

Kroger Limited Partnership, d/b/a Hilander Foods and United Food and Commercial Workers Union, Local 1546, Petitioner. Case 33–RC–4715

November 30, 2006

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On November 15, 2002, the National Labor Relations Board¹ granted the Petitioner's request for review of the Acting Regional Director's Decision and Direction of Election finding that the petitioned-for single-facility unit was not appropriate and that the appropriate unit was a multi-facility unit comprising the Employer's 6 stores and the commissary.²

The Board has delegated authority in this proceeding to a three-member panel.

Having carefully reviewed the entire record, including the briefs of the parties, we conclude, contrary to the Acting Regional Director, that the petitioned-for unit, limited to 150 employees at the Roscoe store, is a presumptively appropriate unit and that the Employer failed to rebut the presumption. We, therefore, reverse the Acting Regional Director and remand the case for further appropriate action.

Background

The Employer operates five retail grocery stores and a commissary in the Rockford, Illinois area and one retail grocery store in Cherry Valley, adjacent to Rockford. The stores and commissary comprise Hilander Foods, a division of Kroger Foods. The Petitioner seeks to represent a unit of retail grocery store employees at the Roscoe store. The Employer contends that only a multi-facility unit comprising all six stores and the commissary (which is located in one of the stores) is appropriate. The Acting Regional Director found that the Employer met its burden of rebutting the single-facility presumption and that a unit of the six stores and the commissary is an appropriate unit.³

It is well established that a single-facility unit is presumptively appropriate, unless it has been so effectively

merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. The burden of rebutting this presumption falls on the party arguing in favor of a multi-facility unit. *J&L Plate, Inc.*, 310 NLRB 429 (1993). To determine whether the presumption has been rebutted, the Board examines a number of factors: (1) central control over daily operations and labor relations, including extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) degree of employee interchange; (4) distance between locations; and (5) bargaining history, if any. *J&L Plate*, supra. Analyzing the instant facts in light of the applicable criteria, we find, contrary to the Acting Regional Director, that the Employer has failed to meet its burden of rebutting the single-facility presumption.

Facts

Local autonomy: The overall management of the 6 stores and the commissary is controlled by merchandising coordinator Harp, assisted by Area Support Personnel clerk (ASP clerk) Pearson, who work out of a central office located at the Alpine store (Store 860). Administrative services are centrally controlled, and the Employer's human resources department serves all 7 Hilander facilities. All stores operate under a common budget. All employees are subject to the same personnel policies, employee handbook, safety and training programs, and wage and benefit programs.

Each store has a store manager, co-managers, department heads, and other supervisory personnel. Store managers and co-managers interview and hire applicants. Department heads, who the parties stipulated are Section 2(11) supervisors, can recommend hiring to the store/co-managers. There are no examples of central office involvement in hiring apart from the single circumstance of the grand opening of the Cherry Valley store. There, because of the large number of employees needed to be hired at one time, the merchandising coordinator and the ASP clerk helped the store manager with interviews and hiring. Store managers set the wages for new hires within the established wage range. Store or department managers establish assignments, set work schedules, approve overtime, authorize time off, schedule employee vacations, and determine breaks.

The ASP clerk trains new employees with respect to customer service. Such training requires about 2–1/2 to 3 hours. The ASP clerk does not provide training as to job duties or review labor relations matters. The ASP clerk last retrained an employee over 2 years before the hearing, except for unspecified instances involving employees who received bad scores from “shoppers” hired to report to the Employer. Store managers handle em-

¹ Members Liebman and Cowen; Member Bartlett dissenting.

² The Board also granted review with respect to the Acting Regional Director's finding that certain department managers were statutory supervisors and, therefore, properly excluded from the bargaining unit. On September 30, 2006, the Board remanded the instant case for further appropriate action consistent with its decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), and related cases. On October 20, 2006, the Acting Regional Director notified the Board that the parties had entered into a joint stipulation that the disputed department managers were statutory supervisors, leaving only the issue of unit scope for resolution.

³ There are about 550 employees among all the facilities.

ployee orientation. Although the ASP clerk could help the store manager with orientations, there is no evidence that this has occurred. Store managers can create their own in-store safety rules, are responsible for safety training, and ensure that employees assigned to their store comply with these rules. There also are safety committees at each store.

The store managers and department heads handle verbal and written discipline. Store managers have the authority to suspend or discharge an employee without seeking approval of the merchandising coordinator. Local managers may impose a penalty beyond the standard discipline, such as immediate dismissal for theft. There is no evidence of the central office being involved in such cases.

Merit increases are initiated at the store level. It appears that the coordinator must ultimately approve merit increases. Store managers handle employee promotions. There is no written policy requiring consultation with the coordinator regarding promotions. The only example of the coordinator's involvement in promotions of unit employees is the staffing of the new Cherry Valley store when it opened. Promotion opportunities are given, in the first instance, to eligible in-store employees. If no in-store employee qualifies, the job opportunities are posted in all the stores. There is no evidence that the Employer has posted openings for jobs covered by the proposed bargaining unit.

The store managers and department managers handle routine problems. The grievance procedure in the employee handbook requires that employees first go to their department manager and then to the store manager before contacting the coordinator. A few employees from each store participate in an Advisory Board, which meets monthly to discuss employee concerns, among other issues. Employees are encouraged to take their questions and concerns to Advisory Board members. The employee concerns generally relate to customer service and community relations. The Advisory Board does not take the place of the grievance procedure. Employees are expected to contact in-store management with questions relating to wages and benefits before calling the ASP clerk in the central office.

The store managers handle intra-store employee transfers. The store managers work out inter-store employee transfers among themselves without involvement of the central office. The only exception may have been recommendations by the ASP clerk with respect to the grand opening of the Cherry Valley store. Layoffs are handled at the store level, since the store manager knows who has the least seniority and also knows the staffing needs of each department. There is no evidence that em-

ployees are laid off based on Employer-wide, rather than store-wide, seniority. Store managers also can recall employees without guidance or approval of the merchandising coordinator.

The merchandising coordinator visits each store weekly to promote sales and check on merchandising. The sole example of the coordinator visiting the Roscoe store to discuss labor relations occurred a year before the hearing. The ASP clerk visits each store weekly to perform front end audits (checking on the baggers and cashiers), including cash audits and shrink audits (checking on loss of revenue through theft, spoilage, etc.), and the coordinator sometimes performs shrink audits. However, the front end store manager is responsible for monitoring the front end employees and there is a shrink team in each store. If the coordinator sees a problem, he might discuss this with the employee and report it to the store manager. Discipline is left up to the store manager. The ASP clerk, following her 1-2 hour weekly observation, makes suggestions to the store managers for improvement and files a report with the coordinator. The ASP clerk has never disciplined or recommended discipline of an employee. The ASP clerk's comments do not go into the employee's disciplinary file. There is no evidence that the ASP clerk's suggestions result in any action taken by the store manager with respect to the employees.

Employee skills, functions, and working conditions: Employees at the 6 stores have essentially the same skills and functions.⁴ The employees are subject to the same personnel policies and handbook.

Interchange and contact: The Roscoe store manager remembered only three instances of temporary transfers from his store, not involving vacation coverage, each for 1 to 2 days, and all going to store 859. One of these temporary transfers was a department manager. The coordinator cited one example of a Roscoe employee transferring temporarily to another store—also store 859. In June 2001, unspecified employees worked at the North Main store on their day off or in addition to their work at their own store.⁵ There is no indication whether Roscoe store employees were involved. When an employee is scheduled for vacation, the department manager solicits in-store employees to cover the absence. If no in-store employee is available, employees transfer from other stores to cover the absence. The Roscoe store manager testified that there are regular transfers from other stores into the produce department to cover ab-

⁴ The record does not detail the work of the commissary employees.

⁵ North Main is not listed among the Employer's stores, but store 859 is located on Main Street and we assume that the reference to North Main is to store 859.

sences. However, the record is unclear as to the number of transfers in any given period of time.⁶ There are no further details with respect to these transfers and no evidence with respect to any other departments at Roscoe. An unspecified number of employees were temporarily transferred to the newly opened Cherry Valley store in 2000 to train and mentor Cherry Valley's new hires. There is no indication whether, and to what extent, these transfers involved employees at the Roscoe location.

According to an Employer-supplied exhibit, of the 550 employees at the six stores and the commissary, there were 51 permanent transfers over a 3-1/2 year period, including lateral transfers and promotions. Some of these transfers involved employees in the meat department unit, who are not in the petitioned-for unit and are covered by a collective-bargaining agreement. Some transfers were at the request of the employee, not the Employer. Several of the transfers did not reveal the position of the transferee before or after the transfer. Twenty-nine of the transfers were to the newly-opened Cherry Valley store. Only 8 of the 51 transfers involved the Roscoe store (in and out of the unit). The store manager recited one additional instance of a permanent transfer, citing a transfer of a produce clerk from an unspecified location to Roscoe at some time in 2002. The coordinator testified that if there were employees competing for a transfer, seniority with Hilander, not just the individual store "would probably" be a strong consideration. There are no specific examples of Hilander-wide seniority being used in a transfer situation.

With respect to inter-store employee contact, training at the central office generally is limited to customer service training for new employees and may include employees from only one store. There is no evidence with respect to employee contact as a result of re-training. Many types of centralized meetings involve management personnel only. Although some centralized meetings involve employees, such as Advisory Board teams, only a few employees attend from each store. Employees from store shrink teams may attend some central shrink team meetings, but there is no evidence that attendance is widespread. Drivers routinely drive trucks between the stores and the commissary delivering product. There is no evidence as to who drives the trucks⁷ and whether and with whom the drivers interact at the stores. Community

⁶ The store manager initially testified that there were four occasions in the past year when employees transferred into the produce department from unspecified stores to cover for vacations. He also testified that there were four instances during the past summer when such transfers had occurred.

⁷ The Employer utilizes its own trucks and vans to deliver the goods. The record does not indicate whether the drivers are unit employees or even whether they are the Employer's employees.

service projects, apart from in-store mandatory projects, are voluntary, as is participation in store-based "Show and Tell" programs (demonstrations of good practices and ideas) and attendance at benefits meetings. There are few details with respect to the frequency of such projects and programs. Although the newsletter is sent to the employees, there is no showing that the publication of the newsletter involves employee contact.

Geographic proximity: According to the Employer, the distances from Roscoe to other stores range from 8 miles to 13-14 miles.⁸

Functional integration: All stores receive bakery and deli products from the commissary, located in Store 859, but the commissary, on request, also sends bakery goods to Kroger's Indianapolis warehouse for distribution to some other stores. Store 859 contains an area for storage of some equipment/and or supplies, not general store products, such as boxed and canned goods. The stores apparently receive most of their merchandise from non-Hilander sources. The Employer has no set plan with respect to transfers of product between stores. There have been some inter-store product transfers involving the Roscoe store, but these transfers generally seem to have involved just a few cases of an item. Although the same local advertising covers all six stores, advertising planning is done by Kroger's advertising department in Indianapolis that also handles advertising for Kroger's other stores. Kroger has deemed the Rockford-area job market a multiple statistical area ("MSA").

Bargaining history: There is no history of collective bargaining involving the petitioned-for employees. The Petitioner represents meat department employees in a unit covering the six Hilander stores (apparently not including the commissary) under a collective-bargaining agreement.

Analysis

On these facts, it is clear that the Employer's facilities have strong local autonomy, there is no significant level of transfers, there is little functional integration, and there is no bargaining history involving the petitioned-for employees. In these circumstances, we find that the Employer has failed to establish that the petitioned-for single-facility unit at Roscoe has been merged into a more comprehensive unit, and, therefore, failed to rebut the single-facility presumption.

Specifically, the record shows that the day-to-day decisions at Roscoe and each other facility are handled, in large part, separately within each store by the store manager, co-managers, department heads, and other supervi-

⁸ A Petitioner witness testified that he drives to these stores and the distance from Roscoe to other stores ranges from 11-25 miles.

sory personnel. Store managers and department heads hire, set wages, handle orientation, establish assignments, set work schedules, approve overtime, authorize time off, schedule employee vacations, determine breaks, establish safety rules and provide safety training.

Further, employee discipline is handled locally. Store management independently addresses discipline problems, having the authority to suspend and discharge as well as give verbal and written discipline.

Store managers also evaluate employees. The coordinator ultimately approves merit increases, but there is no showing that the approval is other than routine. Store managers handle in-store promotions. There are no examples of the store managers consulting with the coordinator apart from the staffing of the new Cherry Valley store.

Finally, the store managers and department managers handle routine problems and constitute the first two steps of the Employer's grievance procedure. Employee transfers within a store are handled by the store manager, and transfers between stores are handled by store managers, all without involvement of the central office, apart from the Cherry Valley grand opening.

The Acting Regional Director acknowledged that the employees in the seven facilities have separate direct supervision, but asserted, without detail, that this day-to-day supervision is circumscribed by common personnel policies, as well as by the coordinator and the ASP clerk, through their store visits. However, the coordinator testified that store managers are given substantial authority to apply the Employer's policies. Although the coordinator and the ASP clerk regularly visit each store, these visits do not meaningfully limit local management's authority over day-to-day labor relations. The coordinator's visits are generally focused on sales and merchandising. The ASP clerk performs front end audits and shrink audits, but store management also monitors the front end employees and shrinkage. Moreover, there is no evidence linking these audits by the coordinator and the ASP clerk with any specific impact on the employees. Discipline is still the province of the store manager.

Although the Employer contends that its centralized control over personnel and labor relations policies requires a finding that the seven facilities function as one unit, centralization, by itself, is not sufficient to rebut the single-facility presumption where there is significant local autonomy over labor relations. *New Britain Transportation*, 330 NLRB 397 (1999). Instead, the Board puts emphasis on whether the employees perform their day-to-day work under the supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the

daily matters which make up their grievances and routine problems. For example, in *Renzetti's Market*, 238 NLRB 174, 175 (1978), despite centralization and similarity of employee skills, functions, and pay, the Board found a single-facility unit to be appropriate where immediate supervisors issued oral warnings, granted leave requests, and participated in hiring and discharge decisions. This level of involvement, according to the Board, was not routine but "demonstrate[d] meaningful local autonomy and participation in matters directly affecting the service representatives' working lives." *Rental Uniform Service, Inc.*, 330 NLRB 334, 335-336 (1999).

Moreover, although the employees at the six stores have essentially the same skills and functions, there is no evidence that these differ significantly from those of Kroger employees in its many other stores—stores which the Employer does not seek to include in the unit. The Acting Regional Director found that the personnel policies and handbook are generally unique to the six stores and the commissary and do not generally apply to other Kroger-owned facilities. However, there is no evidence with respect to policies at the other Kroger facilities with which to make a precise comparison.

There is also a lack of evidence of significant interchange involving the Roscoe facility. The coordinator and store manager together cited only three instances of temporary transfer between stores, not including vacation coverage. This is over more than a year period. There are 150 Roscoe and 550 employees among the seven facilities. Vacation absences are covered, in the first instance, by intra-store transfers handled by store management. Even assuming that there were a few inter-store vacation transfers over an overlapping period involving Roscoe, the temporary transfer rate is minimal. *Red Lobster*, 300 NLRB 908, 911 (1990) (level of transfers not significant where 19 of 85 employees affected by temporary work assignments during one year). Although an unspecified number of employees were temporarily transferred to the newly opened Cherry Valley store, there is no evidence that these transfers involved the Roscoe store. Moreover, the Board traditionally has not accorded significant weight to staffing new stores temporarily by transferring employees who ultimately return to their permanent store assignments,⁹ or to transfers from an existing location to a new facility.¹⁰ There is also little permanent employee interchange. Thus, there were only 8 or 9 permanent transfers involving the Roscoe store over a 3 ½ period among 550 employees. We note that, although the coordinator testified that sen-

⁹ See *Renzetti's Market*, supra.

¹⁰ See *J.L. Hudson Co.*, 155 NLRB 1345, 1348 fn. 9 (1965).

iority with Hilander would probably be used in determining transfers, there are no specific examples showing that this had occurred.

There is no evidence that Roscoe employees have had frequent contact with employees at the other facilities as a result of central training, central meetings, community service projects, or the newsletter.

Contrary to the Acting Regional Director, we find that the 8 to 13 mile distance between Roscoe and the other facilities does not favor a multilocation unit here. See *New Britain Transportation Co.*, supra, 330 NLRB at 398. This geographic separation is not sufficiently significant to outweigh the other factors supporting the single-facility unit. *Bowie Hall Trucking*, 290 NLRB 41, 43 (1988).

Further, functional integration among the seven facilities is limited. The stores receive bakery and deli products from the commissary, but apparently receive most of their merchandise from non-Hilander sources. Inter-store product transfers involving the Roscoe store generally involve a limited amount of goods and are not based on any set plan. Although the coordinator and the ASP clerk visit the stores on a regular, weekly basis, they are not involved in day-to-day labor relations at the stores.¹¹

In sum, we find that the similarity of employee skills and working conditions, centralized personnel and labor relations policies, and limited functional integration among the seven facilities, is outweighed by significant local autonomy, lack of substantial interchange or functional integration, geographic separation, and absence of

¹¹ The Petitioner's representation of the Employer's meat department employees in a unit covering the 6 Hilander stores does not control unit disposition with respect to the other categories of the Employer's retail employees here as to whom there is no bargaining history. *Renzetti's Market*, supra, 238 NLRB at 176 fn. 13.

bargaining history. *New Britain Transportation Co.*, supra, 330 NLRB at 397–398; *Foodland of Ravenswood*, 323 NLRB 665, 666 (1997); *Red Lobster*, 300 NLRB 908, 911 (1990); *Carter Hawley Hale Stores*, 273 NLRB 621, 622–623 (1984).¹²

In these circumstances, we conclude, contrary to the Acting Regional Director, that the Employer has failed to meet its burden of rebutting the single-facility presumption. We, therefore, reverse the Acting Regional Director and remand this case for further appropriate action.

ORDER

The Acting Regional Director's finding that the petitioned-for single-facility unit is not appropriate is reversed, and this proceeding is remanded to the Acting Regional Director for further appropriate action.

¹² Cases cited by the Employer are distinguishable from the facts herein. *Big Way Super Market*, 226 NLRB 180 (1976), did not involve a petitioned-for single-facility unit and, therefore, no presumption of appropriateness was applicable. Rather, the issue was whether certain central operations employees were sufficiently integrated with the multi-location retail operation to be included in the unit. In other cases cited by the Employer in which the Board found that the single-facility presumption had been rebutted, there was significantly greater central control over labor relations and/or interchange than in the instant case. See, for example, *Waste Management Northwest*, 331 NLRB 309 (2000) (lack of local autonomy at the second facility where there was no permanent supervisor and employees interacted and coordinated deliveries and pickups to customers); *Dayton Transport Corp.*, 270 NLRB 1114 (1984) (final authority on all personnel decisions centralized; over 400 instances of interchange among three facilities in 1 year); *Novato Disposal Services*, 328 NLRB 820 (1999) (common supervision of employees at all locations; frequent permanent and temporary interchange); *R&D Trucking*, 327 NLRB 531 (1999) (common supervision—no local manager at one of the facilities; frequent interchange—12 instances a month among 10 employees); *Big Y Foods, Inc.*, 238 NLRB 860 (1978) (significant central control of day-to-day labor relations including hiring, discipline, and grievance handling); *Dan's Star Market Co.*, 172 NLRB 1333 (1968) (division managers directly supervised departments in store; half of numerous temporary transfers involved store sought by petitioner).