

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

In the matter of:

SLEEPY'S, LLC

Employer,

and

United Food and Commercial Workers Union,
Local 919

Petitioner.

Case No. 34-RC-2317

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
JUNE 17, 2009 DECISION AND DIRECTION OF ELECTION**

On the Brief:

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I. PRELIMINARY STATEMENT

Sleepy's, LLC ("Sleepy's" or "Employer") operates approximately 700 retail stores in the northeast within which it sells mattresses. Region 34 issued a hasty decision in which it decided that a bargaining unit of approx. 70 employees who work in a random selection of 32 retail stores operated by the Employer in Connecticut is appropriate. The Region defined the unit by identifying stores that have been overseen by one of the Employer's many Regional Managers, Jack Edmunds, for approximately 4½ months.

At issue in this Request for Review is the propriety of the Regional Director's decision to define a 32 store multi-location bargaining unit merely based upon the commonality of the Regional Manager who is currently assigned to oversee the select retail stores. There is no other rhyme or reason to this unit definition. The bargaining unit does not comport with any of the Employer's administrative groupings; the 32 retail stores are a random subset of the Employer's administratively-defined 155 retail store New England Market. The bargaining unit does not fit within any geographic boundaries; in addition to these 32 retail stores, the Employer operates 27 additional stores in Connecticut. The randomness of this unit finding is underscored by the Regional Director's naming, *sua sponte*, of these 32 retail stores as "the R-37 region" based on Regional Manager Edmunds' employee identification number (R-37).

Moreover, by defining a bargaining unit based upon who currently oversees the stores, it is susceptible to change and will foster labor instability, which is inimical to a core tenet of the Act. Indeed, the stores assigned to Regional Manager Edmunds have changed at least three times in the past year and will change within the next six months, based upon the business needs as determined by Regional Vice President John Pergolizzi, who has the sole authority to make such decisions. This highlights the problem with the Regional Director's decision to define a

bargaining unit based on the stores overseen by a specific person instead of an administratively or geographically defined multi-store unit comprised of the New England Market.

Accordingly, Section 102.67 of the Board's rules was intended for a situation such as the one presented here. The DD&E raises a substantial question of law because it defines the bargaining unit without regard to any administrative or geographical grouping of the Employer. See NLRB Rule 102.67(c)(1); Lawson Milk Co., 213 NLRB 360 (1974). The DD&E contains clearly erroneous findings on substantial factual issues and departs from Board precedent. See NLRB Rule 102.67(c)(2). The DD&E raises a compelling reason for reconsideration of the Board's "vote and impound" procedure. See NLRB Rule 102.67(c)(4). On any one of these bases, the Board should grant review and vacate the DD&E.

II. REQUEST TO STAY MAIL BALLOT ELECTION

The Employer also respectfully requests that the Board stay the further processing of the instant petition until the Board rules on this Request for Review. The Employer filed a Motion to Stay on June 25, 2009 seeking this relief. Specifically, the mail ballot election currently scheduled for **July 13, 2009** should be cancelled. Requiring the employees who work in the 32 retail stores overseen by Regional Manager Edmunds to vote will deny them of their right to make an informed choice of a collective bargaining representative. This is so because the Board should ultimately determine that the New England Market is the only appropriate bargaining unit. Certainly, the eligible voters who work in stores overseen by Regional Manager Edmunds may vote differently if they are voting to secede from the New England Market or remain part of the New England Market. Without question, the character of the unit changes dramatically if it consists of employees working in all the New England Market stores or just employees working

in the subset of stores currently overseen by Regional Manager Edmunds. Moreover, the fact that the stores assigned to Edmunds frequently and materially change just adds to the likely confusion of the eligible voters as to the scope of the unit. The Board must rule on the Request for Review and define the appropriate bargaining unit in order to protect employees' Section 7 rights. Put simply, if the Board permits the election to go forward without defining the appropriate unit, the eligible voters will have no idea what they are voting for. This situation is not ameliorated by the Regional Director's anticipated use of the "vote and impound" procedure. That procedure is effective only when there are a small number of classifications in dispute. Herein, there is a significant issue of unit scope, not unit composition. Accordingly, the Board is asked to reconsider its application of the "vote and impound" procedures, and preclude the use of such procedures where there are unit scope issues in multi-location settings as herein.

III. PROCEDURAL STATEMENT OF THE CASE

The United Food and Commercial Workers Union, Local 919, ("Union" or "Local 919") filed a representation petition (Case 34-RC-2317) with Region 34 seeking to represent the mattress professionals (a/k/a sales employees, sales professionals, hereinafter referred to as "sales employees") employed in the Employer's retail stores currently assigned to Regional Manager Jack Edmunds (R-37 is Edmunds' ID number) (hereinafter referred to as "Petition") (Bd.Ex. 1).¹ On June 1 and June 4, 2009,² a hearing was held before Hearing Officer Dina Emirzian at Region 34's office in Hartford, CT.

¹ DD&E Citations are designated "(DD&E. ___)"; Board Exhibits are designated "(Bd.Ex. ___)"; Petitioner UFCW's Exhibits are designated "(Pt.Ex. ___)"; and Employer Exhibits are designated "(Er. Ex. ___); Transcript Citations are designated "(Tr. ___)".

² All dates hereinafter are 2009 unless otherwise noted.

The Employer contended at hearing and in its post-hearing brief that: (1) the petitioned-for unit of sales employees who work in the 32 stores that are currently overseen by Regional Manager Jack Edmunds (R-37) is not an appropriate unit; (2) the only appropriate unit is comprised of all 155 stores within the New England Market; and (3) by using the extent of its organizing to the define its Petition, the Union attempts to exclude from the bargaining unit the other 123 stores within the New England Market.

The post-hearing briefs were submitted on June 15, 2009. Only two days later on June 17, 2009, the Regional Director issued the Decision and Direction of Election (“DD&E”). In the DD&E, the Regional Director held that the Petition sought an appropriate unit: “I find that a unit of sales employees at the 32 stores designated R-37 constitutes an appropriate unit for the purposes of collective bargaining.” (DD&E. 9). This Request for Review is due on July 1, 2009.

IV. FACTUAL STATEMENT OF THE CASE

The facts in this case are undisputed. As set forth below, the degree of control exerted by corporate and Regional Vice President Pergolizzi over the retail stores and sales employees in the New England Market is staggering. In addition, the lack of local autonomy and the high degree of functional integration calls for a multi-location unit comprised of all retail stores in the New England Market. The Regional Director, however, failed to consider the record evidence and erred in its analysis of these facts under Board precedent.

A. General

Sleepy’s, headquartered in Bethpage, NY, is a mattress and bedding retailer currently operating approximately 700 stores in 11 states on the East Coast from Maine to Virginia. (Tr. 15, 16). There are 1,300 sales employees company-wide. (Tr. 24).

For administrative purposes, the stores are divided into five markets. (Tr. 16, Er.Ex. 1). Each market has a Regional Vice President (“RVP”), who is responsible for the operations of the entire market. There is no local autonomy below the RVPs. Reporting to the RVPs are Regional Managers (“RM”) who each oversee between 28 to 35 stores at a given time within their assigned market as determined by the RVPs. Reporting to each RM are District Sales Managers (“DM”). DMs are top sales employees who roam around to assigned stores to help the sales employees close sales. The RMs and the lower-tiered DMs do not control day-to-day operations of the stores. Indeed, there are no store managers with supervisory authority, and the majority of Sleepy’s stores operate with just one sales employee.

Moreover, the stores that comprise a market frequently change at the discretion of the RVPs with input from corporate. (Tr. 30, 31, 35-40, 177; Er.Ex. 4). Also, the assignment and re-assignment of stores to RMs and DMs within a market is always changing based upon business needs at the sole discretion of the RVP. (Tr. 37, 58; Er.Ex. 8). Similarly, the sales employees working in a specific store varies on a daily basis. From a personnel assignment standpoint, the only consistent aspect of operations in a given market is the RVP. RMs, DMs or sales employees may work in a different store on a moment's notice.

B. The New England Market

The New England Market is comprised of 155 stores located in Connecticut, Massachusetts, New Hampshire, Rhode Island and Vermont. (Tr. 14, 16; Er.Exs. 1, 2, 3, 4). John Pergolizzi (“Pergolizzi”) is RVP for the New England Market. Reporting to Pergolizzi are five RMs, each of which Pergolizzi assigns between 28 to 35 stores. (Tr. 21; Er.Exs. 4(d), 4(e)). It is Pergolizzi’s goal to have an even number of stores overseen by each RM. RMs provide sales support and make sure the sales employees receive the proper training. (Tr. 21). There are

15 DMs in the New England Market and each DM covers between 7 to 12 stores. (Tr. 23, 24, Er.Ex. 4). Pergolizzi is often re-assigning stores to RMs and assigning DMs to different RMs to maximize his sales.

There are 300 sales employees in the New England Market. (Tr. 24). These 300 employees float between the New England Market stores as needed. The sales employees are not assigned to work in a specific store, rather, they often work in many stores within the New England Market. Given the fact that each store is generally staffed with one employee, flexibility in assigning sales employees to work in different stores is imperative to the operation of the New England Market. Put simply, if a sales employee doesn't come to work on a given day, the store is closed (and there is a loss of revenue) unless another employee within the New England Market (and sometimes from other markets) is assigned to cover for that absence.

RM Edmunds reports to RVP Pergolizzi in the New England Market. Edmunds' Sleepy's identification number is R-37. The stores supervised by Edmunds constantly change. As recently as January 2009, the Employer undertook a major restructuring of its management team, which changed Edmunds' responsibilities. Furthermore, as has historically been the case, the stores Edmunds supervises will continue to change.³

³ According to the DD&E, there was no evidence in the record that Edmunds' stores would continue to be in flux. This fails to accurately portray the record and the actual circumstances. The Regional Director completely ignored the direct and circumstantial evidence that clearly demonstrated the fluid nature of the purported unit in question, such as: (1) the major overhaul in January 2009 of the New England Market; (2) testimony that stores open and close all of the time, including those overseen by Edmunds; and (3) RVP Pergolizzi's direct testimony that he continues to change the stores that are supervised by RMs in the New England Market. To the contrary, there is absolutely no evidence in the record that the alleged "R-37 region" is static.

C. Through Excessive Corporate And RVP Control, All New England Market Stores Operate The Exact Same Way And The Sales Employees Enjoy The Exact Same Terms And Conditions Of Employment

All of the stores in the New England Market operate in the exact same manner. The record contains an abundance of evidence of the excessive control exerted by the corporate office and by RVP Pergolizzi over the New England Market stores. Also, all sales employees in the New England Market are subject to the exact same terms and conditions of employment. Corporate and RVP Pergolizzi exercise day-to-day control over the sales employees.

In this regard, the Regional Director acknowledged these clear facts and correctly found in the DD&E that:

- “The Employer maintains common labor relations policies and has centralized management over all stores.” (DD&E. 4)
- All sales employees “perform the same duties, utilizing the same equipment and forms, and work under the same terms and conditions of employment at each store.” (DD&E. 4).
- “All sales employees are subject to the same benefits, wage and commissions structure, vacations, holidays, hours of work, dress code and employee handbook.” (DD&E. 4).
- “Commission disputes between sales employees are determined by a ‘rules committee’, which is established and administered by corporate.” (DD&E. 5)
- “Paychecks are centrally processed by corporate, and sales employees directly contact corporate in the event of a paycheck problem.” (DD&E. 5)
- “Recruitment of new sales employees is also centralized in corporate.” Recruiting is performed by Lauren Rant “for all stores in the New England market.” Applicants apply based upon the “geographic area in which they wish to work, rather than a particular store.” Pergolizzi makes the final hiring decision for all employees in the New England Market. (DD&E. 5).
- “All personnel files are maintained at the corporate office.” (DD&E. 4).
- All sales employees attend the same training program in Farmingdale, NY. (DD&E. 4).

- All sales employees attend town hall meetings held by RVP Pergolizzi, which were attended by employees working stores overseen by Jack Edmunds (R-37), John Demma (R-82) and Joe Kilty (R-77). (DD&E. 4).
- All discipline is reported by corporate Human Resources to RVP Pergolizzi “who makes the final disciplinary decision with regard to terminations.” (DD&E. 5).
- All promotions are determined by RVP Pergolizzi. (DD&E. 5).
- “Corporate makes all decisions regarding advertising, store set-up, merchandise and sales goals.” Any adjustments to sales goals are “subject to RVP Pergolizzi’s approval.” (DD&E. 5).

In addition to the above findings in the DD&E, the record evidence established:

- All Sleepy’s stores have the same days and hours of operation, as determined by the corporate office. (Tr. 25, 78-80).
- The Company’s Human Resources department is responsible for employee relations at the New England Market stores. (Tr. 43).
- The new hire process is corporate driven. RVP Pergolizzi reviews all applicants for the New England Market, interviews applicants when he deems necessary, and approves all new hires. (Er.Ex. 6). A sales employee cannot be hired without Pergolizzi’s involvement and approval. All new hires attend the same orientation and receive the same new hire packet, both of which is corporate driven. (Tr. 60-61, Er.Ex. 9).
- Customer complaints in the New England Market are handled at corporate. (Tr. 77).
- Merchandising for all New England Market stores is all determined by corporate. Corporate puts together the store floor plan and the RVP Pergolizzi approves it. (Tr. 73-75).
- RVP Pergolizzi approves all requisitions for the New England Stores. (Tr. 76, Er.Ex. 12).
- The advertising for a holiday sale is the same across all Sleepy’s stores including the New England Market. (Tr. 72, 73). For example, if a mattress is discounted 50% in New Jersey, it will also be discounted 50% in New York. (Tr. 73).
- The corporate office has a centralized corporate policy in place for the handling of money. (Tr. 71). This policy is the same for all markets. (Tr. 71). The RVPs, RMs, and DMs have no involvement in creating this policy. (Tr. 71). Corporate sends out a memo every day listing stores that did not make their daily deposit.

(Tr. 72).

- Corporate decides the break schedule for all sales employees. (Tr. 92).
- Only the corporate “exchange team” can effectuate a return of merchandise from one store to another store. (Tr. 182).
- Corporate assigned field operations employees address the day-to-day maintenance of the stores. (Tr. 70).
- There are company-wide sales contests for the sales employees. (Tr. 69).
- Corporate issued a uniform warning notice. (Tr. 66, 127, Er.Ex. 11).

These undisputed facts show the high degree of centralized control in management, the lack of local autonomy, and the similarity of skills, duties and working conditions of all sales employees.

D. There Is A High Degree Of Functional Integration Among The New England Market Stores

The record plainly establishes that the centralized control exerted by the corporate office and RVP Pergolizzi results in a high degree of functional integration (although the DD&E paid little attention to this evidence).

Corporate selects all vendors, orders all merchandise for the stores, and sets the store floor plans. Indeed, the same exact merchandise is available for purchase at all stores. (Tr. 73-74). The stores are serviced by the same Sleepy’s distribution centers and otherwise share merchandise by directing customers to pick it up at another store.

All stores are connected by a computer network/system called SIESTA. (Tr. 76). A sales employees at one store can look in the SIESTA system to see what merchandise is available in another store. (Tr. 76). All sales employees communicate via email through SIESTA and receive updates from corporate through this portal. (Tr. 76, 179). An employee in one store can access a computer in another store. (Tr. 123). This SIESTA system is also used by sales

employees to “clock in” on a daily basis and to check their weekly work schedules (because they vary).

There are many other examples of functional integration. First, the sales employees work together to handle a same-day purchase by a customer. (Tr. 75). For example, if a customer purchases a mattress in one store, but the store does not physically have the item, the customer can pick up the mattress at a different store that carries it in stock. (Tr. 75). Second, all the sales employees use the same paperwork to complete sales. (Tr. 87). The paperwork is not specific to the region but is company-wide. (Tr. 87). Third, accessories such as pillows, frames, sheets, mattress protectors are transferred from store to store. (Tr. 94). Fourth, the Company’s 800 number is routed to corporate. (Tr. 95). The number never connects to any individual store. (Tr. 95). Fifth, sales employees routinely contact other stores to call for merchandise. If a sales employee in one location has a customer that he/she thinks will purchase clearance merchandise stored in another location, he/she would contact the sales employee at the other store and work together to sell the item. (Tr. 95). Sixth, sales employees work together when situations arise where a customer goes to one location, gets a quote, and then goes to another location to get a lower price. (Tr. 95, 96). The sales employees call the other stores to verify the previous quote. Seventh, if a customer purchase a mattress at one store, he/she can exchange the mattress to another location for an exchange. (Tr. 99, 123). Eighth, the same sales are run at all stores. Ninth, DMs will call an RM from another area if the DM cannot find the RM to whom he/she is assigned. (Tr. 100). Tenth, sales employees can call any RM or DM they wish. (Tr. 100, 101). This issue arises when they need to service a customer quickly. (Tr. 101). For example, if the sales employee needs a code but cannot get in touch with his/her RM or DM, the sales employees can reach out to any other RM or DM. (Tr. 101). RVP Pergolizzi also fields those

calls for the sales employees. Eleventh, sales employees transfer between stores for daily staffing and to cover for absences (as discussed below). Twelfth, sales employees attend town hall meetings and continuing education classes with sales employees who work in stores overseen by other RMs. (Tr. 101; Er.Exs. 16, 17). The continuing education classes are not limited to a specific store, specific state, or specific region. (Tr. 104; Er.Exs. 18, 19). In this vein, former employee/Union witness Gray testified he did not recognize a lot of the employees at the town hall meetings he attended. (Tr. 180).

E. Sales Employees Are Frequently Transferred Between Stores Within The New England Market

In addition to the high degree of functional integration and interchange, Sleepy's requires its sales employees to transfer between stores on a moment's notice. The "one sales employee per store" business model is dependent upon the interchange of sales employees. Pergolizzi testified that "a number of things can happen when you're operating a business that has one associate in it" and that you have to be agile and "work as a team in order to get these stores covered." (Tr. 26). Therefore, approximately 50% of the workforce in Connecticut are floaters. (Tr. 138). These individuals can float across territories and are not scheduled to one particular store. (Tr. 141). Pergolizzi summed it up best: "We have one person coming in. If somebody calls out sick and there is nobody to cover that store, we're closed for the day. They have to work as a team. They don't work as a team, there's potential opportunity that a store doesn't open." (Tr. 57).

Fittingly, sales employees are not assigned to a specific store upon hire and are not assigned to work in any specific store during their employment. Rather, sales employees "float around" and are assigned to stores based upon operational needs and where the sales employees live in relation to the stores. (Tr. 26, 134). In fact, because sales employees are assigned to a

geographic area instead of a specific store, one sales employee can be under the direction of two different RMs. (Tr. 134).

Sales employees can potentially be scheduled to work in different stores every day of the week. (Tr. 138). Former employee/Union witness, Scott Gray, testified that sales employees get one day's notice of their weekly work schedule. (Tr. 170). Gray further testified that he "moved around a lot in the past year" and worked in 10 different stores. (Tr. 176).

The record is replete with examples of the excessive transfer of sales employees. (Tr. 42; Er.Exs. 21, 22, 23, 25(a-ff)). Sales employees are transferred between the stores and overseen by various RMs. (Tr. 42). Appended to this Request for Review at Exhibit A is a summary of employee interchange based on the data contained in Er.Exs. 25a-ff.⁴ Chart I shows that there are 18 sales employees who are currently working in stores overseen by RM Jack Edmunds (R-37) who have also worked in stores overseen by other RMs. Chart II shows that there are 35 sales employees who are currently working in stores overseen by other RMs, who have also worked in a store overseen by RM Jack Edmunds (R-37). The point is, sales employees work in many different stores under the oversight of various RMs.

What's more, to ensure that the stores are always staffed, a sales employee in any Sleepy's store can perform his/her same job duties in any other Sleepy's store. (Tr. 93). All sales employees in the New England Market are provided with a "cyber key" that grants them access to every store in the New England Market. (Tr. 87). Once a sales employee is assigned to a store, he/she can easily gain access to open the store, utilize the same equipment within the store to service customers, and close the store at the end of the day.

⁴ To facilitate reading the two charts: "S/R" is the showroom that the employee works in; "S/R RM" shows the identification number of the RM assigned to oversee that showroom; "MP" denotes the sales employees' five digit alphanumeric identification number; "RM" shows that they currently work in stores overseen by RM Jack Edmunds (R-37).

In addition to the regular interchange/transfer of sales employees to cover the stores, there are other occasions where the sales employees work in other stores within the New England Market.

V. ARGUMENT

Given the Regional Director's findings that (1) Sleepy's "maintains common labor relations policies and has centralized management over all stores" and (2) all sales employees "perform the same duties, utilizing the same equipment and forms, and work under the same terms and conditions of employment at each store," it is hard to fathom how the Regional Director then defined an appropriate unit limited to the stores overseen by RM Jack Edmunds (employee number R-37) (DD&E. 4). Evidently, the DD&E ignored the extensive evidence of the high degree of functional integration, employee interchange and lack of local autonomy.

To reach this finding, the DD&E made three flagrant missteps. First, the DD&E defined the appropriate unit merely based upon the commonality of the RM Edmunds (R-37), who is currently assigned to oversee these select retail stores. This is contrary to established Board precedent and is based on the Union's extent of organizing, which is precluded by Section 9(c)(5) of the Act. Further, the Regional Director's conclusion completely ignores the record evidence that the store assignments to RM Edmunds are constantly changing. Second, the DD&E found that the sales employees working in stores overseen by RM Edmunds share common immediate supervision. The record does not support this finding. Third, the DD&E found that the employee interchange is insufficient to show the sales employees do not have a distinct community of interest. However, the Regional Director ignored (or plainly did not understand) the record evidence of the interchange.

Lastly, the Regional Director's anticipated use of the "vote and impound" procedure warrant the Board's reconsideration of its viability in unit scope cases.

A. The Law

Where a union petitions for a multi-facility unit that is not employer-wide, there is no presumption that the petitioned-for unit is appropriate. Capital Coors Co., 309 NLRB 322 (1992), citing NLRB v. Carson Cable TV, 795 F.2d 879, 886-887 (9th Cir. 1986).

In defining the appropriate bargaining unit where no presumption applies "the key question is whether the employees share a sufficient community of interest." Verizon Wireless, 341 NLRB 483, 485 (2004) (citing Alois Box Co., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994)). As stated in Verizon Wireless, 341 NLRB 483 (2004),

There is nothing in the Act that requires that the unit for bargaining be the only appropriate unit or the most appropriate unit; the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. Overnite Transportation Co., 322 NLRB 723 (1996); Brand Precision Services, 313 NLRB 657 (1994); Phoenix Resort Corp., 308 NLRB 826 (1992). In defining the appropriate bargaining unit, the key question is whether the employees share a sufficient community of interest. Alois Box Co., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994). When examining a petitioned-for multifacility unit, the Board considers (1) similarity in skills, duties, and working conditions, (2) functional integration, (3) employee contact and interchange, (4) centralized control of management and supervision, (5) geographic proximity, and (6) bargaining history.

See also Alamo-Rent- a Car, 330 NLRB 897 (2000).

Application of these factors herein compel the conclusion that the entire 155 retail stores in the New England Market is the only appropriate bargaining unit that exists. Put simply, each of these stores have been effectively merged into a more comprehensive unit and, as a result, are so functionally integrated that they have lost any separate identity and have become one unified and coherent grouping. See J&L Plate, 310 NLRB 429 (1993).

In defining a bargaining unit limited to the 32 retail stores currently overseen by RM Edmunds, the Regional Director failed to analyze the record evidence under Board precedent.

B. The Regional Director Departed From Precedent And Ignored The Record Evidence In Defining The Scope Of The Bargaining Unit Based On The Retail Stores Overseen By RM Edmunds

1. R-37 Is Jack Edmunds' Identification Number, Not An Administrative Or Geographic Grouping Of Stores

The Regional Director erred in finding that “a unit of sales employees at the 32 stores designated R-37 constitutes an appropriate unit for the purposes of collective bargaining.” (DD&E. 9). More specifically, the apparent crux of this finding is the Regional Director’s belief that “R-37 is a distinct Employer-designated geographical grouping of stores, all of which are under the direct supervision of RM Edmunds.” (DD&E. 9). In this same vein, the Regional Director found that RMs “are each assigned to a particular geographical area within the New England market” and “Jack Edmunds is the RM assigned to R-37. (DD&E. 2, 3).

All of these findings are contrary to the record evidence. R-37 is the employee number assigned to RM Jack Edmunds. R-37 is not an administrative or geographical grouping of retail stores. There are many definitive references in the transcript in this regard. For example, in reviewing Er.Ex. 1, RVP Pergolizzi testified:

- Q. And so the top line, Jack Edmunds, John Richardson, Steve Criner, Joe Kilty, and John Demma, what are their job titles?
A. They are regional managers. They report to me.
Q. And who is under that first line of regional managers?
A. District managers.
Q. And, for example, under Jack Edmunds name, it says R-37, what does R-37 mean?
A. It just represents that he’s a regional manager, and 37 is just a number that he’s associated with. It actually identifies Jack.
Q. So R-37 doesn’t designate an area?
A. No. It designates him as a person.

(Tr. 19, 1.12-23). Upon questioning by the Hearing Officer, RVP Pergolizzi again testified:

- Q. All those codes, okay. Now and you said the R-37 refers to Jack.
A. To Jack, himself.
Q. And not to the grouping of the stores.
A. That's correct.

(Tr. 130, 1.21-25, 131, 1.1).

A simple review of Er.Ex. 1 shows that the RMs and DMs have numbers. All Sleepy's personnel, including RVP Pergolizzi, are assigned identification numbers corresponding to their positions. These numbers, such as RM Edmunds' R-37, do not otherwise have any operational significance. By defining the bargaining unit based on the stores currently assigned to RM Edmunds, the Regional Director *sua sponte* grouped the 32 retail stores in the fictional "R-37 region". There never has been and never will be an "R-37 region". The Employer's stores are divided into five markets based upon multiple states. Those are the only administrative groupings that exist. Sleepy's also does not group stores based on the location of a store within a state. Certainly, RM Edmunds does not oversee all Sleepy's stores in Connecticut (as the DD&E would imply). Rather, the New England Market currently includes stores in CT, MA, NH, RI and VT, many of which are in Connecticut and not overseen by RM Edmunds. The Regional Director ignored this evidence and rendered clearly erroneous findings on substantial factual issues.⁵

⁵ The Regional Director's decision to limit the unit to stores overseen by RM Edmunds flies in the face of his other findings that the Employer has centralized management over all stores, maintains common labor relations policies, and all sales employees work under the same terms and conditions of employment (e.g. hours, wages, benefits, vacations, holidays, dress code, handbook, equipment, etc.). Moreover, given the absence of day-to-day control by RM Edmunds (as discussed in Section IV(C) below), there is absolutely no basis to define the unit around Edmunds. To the extent defining a unit by person was appropriate, the only appropriate unit would be RVP Pergolizzi who clearly controls (with corporate involvement) every store and sales employees in his New England Market.

2. In Defining The Unit Based On Stores Overseen By RM Edmunds, The Regional Director Departed From Precedent And Violated Section 9(c)(5) Of The Act

Aside from getting the facts wrong, the Regional Director departed from Board precedent in defining a bargaining unit that does not comport with any of the Employer's administrative or geographical groupings. Indeed, the Regional Director's own citation to Lawson Milk Co., *supra*; White Cross Discount Centers, Inc., 199 NLRB 721 (1972); and Storemont-Vail Healthcare, Inc., 340 NLRB 1206, 1209 (2003) supports the Employer's position.

Furthermore, absent predicating the unit determination on the Employer's administrative or geographical grouping of retail stores, the petitioned-for unit is precluded by Section 9(c)(5) of the Act.⁶ The Board is constrained in its determination of appropriateness by Section 9(c)(5), which expressly states that "the extent to which the employees have organized shall not be controlling." This statutory mandate has been applied by the Board to reject arbitrary groupings of locations. Moreover, the Board will not approve a unit smaller than that which is otherwise appropriate in order to facilitate unionization. Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1093 (7th Cir. 1984). "Otherwise unions would gerrymander the bargaining units to their hearts content." *Id.*

Board law is clear; unit determinations must be based on community of interest, not the Union's successes and failures in garnering employee support at specific stores. The Regional Director failed to apply Section 9(c)(5) to prevent fragmentation of appropriate units into smaller inappropriate units, which the Board has historically done. See e.g., Overnite Transportation Co., 322 NLRB 723 (1996); Kansas City Coors, 271 NLRB No. 216 (1984);

⁶ The Regional Director's use of footnote 11 in the DD&E to superficially dispatch with the Employer's concern that the petitioned-for unit is based on the Union's extent of organizing is an implicit admission that absent an administrative or geographical grouping, the petitioned-for unit violates Section 9(c)(5).

Malco Theatres, Inc., 222 NLRB No. 16 (1976); Quality Food Markets, Inc., 126 NLRB No. 38 (1960).

Here, there is no doubt that the Union's petition for arbitrary stores is based solely on the extent of its organizing. The Union's attempt to pick-off a random grouping of stores currently overseen by RM Edmunds shows its inability to garner broader support and improperly fragments the New England Market. Without question, the abundance of record evidence establishes that the only appropriate unit is the New England Market. The simple fact that RM Edmunds may oversee a particular store has nothing to do with the assignment of sales employees to work in a particular store. The close geographic proximity of stores currently overseen by RM Edmunds to stores currently overseen by other RMs within the New England Market and outside the New England Market (Er.Ex. 2) highlights the arbitrariness and inappropriateness of the petitioned-for unit. The Regional Director endorsed the Union's extent of organizing in violation of Section 9(c)(5) and, as such, raises a substantial issue of law warranting Board review under NLRB Rule Section 102.67(c)(1).

C. The Regional Director Departed From Precedent And Stretched The Record Evidence To Conclude That The "Sales Employees in R-37" Share Common Immediate Supervision

The Regional Director erred in finding that the "sales employees in R-37 share common immediate supervision that is different from the other employees in the New England market." (DD&E. 10). To support this claim, the Regional Director further found that "RM Edmunds can recommend discipline and promotions, conduct training, approve call-outs, and temporarily transfer employees from store to store to cover call-outs." (DD&E. 10). These findings were result-oriented and in utter disregard of the record evidence.

First and foremost, the Regional Director properly found that the "Employer maintains

common labor relations policies and has centralized management over all stores.” (DD&E. 4). That finding, however, should have ended his inquiry. Instead, the Regional Director disregarded the fact that RM Edmunds cannot issue any discipline without the involvement of corporate Human Resources and RVP Pergolizzi. RVP Pergolizzi testified

Q. Do you have any involvement in HR issues?

A. Absolutely.

Q. What is your, just in general, what is your involvement?

A. My involvement is that, you know, nothing happens in the stores without going through HR, first off. And then once it goes to HR, HR does all, all the investigation that needs to be done. And then they bring it to me for a decision. So I’m on the phone, at least on a regular basis.

(Tr. 43, 1.25, 44, 1.1-7).

.....

Q. What is the process for issuing discipline to an employee in your market?

A. First, the facts have to be brought to HR before any discipline is given. So if somebody, whether it’s another sales person, district manager, or regional managers sees or identifies something as being a problem, they would bring it to HR, HR would, you know, check for consistencies and advise how to proceed, gather all the information, and then it would come to me for approval prior to being administered.

Q. Who makes the decision, the decision on the level of discipline that is issued to an employee?

A. It all comes through me. I work on it with HR.

Q. Can a regional manager decide the level of discipline?

A. They can make a recommendation, but they are not making the ultimate decision.

Q. And who is making the ultimate decision?

A. Myself and HR.

(Tr. 64, 1.4-22).

Quite clearly, RM Edmunds can do nothing more than any other employee or DM in reporting a problem and making a recommendation to HR. All decision making authority is vested in HR and RVP Pergolizzi. Thus, the Regional Director’s footnote 5 that it is “unclear from the record whether Pergolizzi also approves all written warnings and other less severe discipline, or whether the RM may institute such discipline without Pergolizzi’s approval” are clearly erroneous

findings on substantial factual issues.

The Regional Director also erred in trying to convey supervisory authority to RM Edmunds based upon his alleged involvement in promotions, training, call-outs and transfers of sales employees between stores. First, the record evidence does not establish that RM Edmunds is a Section 2(11) supervisor. Second, RM Edmunds cannot effectuate a promotion. RVP Pergolizzi decides and approves all promotions. (Tr. 58, 98 126). Third, any “training” by RMs only pertains to helping sales employees reach their sales goals. RVP Pergolizzi testified that he expects DMs (not RMs) to meet with sales employees to discuss how to sell. (Tr. 49). Such training is at the specific request and direction of RVP Pergolizzi. RM Edmunds does not exercise any independent judgment in conducting such training. All training about employment-related issues is designed and conducted by corporate personnel with RVP Pergolizzi’s involvement. Fourth, there is no evidence in the record that RMs approve call-outs. Indeed, the only evidence is that RMs and DMs field the calls from sales employees when they are absent. (Tr. 57). The RMs do not have the authority to approve or deny a call-out, as the Regional Director found. Fifth, RM Edmunds’ decision to cover an absence in one store with a sales employee is routine and does not require the exercise of independent judgment.

Lastly, but with significance, the Regional Director attempted to paint the picture that RM Edmunds is a fixture in the New England Market and there are “no concrete future plans to change the supervisory structure of either the stores or the employees assigned to R-37.” (DD&E. 10). The record contains evidence that RVP Pergolizzi is opening 10 more stores within the next six months and that he will reassign stores to his RMs. (Tr. 50,1.23-25, 51, 1.1). Moreover, the record evidence makes perfectly clear that RVP Pergolizzi is frequently deciding and implementing changes in store assignments within and outside of the New England Market.

(Tr. 30, 177). According to Pergolizzi, the “markets are constantly changing.” (Tr. 30). For example, in January 2009, Pergolizzi decided to “give up” the stores in Danbury, CT to RVP Dino Cifelli and believes that the Danbury, CT stores will come back under his control in the future. (Tr. 1-18, 30). Pergolizzi’s store assignments to RMs are “constantly changing” and when an RM has “stores that aren’t performing, I’m going to swap them out. I might give him less stores and give somebody else who can drive sales a little bit more, more stores.” (Tr. 31). As with all other RMs, the stores assigned to RM Edmunds frequently change. Even the Union’s witness, Gray, admitted that store assignments to RMs change “quite a lot” and Edmunds’ store assignments have changed three times within the past year. (Tr. 183-184). Gray also testified that sales employees are not provided with any advance notice of the change in RM assignment, but rather they receive an email on the company-wide portal from Pergolizzi setting forth the new reporting structure. (Tr. 184).

Despite the Regional Director’s effort to undermine the centralized control by corporate and RVP Pergolizzi, the record evidence shows Pergolizzi’s direct involvement in all employee relations issues within the stores in the New England Market. Pergolizzi spends 80% of his time every week out of his office visiting his 155 stores. His control over the stores within the New England Market runs all the way down to the store level. He is involved in transferring sales employees to other stores within the New England Market (Tr. 42); approving all new hires (Tr. 55); approving all promotions (Tr. 58, 98); approving all discipline and terminations for sales employees (Tr. 65, 66); approving split shifts for sales employees (Tr. 80-81; Er.Ex. 13); approving the holiday work schedule for his stores (Tr. 83); setting the dress code for his sales employees (Tr. 92); approving all requisitions of merchandise (Tr. 76, Er.Ex. 12); and, getting calls “on a regular basis” from sales employees about store assignments, customers, pricing and

merchandise (Tr. 95-98).

Commensurate with the extensive centralization of control in corporate and RVP Pergolizzi, there is no local autonomy over the stores. Indeed, every decision which requires independent judgment regarding the terms and conditions of employment of the sales employees in the New England Market requires the involvement and approval of RVP Pergolizzi.

With the Sleepy's business model, most stores are operated from open to close by one person – a lone sales employee. There is no store manager with authority at the store. The next closest person with involvement at the store level are the DMs. The DMs, however, serve a sales support function and are charged with pushing sales in their assigned 7 to 12 stores. (Tr. 23). They have no decision-making authority and clearly no Section 2(11) supervisory authority.

The RMs also do not have any meaningful decision-making authority regarding the sales employees. Aside from assisting the sales employees with understanding their sales objectives, the RMs only provide sales support. They are responsible for the sale figures and working with the sales employees to drive sales.⁷ (Tr. 21).

D. The Regional Director Erred In Finding A Lack Of Employee Interchange and Transfers

The Regional Director made clearly erroneous finding that “the evidence of temporary and permanent interchange between the sales employees in R-37 and the rest of the New England market is insufficient to show that the employees in the petitioned-for unit do not share a community of interest distinct from the employees in the New England market.” The Regional Director further erred in finding “regardless of the extent of such temporary interchange, it is

⁷ Neither the RMs nor the DMs have offices or administrative assistants because their job function is to travel between stores to drive the sales with the sales employees. Conversely, as Pergolizzi is charged with operating the stores, he does have an office and an administrative assistant. (Tr. 15).

insufficient to overcome the distinct community of interest shared by the sales employees in R-37.” (DD&E. 10).

As an initial matter, the Regional Director arbitrarily used January 9, 2009, just 4 ½ months prior to the petition, as a cut-off date prior to which he refused to consider the record evidence of employee interchange. Had the Regional Director reviewed the record evidence just one or two months prior to January 9, 2009, the degree of interchange would have spiked many times more than what it sought to reflect in the limited sample period commencing with January 9, 2009. The DD&E cited no support for this random and inaccurate distinction, which ignored a legitimate sample period of six months prior to the filing of the Petition. Once again, this highlights why defining the unit based upon the “R-37 region” is reversible error.

Moreover, there is no evidence that the sales employees working in stores overseen by RM Edmunds have a distinct community of interest. As stated above in great detail, everything about their terms and conditions of employment are the exact same as employees working in other stores. The Regional Director found that there are common labor relations policies, centralized management over all stores, and “all sales employees are subject to the same benefits, wage and commissions structure, vacations, holidays, hours of work, dress code and employee handbook.” (DD&E. 4). To the extent the Regional Director draws the distinction in community of interest based on RM Edmunds’ control over the employees, Edmunds has no such control as set forth above in Section IV(C).

1. There Is An Abundance Of Interchange Among The Sales Employees

With regard to interchange, the Regional Director claimed that “daily work-related contacts between and among sales employees appears to be limited to those occasions when a sales employee from one store needs to contact a sales employee from another store to locate

merchandise for a potential sale.” (DD&E. 6). The record proves that sales employees: (1) communicate via email through SIESTA; (2) access a computer at another store; (3) work together to handle a same-day purchase by a customer (Tr. 75); (4) work to transfer accessories such as pillows, frames, sheets, mattress protectors from store to store (Tr. 94); (5) routinely contact other stores to call for merchandise; (6) work together when situations arise where a customer goes to one location, gets a quote, and then goes to another location to get a lower price (Tr. 95, 96); (7) work through situations where a customer purchase a mattress at one store to exchange it at another location (Tr. 99, 123); (8) attend town hall meetings and continuing education classes with sales employees who work in stores overseen by other RMs (Tr. 101; Er.Exs. 16, 17); and (9) work together for events, such as the Massachusetts “tax free” weekend (Tr. 93).

2. There Is An Abundance of Temporary Transfers Among Sales Employees

With regard to transfers, the record establishes that sales employees are not assigned to work in any specific store and “float around” as needed. Sales employees can potentially be scheduled to work in different stores every day of the week. (Tr. 138). Union witness Gray admitted that employees get one day’s notice of their weekly work schedule. (Tr. 170). Gray further testified that he “moved around a lot in the past year” and worked in 10 different stores. (Tr. 176). Pergolizzi testified that approximately 50% of the workforce in Connecticut are floaters who work across territories. (Tr. 138, 141). The frequency of the transfers is facilitated through the provision of “cyber keys” to all sales employees in the New England Market enabling them to gain access to every store in the New England Market. (Tr. 87).

The record is replete with examples of the excessive interchange of sales employees. (Tr. 42; Er.Exs. 21, 22, 23, 25(a-ff)). Sales employees are interchanged between the stores and

overseen by various RMs. (Tr. 42).

a. Sales Employees Working In Stores
Assigned To RM Edmunds Frequently
Transfer to Stores Assigned to Other
RMs

The schedules of the sales employees in evidence established that 18, or 27%, of the sales employees who are currently working in stores overseen by RM Edmunds (R-37) have also worked in stores overseen by other RMs. (See Exhibit A, Chart I). The Regional Director attempted to dilute this evidence under the artifice of limited his inquiry from January 9, 2009 to May 31, 2009. Under this fixed period, the Regional Director found that “at least one individual from R-37 worked in a store outside of R-37 . . . only 4% during that time period.” (DD&E. 7). Moving that arbitrary January 9, 2009 cut-off back less than two weeks to December 28, 2008, results in a 7.2% rate. Then, in a further attempt to weaken the evidence, the Regional Director made the incredible claim that “the record does not reflect who supervises or even directs an R-37 sales employee who is temporarily assigned to a store outside R-37.” (DD&E. 7). The exhibits and testimony establish that RVP Pergolizzi remains in charge of all employees in the New England Market and the sales employees are overseen by the RM who is assigned to the specific store.

b. Sales Employees Working In Stores
Assigned to Other RMs Frequently Transfer
Into Stores Assigned To RM Edmunds

The evidence establishes that there are 35 sales employees who are currently working in stores overseen by other RMs, who have also worked in a store overseen by RM Edmunds. (See Exhibit A, Chart II). In this regard, the Regional Director properly found that “at least one individual from outside R-37 worked in at least one store within R-37 . . . 52% of during that period of time” from January 9, 2009 to May 31, 2009. (DD&E. 7). Significantly, on the

majority of days, there is at least one individual working in a store overseen by RM Edmunds who works in stores assigned to other RMs within the New England Market.

To bury this strong evidence of frequent employee transfers, the Regional Director claims that there is no proof those individuals “are actually sales employees from other stores in the New England market.” (DD&E. 8). The record evidence does establish who are sales employees and who are not. Sales employees have a five digit alphanumeric identification number, which starts with the initials of their first and last name and then three random numbers. For example, former employee/Union witness Scott Gray had the employee identification number of SG965. (Tr. 182). By comparison, RMs and DMs have different identification numbers, such as Jack Edmunds’ R-37. The identification numbers of all RMs and DMs are included in Er.Ex. 1.

Documents admitted in evidence identify the sales employees in the New England Market by their identification number. Examples include: Er.Ex. 14 lists all sales employees in the New England Market assigned to work on Memorial Day weekend; Er.Exs. 25 show the identification numbers of the sales employees who worked in the stores; Er.Exs. 21-23 further list the sales employees in the New England Market who have been transferred between stores. Once again, the Regional Director’s incredible claim that “the record does not reflect who supervises or even directs a sales employee from outside R-37 who is temporarily assigned to a store within R-37” (DD&E. 8; 11) is easily refuted by the record evidence.

E. Pursuant to Section 102.67(c)(4) of the NLRB’s Rules and Regulations, There are Compelling Reasons for Reconsideration of Board Precedent Which Permits The “Vote and Impound” Procedure Where There Are Significant Unit Scope Issues

The “vote and impound” procedure should not be permitted in the instant case given the unit scope issues presented. Indeed, reviewing courts have invalidated elections where the

eligible voters were not able to exercise their Section 7 rights due to the uncertainty of the unit scope.

Therefore, it is respectfully requested that the Board reconsider its policy of using the “vote and impound” procedure where there are significant unit scope issues. Here, assuming the Board grants review and defines the bargaining unit as all retail stores in the New England Market, the unit will expand from 32 to 155 stores and the number of eligible voters will increase by over 300% (from approx. 70 to 300). As such, the Board’s decision will significantly alter the character and scope of the bargaining unit. See NLRB v. Parsons School of Design, 793 F.2d 503 (2nd Cir. 1986); Hamilton Test Systems, New York, Inc. v. NLRB, 743 F.2d 136, 140 (2nd Cir. 1984).

The holding of the election and impounding the ballots will interfere with employee Section 7 rights regardless of whether the Board grants or denies review. The mere fact that an election goes forward while a determination over the scope of the unit is pending before the Board will mislead voters and deny them of their Section 7 rights to make an informed choice of a collective bargaining representative. Certainly, the eligible voters who work in stores overseen by RM Edmunds may vote differently if they are voting to secede from the New England Market or remain part of the New England Market. Without question, the character of the unit changes dramatically if it consists of employees working in all the New England Market stores or just employees working in the subset of stores currently overseen by RM Edmunds. Moreover, the fact that the stores assigned to RM Edmunds frequently and materially change (as the record clearly shows they changed three times within the last year) just adds to the likely confusion of the eligible voters as to the scope of the unit. Put simply, if the Board permits the election to go forward without defining the appropriate unit, the eligible voters will have no idea what they are

voting for. The “vote and impound” procedure is not applicable and will not protect Section 7 rights. In fact, holding the election prior to the Board granting review will only waste precious Board resources.

VI. CONCLUSION

For all the above reasons, it is respectfully requested that the Board grant this Request for Review, reverse the Regional Director’s Decision and Direction of Election in its entirety, and stay the impending mail ballot election commencing on July 13, 2009.

Respectfully submitted,

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Alan I. Model

Dated: July 1, 2009

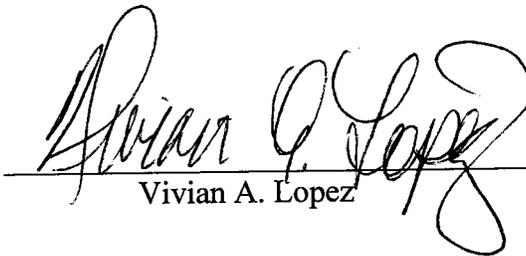
CERTIFICATE OF SERVICE

I, Vivian Lopez, hereby certify that the Request For Review Of The Regional Director's June 17, 2009 Decision And Direction Of Election on Behalf of Sleepy's, LLC, in Case No. 34-RC-2317, has been served this day FedEx and via electronic filing upon:

Jonathan Kreisberg, Regional Director
National Labor Relations Board, Region 34
280 Trumbull Street, 21st Floor
Hartford, CT 06103

and via fax and FedEx upon the Petitioner:

William Gagne, Esq.
J. William Gagne, Jr. and Associates
970 Farmington Avenue, Suite 207
West Hartford, CT 06107


Vivian A. Lopez

Dated: July 1, 2009

Exhibit A

Chart I

Exhibit A

Chart II

