11/9/01

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

F. B. PURNELL SAUSAGE CO., INC. [1]/

Employer

and Case 9-RC-17594

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 227, AFL-CIO-CLC [2]/

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, [3]/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is engaged in the manufacture of sausage and related food products at its Simpsonville, Kentucky facility. In the petition, the Petitioner seeks to represent a unit of all employees employed at the Employer's Simpsonville, Kentucky facility excluding all office

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[1]/ The name of the Employer appears as amended at the hearing.

[2]/ The name of the Petitioner appears as amended at the hearing.

[3]/ The Employer timely filed a brief which I have carefully considered in arriving at my decision. Although given the opportunity to do so, the Petitioner did not file a brief.

clerical employees, sales employees, truck drivers and all professional employees, guards and supervisors as defined in the Act. The petition indicates that there are 175 employees in the unit sought. At the hearing, the parties agreed that in addition to the exclusion stated in the petition the two mechanics and electronic maintenance employees should be excluded from any unit found appropriate. The only employees whose status was raised at the hearing were six production/maintenance employees, also referred to herein as general maintenance employees, [4]/ whom the Employer, contrary to the Petitioner, would include in the unit. The employees who are undisputedly included in any unit found appropriate were characterized by the hearing officer as production employees. [5]/ The Employer declined to characterize this group of employees as being production employees, and instead referred to them as "all employees" except those specifically excluded by agreement of the parties. The Petitioner did not place a specific characterization on the group of employees it was seeking to represent. The record does not identify any other statutory employees, except for the general maintenance employees, that the parties have not agreed to either include or exclude from the unit. The Petitioner is willing to proceed to an election in any unit found appropriate. There is no history of collective bargaining affecting any of the employees at issue in this proceeding.

The parties stipulated that the following individuals, whose areas of responsibility are indicated by their names, are all hourly foremen or hourly supervisors who have authority to evaluate the performance of employees and to assign them work using independent judgment: Richard Wise, cooked product; James Perry, breakfast links; Timmy Richardson, patty room; Arun Inman, another patty room; David Wise, sausage and biscuit; Clarence White, kill floor; Tommy Wise, KP Packaging; Martin Shelburne, deboning; Leroy Wise, kill floor/deboning; Charles Smith, general maintenance, and Jackie Donovan, clean up. The parties further stipulated and I find based on the record as a whole that these individuals are supervisors within the meaning of Section 2(11) of the Act. Accordingly, they are excluded from the Unit found appropriate. I note that the record does not reflect whom these individuals supervise or the identity of their immediate superiors. [6]/ However, based on their supervisory authority and job titles, it is likely that they are first level supervisors who directly supervise employees.

The parties stipulated that Ray Barnes, plant superintendent, has the authority to hire and fire and should be excluded from any unit found appropriate. In accordance with the stipulation of the parties and the record as a whole, I find that Barnes is a supervisor within the meaning of Section 2(11) of the Act and is excluded from the unit on that basis.

The parties stipulated that Bill Nethery, Plant Manager; Allen Purnell, CEO; Bob Purnell, Company Secretary; Dick Shearer, Controller; Todd Purnell, President; Lynn Chesser, Human Resources; the Retail Sales Manager; the Truck Fleet Manager and the Assistant Truck Manager

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[4]/ The six employees in dispute were referred to on the record as production/maintenance employees. All of them perform maintenance work in support of the production process. Lynn Chesser, who performs the Employer's human resources functions, testified that these six employees were maintenance employees who do not spend any time performing production tasks. For purposes of semantic clarity, I shall also refer to these employees as general maintenance employees to distinguish them from the electronic maintenance employee and the two truck mechanics whom Chesser characterized as being in maintenance.

[5]/ Chesser's testimony makes specific references to "production employees" but the record does not clearly define what he meant by that term.

[6]/ The Employer, in its brief, citing page 12 of the transcript, asserts that all of the hourly supervisors report to Ray Barnes, plant superintendent. However, page 12 of the transcript merely reflects the parties' stipulation as to Barnes' supervisory status and does not indicate who his superiors or subordinates might be.

should be excluded from any unit on the basis that they are supervisors or managerial employees. In accordance with the parties' stipulation, I shall exclude them from the Unit.

Chesser testified that the Employer's operations are divided into departments for payroll purposes with department 150 being part of the maintenance payroll department, department 160 truck maintenance, department 149 being the electronic specialist in maintenance, department 130 cooked products, department 131 breakfast links, departments 135 and 136 patty rooms, department 137 sausage and biscuit, departments 140 and 142 slaughter department consisting of kill floor and deboning, department 141 KP packaging and department 170 clean up. Chesser related that as far as production work goes, there were no other department numbers. Chesser testified that each department has a separate supervisor. [7]/

All the meat processing functions are performed on the day shift which begins at 6 a.m. and ends around 2:30 p.m. or 3 p.m. when the production for the day is completed. The slaughter area receives live hogs which are killed, skinned and eviscerated to create a carcass which is then cleaned in preparation for USDA inspection before going to the deboning area. In the deboning area, the carcasses are cut into manageable pieces from which the bones are removed. After deboning, the meat is processed by employees through machinery which performs further functions such as grinding, emulsifying, stuffing into edible casing or plastic retail packaging, cooking, freezing, slicing and packaging. The record does not disclose the number of meat processing employees at the Simpsonville plant. [8]/

All six general maintenance employees at issue are listed by the Employer in payroll department 150. Charles Smith, whom the parties stipulated was a supervisor with responsibility for production/maintenance, is listed by the Employer in payroll department 150. Besides Smith and the general maintenance employees, there is no evidence that any other individuals are listed in payroll department 150. Although the record does not specifically identify Smith as the supervisor for the general maintenance employees, his area of responsibility and his payroll department listing are an indication that he is their supervisor. [9]/

The general maintenance employees work the same day shift hours as the meat processing employees. All of the general maintenance employees perform repair and routine preventative maintenance on the machinery used by the meat processing employees, such as changing motors, belts, chains, bearings, oil and grease. They work on the meat processing machines when a breakdown occurs or when a part needs to be changed. [10]/ Carl Barnes is a general maintenance

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[7]/ There is a correlation between the descriptions of the payroll departments and the areas of responsibility for the hourly foremen and hourly supervisors. However, Chesser also described payroll departments 140 and 142 as being part of the slaughter department and it would appear that he considers departments 150 (general maintenance), 160 (truck mechanics) and 149 (electronic maintenance) to all be a part of maintenance. Thus, the notion of what constitutes a department is not entirely clear from the record.

[8]/ In portions of his testimony, Chesser referred to the meat processing employees as production employees. Elsewhere in his testimony Chesser also seemed to include the general maintenance employees and/or the clean up employees in his references to production or production employees.

[9]/ The record does not disclose the identity of the immediate supervisor of the two truck mechanics and the electronic maintenance employee whom Chesser characterized as being part of maintenance and whom the parties agree should be excluded from any unit found appropriate.

[10]/ Contrary to the assertions in the Employer's brief, the record does not contain evidence that the general maintenance employees are "working alongside" the meat processing employees while performing these maintenance tasks.

employee who spends about 85 to 90 percent of his time repairing machinery in the meat processing area and the remainder of his time transporting component parts to and from the maintenance shop or repairing those component parts at the maintenance shop. Contrary to the assertions in the Employer's brief, the record does not reflect whether this division of time between the meat processing areas and the maintenance shop is typical of other general maintenance employees. Wallace Clark and Thomas Hardesty are general maintenance employees who, in addition to performing work on meat processing machines, also do routine preventative maintenance on the Employer's ammonia refrigeration unit and possess statutorily required certifications to perform that work. Clark spends about 40 to 50 percent of his time on ammonia refrigeration work while Hardesty spends about 30 percent of his time performing that work.

The maintenance shop is located in a separate building about 75 to 100 feet from the main building where the meat processing employees work. The Employer attempts to limit access to the maintenance shop to maintenance employees. Charles Smith, the supervisor with responsibility for general maintenance, has an office in a separate building about 50 feet from the main building on the opposite side from the maintenance shop.

The clean up employees work at night. The record does not disclose their hours of work. They disassemble meat processing equipment and clean it with sanitizing solution using pressurized hoses and hand cleaning methods. Portions of meat processing equipment which should not be exposed to the cleaning solution are disassembled and secured by meat processing employees at the end of their shift, while the remaining meat processing equipment is disassembled and cleaned by the clean up employees at night. The record does not disclose the number of clean up employees employed at the Simpsonville plant.

Chesser testified that the maintenance employees receive the same benefits as the production employees, that they have the same starting wage rate of $7 per hour, that the average wage rate for production employees is $9.30 per hour, and that the highest paid production employee receives $15.54 per hour. [11]/ Payroll records received in evidence show that of the six general maintenance employees at issue, the lowest paid employee earns $7.50 per hour, the average pay is $11.29 per hour, and the highest paid employee earns $16.75 per hour.

Although the record does not indicate whether prior maintenance experience is required, the Employer has not hired any general maintenance employees who did not have prior experience. In contrast, however, the Employer does not require the production employees it hires to have any prior experience.

Charles Smith, the general maintenance supervisor, and Somnuk Kongkran, the electronic maintenance employee (who the parties agree should be excluded from any unit found appropriate) began their employment with the Employer as production employees. Chesser testified that the maintenance employees spend all of their time performing maintenance work and that they do not perform production work or otherwise process the product. He related that there are instances where a few employees (presumably meat processing employees) will make adjustments to the packaging machines, that a meat processing employee may directly contact a general maintenance employee by radio requesting a repair to a machine, and that more than one general maintenance employee may work together on a machine when an extra set of hands are

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[11]/ For reasons set forth above, the record is unclear what Chesser means by the term "production employees."

needed. There was no additional evidence regarding interchange, work related contact or functional integration between the general maintenance employees and the employees in the unit sought by the Petitioner, nor does the record specify the frequency of such interchange, work related contact or functional integration which might exist.

ANALYSIS:

Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining. The statute does not require that the unit sought for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Co*., 91 NLRB 409, 418 (1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a particular employer may be grouped for purposes of collective bargaining. *Overnite*, supra; *Home Depot USA*, 331 NLRB No. 168, slip. op. p. 3 (2000). In *Home Depot*, the Board recognized that employees often have a dual community of interest with certain factors supporting their inclusion in the same unit with other employees and certain factors favoring their separate representation. As the Board explained at Section III(B)(4)(b) of its decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173, slip. op. p. 9 (2000), "That some of the employees working for [an] employer may have some differing terms and conditions of employment from those of their colleagues does not ordinarily mean that those employees cannot be included in the same unit, although it might, in some circumstances, permit them to be represented in a separate unit." It is possible, therefore, that community of interest factors may ***permit*** a group of employees to be appropriately represented in a combined unit with other groups of employees while the same community of interest might also ***permit*** their separate representation, without ***requiring*** their representation in either a combined or a separate unit. See, *Engineering Storage Products*, 334 NLRB No. 138 (2001). [12]/

Although the broader unit urged by the Employer may be appropriate, it has no bearing on whether the petitioned-for unit may also be appropriate. *Overnite*, supra. [13]/ In deciding whether the petitioned-for unit of drivers and dock workers excluding mechanics was appropriate in *Overnite,* the Board considered whether the mechanics could constitute a separate appropriate unit. Upon finding that the mechanics could constitute a separate unit, the Board concluded that the mechanics did not share such a close community of interest with the drivers and dock workers to require their inclusion in the unit sought by the union. Thus, in the instant matter, to determine whether the unit sought by the Petitioner is appropriate, I must decide whether the community of interest of the general maintenance employees might permit them to appropriately enjoy separate representation. See, *Lawson Mardon USA*, 332 NLRB No. 122 (2000), where the Board, citing *Capri Sun, Inc.*, 330 NLRB No. 158 (2000); noted its long standing policy of

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[12]/ In its brief, the Employer maintains that the factors demonstrating a community of interest between the general maintenance employees and the employees sought by the Petitioner have been met. However, in light of the foregoing precedents, it is not relevant that a community of interest might exist which would permit the general maintenance employees to be represented in the overall unit urged by the Employer. Although the general maintenance employees may share a community of interest with the other employees, for reasons set forth below, I find that this community of interest is not so strong as to require their inclusion in the overall unit.

[13]/ The Employer's argument in its brief that a production and maintenance unit is the quintessential appropriate bargaining unit simply has no impact on whether the unit sought by the Petitioner might also be appropriate.

finding maintenance units appropriate where such employees have a requisite community of interest with no history of bargaining on a more comprehensive basis. In determining whether a requisite community of interest exists, the Board examines such factors as mutuality of interest in wages, hours and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Capri Sun*, supra.

In the instant matter, the general maintenance employees are established in their own department with their own supervisor. [14]/ They perform machine maintenance and repair functions which are distinct from the functions of the employees sought by the Petitioner. Thus, the latter employees process meat, operate the machinery or clean machinery at night. Because the Employer hires general maintenance employees with prior experience while not requiring experience of the employees sought by the Petitioner, it appears that the general maintenance employees have a greater level of skill which is manifested in their generally higher wage rates. These differences in supervision, department, function, skill and pay indicate that the general maintenance employees constitute a distinct and recognizable grouping of employees separate and apart from the employees in the unit sought by the Petitioner. See, *American Cynamid Company*, 131 NLRB 909 (1961), relied upon in *Capri Sun*, supra, where the Board found that the maintenance employees, like those here, were established in their own departmental sections, had their own supervision and performed varied maintenance work for the entire plant exercising the particular skills required by that function. Upon these facts, the Board found that "maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation." *Id.* at 910.

This separate identity of the general maintenance employees is reinforced by the lack of evidence of any significant interchange, work related contact or functional integration with the employees in the unit sought by the Petitioner. Although the general maintenance employees work the same hours as the meat processing employees and all of the employees receive the same benefits, such common factors do not destroy the separate community of interest shared by the maintenance employees.

Having weighed the factors indicating a commonality of interest against those manifesting the separate identity of the general maintenance employees, I conclude that their separate identity could permit them to appropriately enjoy representation separate from the employees sought by the Petitioner. *American Cynamid*, supra; *Capri Sun*, supra. The evidence

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[14]/ As noted above, the Employer's departmental and supervisory structure is not absolutely clear from the record. However, the structural ambiguity which exists appears to involve a question as to whether the truck mechanics and the electronic maintenance employee might also share common supervision and the same department with the general maintenance employees. Any commonality that the general maintenance employees might share with the truck mechanics and the electronic maintenance employee would tend to militate towards exclusion of the general maintenance employees from the unit sought because the truck mechanic and the electronic maintenance employee are excluded from that unit by agreement of the parties.

The record does not identify any one supervisor common to all of the employees sought by the Petitioner who is not also a supervisor of the general maintenance employees. This circumstance, however, does not mitigate the separate nature of the general maintenance employees' supervision. See, *American Cynamid*, 130 NLRB 1 (1961), vacated at 131 NLRB 909 (1961), where the Board found appropriate a unit of maintenance employees employed in the maintenance section of the engineering department combined with maintenance employees in the utility section of the production department and *Yuengling Brewing Company of Tampa*, 333 NLRB No. 104 (2001), where the maintenance supervisor shared a common immediate superior with two production supervisors and the Board found that the maintenance employees did not share common supervision with the production employees.

is, therefore, insufficient to compel the inclusion of the maintenance employees in the unit sought by the Petitioner. *Lawson Mardon*, supra. [15]/ Accordingly, I shall exclude the maintenance employees from the unit found appropriate.

The Employer argues in its brief that excluding the general maintenance employees from the overall unit would violate Section 9(c)(5) of the Act which provides that the extent to which employees have organized shall not be controlling of whether a unit is appropriate for purposes of collective bargaining. It is well settled that in determining whether a unit is appropriate, the extent of organization may be a factor evaluated but it cannot be given controlling weight. *NLRB v. Metropolitan Life Insurance Company*, 380 U.S. 438, 422 fn. 4 (1965); *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996). Nevertheless, I have not considered the extent of organization in arriving at my unit determination. [16]/ I have considered only whether the unit sought by the Petitioner is an appropriate one under traditional community of interest standards without reference to extent of organization. If the Petitioner's extent of organization happens to coincide with the unit it seeks, it does not constitute any basis for concluding that a unit which is otherwise appropriate under traditional community of interest analysis is no longer appropriate.

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in the Employer's brief, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

> **All employees employed by the Employer at its Simpsonville, Kentucky facility, but excluding all office clerical employees, sales employees, truck drivers, truck mechanics, electronic maintenance employee, maintenance employees and all professional employees, guards and supervisors as defined in the Act.**

Accordingly, I shall direct an election among the employees in such unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the

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[15]/ In its brief, the Employer distinguishes *Lawson Mardon* on the basis that the maintenance employees in that case performed substantial electrical work as well as maintenance work in support of employees outside the unit. The Employer fails to explain, however, how these factual differences might affect community of interest considerations. I have relied on *Lawson Mardon* primarily for the general proposition that a group of maintenance employees may be excluded from a unit of other employees where their separate representation might be permitted. I note moreover that in *Lawson Mardon*, the maintenance employees had a greater degree of interchange, contact and working together with production employees than is revealed by the evidence in the instant matter. The Employer does not cite any precedents in which the inclusion of maintenance employees in a broader unit was required.

[16]/ I note that the record does not contain any evidence regarding the extent to which employees have organized.

United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Food and Commercial Workers International Union, Local 227, AFL-CIO-CLC.**

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **November 16, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 23, 2001**.

Dated at Cincinnati, Ohio this 9th day of November 2001.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

440-1760-0500