

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ALBERTSON'S, INC.

Employer

and

Case 36-UC-277

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 555 AND UNITED
FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as 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.

Upon the entire record¹ in this proceeding, the undersigned finds:

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 herein.
3. The labor organization involved claims to represent certain employees of the Employer.

The Employer is engaged in the multi-state operation of a chain of retail grocery stores, including the one at issue in Portland, Oregon. The facility involved is a gasoline service station, called the "fuel center" or the "A-Express", which is located on the same property as the Employer's grocery store number 575.² The fuel center has been in operation since September 22, 1999. The fuel center is the only one currently operated by the Employer in the Portland, Oregon area.³ The Petitioner seeks the accretion of the fuel center employees to its existing unit of grocery, produce, delicatessen, bakery sales, and

¹ The parties have filed briefs which have been considered.

² The store and the fuel center have different street addresses but are located on different sections of the same property.

³ There are other fuel centers located outside the metropolitan Portland area. The record shows that there is at least one fuel center in southern Oregon and one in Spokane, Washington.

general merchandise employees employed by the Employer in its Portland, Oregon and vicinity stores.^{4 5} The Employer argues that the UC petition is untimely. Failing that, the Employer contends that the fuel center employees are not an appropriate group to accrete to the overall unit. In addition, the Employer contends that the fuel center manager, Nancy Logue, is a statutory supervisor.

Timeliness Issue

The Employer argues that this UC petition is untimely filed because the Petitioner knew or should have known of the existence of the fuel center and its employees during the most recent collective bargaining negotiations.

The petition was filed September 25, 2000. The record shows that the fuel center opened on September 22, 1999, one year earlier. The last contract (“Predecessor Contract”) had a term that apparently expired on about July 23, 2000. It covered stores of multiple employers, including Albertson’s, in “Portland and vicinity.” The Predecessor Contract made no mention of fuel center employees. There were no fuel centers run by Unit employees within the geographic scope of the Unit, prior to the one at Albertson’s Store No. 575. Collective bargaining negotiations for the current (successor) contract covering store 575 (as part of an area agreement) commenced in October 1999 and were completed in January 2000, and ratified in early February, 2000, resulting in a successor contract effective July 23, 2000.

The record reflects that the fuel center was under construction for at least three months prior to September 1999, with signs prominently advertising its impending opening. The Employer asserts the Petitioner knew or should have known about the fuel center prior to and during the negotiations. The record shows that Petitioner’s then business representative for store 575, Bob Spicher, visited the store on a periodic basis and most likely visited the store in October 1999⁶ to discuss disciplinary actions. Petitioner’s chief negotiator testified that he did not become aware of the fuel center until May 2000 when someone not affiliated with the Local pointed it out. He also testified that he personally was not aware of the existence of the fuel center during negotiations and that the Employer did not mention the subject during their discussions. Petitioner also contends that Spicher was not aware of the fuel center; however, did not testify, so that contention is at best hearsay. His store visits were deliberately periodic, but given to variation by circumstances; he had a large number of locations to service, including some in eastern Oregon and conceivably was not aware of the existence of the fuel center. However, the fuel center was not a hidden secret; it was under construction for some months prior to opening with some degree of advertising and it was heavily promoted after its opening. It is reasonable to assume that a union business representative would have seen, or at least heard of,⁷ this activity during the approximately six months period prior to the culmination of bargaining in January 2000, as he was making his visits to this and other stores. It stands to reason that the Employer would make its center highly visible so as to attract customers; in fact, photos in the record show it to be highly visible from the street and from the entrance

⁴ On brief, the Petitioner seeks to amend its petition to include “lobby” employees in the overall unit. This issue was not mentioned prior to the brief and no evidence was presented during the hearing, nor has the Employer had an opportunity to address the issue. The motion is untimely and I hereby deny the request.

⁵ There are also separate meat department and baker agreements.

⁶ Petitioner asserts this date is vague and not necessarily accurate, but even assuming a leeway of a couple of months in either direction, the visit still would have occurred while there was evidence of the existence of the fuel center.

⁷ From employees, store steward, news reports, scuttlebutt - at least enough to trigger an inquiry.

to the store, prominently sited at the intersection of two streets on a corner of the store property/parking lot. I note from photos in evidence that the fueling island's roof is about the height of four VW campers. I take administrative notice that a VW camper is on the order of 5 feet high, making the island about 20 feet in height. The Petitioner did not provide any explanation for its claimed, or actual, lack of knowledge. Mr. Spicher - still employed by Petitioner - did not testify at the hearing nor did Petitioner claim unavailability or provide any explanation for his absence from the hearing. I also note that the store itself supports a large number of Petitioner's members. It is not a tiny facility - say, a corner convenience store with a handful of employees - where one might anticipate highly infrequent calls. Moreover, the store is in the Portland metropolitan area, as is Petitioner's headquarters.

As a general rule, the Board has held that it will not, during the term of contract, clarify a unit that is defined by contract, to include positions that existed before the current contract was agreed upon, if the positions were not included in the unit, because to do so would be disruptive of the parties' bargaining relationship. A petition is properly filed following the change, but during the life of the current contract; or before agreement on a successor contract; or immediately after agreement on the successor, if the issue was reserved during negotiations. Otherwise, there will be a QCR requiring an election. If the facility existed and was known to the Union, and it did nothing to secure inclusion during the relevant negotiations, its silence is deemed to be acquiescence in the exclusion. *Wallace-Murray Corp., Schwitzer Division*, 192 NLRB 1090 (1971). In this case, the Employer - which is claiming a bar and therefore has the burden to demonstrate the existence of the bar -- has made a reasonable, albeit not absolutely conclusive, showing that the Petitioner's representative knew or should reasonably have known of the existence of the fuel center employees prior to the culmination of negotiations for the current collective bargaining agreement. Petitioner, in response to this evidence, had the Union's chief negotiator testify that *he* had no knowledge. However, neither the Union's business representative responsible for servicing the store, nor the Union's CEO, testified about *their* lack of knowledge. I draw an adverse inference from the failure to call either, and particularly Spicher. The Employer did not raise the issue in negotiations, but it is Petitioner that would seek accretion, not the Employer. Petitioner did not file this petition *until over a year* after the fuel center was opened; the center was open a full four months before agreement was reached, and prominently under construction an additional three. This situation falls within the *Wallace Murray* doctrine and bars the processing of this UC petition. However, in the event the Board were to decide the Employer had not met its bar burden, in that it was necessary for the *negotiator* to have knowledge for a bar to exist,⁸ I make the following additional findings concerning the supervisory and accretion issues.

Supervisory Issue

The Employer contends that the fuel center manager, Nancy Logue, is a supervisor within the meaning of Section 2(11) of the Act. Petitioner argues that Logue is the equivalent of a lead person and does not qualify as a statutory supervisor. Logue used to be a manager of a bakery in Memphis, Tennessee, which was purchased by the Employer. Logue then left her employment, traveled to Oregon and was hired in September, 1999 by Bateman, the Store 575 store director, to run the new fuel center at store 575. There was an approximate six-week hiatus between Logue leaving her prior employment and starting as fuel center manager in Portland, Oregon. Her immediate supervisor is Bateman. He did the hiring for the initial complement of employees for the fuel center. Thereafter, Logue has done the hiring of all additional personnel (at least eleven employees). Almost all of these hires have been from the general public, rather than from Store 575's complement. Logue interviews and independently makes the hiring decisions. Once an applicant is hired by Logue, they complete the normal Employer paperwork through the Employer's corporate offices in Boise, Idaho.

⁸ There is no record evidence to refute the negotiator's testimony that he had no knowledge of the fueling operation until well after the new agreement was ratified.

Logue also plays an independent role in disciplinary matters and terminations. While the Petitioner disputes Logue's disciplinary authority, there is ample un rebutted record evidence to show that Logue makes termination or other disciplinary decisions without prior approval or consultation with Bateman. As the head of store 575, Bateman is kept informed of all important decisions, but this information may reach him after the fact. Logue independently prepares the fuel center's weekly schedule. She insures coverage of all hours; her only restrictions are the total number of weekly hours budgeted for the fuel center by Bateman. Since some fuel center employees are not qualified to operate the cash registers, Logue makes sure she has adequate coverage of the fuel pumps and cash registers at all times, without running over budget. She schedules vacations and time off for fuel center employees. Fuel center employees report absences and lateness to Logue or her designee, not Bateman. She directs the daily work for the fuel center employees and does the training⁹ for these employees.

Section 2(11) of the Act defines the term "supervisor" as any individual having the authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them or adjust their grievances, or effectively recommend any of such actions. The list is interpreted in the disjunctive; the possession of any one of the supervisory criteria qualifies that individual as a supervisor. *Pepsi-Cola Co.*, 327 NLRB No. 183 (1998). Logue clearly qualifies as a supervisor by virtue of her independent hiring authority, without further inquiry into any other factors. However, she also administers discipline, including termination, independently. Each of these actions requires independent judgment. I find that Logue is a supervisor within the meaning of section 2(11) of the Act.

Accretion Issue

Store 575 has existed at its current site for approximately six years. The fuel center was opened in September 1999 on a corner of the store parking lot. The entrances of the store and fuel center are approximately 390 feet apart - about the length of a football field from end zone to end zone. Jeff Bateman, store director, manages the store and he has overall authority. There is an assistant manager (grocery manager) and "third" and "fourth persons", respectively, who substitute for Bateman. Bateman has overall authority over the fuel center as a department of Store 575. Supervisor Logue reports directly to him.

Since the fuel center opened in September 1999 there have been twenty-three employees in total, including seven currently employed. The remainder left the employ of the fuel center for various reasons, voluntarily or otherwise. Two of the initial staff for the fuel center were voluntary transfers by Bateman from Store 575. None of the remaining fuel center employees has worked for Store 575 in the past; all have been new hires. Bateman did the hiring for the initial complement of employees, but once Logue took over as fuel center manager upon her arrival, she did all subsequent hiring. There are approximately 64 employees in the existing relevant bargaining unit in Store 575.

Fuel center employees receive a couple of days of training, including the operation of the gasoline pumps and associated equipment, how to clean up spills and what to do when a customer drives away without paying or without disengaging the gasoline hose from the automobile. The cash register and scanning device are different from the type used in store 575 and some of the fuel center employees receive training in the operation of that equipment as well as the other types of equipment in the fuel center (ice dispenser, cooler, hot dog machine etc.) The fuel center employees are engaged in the dispensing of fuel and related tasks for approximately 70% of the allocated working hours, with the remaining 30% being spent in the other work tasks of operating the fuel center.

In addition to gasoline, the fuel center sells various food and non-food items, comparable to other so-called "mini-marts" associated with gasoline service stations. This amounts to a small percentage of

⁹ Operation of the fuel pumps, safety equipment, registers and fuel center vending equipment.

total sales and is done primarily as a convenience to customers. The fuel center's merchandise is purchased primarily from outside vendors, who stock the fuel center. A small percentage of its non-fuel inventory, such as bakery and dairy items and fruit, is obtained from the main store. In contrast, store 575 obtains most of its merchandise and groceries from the Employer's distribution center in Portland, Oregon. Fuel center employees might go to the store a couple of times a day to pick up these miscellaneous items for sale in the fuel center.¹⁰ This merchandise is administratively "purchased" and the fuel center has to account for the goods through the store's internal accounting procedures.

Employees assigned to the store do not work in the fuel center, with the exception of one instance where there was a problem with the cash register in the fuel center. The "fourth man" was familiar with that kind of register from previous work in the center and went from the store over to the fuel center for a brief time to attempt to correct the problem. Likewise, the fuel center employees do no work in the store, again with one exception - a fuel center employee was used to clean up an area of the store, for under 30 minutes. There is no other record evidence of employee interchange. Two of the fuel center employees have applied for and been transferred to Store 575 for openings in the store. Bateman does not have any regular presence at the fuel center but he does visit once or twice a week for 15-20 minutes at a time.

Store 575 is divided into separate departments, including the fuel center. They are all administratively operated by Bateman, with all departments having a common accounting center and subject to common Albertson's policies. There is a grocery department where employees stock groceries and some other areas such as the dairy and snack sections. The produce department employees deal with stocking and maintaining produce. The front-end employees operate the cash registers, bag groceries. Sales employees in the bakery department sell bakery items and employees in the delicatessen department prepare and sell deli items. The customer service booth employees and pharmacy employees are not represented by a labor organization. The bakery employees who perform the actual baking, and the meat department employees, are separate appropriate units and represented by other labor organizations.

The fuel center is treated as a department of store 575 for accounting purposes. There are advertising distributions for the store within the fuel center, and fuel center specials have been announced on the loudspeaker system at the store; particularly when the fuel center first opened. There is an underground pneumatic tube which connects the fuel center to the store, it's used to transfer cash from the fuel center to the store. Records from the fuel center are supplied to store 575's bookkeeper, who keeps track of the fuel center sales on a daily basis. There are separate video systems for the store and the fuel center, but they are both monitored at the store.¹¹

All Store 575 employees, including the fuel center employees, are subject to the same personnel policies and rules applied to all Albertson's employees. All employees pick up their paychecks from the courtesy booth in the store and all employees use the same time clock which is located in the store. Both groups of employees use the same break and lunchroom, which are located in the store. The fuel center is open from 6:00 a.m. to 10:30 p.m. daily, while store 575 is open 24 hours per day, seven days a week.

The Board set forth its accretion policy in *Safeway Stores, Inc.* 256 NLRB 918 (1981). The Board will find an accretion only where the additional employees have little or no separate identity and thus cannot be considered a separate appropriate unit and the additional employees share an overwhelming community of interest with the existing bargaining unit. In *Towne Ford Sales*, 270 NLRB 311 (1984), affd. sub nom *Machinists Local 1414 v. NLRB* 759 F. 2d 1477 (9th Cir. 1985), the Board held

¹⁰ A shopping cart generally transports the merchandise.

¹¹ The monitors at the fuel center are primarily used for monitoring customers as opposed to employees. The record indicates they are used to develop a record of customers who drive away without paying and similar circumstances.

that common day-to-day supervision and the degree of interchange are the critical factors in making an accretion determination. Other relevant factors include similarity of skills, duties, working conditions, functional and administrative integration and bargaining history. The Board also follows a restrictive policy in finding accretions to existing units, because accretion deprives employees of their normal statutory right to determine their own collective bargaining representative, something the Board is reluctant to do. *Gitano Group, Inc.*, 308 NLRB 1172 (1992).

Petitioner argues that a prior UC decision from this region should control in this case. The earlier decision was 19-UC-662, which involved a fuel center in an Albertson's store in Spokane, Washington, wherein the fuel center employees were found to be an accretion to the existing overall unit. The Employer points to another UC decision (19-UC-658), involving coffee bar employees in a store in Kingston, Washington, where the employees in question were not found not to be properly accreted. Neither one of these prior decision controls the outcome of the instant case. The controlling principles are set forth in the Board decisions cited above and are applied to the facts of each case before the Board. The facts in the Spokane, Washington (19-UC-658) situation are almost identical to the facts in this case, with two critical exceptions. The Portland fuel center employees have separate day-to-day, first level supervision, in contrast to the centralized supervision in Spokane, where the first level of supervision was at the store director level. In addition, in the Spokane case there was significant interchange between the fuel center and the main store unit, compared to virtually no employee interchange between the fuel center and the main store in the instant case. In addition, the employees in the Spokane fuel center were all transferred from the main store in contrast to only two of the twenty-three employees for the Portland fuel center. Thus, there was a substantial difference on the two most critical elements, separate supervision and interchange level. There are some other minor differences which are not controlling. E.g., Oregon does not permit self-service gasoline sales, so the fuel center employees here spend a substantial portion of their time actually pumping gasoline, whereas the Spokane employees handled the clerical aspects of the sales with no amount of time actually pumping gasoline.¹² Essentially all other operational details are similar when compared to the instant case.

The fuel center employees in Store 575 are supervised by Logue who is a statutory supervisor as discussed above. Logue schedules the hours of work (within the total weekly hours budget provided by Bateman). She decides which employees work the fuel pumps and which operate the register functions. Logue independently hires fuel center employees and independently disciplines.¹³ While Logue reports to Bateman and has limited discretion in some areas such as wages and benefits, it is clear from the record that she runs the fuel center on a day-to-day basis. In addition, there is no significant interchange between the employees of Store 555 and the fuel center. These two critical factors augur, most strongly, against finding an accretion in this situation.

¹² I note the Employer contends this is a skill difference between the main employees and the fuel center employees. While I do not intend to delve into the rationale for the state prohibiting self-service gasoline sales in Oregon, it does not take any meaningful training or skill level to be able to pump gasoline as is attested to by the self-service practice in all other states with the exception of New Jersey.

¹³ Petitioner argues that Logue should be discredited due a credibility dispute as to the termination of one employee. The employee in question claims he was terminated by Bateman without Logue's involvement and Logue testified she terminated the employee without prior consultation with Bateman. If this were the only evidence in support of the Employer's position that Logue is a 2(11) supervisor, I might be hesitant to make such a finding. However, the record has numerous instances of un rebutted testimony supporting Logue's authority to hire, discipline and assign work, thus qualifying her a Section 2(11) supervisor. The pre-election representation hearing is non-adversarial in nature and only part of an investigation into the facts. See Section 102.20(c), NLRB Rules and Regulations, as amended. I cannot credit or discredit Logue on the basis advanced by Petitioner.

In the end, the fuel center stands as a physically separate enterprise, with its own supervision, its own cadre of employees who do all and only fuel center work, selling (primarily) a distinct, non-food product. There is minimal contact between the fuel crew and the rest of the store employees – in fact, it appears limited primarily to breaks. The fuel center is only somewhat integrated into the store operation; in particular, its primary product – fuel – and most of its non-fuel stock come from a separate supply chain. It is true that ultimate labor relations/employee relations authority for the entire operation lies with Bateman, and there is common corporate policy, employee handbook, etc. However, these common features are insufficient to defeat the distinct separateness of the fuel center.

Thus, I conclude that the fuel center group stands as a distinct group – separate from the “grocery” store, cohesive within itself. See *Safeway*, supra. In fact, the group could stand as a separate bargaining unit. Either of these conclusions proscribes accretion, because a QCR has been raised. Accordingly, assuming the petition were not barred by an untimely filing, I independently would deny the petition on the merits.

Therefore based on the entire record, I conclude that the fuel center employees are not an accretion to the overall unit and I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 10, 2001.

DATED at Seattle, Washington, this 27th day of December, 2000.

/s/ PAUL EGGERT

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