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**Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York and United Food and Commercial Workers, Local 2D, Petitioner.** Case 29–RC–270372

October 8, 2021

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN  
AND RING

The Employer’s Request for Review of the Regional Director’s Decision and Direction of Election is granted as it raises substantial issues warranting review.<sup>1</sup> On review, we affirm the Regional Director’s Decision, but only for the reasons stated below.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Petitioner seeks to represent a unit of 47 outside sales representatives based in Metro New York (MNY sales representatives). The sales representatives do not report to a facility but, rather, work from home or are in the field visiting customers. The MNY sales representatives, who generally sell the Employer’s products within the New York counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, and Westchester, are divided into six teams—New York City (two teams), Brooklyn/Queens/Staten Island, Long Island/Suffolk, Long Island/Nassau, and Westchester/Bronx. The Employer contends that for the unit to be appropriate, it must include all of its sales representatives in the state of New York. Accordingly, it argues that 27 additional outside sales representatives, each of whom is based in one of four areas/teams located in Upstate New York—Albany, Buffalo/Rochester, Syracuse, and North Country (UNY sales representatives)—must be included in the unit. The Regional Director determined that the petitioned-for unit of MNY sales representatives had interests “sufficiently distinct” from the excluded UNY sales representatives’ interests to be an appropriate unit under *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) and *Boeing Co.*, 368 NLRB No. 67 (2019).

<sup>1</sup> The Board has exercised its discretion to read the entire record. See Sec. 102.67(e) of the Board’s Rules and Regulations. Based on our careful review of the record, we reject the Employer’s unsubstantiated claims that the Regional Director made “intentionally false” statements, “manufactured” her conclusion without record evidence, or based her determination “upon ‘something’ other than weighing the record facts and applicable law.”

<sup>2</sup> *AT&T Mobility Services, LLC*, 371 NLRB No. 14, slip op. at 1 (2021) (emphasis in original).

Initially, we disavow the Regional Director’s reliance on the framework set forth in *PCC Structural*. As we recently clarified, “*PCC Structural* applies when a non-petitioning party contends that the petitioned-for unit is inappropriate unless the unit includes additional *classifications*; it does not apply where, as here, a party contends that the petitioned-for unit is inappropriate without the inclusion of employees at additional *locations*.”<sup>2</sup>

“In determining whether a petitioned-for multifacility unit is appropriate the Board evaluates the following factors: employees’ skills and duties; terms and conditions of employment; employee interchange; functional integration; geographic proximity; centralized control of management and supervision; and bargaining history.” *Audio Visual Services Group, LLC*, 370 NLRB No. 39, slip op. at 2 (2020) (internal citation omitted). “An appropriate multifacility unit is one that has a ‘distinct’ community of interest from the excluded facilities.” *Ibid.* (citations omitted). Applying the proper analytical framework, we agree with the Regional Director’s ultimate determination that the petitioned-for unit of MNY sales representatives constitutes an appropriate unit. As explained below, they share a community of interest that is distinct from the excluded UNY sales representatives.

To begin, we find that the centralized supervision and management factor weighs in favor of the petitioned-for unit, particularly when considered in conjunction with the fact that the Employer treats the Metro and Upstate groups as de facto divisions. As the Regional Director observed, there are, in practice, extant and ongoing organizational divisions between Metro and Upstate New York evident in the Employer’s public appearance and internal operations. Notably, the Employer’s public website lists Metro and Upstate New York as two of the seven distinct markets users can select, and the Employer provides business cards to MNY sales representatives that identify them as “Metro,” rather than generalized New York, representatives. Operationally, separate Metro and Upstate Region Managers serve as the MNY and UNY sales representatives’ front-line, day-to-day supervisors; the Employer maintains separate quota requirements and incentive programs for the two divisions; there are separate price books for the two divisions and the Employer requires the sales representatives to sell product from the appropriate price

Chairman McFerran joins her colleagues in disavowing the Regional Director’s reliance on *PCC Structural* here. For the reasons stated in her dissenting opinion in *PCC Structural*, the Chairman adheres to the view that the Board should return to the unit-determination standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *affd.* sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which *PCC Structural* overruled. *Id.*, slip op. at 13–26.

book based on the customer's location; and the Employer maintains separate e-mail groups for the two divisions that it uses to communicate with employees (including by e-mailing all Metro Region Managers and Upstate Region Managers as separate groups). Although the Employer no longer maintains "official" overall managers for Upstate and Metro,<sup>3</sup> this fact does not undercut the foregoing evidence establishing that the Employer continues in practice to treat the two areas as separate divisions.

Inasmuch as the Employer appears to have some degree of centralized management, the record evidence on this matter is relatively insubstantial and therefore is not entitled to meaningful weight.<sup>4</sup> Consistent with the Employer's de facto treatment of Metro New York and Upstate New York as separate regions, the record shows that Region managers have significant autonomy with respect to day-to-day labor relations matters. In this regard, Region managers control their team's expense accounts; complete performance evaluations for sales representatives<sup>5</sup>; and—according to the Employer's handbook—monitor time and attendance, approve leave requests, determine work hours and break times, and provide employee documentation (e.g., evaluations, disciplinary actions, illnesses, accidents, and absences) to Human Resources. In addition, Region managers provide their sales representatives with periodic updates on overall sales and progress toward quotas and incentives, and sales representatives ordinarily have daily phone and e-mail communications with Region managers addressing work-related issues that may arise, such as incomplete reports or difficulties in meeting quotas. Further, sales representatives seeking changes in draws or commission rates direct such requests to their Region manager, who will escalate the request to higher management. In short, sales representatives view their Region manager as the principal

representative of the Employer's authority and communicate nearly exclusively with their Region manager regarding work-related issues.<sup>6</sup> On the whole, then, the centralized management and supervision factor supports the petitioned-for unit of MNY sales representatives.

The geographic proximity factor also clearly and strongly weighs in favor of the petitioned-for unit because the closest Upstate region, Albany, is approximately 150 miles from New York City and the furthest Upstate regions—located in Buffalo/Rochester and North Country (near the Canadian border)—are well over 300 miles from New York City. Additionally, all of the petitioned-for teams of MNY sales representatives are based in the New York-Newark-Jersey City Metropolitan Statistical Area (MSA) and none of the Upstate teams are based in that MSA.<sup>7</sup> The Board has relied on a unit's "geographic coherence" as important support for a unit's community of interest, even where the unit does not correspond to any single administrative division of an employer.<sup>8</sup> Here, the support is even stronger because the Metro and Upstate groups constitute de facto separate divisions for the reasons explained above.

Next, the MNY sales representatives' terms and conditions of employment also weigh strongly in favor of finding the petitioned-for unit appropriate. Although the MNY and UNY sales representatives receive the same generally applicable commission rates and are subject to the same handbook (to which all of the Employer's employees are subject), the differences between the geographic territories in which the two groups are based (and therefore the areas in which they sell) create distinct collective-bargaining interests for the two groups, primarily with respect to compensation. Although the record does not disclose any sales representative's annual compensation or provide salary ranges for them, MNY

<sup>3</sup> In any event, the record indicates that the Employer has designated one managerial point of contact (Senior Portfolio Manager Bill LoVine) for certain Upstate matters while designating different points of contact (Director of Sales Joshua Muska and Executive Vice President Steven Hutchinson) for the same Metro matters.

<sup>4</sup> For example, although the record indicates that senior management makes the final decision for hiring a new sales representative and that the Employer's handbook governs issues such as discipline and discharge, which are "handled through" Human Resources, there is a lack of evidence concerning the precise involvement (or lack thereof) that Region managers have in those matters. See, e.g., *Audio Visual Services*, supra, slip op. at 3 & fn. 5 ("there may be some degree of centralized management, but the record evidence is too insubstantial to accord this factor meaningful weight").

<sup>5</sup> There is no evidence that higher-level managers are involved in that process.

<sup>6</sup> See *Gerber Products Co.*, 172 NLRB 1698, 1699 (1968) ("Inasmuch as Rochester salesmen rarely meet with the Pittsburgh district manager, the Rochester manager is thus the principal representative of company authority and policy insofar as these salesmen are concerned.").

The Employer is incorrect in asserting that the petitioned-for unit is inappropriate due to the lack of a formal managerial link common to all of the petitioned-for employees that is not also common to the excluded employees. See, e.g., *AT&T Mobility*, supra, slip op. at 2 & fn. 9.

<sup>7</sup> Although there is some overlap—9 MNY sales representatives service a total of 21 accounts in Upstate territory and 2 UNY representatives service a total of 3 accounts in Metro territory—it is unclear how many total accounts each of these representatives has or what percentage of their sales come from "out-of-territory" accounts. In any event, such modest overlap does not undercut the unit's geographic coherence. See *Buitoni Foods Corp.*, 111 NLRB 638, 638 & fn. 1 (1955) (unit limited to 26 salesmen in New York metropolitan area appropriate despite 1 salesman who performed work in excluded area). Moreover, the MNY sales representatives in question appear to work in areas that, although in the Employer's Upstate market, are still part of the New York-Newark-Jersey City MSA (i.e., Dutchess and Putnam counties).

<sup>8</sup> *Central Power & Light Co.*, 195 NLRB 743, 745–746 (1972); see also *Panera Bread*, 361 NLRB 1236, 1236 fn. 1 (2014); *Drug-Fair Community Drug Co.*, 180 NLRB 525, 527 fn. 10 (1969).

representatives have a far greater percentage of on-premises sales (such as restaurants, bars, and nightclubs) than their UNY counterparts; conversely, UNY sales representatives have a larger percentage of off-premises sales (such as retail stores) than their MNY counterparts. These differences in sales type directly affect the MNY and UNY sales representatives' compensation because the Employer pays different commission rates for on-premises versus off-premises sales. MNY and UNY sales representatives thus have different (and potentially even opposing) interests with respect to any changes to commission rates. Indeed, as the Regional Director noted, MNY sales representatives have previously sought (through the Metro Sales Club—an employee group composed of MNY sales representatives) separate, higher commission rates. As Board precedent recognizes, a wage differential could become a “prime source of friction” during collective-bargaining negotiations were the two groups included in the same unit.<sup>9</sup> Such is the case here, where MNY sales representatives depend far more on sales to on-premises clients than do UNY sales representatives.

In addition to commission-based differences, the two groups' geographic locations result in numerous other differences in their terms and conditions of employment. First, the Employer effectively requires MNY sales representatives to take their vacations during the Employer's Glen Rock, New Jersey twice-annual warehouse shutdowns; such closures do not similarly dictate the UNY sales representatives' vacation schedules. Second, prior to the Covid-19 pandemic, MNY and UNY sales representatives attended different trade shows. Third, MNY sales representatives are paid a different amount for travel reimbursement than is paid to UNY sales representatives, and MNY sales representatives generally use different methods of travel than UNY sales representatives, who nearly exclusively drive. Fourth, there is a difference in the products that MNY and UNY sales representatives are able to sell, are required to sell, and are incentivized to sell, with those differences being reflected in different price books (which list most, but not all, of the same products), separate quotas, and separate incentive programs. Fifth, the product delivery timeframe for MNY sales representatives is almost always shorter than the delivery timeframe for UNY sales representatives, effectively permitting the MNY representatives to service their

customers more efficiently while disadvantaging the UNY representatives regarding their own sales and commissions. Sixth, MNY and UNY sales representatives obtain their product samples by different methods, typically resulting in MNY representatives getting samples more quickly, which, in turn, supports sales by allowing a customer to promptly taste a product before buying it. Seventh, MNY sales representatives are more likely to work later hours because those who cover the New York City area typically have nightclub clients who are more apt to meet with sales representatives between 10 pm and 2 am than during traditional daytime hours. Finally, the record indicates that competition for selling products is likely much greater in Metro New York than in Upstate New York because there are a greater number of distributors in the Metro area.

The factors of employee interchange and functional integration also support the petitioned-for unit. There is no evidence of interchange between MNY and UNY sales representatives, and therefore no basis for finding that this factor supports the Employer's desired statewide unit. Although the lack of evidence of interchange among the MNY sales representatives might detract from the appropriateness of the petitioned-for unit under other circumstances, it is not significant here given that (1) MNY sales representatives work primarily from home rather than reporting to the Employer's facility, and (2) sales representatives all have certain clients and areas they service and must give up those clients (and presumably begin anew) if they move to a different area; they therefore cannot merely “substitute” for one another but must acquire work through building customer relationships. Regarding functional integration, there is no evidence that the MNY and UNY sales representatives are integrated or dependent upon one another to perform their jobs. Rather, each sales representative generally works independently to meet his or her individual goals. Occasional incentive program payments to particular teams for attaining the highest overall sales of a designated product during a period offer the only evidence of sales representatives working together in any capacity. That evidence plainly does not show functional integration between the MNY and UNY sales representatives.<sup>10</sup>

<sup>9</sup> *Executive Resource Associates*, 301 NLRB 400, 402, 404 (1991).

<sup>10</sup> Contrary to the Employer's assertion, functional integration is not established by the fact that each sales representative's sales losses or gains contribute to the Employer's overall profits or losses. The Board has never viewed functional integration through that lens, and with good reason: the success or failure of one facility, unit, or group will always contribute to an employer's overall financial status. Accordingly, such shared contributions to an employer's overall financial status do not

meaningfully bear on the existence of a community of interest among a particular group of employees. See *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) (unit determinations “must have a direct relevancy to the circumstances within which collective bargaining is to take place” in order to fulfill the “two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining.”).

As for the remaining factors, the employees' common skills and duties favor a broader, New York-wide unit, and the bargaining history factor is neutral.<sup>11</sup>

In sum, weighing all of the factors here, as well as the fact that the Employer treats the Upstate and Metro New York operations as de facto separate divisions, we conclude that the petitioned-for unit of Metro sales representatives has a distinct community of interest and is therefore an appropriate unit.

#### ORDER

The Regional Director's Decision and Direction of Election is affirmed.

Dated, Washington, D.C. October 8, 2021

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Lauren McFerran, Chairman

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Marvin E. Kaplan, Member

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John F. Ring, Member

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<sup>11</sup> Regarding bargaining history, the parties stipulated that there is none; we therefore disavow the Regional Director's conclusion that the

Metro Sales Club's discussions with the Employer's higher-level managers constitute "bargaining history."