UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1439, Petitioner, and TWIN CITY FOODS, INC., Employer,	No. 19-RC-265696 **UFCW LOCAL 1439' S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 1

ARGUMENT 3

I. The conduct of the hearing did not result in prejudicial error and the Regional Director's decision was not clearly erroneous on the record, so the Board should reject review. 3

A. Standard of review. 3

B. The Employer was properly precluded from litigating the appropriateness of the unit under 29 C.F.R. § 102.66. 4

C. The Regional Director fulfilled his independent responsibility to investigate the representation petition and created an adequate record to determine an appropriate unit. 7

D. On the Existing Record, the Regional Director properly applied the second *Boeing* factor to determine that the packaging employees constitute an appropriate unit. 10

1. The Regional Director correctly determined that departmental organization weighs against a shared community of interest. 11

2. The Regional Director correctly found that skills and training weighs slightly against a shared community of interest. 11

3. The Regional Director correctly found that job functions and work was a neutral factor. 12

4. The Regional Director correctly found that functional integration was a neutral factor 14

5. The Regional Director correctly found that contact weighs against finding a shared community of interest. 14

6. The Regional Director correctly found that differing terms and conditions of employment weigh against finding a shared community of interest. 16

7. The Regional Director correctly found that supervision weighs against a shared community of interest. 17

E. The Regional Director did not err in ordering a mail-ballot election because COVID-19 rates were on the rise in the area and mandatory limits on gathering size prevented the Region from safely ordering a manual election. 18

CONCLUSION 21

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

TABLE OF AUTHORITIES

Page(s)

Cases

Aspirus Keweenaw,
370 NLRB No. 45 (2020) 19, 20

Aztar Indiana Gaming Co., LLC d/b/a Casino Aztar,
349 NLRB 603 (2007) 12, 18

Boeing Co.,
368 NLRB No. 67 (2019) 10, 11, 15

Brunswick Bowling Prod., LLC,
364 NLRB No. 96 (2016) 5

Harrah's Illinois Corp.,
319 NLRB 749 (1995) 17

Health Acquisition Corp.,
332 NLRB 1308 (2000) 7

PCC Structurals, Inc.,
365 NLRB No. 160, slip op. (2017).....10

San Diego Gas & Electric,
325 NLRB 1143 (1998) 19

Urs Fed. Servs., Inc.,
365 NLRB No. 1, slip. op. (2016).....6

Wheeling Island Gaming, Inc.,
355 NLRB 637 (2010) 12

Williams-Sonoma Direct, Inc.,
365 NLRB No. 13, slip. op. (2017).....4

Other Authorities

29 C.F.R. § 102.63(b) 4

29 C.F.R. § 102.66.....4

29 C.F.R. § 102.66(b) 7

29 C.F.R. § 102.66(d) 1, 4, 5, 6

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

84 Fed. Reg. 69524-01 (Dec. 18, 2019).....4

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

INTRODUCTION

The Board should not grant the request for review made by Twin City Foods, Inc. (the Employer) because the Regional Director's straight forward decision to preclude the Employer from litigating the appropriateness of the unit was appropriate under 29 C.F.R. § 102.66(d) and because the Regional Director fulfilled his statutory obligation to investigate an appropriate unit under Section 9 of the National Labor Relations Act and correctly determined that the packaging employees shared a community of interest sufficiently distinct from the excluded employees to constitute an appropriate unit within the meaning of the Act. The Regional Director's decision to order a mail ballot election was not clearly erroneous and did not prejudice the Employer's rights. Thus, review by the Board is unwarranted in this case. Specifically, the decision to preclude the Employer from submitting evidence when it failed to timely serve its statement of position is a straightforward application of the Board's rules. Furthermore, the Hearing Officer in a two-day hearing, in which he introduced 40 exhibits, created an adequate record to determine unit appropriateness. Based on the sufficient record, the Regional Director correctly determined that packaging employees share a community of interest sufficiently distinct from the excluded employees to create an appropriate unit within the meaning of the Act. The Regional Director also correctly determined that given the state of the pandemic in the Pasco area, a mail-ballot election was appropriate.

STATEMENT OF FACTS

The Employer is a frozen foods processing company with locations in Washington and Michigan. Decision and Direction of Election (DD&E) at 3. The location relevant here, the Pasco, Washington facility, initially only contained processing and warehousing departments, but in 2018, the Pasco location transferred packaging from the Stanwood, Washington location to Pasco. DD&E at 3. The Pasco location has three departments: (1) the packaging operation also

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

called "repacking or repack"; (2) the processing operation; and (3) the warehouse department which supports both packaging and processing. DD&E 3-4.[1]

The processing department takes fresh vegetables, mainly corn and peas, and processes them to create frozen product. DD&E at 3. Processing occurs for the most part during the vegetables respective harvest seasons which run roughly from May through November. *Id.* During the high season, the Employer employs between 300 and 400 processing employees, of whom about 90 percent are seasonal. *Id.* Roughly 20 to 40 processing workers remain employed in the off-season, but the primary emphasis is on upkeep and maintenance since there is no fresh product to process. *Id.*, Tr. 49.

Packaging employees package or repackage the frozen product processed by one of the Employer's plants or purchased from another company. DD&E at 3. The packaged product is then sold to grocery stores for sale. *Id.* Packaging is a year round operation and does not fluctuate with the processing season. DD&E at 3-4. There are approximately 210 packaging employees of whom 17 are seasonal. DD&E at 4.

On September 3, 2020, Local 1439 filed a petition seeking to represent all full and regular part-time packaging and warehouse employees of the Employer. B. Ex. 1(a). Although the Employer filed its Statement of Position with the Region prior to the deadline of 12 noon on September 17, 2020, the Employer failed to timely serve its Statement of Position on the petitioner before that deadline. DD&E at 2. Once alerted to this failure, the Employer served the Statement of Position on Local 1439. *Id.* Subsequent to the tardy service, the Employer filed a motion to extend the deadline for serving the Petitioner with the Statement of Position. *Id.*; B.

[1] Because the Employer does not contend that warehouse employees were improperly excluded from the unit, Request for Review (Req. for Rev.) at 20, this description and the subsequent analysis will focus on the packaging and processing departments.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Ex. 4. This motion was referred to the Hearing Officer, who denied the motion at hearing; the Employer sought request to file a special appeal with the Regional Director, who then denied the special appeal. DD&E at 2. The Employer did not seek review of the Regional Director's disposition of the special appeal. DD&E at 2.

A Hearing Officer held a hearing on September 25, 2020 and September 28, 2020 via zoom to determine whether the proposed unit was appropriate. DD&E at 1. The Hearing Officer called all of the witnesses identified in the Employer's Offer of Proof with the exception of Ellensburg Division Manager Grant Craig. Er. Ex. 1. The Hearing Officer also introduced 40 exhibits creating the record on which the Regional Director could make his decision regarding unit appropriateness.

The Regional Director determined that "although the original packaging and warehouse unit sought by Petitioner is not appropriate, Petitioner's alternate proposed unit of packaging employees is an appropriate unit for the purpose of collective bargaining and that a question of representation exists under Section 9(c) of the Act."[2]

The Regional Director also determined that despite the Employer's willingness to comply with the General Counsel's "Suggested Manual Election Protocols," "the Pasco area and Washington had not reached a safe enough juncture in the pandemic for the [Regional Director] to order a manual election." DD&E at 26.

ARGUMENT

I. The conduct of the hearing did not result in prejudicial error and the Regional Director's decision was not clearly erroneous on the record, so the Board should reject review.

A. Standard of review.

[2] The Regional Director also determined that seasonal employees may vote subject to challenge. The Employer did not challenge this determination in its Request for Review, so it will not be discussed here.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

The Board will grant a request for review only where compelling reasons exist to do so. Accordingly, a request for review may be granted only upon one or more of the following grounds: (1) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (2) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.[3]

B. The Employer was properly precluded from litigating the appropriateness of the unit under 29 C.F.R. § 102.66.

"[T]he Statement of Position requirement has been a highly effective tool in promoting orderly litigation and efficiency" and includes "heavy" consequences for failing to comply with its requirements. 84 Fed. Reg. 69524-01 (Dec. 18, 2019). Board regulations require that a statement of position be filed with the Board and served on all parties named in the petition. 29 C.F.R. § 102.63(b).

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its *timely* Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition.

29 C.F.R. § 102.66(d) (emphasis added). It is proper to preclude an Employer from litigating a unit appropriateness issue based on their failure to serve a named party. *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip. op. at 1, fn. 1 (2017) (denying review and affirming the decision of the Regional Director "to preclude the Employer from litigating the appropriateness of the petitioned-for unit (based on the Employer's failure to timely serve its statement of position on the Petitioner)"). The Board has required that preclusion apply even if service is only

[3] This response only addresses 29 C.F.R. § 102.67(d)(2) and (3) as they are the only grounds alleged in the brief.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

a few hours late. *Brunswick Bowling Prod., LLC*, 364 NLRB No. 96, slip op. at 3 (2016) (overturning the decision of the regional director when statements of position were due at noon but served at 3:20 pm the same day). Thus, the Board's preclusion rule is not discretionary and instead requires that parties file and serve timely statements of position in order to avoid preclusion. This is so even where the failure to timely serve does not result in actual prejudice to the party not timely served. *Id.* ("Section 102.66(d) does not require that prejudice to another party be shown to have resulted from a failure to comply with the statement-of-position requirement in order for preclusion to be imposed.").

Because Twin City Foods failed to timely serve its statement of position, the Regional Officer rightly directed the Hearing Officer to exclude the Employer from litigating the appropriateness of the unit, and then subsequently reaffirmed his ruling in the DD&E, where he found that the Employer was properly precluded from litigating the appropriateness of the unit. DD&E at 1-2. The clear language of 29 C.F.R. §102.66(d) is mandatory and does not allow for discretion. Moreover, as noted above, the Board has strictly applied its preclusion and does not require prejudice to be shown. *Brunswick Bowling Prod., LLC*, 364 NLRB No. 96 at slip. op. at 3. Notably, the Employer does not grapple with the Board precedent in either *William-Sonoma* or *Brunswick Bowling* in its Request for Review; instead, seeking to elide the distinction between the preclusion rule and the Regional Director's need to determine whether a unit is appropriate. Req. for Rev. at 13-15. Thus, despite the Employer's arguments to the contrary, Req. for Rev. at 13-15, it is immaterial that the statement of position was eventually served because that service was not strictly timely, as is required by the rule. As a result, the Board should reject the request for review on this issue.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

The Employer argues that the Board should abandon the preclusion rule, Req. for Rev. at 11-17, but this argument is unsupported by Board regulation or practice. To support this contention, the Employer points to the language of 29 C.F.R. §102.66(d) that states, "no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory *jurisdiction* to process the petition." Rev. at Rev. at 14 (citing 29 C.F.R. §102.66(d)) (emphasis added). Questions of statutory jurisdiction are unquestionably distinct from the question of unit appropriateness, a distinction which cannot be obfuscated by the Employer attempt to label unit determinations a "statutory obligation." No question exists regarding Board jurisdiction here.

The Employer also proposes that the Board abandon the bright line standard in 29 C.F.R. §102.66(d) and instead apply the "excusable neglect" standard. However, this wholesale change in policy is inappropriate given that the preclusion rule was promulgated to create a bright-line rule, and the Board has consistently enforced this rule. *Urs Fed. Servs., Inc.*, 365 NLRB No. 1, slip. op. at 2 (2016) ("In enacting the amended Rules, the Board deliberately created certain new bright-line provisions and consequences for noncompliance. These provisions include the service requirements for the voter list in 102.62(d) and for the statement of position in 102.66(b) and (d)."); *See id.* at 3 (Dec. 8, 2016) (Miscimarra dissenting) ("There is no such history of leniency regarding the Statement of Position requirements established in the Election Rule, which articulated an inflexible preclusion principle stating that noncompliance will preclude noncomplying parties 'from litigating issues as to which they have failed to take positions required . . . as part of [the] Statement of Position.'").[4] Thus, there is no error here and the hearing officer rightly enforced the Board's preclusion rule.

[4] Although the Employer characterizes missing the statement of position deadline as a one-off occurrence, Req. for Rev. at 15, the Employer has also missed the deadlines for submitting the voter list and posting election notices. This shows a pattern of untimely compliance.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

C. The Regional Director fulfilled his independent responsibility to investigate the representation petition and created an adequate record to determine an appropriate unit.

The Employer points to three examples of excluded evidence to show that the record is incomplete but these examples are unavailing. Although the Regional Director must ensure that the unit sought by the Petitioner is appropriate for the purposes of collective bargaining, this duty does not mean that the Employer has a right to any and all evidence that it believes should be included. Instead, the Regional Director has the "*discretion* to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the Regional Director determines that record evidence is necessary." 29 C.F.R. § 102.66(b) (emphasis added). "[A]bsent a stipulated agreement, presumption, or rule, the Board must be able to find—*based on some record evidence*—that the proposed unit is an appropriate one for bargaining before directing an election in that unit." *Health Acquisition Corp.*, 332 NLRB 1308, 1309 (2000). The examples of refused exhibits cited by the employer are cumulative of other evidence provided and thus are not required for the creation of a full record, and if these documents should have been introduced at hearing, the failure to do so is not prejudicial to the Employer.

The Employer points to the photographs of the facility "which would have underscored" the functional integration of the facility as necessary to create an adequate record. Req. for Rev. at 17. However, as suggested by the word "underscore," evidence regarding functional integration was already in the record, and it is not clear how the addition of these photographs of different areas of the facility would provide evidence of functional integration beyond the lengthy description of corn processing, which depicts how the corn moves through the factory. DD&E at 7-8. Furthermore, the photographs are especially unnecessary in light of Board Exhibit Five, which shows the flow of products through the workplace, Tr. 189:14-22.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

The Regional Director found "[s]ome functional integration exists between packaging and processing in that some of the frozen product produced in the processing department is eventually packaged by the packaging employees and both departments assist in the creation of the same frozen vegetables for consumer use." DD&E at 18. It seems likely that this is the very conclusion that the Employer attempts to "underscore" with its photographs. *See* Employer Ex. 3, Part 1, Ex. A-C. Significantly, the photographs do nothing to counter the significance that the Regional Director attaches to the fact that "packaging employees also package frozen vegetables shipped from the Employer's other facilities and purchased from other companies, meaning that the packaging department's work is not completely dependent on the processing department" and that the packaging occurs year-round while processing is seasonal. DD&E at 18. Thus, the photographic evidence that the Employer argues was improperly excluded is not necessary to the creation of a full record.

Although the Hearing Officer did not introduce job descriptions at the hearing, there is testimony regarding skills and training upon which that the Regional Director based his decision. For example, the Regional Director appropriately determined that packaging department employees "have a higher level of skill and training than processing employees." DD&E at 5. In particular, when the Employer established its packaging department in 2018, it sent employees to the Lake Odessa plant for training not available in Stanwood, Washington. Similarly, a polybag operator—one of the positions in the packaging department—was sent to another facility for training and four or five employees who were hired in the printing classification were sent to Ellensburg for training. DD&E at 5. Currently, training for employees performing these jobs is mainly performed onsite. DD&E at 5. For example, repack general laborers receive on the job training, polybag operators—who did not previously hold this job elsewhere—receive special

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

training; employees transitioning from general labor to mixed tank breaker often receive one week of training although recently one worker learned on the job due to staffing needs; and inspectors receive a week of on-the-job training where they are paired with an experienced inspector. DD&E at 5. Tellingly, an employee who transferred from the processing department to a general labor position in the repack department received two weeks of training when she began that position. DD&E at 5. This evidence is sufficient to determine that packaging department employees have a higher level of skills and are more highly trained than processing employees.

Furthermore, the Employer's argument that the Hearing Officer should have included job descriptions which "would have helped the Regional Director discern commonalities between the two groups," Req. for Rev. at 17, is unavailing because the Regional Director did discern that there were commonalities between the two groups (noting the "general similar nature of the jobs in these two groups,") but found differences that rendered this factor "essentially neutral." Thus, inclusion of these descriptions would not have materially changed the analysis.

The Employer next points to its offer of proof stating that the Hearing Officer did not pursue evidence contained in the Employer's offer of proof, specifically, that "Mr. Martinez and Mr. Twiss would testify that filling and loading totes, inspecting product for quality control, and operating equipment is largely the same in processing as it is in packaging." Req. for Rev at 18. However, the Regional Director recognized this fact in his analysis noting that "evidence regarding job function demonstrates that employees in both departments handle raw or frozen vegetables or operate machinery that handles the product, albeit at different stages of the process. Given the generally similar nature of the jobs, but with some specific differences related to the state of the process, I find this is essentially a neutral factor." DD&E at 17-18. Thus, the Regional Director had, without the need for the proffered testimony, recognized that the two

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

groups of jobs are similar in nature, making the evidence merely duplicative, and without salience to the neutral outcome on the job function factor. The evidence was thus, neither necessary to making an appropriate unit determination nor would it have affected the decision of the Regional Director.

D. On the Existing Record, the Regional Director properly applied the second *Boeing* factor to determine that the packaging employees constitute an appropriate unit.

As to the alleged failure to properly determine the unit composition, the Employer limits its challenge to contending that the Regional Director improperly applied the second prong of the test set forth in *Boeing Co.*, 368 NLRB No. 67 (2019). Req. for Rev. at 20. That test is a three step process used to determine whether a bargaining unit is appropriate.

As to the first step, the Board considers the following factors in the traditional community-of-interest test:

> 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 Structurals, Inc., 365 NLRB No. 160, slip op. at 5 (2017) (quoting *United Operations, Inc.*, 388 NLRB 123, 123 (2002)). No single factor is controlling; instead, the Board considers all the factors together. *Id.*

> First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

Boeing Co., 368 NLRB No. 67, slip. op. at 3.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

"This inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a different unit might be more appropriate." *Id.* This test instead requires that "the Board 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.*[5]

1. The Regional Director correctly determined that departmental organization weighs against a shared community of interest.

Here, the Employer seeks to have the Employer's perception of the functional integration factor dictate the outcome of this prong. Req. for Rev. at 20 (noting that the Employer's Chief Financial Officer, Virgil Roehl "considers its employees to be 'plant employees' despite the fact that the employees are assigned to different areas of the plant, have different supervisors, and perform work in different areas of the plant"). However, management perception cannot overcome that the "Employer has separate packaging and processing departments with separate supervision." DD&E at 4, 17. The Regional Director correctly determined that department organization weighs in favor of finding a shared community of interest.

2. The Regional Director correctly found that skills and training weighs slightly against a shared community of interest.

Although some of the classifications in both departments require minimal skill, "some packaging employees require more extensive on-the-job training and are more specialized." DD&E at 17. The Regional Director found that skilled classifications such as polybag operators had to be sent to other facilities to train when the employer initially instituted its packaging operation at the Pasco facility. DD&E at 17. And, polybag operators were not alone in requiring this initial training. *See supra* at § I.C. for a discussion of training.

[5] The Employer does not contest that there are no specific industry considerations at play here.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

The fact that employees have some common training does not negate the fact that some packaging classifications require heightened training. Furthermore, the cases that the Employer cites for this proposition are unavailing. In *Wheeling Island Gaming, Inc.*, the fact that employees did not have additional levels of training above and beyond the requirements common to applicants for dealer positions regardless if they were poker dealers or other table games players did not dictate they. 355 NLRB 637, 642 (2010) (finding that even though dealers were only seated at tables where they were certified to play the relevant game they had the same level of skill). In contrast, here, certain package employees are instead required to get additional training on top of the food safety training common to all plant employees. DD&E at 17. Similarly, *Casino Azar* is inapposite because in that case there was "no distinction between the included and excluded employees in terms of skill or training*." Aztar Indiana Gaming Co., LLC d/b/a Casino Aztar*, 349 NLRB 603, 605 (2007). That is simply not the case here, where packaging employees are trained above and beyond the bare minimum safety requirements in both departments. As a result, the Regional Director correctly determined that skills and training weigh slightly against finding a shared community of interest.

3. The Regional Director correctly found that job functions and work was a neutral factor.

While the Employer focuses on the fact that there are some employees who are general plant labor and work in repack, it fails to grapple with the wide variety of positions in the two different departments. Req. for Rev. at 22-23. The following job classifications are found in the processing department:

- B/R mechanics are maintenance employees who work with boilers, steamers, and refrigeration equipment or machinery.
- Bacteria lab employees, also referred to as bac lab employees, collect material samples from all over the plant, but their jobs are physically located within processing.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

- Chemical attendants dispense chemicals to sanitation employees for sanitizing the plant.
- Electricians handle any electrical work in the processing department.
- Knife sharpeners sharpen the knives on the cutting machines in processing.
- Lab employees grade product and make labels with the grade.
- Machine operators operate production machines, such as cob machines.
- Maintenance employees and leads perform maintenance, such as fixing belts and changing motors, on machines in the processing department.
- Processing general labor employees, also referred to as general plant workers, perform a variety of tasks in the processing department, including sorting, inspecting, and building totes.
- Processing lab employees grade product based on maturity, color, and smell.
- Tunnel operators and leads are subsets of processing general labor that operate the tunnel freezing machines.

DD&E at 5-6.[6] In contrast, the following classifications exist in the packaging department:

> case end, crew lead, electrician, forklift, hand casing/stacking, mix tank breaker operator, parts room assistant and lead, polybag operator, polybag operator lead, printer helper, printing press operator, repack crew leader, repack general labor, repack general labor variable, repack lab, repack lab lead, repack mechanic, repack QA lab lead, repack sanitizer, sanitation, and tote teardown.

DD&E at 6.

The Employer again seeks to have the interchange prong swallow the other prongs of the analysis. Req. for Rev. at 22 (discussing some employee interchange in the context of the Job Functions and Work analysis). But, the fact that there is some interchange among some workers does not negate the Regional Director's finding that there are "some specific differences [in job

[6] The Regional Director also includes seasonal forklift drivers in the processing department, but notes, "unclear from the record if these are the warehouse department forklift drivers assigned to work in processing or if they are separate forklift operators that fall only in the processing department." DD&E at 6.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

function] related to the stage of the process" in processing and packaging frozen vegetables. DD&E at 18. Thus, it was appropriate for the Regional Director to determine that this factor is neutral.

4. The Regional Director correctly found that functional integration was a neutral factor.

The Employer misunderstands the Regional Director's finding here by focusing on the phrase "the packaging department's work is not completely dependent on the processing department," Req. for Rev. at 23 (citing DD&E at 23). However, that statement is recognition that, although there was some functional integration, the record demonstrated that: (1) packaging employees also package frozen vegetables shipped from the Employer's other facilities and purchased from other companies; and (2) even when packaging does package frozen vegetables processed at the facility, the timing of the packaging is not dependent on processing season and frozen vegetables can remain in the warehouse for up to a year. DD&E at 23. These two factors together demonstrate how departments at the facility operate independently. The Regional Director appropriately determined that this factor is neutral.[7]

5. The Regional Director correctly found that contact weighs against finding a shared community of interest.

The Employer argues that, because there are some instances where processing employees are sent to assist packaging or vice versa and that there are some shared trainings, the contact prong should tip in favor of finding a shared community of interest. Req. for Rev. at 25-27. However, this does not overcome the fact that "contact, packaging and processing employees have separate break rooms, restrooms, and time clocks." DD&E at 18. The Employer seeks to minimize the importance of the separate breakroom requirement by inappositely comparing it to

[7] For a discussion of why the excluded pictures would not affect the Regional Director's finding, see *supra* at § C.I.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

A&P license requirement in *Boeing*, 368 NLRB No. 67, slip op. at 5. Req. for Rev. at 26. In *Boeing*, this factor was examined in the context of the skills needed and only affected a small portion of the time that the aircraft is on the flight line. *Id.* ("Repair station status lasts only a short portion of the time the aircraft is on the Flight Line. In any event, evidence tends to support that FRTs and FRTIs largely use the same skills as excluded employees before and even during repair station status.") *Id.* In contrast, here, the food safety concerns create temporal and physical barriers to contact between departments. DD&E at 8-9 ("During processing season, packaging employees are generally not permitted to enter the processing room due to food safety concerns. If a packaging employee is called to human resources, the employee may be given permission to walk around the perimeter of the processing room to access the offices. Otherwise, if for example a packaging employee wants to go pick up a check in human resources, the employee would go around the outside of the building, and possibly drive over to the office.").

The Employer also argues that food and safety trainings provide an opportunity for contact, but weekly meetings are held by department, leaving only a monthly cross department meeting. DD&E at 9; Tr. 83:10-18 ("The weekly safety -- the weekly meetings, for example, it's safety, food safety, and all -- you know, all of the above that cover that -- those areas. So for example, packaging department will hold their safety, food safety for that -- for those employees working in that area at that date. The monthly food safety meetings are compiled by employees from the packaging department, warehouse department, refrigeration department, maintenance department, electrical department, and the processing department.").

Additionally, while some employees may have interaction between the packaging and processing department, that interaction is minimal. Req. for Rev. at 26; DD&E ("One of the packaging employees testified that she has no interaction with employees in processing. Two of

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

the packaging department employees testified that the only interaction they have with processing employees is when the Employer at times sends over processing employees to help in packaging."). Thus, the Regional Director correctly found that contact weighs against finding a shared community of interest.

6. The Regional Director correctly found that differing terms and conditions of employment weigh against finding a shared community of interest.

The Employer argues that the Regional Director erred in analyzing the terms and conditions of employment by oversimplifying the analysis, but the Employer has failed to recognize the interconnectedness between the job classifications and seasonal employment and allowed the interchange prong of the analysis to impermissibly bleed into the terms and conditions of employment prong.

The Employer argues that because an employee's access to benefits is dictated by the amount of time they work for an Employer not the department they work in, this factor weighs in favor of finding that employees in the two departments share a community of interest. Req. for Rev. at 28. However, this fails to take into account the interconnectedness of benefits and the seasonal nature of processing work versus the interconnectedness of benefits and the non-seasonal nature of packaging. Unlike in packaging where more than 90 percent of processing employees are seasonal, only 17 employees out of 230 packaging employees are seasonal, thus, the seasonal nature of the processing work is inextricably intertwined with the department an employee works in. DD&E at 3-4. Furthermore, the Employer itself associates seasonal workers with processing and uses the non-seasonal nature of the packaging department to justify compensating the packaging employees more generously. DD&E at 12 ("The plant manager testified that the Employer decided to pay packaging employees a higher wage rate because they are committed to year-round employment and thus have a higher stake in their employment than

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

the seasonal employees.”). Thus, Regional Director’s finding that “almost all of the employees in packaging are full-time or variable employees entitled to full benefits, and almost all of the processing employees are seasonal employees not entitled to benefits” weighs toward finding that the two groups have different terms and conditions of employment. DD&E at 18.

Similarly, the Employer confused the distinction between interchange and wage rates and schedules. The fact that when employees perform other jobs in the plant they receive the wage rate for that job does not mean that wage rates are not distinct between the two departments. DD&E at 12. Instead, these groups get paid different wages based on these employees commitment to the company and for the Employer to remain competitive with other firms. Similarly, the fact that sometimes employees fill in another department render the department’s different schedules irrelevant. At most this means that an employee has a variable schedule, but it does not render the different schedules for the rest of the 230 packaging and almost 373 processing employees the same.

The Employer also ignores the fact that these two different groups of employees have different uniforms and seniority lists. DD&E at 18, 13 (“Processing, packaging, and warehouse employees each have their own line of seniority.”). Thus, taken together, the Regional Director was correct in finding that differences in terms and conditions of employment in packaging and processing weigh against finding a shared community of interest.

7. The Regional Director correctly found that supervision weighs against a shared community of interest.

Here, the Employer again attempts to rely on the minimal interchange between the two groups of employees two obliterate this prong of the analysis. Req. for Rev. at 31-32. The situation here is different than the situation in *Harrah’s Illinois Corp.*, 319 NLRB 749, 750, 750 fn. 2 (1995) where “the supervisors to whom heavy-duty and cleaning employees report also

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

work only on one shift, while their respective employees work all shifts." Or, where employees are working the same event in the same location and answering to the supervisor there. *Casino Aztar*, 349 NLRB 603, 605 (2007). Here, the employees are going to a different department to perform a different job. DD&E at 13 ("During day shift, the processing and packaging departments each have their own front-line supervisors, sometimes referred to as hourly supervisors, who supervise the employees at issue in the instant case.").

Additionally, the Employer incorrectly characterizes the supervisory chain by ignoring the presence of intermediate supervisors. Req. Rev. at 31-32. While the processing supervisors report to the plant manager or assistant plant manager, the repack supervisor reports to the repack operations manager, plant manager, or the assistant plant manager. DD&E at 13; B. Ex. 7; Tr. 223:13-225:16. Thus, the Regional Director appropriately determined that the supervision weighs against finding that there is a community of interest between the processing and packaging employees.[8]

Taken together the Regional Director appropriately concluded that the evidence concerning departmental organization, skills and training, contact, terms and conditions of employment, supervision, interchange and bargaining history, supported the conclusion that packaging employees share a community of interest sufficiently distinct from the excluded employees and thus constituted an appropriate unit.

E. The Regional Director did not err in ordering a mail-ballot election because COVID-19 rates were on the rise in the area and mandatory limits on gathering size prevented the Region from safely ordering a manual election.

[8] The Employer again attempts to confuse the categories at issue here when it states that because front-line supervisors may transfer employees this weighs against the conclusion that there are distinct supervisors in the two departments. Req. for Rev. at 32. The fact that supervisors communicate with each other regarding workplace needs does not change that supervisor chains in the different departments.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

In addition to the fact that the Employer was rightly precluded from litigating this issue, the Employer's objection to ordering a mail ballot election is solely based on the employer's willingness to comply with the COVID-19 precautions outlined in Memorandum GC 20-10 which is not dispositive. Given the rise in rates of COVID-19 in the county in which the employer was located and the Board's recent decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), a mail-ballot election was appropriately ordered.

Although *Aspirus Keewenaw* was decided after the DD&E was rendered in this case, the Board has indicated that it will apply retroactive to all pending cases. 370 NLRB No. 45 (2020). *Aspirus Keewenaw* fleshes out the "extraordinary circumstances" standard outlined in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). In particular, it outlines five situations that render a mail ballot election normally appropriate, but it notes "these situations are not exclusive or exhaustive." *See Aspirus Keewenaw*, 370 NLRB No. 45, slip. op. at 11. Two of those five factors are relevant here: (1) Either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher; and (2) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size. *Aspirus Keweenaw*, 370 NLRB No. 45, slip. op. at 7-9.

COVID-19 cases were on the rise in the location of Employer's facility in the period immediately preceding the Regional Director's DD&E. Here, the Benton-Franklin data is the most relevant local data. 370 NLRB No. 45 at *8. ("Although we have identified county-level data as our preferred metric, we do not mandate that Regional Directors use any particular geographic level of data where better, more applicable, data exists, and we encourage the Regional Directors to cite with explanation the best available geographic statistical measure in

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

making their determinations."). This data is the most relevant because as the Regional Director explained, the Employer's facility is located on the border of Benton and Franklin counties and share a local health district, the Benton-Franklin Health District. DD&E at 23. At the time of the DD&E, November 3, 2020, the Regional Director cited to Benton-Franklin Health District data finding, "COVID-19 cases have been steadily rising in the area since early September." *Id.* Thus, based on the local statistics available to the Regional Director, he appropriately ordered a mail-ballot election even when examined under the *Aspirus Keneenaw* standard.

The Regional Director also expressed doubt that the proposed manual election site could be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size given that both Benton and Franklin Counties were subject to the Phase 2 restrictions issued by the State of Washington. DD&E at 22-23. Phase 2 limits gatherings to no more than five people outside of a household in a given week.[9] *Id.* Evaluating the required contacts in a manual election, the Regional Director noted:

> The Board agent, observers, and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. The Board agent and observers must also be present in the same space for the duration of the polling period. There are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of challenged ballots that require the passing and initialing of envelopes. Moreover, the ballot count at the cumulation of the election will proceed in an area with multiple people, unnecessarily causing a significant risk of exposure for all involved. These factors are especially acute in the instant case, where there are approximately 210 employees eligible to vote in the election and I have ordered all seasonal packaging employees to vote subject to challenge.

DD&E at 25 (sic). As a result, the fact that Benton and Franklin are still subject to Phase 2 restrictions in Washington means that a mail-ballot election was appropriately ordered.

[9] Washington's Safe Start Washington Phased Reopening Plan was promulgated by Proclamation of Washington's Governor. Violators of the Governor's order may be subject to criminal penalties. Proclamation 20-25.7.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Since the filing of the Employer's Request for Review, the situation in the Benton-Franklin Health District has only deteriorated as COVID-19 cases have continued to rise.[10] Moreover, on November 15, 2020, Governor Inslee issued an updated order prohibiting all indoor social gatherings with people outside one's household unless they (a) quarantine for fourteen days (14) prior to the social gathering; or (b) quarantine for seven (7) days prior to the social gathering and receive a negative COVID-19 test result no more than 48-hours prior to the gathering. Outdoor gatherings are limited to five people outside one's household. This guidance remains in effect until December 14, 2020.[11] Thus, given the current conditions in Washington and Benton and Franklin counties in particular, the decision of the Regional Director is appropriate.

CONCLUSION

For the foregoing reasons, the Local 1439 respectfully requests that the Board reject the Employer's request for review.

RESPECTFULLY SUBMITTED this 4th day of December, 2020.

Kathleen Phair Barnard, WSBA #17896
Melissa J. Greenberg, WSBA #54132
BARNARD IGLITZIN & LAVITT LLP
18 W Mercer St, Suite 400
Seattle, WA 98119
(206) 257-6002
(206) 257-6019
barnard@workerlaw.com
greenberg@workerlaw.com

[10] *See* https://www.bfhd.wa.gov/programs_services/investigations___outbreaks/c_o_v_i_d-19/benton-_franklin_case_count (last visited December 2, 2020).

[11] Proclamation By The Governor Amending Proclamations 20-05 And 20-25, Et Seq. 20-25.8 "Stay Safe– Stay Healthy" Rollback Of County-By-County Phased Reopening Responding To A Covid-19 Outbreak Surge, https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.8.pdf (last visited December 2, 2020).

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Scott Habenicht, WSBA #45983
Counsel, UFCW Local 1439
1719 N. Atlantic
Spokane, WA 98205
(509) 328-6090
Scott@ufcw1439.org

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the State of Washington, that on the date set forth below I caused the foregoing *UFCW LOCAL 1439' S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION* to be filed with the National Labor Relations Board via electronic filing. On this same date, I caused a true and correct copy of the same to be served via electronic mail to:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Ronald K. Hooks, Regional Director National Labor Relations Board Region 19 915 2nd Avenue, Room 2948 Seattle, WA 98174-1078 ronald.hooks@nlrb.gov	☐ Hand Delivery ☐ Certified Mail ☐ Facsimile ☒ E-mail ☐ U.S. Mail ☐ E-Service
Peter G. Finch Davis Wright Tremaine LLP 920 Fifth Avenue, Suite 3300 Seattle, WA 98104-1610 Telephone: 206.757.8153 Fax: 206.757.7700 peterfinch@dwt.com 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 *Attorneys for Twin City Foods, Inc.*	☐ Hand Delivery ☐ Certified Mail ☐ Facsimile ☒ E-mail ☐ U.S. Mail ☐ E-Service

DATED this 4th day of December, 2020 at Seattle, Washington.

By: Jennifer Woodward
Jennifer Woodward, Paralegal

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP