

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

INTERSTATE BRANDS CORPORATION<sup>1</sup>

Employer

and

BAKERY, CRACKER, PIE, YEAST DRIVERS & MISCELLANEOUS WORKERS UNION, LOCAL 734, IBT

Petitioner

Case 13-RC-20928

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter 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>2</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 is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3</sup>

3. The labor organization(s) involved claim(s) 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 following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:<sup>4</sup>

See Attachment A

**DIRECTION OF ELECTION\***

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) 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(s) 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. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the 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 Bakery, Cracker, Pie, Yeast Drivers & Miscellaneous Workers Union, Local 734, IBT.

#### LIST OF 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 and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (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 of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before February 6, 2003. 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, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by February 13, 2003.

**DATED** January 30, 2003 at Chicago, Illinois.

/s/Elizabeth Kinney

Regional Director, Region 13

- \*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
  - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
  - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing and in the Employer's brief have been carefully considered.
- 3/ The Employer is a corporation engaged in the production, distribution, and sales of baked goods.
- 4/ The Petitioner seeks to represent a unit of all full time and regular part time stock clerks, cashiers, and sales clerks at various locations in the Chicago, Illinois and Northwest Indiana area.

## **1. The Parties' Contentions**

The Petitioner, in its petition, sought a unit of full time and regular part time stock clerks, cashiers, and sales clerks at 27 of the 31 retail store locations that report to the Employer's Hodgkins, Illinois Bakery. At the hearing, the parties agreed to include all 31 of the retail sales stores within the Hodgkins Bakery territory. The only issue raised concerns the placement of the store manager (as the position is referred to by the Employer) or lead sales clerk (as the position is called by the Petitioner) in the appropriate bargaining unit. It is clear from the record that the parties agree, despite the difference in nomenclature regarding the job title, that there is only one job position in dispute. For clarity, I will refer to this position as "store manager" in the following discussion.

The Employer contends that the store managers are statutory supervisors within the meaning of Section 2(11) of the Act. The Petitioner, on the other hand, contends that the store managers are not supervisors as defined by the Act and because of their close "physical proximity" to the other sales clerks should be included in the unit found appropriate herein.

Because the evidence, as discussed below, shows that they have the authority to hire, discipline, discharge, suspend, assign, transfer, or reward employees while exercising their own independent judgment in so doing, I find that the store managers are statutory supervisors within the meaning of the Act. Accordingly, I shall exclude them from the unit found appropriate.

## **2. Background**

The Employer is engaged in the production, distribution, and sales of baked goods. The product is prepared at a primary bakery located in Hodgkins, Illinois and is distributed either to retail stores by route salesmen or is sold to the general public through the Employer's own retail outlet stores. There are 31 retail outlet stores that are the subject of the instant proceeding which are located in the Chicago, Northeast Illinois, and Northwest Indiana area. The Employer operates these stores under various brand names such as "Wonder" and "Hostess". There were 25 such stores operated by the Employer until its acquisition in November 2002 of six additional retail outlets from another bakery located in Columbus, Indiana. These six stores operated under the brand name "Dolly" prior to their acquisition by the Hodgkins bakery. The record is unclear whether these six stores have changed their names.

Three to five employees, including the store manager, staff each retail outlet. The store manager and other sales clerks perform duties that overlap in the operation of the outlet stores.

These duties include stocking the shelves, operating the cash register, rotating bread, assisting customers, opening and closing the stores and clean-up. The store manager selects and designates an “assistant” at each outlet store and has from one to three additional sales clerks on staff. Some higher level in the Employer’s corporate structure establishes the individual stores’ staffing level, although the record does not contain any evidence showing by whom or how this is computed.

The store manager works 40 hours per week on average, is paid at least \$1.00 per hour more than the sales clerks, and receives benefits, such as health insurance, from the Employer. Store managers participate in a bonus program that rewards them monetarily for increases in their stores’ profits. In addition to the sales clerk type duties performed by all members of the staff at each outlet store, the store managers are responsible for the overall day-to-day operation of their retail store. They hire, train, schedule, discipline, evaluate and reward employees. They complete various Employer forms regarding these functions such as the Employer’s Reprimand Form, Employee Record Notification form, Outlet Store Training Checklist, Probationary Review form, and Accident Prevention Orientation Checklist. Each of these forms is signed by the store manager in the space designated for the supervisor.

The store managers report to the Employer’s Retail Sales Manager and receive PL (Profit and Loss) packets from the Employer on a regular basis that informs the store manager about the profitability of their store. The store managers are responsible for the profitability of their retail outlet. The store manager attends meetings with other store managers and the Retail Sales Manager three or four times per year. The assistant and other sales clerks do not attend these meetings.

The assistant in each outlet works from 30 to 36 hours per week. The record does not show how much the assistants are paid. However, in order to be entitled to receive benefits from the Employer, the assistants must work at least 30 hours per week on average. The record appears to show that the assistants receive benefits similar to the store managers, such as health insurance. In addition to their regular sales clerk type duties, an assistant fills in for the store manager during the store manager’s absence from the store for vacation or illness.

The other sales clerks employed in the retail outlets work anywhere from 15 to 25 hours per week on average. They do not receive any benefits. The record does not contain information regarding the pay scale of the sales clerks. In addition to their regular work tasks, the sales clerks, like the assistant, may open and close a store, train new hires to some extent, and can order supplies.

### **3. The Evidence and Analysis of the Store Managers’ Supervisory Authority.**

#### **A. THE STORE MANAGERS**

From the record, the evidence shows that the store managers have the authority to hire employees within the staffing levels set by other corporate authorities. The testimony of the store managers establishes that when they need to hire, they take the following steps. First, they post a sign in the window of the store advertising the opening and, perhaps, place an ad in the newspaper. Next, they accept applications, screen the applicants, and select the individual they want to hire. Then, the store managers perform reference checks of the individual by telephone

and refer the one selected to the Employer's Human Resource Department, which arranges for a drug test and background check. Finally, if the applicant passes these tests, the individual is hired. The store manager does not need to obtain permission from any other Employer official before engaging in this hiring process, as long as the hire is within the store's allocated staffing level.

The record evidence establishes that the store managers have the authority to discipline, suspend, or discharge employees. Thus, the store managers, utilizing the Employer's Reprimand Form, can issue oral and written reprimands and suspensions to sales clerks for various reasons including absenteeism, tardiness, poor work performance and other issues such as theft. The record contains examples of such disciplines and suspensions from store managers at all 31 retail outlets encompassed by the instant petition. Testimony of store managers also shows that they have the authority to discharge a sales clerk and have done so for various reasons, including one store manager who discharged an employee for drinking alcohol on the job and refusing to take an alcohol test.

After hiring an employee, the store managers train the employees, and direct them in their daily tasks. Thus, the store managers can assign work to employees, such as stocking shelves and rotating bread, and the store manager can transfer an employee from one job assignment to another. Store managers schedule the employees and, therefore, determine when and the number of hours each sales clerk will work each week. The store managers also have the sole authority in their outlets to grant employee's vacations and approve their sick leave requests. Employees contact the store manager if they are unable to report to work due to illness or need the day off for some other reason. The store managers can resolve complaints from the sales clerks and approve their time cards. The weekly schedules are sent to other corporate authorities, as are the time cards. There is no evidence in the record that shows that any corporate official overrides the store manager's decisions with respect to the work schedules that the store managers have prepared and submitted.

The record shows that the store managers evaluate employees after a new employee has worked 20 days and again as the employee approaches the end of their 60 day probation period. These evaluations are recorded on the Employer's forms and signed by the store manager where the form designates "supervisor". The store managers can reward employees and set policy. For example, the record shows that in one outlet store, the store manager bought pizza for lunch for the sales clerks in recognition of a good job they performed as a team. At another store, the store manager purchased a microwave oven and supplies hot chocolate and soups for the sales clerks. With respect to establishing policy, the evidence shows that, in at least one location, the store manager has instituted a policy that allows employees to exchange their work shifts by merely finding another sales clerk to cover their shift and notifying the store manager. It appears from the record that the store manager established this policy without any involvement from any other corporate official.

The evidence further shows that the store manager has the sole authority to choose an "assistant" to act in the place of the store manager during the store manager's absence for any reason such as vacation or illness. No outside permission from any other Employer's official is needed before the store manager can designate an assistant. Store managers attend company meetings with other store managers three or four times per year.

As set forth above, store managers are the only employees in a retail sales outlet who work 40 hours per week. Store managers are paid at least \$1.00 per hour more than the sales clerks and are the only store employees who receive a bonus based on the store's profitability. The store managers and assistants who work more than 30 hours per week receive benefits from the Employer like health insurance whereas the other sales clerks do not.

## **B. THE LEGAL STANDARDS**

Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The exercise of any one of these types of authority is sufficient to confer supervisory status; however, it is well settled that such authority must be exercised "with independent judgment on behalf of management and not in a routine or sporadic manner" (Citation omitted), *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990); *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). The exercise of some supervisory authority "in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.." (Citation omitted). *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986); *Clark Machine Corp.*, 308 NLRB 555 (1992). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of directions; between effective recommendation and forceful suggestion; and between appearance of supervision and supervision in fact. *See, Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994). Because the statute is ambiguous as to the degree of discretion required for supervisory status, it is within the Board's discretion to determine the issue. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001); *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, *slip op.* at 1-2 fn. 3; *Dynamic Science, Inc.*, 334 NLRB No. 57 *slip op.* at 1 (2001).

The burden of demonstrating supervisory status rests on the party seeking to establish that status. *Kentucky River*, 532 U.S. at 710; *Alois Box Co.*, 326 NLRB 1177 (1998). Moreover, in the event that "the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Conclusionary evidence regarding the possession of Section 2(11) indicia, whether the evidence is contained in job descriptions, *Crittendon Hospital*, 328 NLRB 879 (1999), or testimony, *Sears Roebuck & Co.*, 304 NLRB 193 (1991), is insufficient to establish supervisory status. Thus where there exists general conclusionary evidence that individuals are responsible for supervising, directing, or instructing others, such evidence, standing alone, is deemed insufficient to prove supervisory status because it does not shed light on exactly what is meant by

such general words or whether an individual engaging in those activities is required to exercise independent judgment.

Applying these principles as discussed below, I find that the Employer has met its burden of establishing that the store managers are supervisors within the meaning of Section 2(11) of the Act.

### C. ANALYSIS

In support of its contention that the store managers are statutory supervisors, the Employer offered the testimony of two current store managers from among the 25 original Wonder/Hostess retail outlets within the realm of responsibility of the Hodgkins, Illinois bakery. In addition, the Employer was prepared to offer the testimony of two additional store managers concerning this issue. At the hearing, in the interest of avoiding cumulative testimony, the Employer made an offer of proof that these two additional store managers would testify regarding the supervisory issue similar to the testimony of the Employer's other two store manager witnesses. The Petitioner agreed and the parties stipulated that the Employer's remaining two store managers would testify as represented by the Employer's Counsel. The Petitioner offered the testimony of three store managers who were all currently employed at retail outlet stores that were among the six "Dolly" stores acquired in November 2002 by the Hodgkins Bakery from another bakery located in Columbus, Indiana. I find that the record evidence of all the store managers is mutually corroborative of the fact that store managers possess supervisory authority within the meaning of Section 2(11) of the Act, irrespective of their retail outlet store's "brand name".

As detailed above, the record shows that the applicant selected by the store manager are hired if the applicant passes the drug test and background check. In performing the hiring function, the store manager exercises independent judgment in seeking, screening, selecting, and ultimately hiring an applicant without the need for outside permission. The authority to hire or to effectively recommend hiring, utilizing independent judgment, is itself sufficient to confer statutory supervisory status. *See e.g., Queen Mary*, 317 NLRB 1303 (1995); *enfd., sub nom. NLRB v. RMS Foundation, Inc.*, 113 F.3d 1242 (9th Cir. 1997). Accordingly, I find that the store managers have the authority to hire employees exercising independent judgment in doing so.

The record also shows that the store managers can discipline, suspend, and discharge the sales clerks at their outlet stores. Although the evidence shows that the store managers may sometimes contact the Retail Sales Manager for guidance with respect to discipline, it is clear that the store managers may issue discipline, suspensions and discharge employees without obtaining permission from anyone else. Accordingly, based on the record, I find that the store managers have the authority to discipline, suspend and discharge employees.

Based on the record, it appears that the store managers do to a great extent perform the same job duties of the other sales clerks on a day-to-day basis. For this reason, the Petitioner claims that the store managers have a close "physical proximity" to the sales clerks and should be included in the unit. However, unlike the sales clerks, the store managers also spend up to 25% of their time carrying out their supervisory functions as discussed above. The Petitioner offered evidence that shows that the store managers must obtain corporate approval from their Retail Sales Manager before incurring expenses for repairs. Thus, if a store manager believes

that there is a heating or plumbing problem at their outlet store or that they need to replace a cracked window, the store managers must first seek authorization from the Retail Sales Manager before incurring the expense for the repair. However, this specific limitation on the store manager's authority is insufficient to negate the ample record evidence that store managers possess and independently exercise a wide range of supervisory indicia as defined in Section 2(11) of the Act. The Petitioner also offered testimony of a store manager who had not exercised any disciplinary authority and did not think she had the authority to engage in actual supervisory functions, such as the hiring, discipline, or discharge of an employee. The fact that an individual has not exercised certain supervisory authority does not preclude a finding of supervisory status. *See, Fred Meyers Alaska*, 334 NLRB No. 94, fn. 8 (2001).

#### **D. CONCLUSION**

For the reasons set forth above, I find that the store managers at each of the 31 retail sales outlet locations covered by the instant petition exercise independent judgment in connection with their exercise of a wide range of supervisory authority, including the authority to hire, discipline and discharge employees, I find that the store managers are supervisors within the meaning of the Act. Accordingly, the store managers will be excluded from the unit found appropriate herein.

Because the Petitioner indicated at the hearing a willingness to proceed to an election in a unit other than what it petitioned for and sought through the hearing, I hereby direct an election to determine if the employees in the above-described unit wish to be represented by the Petitioner.

There are approximately 90 employees in the unit found appropriate.

177-8501-2000  
177-8520-0800  
177-8520-5500

Voter Elig.-Statutory Exclusion

## ATTACHMENT A

All full time and regular part time stock clerks, cashiers, and sales clerks employed by the Employer at the following retail sales outlets currently located as follows: 5702 W. 55<sup>th</sup> Street, Chicago, IL 60638; 5517 St. Charles Road, Berkeley, IL 60163; 116 N. Bolingbrook Drive, Bolingbrook, IL 60440; 1911 Route 50, Bourbonnais, IL 60914; Countryside Plaza #2315, Countryside, IL 60525; 1330 E. 142<sup>nd</sup> Street, Dolton, IL 60419; 217 W. Ogden Avenue, Downers Grove, IL 60515; 425 Airport Road, Elgin, IL 60123; 2530 W. 94<sup>th</sup> Street, Evergreen Park, IL 60642; 3201 West 167<sup>th</sup> Street, Hazelcrest, IL 60429; 2097 E. 37<sup>th</sup> Avenue, Hobart, IN 46342; 21403 S. Cicero, Matteson, IL 60443; 9450 S. Calumet, Munster, IN 46321; 700 West Lincoln Highway, Merrillville, IN 46410; 790 Royal St. George Drive, Naperville, IL 60540; 1301 Diversey Parkway, Chicago, IL 60614; 6325 West North Avenue, Oak Park, IL 60302; 6655 S. Pulaski, Chicago, IL 60629; 2150 West Street, River Grove, IL 60171; 8541 E. U.S. 20, Michigan City, IN 46360; 850 Brook Forest Avenue, Shorewood, IL 60431; 7336 S. Stony Island Avenue, Chicago, IL 60649; 7901 S. Vincennes, Chicago, IL 60620; 1418 119<sup>th</sup>, Whiting, IN 46394; 6080 W. 159<sup>th</sup> Street, Oak Forest, IL 60452; 6625 W. Roosevelt Road, Berwyn, IL 60402; 6665 Broadway, Merrillville, IN 46410; 6420 West 87<sup>th</sup> Street, Burbank, IL 60459; 6520 Fullerton, Chicago, IL 60707; 5808 Hohman Avenue, Hammond, IN 46320; and 1526 N. Nickolson, Joliet, IL 60435; but excluding all office clerical employees, professional employees, maintenance employees, guards, and supervisors as defined in the Act and all other employees.