

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAYLESS SHOESOURCE, INC.,

Employer

and

Case 14-RC-087469

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 655

Petitioner

**PETITIONER'S OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW**

Pursuant to NLRB Rules and Regulations 102.67(e), United Food and Commercial Workers, Local 655("UFCW 655") submits this Opposition to the Employer Payless ShoeSource, Inc.'s ("Payless") Request for Review of the Regional Director's Decision and Direction of Election. UFCW 655 asserts that there are not compelling reasons for review and therefore that the Request for Review of Payless should be denied. Likewise, the request by Payless that the election set for October 9, 2012, be stayed pending a decision by the Board should be denied.

**I. The Regional Director Did Not Make Clearly Erroneous Findings
on a Substantial Factual Issue**

Payless asserts that the Regional Director made erroneous factual conclusions on the issue of the local autonomy of the Rolla store. Payless claims that the Regional Director's finding that control of daily working conditions of the Rolla store associates is separate and autonomous from the other Payless stores is clearly erroneous because 1) it

is contrary to uncontroverted evidence and 2) it ignores record evidence. Neither of these contentions is correct.

Payless appears to base its argument that the Regional Director's factual findings were contrary to uncontroverted evidence on the risible position that its Associate Handbook is not evidence. This Handbook, however, was introduced into evidence by Payless; testimony introduced by Payless established that the Handbook applied to all Payless sales associates throughout the United States, including those at the Rolla store. (Tr. 95.) More specifically, the witness established that the Hiring Policies and Procedures, the Compensation provision, the Work Hours and Schedules provision, the Employment Guidelines, and the Employee Relations provisions as set forth in that Handbook applied to all Payless sales associates throughout the United States, including the sales associates employed in Rolla. Indeed, as the following exchange demonstrates, all provisions of the Handbook apply to the Rolla store:

Q. BY MR. SCHREINER: With respect to all the headings [of the Handbook] – remaining headings that we have not gone through, do all the policies set forth under those headings apply to the Rolla associates the same as they do to all other non-union sales associates employment by Payless throughout the United States?

A. They do.

(Tr. 98.)

Based on that testimony, the Regional Director made no error in relying on the descriptions of manager job duties that were set forth in the Associate Handbook in determining that the Rolla Store Leader exerted sufficient control over the associates' daily working conditions to make the single unit appropriate. As the Regional Director

stated, this Handbook, which Payless made clear applied nationwide, belied Payless' claims at the hearing of lack of authority on the part of the Store Manager.

Payless contends also that the Regional Director ignored record evidence in determining that the daily working conditions of the Rolla associates is "separate and autonomous" from the other Payless stores. Specifically, Payless contends that the Regional Director ignored evidence of the Store Leader's lack of control over certain functions: banking/expenses; payroll; product selection/pricing; store layout/merchandising; loss prevention; tracking of employee performance; qualifications/job duties of associates; dress code; benefits and wages; and personnel records. However, as the Regional Director sets forth in his Decision, the Board has recognized that in retail chain operations, there is a considerable degree of integration of operations and centralized administration. AVI Foodsystems, Inc., 328 NLRB 426, 430 (1999). The factors that Payless contends were "ignored" are representative of integrated operations and centralized administration. This integration and centralization "is not considered a primary factor in deciding the appropriateness of a single facility unit in this industry." RD Decision, p. 5. Indeed, as the Regional Director quoted from AVI Foodsystems: "In determining the appropriateness of a single-facility unit, the most significant consideration is whether the control of the day-to-day working conditions is separate and autonomous from any other facility."

Even if the Regional Director "ignored" record evidence, that evidence was not controlling of the issue presented for resolution and thus, this point does not present a compelling basis for review.

II. The Regional Director Did Not Depart from Officially Reported Board Precedent

There is no merit to the argument by Payless that the Decision of the Regional Director is not supported by Board precedent. In the retail industry, the Board has held that “[a]bsent a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity, the employees’ ‘fullest freedom’ is maximized, we believe, by treating the employees in a single store or restaurant of a retail chain operation as normally constituting an appropriate unit for bargaining.” Haag Drug Co., 169 NLRB 877, 878 (1968). The Board explained that

[t]he employees in a single retail outfit form a homogeneous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees in other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets.

Haag Drug Co., 169 NRB at 878-79. Furthermore,

More significant is whether or not the employees perform their day-to-day work under the immediate supervision of a local store manager who is involved in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems.

Thus, in the current case, as in Haag Drug Co.

the central headquarters [of the Employer] performs those administrative and merchandising functions typically performed by the central office of a retail chain operation: it keeps all personnel and payroll records, it negotiates all contracts with vendors, it pays all bills and keeps all financial records, it establishes the budget for each

individual restaurant, it maintains a profit-and-loss statement for each restaurant, it establishes pay scales for the particular jobs, and establishes all personnel policies.

Id. at 879. However, despite this centralization, a single unit was appropriate because the centralization did not “overshadow such important factors as infrequent interchange and communication among the employees of the various restaurants and the separate immediate supervision by the local manager. . . .” See also Emporium-Capwell, 273 NLRB 621 (1984) (two single-store units appropriate despite centralized administration where day-to-day supervision of employees not “done solely by central office officials,” there was little to no employee interchange, and there was a significant distance between the stores.)

Payless likewise contends erroneously that the Regional Director gave no weight to the bargaining history between the parties in finding the single-store unit appropriate. A review of his Decision establishes, however, that the Regional Director explicitly considered the parties’ bargaining history. On page 17 of his Decision, he correctly states that there was no evidence that the employees at the Rolla store had ever been represented. Furthermore, there was no evidence that the multi-facility bargaining of the 24 Payless stores currently represented by UFCW Local 655 was based on anything other than voluntary agreement by the parties. Thus, there was no “bargaining history” that precluded a Board finding that a single-store unit was appropriate.

III. The Board’s Presumption of the Appropriateness of a Single Store Unit in a Retail Chain Should Not Be Reconsidered

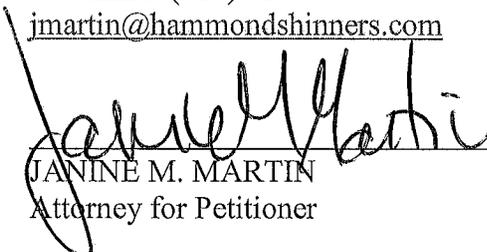
The Board should not reconsider its presumption that a single store unit in the retail industry is appropriate. Contrary to Payless’ contention, the interests of the employees in the remaining stores is not impacted by the organization of a single store.

Indeed, testimony introduced by Payless clearly established that in regard to its stores, uniform policies have continued to exist for all stores that are not represented by a union. Thus, while the 24-store unit currently represented by UFCW Local 655 has a collective bargaining agreement covering the terms and conditions of employment of the employees working in those stores, the rest of the Payless employees throughout the United States continue to work in accordance with the centralized policies adopted by Payless. The single-store presumption maximizes employee choice without impacting employees who have not had a voice in selecting the union.

IV. Conclusion

For all the reasons set forth above, UFCW 655 requests that the Board deny the employer's Petition for Review.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the October 4, 2012, the foregoing was e-filed and served, by e-mail and first-class mail, on David E. Schreiner, FISHER & PHILLIPS, LLP, 9150 South Hills Blvd., Suite 300, Cleveland, OH 44147, dschreiner@laborlawyers.com.



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