

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

FIVE STAR SUPERMARKETS OF NEW
LONDON, INC. D/B/A SHOP RITE

Employer¹

and

LOCAL 371, UNITED FOOD AND COMMERCIAL
WORKERS UNION, AFL-CIO, CLC

Petitioner

Case No. 34-RC-2043

DECISION AND ORDER

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. Pursuant to 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, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and that no question affecting commerce exists concerning the representation of certain employees of the Employer.

The Petitioner seeks to represent a unit of approximately 200² full-time and regular part-time employees at the Employer's supermarket located in New London, Connecticut. The Employer contends that a unit limited to the employees at its New London store is not an appropriate unit for the purposes of collective bargaining, and

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

² The Petitioner claims that there are only 168 employees in the petitioned-for unit, whereas the Employer claims that the unit is composed of approximately 220 employees. Payroll records indicate that the number of employees is approximately 200-210. In light of my decision herein, I find it unnecessary to determine the exact number of employees in the petitioned-for unit.

that an employer-wide unit consisting of its New London and Norwich supermarkets is the only appropriate unit. In this regard, the Employer maintains that it has rebutted the Board's presumption favoring single facility bargaining units. For the reasons noted below, I find merit to the Employer's contention, and shall dismiss the petition.³

1. Overall Operations

The Employer is a Connecticut corporation with an office and place of business located at 351 North Frontage Road, New London, Connecticut, where it operates a retail supermarket under the trade name "Shop Rite". The Employer is owned and operated by the Capano family, consisting of father Ken, Sr., who serves as President, and brothers Scott and Ken, Jr., who each serve as vice-president. The Capano's began operating the New London store in February 2000. Since 1996, the Capanos also owned and operated another retail supermarket under the trade name Shop Rite located at 634 West Main St., Norwich, Connecticut. The Norwich store, which is 12 miles from the New London store, is separately incorporated under the name Five Star Supermarkets of Norwich, Inc., d/b/a Shop Rite.

Although each store maintains its own tax identification number, payroll account, and payroll records, they are physically set up and operated in a virtually identical manner. In this regard, with the exception of the pharmacy in New London, both stores have the same departments, i.e., deli, seafood, floral, produce, meat, bakery, grocery, frozen food, dairy, non-foods, health and beauty aides, and front end. Employees in each department in each store occupy the same job classifications and perform precisely the same work. Both stores have the same products on sale at the same time utilizing the same merchandising displays.⁴ All products are ordered by the Capanos through a centralized computer generated ordering system, and are delivered to each store directly by the vendors. Each store is the same relative size, and utilizes approximately the same number of employees. Apart from the fact that only the New London store has a pharmacy, the only significant difference between the stores is that

³ In light of my decision to dismiss the petition, I find it unnecessary to address the Petitioner's contention, disputed by the Employer, that the department managers and the night crew chief should be excluded from the unit as supervisors, and that the maintenance employee and a dual function security guard/grocery clerk should be excluded from the unit as lacking a community of interest with employees in the petitioned-for unit.

⁴ The weekly advertising circular that appears in local newspapers prominently lists both the Norwich and New London store.

the New London store is closed to the public from 1 a.m. to 6 a.m., although employees continue to work in the store during those hours. The Norwich store is open to the public 24 hours a day, primarily due to its proximity to gambling casinos that are similarly open 24 hours a day.

Primarily responsible for the overall operation of both stores is Ken, Sr., Ken Jr., and Scott. They jointly share ultimate responsibility for ordering, marketing, merchandising, staffing, hiring, budgeting, and policy decisions at both stores. Reporting directly to the Capanos are Human Resource Supervisor Joan Bonomi, who is directly responsible for hiring and staffing at both stores, orienting new employees, and arranging corporate functions; Loss Prevention Supervisor Jay Kaine, who is directly responsible for security at both stores, and also assists with hiring and staffing, orientation of new employees, and merchandising and purchasing issues; and Store Managers' Joe Orlando (New London) and Carmela Crawford (Norwich). Each store also has several assistant store managers who report directly to their respective store manager. Finally, each department in each store has a department manager who reports directly to the store manager.

The Employer does not maintain a separate office or corporate headquarters away from the stores. Rather, the Capanos, as well as Human Resource Supervisor Bonomi and Loss Prevention Supervisor Kaine, spend a portion of each day at each store. In this regard, Ken, Jr. and Scott each have their own office and receive mail in each store, and Ken, Jr.'s business card and the letterhead he uses contain the name and address of both stores. Ken, Sr. has an office in the Norwich store. Bonomi has an office in the New London store that she shares with Kaine, and an office in the Norwich store that she shares with the store manager. Kaine shares an office with Bonomi in the New London store, and shares an office in the Norwich store with Ken, Sr. In addition, the Capanos, Bonomi, Kaine and the store managers utilize company-provided cell phones to facilitate communication with each other in the course of the day.

The Capanos' daily presence in both stores results in their active involvement in virtually every aspect of each store's operation. Thus, they have the sole authority regarding product and vendor selection, pricing, budgeting, merchandising, advertising, hours of operation, and personnel policies and practices, including wages and benefits. As discussed in more detail below, they are also intimately and regularly involved, and

make the final determination, on such matters as hiring, discipline, discharge, training, orientation, scheduling, performance evaluations, overtime, and transfers. On a daily basis, Ken, Jr. walks through each store with the store manager, reviewing such things as operating procedures, any problems that need to be addressed, budgeting issues, and merchandise display. This includes detailed instructions regarding particular displays, which the store manager is then responsible for executing. Employees may and do approach Ken, Jr. during these daily walk-throughs to discuss work-related concerns.

In addition to his daily meeting with the store manager while walking through the store, daily “huddle-up” meetings are held twice a day in each store at 9:00 a.m. and 3:00 p.m. Those meetings are chaired by at least one of the Capanos, along with the store manager and assistant store managers. Bonomi and Kaine may also attend the daily huddle-up meetings when they are in the store at the time of the meeting. The daily business plan, the budget, department conditions, and staffing are discussed during such meetings.

The Capanos are also involved in other regular meetings regarding the operation of each store. A weekly merchandising meeting attended by the Capanos, Kaine, and the store manager and front-end manager from each store is held to discuss the upcoming advertising program, the products that will “pushed” during the following week, the products that will appear near the front door, and the cost of merchandising materials. The weekly merchandising meetings alternate between each store. A similar meeting is also held on a monthly basis, once again alternating between each store.

Ken, Jr. also holds a weekly meeting with all department managers in each store, during which he explains the budget and sales expectations for the upcoming week. In the course of this meeting, Ken, Jr. provides each department manager with the number of hours and budgeted dollars for their department, which the department manager then utilizes to prepare the work schedules for each employee assigned to that department. Other issues such as staffing and special events may also be discussed during these meetings.

On a semi-annual basis, the Capanos conduct a “State of the Store” meeting that is attended by the store managers, assistant store managers, department managers, and two employee representatives (one full-time, one part-time) from each store. During

the meeting the Capanos review the semi-annual “numbers” for both stores combined and individually, and by department in each store.

2. Terms and Conditions of Employment

With regard to employees’ terms and conditions of employment, the record establishes that employees at both stores are subject to identical policies and practices regarding hiring, orientation, promotions, scheduling, evaluations, discipline, wage rates, benefits, payday, rules of conduct, holidays and uniforms. There is one 401(k) plan covering employees at both stores. There is also a joint company newsletter, company picnic, holiday party, and periodic anniversary breakfasts. Employees at both stores may raise any work related problems directly with any of the Capanos, Bonomi, or Kaine.

a. Hiring

With regard to hiring, advertisements are placed in local newspapers seeking applicants for particular positions at “Shop Rite Supermarket”, and the applicants are instructed to apply in person at the courtesy desk of either the Norwich or New London store. The same application forms are provided to individuals who respond to the advertisement at either store. The application is then forwarded to Bonomi, who arranges an interview with the applicant.⁵ Present for the interview is the manager of the department where the applicant would be working, the store manager, and Bonomi. In the event that Bonomi is not available, either Kaine or one of the Capanos will attend the interview. The final hiring decision is generally reached by a consensus of those present at the interview, with department and store managers’ providing “significant input” into the final decision. However, in the event that consensus cannot be reached, the highest ranking official, either Bonomi, Kaine, or the Capanos, will make the final hiring decision.

Full-time positions in both stores are also filled via an internal job posting procedure. In this regard, an identical notice is posted in each store announcing an opening for a particular position. In most cases the notice does not indicate the store where the opening exists. The notice advises interested employees to contact Bonomi

⁵ Applicants for the meat department will also be given a meat cutting test by a meat department manager, who then recommends whether the applicant has the necessary skills to perform meat cutting work.

in order to schedule an interview. Bonomi provides all the applications to the Capanos, who then decide who to interview. The interview itself and the decision as to who to select is the same as described above for new employee hiring.

All new employees, regardless of the store in which they are hired to work, attend the same orientation, which is held every Saturday (except for certain holidays and during certain sales periods) in alternating stores. The orientation sessions are conducted by Bonomi and Kaine, with each of the Capanos making a brief presentation to the new employees. An incumbent employee from one of the departments, on a rotating basis, will also attend the session. The new employees are provided with a "New Associate Orientation Workbook" that the Employer receives from Shop Rite corporate headquarters. The workbook, which primarily deals with the actual work to be performed by the employee, is utilized during the course of the orientation session. The new employees are also provided with a "Store Associate Handbook", which addresses all aspects of the employee's terms and conditions of employment, including rules of conduct.

b. Scheduling and Assignment

With regard to the scheduling of employees, the record reveals that every Wednesday, each department manager in each store drafts a schedule for the following week for the employees assigned to his department. As noted above, the scheduling of employees and the hours to be worked by each employee is based upon the budgeted dollars and hours assigned to that department by Ken, Jr. at the weekly managers meeting. The department managers turn in their draft schedules to the store manager, who then reviews the schedules to insure that staffing is appropriate and within the allotted budget. The draft schedules are then returned to each department manager in order to make any necessary adjustments deemed necessary by the store manager, and the final schedule is then returned to the store manager for implementation and posting. Department managers may authorize changes to the posted work schedule in the course of the workweek as long as staffing coverage is insured.

The actual daily work assignments are made by the department manager, who completes an assignment card for each employee setting forth the particular tasks to be performed that day. In this regard, most of the work performed by employees in unit

positions is very routine and repetitive, such as stocking shelves or operating a cash register, so the actual assignment consists primarily of location.

All pre-scheduled overtime must be approved by Ken, Jr. In this regard, in the event of a need for overtime in one store, Ken, Jr. will first check on the availability of employees from the other store who can perform the work on a straight time basis. However, store managers may authorize limited amounts of overtime in an emergency situation.

With regard to vacation scheduling, Ken, Jr. provides each store manager with a calendar that “blacks out” certain weeks during which no vacations may be scheduled. Each department manager then drafts a vacation schedule based upon the vacation requests of each employee in his department. The store manager reviews the draft schedules to insure that staffing is appropriate, and may return the schedule to a department manager to make any necessary adjustments. The final draft schedules are returned by the store managers to Ken, Jr. for final approval. Further changes to the vacation schedule in the course of the year may be authorized by the store managers.

c. Evaluations

All employees receive a written evaluation on their employment anniversary date. The evaluation consists of a two-page, pre-printed form requiring numerical ratings and narrative comments in various categories. The form is initially completed by the department manager, who submits the completed form to the store manager. The store manager may modify the evaluation, and submits it to either Bonomi, Ken, Jr. or Scott for further review. In this regard, it is not unusual for Bonomi or the Capanos to direct the department manager to make substantive changes to the evaluations in order to insure the usefulness of the evaluation as a development tool. The final completed evaluation is then provided to the employee during a meeting consisting of the department manager and either the store manager, Bonomi, or one of the Capanos. During the first three years of employment, when periodic wage increases are automatic, the evaluation primarily serves as a development tool by providing feedback to the employee about his relative strengths and weaknesses. After the third year, the evaluation is used to determine merit wage increases.

d. Discipline

The Employer utilizes a progressive disciplinary system consisting of verbal warning, written warning, suspension, and termination. Department managers may issue verbal warnings, but only the store manager may issue written warnings or suspensions. However, when an employee is suspended, Kaine and the Capanos review the discipline to insure that the Employer's policies are being uniformly applied. All discharge decisions are made by the Capanos.

e. Interchange

With regard to the interchange of employees between the stores, the record reflects that, notwithstanding the separate corporate and fiscal formalities maintained by each store, the Capanos have basically operated both stores as a single entity. In this regard, the Employer utilized employees from the Norwich store to interview, hire, and train new employees to work at the New London store. Much of the training of the newly-hired New London employees was actually performed at the Norwich store by Norwich employees prior to the opening of the New London store. After the New London store opened, many Norwich employees worked there temporarily for the remainder of 2000.

Since the opening of the New London store, the Employer has routinely transferred employees between the stores on a temporary and permanent basis. The overwhelming majority of permanent transfers have involved department managers, with the remaining permanent transfers involving the accommodation of employees who desire to work at a different store for personal reasons, or who bid on and acquire a job in the other store. Temporary transfers similarly involve many department managers, who will typically fill in as department manager of their same department at the other store. Other employees also temporarily work in both stores, especially meat department employees. Also, on a daily basis, employees transfer product between the stores to account for short-term shortages. Such product transfers may be preceded by telephonic communication between employees in each store.

Because the Employer does not maintain records to account for these temporary and permanent transfers, it introduced other records in an effort to establish the degree of employee interchange between the stores. In this regard, the Employer introduced a document showing those employees who received paychecks from both stores. For

calendar year 2000, approximately 42 employees in stipulated unit positions were paid by both stores; for 2001, approximately 19; for 2002, approximately 23; and for 2003 (to the date of hearing), approximately 13. The Employer admitted that the significantly larger number of employees who worked in both stores in 2000 was caused by the opening that year of the New London store. Thus, it appears that the average number of employees in stipulated unit positions who spend some portion of their work year in both stores is about 20, which represents approximately 10% of the employees in the petitioned-for unit.

The Employer also introduced a document showing those employees whose reported payroll hours were listed under the category “jury hours” during 2002 and 2003. “Jury hours” is a catch-all category that includes time spent for jury duty, light duty, seminars or conferences outside the store, and working in the other store. The record reflects that only a few employees each year perform jury duty or light duty, and that only about 5 employees attended conferences or seminars outside the store during 2002-2003. Thus, the overwhelming majority of employees whose payroll record reveals “jury hours” actually worked in both stores.⁶ In this regard, this document reveals that for 2002 and 2003, six employees in stipulated unit positions at the New London store worked in Norwich, and four employees in stipulated unit positions at the Norwich store worked in New London. These instances ranged from one day to as many as 16 days. This document also shows approximately 15 individuals in stipulated non-unit positions who worked in both stores.

The Employer’s witnesses also identified several other employees in stipulated unit positions who have been temporarily transferred between stores, but whose names do not appear on either of the above documents. Finally, the sole maintenance employee, whose unit placement is disputed by the Petitioner, is assigned to the New London store but performs the same light maintenance duties in both stores, and also transfers product between the stores on a daily basis.

⁶ The Employer maintains that this document does not fully and accurately reflect the number of hours of employees who worked in both stores because the department manager does not bother to insure on every such occasion that the “jury hours” entry is made.

3. Conclusion

Based upon the foregoing and the record as a whole, I find that the Employer has rebutted the Board's presumption favoring single facility bargaining units. See *Queen City Distributing Co. t/a Sol's*, 272 NLRB 621 (1984); *V.I.M. Jeans*, 271 NLRB 1408 (1984); *Point Pleasant Foodland*, 269 NLRB 353 (1984); *Petrie Stores Corp.*, 266 NLRB 75 (1983); *Big Y Foods, Inc.*, 238 NLRB 860 (1978); *Super X Drugs of Illinois*, 233 NLRB 1114 (1977); *Kirlins, Inc.*, 227 NLRB 1220 (1977). More particularly, I note the high degree of centralized control retained and actually exercised by the Capanos over the establishment and implementation of uniform operational and labor relations policies, procedures and practices at both stores. This exclusive control extends to such matters as product and vendor selection, pricing, budgeting, merchandising, advertising, hours of operation, and personnel policies and practices, including wages and benefits. Moreover, their visible daily presence in each store results in their intimate involvement in even the most basic personnel matters, including hiring, discipline, discharge, training, orientation, scheduling, performance evaluations, overtime, and transfers. Such extensive daily involvement significantly restricts the local autonomy and authority of the store managers. See *Queen City Distributing Co. t/a Sol's*, supra; *Point Pleasant Foodland*, supra; *Petrie Stores Corp.*, supra; *Big Y Foods, Inc.*, supra. I also note the virtually identical employee skills and working conditions at these geographically proximate stores, which facilitates the seamless transfer of employees, managers and product between the stores. While the overall percentage of employees who work in both stores may not be significant, it is clearly more than de minimus. Moreover, this factor alone, in light of the other factors noted above, is insufficient to establish that the employees at the New London store constitute a distinct and separate unit from the employees at the Norwich store so as to warrant the establishment of a separate unit. See *Point Pleasant Foodland*, supra; *V.I.M. Jeans*, supra; *Big Y Foods*, supra.⁷

⁷ In this regard, the cases cited by the Petitioner in support of its assertion that the Employer has failed to rebut the single facility presumption are clearly inapposite to the facts of the instant case. In each of those cases, unlike the instant case, the Board found both significant local autonomy vested in the store managers and minimal interchange between stores.

Accordingly, based upon the above, and noting that the Petitioner has indicated that it does not desire to proceed to an election in a broader unit, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition 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, N.W., Washington, DC 20570. This request must be received by the Board in Washington by September 24, 2003.

Dated at Hartford, Connecticut this 10th day of September, 2003.

/s/ Peter B. Hoffman

Peter B. Hoffman, Regional Director
Region 34
National Labor Relations Board

440-1720-0133