

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

OCEAN STATE JOBBERS, INC.,
d/b/a OCEAN STATE JOB LOT

Employer¹

and

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 328, AFL-CIO

Petitioner

Case 1-RC-21820

DECISION AND DIRECTION OF ELECTION²

United Food & Commercial Workers Union, Local 328, AFL-CIO (Petitioner or Union) seeks to represent a unit of about 150-160 production and maintenance employees who are employed by the Employer at its warehouse facility at 360 Callahan Road, North Kingstown, Rhode Island. The Employer and the Petitioner agree that the unit should include all associates, including receivers, splitters, pickers, shippers, and maintenance persons.

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

² 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. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 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 in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 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.

The sole issue in this proceeding is the status of 16 team leaders. The Petitioner contends the team leaders should be excluded from the unit as statutory supervisors by virtue of their authority to assign work, direct the workforce, and train workers and the fact that they have different wages, hours, and benefits than other workers and perform significantly less production work compared to other workers. The Employer maintains that its team leaders do not exercise or have authority to exercise any of the statutory indicia of supervisory status and, therefore, they should be included in the unit. I find the team leaders are non-supervisory employees, and I have, therefore, included them in the unit found appropriate.

The Employer, which is headquartered in North Kingstown, Rhode Island, is in the business of purchasing and reselling consumer merchandise through its 71 retail stores located in Massachusetts, Connecticut, Rhode Island, and New Hampshire. The Employer receives, stores and distributes merchandise for its stores through its large warehouse facility, which is also located in North Kingstown, RI. The Employer employs a total workforce of about 2800 employees. At the warehouse, which is the subject of this petition, there are 167 employees, including managers.

The Employer's owners, Mark Perlman, Alan Perlman and Steve Aronow, who maintain their corporate offices at the North Kingstown location, also participate in day-to-day operations of the warehouse. The warehouse management team consists of Vice President of Operations Richard Portno, Director of Logistics Richard Giordano, and Facilities Manager David Reardon, who has overall responsibility for the warehouse.³ Reporting to Reardon are the eight shift and area managers.⁴ The owners and Vice President of Operations Portno set personnel policy, including policy concerning employees taking time off.

There are five main areas or departments in the warehouse operations, four of which, Picking/Stacking/Returns, Receiving/Splitting, Shipping, and Maintenance, are encompassed in this petition.⁵ In the Picking area, workers fill orders for stores by selecting merchandise from around the warehouse and placing it on pallets for shipment or storage in the warehouse. Associates use computerized scanning guns that direct them what items to "pick." In the Return area, which is part of Picking, workers similarly process merchandise that has been returned from stores. In Receiving/Splitting, workers receive merchandise, unload trucks, and "split" merchandise by allocating it to pallets going to particular stores. The Shipping department ensures that freight is loaded timely

³ Based on the record as a whole, I find that Vice President of Operations Richard Portno, Director of Logistics Richard Giordano, and Facilities Manager David Reardon are managerial employees and are excluded from the unit found appropriate.

⁴ Based on the record as a whole, I find that the shift and area managers are supervisors within the meaning of Section 2(11) of the Act and are excluded from the unit found appropriate.

⁵ The employees in the fifth area, the Transportation Department, are not sought by this petition or are at issue here.

and appropriately onto trucks, and, especially, that priority freight is loaded on the trucks and in such a way that merchandise will not be damaged in transit.

The warehouse is open continuously from 10 p.m. Sunday through midnight Friday. In addition, it may reopen, as needed, on Saturdays. There are three shifts daily, and one or two shifts on Saturday, as needed. In Picking/ Stacking/Returns there are about 35 associates who work on each of the first and second shifts, along with three team leaders on the first shift and two on the second shift. In Receiving/Splitting there are about 26 associates who work on each of the first and second shifts, with two team leaders on both shifts. In Shipping there are about seven associates, depending on need, with two team leaders on the first shift and one associate filling the team leader role on second shift. Associates working on the third shift perform all warehouse duties, depending on need. The third shift, from 10:30 p.m. to 7 a.m., is small and has one team leader, one area manager, called the shift manager,⁶ and about eight associates.

Area managers handle the day-to-day operations of the various areas or departments within the warehouse. Area managers have authority to hire, fire, recommend firing, and discipline employees. Area managers, who are salaried workers, do not receive overtime. Only the Director of Logistics and Facilities Manager has authority to layoff or recall employees. Area managers assign the team leaders the task of telling employees what their specific jobs are for the day. If a team leader wants to move an employee to a different assignment, she/he must obtain the area manager's permission. Area managers prepare employee evaluations, which are then submitted to the Facilities Manager and the Logistics Manager, who review the evaluations. The Area manager then presents the evaluation to each employee. Sometimes, team leaders serve as translators for the presentation of evaluations and sign the evaluations as witnesses to the presentation, as some employees do not speak English.

All associates are hired through temporary agencies in a "temp to hire" process. If employees successfully work 480 hours in three months, they are hired. Successful work includes good communication, attendance, productivity, quality of work, and safety record. The area manager will recommend to the Facilities Manager that the company hire a person with 480 hours, and the Facilities Manager makes the decision. There is no interview, as the managers already know the employee. There is no evidence that team leaders are involved in the hiring process.

Subordinate to and under the direction of the area managers, are team leaders, receivers, pickers, splitters, shippers, and maintenance employees. The Employer refers to all of these workers as its associates. There are about 16 team leaders. Team leaders are paid on an hourly basis. They hand out work assignments to other associates and also perform production work, including moving merchandise around the warehouse. Team leaders also train associates, check their work, direct them to redo work that has been incorrectly completed, and are held responsible for positively motivating their team and for setting a good example for the other associates. Team leaders are promoted from the

⁶ Third Shift Manager is Ed Quinn.

ranks of the production and maintenance associates through a posting and application process. Qualifications considered by the management group of the particular area manager, the Facilities Manager and the Director of Logistics in determining whom to promote to team leader include: ability to communicate, bilingualism,⁷ attention to detail, ability to do their production job, good attendance, a good safety record, and a good attitude.

In the Picking Area, team leaders generate a worksheet that tracks work. Team leaders also train associates in the picking and stacking tasks. In Picking, work assignments are made in the morning by the area manager, communicated to the associates by the team leader, and updated during the shift primarily through hand-held scanners. Employees go to their team leader to receive their initial assignment in the morning. The scanner has a screen that directs the “picker” what task to do next. Employees generally know what to do in Picking, and do the work as indicated by the scanner. Workers use a fork truck to carry pallets of merchandise to their designated places. Team leaders check the work of pickers, and will tell them to redo work if it is done incorrectly. For example, if an employee stacks fragile items in such a way that they may be damaged by heavier items, the team leader will tell them to redo the pallet. Team leaders also may tell associates they are doing a good job or if they are slow. There is no evidence, however, that these critical statements amount to or result in discipline. The area managers make some assignments that are not task-driven. Although the record is not entirely clear, it appears that team leaders in Picking do not spend a significant amount of time actually picking or stacking merchandise.

In the Shipping Area, team leaders load trucks and train other employees. They also may unload empty pallets and such off trucks returning from stores. Each associate receives a worksheet from the team leader that details what is going on the trailer by pallet. The Shipping office prepares the worksheet, which is generated by the team leader pressing a key on the computer. The team leader does not contribute to the substance of these shipping worksheets. The area manager assigns work depending on priorities. The Transportation Manager determines which trucks need to be loaded first.

In the Receiving Area, team leaders hand out worksheets to other associates at the direction of area managers. These worksheets contain a chart indicating what merchandise is arriving on the trucks. Associates use scanners to record and allocate inventory to the appropriate area. Area managers prepare the worksheets. When a truck comes in, a clerical checks to see if the truck has a prearranged appointment and if so has a manager determine which dock the truck parks in and which worker is assigned to unload it. If a manager is not available, team leaders may also assign a trailer to a dock and direct an associate to unload the truck. The area manager or team leader selects

⁷ Many of the associates have limited English-speaking skills, and it is clear that the Employer relies on the bilingual (Spanish/English) skills of the team leaders to communicate directions, personnel information, and scheduling information between the area managers and some associates. Some team leaders serve as translators for managers regarding questions about time off, evaluations, and discipline discussions with workers including warnings.

whatever associate is available to unload an incoming truck. The area manager is empowered to make that decision; but, if the area manager is in a meeting, the team leader will do it. Team leaders assist in unloading the trucks. Team leaders also train associates on unloading trucks and scanning merchandise into inventory. Team leaders take samples of merchandise to the buyers in the office when requested. Team leaders also verify the count done by associates by rechecking and counting freight. In Receiving, team leaders are responsible for overall safety, by ensuring others are trained in safety and engage in safe practices.

In the Splitting Area, team leaders hand out computer-generated worksheets that list how the merchandise is to be allocated to various stores and how many cartons are to be placed on each pallet. The buying office inputs the information on the worksheets – it is not entered by the team leaders or anyone else in production at the warehouse. The team leader in Splitting works with and trains the other associates. The team leader in Splitting takes attendance in the morning and reports it to the area manager. Although employees scan their identification cards into an automated system for official time-keeping purposes, team leaders take attendance so that area managers can assess whether there are enough associates on hand to complete the shift's work. Team leaders also use a computer to research and generate lost labels, which are required so that items can be scanned before shipment to a store.

On the third shift, the team leader does whatever needs to be done. Depending on the needs of the shift she/he is responsible for training associates, handing out worksheets, verifying counts, and pulling samples.

Area managers recommend wage increases for associates through an annual evaluation process. The Director of Logistics and the Facilities Manager make wage increase determinations based on the recommendations of and evaluations prepared by the area managers. There is no evidence team leaders have any role in preparing evaluations. On occasion, team leaders assist area managers in translating evaluation results to other associates, many of whom have limited English-speaking skills. The area manager is present during these discussions. There is no evidence the team leaders play anything other than a communicative role in the evaluation process.

Area managers handle any discipline of production workers. The team leaders' role is limited to a communication role, particularly with respect to limited English-speaking workers. Any employee, including team leaders, may bring a problem to the attention of the managers, but there is no evidence team leaders play any direct role in discipline.

To resolve grievances, employees first go to their area managers. If they do not get satisfactory results, the Employer has a "total open door policy" where employees may visit the Vice President, owners, or Human Resources.

If employees are temporarily transferred due to lack of work in one department, the determination is made between two area managers involved. If employees are

permanently transferred, or an employee requests another position, that determination is made by the Facilities Manager.

Area managers authorize overtime. Area managers may request that team leaders determine if associates will work overtime. In doing so, team leaders ask all employees if they will work overtime. There is no evidence that team leaders play any role in selecting who will work overtime.

Employees call a 900 number to leave a message that they will not be in that day. Some employees may call their team leader or area manager if they cannot come in or if they are running late. Team leaders do not have access to messages left on the 900 number. Team leaders must check with area managers about an associate's request for time off. If an employee wants to take a leave of absence or vacation, either the Director of Logistics or the Facilities Manager would recommend granting it and then submit it to Human Resources for the final determination. If an employee wants to take a day off, they would go to their area manager who, in turn, may need to get permission from the Director of Logistics.

Team leaders are paid on an hourly basis, as are the unit associates. Area Managers and upper management are salaried. The record is not entirely clear concerning the rates of pay. It appears, however, that rates of pay are related to seniority with some associates earning more than team leaders. Team leaders receive a quarterly bonus of \$250. Team leaders are eligible for different bonuses from other associates, although other associates are eligible for bonuses. Although both team leaders and associates have access to company sponsored health insurance, team leaders are eligible for a discount on the family medical plan. Team leaders arrive for their shift before other associates, and work alongside associates during their shift. Area managers are also present on the floor, as is the Facilities Manager. Team leaders do not attend management meetings.

The annual evaluations of many team leaders indicate that the Employer expects team leaders to direct the work of other associates and holds them accountable for the success of their teams. The evaluations show that some team leaders are expected to plan for workplace transitions, to behave appropriately in front of associates and to otherwise serve as role models, to follow training procedures, motivate the people in their area, and communicate effectively. Comments in the evaluations also reveal the Employer relies on some team leaders to keep their areas running smoothly.

ANALYSIS AND CONCLUSION ON SUPERVISORY STATUS

As previously stated, there are approximately 16 Team leaders in a workforce of about 150-160 warehouse employees.

Pursuant to Section 2(11) of the Act, 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 recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*⁸

The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*⁹ Only supervisory personnel "vested with genuine management prerogatives" should be considered supervisors, not straw bosses, lead men, setup men and other minor supervisory employees. *Ten Broeck Commons.*¹⁰ Employees, such as leadmen, who assign tasks to unit employees and make sure the tasks are completed are doing nothing more than giving minor directives and orders that are routine in nature and do not require the use of independent judgment, thus providing no support for a finding of supervisory status. *George C. Foss Co.*¹¹

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care, Inc.*¹² The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*¹³

Team leaders Have No Authority to Hire, Transfer, Suspend, Lay Off, Recall, Promote, Discharge, Reward or Discipline Employees, or to Resolve Employee Grievances.

I find, based on the record, that team leaders do not exercise any authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline, employees, or to resolve employee grievances, or to effectively recommend such actions. As there is no claim that team leaders exercise any of these ten indicia of supervisory authority within the meaning of Section 2(11), and the record is uncontroverted that, indeed, they do not, it is unnecessary to address these indicia in detail.

⁸ 273 NLRB 1677, 1689 (1985).

⁹ 175 NLRB 871 (1969).

¹⁰ 320 NLRB 806, 809 (1996).

¹¹ 270 NLRB 232, 234 (1984).

¹² 532 U.S. 706, 710-712 (2001).

¹³ 308 NLRB 101, 102 (1992).

Team Leaders' Role in Assignment and Responsible Direction of Work is Nonsupervisory

I find that the evidence does not show that team leaders assign work to or responsibly direct the work of other warehouse associates in a manner requiring independent judgment or any discretion that is not merely routine. *Chicago Metallic Corp.*,¹⁴ and *Quadrex Environmental Co., Inc.*¹⁵ Their role in this regard is that of traditional lead persons whom the Board has long found are nonsupervisory. *Id.*¹⁶ As discussed below, I therefore find the team leaders' role in the assignment and direction of work does not involve the exercise of supervisory authority within the meaning of Section 2(11).

Area managers, not team leaders, make formal assignments of work. Even temporary assignments are made by area managers or their superiors. There is some evidence that, during the course of the day, team leaders may temporarily reassign an employee to a different job within the same area of the warehouse, but they must seek approval from the area manager to do so. There is no showing that such occasional shuffling is anything other than routine. This type of temporary reassignment that is not shown to involve any independent judgment is not sufficient to indicate supervisory status, particularly when, as here, all final assignment authority is retained by the area managers. See *Hausner Hard-Chrome of KY, Inc.*¹⁷ The fact that associates learn of their assignments from team leaders, or that some associates may in fact believe they are receiving orders generated by team leaders, is not dispositive of supervisory authority. See *K.G. Knitting Mills, Inc.*¹⁸

Similarly, the evidence does not establish that team leaders use independent judgment or discretion in their direction of the work force. The evaluations of team leaders show that the Employer expects team leaders to direct the workflow and holds them accountable for the success of their teams. There is no evidence, however, that the direction is the kind of responsible direction, using independent judgment, required by the Act to be indicative of supervisory status. Even when work is fast paced, complex or requires flexibility, the Board will not find it to be "responsible direction" in the absence of a showing that independent judgment is required. See *J. C. Brock Corp.*;¹⁹ *Ten Broeck*

¹⁴ 273 NLRB at 1688-91.

¹⁵ 308 NLRB at 101-02.

¹⁶ See also *George C. Foss Co.*, 232 NLRB at 234-35; and *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994); *SDI Operating Partners*, 321 NLRB 111 (1996); cf. *Sanford Seed Co.*, 245 NLRB 1064 (1979).

¹⁷ 326 NLRB 426 (1998).

¹⁸ 320 NLRB 374 (1995).

¹⁹ 314 NLRB at 158.

Commons.²⁰ Here, there is no showing that the direction provided by team leaders is anything but routine. In fact, nearly all discretion is retained by the area managers. The work of the associates is itself routine, and associates, once trained, require little direction. Much of the work is so routine, that it is divided up by the automated scanners or determined by when the trucks arrive.

Nor does the fact that team leaders check the work of associates cause them to exercise supervisory authority on these facts. *Ten Broeck Commons*.²¹ Team leaders may instruct an associate to redo work, but that alone does not confer supervisory status. *Hexacomb Corp.*;²² *299 Lincoln Street, Inc.*²³ This is particularly so in the absence of any showing the team leaders play a role in discipline or evaluations, as they cannot directly affect other employees' job status. See *Ken-Crest Services*.²⁴ The fact that team leaders act as conduits for management, even in personnel or scheduling matters, does not confer supervisory status on these team leaders. *Chicago Metallic Corp.*;²⁵ *Quadrex Environmental Co.*²⁶ I find this particularly so in a context where their bilingual skills are needed for area managers to speak with some of their co-workers.

Secondary Indicia Cannot Support a Finding of Supervisory Authority in the Absence of Primary Indicia

The Union elicited evidence of secondary indicia of supervisory authority, such as: the use of different equipment such as computers; the enjoyment of somewhat different wages, hours, and benefits; the performance of different job duties with different expectations such as training and setting examples in behavior; the performance of significantly less production work as compared to other associates; the role as intermediaries or conduits for management in personnel or scheduling matters; and employees' impression that the team leaders function as their "boss." In the absence of evidence, however, that the team leaders have exhibited any of the primary statutory indicia of supervisory authority, the existence of secondary indicia, does not establish supervisory status. See e.g., *Ryder Truck Rental*.²⁷

²⁰ 320 NLRB at 809.

²¹ 320 NLRB at 811-12.

²² 313 NLRB 983, 984 (1994).

²³ 292 NLRB 172, 183 (1988).

²⁴ 335 NLRB 777, 777-78 (2001).

²⁵ 273 NLRB at 1691, fn. 83.

²⁶ 308 NLRB at 101-02.

²⁷ 326 NLRB 1386, 1388 n. 8 (1998).

In any event, I find the evidence of secondary indicia does not support a finding of supervisory authority. Notwithstanding the Petitioner's argument to the contrary, the wages, hours, and working conditions of team leaders are not dissimilar to the other associates. They do receive a \$250 quarterly bonus and a discount on the family health care benefit, but otherwise they work similar hours, work alongside the associates, are paid on an hourly basis, and receive the same benefits as other associates. Team leaders use computers and a desk to complete paperwork, but they spend most of their time on the warehouse floor with other associates. The use of different tools does not make them supervisors. Nor does the Employer's expectation of higher standards of behavior and performance from team leaders make them supervisors. See *George C. Foss Co.*²⁸ As discussed above, the fact that team leaders act as conduits for management does not, in the absence of authority, make them supervisors, even if some employees believe them to be their bosses. See *K.G. Knitting Mills, Inc.*²⁹

Based upon all the foregoing, I find that the Petitioner has not met its burden of establishing that the team leaders are supervisors within the meaning of Section 2(11) of the Act, and I, therefore, include them in the unit found appropriate.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including associates, team leaders, receivers, pickers, splitters, shippers, and maintenance employees, employed by the Employer at its 360 Callahan Road, North Kingstown, Rhode Island facility, but excluding all other employees, office clerical employees, road crew employees, confidential employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTIONS

An election by secret ballot shall be conducted by the Regional Director 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. Employees engaged in an 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 which 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

²⁸ 270 NLRB at 232.

²⁹ 320 NLRB 374 (1995).

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 purposes of collective bargaining by United Food & Commercial Workers Union, Local 328, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*,³⁰ *NLRB v. Wyman-Gordon Co.*³¹ Accordingly, it is hereby directed that within seven days of the date of this Decision, two 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 Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.³² In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before – October 15, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

³⁰156 NLRB 1236 (1966).

³¹ 394 U.S. 759 (1969).

³² 315 NLRB 359 (1994).

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 and Direction of Election 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 October 22, 2004.

/s/ Elizabeth A. Gemperline

Elizabeth Gemperline, Acting Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 8th day of October, 2004.