

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8

**KOCOMO PIZZA, INC. d/b/a PIZZA HUT**

**Employer**

**and**

**Case No. 8-RC-16660**

**ASSOCIATION OF PIZZA DELIVERY DRIVERS, INC.**

**Petitioner**

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (the Act), a hearing was held before a hearing officer of the National Labor Relations Board (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.<sup>1</sup> I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

*All delivery drivers employed at the Employer's facility at 55 South Miller Drive, Sunbury, Ohio, but excluding production employees, servers, customer service representatives, managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.*

Approximately 8 employees are in the unit found to be appropriate.

INTRODUCTION

The Union seeks a bargaining unit limited to the delivery drivers at the Employer's restaurant at 55 South Miller Drive, Sunbury, Ohio, but is willing to proceed to an election in any unit found appropriate. The Employer contends that the only appropriate unit would include

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<sup>1</sup> The parties filed post-hearing briefs, which have been carefully considered. Upon the entire record in this proceeding, the undersigned finds: the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby 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 herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

production employees, servers, and customer service representatives, as well as delivery drivers. This unit would include approximately 29 employees.

For the reasons described more fully below, I find that the unit requested by the Union is appropriate.

### THE LEGAL STANDARD

The Act does not require that the unit sought by the petitioner be the only appropriate unit or even the most appropriate unit. If the petitioned-for unit is an appropriate unit, the Board will not examine alternative units.<sup>2</sup>

The Board has held that the appropriateness of a separate unit of delivery drivers or other truck drivers depends on a determination in each case of the extent of their community of interest with other employees.<sup>3</sup> Relevant factors include degree of functional integration, common supervision, the nature of employee skills and functions, interchangeability and contact among employees, and similarities or differences in general working conditions and fringe benefits.<sup>4</sup>

### FACTS

At the Employer's Sunbury, Ohio, restaurant, the only facility involved in this proceeding, hourly nonsupervisory employees fall into four categories: delivery drivers, servers, production employees, and customer service representatives.<sup>5</sup> The customer service representatives are essentially production employees whose sole function is to answer the telephone, take an order for food, and enter it into the computer terminal. They work during peak periods at the restaurant.

The delivery drivers' principal function is to deliver pizza and other food to customers at addresses within an area of 35 square miles. They use their personal vehicles to make these deliveries. They spend the majority of their working time away from the restaurant, making deliveries. When at the restaurant, they assist other employees in performing functions such as washing dishes, oiling pans, or folding boxes, or answering the telephone. Their job description does not refer to duties other than delivery.

Delivery drivers are required to have a valid driver's license, insurance coverage, and a good driving record. Loss of license or insurance coverage, a serious accident or violation of law, or any two accidents or violations within 12 months will result in termination or in reassignment of the driver to other duties. The drivers are also required to place Pizza Hut signs

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<sup>2</sup> *Boeing Co.*, 337 NLRB 152, 153 (2001); *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000).

<sup>3</sup> *E.H. Koester Bakery Co.*, 136 NLRB 1006, 1011 (1962)

<sup>4</sup> *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962). See also *Esco Corp.*, 298 NLRB 837, 839 (1990).

<sup>5</sup> The Employer would specifically exclude the restaurant general manager, salaried and hourly assistant managers, and managers in training from the bargaining unit as supervisors. The Petitioner takes no position as to the supervisory status of individuals in any specific positions. The record clearly shows that the restaurant general manager makes hiring and disciplinary decisions, and determines employees' work schedules. I find that he is a supervisor and exclude him from the unit. The record is inconclusive as to the functions of the assistant managers. However, I find that, even if not supervisory, they should be excluded from the unit found appropriate because they lack a community of interest with the delivery drivers.

on their personal vehicles and meet detailed requirements for maintenance of their vehicles. Other employees are not subject to any of the foregoing requirements.

The delivery drivers are paid wages of between \$6.00 and \$7.00 per hour and also receive \$.75 per delivery as reimbursement for expenses incurred in making deliveries with their personal vehicles, such as the cost of gas, insurance, and vehicle repairs and maintenance. They average about 3 deliveries per hour. They also receive tips from about 70 percent of delivery customers, with an average tip of between \$1.00 and \$2.00 per delivery. The tips must be reported at the end of each shift, but the computer system does not allow reporting of amounts less than \$5.00.

Production employees also receive wages of \$6.00 to \$7.00 per hour, but receive no tips or vehicle use reimbursement. Servers receive wages of \$2.13 to \$2.40 per hour, but no vehicle use reimbursement. They receive an average of \$20.00 per night in tips, and must report at least 10 percent of their gross sales on each shift as tips. All nonsupervisory employees receive the same fringe benefits.

The restaurant manager is primarily responsible for hiring all new employees, including delivery drivers. However, only delivery drivers are required to sign a written contract reflecting the requirements of their job.

When in the restaurant, the delivery drivers have the same supervisors as other employees. However, the drivers are not closely supervised while making deliveries, whereas other employees, who do all their work in the restaurant, are closely supervised.

The record shows few, if any, permanent transfers between job classifications. Since May 2003, one driver transferred to a production position and then transferred back to a position as a driver.

If a driver is not available to make a delivery, the Employer normally uses another driver or, if none is available, a manager. Only as a last resort is a production employee or server sent out to make a delivery. During the past year, this occurred a total of approximately 20 times out of the thousands of deliveries that were made. Delivery drivers have infrequently performed the functions of production employees or servers.

### ANALYSIS

On the foregoing facts, I conclude that the separate unit of delivery drivers sought by the Petitioner is an appropriate unit.

Initially, I note that no bargaining history exists for any of the employees at the Sunbury facility. In the absence of such a history, the Board has found truck drivers to be a separate appropriate unit where they have a substantial community of interest separate and apart from the broader one they share with other employees.<sup>6</sup>

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<sup>6</sup> *Pacesetter Corp.*, 241 NLRB 1150 (1979).

In this case, the delivery drivers' principal duties and required skills are those associated with driving, and are wholly different from those required of other employees, whose principal duties are to prepare meals (production employees) and deliver them to customers in the restaurant (servers). Even when the delivery drivers are at the restaurant, they often perform distinct functions, such as washing dishes. Because they spend the majority of their time on the road, their contact with other employees is limited.

The pay delivery drivers receive is both different in nature, insofar as it includes reimbursement for vehicle expenses, and substantially higher than that of other employees. The wages, tips, and reimbursement a driver receives average about \$11.90 per hour. Production employees receive a wage rate of \$6.00 to \$7.00 per hour, similar to that of drivers, but receive no other pay. Servers receive wages and tips in amounts averaging little more than the federal minimum wage.

There is minimal transfer of employees between job classifications within and outside the requested bargaining unit, and minimal interchange between drivers and other employees. The record shows only one case of a transfer of an employee from a driver's position to a production position and then back to a driver's position; there is no showing that any other similar transfers occurred in either direction. The record further shows that thousands of deliveries are made each year, but that only about 20 of them are made by production employees or servers, and that delivery drivers infrequently perform the work of production employees or servers.

Cases in which the Board has found that drivers may not form a separate appropriate unit, or must be included in the same unit with other employees, are clearly distinguishable. In *Levitz Furniture Co.*, 192 NLRB 61, 62-63 (1971), the interchange between drivers and other employees was far more regular and frequent than here; the drivers participated in sales of surplus merchandise every 6 weeks and performed will-call picking (use of a forklift to remove inventory from shelves) 45 times in a 3-month period, while employees in several other job classifications made deliveries in trucks. Both truck drivers and other employees did loading and unloading, other employees performed as truck drivers, and at least 3 truck drivers were asked to sell on the sales floor. In *Damon Medical Center*, 234 NLRB 387, 388 (1978), several other classifications of employees--house-call technicians, laboratory employees, and stockroom employees--all regularly performed some of the same functions as drivers; phlebotomists and stockroom employees, as well as drivers, were required to have valid drivers' licenses; and several drivers had previously worked in other job classifications.

In summary, existing caselaw does not militate against the conclusion that the unit requested by the Petitioner is appropriate.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the 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 the ASSOCIATION OF PIZZA DELIVERY DRIVERS, INC.

### LIST OF VOTERS

In order to ensure that all eligible voters 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); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by November 8, 2004.

Dated at Cleveland, Ohio this 25th day of October 2004.

/s/ [Frederick J. Calatrello]

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Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8