tr. 42-43), take breaks in the warehouse breakroom, (Tr. 104), and have contact with forklift operators when forklift operators perform handfeeding work on the Variety Pack line (only six or seven occurrences over the last six months). (Tr. 49-50). The Employer claimed that Variety Pack operators can work overtime in the warehouse, but there is no evidence in the record of any overtime worked except forklift operator Richie Kopf’s testimony that five-six months have passed since a Variety Pack operator worked in the warehouse. (Tr. 157-158). The evidence of interaction and interchange between Variety Pack operators and forklift operators is not material or meaningful in light of the

minimal interaction, and complete absence of temporary interchange, of production operators and forklift operators Plant-wide.

Production operators also have distinct supervision. Besides sharing the same Factory Manager, all the supervision of production operators is distinct from forklift operators. (UX7). Production operators are supervised by Facilitators and Production Managers who do not supervise forklift operators, while forklift operators have their own Facilitators, Coordinators, and Managers responsible for their supervision. (Tr. 97-99).

Furthermore, the warehouse is not functionally integrated with the production lines. As stated repeatedly above, the warehouse has a separate entrance, time clock, and break room, and currently has its own parking lot. Even after the new parking lot is completed, forklift operators will still have their own break room, use their own time clock, attend their own pre-shift meetings, and with the exception of line hauls (which will be automated in the future) perform all of their work far away from the production lines. (Tr. 30, 129).

Finally, the bargaining history at the Plant favors finding that the warehouse is an appropriate unit. In *Boeing*, the Board reaffirmed the well-established principle that “[i]n determining appropriate bargaining units, the Board has [] long given substantial weight to prior bargaining history.” *Id.*, slip op. at 2. In September 2019, the Employer stipulated that maintenance technicians comprise a separate and appropriate bargaining unit. (UX1). The Employer and Union recently reached a final agreement on a collective bargaining agreement covering only maintenance technicians working at the Plant. (UX8). Thus, through its actions, the Employer has conceded that the maintenance technicians possess meaningfully distinct interests in the context of collective bargaining that outweigh similarities with other hourly employees.

Unlike forklift operators, maintenance technicians work side-by-side with production operators every day. (Tr. 123-124). Production operators are also required to perform some low-level maintenance work, such as oiling and preventative maintenance tasks. (Tr. 124). Both production and maintenance employees carry a “lock” that is used to turn off machinery when it is being repaired. (Tr. 164-165). Moreover, production operators and maintenance technicians use the same employee entrance, (Tr. 27, 122), timeclock, (Tr. 104, 122), and break room. (Tr. 104).

Maintenance technicians share a stronger community of interest with production operators than production operators share with forklift operators. The Employer agreed that maintenance technicians constitute an appropriate unit and have distinct interests in collective bargaining. It follows that since maintenance technicians warrant their own unit and collective bargaining agreement, certainly forklift operators – that share a far weaker community of interest with production operators than maintenance technicians do – also possess distinct interests in the context of collective bargaining.

The collective bargaining agreement reached by the Employer and the Union for the maintenance unit proves that the interests of the production unit are meaningfully distinct and outweigh similarities with the forklift operators. Maintenance technicians previously received pay increases “based on completion of competency matrix”, the same as how production operators currently receive their wage increases. (EX10 at p. 2). However, under the new collective bargaining agreement, maintenance technicians no longer advance in pay based on a competency matrix, but now receive annual across-the-board wage increases based on their category placement. (UX8 at p. 16). Thus, a collective bargaining agreement was reached covering one group/department of the Plant and their former pay progression system was

replaced through collective bargaining. Yet the sky did not fall. This is direct and concrete evidence that the groups/departments at the Plant have meaningfully distinct interests and can be separated for purposes of collective bargaining without resulting in “arbitrary, irrational, or fractured units”. *PCC Structural*s, slip op. at 5 (quotations omitted).

The Employer will likely argue that combined production and distribution units represented by the Union and other locals of its International Union constitutes relevant bargaining history. For one, the Union disputes that the unit makeup of other employers and other local unions is relevant in any way to the issues presented in this case. Nevertheless, the bargaining history at the only other Purina plant in Georgia represented by the Union supports the Union’s position in this case. At the Fairburn, Georgia Purina facility the Quality Control employees – one of the groups/departments identified by the Employer (Tr. 91-92) – has a separate collective bargaining agreement. (UX9). Thus, the bargaining history at the only other Purina plant represented by the Union shows that groups/departments have distinct interests for the purpose of collective bargaining.

The Employer will also likely argue that the 6-7 permanent transfers from warehouse to production demonstrates that similarities between production and warehouse are not outweighed. However, a forklift operator cannot simply transfer into production, instead there must first be an opening and they then must apply for the position and undergo an interview. (Tr. 125-126). There is no guarantee that a forklift operator will be hired for a vacant position, and if a production operator applies for the same job, the production operator would likely be selected if they had experience working similar equipment. (Tr. 126). When hired, the former forklift operator still must complete extensive training. (Tr. 116-117). Therefore, the evidence of

permanent transfers does not show that similarities between production and warehouse are not outweighed by the distinct interests of production operators.

For the reasons argued above, the petitioned-for unit is appropriate at the second step of the *Boeing* analysis.

C. There are no industry-specific guidelines applicable to this case

The third step of the *Boeing* analysis only applies in situations where the Board has established unit configuration guidelines for specific industries, for example in cases involving public utilities, defense contractors, and retail establishments. *Id.*, slip op at 5. No industry-specific guidelines exist related to the petitioned-for unit and therefore the third step of the *Boeing* analysis is not applicable. Indeed, the Board in *Boeing* specifically rejected the argument that “the Board has established a presumption in favor of a plantwide unit for integrated manufacturing facilities that must be rebutted by a union seeking a smaller unit.” *Id.*, slip op. at 6. The Board explained that it has never held that a “less-than-plantwide manufacturing unit is presumptively inappropriate, or that a petitioner seeking such a unit bears any heightened burden of proving that it is appropriate.” *Id.* Accordingly, the third step of the *Boeing* analysis is not applicable here. Because the petitioned-for unit is appropriate under the first two *Boeing* factors, the Union respectfully requests that the Regional Director order an election.

III. ELECTION DETAILS

As argued at the September 22, 2020 hearing and in its Responsive Statement of Position, (BX5), the Union prefers a mail ballot election due to the extraordinary circumstances created by the COVID-19 pandemic in the State of Georgia and Hart County.⁸ *See e.g. Sea World of*

⁸ As of September 28, 2020, there were 315,281 confirmed cases of COVID-19 in Georgia, and 510 in Hart County (1953.5 cases per 100k residents). Georgia Department of Public Health Daily Status Report, <https://dph.georgia.gov/covid-19-daily-status-report> (last visited Sep. 29, 2020)

Florida, LLC, Case No. 12-RC-257917, 2020 WL 5658311 (Sep. 22, 2020). However, because the Employer made assurances at the hearing that it would meet the safety protocols for an in-person election outlined in Memorandum GC 20-10, (Tr. 169), the Union will go forward with a manual election if one is directed.

This 29th day of September, 2020.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

NESTLE PURINA PETCARE CO.)	
)	
Employer,)	
)	
and)	CASE NO. 10-RC-265325
)	
)	
BAKERY, CONFECTIONERY, TOBACCO)	
WORKERS AND GRAIN MILLERS UNION)	
LOCAL 42)	
Petitioner.)	

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I submitted the foregoing **PETITIONER’S POST-HEARING BRIEF** to the National Labor Relations Board, Region 10 via the NLRB e-filing system, and served a copy of the same on the following via e-mail:

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ATTACHMENT

5

1 maintenance -- excuse me, warehouse and production. The
2 evidence shows there's only two people that are out in relation
3 to COVID quarantine, and so that's less than one percent of the
4 people that we're talking about.

5 But even with respect to those two persons, we would be
6 perfectly willing to arrange a drive-up voting opportunity.
7 You know, Mr. [REDACTED] confirmed that he's perfectly able to drive,
8 and we could have him drive up to near the tent where you leave
9 his ballot on a stand for him to reach through his -- you back
10 away, he reaches through his car window, he takes the ballot,
11 he votes it, and he puts it in the box that you have out there.
12 So -- and then you retrieve it. I -- no one needs to get
13 within 50 feet of him.

14 So even the two employees are less than one percent of our
15 proposed unit that's out on quarantine, probably not much
16 different than the standard one percent you'd have out in any
17 flu season, we can arrange it so that these people can drive up
18 and vote under the observation of yourself and the designated
19 observers. And we can offer that opportunity to them and
20 preserve everybody's rights.

21 The Union has asked for a mail ballot, and you know that
22 the Board law, really the preeminent case is a San Diego Gas &
23 Electric case allows a Regional Director the discretion to
24 order a mail ballot in what the Board calls extraordinary
25 circumstances. And it really gave as the three examples of

