

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

TWIN CITY FOODS, INC.,

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1439, AFFILIATED
WITH THE UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,

Petitioner.

No. 19-RC-265696

EMPLOYER'S REQUEST FOR
REVIEW OF REGIONAL
DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

TABLE OF CONTENTS

	Page
I. INTRODUCTION	4
II. PROCEDURAL HISTORY	4
III. STATEMENT OF FACTS	7
IV. ARGUMENT	11
A. The Regional Director Did Not Fulfill His Independent Responsibility to Investigate the RC Petition and Determine the Appropriate Unit at the Employer’s Pasco Facility	11
1. The Preclusion Rule Should Not Have Been Applied When There Was No Prejudice And It Prevented the Board from Fulfilling Its Statutory Obligations	13
2. The Hearing Officer’s Refusal of Evidence in the Region’s Possession Was Improper.	15
B. Even on the Existing Record, the Regional Director Misapplied <i>Boeing</i> in Finding the Unit of Packaging Employees Appropriate Without the Processing Employees	18
1. Departmental Organization	20
2. Skills and Training	20
3. Job Functions and Work	22
4. Functional Integration	23
5. Contact	25
6. Interchange	27
7. Terms and Conditions of Employment	28
8. Supervision	31
9. Bargaining History and Considerations	32
C. The Regional Director Erred in Ordering a Mail-Ballot Election	33
V. CONCLUSION	35

TABLE OF AUTHORITIES

Page(s)

Cases

American Hospital Assn. v. NLRB,
499 U.S. 606 (1991)..... 11

Aspirus Keweenaw,
370 NLRB No. 45 (2020)7, 34, 35

Boeing Co.,
368 NLRB No. 67 (2019) *passim*

Bon Appetit Management Co.,
334 NLRB 1042 (2001) 14

Brand Precision Services,
313 NLRB 657 (1994) 22

Brunswick Bowling Products,
364 NLRB No. 96 (2016) 15, 16

Casino Aztar,
349 NLRB 603 (2007) *passim*

Colorado National Bank of Denver,
204 NLRB 243 (1973) 19

Davidson Hotel Co. LLC (Chicago Marriott at Medical District/UIC) v. NLRB,
No. 19-1235 (D.C. Cir. 2020)..... 18

Elevator Constructors Local 2 (Unitec Elevator Services Co.),
337 NLRB 426 (2002) 15

Executive Resources Associates,
301 NLRB 400 (1991) 27

Harrah’s Illinois Corp.,
319 NLRB 749 (1995) 27, 31

Health Acquisition Corp. d/b/a Allen Health Care Services,
332 NLRB 1308 (2000) 11, 12, 18

Hilton Hotel Corp.,
287 NLRB 359 (1987) 27

1	<i>In re Mem'l Hosp. of Roxborough,</i> 231 NLRB 419 (1977)	12
2	<i>J.C. Penny Co., Inc.,</i> 328 NLRB 766 (1999)	22
3		
4	<i>Leedom v. Kyne,</i> 358 U.S. 184 (1958).....	15
5		
6	<i>LeMoyne-Owen College v. NLRB,</i> 357 F.3d 55 (D.C. Cir. 2004).....	16, 18
7		
8	<i>Monsanto Co.,</i> 183 NLRB 415 (1970)	23, 33
9		
10	<i>PCC Structural,</i> 365 NLRB No. 160 (2017)	12
11	<i>Pierson Electric, Inc.,</i> 307 NLRB 1494 (1992)	12
12		
13	<i>Pole-Lite Industries,</i> 229 NLRB 196 (1977)	14
14		
15	<i>Proctor & Gamble Paper Products,</i> 251 NLRB 492 (1980)	21
16		
17	<i>Publix Super Markets, Inc.,</i> 343 NLRB 1023 (2004)	24
18		
19	<i>Seaboard Marine, Ltd.,</i> 327 NLRB 556 (1999)	19
20		
21	<i>See Shaw's/Star Market, A Division of Albertson's d/b/a/ Osco Pharmacy,</i> Case 01-RC-144611 (Feb. 25, 2015)	12
22		
23	<i>Stage Employees IATSE (Crossing Guard Productions, Inc.),</i> 316 NLRB 808 (1995)	14, 29
24		
25	<i>Transerv Systems, Inc.,</i> 311 NLRB 766 (1993)	24
26		
27	<i>Wheeling Island Gaming, Inc.,</i> 355 NLRB 637 (2010)	21, 24, 26, 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Statutes

29 U.S.C. § 159(b)12, 15

National Labor Relations Act § 9(b).....11, 12, 16

National Labor Relations Act § 3(b).....15

National Labor Relations Act § 712, 33

National Labor Relations Board Rules & Regulations § 102.666, 34, 35

National Labor Relations Board Rules & Regulations § 102.674

Regulations

29 C.F.R. § 101.18(a).....12

29 C.F.R. §102.215

29 C.F.R. § 102.2(d)(1)(ii).....14

29 C.F.R. § 102.6312

29 C.F.R. § 102.66(b)16

29 C.F.R. § 102.66(d)4, 14, 19

29 C.F.R. § 102.67(c).....4

29 C.F.R. § 102.67(d)6, 19

29 C.F.R. § 102.67(d)(2).....4

29 C.F.R. § 102.67(d)(3).....4, 5

29 C.F.R. §102.111(c).....15

Other Authorities

NLRB Casehandling Manual, Part Two (Representation Proceedings), §1118112

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I. INTRODUCTION

Pursuant to § 102.67 of the National Labor Relations Board’s (“Board” or “NLRB”) Rules and Regulations, Twin City Foods, Inc. (“Employer”) requests that the Board review and reverse the Regional Director’s Decision and Direction of Election (“DDE”) and hold that the bargaining unit must include both processing and packaging employees.¹ The DDE’s unit determination is fundamentally flawed. First, the Region failed to create a full record upon which the Regional Director could properly analyze the appropriate unit and thereby endangered the rights of the excluded processing employees. The Region’s prioritization of 29 C.F.R. § 102.66(d) preclusion over its ability to receive and consider relevant evidence wrought substantial harm to its consideration. Further, even assuming *arguendo* that preclusion was proper, the Hearing Officer refused to admit evidence that the Region already possessed. Together, these determinations prevented the Regional Director from fulfilling his independent statutory obligation to determine the appropriate unit.

In any event, solely on the existing record, the Regional Director’s unit determination is not supported by the evidence. The DDE disregards certain testimony and misapplies other undisputed evidence. The record makes quite clear that the similarities between the petitioned-for packaging employees and the excluded processing employees outweigh their differences. The DDE results in a fractured unit. Individually and collectively, these flaws constitute prejudicial error to the Employer under 29 C.F.R. § 102.67(d)(2) and (3).

As a separate matter, the Regional Director also erred in directing a mail-ballot election absent consideration of the Employer’s ability to safely facilitate an in-person election.²

II. PROCEDURAL HISTORY

23 On September 4, 2020,³ Petitioner, United Food and Commercial Workers Union, Local
24 1439, Affiliated with the United Food and Commercial Workers International Union, (the

25 ¹ Alternatively, the Board should grant review and remand to the Regional Director to reopen the record.

26 ² In light of the Regional Director’s error in ordering a mail ballot election, the Employer requests that the election
27 proceedings be halted. At a minimum, pursuant to 29 C.F.R. § 102.67(c), the Board must impound the ballots in the
directed mail-ballot election while it considers this timely filed request for review.

³ All dates hereafter are in 2020 unless otherwise noted.

1 “Petitioner”), filed a petition (the “RC Petition”) in the above-captioned matter seeking to
2 represent a unit of packaging and warehouse department employees at the Employer’s Pasco,
3 Washington facility, but excluding processing department employees. Immediately thereafter,
4 and from September 4 through September 16, Employer’s counsel communicated with
5 Petitioner’s counsel that the petitioned-for unit was incomplete without inclusion of the
6 Employer’s processing employees. *See* Employer’s Exh. 2 at 5 (citing Declaration of Peter G.
7 Finch).⁴ On September 17, the Employer timely filed its Statement of Position (with
8 Attachments, including the Employer’s Voter List) and Certificate of Service with the Board’s e-
9 filing service. *See* Employer’s Exh. 2 at 2-3. Due to an inadvertent clerical error, Petitioner’s
10 counsel was served with the Employer’s Voter List but not the Employer’s Statement of
11 Position. *See* Employer’s Exh. 2 at 2-4 (citing Declaration of Margaret Sinnott). Realizing the
12 clerical error, the Employer immediately provided Petitioner’s counsel with the Statement of
13 Position. *Id.* Petitioner’s counsel was in possession of all relevant and required documents
14 within 1.4 hours after timely filing with the Board. *Id.* at 4. Petitioner’s counsel was not
15 prejudiced by the inadvertent clerical error; he was “out of office” during the period the
16 Employer’s Statement of Position was e-filed and served, he already knew of the Employer’s
17 position, and the Voter List would also have advised him of the Employer’s position. *See*
18 Employer Exh. 2 at 3.

19 The Employer promptly filed a motion to extend the deadline for serving the Petitioner
20 with the Statement of Position. DDE 2; Employer Exh. 2. The motion was transferred to the
21 Hearing Officer, who held a videoconference hearing in this matter on September 25 and 28.
22 DDE 1-2. *See also* Tr. 8:15-9:14. The Hearing Officer denied the Employer’s motion either to
23 extend the time to file a Statement of Position or, in the alternative, to accept the Employer’s
24 filed position statement. DDE 2. Thereafter, the Employer’s request for permission to file a
25 special appeal was granted but the Regional Director denied the special appeal. *Id.* *See also* Tr.

26 ⁴ The Transcript is referred to as “Tr.,” followed by the relevant page and line number(s), the Board’s exhibits are
27 referred to as “Board Exh.,” the Employer’s as “Employer’s Exh.,” and the Petitioner’s as “Petitioner Exh.”
The exhibits and transcript have been filed concurrently with this Request for Review.

1 12:14-14:5. The Regional Director instructed the Hearing Officer to refuse to take evidence or
2 allow argument on issues raised in the Employer's Statement of Position, including the
3 appropriateness of the petitioned-for unit. DDE 2. And, although the Hearing Officer permitted
4 the Employer to make an oral and written offer of proof, the Hearing Officer, at the Regional
5 Director's direction, rejected the Employer's offer of proof and did not permit the Employer to
6 present or challenge evidence about the appropriateness of the unit. *Id.* See also Tr. 41:18-42:4;
7 Employer Exh. 1 (rejected Offer of Proof).

8 During the hearing, the Hearing Officer called as witnesses those persons whom the
9 Employer identified as having relevant information in its offer of proof; however, the Hearing
10 Officer but did not question the witnesses about all matters offered by the Employer. Likewise,
11 the Hearing Officer admitted into evidence some of the documents the Employer identified as
12 relevant, but not all of them. Tr. 19:5-8, 36:5-12, 182:19-184:5. Without meeting the witnesses
13 before the hearing, and without being able to review and understand all of the documents, the
14 Hearing Officer was put in the impossible position of trying to create a full record without
15 knowing when it was full.

16 The Hearing Officer also precluded the Employer from offering information and
17 argument about whether the election should be by mail or manual ballot.

18 On November 3, in his DDE, the Regional Director found that the petitioned-for
19 packaging and warehouse unit does not constitute an appropriate unit. He concluded that a unit
20 comprised solely of packaging employees, and excluding the warehouse and processing
21 employees, was appropriate. He also determined that seasonal packaging employees may vote
22 only subject to challenge. DDE 14-20. The Regional Director directed a mail-ballot election for
23 the unit found appropriate. DDE 21-26.

24 The Employer now requests review of the Regional Director's decision that the alternate
25 proposed packaging unit is appropriate, including his reliance on an incomplete record as a result
26 of § 102.66 preclusion, and that a mail-ballot election is appropriate. See 29 C.F.R. § 102.67(d).
27 The Board should grant review, reverse the Regional Director's DDE, and find that the

1 bargaining unit is appropriate only if both packaging and processing employees are included.
2 Alternatively, the Board should grant review and remand to the Regional Director with
3 instructions to reopen the record, and allow the Employer to provide evidence to ensure there is a
4 complete record in this case, upon which the correct decision can be made. If an election is
5 ordered, the Employer should be permitted to provide information and argument that the
6 standards identified in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), can be met and that a
7 manual election should be held.

8 **III. STATEMENT OF FACTS**

9 The Employer processes, packages, and warehouses frozen vegetables at its Pasco,
10 Washington facility, and other facilities in its storage and distribution network. *See generally*
11 Tr. 15:21-24; 45:10-15. The Employer sources the product from growers, processes the raw
12 vegetables into a frozen product in bulk, stores the bulk product and repackages it, and then ships
13 it to customers, largely grocers. Tr. 45:15-20. The Employer has three different plants: Pasco,
14 Washington; Ellensburg, Washington; and Lake Odessa, Michigan. Tr. 45:2-23. Each plant
15 does the same work—sourcing from the field, processing to a finished product, and selling to
16 grocers’ distribution centers—but for different commodities. Tr. 45:21-46:4.

17 **High-Level Overview of Operations**

18 The Employer purchases product, such as corn, from a grower. Tr. 46:15-20. When the
19 corn is ready, the Employer sends in a third-party harvesting crew to harvest it and truck it to the
20 Pasco facility. Tr. 46:21-24. The product is brought to the Employer’s outside receiving area to
21 be washed and then is processed from a raw vegetable to a frozen vegetable, “flow[ing]” through
22 the plant “from one end to the other ... through the washing area, the blanching area, [and] the
23 freezing area.” Tr. 46:24-47:11. The Pasco facility has a “cold storage” on site. There is a
24 partial wall between the processing area and the packaging area: “[a] forklift will cross over the
25 wall ... through [an] opening, pick up the product, [and] take it into the cold storage.” Tr. 56:12-
26 16.⁵ The product is later brought out of cold storage for repackaging, a process that also flows

27 ⁵ The forklift drivers are warehouse employees. Tr. 61:7-11.

1 through the plant. Tr. 47:12-14. This packaging work was integrated into the Pasco facility
2 from the Employer's Stanwood facility in 2018 to increase production efficiencies. Tr. 73:4-6,
3 12-15.⁶ Packaging and shipping to customers is year-round. Tr. 48:10-12.

4 **Specifics of Employer's Operations**⁷

5 General labor employees in the processing department launch the Employer's operations
6 by unloading a product, *e.g.*, a vegetable such as corn, from harvesting trucks by "controlling a
7 hydraulic knob on the side of a belted trailer," "unloading the product onto a feed taker system"
8 into a "receiving area." Tr. 189:21-190:13, 191:5-6, 191:9-10. The next group of employees
9 grades the raw material coming in to pay out the farmer. Tr. 191:11-16. Processing employees
10 next inspect the product for, *inter alia*, "unusable[]" pieces. Tr. 193:16-20.

11 This general labor area, and the next two steps in the line—cob selection and corn
12 cutters—can be, and are, done by both processing and packaging employees. The packaging
13 employees "will come from the packaging room if the [Employer doesn't] need the[m] there."
14 Tr. 194:3-10. When employees come from packaging they are "integrated [and] comingled []
15 with the processing group." Tr. 194:11-16. This processing/packaging interchange is reciprocal
16 too; for example, the Employer will "extract [processing] people from [the fourth] area [of its
17 operations—cob selection—] to go and help out the packaging department when they're in need
18 of employees." Tr. 195:21-22. General labor processing employees doing the corn cutting work
19 at the fifth step of the operation also "go to the packaging area to help out" as needed.
20 Tr. 197:17-198:8. Blancher operators are at the sixth step of the process. This processing role
21 also "requires a little bit more training because they have to control the temperatures of the
22 blanchers." Tr. 198:21-23. Then, washer operators make sure that washer machines are working
23 properly to separate out corn skins and unusable product. Tr. 199:18-25. Here too packaging
24 employees assist with processing, *i.e.*, the Employer relies on "cross-trained" employees.

25 ⁶ The terms "packaging" and "repack" are synonymous and used interchangeably throughout the Employer's
26 Request for Review.

27 ⁷ Division Manager Raul Martinez ("Mr. Martinez") testified to the specifics of the Employer's operations, tracking
a flow chart he created for the hearing that was introduced as Board Exh. 5. Tr. 188:21-22. His testimony is
supplemented herein and throughout by that of Plant Manager Mike Twiss ("Mr. Twiss").

1 Tr. 200:19. For example, some repack employees worked as washer operators before the
2 packaging room was integrated into the Pasco facility so if the Employer doesn't have any
3 washer operators, or has an operational need for more, it will ask one of the packaging
4 employees to help run the processing equipment. Tr. 200:12-17.⁸ At the next step of the
5 operation, processing general labor employees do another inspection, Tr. 200:20-201:3, and then
6 the product is put into a freezing tunnel. An employee performing this function is working with
7 an "ammonia [refrigeration] system" and "is trained to run and make sure that the product
8 enters" properly and then exits at the proper frozen temperature. Tr. 201:13-18. The product
9 then comes out to a mezzanine area and general labor processing employees "mak[e]
10 adjustments to a speed belt" and alert others if equipment stops working. Tr. 202:1-11. In the
11 next area, general labor processing employees build cardboard totes for the product. Tr. 202:16-
12 20. The Employer does not allow these employees to fill the totes for food safety reasons so
13 another general labor processing employee fills the totes. Tr. 203:3-4, 203:7-20. Processing
14 employees in a quality control job classification then grade the product and create a ticket to
15 identify the tote, similar a Social Security Number. Tr. 203:21-204:5, 205:1-7. When the totes
16 are filled, they're rolled into the cold storage room through "an aperture in the wall [of the
17 processing room] that has curtains." Tr. 206:4-6. The tote "flow[s] right through it into the cold
18 storage room" where it stays until the product is needed. Tr. 206:6-7, 207:12-15. A product can
19 stay in cold storage for extended periods of time (up 16 months) "depending on the need of the
20 product." Tr. 207:12-15.

21 The repack area begins at Step 15 of the Employer's work flow. Tr. 207:24-208:1; Board
22 Exh. 5. Tote input employees "are responsible for receiving the product, scanning the tote ticket
23 that was created" by quality control employees at Step 12 of the operational process, and then
24 "distribut[ing] the tote" to one of four lines in the packaging room "that's going to run that
25 product." Tr. 208:4-12. These are general labor employees in repack. Tr. 208:18. The product

26 ⁸ The Employer relies on "cross over" in other areas of its operation. As Mr. Twiss testified, seasonal processing
27 employees "are trained to be able to cross over and ... perform ... sanitation work in the repack" area during the
winter. Tr. 241:11-23. This cleaning process "is done the exact same on both sides." Tr. 241:21-22.

1 then goes to the tote dump; forklift operators working in the warehouse part of the Employer's
2 operation raise the totes and dump them into a hopper. Tr. 208:21-209:6.⁹ Packaging general
3 labor employees then do an inspection at Step 17. Tr. 212:10-12; Board Exh. 5. This is an area
4 where general labor from the processing department is sent if packaging needs more employees.
5 Tr. 212:11-18. After the inspection, skilled poly bagger operators, trained to run the Employer's
6 bagger machines, handle the product. Tr. 212:21-25. Following this step, the totes are inspected
7 and the packaging department handles case ticketing, Tr. 213:1-3, and then the product
8 eventually makes it way to the Employer's loading area for distribution to customers.

9 Once a crop's season is complete, certain of the Employer's operations change to focus
10 on different processes, like maintenance or product "rework." Tr. 47:21-48: 3, 48:9.
11 For example, the work in the processing area becomes more focused on maintenance when
12 there's no fresh product to process because a season is over. Tr. 49:14-17.¹⁰ However,
13 processing itself does not completely cease in the off-season. For example, "[r]ework is
14 performed after the processing season." Tr. 216:7-20.¹¹ Rework occurs when there are quality
15 issues with a product; employees "take it out of the freezer and go all the way back to the
16 beginning, and rework it through the processing lines to clean it up." Tr. 48:4-9. The Employer
17 also reworks commodities from its other plants "that need to be reprocessed because they had
18 imperfections or they had other materials in them that need to be cleaned up." Tr. 48:20-25.
19 These products are similarly reprocessed and packaged by the Employer's Pasco employees.
20 Tr. 49:4-7. If carrots originally processed in Ellensburg are found to be defective, they are
21 reprocessed and ultimately repackaged in Pasco. Specifically, the carrots would be shipped to
22

23 ⁹ Forklift operators in the processing and packaging departments get the same training by the same warehouse
24 supervisor and are "interchangeable." Tr. 210:10-14, 211:4-6. The warehouse supervisor determines whether
25 someone is going to be a forklift operator in processing or in repack each day, rotating and moving them based on
26 need. Tr. 210:19-211:3.

25 ¹⁰ Because of the seasonal nature of its product, the Employer must "staff up" at times, *i.e.*, bring in seasonal
26 employees for the fresh processing season. Tr. 49:20-22. Thus, there may be upwards of 400 processing employees
27 in season and 30 in the off season. Tr. 66:4-6.

27 ¹¹ The number of processing employees is smaller in the off-season as not all of these employees wish to work
during the wintertime. Tr. 216:21-217:2. Nevertheless, the rework process involves both processing and packaging
employees.

1 Pasco, put into the cold storage to await reprocessing, brought by forklift to the front of the plant
2 for reprocessing, then brought back into cold storage to await repackaging for the customer.
3 Tr. 62:17-63:5. Specifically, during the rework operations, the product “follows the flow to the
4 mezzanine, as [described above], and in[to] the tote fill, and the [quality control], and so forth.”
5 Tr. 215:4-12. *See also* Board Exh. 6. The process is completed by both processing and
6 packaging employees, as described above, with similar interchange. For example, the “tote fill”
7 job—Step 4 of the rework operation, *see* Board Exh. 6—is completed by a processing general
8 laborer or, if the Employer “reduce[s ...] the labor force in the packaging room, [a] person from
9 the packaging area [who] know[s] how to fill totes, [] will end up filling totes for that day.”
10 Tr. 215:20-216:4. Thus, although the specific facility needs change throughout the year, the
11 Employer has “work year-round in all of [its] departments.” Tr. 49:13-14.¹²

12 IV. ARGUMENT

13 A. The Regional Director Did Not Fulfill His Independent Responsibility to 14 Investigate the RC Petition and Determine the Appropriate Unit at the Employer’s Pasco Facility

15 The Board has an affirmative statutory obligation to determine the appropriate bargaining
16 unit in each case. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611, 614 (1991).

17 Section 9(b) of the National Labor Relations Act (the “NLRA” or “Act”) specifically provides
18 that:

19 The Board shall decide in each case whether, in order to insure to employees the full
20 benefit of their right to self-organization and to collective bargaining, and otherwise to
21 effectuate the policies of this Act, the unit appropriate for the purposes of collective
bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

22 “The Board may use classifications, rules, principles, and precedents in order to regularize the
23 process, but absent a stipulation, it still must determine the appropriateness of the unit in every
24 case.” *Health Acquisition Corp. d/b/a Allen Health Care Services*, 332 NLRB 1308, 1309
25 (2000) (internal citation omitted). And, “absent a stipulated record, presumption, or rule, the
26 Board must be able to find—based on some record evidence—that the proposed unit is an

27 ¹² The Employer provides additional facts relevant to the *Boeing* analysis in its Argument.

1 appropriate one for bargaining before directing an election in that unit.” *Id.* (internal citation
2 omitted).¹³ In order for the Board to fulfill its statutory obligation to determine the appropriate
3 bargaining unit in each case, *the Region* has a corresponding obligation to create a full record in
4 each case. *See Shaw’s/Star Market, A Division of Albertson’s d/b/a/ Osco Pharmacy,*
5 *Case 01-RC-144611, slip op. at 1 fn. 1 (Feb. 25, 2015) (granting special permission to appeal;*
6 *denying appeal on merits) (“The Regional Director is responsible for ensuring that the record is*
7 *full and complete. Inherent in that responsibility is the authority to supplement an incomplete*
8 *record by reopening a representation hearing.”)* (internal citations omitted).¹⁴

9 The purpose of requiring a complete record to allow a determination of an appropriate
10 unit “in each case” is to fulfill the statutory command in Section 9(b) of “assur[ing] to employees
11 the fullest freedom in exercising the rights guaranteed by this Act....” 29 U.S.C. §159(b). The
12 complete record serves two critical goals—it facilitates the Board’s determination of an
13 appropriate unit, which in turn protects employees’ Section 7 rights and makes for meaningful,
14 efficient bargaining. Indeed, the Section 7 rights of those excluded, as well as those included,
15 from the proposed unit must be protected. As the Board pronounced in *PCC Structurals,*
16 “considering the interests of excluded employees along with those in the petitioned-for unit ...
17 better effectuates the policies and purposes of the Act....” 365 NLRB No. 160, slip op. at 8
18 (2017) (citing Sec. 9(b)) (internal quotations omitted) (emphasis added).

19 Although a representation hearing is superficially set up as a contest between the
20 Petitioner’s position and the Employer’s position, it is truly a non-adversarial fact-finding
21 proceeding. *NLRB Casehandling Manual, Part Two (Representation Proceedings), §11181* (The
22 hearing “is investigatory, intended to make a full record and nonadversarial.”) That structure is
23 intentional; characterizing otherwise stands in the way of discharging the Board’s statutory

24 _____
25 ¹³ The Regional Director’s obligation to investigate a petition absent a stipulation agreement is now found in
26 29 C.F.R. § 102.63; the Rules no longer contain a § 101.18(a), relied on in *Allen Health Care Services.*

27 ¹⁴ *See generally Pierson Electric, Inc.,* 307 NLRB 1494, 1494 (1992) (noting Board’s issuance of “Supplemental
Order Remanding, finding that the issue of 9(a) status could best be resolved after development of a full record”);
In re Mem’l Hosp. of Roxborough, 231 NLRB 419, 420 (1977) (“We view the court’s remand as requiring the
development of a full record, sufficient to resolve the unit question underlying the unfair labor practice
allegations...”).

1 obligations. Precluding relevant evidence, no matter how it arrives, compromises the Board's
2 ability to complete its responsibility.

3 **1. The Preclusion Rule Should Not Have Been Applied When There Was**
4 **No Prejudice And It Prevented the Board from Fulfilling Its Statutory**
5 **Obligations**

6 Here, the Hearing Officer and Regional Director refused to consider relevant evidence
7 about the appropriateness of the unit in two ways. First, the Regional Director applied a
8 mechanistic approach to the preclusion regulation, without considering the impact on his
9 fundamental statutory obligation. The best way to create a full record in matters such as these—
10 and thereby protect *all* employee interests—is by permitting all parties, no matter how situated,
11 to proffer evidence. This is even more the case where the preclusion occurred because of an
12 inadvertent and minor clerical error, which caused no prejudice. Here, the Employer timely filed
13 its Statement of Position and other relevant documents with the Board but inadvertently failed to
14 attach the Statement of Position when emailing the materials to Petitioner's counsel.
15 Nevertheless, Petitioner's counsel received the Statement within 1.4 hours of its filing and
16 suffered absolutely no prejudice as a result of the delay—in fact, Petitioner's counsel had known
17 since the day the RC Petition was filed, and throughout the entire period leading up to filing and
18 service of the Employer's Statement of Position, that the Employer would contest the
19 appropriateness of the petitioned-for unit because of its exclusion of the processing employees.
20 *See* Employer Exh. 2. Petitioner's counsel was also “out of office” during the time the Statement
21 of Position was filed and served on his client and thus it is unlikely he would have even reviewed
22 the document at the time of service. Furthermore, there were five full business days between
23 service of the Employer's Statement of Position on the Petitioner and the hearing wherein the
24 parties confirmed that the sole issue in dispute was the appropriateness of the proposed
25 bargaining unit. *See* Employer Exh. 2. Thus, the purpose of the Statement of Position—the
26 “promoti[on] of orderly litigation and efficiency”—was fully satisfied before the document itself
27 was filed and served, and there was no reason to preclude the Employer from litigating unit

1 appropriateness at the hearing.¹⁵ Nevertheless, the Regional Director, under § 102.66(d),
2 completely precluded the Employer from submitting and challenging evidence regarding this
3 issue during the hearing.

4 Whatever the merits of the preclusion rule, it cannot overcome the Board’s statutory
5 obligations. Indeed, the preclusion rule itself recognizes this, as it states “no party shall be
6 precluded from contesting or presenting evidence relevant to the Board’s statutory jurisdiction to
7 process the petition.” 29 C.F.R. §102.66(d). In this case, where the question of appropriateness
8 of the unit is at the core of the Board’s statutory obligation, the Employer should not have been
9 precluded from offering evidence.¹⁶

10 Alternatively, the Board should reconsider a strict application of § 102.66(d) in favor of
11 § 102.2(d)(1)(ii)’s concept of “excusable neglect.”¹⁷ The latter section’s applicability to
12 representation proceedings, *e.g.*, acceptance of untimely filed requests for review and briefs,
13 supports its expansion, particularly under compelling circumstances such as these. As detailed,
14 Employer’s counsel sought to comply with the Rules, and functional and substantial compliance
15 was quickly achieved. When the omission was discovered, it was promptly remedied. This is
16 the very definition of “excusable neglect.” See, *e.g.*, *Stage Employees IATSE (Crossing Guard*
17 *Productions, Inc.)*, 316 NLRB 808, 809-809 (1995) (finding respondent’s 2-day late filing of its
18 answer was excusable where it was “the product of a *misunderstanding* between the [r]espondent
19 and counsel for the General Counsel regarding the form in which the answer was being sent” and
20 where no party to the proceeding was prejudiced) (emphasis added).¹⁸

22 ¹⁵ See NLRB Final Rule, Federal Register, December 18, 2019 at 69535 (“The Board has determined that the
23 Statement of Position requirement has been a highly effective tool in promoting orderly litigation and efficiency.
It has been particularly useful in narrowing the issues to be litigated at the pre-election hearing....”).

24 ¹⁶ This case does not raise the question of whether the preclusion rule should be applied in cases where its operation
does not conflict with a statutory mandate.

25 ¹⁷ Pursuant to § 102.2(d)(1)(ii) of the Board’s Rules and Regulations, certain documents in representation
proceedings may be filed within a reasonable time after the time prescribed by the Rules upon good cause shown
based on excusable neglect and when no undue prejudice would result.

26 ¹⁸ The Board has also exhibited leniency regarding filing deadlines in related contexts when the delay has not
27 resulted in prejudice to other parties. See, *e.g.*, *Bon Appetit Management Co.*, 334 NLRB 1042, 1043 (2001)
(overruling election objection where *Excelsior* list was 1 day late); *Pole-Lite Industries*, 229 NLRB 196, 197 (1977)
(same where *Excelsior* list was 3 calendar days and 1 working day late).

1 This is not a situation where Employer’s counsel claims that he “was busy with other
2 legal matters, and experienced technological problems” that prevented timely filing. See, e.g.,
3 *M&M Affordable Plumbing, Inc.*, Case No. 13-CA-121459 (May 3, 2018) (Associate Executive
4 Secretary denying respondent’s motion for acceptance of late filing). It is also not a “law office
5 failure” case where “tardiness is solely a miscalculation of the filing date.” *Elevator*
6 *Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 428 (2002).¹⁹ Instead, the
7 Employer timely filed its documents with the NLRB and its counsel’s staff member simply
8 inadvertently forgot to attach the Statement of Position to the email. No one is perfect; for years,
9 this has been a common mistake.²⁰ Accordingly, the Board should apply “excusable neglect” in
10 this matter, reverse the Regional Director and remand with instructions to reopen the record for
11 the Employer to litigate the question of unit appropriateness.

12 **2. The Hearing Officer’s Refusal of Evidence in the Region’s Possession**
13 **Was Improper.**

14 Even within his attempt to comply with the preclusion rule, the Regional Director’s
15 attempted solution to creating a full record failed. This case demanded more from the Regional
16 Director whose statutory obligation to determine the appropriateness of the unit stands fully
17 independent of the serving of the Employer’s Statement of Position. See *Brunswick Bowling*
18 *Products*, 364 NLRB No. 96, slip op. at 3 (2016).²¹ Critically, the Regional Director is obligated
19 to make every effort to ensure the petitioned-for unit is appropriate as the Board has no statutory
20 authority to certify an *inappropriate* unit. 29 U.S.C. § 159(b). See also *Leedom v. Kyne*, 358

21
22 ¹⁹ In *Unitec Elevator Services Co.*, the Board considered cases under the excusable-neglect provision of former
§102.111(c) of its Rules; the excusable-neglect provision is now found in §102.2 of the Board’s Rules.

23 ²⁰ See, e.g., “Oops! I forgot the Attachment, and Other E-Mail Faux Pas: Microsoft Entourage Survey Spotlights
24 Electronic Communication Trends,” Microsoft News, April 29, 2003, available at
<https://news.microsoft.com/2003/04/29/oops-i-forgot-the-attachment-and-other-e-mail-faux-pas-microsoft-entourage-survey-spotlights-electronic-communication-trends/>.

25 ²¹ In *Brunswick*, the Board expressly held that “[t]he statement-of-position requirement that the preclusion provision
26 enforces and the hearing that it affects are only parts of the larger representation proceeding, which has historically
27 been investigative in nature. The amendments to the Board’s Rules did not change this. Once a petition is filed, the
regional director is charged with the responsibility to investigate the petition and ultimately determine whether a
question concerning representation exists. These are the regional director’s statutory responsibilities under
Section 3(b) of the Act; the amended rules did not—and could not—change them.”

1 U.S. 184 (1958) (District Court has jurisdiction to consider claim that the Board had exceeded its
2 statutory authority to determine an appropriate unit). This requires thoroughness, for as the
3 circuit courts have held, “[t]he need for an explanation is particularly acute when an agency is
4 applying a multi-factor test through case-by-case adjudication.” *LeMoyne-Owen College v.*
5 *NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). The Board’s Rules and Regulations at § 102.66(b)
6 underscore the magnitude of the Regional Director’s responsibility, explicitly providing
7 Regional Directors with the “discretion to direct the receipt of evidence concerning any issues,
8 *such as the appropriateness of the proposed unit*, as to which the Regional Director determines
9 that record evidence is necessary” (emphasis added). By express grant of discretion on when and
10 how to gather evidence, the Board makes clear that the Regional Director is independently
11 obligated to satisfy § 9(b) of the Act so that the Board itself can properly certify a unit deemed
12 appropriate.²²

13 As a direct result of the Region’s failure to create a full record and the unyielding nature
14 of the preclusion Rule, the Regional Director failed to satisfy § 9(b) of the Act because he
15 considered an incomplete record and thus could not properly evaluate the appropriateness of the
16 unit.²³ Such incompleteness is abundantly clear from the DDE as the Regional Director
17 repeatedly remarks that “[t]he record contains limited testimony” and “limited evidence” and
18 “limited detail,” and “lacks specific evidence” on the traditional community-of-interest factors he
19 is responsible for analyzing. *See, e.g.*, DDE 4-6, 17.

20 Necessary evidence to fill these gaps was out of reach of the Regional Director because
21 the Hearing Officer excluded documents and evidence in his possession and control. At the
22

23 _____
24 ²² For example, in *Brunswick Bowling*, *supra*, although the Board found that the *union* should have been precluded
25 from introducing into evidence an untimely served Statement of Position and from raising the contract bar issue
26 asserted in its Statement, the Regional Director was not herself precluded from considering the preclusion issue.
27 Rather, “the Regional Director did not abuse her discretion in receiving evidence regarding the existence of the
contract bar,” particularly where that very issue “was raised by the Petitioner on the face of the petition.”

²³ As detailed in Section B of the Employer’s Argument, there is sufficient evidence to show the Regional Director’s
Boeing analysis is incorrect and warrants a reversal of the DDE. Should the Board grant review and disagree,
however, it must remand the case and direct the Regional Director to reopen the record for introduction of evidence
within the Region’s possession.

1 Hearing Officer’s “informal request,”²⁴ Employer voluntarily submitted approximately 200
2 pages of documentary evidence to the Hearing Officer yet the Hearing Officer only introduced
3 50 pages. Tr. 184:22-185:1.²⁵ Employer witnesses also appeared voluntarily, waiving their
4 rights to petition for revocation of subpoenas served on them at the last minute. When
5 questioned on his choice of exhibits from those provided by the Employer, the Hearing Officer
6 stated that the documents he selected were those “documents that ... the Hearing Officer believes
7 [] sufficient for the decision writer to determine the appropriate unit.” Tr. 186:1-9. He
8 considered certain of the other documents to be “redundant.” Tr. 186:6-9. The DDE makes
9 quite clear that the admitted documents were not sufficient.

10 As an example, the Hearing Officer refused to admit the Employer’s photographs of its
11 operations, which would have underscored the extensive functional integration present at its
12 Pasco facility. Absent such evidence, the Regional Director found that there is a “disconnect
13 between the packaging and processing departments,” and that the function-integration factor was
14 “essentially neutral” at step 2 of the *Boeing* analysis. DDE 18.²⁶

15 The Hearing Officer also opted not introduce any of the job descriptions proffered by the
16 Employer. Unsurprisingly then, the Regional Director found there was only “limited evidence
17 regarding job function[s]” and that “the record does not include any job descriptions, job
18 postings, or other documentary evidence regarding skills and training.” DDE 4, 17-18.
19 The collection of job descriptions supplied by the Employer, including descriptions for both
20 packaging and processing positions, would have helped the Regional Director discern the
21 commonalities between these groups of employees. The omission of the job descriptions also
22 prevented the Hearing Officer and the Union from asking the witnesses whether the job
23 descriptions accurately described the functions of the employees.

24
25 ²⁴ Neither the Hearing Officer nor the Union timely filed a subpoena *duces tecum* compelling the Employer’s
26 Custodian of Records to appear at the hearing with specific documents. Indeed, subpoenas *ad testificandum* were
only served upon Employer witnesses the night before the hearing .

27 ²⁵ The full set of Employer’s documents submitted to the Hearing Officer have been filed with the Board as
Employer’s Exhibit 3 (in two parts).

²⁶ The Employer discusses functional integration in greater detail in Section B of its Argument.

1 Likewise, the Employer advised the Hearing Officer in its offer of proof that
2 Mr. Martinez and Mr. Twiss would testify that filling and loading totes, inspecting product for
3 quality control, and operating equipment is largely the same in processing as it is in packaging.
4 Employer Exh. 1 at 6. Such evidence would have weighed in favor of a shared community of
5 interest.²⁷ Yet the Hearing Officer did not pursue this evidence on the record.

6 When the Region has relevant information in its possession, yet refuses to consider it, it
7 cannot make the decision with which it is charged. The Board cannot countenance a
8 compromised hearing procedure and DDE that affects the representational rights of hundreds of
9 employees. Complete preclusion of the Employer, coupled with the Hearing Officer's
10 unfounded "redundancy" determinations and the Regional Director's unit finding on an
11 incomplete record, deprives the Pasco facility employees of their right to an appropriate unit and
12 flies directly in the face of the purposes of the Act.²⁸ Accordingly, the Board must remand this
13 case to the Regional Director to flesh out the record – with the benefit of Employer's counsel
14 serving to fully present the Employer's evidence – "so that an adequate factual basis may be
15 determined to support his unit determination." *Allen Health Care Services*, supra, 332 NLRB at
16 1309.²⁹

17 **B. Even on the Existing Record, the Regional Director Misapplied *Boeing* in**
18 **Finding the Unit of Packaging Employees Appropriate Without the**
19 **Processing Employees**

20 The Regional Director did identify the appropriate analytical framework for this case; he
21 did not, however, apply it correctly to the evidence he was willing to consider. Where a party

22 ²⁷ See generally *Boeing*, 368 NLRB No. 67, slip op. at 5 (2019) (noting that "a portion of the work that is exclusive
23 to [petitioned-for employees] is at least similar to ... work performed by excluded employees earlier on the
24 production line").

25 ²⁸ The incompleteness of the record is particularly troubling in light of recent criticism from the D.C. Circuit.
26 See *Davidson Hotel Co. LLC (Chicago Marriott at Medical District/UIC) v. NLRB*, No. 19-1235 (D.C. Cir. 2020)
27 (remanding Board's cursory dismissal of employer's request for review of regional director's purported departure
from Board precedents and the precedent set in regional director's first unit-determination decision in the case).
The Board's cursory denial of the Employer's request for review would thus further compound the flaws of the
hearing and would be improper. See *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61 ("The need for an
explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication.").

²⁹ Recognizing that in *Allen Health Care Services*, "the Employer presented no evidence" and the "Petitioner did not
call any witnesses during the hearing," the Employer cites this case as analogous, not synonymous, on the point of
an insufficient record. 332 NLRB at 1308.

1 asserts that the smallest appropriate unit must include employees excluded from the petitioned-
2 for unit, the Board applies its traditional community-of-interest factors to “determine whether the
3 petitioned-for employees share a community of interest sufficiently distinct from employees
4 excluded from the proposed unit to warrant a separate appropriate unit.” *Boeing Co.*, 368 NLRB
5 No. 67, slip op. at 2 (2019) (citing *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 7
6 (2017)). Although the Employer has not technically lodged its assertion because of the
7 § 102.66(d) preclusion, the Regional Director is correct to analyze this case under *Boeing*. DDE
8 15.³⁰ His error is thus substantive as he failed to consider evidence in the record and, contrary to
9 his conclusion, *see* DDE 17-18, there is sufficient evidence to show that the petitioned-for unit is
10 inappropriate without the processing employees. Accordingly, the Regional Director’s decision
11 should be reversed. Finding that the packaging employees alone are an appropriate unit creates a
12 fractured unit, i.e., a combination of employees that is too narrow in scope or that has no rational
13 basis, despite the Board’s clear directive that such units are inappropriate.³¹

14
15
16 ³⁰ The Board’s unpublished decision in *Macy’s West Stores, Inc.*, Case 32-RC-246415 (May 27, 2020), should not
17 further preclude the Employer’s argument under the second prong of the *Boeing* analysis. In *Macy’s West Stores*,
18 the Board denied petitioner-union’s request for review but provided that “where no party asserts that the smallest
19 appropriate unit must include employees excluded from the petitioned-for unit, it is unnecessary to apply the three-
20 step analysis set forth in” *Boeing* in its entirety. Case 32-RC-246415 at slip op. 1. The Board found that “[s]tep two
21 ... which considers whether the petitioned-for employees share a community of interest sufficiently distinct from
22 employees excluded from the proposed unit to warrant a separate appropriate unit, [] only applies if a party contends
23 that additional employees must be included in the unit to render it appropriate....” (internal quotations and citation
24 omitted). There was no such contention in *Macy’s West Stores*.

25 *Macy’s West* should not preclude the Employer’s argument for at least two reasons. First, the decision is
26 unpublished and thus not binding precedent on the Employer and Petitioner. *See* “Unpublished Board Decisions,”
27 NLRB, (“The Board decisions listed below are not intended or appropriate for publication and are not binding
precedent, except with respect to the parties in the specific case.”) [https://www.nlr.gov/cases-
decisions/decisions/unpublished-board-decisions?search_term=32-RC-246415+&year=2020&volume=-
1&form_build_id=form-
8_IDqRKhpclc6Bj5xFHXNB3rwR79cg37FDqissCsw&form_id=nlrb_case_decisions_search_form&op=Search](https://www.nlr.gov/cases-decisions/decisions/unpublished-board-decisions?search_term=32-RC-246415+&year=2020&volume=-1&form_build_id=form-8_IDqRKhpclc6Bj5xFHXNB3rwR79cg37FDqissCsw&form_id=nlrb_case_decisions_search_form&op=Search)
(link to Case 32-RC-246415). Second, the Regional Director analyzed the case using *Boeing* step 2 and thus the
issue is eligible for appeal. *See* 29 C.F.R. § 102.67(d). Accordingly, the Board should proceed to review the
Regional Director’s *Boeing* analysis as detailed within the Employer’s Request for Review.

³¹ *See Seaboard Marine, Ltd.*, 327 NLRB 556 (1999) (finding petitioned-for unit inappropriate based on fact that
the duties and minimal skills of the employees in the petitioned-for unit were not distinct from those of several other
classifications); *Colorado National Bank of Denver*, 204 NLRB 243 (1973) (finding unit sought was “too narrow in
scope” where the unit sought was comprised of computer operations employees and the excluded employees
performed technical support on and developed operating procedures for the equipment used by the petitioned-for
employees).

1 The Employer does not contest that the packaging employees within the proposed unit
2 share an *internal* community of interest. Its Request for Review involves only the second prong
3 of the *Boeing* test: whether the interests shared by the packaging employees are sufficiently
4 distinct from those of the excluded processing employees to warrant a stand-alone unit of the
5 former employees.³²

6 **1. Departmental Organization**

7 The Regional Director determined that the Employer’s departmental organization weighs
8 against a shared community of interest between the packaging and processing employees
9 because “the Employer has separate packaging and processing departments with separate
10 supervision.” DDE 17. This analysis is flawed in its simplicity. While the Employer
11 categorizes employees as working within its “packaging” and “processing” departments, these
12 departmental designations are somewhat of a misnomer given the fluid nature of the Employer’s
13 operations. As the Employer’s Chief Financial Officer, Virgil Roehl, testified, the Employer
14 considers its employees to be “plant employees,” and although “some people may ... [be]
15 dedicated for the most part to one area,” the Employer “regularly ha[s] employees crossing over
16 [to do work in another area]. They might be assigned to processing because [the Employer is]
17 processing that day, but then later in the year [the Employer] may need them in repackaging.”
18 Tr. 63:8-15. Such functional integration, discussed in more detail below, underscores the
19 superficiality of departmental titles and thus cannot support exclusion of the processing
20 employees from this unit. Accordingly, this factor weighs in favor of a shared community of
21 interest. At worst, this factor is neutral.

22 **2. Skills and Training**

23 The Regional Director found that “[t]he record lacks specific evidence demonstrating
24 shared skills and training beyond the most basic elements shared by all employees” and that the
25 available evidence “does show differences between the two departments,” so “this factor weighs

26 ³² The Employer also does not contest the Regional Director’s finding that the warehouse employees should be
27 excluded from the appropriate unit, or his determination that there are no special industry-specific considerations at
play in this matter. DDE 15-17, 19.

1 slightly against a shared community of interest.” DDE 17. Any such minor differences do not
2 outweigh broader commonalities, including common training that both groups receive.
3 For example, both departments receive food safety trainings every week on Mondays before the
4 shift starts; food safety meetings happen every month; and food safety annual retraining or
5 refresher trainings occur every year. Tr. 82:15-83:2.³³ See *Wheeling Island Gaming, Inc.*,
6 355 NLRB 637, 642 (2010) (affirming acting regional director’s finding that a unit limited only
7 to poker dealers was not an appropriate unit where, *inter alia*, “all of the dealers have the
8 opportunity to have informal contact with each other as a result of ... attending periodic
9 departmental meetings.”). This common training couples fact that the vast majority of positions
10 within both processing and packaging are “general labor,” i.e., entry level, who require minimal
11 skill and training and receive basic training upon hire during orientation—a commonality that
12 facilitates employee interchange at the Pasco facility and unites these employees. Tr. 308:17-
13 310:18. See *Casino Aztar*, 349 NLRB 603, 605 (2007) (noting “there is no distinction between
14 the included and excluded employees in terms of skill or training” where “[n]one of the
15 beverage, catering, or restaurant jobs are highly skilled” and “[a]ll employees receive the same
16 orientation”).³⁴

17 Since the skills and experience necessary to perform packaging and processing jobs is
18 relatively equal in its minimalism—e.g., someone who can stack cases in the repack area “would
19 have a very similar skill set to someone who can build a tote in the processing area,”

20 _____
21 ³³ The weekly safety meetings are held for whichever employees are working in the packaging or processing
22 department that day of the week, and the monthly food safety meetings consist of employees from all departments.
Tr. 83:10-18.

23 ³⁴ See also *Proctor & Gamble Paper Products*, 251 NLRB 492 (1980) (noting there was no licensing requirement
24 for petitioned-for electrical employees, and they were recruited from the production ranks).

25 The Employer acknowledges some employees may have experience doing a particular job, such as a
26 packaging job, so the Employer would “want to utilize them in the packaging area as much as possible because of
27 that skill set, ... [b]ut as far as the general labor goes, there’s lots and lots of crossovers.” Tr. 68:2-12. On this very
point, Petitioner’s witness Octavio Zamudio testified that it is possible for a person to come in from processing, go
into a different part of the repack department, and be trained to do that particular job within a certain period of time.
Tr. 312:9-14.

Had the Employer been permitted to litigate unit appropriateness, it would have elicited further testimony
from Mr. Martinez and Mr. Twiss that most of the skills necessary to work in either processing or packaging are the
same. For example, filling and loading totes (large bins used to hold product), inspecting product for quality
control, and operating equipment is largely the same in processing as it is in packaging. Employer Exh. 1 at 6.

1 Tr. 69:3-6—and these employees all receive food and safety training and orientation training, the
2 Regional Director should have found that this factor weighs in favor of a shared community of
3 interest and not exclusion of the processing employees from the unit; the similarity of
4 requirements is greater than the differences.

5 **3. Job Functions and Work**

6 The Regional Director next determined that there is “limited evidence regarding job
7 functions,” but continued that, although employees in both departments handle raw or frozen
8 vegetables, “some specific differences related to the stage of the process” establish that “this is
9 essentially a neutral factor.” DDE 17-18. The Regional Director’s analysis is troubling for
10 several reasons. First, as detailed above, this lack of evidence is a direct result of the Hearing
11 Officer’s exclusion of job descriptions and other evidence provided by the Employer at the
12 Hearing Officer’s informal request and identified in its offer of proof. Tr. 184:22-185:1.

13 Second, and most importantly, the Regional Director disregarded testimony relevant to
14 this factor. Evidence that employees perform the same basic function or have the same duties,
15 that there is a high degree of overlap in job function or of performing one another’s work, or that
16 employees work together as a crew, support a finding of similarity of functions. *See Casino*
17 *Azta*, 349 NLRB 603 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision*
18 *Services*, 313 NLRB 657 (1994). Here, the record reflects that the Employer’s entry-level
19 positions are “general plant labor” that can be sent “where they’re needed”—e.g., if the
20 Employer has “a need in processing, that’s where they go,” or if the Employer has “a need in
21 repack, that’s where they would go.” Tr. 68:13-24. And as the Regional Director himself found,
22 employees are in fact sent to different parts of the Employer’s operation. *See* DDE 18.³⁵ Thus,
23 on the present record, this factor should weigh in favor of a shared community of interest—while
24 the record does not reflect some overwhelming degree of overlap in job functions, there is
25 significant evidence of packaging and processing employees performing one another’s work and,

26 _____
27 ³⁵ DDE 18 (“Interchange weighs in favor of a shared community of interest, as the record establishes both temporary
and permanent interchange from the processing department into the packaging department.”)

1 as the Regional Director acknowledged, there is similarity of functions, i.e., both classifications
2 are responsible for handling and inspecting vegetables and for maintaining equipment and
3 therefore perform the same basic function. *See Monsanto Co.*, 183 NLRB 415, 416 (1970)
4 (“Work functions have frequently been reassigned from maintenance classifications to
5 production classifications and vice versa. Similarly, production and maintenance classification
6 employees perform many of the same or similar functions, frequently and regularly work
7 together, and during slack production periods, production employees are regularly assigned to
8 maintenance utility crews to avoid laying them off.”). At the very least this factor should be
9 found neutral as the Regional Director determined because both packaging and processing
10 employees handle vegetable or operate machinery that handles the product. DDE 17.

11 **4. Functional Integration**

12 The Regional Director found that “[s]ome functional integration exists between
13 packaging and processing” but that there is a “disconnect between the ... departments such that
14 this factor is ‘essentially neutral.’” DDE 18. Here again, the Employer has been prejudiced by
15 the Hearing Officer’s failure to introduce evidence. As detailed above, the Employer provided
16 the Hearing Officer with photographs of its Pasco operations, elaborating on the plant’s work
17 flow and showing how employees in each area interact and cooperate to ensure the Employer’s
18 operation runs smoothly on a daily basis.³⁶ Such photographic evidence would have
19 supplemented Pasco Division Manager Raul Martinez’s testimony,³⁷ emphasizing that Pasco’s
20 operations are deeply integrated such as by the physical layout of the facility, distance between
21 the various work areas, and operational structure.³⁸

22 Beyond the blind eye turned to relevant evidence, the Regional Director also misstated
23 the legal standard for considering this factor by finding that “the packaging department’s work is

24 ³⁶ These photographs should have been introduced in conjunction with the schematic prepared by Mr. Martinez. *See*
25 Board Exh. 5 and 6.

26 ³⁷ *See generally* Tr. 187:21-213:3.

27 ³⁸ The Regional Director also disregarded evidence in the record of the interconnectedness of the Pasco operations.
For example, a repack electrician may be called when needed to the processing department to troubleshoot and assist
with breakdowns on the processing side, even though there are other electricians there—these employees are
“integrated within the facility, they have to go back and forth.” Tr. 95:10-96:13.

1 *not completely dependent* on the processing department.” DDE 18 (emphasis added).
2 Functional integration exists when employees work on different phases of the same product,
3 provide a service as a group, and/or when the Employer’s workflow involves all employees.
4 Thus, the Board looks to see whether employees work together on the same matters and perform
5 similar functions to determine if functional integration exists. *Publix Super Markets, Inc.*, 343
6 NLRB 1023, 1024-1025 (2004); *Transerv Systems, Inc.*, 311 NLRB 766 (1993). Contrary to the
7 Regional Director’s analysis though, the Board does not require complete dependence for
8 functional integration to weigh in favor of a shared community of interest. Rather, the Board has
9 found that a group should not be excluded where there is a “*high degree* of functional
10 integration.” *See Boeing*, supra, slip op. 5 (emphasis added). As with many functionally
11 integrated facilities, employees at the Pasco facility are not all focused on one product or
12 function every minute of every shift, every day of the year. *See, e.g. Wheeling Island Gaming,*
13 *Inc.*, supra, 355 NLRB at 642 (finding “significant functional integration among all of the
14 dealers” where they “are integral elements of the [e]mployer’s gaming operations”); *Casino*
15 *Aztar*, supra, 349 NLRB at 605 (noting “[a]ll three subdepartments are integral elements of the
16 Employer’s business of serving food and drink to patrons”). Instead, Pasco employees are
17 working toward a common goal: providing high-quality frozen product to customers.

18 The Employer acknowledges that packaging and processing employees may work on
19 different timelines at different points in the year, and does not seek to minimize the fact that
20 “packaging is priority.” Tr. 167:8. That priority helps create the interchange. As Mr. Twiss
21 testified, there are times when the Employer “will suspend operations on the plant side ... in
22 order to send enough people over to packaging ... to cover” when needed. Tr. 167:7-12. Such
23 different timelines and occasional prioritization of packaging are not dispositive though, and do
24 not diminish the fact that there is a “high degree of functional integration” at the Pasco facility—
25 the Employer’s processing, warehousing, and packing functions are all under one roof, and
26 product works its way from one area to the next, with regular interchange among employees at
27 the plant. The Regional Director has overstated any “disconnect” and, as in *Boeing*, it would be

1 inappropriate to carve out the processing portion of the Employer’s large, functionally integrated
2 facility as a separate unit. *Id.* (citing *Publix Super Markets*, 343 NLRB 1023, 1027 (2004)).
3 Ultimately, all of the Pasco employees are working hard to ensure that the Employer’s frozen
4 product reaches its destination. Accordingly, this factor weighs in favor of a shared community
5 of interest. DDE 18.³⁹

6 **5. Contact**

7 The Regional Director next found that “contact weighs slightly against a shared
8 community of interest.” DDE 18. His analysis fails to appreciate the level of employee
9 interchange, discussed in more detail below, which is required to ensure the Pasco facility
10 operates properly. And, contrary to the Regional Director’s conclusion that it is “unclear what, if
11 any, level of interaction” processing employees have with packaging employees when the former
12 are sent to perform the latter’s jobs, DDE 18, the record makes clear that there are multiple steps
13 of the processing operations where these employees interact. Furthermore, it is not the case, as
14 the Regional Director suggests, that “a limited number of processing employees are sent to work
15 in packaging” only “during the off-season.” DDE 18. For example, Step 17 of the Employer’s
16 operation—inspections done by packaging general labor employees—is an area where general
17 labor from the processing department is sent if packaging needs more employees. Tr. 212:11-18.
18 Also, packaging employees will be sent to the third, fourth, and fifth steps of product processing
19 if they are not needed in packaging. Tr. 193:25-194:10; Board Exh. 5. And, as Mr. Martinez
20 expressly testified, when employees come from packaging to do these jobs they are “integrated
21 [and] comingled employees with the processing group.” Tr. 194:11-16. In fact, when asked by
22 the Hearing Officer whether a repack person who is transferred to work with a seasonal
23

24 ³⁹ That packaging was only brought to Pasco in 2018 does not change this analysis. As Mr. Roehl testified, the
25 Employer integrated packaging into Pasco because “it was just not efficient to do in two plants what we can do in
26 one” and not “efficient” or “economically feasible” to keep packaging separate. Tr. 72:25-73:6, 73:17-19.

27 A prime example of efficiency born from this integration involves the processing and packaging of corn
cobs. As Mr. Roehl testified, the Employer has “a repackaging area right next to the processing area” so employees
can “pull the product right off of the freezer tunnel into a sellable cob case.” Tr. 70:22-71:2. It’s one of the
Employers “most efficient processes where [they] package directly off the line ... a product that goes directly to the
customer.” There’s “a lot of crossover on [] those positions because that’s a repackaging job as well.” Tr. 71:6-8.

1 employee in processing would work “side-by-side” with that processing employee, Mr. Martinez
2 expressly stated: “Yes, sir; they work side-by-side.” Tr. 88:22-25. The Employer provided, but
3 the Hearing Officer did not introduce, dozens of crew sheets that establish the regular and
4 persistent degree of contact between the processing and packaging employees.

5 That evidence is corroborated by the Union’s witnesses. Bambidawn Santiago
6 corroborated that packaging and processing employees interact. She testified to interacting with
7 processing employees when they are sent to assist the packaging department and that the
8 Employer sends “three to four people at a time,” “about one or two times per week.” Tr. 346:10-
9 13, 347:20-348:5.

10 Contact is also evidenced by the employees’ common attendance at food and safety
11 trainings. Tr. 82:15-83:2. *See Wheeling Island Gaming, Inc.*, supra, 355 NLRB at 642 (acting
12 regional director found, inter alia, “all of the dealers have the opportunity to have informal
13 contact with each other as a result of ... attending periodic departmental meetings.”); *Casino*
14 *Aztar*, supra, 349 NLRB at 605 (“When working catering events, no distinction is made between
15 beverage, catering, and restaurant employees. Employees from different subdepartments work
16 side-by-side, wear the same uniform or costume, and answer to catering supervisors. Usually,
17 they are all paid the same rate through catering and share tips equally.”).

18 The Regional Director also misunderstands the realities of the Pasco facility such that he
19 creates a distinction in interests where none exists. For example, as Mr. Martinez testified, the
20 Employer must provide a separate breakroom for packaging employees not because they are a
21 separate entity, but only to ensure food safety is maintained. Tr. 133:17-18.⁴⁰ This lack of
22 contact should not be overstated to support a conclusion that is stands as a fundamental
23 difference in the employees’ workplace interests; it is merely a byproduct of industry health-and-
24 safety concerns.⁴¹ Ironically, even despite the safety concerns that necessarily keep packaging

25 ⁴⁰ Had the Employer been permitted to litigate unit appropriateness, it would have elicited additional testimony from
26 Mr. Martinez that having employees working with raw product mingling with packaging employees could lead to
cross-contamination. Employer Exh. 1 at 4.

27 ⁴¹ *See generally Boeing*, 368 NLRB No. 67, slip op. at 5 (2019) (noting that “license requirement [was] in place to
meet FAA regulations about who can work on an airplane in repair station status, following FAA certification” and

1 and processing employees from using the same breakrooms, Petitioner’s own witness, Daniel
2 Bello Medina, testified that on the night shift that he works, two or three people from processing
3 use the packaging breakroom. Tr. 328:24-329:7.

4 Ultimately, the contact between these groups of employees—evidenced, in part, by direct
5 testimony that they work side-by-side—weighs in favor of finding a shared community of
6 interest. *See, e.g., Casino Aztar*, supra, 349 NLRB at 605-606. Alternatively, this factor is
7 neutral.

8 **6. Interchange**

9 The Employer agrees with the Regional Director’s interchange analysis, but submits that
10 the DDE minimized its impact. As the Regional Director found, “the record establishes both
11 temporary and permanent interchange from the processing department into the packaging
12 department.” DDE 18. This finding is clearly accurate based on testimony from Mr. Martinez
13 who noted that, on the day prior to the hearing, nine seasonal employees were moved to the
14 processing area after the operational needs of the packaging department changed. Tr. 86:7-12.
15 This factor clearly weighs in favor of a shared community of interest for as the Board has held
16 frequent interchange “may suggest blurred departmental lines and a truly fluid work force with
17 roughly comparable skills.” *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987); *Harrah’s Illinois*
18 *Corp.*, 319 NLRB 749, 751 (1995) (finding that “relative fluidity of movement and job
19 interaction of employees ..., together with other traditional community-of-interest criteria,
20 compel conclusion that all employees in the maintenance employee classification constitute the
21 minimum appropriate unit”). The Board has thus held that “[t]he frequency of employee
22 interchange is a critical factor in determining whether employees who work in different groups
23 share a community of interest sufficient to justify their inclusion in a single bargaining unit.”
24 *See Executive Resources Associates*, 301 NLRB 400, 401 fn. 10 (1991) (internal citation and
25 quotations omitted). Should the Board find certain of the previously discussed factors to be

26 _____
27 noting that while different interests may arise from this license, “it seems unlikely, overall,” that the petitioned-for
employees’ interests “are much different than the interests of excluded employees”).

1 neutral, the frequent interchange at the Pasco facility, standing alone, should carry great weight
2 in the Board's *Boeing* analysis.

3 Although the Employer agrees with the Regional Director's analysis, the Regional
4 Director did not accurately reflect the record when discussing temporary interchange.
5 Specifically, the Regional Director states that "the Employer does not generally send skilled
6 processing employees, such as B/R mechanics, maintenance employees, or electricians, to work
7 in packaging." DDE 9. When asked about interchange between maintenance and electricians
8 and repackaging employees however, Mr. Twiss testified "the maintenance people will go help
9 in packaging as needed. If the ... electrician is not on staff on a given day or if it's on shift
10 where there's no electricians around, then the electrician working in the plant or the maintenance
11 people who are working in the plant will go assist." Tr. 162:13-18. These facts of record, had
12 they been considered, would have emphasized the Regional Director's finding that interchange
13 weighs in favor of a shared community of interest.⁴²

14 **7. Terms and Conditions of Employment**

15 The Regional Director next finds that "[t]erms and conditions of employment weigh
16 against a shared community of interest." DDE 18. His conclusion is flawed as it oversimplifies
17 the workplace.

18 **Benefits:** The Regional Director improperly equates the processing employees' often
19 seasonal status as an automatic guarantee that they have distinct terms and conditions of
20 employment from packaging employees. An employee's benefits are dictated by the amount of
21 time they work for the Employer, i.e., if they are full-time, variable or seasonal, not if they are
22 working in packaging or processing. Tr. 128:3-10, 128:24-129:5, 129:18-130:1. *See also*
23 Petitioner Exh. 1 at p. 7, 11 (employee handbook). For example, as Ms. Gutierrez testified, a
24 seasonal processing employee who gets hired in the off-season would be a variable employee,

25 _____
26 ⁴² The Employer further emphasizes that the evidence of contact, discussed above in subsection 5 of its Argument, is
27 directly related to the interchange acknowledged by the Regional Director, and thus strong evidence that processing
and packaging employees' interests are not sufficiently distinct to warrant exclusion of the former employees from
this unit.

1 and there are “variable hour employees in [the Employer’s] packaging department.” Tr. 127:15-
2 21, 128:15-16.⁴³ Further, variable status does not automatically mean different benefits as there
3 are variable employees who have “made their ... hours so ...they’re drawing benefits.”
4 Tr. 164:11-13. Also, if a seasonal processing employee completes the requisite number of hours
5 “then they would qualify for almost the exact same benefits as a full-time employee.”
6 Tr. 156:12-23. Petitioner’s witness Maria Flores did just that – she was hired as a seasonal
7 processing general labor employee and about two months before the hearing she became a full-
8 time employee. Tr. 336:7-16.⁴⁴ Thus, if a seasonal or variable employee completes 1,560 hours
9 they are eligible for health insurance benefits, regardless of whether they work in packaging or
10 processing. Benefit distinctions based on employee classification should thus not be used to
11 exclude processing employees from this unit.

12 **Wage Rates:** Relatedly, given the fluidity of the workplace—as evidenced by the regular
13 interchange at the Pasco facility—the claim that “different wage rates” support exclusion of the
14 processing employees is also a red herring. DDE 18. Packaging and processing positions are
15 paid at different rates—generally, “packaging pays \$15 an hour” and “processing [] is \$13.50,”
16 —but *employees* are not bound by those rates at all times because they move between packaging
17 and processing. Tr. 88:9-13. In reality, “the job code follows the employee,” i.e., the employee
18 is paid based on the position they are working. Tr. 88:9-10, 90:8-9. Mr. Martinez explained that
19 a packaging employee who is transferred to processing will make \$13.50/hour for his or her time
20 in processing and not the \$15/hour they’d make in packaging. Tr. 89:1-4. Thus, the Regional
21 Director cannot claim that different wage rates serve to differentiate these employees when
22 employees are paid both rates, depending on the work they actually do for the Employer during a
23 given pay period. *See Casino Aztar*, 349 NLRB 603, 605 (2007) (“When working catering
24 events, no distinction is made between beverage, catering, and restaurant employees. Employees
25
26

27 ⁴³ “A variable employee is hired for a definite period or year-round but not guaranteed 30 hours.” Tr. 127:9-12.
⁴⁴ She also moved to general labor repack and now remains a packaging employee. Tr. 336:23-337:2.

1 from different subdepartments work side-by-side ... [and u]sually, they are all paid the same rate
2 through catering and share tips equally.”).

3 Critically, too, the Regional Director failed to analyze overtime as another area of
4 commonality between these employees. In fact, the Employer has had some employees who are
5 working in packaging “work two or three hours additional on the processing side. [Once] they[]
6 finish their job in packaging, and they want the extra hours. ... they will go and work in
7 processing, which could be overtime hours.” Tr. 132:9-16. *See also* Tr. 170:9-11. Wage rates
8 thus cannot be viewed as a point of distinction warranting exclusion of processing employees
9 from this unit. *See Boeing*, supra, 367 NLRB at slip op. 2 (noting that petitioned-for and
10 excluded employees have “the same overtime system”).

11 **Schedule:** That these employees have different schedules is also irrelevant—individuals
12 are bound to the schedule for the job which they are performing at a given time. Thus, if a
13 processing employee works a packaging job they work the packaging schedule, and vice versa.
14 The Employer might send employees from processing to packaging in real time “to cover
15 shortages, or sometimes [] schedule them the previous day if [the Employer] know[s] they’re
16 going to be requiring more people.” Tr. 154:23-155:2. A “short period” of coverage might be
17 “to help cover for lunch,” where an individual “might go for two hours and then come back.
18 But typically, people will work from the start of their shift to the end of the shift in the packaging
19 room” if they’ve been sent there. Tr. 155:3-9. Thus, as with wages, the Regional Director
20 oversimplifies this case by saying packaging and processing employees have “different
21 schedules” as processing and packaging employees are not bound to the exact schedules of those
22 operations every day of their employment with the Employer. Thus scheduling differences
23 should not support the exclusion of processing employees from this unit.

24 **Time Clocks:** Finally, while it is true that there are time clocks in the different
25 departments, the Employer has “clocks all over the plant for employees to clock in and out,” and
26 all employees clock in the same way: “either using a fingerprint or ... clocking in with a PIN.”
27

1 Tr. 133:8-14. This common clock-in system should outweigh the physical presence of different
2 time clocks in the packaging and processing areas.

3 Ultimately, the Regional Director’s analysis of packaging and processing employees’
4 terms and conditions of employment is flawed because he failed to recognize the nuances of the
5 Employer’s Pasco facility and the deep functional integration and interchange among its
6 operations. Accordingly, this factor weighs in favor of a shared community of interest.

7 **8. Supervision**

8 As with terms and conditions of employment, the Regional Director’s analysis that
9 “[s]upervision generally weighs against finding shared interests” oversimplifies the realities of
10 the Pasco facility. Mr. Martinez testified that when employees from the packaging side move
11 “over to the processing side, those employees report to the supervisor or the crew leader in that
12 department. And when processing goes over to the packaging side, they report to the crew leader
13 or packaging supervisor in that department.” Tr. 112:18-23. Thus there is commonality of
14 supervision—employees may be supervised by a packaging supervisor and then a processing
15 supervisor depending on the work they’re doing on a particular day. *See Harrah’s Illinois Corp.*,
16 319 NLRB 749, 750, 750 fn. 2 (1995) (reversing acting regional director’s finding that a unit
17 limited to maintenance employees was appropriate; finding, *inter alia*, that petitioned-for and
18 excluded employees shared some common immediate supervision where employees are “under
19 the watch of other supervisors” than those to whom they otherwise report and noting that
20 employees “report to different supervisors on the shifts their immediate supervisors do not work”
21 and work orders originate from different supervisors); *Casino Aztar*, 349 NLRB 603, 605 (2007)
22 (“When working catering events, no distinction is made between beverage, catering, and
23 restaurant employees. Employees from different subdepartments work side-by-side ... and
24 answer to catering supervisors.”). On this point too, the Regional Director gave short shrift to
25 the fact that all supervisors report directly to Plant Manager Mike Twiss. DDE 13; Board Exh. 7.
26 *See Harrah’s Illinois*, supra, 319 at 750 (noting common “overall supervision”); *Boeing*, supra,
27

1 367 NLRB at slip op. 5 (noting “share[d] overall supervision with excluded” employees,
2 “including some immediate and secondary supervision”).

3 Importantly too, the Regional Director completely disregards testimony on front-line
4 supervisors’ communications and collaboration to meet the Employer’s operational needs.
5 When asked by the Hearing Officer who makes the decision to transfer employees, Mr. Martinez
6 testified that “the supervisor from the packaging department will notify the supervisor from the
7 processing area,” they meet and discuss the number of employees not being used in one area, and
8 “communicate amongst each other” to determine if those employees can be used in the other
9 area. Tr. 87:18-88:5. *See also* 105:13-20, 160:2-15. This testimony underscores the highly
10 integrated nature of the Employer’s operations and the significant interchangeability amongst its
11 employees, and makes clear that the Regional Director’s analysis does not appreciate the nuances
12 of the workplace. To the extent the Board does not agree with the Employer’s analysis, the
13 Employer avers that separate supervision does not itself mandate separate units; the Board
14 considers the degree of interchange, contact, and functional integration much more important.
15 *Casino Aztar*, supra, 349 NLRB at 607, 607 fn. 11; *Wheeling Island Gaming, Inc.*, supra,
16 355 NLRB at 642. Ultimately, this factor weighs in favor of a shared community of interest.
17 Alternatively, this factor is neutral.

18 **9. Bargaining History and Considerations**

19 The Employer does not take issue with the Regional Director’s identification of
20 bargaining-history type evidence, i.e., the consideration that “some of the Employer’s other
21 plants have unionized employees, as he does not analyze this factor for unit appropriateness.”
22 *See* DDE 13-14. Should the Board consider evidence from the Employer’s other plants, this
23 factor is neutral.

24 In sum, all of the traditional community-of-interest factors weigh in favor of a shared
25 community of interest between packaging and processing employees. The Regional Director
26 thus errs in concluding that the “packaging employees share a community of interest sufficiently
27 distinct from excluded [] processing employees and constitute an appropriate unit within the

1 meaning of the Act.” DDE 20. By so concluding, the Regional Director has essentially blessed
2 “a gerrymandered grouping of employees whose interests are *insufficiently* distinct from those
3 of” the Employer’s processing employees, and has failed to consider the Section 7 rights of the
4 excluded processing employees who share a substantial community of interest with the sought-
5 after group of packaging employees. *Id.* at slip op. 3 (citing *PCC Structurals*, supra, slip op. at
6 5). Such a conclusion is inappropriate because “any community of interest which the
7 [packaging] employees might enjoy has been largely submerged in the broader community of
8 interest which they share with the [processing] employees.” *Monsanto Co.*, supra, 183 NLRB at
9 416. Accordingly, the Board must grant review and reverse this flawed unit determination
10 because the shared interests of the Employer’s packaging and processing employees outweigh
11 any distinctions between the two groups, and the petitioned-for unit is inappropriate without the
12 latter group.

13 **C. The Regional Director Erred in Ordering a Mail-Ballot Election**

14 The Regional Director’s final error arises from his determination that a mail-ballot
15 election is necessary in this case. The Hearing Officer’s handling of this issue was inconsistent
16 and confused, and the Regional Director’s analysis, albeit lengthy, again underscores that the
17 record is not complete in this matter.

18 At the outset of the hearing, the Hearing Officer provided that the issue of mail versus
19 manual ballot would “not be litigated” as it “is an issue that is within the discretion of the
20 Regional Director.” Tr. 35:10-13, 366:3-4. The Hearing Officer noted that the issue could be
21 briefed or a statement made on the record, although not by the precluded Employer. Tr. 366:4-7.
22 At the end of the hearing though, the Hearing Officer discussed specifics of a potential manual
23 election, asking Employer’s counsel about preferred dates, times, and location. Tr. 388:4-9.
24 The Hearing Officer found this to be “factual detail that [he] guess[ed] falls outside of the
25 preclusion.” Tr. 388:5-6. During his responses, Employer’s counsel provided that “given the
26 food safety unit and the other precautions necessary to operate the plant, the Employer can meet
27

1 the requirements set forth in [GC Memo 20-10] regarding the optimum or the necessary
2 conditions for [the] manual form of election.” Tr. 389:7-12.

3 Given the inconsistent nature of the hearing on this point, the Regional Director had no
4 basis to determine that a mail-ballot election was necessary over a manual election.

5 The Employer appreciates the thoroughness of the Regional Director’s analysis—for example,
6 his inclusion of COVID-19 rates in the area, *see* DDE 23—but his analysis does not consider the
7 practical realities of the Employer’s operations or the fact that its employees have been coming
8 to the Pasco facility throughout the entirety of the pandemic. Importantly too, the record also
9 reflects that “a very large majority of [its] employees that [it] brings in seasonally are returning
10 from the prior season.” Tr. 49:22-25. The Employer contends that such evidence shows the
11 seasonal employees’ expectation of reemployment and their actual return to the Pasco facility
12 each year, and bolsters the Employer’s position that a manual versus mail-ballot election is more
13 appropriate in the circumstances. Had the Employer been permitted to address the election issue,
14 it would have shown that it is fully capable of meeting the requirements of GC Memo 20-10. It
15 is also unclear from the Regional Director’s decision whether the Employer was in fact
16 precluded from presenting evidence on this issue under the Board’s Rules at § 102.66.⁴⁵ Further
17 compelling is the Board’s recent decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020),
18 where the Board established considerations Regional Directors should weigh in determining
19 whether an election should be conducted by mail- rather than manual-ballot election, because of
20 COVID-19-related conditions. In relevant part, the Employer has not “fail[ed] or refuse[d] to
21 commit to abide by the GC Memo 20-10 protocols.” *Id.* at slip op. 7. Rather, the Employer has
22 been precluded from fully explaining its commitment and ability to abide by the relevant
23

24 ⁴⁵ On this point, the Employer notes that the Regions are handling preclusion and the manual versus mail-ballot
25 election question inconsistently. In *Ikea Distribution Service, Inc.*, 31-RC-266527, the Regional Director for
26 Region 31 found that Ikea was precluded from litigating the unit issue where it failed to timely serve its
27 Statement of Position on the petitioner. Despite preclusion, however, the Regional Director directed the Hearing
Officer to permit the employer to submit a post-hearing brief on the appropriate legal standard to apply in
determining the appropriateness of the unit at issue and its position on the method of election. *See* 31-RC-266527
Decision and Direction of Election at 3. The Employer was not permitted to brief the method of election under
Region 19’s directives. The Board should clarify the impact of preclusion on this election issue.

1 protocols. Given the retroactive application of *Aspirus Keweenaw*, *see id.* at slip op. 8, the Board
2 should grant review and remand to the Regional Director on this issue.

3 **V. CONCLUSION**

4 Standing alone, the deep interconnectedness of the Employer’s operations—evidenced
5 most prominently by functional integration and interchange—make clear that the Regional
6 Director erred in excluding the processing employees from the appropriate unit. Taken together
7 with other facts of record, the Regional Director’s decision cannot stand. Accordingly, the
8 Employer respectfully requests the Board grant its Request for Review and reverse the Regional
9 Director’s DDE or, in the alternative, remand to the Regional Director to reopen the record for
10 the Employer’s evidence. Either decision should not be precluded by § 102.66 of the Board’s
11 Rules and Regulations because the Regional Director failed to satisfy his independent obligation
12 to investigate the appropriateness of the petitioned-for unit. The Board should also grant review
13 and remand on the mail-ballot election question as the Employer is fully capable of meeting the
14 requirements of GC Memo 20-10.

15 DATED this 17th day of November, 2020.

16 Davis Wright Tremaine LLP
17 Attorneys for Twin City Foods, Inc.

18
19 By:  _____

20 Peter G. Finch
21 Davis Wright Tremaine LLP
22 920 Fifth Avenue, Suite 3300
23 Seattle, WA 98104-1610
24 Telephone: 206.757.8153
25 Fax: 206.757.7700
26 peterfinch@dwt.com
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Nicole Mormilo
Davis Wright Tremaine LLP
1251 Avenue of the Americas, 21st Floor
New York, NY 10020-1104
Telephone: 212.402.4094
Fax: 212.489.8340
nicolemormilo@dwt.com

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that at all times mentioned herein I was and now am a resident of the
3 State of Washington, over the age of 18 years old, not a party to the proceeding or interested
4 therein, and competent to be a witness therein. My business address is 929 108th Avenue NE,
5 Suite 1500, Bellevue, WA 98004.

6 On November 17, 2020, I caused a true and correct copy of the attached to be served
7 upon the following via email:

- 8 • Regional Director Ronald K. Hooks: Ronald.Hooks@nlrb.gov
- 9 • Union counsel - Scott Habenicht: scott@ufcw1439.org

10
11 Executed this 17th day of November, 2020, at Bothell, Washington.

12
13 *Clair D. Tollfeldt*
14 _____