

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

BRUNO'S SUPERMARKETS, INC. d/b/a  
FOOD MAX STORES ALABAMA

Employer

and

Case 10-UC-226

UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 1657, AFL-CIO

Union-Petitioner

DECISION AND ORDER DISMISSING PETITION

Upon a petition duly filed under Section 9(b) 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 referred to as 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<sup>1</sup> in this proceeding 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, Food Max Stores Alabama, (herein referred to as Employer or Food Max) is a Delaware corporation engaged in the retail grocery business at various facilities in Alabama. During the past calendar year, a representative period, the Employer received gross revenues in excess of \$500,000. During the same period, the Employer sold goods and services

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<sup>1</sup> Briefs filed by the Employer and the Union-Petitioner have been duly considered.

to customers outside the State of Alabama valued in excess of \$50,000. Accordingly, the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Unit Clarification Petition: The Union-Petitioner filed the instant petition on May 7, 2002, during the term of the current contract effective 2001-2005 covering the Food Max bargaining unit. The Union-Petitioner seeks to clarify the existing bargaining unit to include the position of Customer Service Manager, which is a title that has been used interchangeably with the title of Front End Manager<sup>2</sup>. For the reasons set forth below, I find that the Customer Service Managers have been historically excluded from the unit, and therefore cannot be added to the unit by means of unit clarification.

4. Positions of the Parties: The Union-Petitioner asserts that the Employer has been “illegally excluding” Customer Service Managers from the bargaining unit. The Union-Petitioner contends that clarification to include this position in the unit is appropriate because: a) the recognition clauses of the successive contracts at Food Max format stores did not expressly exclude the Customer Service Manager position, b) a November 8, 2000 Memorandum of Understanding (MOU) between the parties contemplated the bargaining unit inclusion of Customer Service Managers in Food Max format stores, and c) because Customer Service Managers are non-supervisory employees who share a community of interest with bargaining unit employees.

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<sup>2</sup> Although the petition in the instant case was filed during the term of the current Food Max contract, I do not find the petition to be untimely. The Board, as a general rule, will find a unit clarification petition to be untimely when filed during the term of a contract that clearly defined the unit and specifically named the job classifications in dispute. See e.g., Wallace-Murray Corp., 192 NLRB 1090 (1971). Here, the Customer Service Managers are not specifically named in the coverage clause of the current contract. Further, it is undisputed that the parties mutually agreed during contract negotiations for the current contract that the Union-Petitioner could reserve the right to file a clarification petition over this issue after the completion of negotiations.

The Employer argues that the Customer Service Manager position, in practice, has historically been excluded by the Employer from the bargaining unit and that the Union-Petitioner first sought representation of this position in the year 2000. Relying upon the same November 8, 2000 MOU, the Employer asserts that the Union-Petitioner agreed therein to exclude the Customer Service Manager position in exchange for the Employer's agreement to include the Assistant Market Manager position in the bargaining unit. The Employer argues that the Union-Petitioner should be required to honor the promise it agreed upon in the MOU. The Employer also argues that unit clarification is inappropriate in the instant case because the Union-Petitioner seeks to accrete positions that have been historically excluded from the unit.

4. Bargaining History and Applicable Contract Language: The bargaining unit at issue in the subject case is covered under the Food Max contract. The record discloses that the parties have been signatory to successive collective bargaining agreements covering wall-to-wall units at the Food Max format stores since at least 1986. There are approximately five Food Max stores. In addition to the contracts covering the Food Max format stores, the parties are signatory to separate contracts with other supermarket subsidiaries owned and operated by Bruno's Supermarkets. These include Food World of Alabama, Bruno's Food and Pharmacy, Food Fair, Food World of Florida, Fresh Value, and Liquor Stores of Florida.

In the current collective bargaining agreement covering the Food Max bargaining unit, which is effective May 27, 2001 through May 22, 2005, Article V - Coverage provides:

The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all employees in all present and future retail establishments of Bruno's Supermarkets, Inc., for its stores operated under the name of Food Max or any other name the Employer may purchase or acquire through any acquisitions or successorship, situated within the jurisdiction of UFCW Union Local 1657, AFL-CIO, with respect to rates of pay, hours of work, and all other conditions of employment, *excluding the Store Manager, the Assistant Store Manager(s), Market Manager*, Watchmen, Guards, and all other Supervisors as defined in the LMRA, as amended. (emphasis added)

The Union-Petitioner introduced into evidence copies of the parties' 1986-1989, 1989-1992, and 1997-2001 Food Max contracts. The exclusions in the "coverage" clause for all these contracts contain identical language with respect to the exclusions, i.e., expressly excludes the Store Manager, Assistant Store Manager, Market Manager, Watchmen, Guards and statutory Supervisors.

5. Events Leading To Execution of the November 8, 2000 Memorandum of Understanding: As noted above, both parties rely on the November 8, 2000 MOU to support their respective positions. The Union-Petitioner asserts that in the year 2000, it learned that the Employer had been excluding the Customer Service Manager position from the Food Max format stores and had been excluding certain other job positions from the bargaining units at various other subsidiaries. During the summer to fall of 2000, the parties held several negotiating meetings in an effort to resolve these unit placement issues along with other outstanding issues. They were able to reach agreements on most of these issues, including the unit placement of certain positions in the bargaining units for Food Max and other subsidiaries.

The parties' agreements were memorialized in a letter dated November 8, 2000, from the Employer's attorney, who represented the Employer in the negotiations, to the Union-Petitioner's President, who represented the Union. The parties subsequently executed this same letter as a Memorandum of Understanding (MOU). The parties disagree over the meaning and interpretation of key provisions of this MOU.

The disputed provisions of the MOU are found at pages 2 and 3 of the document under a section entitled "Exclusions," which states in relevant part:

5. Exclusions – In all non-Food World of Alabama formats under contract with UFCW Local 1657, *the current contractual exclusions would remain with the exception of the Assistant Market Manager position. This position will become part of the bargaining unit in exchange for excluding a customer service*

***manager in those formats.*** The following job titles will remain and become classifications in their respective formats, . . . ***These jobs will be included in the collective bargaining unit and all current employees occupying these jobs will be eligible for Union membership.*** The job titles which appear in the *matrix* below are job titles identified in your letters dated April 14, 2000 and February 7, 2000. . . . (emphasis added).

The above-quoted language in the MOU is followed by a table, which the parties call a matrix. This matrix lists various job classifications in the left column with columns across the top of the table labeled with the names of the various non-Food World of Alabama store formats (Bruno's, Food Max, Food World Florida, Fresh Value, Food Fair, Liquor Florida) that are covered by the MOU. The columns and rows of the matrix are marked with an "X" to designate those particular job classifications that will be included in the respective bargaining units. The Assistant Market Manager position is listed on the matrix with an "X" marked for all formats, including the Food Max stores, except for the Liquor Florida stores. The Customer Service Manager classification is not listed on the matrix, although the job classification of "Assistant Customer Service Manager" is listed as a bargaining unit position for all formats. The Food Max column on the matrix references a footnote 1, which states: "In Food Max format stores, the Company will retain the current contract exclusions."

The President of Union-Petitioner testified about the Union's interpretation of the above-quoted provisions of the MOU, i.e., the mutual agreement to include the Assistant Market Manager position in the unit in exchange for excluding the Customer Service Manager position. He asserts that this agreement applied to all store formats referenced in the matrix *except* the Food Max format. He explains that he would not have made this trade for the Food Max format because those stores did not have any positions to swap, and consequently, relying on the language of footnote 1 in the MOU's matrix referenced above, the parties agreed to abide by the

original coverage language in the Food Max contract and thus, exempt, the Food Max Stores from the MOU.

To the contrary, the Employer's attorney testified that rather than a format-by-format discussion, the negotiations centered on all formats (except for the Food World of Alabama format that was not a subject of the negotiations). The Employer asserts that it was understood that *all* Customer Service Manager positions in the formats discussed in the matrix would be excluded from the unit and *all* Assistant Market Manager positions in these same formats would become part of the bargaining unit. In addition, the Employer argues that there is no difference between the duties of the Customer Service Managers at Food Max and the duties of this position in the other formats.

After reaching the November 8, 2000 MOU, the parties met and negotiated pay rates for some of the previously salaried positions, which had been excluded but would now be included in the bargaining units. The Employer disputes the Union-Petitioner's contention that the parties met and negotiated pay rates for the Customer Service Manager. The Employer denies that there were any discussions regarding the rate of pay for Front End/Customer Service Managers and asserts that the Employer has historically set the rate of pay and other terms and conditions for this position.

In mid-to late 2001, the parties commenced negotiations for the current Food Max collective bargaining agreement effective 2001-2005. During these negotiations, it was apparent that the parties had a difference of opinion about the interpretation of the MOU with respect to the unit placement of the Customer Service Manager. The parties agreed to reserve this issue and that the Union could either arbitrate or file a unit clarification petition.

### **Analysis and Conclusions**

Based on the foregoing, and the record as a whole, I find that the overwhelming evidence in this case establishes that the parties have had a custom and practice of historically excluding Customer Service Manager from the Foods Max bargaining unit since 1986. Since no party has established that recent and substantial changes have occurred in this position or that the position is newly created, the Union-Petitioner's claims are not appropriately resolved in a unit clarification proceeding. Accordingly, I shall dismiss the petition that seeks to clarify the unit to include Customer Service Managers at the Food Max format stores.

Unit clarification may be appropriate where an employee classification has been newly created or where an existing classification has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether that classification should be accreted to an existing unit. Union Electric Co., 217 NLRB 666 (1975). However, unit clarification may not be used to add a classification that has been historically included or excluded from the unit. Id. Rather, a petition seeking to include a classification historically excluded from the unit raises a question concerning representation, which can be resolved through an election or based on majority status. Further, there is no requirement of acquiescence to the historical exclusion; it is the fact of the historical exclusion that is determinative. Robert Wood Johnson University Hospital, 328 NLRB 912 (1999) citing United Parcel Service, 303 NLRB 326, 327 (1991).

I reject the Union-Petitioner's contention that this disputed classification should be included in the unit because, since 1986, the coverage clauses of the successive Food Max collective-bargaining agreements have not specifically excluded this classification. These successive agreements do not expressly refer to this classification in either the unit inclusions or exclusions. The record evidence supports the conclusion that the first time the parties formally

discussed the unit placement of Customer Service Managers was in 2000 leading up to the negotiations that resulted in the September 8, 2000 MOU. There is no evidence that the parties, during negotiations for these successive contracts, specifically bargained over the terms and conditions of Customer Service Managers. In these circumstances, I do not find the contract language to be controlling. The record evidence does, however, support the conclusion that the Front End/Customer Service Managers, in fact, have been excluded from the unit for approximately the past 15 years. The only contrary record evidence is testimony by Union-Petitioner's President that he thought an employee or employees holding this position had been in the bargaining unit, his suggestion that the Customer Service Manager title was a newly created position, and his testimony that the parties negotiated pay rates for the position after the MOU was executed.

The Union-Petitioner presented no documentary evidence to support its claim that Front End/Customer Service Managers had been members of the bargaining unit. Moreover, the Union-Petitioner does not reiterate this claim in its post-hearing brief. In his testimony at the hearing, the Union-Petitioner's President asserted that this position should have been included, but he ultimately agreed that the Front End Manager had historically been excluded from the unit. In its post-hearing brief, the Union-Petitioner conceded that these job titles had been used interchangeably. Whether these employees are referred to as Customer Service Managers or Front End Managers, the record is undisputed that they have retained basically the same job functions.

With respect to the negotiation of pay rates for the disputed position, the Union-Petitioner's President testified that after executing the MOU, the parties met and negotiated pay rates for various positions previously excluded from the unit, including the Customer Service Managers at the Food Max stores. In support of this testimony, the Union-Petitioner introduced

into evidence, as part of its Exhibit 14, a three-page document entitled “Human Resource Representatives,” which purports to list an hourly wage for Customer Service Managers and other job classifications.

The Employer flatly denies that the parties negotiated pay rates for Customer Service Managers and asserts that no changes were made to the pay for this classification because it continued to be an excluded position. The Employer’s Vice-President of Labor Relations testified that the document entitled “Human Resource Representative” was unrelated to any pay rate negotiations and that this document was provided to the Union in compliance with its request for a list of all individuals that had been designated to have any type of human resource responsibilities in the retail operations. Both parties acknowledge that there were issues involving the position of Human Resource Representative and one or more of these employees may have been performing the duties of other job classifications. The Employer concedes that it made changes in March 2001 to the pay structures for the positions that were listed on the matrix that were to be included in the unit. In its post-hearing brief, the Employer argues that a review of the record reveals that the testimony about pay rate negotiations concerned rates for Human Resource Representatives, a position that was ultimately included in the unit.

At the hearing, the Union-Petitioner did not dispute the above testimony by the Employer’s Vice-President of Labor Relations. In its post-hearing brief, it repeats the bare assertion that wage rates were negotiated for the Customer Service Manager. However, a Customer Service Manager, called as a witness by the Union-Petitioner, testified that she was salaried. Considering the record as a whole, I do not find a basis for concluding that the Employer negotiated bargaining unit pay rates for Customer Service Managers.

For the reasons stated above, I find insufficient evidence to rebut the overwhelming weight of the evidence establishing that the Customer Service Managers have been historically excluded from the unit. Since no valid issue has been raised concerning the unit placement of

the Customer Service Managers that is appropriate for resolution in a unit clarification proceeding, I shall dismiss the Union-Petitioner's unit clarification petition.<sup>3</sup>

**ORDER DISMISSING PETITION**

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

**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, NW, Washington, DC 20570. This request must be received by the Board in Washington by July 8, 2002.

Dated at Atlanta, Georgia, on this 21<sup>st</sup> day of June, 2002.

/s/ Martin M. Arlook  
Martin M. Arlook, Regional Director  
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<sup>3</sup> In view of my conclusion that Customer Service Managers have been historically excluded from the unit, I do not find it necessary to analyze and make findings concerning the parties' conflicting interpretations of the MOU or the community of interest and supervisory issues.