

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21

SEVEN-UP/RC BOTTLING CO. OF  
SOUTHERN CALIFORNIA, INC.<sup>1</sup>

Employer

and

Case 21-RC-20434

AMALGAMATED INDUSTRIAL WORKERS UNION,  
NFIU/LIUNA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter 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 record 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 with the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Category 1 salespersons employed by the Employer at its facilities located at 1166 Arroyo Avenue, San Fernando, California; 3200 E. 26<sup>th</sup> Street, Vernon, California; 1300 W. Taft Street, Orange, California; 1950 William Drive, Oxnard, California; and at the facilities located in San Diego, California and Santa Maria, California;<sup>2</sup> excluding all other employees, Category 2 salespersons, technical employees, quality control employees, technicians, professional employees, office clerical employees, guards and supervisors as defined in the Act.<sup>3</sup>

The Petitioner seeks to represent a unit, as amended at the hearing, consisting of all Category 1 salespersons employed at four of the Employer's facilities: San Fernando, Vernon, Orange, and Oxnard, California.<sup>4</sup> The Employer contends that Category 1 salespersons are supervisors within the meaning of the Act, and that accordingly, the petition should be dismissed.

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<sup>2</sup> The record does not reflect the addresses of the San Diego and the Santa Maria facilities.

<sup>3</sup> Other than the below-noted contention that the Category 1 salespersons are supervisors, the Employer does not contend that a unit comprised solely of Category 1 salespersons is not an appropriate unit. Based on the record presented, I find that the petitioned-for unit, composed solely of Category 1 salespersons, excluding all other employees, at the facilities described, is an appropriate unit for purposes of collective-bargaining.

<sup>4</sup> There are approximately 65 Category 1 salesperson employed in the petitioned-for unit.

The Employer also argues that if the Category 1 salespersons are found not to be supervisors, the only appropriate unit must also include the Employer's facilities located in San Diego and Santa Maria, California.<sup>5</sup>

Based on the reasoning noted below, I conclude that the Employer has failed to meet its burden to establish that the Category 1 salespersons are supervisors within the meaning of the Act, and accordingly, the petition will not be dismissed. I also find, based on the considerations noted below, that the petitioned-for unit is not an appropriate unit; and that the only appropriate unit for the purposes of collective bargaining must also include the Employer's San Diego and Santa Maria, California, facilities.

**I. Supervisory Status Issue**

**A. The Board's Standards**

Section 2(11) of the Act defines "supervisor" as:

. . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In NLRB v. Health Care & Retirement Corp.,

511 U.S. 571, 573-574 (1994), the Supreme Court upheld that the appropriate test for determining supervisory status for employees

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<sup>5</sup> There are approximately 18 Category 1 salespersons employed in the San Diego and Santa Maria facilities, collectively.

is (a) whether the employee has the authority to engage in any of the above 12 criteria; (b) whether the employee uses independent judgment in the exercise of such authority; and (c) whether the employee holds the authority in the interest of the employer. It is not necessary that an individual possess all the criteria in Section 2(11). Rather, the possession of any one of the criteria is sufficient to establish supervisory status. Chicago Metallic Corp., 273 NLRB 1677 (1985); Albany Medical Center, 273 NLRB 485 (1984). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, does not confer statutory supervisory status on employees. Id. at 1689.

More recently, in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), the Supreme Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e. that employees will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. However, while the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. See Beverly Health and Rehabilitation Services, Inc., 335 NLRB No. 54 (2001).

In addition to the supervisory definition, the Board and courts look to several "secondary indicia" for additional

guidance in finding whether an employee is a supervisor. In the absence of evidence that individuals possess any of the enumerated categories of authority set forth in Section 2(11), the primary indicia of supervisory status, there is no need to consider so-called secondary indicia, such as titles, employee-supervisor ratio if they are not deemed supervisors, or pay differentials between them and others in their department. Hausner Hard-Chrome of KY, Inc., 326 NLRB 426, 427 (1998).

The Board and courts have held that it is the burden of the party making the assertion of supervisory status to prove that such status exists. Ohio Masonic Home, 295 NLRB 486, 490 (1989); Kentucky River, supra. Here, the burden is on the Employer. That burden must be met by a "preponderance of the credible evidence." Star Trek, The Experience, 334 NLRB No. 29 (2001). Inference or conclusionary statements, which lack details of specific events concerning the exercise of independent judgment, are not sufficient to prove Section 2(11) status. Chevron U.S.A., Inc., 309 NLRB 59, 61 (1991); Sears, Roebuck & Company, 304 NLRB 193, 199 (1991).

The Board has held that, "Whenever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." Phelps Community Medical Center, 295 NLRB 486, 490 (1989). In addition, the Board will not give controlling weight to job descriptions in determining the existence of supervisory authority. Board law is clear that the mere use of a title or

the giving of "paper authority" which is not exercised does not make an employee a supervisor. North Miami Convalescent Home, 224 NLRB 1271, 1272 (1976).

**B. The Employer's Contentions**

The Employer contends that the Category 1 salespersons are supervisors because: (1) they effectively recommend the hiring, promotion, discipline, transfer and discharge of other employees; (2) they have the authority to issue oral and/or written reprimands to employees; (3) they independently and responsibly direct the work of other employees. In addition, in support of its supervisory status argument, the Employer contends that the Category 1 salespersons possess the following secondary criteria: (a) their job descriptions describe them as "supervisors"; (b) they engage in formal on-the-job training of merchandisers; (c) they are paid higher wages than merchandisers; (d) they set their own hours; (e) they do not punch a time clock or keep time records; (f) they are paid a salary plus commissions and incentive bonuses; (g) they are not paid for overtime; (h) they enjoy different benefits than the merchandisers; (i) they attend management meetings where management objectives are discussed; (j) they are considered to be "supervisors" by other employees; and (k) they have been told by their managers that they are "supervisors."

Below, I will first review the evidence presented concerning the job duties of the Category 1 salespersons, and next, I will consider each of the Employer's above-noted contentions.

## **C. Facts re. Supervisor Contention**

### **1. Background**

The Employer is a Delaware corporation with its principal offices located in Vernon, California; and facilities located throughout California; in Albuquerque, New Mexico; and in Las Vegas, Nevada. The Employer is engaged in the business of manufacturing and distributing beverage products. The current matter concerns the Employer's bottling facilities located at 1166 Arroyo Avenue, in San Fernando, California (the San Fernando facility); at 3220 East 26<sup>th</sup> Street in Vernon, California, (the Vernon facility); at 1300 West Taft in Orange, California, (the Orange facility); at 1950 Williams Drive, in Oxnard, California (the Oxnard facility); in San Diego, California; and in Santa Maria, California.

### **2. Organizational Structure**

John Lehman, the senior vice president of sales, oversees the sale and distribution of beverage products at the above Southern California facilities. The regional managers, Mark Lynch and Steve Glynn, oversee the warehouse, delivery drivers, merchandisers, Category 1 and 2 sales representatives,<sup>6</sup> front-line sales management, the area sales managers (hereinafter ASM), district managers of sales people and merchandises,<sup>7</sup> and warehouse and distribution management in their particular region.

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<sup>6</sup> The Category 1 sales representatives also are referred to as account managers and advanced sales persons. The decision will only use the Category 1 title.

<sup>7</sup> Merchandisers are also known as "display stockers." The decision will only use merchandisers.

The facilities are divided into regions. Regional Manager Lynch oversees the southern region, which includes the San Diego and Orange facilities. Regional Manager Glynn oversees the northwest region, which includes San Fernando, Oxnard, and Santa Maria facilities. Branch manager Eddie Chacon oversees the Vernon facility in the Los Angeles area. Regional Manager Jerry Rodrich oversees the eastern region, which includes the Redlands branch.

A branch manger oversees each facility, with the exception of San Fernando and the Orange facilities, where regional managers Lynch and Glynn oversee as branch managers. Below the branch managers, each facility also has Category 1 and 2 ASMs, distribution managers, and delivery supervisors who manage the sale and distribution of the product and directly supervise employees. Below the ASMs, each facility has Category 1 and 2 sales representatives, merchandisers and drivers. Several of the facilities also have customer service representatives and "green berets"<sup>8</sup>.

### 3. Categories of Employees

A difference between the Category 1 and 2 sales representatives is that the Category 1 representatives handle larger accounts that total over 2 million dollars. The Category 2 representatives handle much smaller accounts and report to Category 2 ASMs. Category 1 sales representatives are divided by geography and assigned to Category 1 ASMs by geography, e.g.

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<sup>8</sup> "Green berets" perform the work of merchandisers and are employed only in the San Diego facility.

Division 1, 2, and 3. Category 2 sales representatives are in Division 4.

The merchandisers from all facilities supply cans/bottles of beverage products, build displays, and fill beverage refrigerators at retail stores. The CSRs assist in the sales function within each ASM division. The CSRs relieve Category 1 representatives when they are out on vacation or sick leave. The CSRs do not fill in for the merchandisers. "Green berets" operate similar to the merchandisers, however, they are assigned to smaller stores.

The distribution managers oversee the warehouse department. The delivery supervisors oversee the check-in and check-out of trucks to drivers, coordinate movement of delivery drivers, and check the loads on the trucks.

#### 4. Wages, Rate of Pay and Benefits

The Category 1 sales representatives<sup>9</sup> are compensated with a base salary plus commission. CIs also receive quarterly bonuses. Category 1s do not earn overtime. On average, Category 1 sales representatives earn between \$38,000 to \$44,000 a year. The Category 2 sales representatives sell to smaller stores and have a different sales structure. Merchandisers, drivers, production and maintenance employees have a set wage rate covered by their respective collective-bargaining agreements and can earn overtime.

Throughout the branches, the Category 1 sales representatives have similar work hours, work days, meal periods,

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<sup>9</sup> Hereinafter referred to as C1, unless otherwise noted.

medical and life insurance (including health, vision, dental, prescriptions, mental, and EAP), 401(k) plan, vacation, sick, purchase product benefit, and mileage and expense reimbursement. C1's also receive the same number of holidays, except that the San Diego facility has a floating holiday in lieu of President's Day.

The merchandisers' benefits are different and are subject to their respective collective-bargaining agreements. However, the merchandisers have the same product purchase benefits and mileage and expense reimbursement as the Category 1 sales representatives.

#### 5. Skills and Education

Regional Manager Lynch testified that the Category 1 sales representative must possess highly developed interpersonal and communication skills to manage and train merchandisers and customer service representatives. They need a high school diploma with at least 2 years experience in the sale of food/beverage products. In addition, it is desirable that a C1 have a bachelor's degree. Merchandisers are required to have a high school diploma, valid driver's license and insurance. In addition, the merchandiser must pass the physical and drug test.

#### 6. Basic Operations

Vice-President Lehman holds a monthly meeting in each region with each regional manager. In the southern region, Regional Manager Lynch holds regional meetings with all the ASMs. Vice-President Lehman and employees below the level of the ASMs do not attend. The purpose of the meetings is to review the

monthly layout and strategic plan for promotions, events, and sales opportunities. The ASMs within their region/division hold weekly meetings with Category 1 sales representatives to go over training, sales incentives, and teamwork on routes. No drivers or merchandisers attend these meetings. As a regional manager of San Diego, Lynch will hold weekly staff meetings with his four ASMs to go over disciplines.

In the San Fernando branch, a weekly "management by operation" meeting (hereinafter MBO) is held with Category 1 sales representatives and ASMs every Thursday. The purpose of the meetings is to discuss the upcoming workweek, routes, and displays.

In the San Fernando branch, the ASMs or branch managers, conduct meetings for all merchandisers. The purpose of the meetings is to discuss merchandising of products on shelves, breakage, backroom, and check-ins with Category 1 sales representatives.

In the Vernon branch, merchandiser meetings are held every 6 months with merchandisers and some Category 1 sales representatives, which are conducted by ASMs or branch managers. The purpose of the meetings is to discuss merchandising products, or company schematics. The meetings are usually held at the end of the employees' shift. The Category 1 sales representative do not attend the merchandisers' meetings.

The Category 1 sales representatives wear different uniforms than the merchandisers. The Category 1 sales representatives wear black pants and white button-down shirts.

The merchandisers wear dark pants and red-and-white striped shirts. All uniforms are company issued. The ASMs do not wear uniforms.

There are assigned parking spaces at the Vernon Branch, which are divided by classification of job. No one below the ASM level has an assigned parking space. The delivery, warehouse, and production supervisors all park in the same parking lot as the Category 1 and 2 sales representatives, drivers, and merchandisers.

7. Authority to Hire

The record reveals that most C1s actively recruit and solicit merchandisers who are in the trade. C1 Victor Gonzalez did not actively recruit but would send individuals to his ASM, when they approached him about a job. Several C1s have recruited applicants and pre-interviewed them by gathering information from store managers before making recommendations to the ASM. The ASM will meet with the individual then "rubber stamp" the individual to be hired subject to the human resources' background check. Human resources sends the individuals' information to an outside agency to determine if they pass the technical requirements. ASMs rely on the C1's pre-interview of the applicant because the C1 has already determined that the individual is qualified for the position. At the recommendation of the C1, the potential employee will meet with the ASM, usually for about 15 minutes. The C1s do not participate in the interview. If the C1 attends the interview, the C1 does not actively participate in the interview process. In the majority

of cases the ASM will follow the Cl's recommendations. If an applicant is not hired, it is usually due to a technical requirement, such as driving record, insurance, physical and/or drug test, or their unwillingness to work weekends. Merchandisers who are hired must pass the probationary period; not all of them do.

If a potential employee that come in off the street is recommended by human resources, the same procedure would be utilized, if there are vacancies. ASM Bryan Keegan testified that he interviews the applicant a little longer to assess whether he will be able to perform the merchandisers' work required and to review prior job experience.

Merchandisers can also recommended individuals for hire as merchandisers. Merchandiser Curtis Huggins testified that ASM Bob Ward, branch managers, and Regional Manager Glynn, told merchandisers to recruit individuals. Huggins recommended to ASM Ward an individual who was not hired because he needed to obtain previous employment papers. ASM Brian Fortier testified that if such recommendation was made, he would thoroughly check the individual's ability to work as a merchandiser.

Drivers can also recommend individuals for hire. Driver Joe Silva recommended two individuals, who were both hired as merchandisers. Silva was given a \$50.00 bonus for his recommendation when the merchandisers passed probationary status. ASM B. Fortier testified that neither Cls nor ASMs are given monetary incentives for their recommendations. The record

discloses that C2s and CSRs can also recommend individuals for hire as merchandisers.

8. Transfers

Internal transfers do occur among the C1's routes. The record revealed that C1s cannot independently remove or transfer merchandisers from one C1's account to another C1s without the ASM's approval. C1 Jose Ybarra attempted to get merchandiser Espinoza removed and transferred to another route, but his recommendation was denied.

C1s can recommend transfer of merchandisers. ASM Keegan testified that he relies on the C1s' recommendations based on their direct knowledge and experience working with the merchandiser and that he would not independently investigate the recommendation. ASM Keegan transferred long-time merchandiser Gerald McGee at the recommendation of C1 Ybarra.

The record revealed that the final decision is made by the ASM. C1 Gonzalez testified that ASM Keegan refused to switch merchandiser Juan Hernandez from C1 Mike Lujan's account until he spoke with Hernandez. Merchandiser Jose Espinoza requested that he be transferred to another ASM. Espinoza tried to get C1 Ybarra to assist in the transfer but he could not do anything without the approval of the ASMs, in that ASM Chris Bachand denied his request.

9. Suspensions

The record revealed that C1s can recommend merchandisers for suspension if they engage in major infractions, such as fighting or improper conduct. The record did not reflect

that CIs have done this. If such an incident were to occur, ASM B. Fortier testified that the CI would write a report and forward the incident report to the corresponding ASM. Before ASM B. Fortier would suspend a merchandiser based on the CI's recommendation, he testified that he would look at the employee's file.

The record evidence indicates that ASMs can suspend a merchandiser without the CI's recommendation. ASM Bachand independently determined to suspend and terminate Espinoza based on a complaint he received directly from a customer. Espinoza testified that CI Hernandez did not complain or recommend the suspension to ASM Bachand.

10. Layoff and Recall

CI Martin Reynoso testified that CIs do not recommend merchandisers for layoff's or recalls.

11. Promote

The record revealed that CIs have recommended several merchandisers for promotions to become CI sales representatives. CIs can communicate the recommendation to their respective ASM based on their experience working with the merchandisers. The ASM generally relies upon the CI's recommendations because they are the only individuals who have direct knowledge of the merchandiser's work performance, customer service skills and reliability. ASMs generally follow the CI's recommendations. ASM B. Fortier testified that he looks at the merchandiser's employee file for any information on their performance as documented by the CI.

The record revealed that ASMs do not always follow C1's recommendations. C1 Troy Jensen testified that despite his little knowledge of the merchandiser Scott Contreras' skills to become a driver, he recommended Contreras for a driver position. The ASM at the time did not act upon the C1 Jensen's recommendation.

The record revealed that contrary to the ASM's testimony, the C1s did not make any recommendations for promotions. C1 Reynoso denied that he ever recommended any merchandiser for a position, despite the ASM testifying to the contrary. C1 Ybarra testified that he never recommended Mike Lujan for promotion, contrary to Keegan's testimony. Ybarra also testified that he was promoted to a CSR by ASM Haslaam. Ybarra testified he does not know where the ASM obtained information that he was a good worker.

Regional Manager Glynn testified that C2s can recommend green berets for promotions to C1 positions. The record did not reflect that such recommendations were ever made.

## 12. Discharge

The record revealed that C1s can recommend merchandisers for termination due to work performance issues. Regional Manager Lynch testified that if an employee was recommended for termination, the employee's file, which contains documentation of the employee's work performance, is reviewed.

The record revealed that ASMs do not always follow the C1's recommendations. While ASM Gunderson testified that he would rely upon the C1's recommendation because the C1 has direct

knowledge of the merchandiser's work performance, ASM B. Fortier testified that he would usually check with human resources to make sure progressive discipline is followed before he terminates a merchandiser.

Thus, the record revealed that ASMs do not always follow a C1's recommendation. C1 Gonzalez testified that he recommended that a merchandiser be terminated due to job performance, but that ASM Keegan has not acted upon his recommendation.

13. Authority to Assign Work

a. Weekly Schedules and Days Off

The record revealed that several C1s recommend the weekly schedule to their respective ASMs. The C1s assign schedules to their merchandisers according to the needs of the customers that day and the amount of time spent at each store. The ASM then prepares the weekly schedule.

The record also indicated that the ASMs actually schedule and make the final decision in terms of the weekly schedule. Former ASM Hector Gomez testified that he would determine the schedule based on the needs of each C1's routes, volume, and amount of stores.<sup>10</sup> The C1 would make a recommendation to him and he would decide whether to follow it.

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<sup>10</sup> Gomez was an ASM at the Vernon branch from approximately 1997 to July 2001 and testified that he does not know of the current operations.

In regard to days off, the record revealed that CIs can recommend to the ASM what days off are needed for merchandisers. The ASM will normally agree with the CI's decision unless the company demands that there be more labor on that particular day. If a CI recommended certain days off for a merchandiser, the CIs would sometimes recommend a replacement as well. The record revealed that the ASM has the final decision in granting time off.

b. Vacation and Sick Leave

The record revealed that the schedules and vacations are approved according to seniority. In regard to sick leave, the record indicated that the CI will call and inform the ASM, so that he can find a replacement. Normally, the ASM will find a replacement by looking on the weekly schedule to see which merchandisers have not worked a 6th day because a merchandiser cannot work more than 6 days a week. Sometimes the CI will call available merchandisers on behalf of the ASM to find a replacement. The merchandiser can refuse to be called in. On the weekends, the ASM handles sick leave.

The record also indicated that a CI could take his own action in handling sick leave. CI Don Martin testified that he will call another merchandiser to come in. In such a situation, Martin will check with the ASM to make sure he has not already been called in. Martin checks the schedule on who to call and the merchandiser has a right to decline. If Martin cannot find a merchandiser to fill in, he will call other CIs for assistance.

c. Start Times

The record revealed that CIs can schedule the start time for merchandisers based on the needs of their accounts for that particular day, which normally is the same every day. The Employer has a guideline that merchandisers should follow, which is a start time at 5:00 a.m. If necessary, the CI will assign an earlier start time to deal with additional customer demands on that particular day. Generally, Wednesdays have the highest labor activity due to store ads and the need for displays. In addition, if a store's display is coming down, generally more labor is needed to break it down.

The record also indicated that the ASM's schedule start times. CI Reynoso testified that he does not assign start times to his merchandiser. CI Ybarra testified that the company schedules the start times, and it coincides with the deliveries. If Ybarra were to request that a merchandiser start earlier, the merchandiser can refuse.

d. Overtime

The record revealed that several CIs have granted overtime without the ASM's approval. Thus at the time the merchandiser makes the request, which is subject to the monthly labor budget, the CI determines whether overtime is needed and how much should be granted based in part on the pre-determined monthly labor budgets. CIs deny requests if they think that overtime is not needed, or if they determine that the merchandiser's route can be finished.

ASM B. Fortier and Gunderson testified that they do not need to approve overtime before the C1 grants the request. When overtime is granted by the C1, ASMs need to document the overtime to make sure the merchandiser is paid.

Cls Reynoso and Ybarra testified that they do not grant overtime without the ASM's approval. C1 Jensen testified that he does not grant overtime and that if a merchandiser called to request overtime, he will tell the merchandiser to call the ASM.

Merchandisers Huggins and Garcia testified that when they requests overtime, they will call the C1 so he can call the ASM to get approval. Huggins testified that he calls the C1 because there is a chance that the C1 can finish his work and he can go home. Huggins testified that he had received a second written warning for failing to obtain approval for overtime from the ASM. Huggins was told at that time, that the ASM is the only person who could approve overtime.

Former ASM Gomez testified that the merchandisers were required to call him in order to be approved for overtime. The merchandisers were instructed to call him 2 hours before their shift ended. If a merchandiser called, he would ask why it was needed. If Gomez denied overtime and the store needed to be merchandised, he would instruct the C1 or other merchandisers to help complete the route. If it was a slow time for the Company, Gomez would inform the C1s of the limited labor budget hours.

e. Sequence of Driver Routes

The record revealed that C1s may recommend the sequence of delivery routes for the drivers. C1s provide the sequence to

the dispatcher the night before. Sometimes CIs will use a route allocation sheet, which indicates the stops, the numbers of products to be delivered to each store, and will time the deliveries to certain stores according to the stores' receiving hours. Generally, the CIs schedule the driver's delivery sequence by deciding the first two stops in the sequence. Thereafter, the dispatcher determines the rest of the delivery sequence based on geography. If necessary, the CI can change the sequence according to the demands of the customer and does not need to seek approval from the ASM.

The recommended sequence is not always followed. CI Jensen testified that he lists the recommended stops, the reasons why he needs the particular sequence, and it is up to the dispatcher to accept.

The record also revealed that the delivery supervisor is the only person who can change the sequence. Driver Joe Silva testified that the CI must contact the delivery supervisor with the changes. CIs cannot directly contact drivers because they only have a one-way radio that communicates with the delivery supervisor. If a change is needed, the CI cannot order the driver to make the change. The delivery supervisor will contact the driver with the changes. A change in the delivery sequence during the day rarely occurs, maybe once a month, and contact with CIs is maybe once a day or even once a week.

As a delivery supervisor and backup dispatcher, Gomez determined the sequence of the drivers' routes based on a computer program that maps the deliveries based on geography and

stores' receiving hours.<sup>11</sup> As a dispatcher, Gomez did accept C1 requests, but he could also decide not to accommodate the requests based on the availability of drivers and trucks.

f. Sequence of Merchandiser Routes

The record revealed that C1s coordinate and assign routes to merchandisers according to their sales and customers' demands. The C1s outline and call the merchandisers the night before to discuss the sequence and any special information. Merchandisers can make suggestions and changes to the route. The C1 will usually agree with the merchandiser's recommendations.

The record indicated that C1s base the sequence on several different factors. C1 Martin testified that he divides the routes based on geography and assigns each merchandiser a route. C1 Reynoso will assign the number of stores that the merchandisers need to visit based on the priority of the stores. C1 Gonzalez testified that he determines the sequence based on the ability and skill of his merchandisers. C1 Ybarra testified that the orders and deliveries dictate the merchandisers' schedule and assignments.

The record indicated that some C1s do not assign or determine the sequence of stores for their merchandisers. C1 Jensen testified that his sequence for merchandisers was already pre-set by another merchandiser who trained him. Jensen uses that list everyday, and the sequence rarely changes. C1 Gonzalez testified that he does not make any changes to the sequence.

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<sup>11</sup> Gomez was a delivery supervisor in 1997, and testified that he does not know of the current operations.

When changes do occur, it is when a merchandiser or floater works half the routes for the day or when a customer places requests.

If necessary, the C1 can assign more than one merchandiser to an account, based on the customer's requests. C1s Brian Rodgers, Ybarra, and Peter Thieleman have done this without the approval of the ASM. C1 Jensen testified that he has assigned more than two merchandisers to build a display at a store. Merchandiser Huggins testified that there are occasions where he will be assigned to one store with another merchandiser to build or breakdown displays.

C1s can make changes to the sequence based on customers' demands. If this change occurs during the day, the C1 contacts the merchandiser via Nextel radio. C1 Reynoso testified that he has never made changes to a merchandiser's routes.

#### 14. Authority to Reward

The record indicated that there is no company policy that requires C1s to reward merchandisers. C1s do reward merchandisers by purchasing breakfast or lunch to show them that they have performed well. Regional Manager Lynch testified that some C1s reward merchandisers with a weekend off, since that is the busiest work time for them.

#### 15. Discipline

The record indicated that C1s can, to some extent, recommend discipline of a merchandiser to an ASM. C1s will either document an incident or speak with the ASM about the incident. The C1 would use forms like the "merchandiser performance form," or the "display stocker form," incident

reports, or just a plain piece of paper. When the C1 complains and/or recommends that a merchandiser be disciplined, the ASM may check the employee's file to see whether there are any prior incidents. C1s have not received any training on disciplining of employees.

Generally, the ASM relies on the C1's account of the merchandiser's substandard performance because they have direct knowledge of the incident. ASM B. Fortier testified that he has relied on such recommendations, even though he knows what level of discipline should be issued. Former ASM Gomez testified that he would not always rely on the C1's recommendation, in that he would tell the C1s to document the incident(s) and then gather all the evidence before he would decide the discipline.

The record revealed that the recommendations have not always been followed by the ASM. C1 Martin testified that he recommended that a merchandiser be terminated due to lack of work performance but that ASM Rich Gunderson issued a verbal warning instead. C1 Reynoso testified that he has complained and documented a merchandiser's problems with a particular store manager, but that the merchandiser is still assigned to his route.

At times, the ASMs do not respond to C1's recommendations immediately. C1 Jensen testified that he complained about a merchandiser for 2 weeks to ASM Ward, who took no action. Jensen testified that he told ASM Ward many times that he wanted the merchandiser fired, and that ASM Ward finally told him to document the incidents. Jensen finally wrote a note

to ASM Ward indicating that the merchandiser needed to be written up or fired. Eventually, ASM Ward issued a written warning to the employee. Jensen was present when it was issued, but he did not actively participate in the meeting. The merchandiser was subsequently removed from the route.

C1 Ybarra testified that it is possible for him to issue a discipline but that he gives the information to the ASM, who decides the level of discipline. Ybarra testified that in the past, he complained several times about a merchandiser's unreliability. Ybarra asked ASM Keegan to remove him or fire him but nothing happened. Keegan testified that he was looking for a replacement before removing the merchandiser from the route.

C1 Gonzalez testified that he complained several times to ASM Keegan regarding another merchandiser. Sometime later, Gonzalez learned that the merchandiser eventually did get fired.

The record indicates that CIs can use a different approach to reporting disciplines. For example, C1 Thieleman testified that he counsels merchandisers on problems before issuing any type of discipline. In this regard, the record revealed that there is some type of progressive discipline followed at the facilities. Normally it begins with a verbal warning and then written warnings. The guidelines are available in the manager's offices, as a tool and resource in discipline matters. The record indicated that CIs were not informed of the progressive discipline procedure until March 7, 2002, a few days before the hearing herein.

The record also revealed that C1s may recommend discipline for drivers. If such action is necessary, the C1 will write an incident report with recommendations and submit the report to the delivery supervisor. Regional Manager Glynn testified that the delivery supervisor and the C1 will determine what level of discipline is necessary. C1 Thieleman testified that he can counsel drivers and that he then notifies the delivery supervisor of such action taken. The record disclosed that in one instance, a driver was disciplined by an ASM, and that the C1 did not sign the discipline, nor was he present when the discipline was issued.

The record revealed that C2s can also recommend discipline to C2 ASMs, if a work issue arises with the merchandiser or green beret.

16. Authority to Direct Employees

a. Evaluation and Inspection of Merchandisers' Work

The record indicated that the C1s may evaluate and inspect the work of their merchandisers. C1s compare the work against the company standards and make sure the product shelves are completed according to company schematics. If the work performance is substandard, the C1 can call the merchandiser back to the store to fix the problem. C1s inspect and evaluate the merchandiser's daily work, as they make their account stops. C1s use the trade survey evaluation forms or display stocker performance forms to review and document the merchandiser's work. The forms are later filed in the employee's file but there is no

annual review of the forms. Nor is there any annual evaluation of the merchandiser's work performance. The forms could be used for disciplinary matters, evaluations, or rewards.

The record indicated that CIs normally do not call merchandisers back to the store. Thus, various CIs testified that they would speak with the merchandisers about the problem, or fix the problems themselves, rather than call a merchandiser back to the store to fix the problem.

b. CI's Direction of Drivers

The record indicated that CIs do not direct the driver's normal workday. Driver Alphonso January testified that the delivery supervisor schedules the start time, assigns and schedules the delivery routes, vacation, days off, and approves sick leave and overtime. January also testified that the delivery supervisor notifies the drivers of any special requests.

CIs do not attend driver meetings that are conducted by the delivery supervisor. Driver Silva testified that meetings are held once a month to discuss issues such as safety.

Driver Silva and January testified that CIs do not direct the drivers on pick-ups of products at stores. The pick-up of breakage or out-of-code product is determined by the ASM who approves the pick-up. Silva and January testified that they do not know of any exchange of information between the CI and the ASM regarding pick-ups. If a store will not accept a delivery, it is because the store wants the driver to take the pick-up products. The driver must call the delivery supervisor to contact the ASM to approve the pick-up.

c. Cl's Direction of Merchandisers

The record indicated that Cls can direct merchandiser's daily work. The Cl will communicate with the store manager and relay the information to the merchandiser. Cls will inform merchandisers to build displays based on the customer's request. Most of the displays are built to company standards so that direction from the Cl is unnecessary. Some of the stores create their own schematics on how they want the displays built or stocked. The merchandisers then build the displays wherever the store manager wants them.

17. Adjustment of Grievances

The record revealed that Cls do not handle or adjust grievances. Cls have not received any grievances on behalf of merchandisers, nor were they informed that merchandisers may file grievances with them.

The record indicated that management has received some type of training of the resolution of grievances. The Cls have not had any training on how to handle grievances.

Generally, the key point of contact may respond to a grievance, which is decided by the regional managers. In the San Fernando branch, only the operations manager handles grievances. In other branches, the ASM can respond to grievances.

Merchandisers file grievances with their respective ASMs and not with Cls. Merchandiser Huggins testified that he has filed several grievances with the ASM. Huggins testified that he would proceed to the first step of the grievances with

ASM or the branch manager in an attempt to resolve the issue. After the first step, the union handles the grievances.

18. Cl's Other Duties

a. Training merchandisers

The record indicated that the Cls have trained merchandisers. The Cls identify work problems and recommend to the ASM what training is needed for all merchandisers. The ASM decides when the training will be, usually once a month. All merchandisers are cross-trained to avoid duplication of issues and training.

Cls and or senior merchandisers train new merchandisers on company standards and schematics. Former ASM Gomez testified that he was in charge of training the new merchandisers. Cl Jensen and merchandiser Huggins testified that the lead merchandisers train the new merchandisers. Cl M. Fortier trains new merchandisers but it depends on their experience. Generally, M. Fortier and Ybarra will train on brand flow and company schematics. Merchandiser Espinoza testified that Cl Ybarra trained him. Ybarra trained Espinoza on the products and brand flow, according to company standards.

b. Taking orders and merchandising stores

On a daily basis, Cls interact with the store's management, take inventory, and place orders for their accounts. Cls usually visit 8-12 accounts based on the customer's needs. Cls do not take an order at every store they visit. When Cls do take an order, they enter the information onto a route card and

into their handheld computer. The CIs may spend 5 to 20 minutes taking orders from customers.

CIs will merchandise a store, if necessary, to make sure the shelves and displays are full. CIs spend about 3 to 3½ hours merchandising three to five stores. Some CIs spend even less time merchandising stores and only restocking products, when there are "hot ads" at the store. Merchandising stores depends on the customer's orders and needs for that day.

C1 M. Fortier testified that he can spend 2 to 5 hours merchandising the stores, depending on the advertisements of sales and customer's request for displays. C1 Martin testified that he will only merchandise a store, if a merchandiser is not assigned to visit. C1 Rodgers testified that he merchandises about four stores a day, 2 to 4 hours. C1 Thieleman testified that he merchandises stores about 2 hours a day. C1 Ybarra will spend about 2 to 4 hours merchandising a store. Sometimes there will be big advertisements, the store will want a big display, and Ybarra will spend about 6 hours merchandising the store.

On some days, CIs will spend all day merchandising a store. Jensen testified that on Fridays, he merchandises stores all day. When there is a VIP tour on a route or store promotions, CIs, merchandisers and ASMs will spend all day merchandising the stores.

When there are pick-ups and breakage, CIs will sort through the product to repack and resale, if the product is not damaged or out of code. CIs do this because they lose money on

returns, and will attempt to resell the items to recoup the loss profits.

c. Communicating with Merchandisers

Cls usually communicate and see their merchandisers while on their routes to make sure they report to work. C1 Martin testified that he usually meets with the merchandiser during the day to help out and go over some of the activities for the day. C1 Jensen testified that his first stop is at a merchandiser's store so that he can go over the day's activities with him. Merchandiser Espinoza testified that he communicates daily with his C1 and meets him at the first stop.

Other C1s and merchandisers, however, do not communicate while on their routes. C1 Ybarra testified that he does not communicate or meet with his merchandisers during the day. Merchandiser Huggins testified that he rarely sees or communicates with the C1 during the day, that he does not call the C1 at the first stop, but that he does communicate with the C1 to obtain his assignments for the next day.

d. Substituting as an ASM

The record indicated that more experienced C1s will cover for an ASM when they are absent. In these instances, the C1s continue with the normal schedule and at the end of the day they deal with ASM issues and paperwork such as pick-ups and breakage. The amount of time a C1 spends doing ASM work in the situation described, is about 15 to 45 minutes a day.

e. Injuries on the Job and Sexual Harassment

CIs have not been trained on how to deal with injuries on the job or sexual harassment. CIs testified that they will notify the ASM of any such situations, who then handle the matter.

**II. SUPERVISORY STATUS ANALYSIS**

**A. Authority to Hire**

As set forth above, in order to establish that CIs are supervisors, the Employer has the burden to establish that the CIs are supervisors and thus excluded from the unit. One of the primary indicia is the authority to hire employees or effectively recommend such actions. The Board has found that effective recommendation generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. Third Coast Emergency Physicians, P.A., 330 NLRB 756, 759-760 (2000), citing Children's Farm Home, 324 NLRB 61 (1997). The Board has also held that an employee's recommendation for hire is not supervisory in nature unless it is based on "delegated authority to participate in the hiring process," and not merely on the employer's respect for the judgment of the individual making the recommendation. Local Union No. 195, 237 NLRB 1099, 1102 (1978).

In the instant case, the Employer fails to establish that CIs effectively recommend merchandisers for hire. The Employer argues that the CIs effectively recommend hiring of merchandisers and that all ASMs have relied on and exclusively followed the CI's recommendation. In Detroit College of

Business, the Board held that coordinators made effective recommendations of individuals for hire. The Board found that the coordinators and management jointly participated in the hiring process, where the coordinator actively participated. Detroit College of Business, 296 NLRB 318, 319 (1989); see also RB Associates, 324 NLRB 874, 878 (1997) (the Board held that the painting supervisor was a Section 2(11) supervisor, who actively participated in the hiring process and recommended several applicants for hire, without an independent review by the employer); and Venture Industries, Inc., 327 NLRB 918, 919 (1999) (where the Board held that the line and department supervisors actively participated in the interview and hiring process).

In the instant case, the record indicates that the ASMs interview the applicant, without the active participation of the C1 at the formal interview. While the evidence indicates that the C1 conducts a "pre-interview" of the applicant by asking store managers about their work performance, the applicants are still subject to an independent investigation by the human resources department and the ASM. The ASM then makes the final decision whether the applicant is hired based on the background check and his own assessment of the applicant. Thus, the evidence indicates that the C1s' recommendations are subject to independent investigations by the Employer, without their active participation, which demonstrates that the C1s do not make effective recommendations.

**B. Authority to Transfer**

The Employer argues that the CIs effectively recommend transfers of merchandisers. In the instant case, the record evidence indicates that in instances where a CI recommends a transfer, the recommendation is independently reviewed by the ASM. Thus, in the instance where CIs Lujan and Gonzalez agreed to the transfer of a merchandiser, ASM Keegan did not allow the transfer until he personally spoke with the employee. Thereafter, the employee was transferred. The record also indicates that ASM Bachand refused to follow CI Lujan's recommendation to transfer another merchandiser. Thus, the evidence indicates that the ASMs determine transfers and that CIs do not make effective recommendations in this regard.

**C. Authority to Suspend**

The record failed to establish that CIs effected the suspension of any employees. Although, Regional Manager Lynch testified that CIs have the authority to suspend merchandisers if they engage in major infractions, fighting, or improper conduct, the record failed to indicate that such action was ever exercised by any CI.

The record also indicates that the CIs have not made any effective recommendations with respect to suspensions. The record revealed that the ASM independently determines whether any CI's recommendation to suspend is justified. For instance, ASM B. Fortier testified that he would look at an employee's file before accepting a CI's recommendation to suspend an employee. Thus, the record establishes that the CI's ability to effectively

recommend suspension is limited by the ASM's verification of whether such action is appropriate. Accordingly, I find that supervisory status has not been established in this regard.

**D. Authority to Layoff and Recall**

The record failed to establish that CIs effected or effectively recommended layoff or recall of employees.

**E. Authority to Promote**

The Employer argues that the CIs effectively recommend promotions for merchandisers. The record revealed that CIs have recommended several of their merchandisers for promotions and that their respective ASMs have followed their recommendations. However, the evidence established that the CIs did not make "effective" recommendations. Although the ASMs testified that they would rely on the CI's recommendations, the evidence indicated, and Regional Manager Lynch admitted, that several ASMs independently reviewed the employee's file before such action is taken. In addition, the CIs relay information to the ASM, or the ASM requests information as to why the merchandiser should be promoted (e.g. good worker, salesman skills, etc). Thus, the record establishes that the CI's ability to effectively recommend a promotion is limited by the ASM's independent investigation on whether the merchandiser should be promoted. Accordingly, I find that supervisory status has not been established with respect to this primary indicia.

**F. Authority to Discharge**

The Employer argues that the CIs effectively recommend the discharge of merchandisers. The record revealed that CIs report to the ASMs incidents which may lead to discharge, such as lack of work performance according to company standard. If a merchandiser takes such action, the CI at times will either document the incident in writing or orally inform the ASM. The ASM then takes action subject to review of the employee's file and advice from human resources. By reviewing the file, the ASM independently determines whether the recommendation is appropriate. Thus, the record indicates that the CI's ability to effectively recommend discharge is limited by the ASM's independent investigation and review of the employee's file, and advice by human resources. Accordingly, I find that supervisory status has not been established with respect to the primary indicia of discharge.

**G. Authority to Assign Work**

The Supreme Court found, with regard to this issue, that the Board is within its discretion to determine, within reason, the scope or degree of independent judgment; and that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. See Kentucky River, supra; see also Beverly Health and Rehabilitation Services, Inc., 335 NLRB No. 54 (2001).

In Dynamic Science, Inc., the Board affirmed that the test leaders did not possess supervisory authority in their direction of other employees. The test leaders' role in

directing employees was extremely limited by the other standard operating procedures. Thus, the degree of judgment exercised by the test leaders fell below the threshold requirement to establish statutory supervisory authority. Dynamic Science, Inc., 334 NLRB No. 34 (2001).

1. Weekly Schedule and Days Off

The Employer contends that the CIs exercise independent judgment and discretion in preparing the weekly schedule. Although the record reveals that several CIs can recommend the merchandiser's weekly schedule to the ASM, the evidence is insufficient to establish that the CIs exercised independent judgment in making the recommended assignments. The record indicated that the merchandisers inform their CI of their preferences. Whether the recommendations are followed is then determined by the ASM. The CIs and the merchandisers do not know whether the recommendation will be followed until the weekly schedule is issued. Thus, by the merchandiser informing the CIs, and the CIs relaying the information to the ASM, the record demonstrates that the CIs do not exercise independent judgment in their recommendations. The CIs simply relay the information to the ASM who ultimately determines the weekly schedule. Since the record is insufficient to establish that the CIs independently determine the workdays of the merchandisers, I find that they do not possess supervisory status, with respect to the weekly scheduling of merchandisers.

2. Vacation and Sick Leave

The record demonstrates that the CIs do not have the authority to assign vacation times. The ASM assigns vacation according to seniority of the merchandisers.

In regard to how CIs handle sick leave, I find that the CIs do not exercise independent judgment when a merchandiser is sick. The record indicates that if a merchandiser calls in sick, he will call the C1. The C1 then calls the ASM to determine who is available to replace the merchandiser. The ASM determines who is able to work and who has not worked a 6th day, since merchandisers can not work 7 consecutive days. The record indicates that the C1 does not exercise any independent judgment in selecting whom to call; the ASM will direct the C1 on who is available after determining whether the individual can work in accordance with company policy. Accordingly, I find that the evidence is insufficient to establish that the CIs exercise independent judgment in handling sick leave.

### 3. Start Times

The Employer argues that the CIs use their independent judgment to assign start times for merchandisers. The record indicates that the normal start times are pre-determined and act as a guideline for merchandisers to follow. The decision on start times are dictated by the deliveries and needs of the customer, which the C1 communicates to the merchandiser the night before the scheduled delivery. However, the merchandisers routinely start and end around roughly the same time for particular days of the week. Thus, the record evidence establishes that the CIs do not exercise independent judgment in

assigning the start time, in that the merchandisers' start times are determined by the Employer's guidelines or the customer's demands. Accordingly, I find that the CIs do not possess supervisory status with respect to this primary indicia.

#### 4. Overtime

The Employer argues that the CIs authorize overtime, normally with no input from the ASMs, and that the CIs use their discretion. The Employer cites Westinghouse Broadcasting Co., 195 NLRB 339 (1972) in support of its contention. In that case, a producer was found to be a supervisor because he had authority to independently grant overtime to employees. The case is distinguishable, however, due to the limited discretion revealed herein.

The record herein reveals that the CIs do not exercise a significant degree of independent judgment in granting overtime to merchandisers. The CI's approval is subject to a monthly labor budget, which the ASMs keep track of each month. The ASM informs the CIs of the budget and/or note on the weekly schedule that no overtime will be granted. Despite testimony that CIs normally grant overtime based on the merchandiser's justification for the need, the approval is subject to the labor budget and predetermined by the monthly budget. Since the CIs' authority to grant and approve overtime is limited by the monthly labor budget, the CIs do not exercise the degree of independent judgment sufficient to confer supervisory status.

#### 5. Driver's sequences

In regard to the assignment of the sequence of stores to drivers, the record demonstrates that the dispatcher and the delivery supervisor ultimately determine the sequence and whether any changes to the sequence can be made. Although the Cl can make recommendations to the dispatcher, the record revealed that the dispatcher may allow the first stop but that the sequence of the rest of the stores is determined by the dispatcher. Further, the dispatcher or the delivery supervisor determines any changes to the sequence of the driver's route. Thus, the record demonstrates that the Cls do not have the authority to assign or change the sequence of routes to drivers.

6. Sequence of Merchandiser Routes

The Employer argues that the Cls use independent judgment to assign work. The record indicates that Cls assign merchandisers the sequence of routes, based on the needs of the route, customer demands, product sales to the customer, the current advertisements that customers have, and the delivery schedule. Since the sequence and routes are very regular, the merchandiser knows how his workdays are scheduled. The fact that the Cls communicate information regarding the sequence and changes to the merchandisers on a daily basis is based on changes dictated by a customer's request. Moreover, changes are often times relayed to merchandisers directly from the customer's store manager. The routine nature of the assignments demonstrates that the Cls do not exercise a degree of independent judgment when preparing the sequence.

The Employer argues that the CIs use independent judgment to assign merchandisers the sequence of routes, citing the below-noted cases, which are distinguished from the present case. In Custom Bronze & Aluminum Corp., 197 NLRB 397, 398 (1972), the Board held that an employee who responsibly assigned and directed the work of other employees was a supervisor because he alone was responsible for the work. Here, the CI is responsible for their route and the work being accomplished; however, the record indicated that the ASM is ultimately responsible for all accounts assigned to their division and making sure that the work is completed. The Employer also cites Grove Truck & Trailer, 281 NLRB 1194, 1203 (1972), where the Board held that the lead mechanic was a supervisor due, in part, to his ability to assign work. However, unlike the present case, the Board found that the lead mechanic's actions in attempting to get pay raises for employees conferred supervisory status. In DST Industries, Inc., 310 NLRB 957, 958 (1993), the Board held three individuals to be supervisors because they exercised independent judgment in performing various job duties, including establishing job priorities, assigning work, approving requests for vacation and time off, and effectively recommending employees for hire and layoff. In contrast, as noted above, the present record lacks evidence that the CIs exercise independent judgment in these categories of primary indicia. In Hecks Inc., 277 NLRB 916, 919 (1985), the Board found that the employee was a supervisor because he scheduled employees to work, determined when they took breaks, and assigned work to employees. In the

present case, the record fails to establish that the CIs exercise independent judgment in similar fashion. Thus, the Employer's contentions are rejected.

**H. Authority to Reward**

The record revealed that some CIs reward their merchandisers with breakfast or lunch for their good work performance. The record also indicated that merchandisers reciprocated by buying CIs lunch. The Employer does not require that CIs engage in this type of "reward" and I find that it is, at best, a nominal reward that is insufficient to establish supervisory indicia.

**I. Authority to Discipline**

The Employer argues that the CIs effectively recommend the discharge of merchandisers. The record fails to establish that the CIs make effective recommendations to discharge employees. The record demonstrates that CIs document incidents of work performance issues, which are kept in the employees' files. While the record reveals that ASMs sometimes follow the recommendation of discipline, if the merchandiser is a problem employee, the ASM independently determines the appropriate level of discipline without the C1's recommendation.

Moreover, the ASM at times reviews the employee's file for any prior disciplines to determine the appropriate level of discipline to be issued. Thus, the ASM ultimately decides when, where, and how an employee is disciplined. Often times, when an employee is disciplined, the C1 does not attend the meeting, and in those instances where a C1 has attended, the C1 has not

actively participated in the issuance of discipline. In addition, several CIs testified that they did not know whether the ASM took any disciplinary action on cases they reported, and that sometimes no action was taken at all. Since the record fails to establish that the CIs play any role, except in relaying the information to the ASM, who then reviews and investigates whether the recommendation is appropriate, I find that supervisory status has not been established.

**J. Authority to Direct Work**

1. Evaluating Merchandiser's Work

The Employer argues that the CIs exercise independent judgment in evaluating merchandisers. The record indicates that, to a degree, the CIs evaluate and inspect the merchandisers' work. The evaluation is based on company standards documented on employer forms, where the CI checks off whether the work was completed. The CIs do not independently determine and evaluate a merchandiser's work performance; they merely check-off on the merchandiser/display stocker forms, whether the merchandiser's displays, shelves, etc. are completed according to company standards. The CIs routinely use the company schematics to compare the merchandiser's work performance. The CIs do not use their personal judgment on how the displays should be completed. If a CI finds a minor problem, they usually fix the problem, rather than direct the merchandiser to return to the store. If the problems is serious, then the CI normally notifies the ASM. Since the CI's ability to evaluate the work performance of the merchandisers is limited to checking whether the work is

completed to company schematics, I find that the CIs do not exercise a degree of independent judgment in the evaluations.

2. CI's Authority to Direct Drivers

The record revealed that the CIs do not have authority to direct drivers on a daily basis. Throughout the driver's normal workday, the drivers mainly communicate with their delivery supervisor, often times via a one-way radio. CIs cannot directly contact drivers to direct their daily workday. Accordingly, I find that the CIs do not have the authority to direct drivers.

3. CI's Authority to Direct Merchandisers

The Employer argues that the CIs exercise independent judgment in directing merchandiser's daily work. Contrary to the Employer's contentions, I find that the CIs do not exercise independent judgment in directing merchandisers. The record indicates that the CIs direct merchandisers on what displays to build or break down in the customer's stores. The CIs' instructions on displays are based on company schematics, or a store manager's deviation from the company schematic. Thus, CIs merely communicate the information to the merchandisers that displays needed to be built or taken down. Absent evidence that the CIs use independent judgment in directing the merchandisers in such work, I find that the record in this regard, fails to confer supervisory status.

**K. Authority to Adjust Grievances**

The record indicated that the CIs do not have the authority to adjust grievances. The record establishes that

grievances have been filed on behalf of merchandisers with the ASM. The ASMs have received and adjusted the grievances without any assistance of the Cls.

**L. Other Supervisory Indicia**

The Employer contends that the Cls possess the following secondary criteria: (a) their job descriptions describe them as "supervisors"; (b) they engage in formal on-the-job training of merchandisers; (c) they are paid higher wages than merchandisers; (d) they set their own hours; (e) they do not punch a time clock or keep time records; (f) they are paid a salary plus commissions and incentive bonuses; (g) they are not paid for overtime; (h) they enjoy different benefits than the merchandisers; (i) they attend management meetings where management objectives are discussed; (j) they are considered to be "supervisors" by other employees; and (k) they have been told by their managers that they are "supervisors."

In the absence of evidence that the Cls possess any of the enumerated authority set forth in Section 2(11) as primary indicia of supervisory status, secondary indicia will not be considered sufficient to confer supervisory status. Hausner Hard-Chrome of KY, Inc., 326 NLRB 36 (1998).

Based on the foregoing, I conclude that the Employer has not met its burden in establishing that Category 1 sales representatives are supervisors within the meaning of Section 2(11) of the Act.

### **III. SCOPE OF UNIT ISSUE**

#### **A. Board's Standards**

In determining whether the petitioned-for unit is an appropriate one, the Board, in Overnite Transportation Co., noted that it is appropriate to first consider the union's petition and whether that unit is appropriate. Overnite Transportation Co., 322 NLRB 723, 723-724 (1996), citing, P.J. Dick Contracting, 290 NLRB 150, 151 (1988). The Board does not compel a petitioner to seek any particular appropriate unit. The Board's standard is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. Id., citing, Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964). "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be appropriate." Id., citing, Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950). Thus, a union is not required to request representation in the most comprehensive or largest unit of employees of an employer unless "an appropriate unit compatible with that requested unit does not exist." Id., citing, P. Ballentine & Sons, 141 NLRB 1103, 1107 (1962). Nor is the petitioner compelled to seek a narrower appropriate unit if a broader unit also is appropriate. Id., citing, NLRB v. Carson Cable TV, 795 F.2d 879 (9<sup>th</sup> Cir. 1986).

The Board also went on to note that "[e]ven though [it] applies a presumption that a single-location unit is appropriate, that presumption is not applicable when a broader multilocation

unit is sought by the petitioner." Id. at n. 6, citing, Carson Cable TV, supra. Accordingly, the question before me is whether the multilocation unit sought by the Petitioner, is an appropriate unit.

In determining whether the petitioned-for unit in a particular case is appropriate, the Board has traditionally looked to the community of interests among the employees sought to be represented. In evaluating the community of interests among employees working at more than one location, the Board considers several factors, including: (1) interchange among employees; (2) common supervision; (3) similarity of terms and conditions of employment; (4) the functional integration of the business, including employee interchange; (5) geographic proximity; (6) bargaining history; (7) central control over labor relations; (8) similarity of skills; (9) representation by other unions. Frito Lay, Inc., 202 NLRB 1011, 1012 (1973).

**B. Facts: Appropriate Unit**

1. Interchange Among Employees

The record revealed that CIs have been permanently transferred from one facility to another facility. Various CIs testified that they were transferred from the San Fernando to the Vernon Branch; another CI testified that he was transferred from the San Fernando to the Orange branch; another was transferred from Oxnard to the San Fernando branch, and later returned to the Vernon Branch as a CSR. Regional Manager Glynn testified that there have been no temporary transfers among the branches.

The record reveals that the CIs do occasionally train with other facilities. Regional Manager Lynch testified that the CIs in the San Diego and Orange branches attend company sales functions about a couple times a year at a centralized location. In addition, the CIs from the San Diego and Orange branches have participated in a "trade blitz", at a centralized location, where they work together for 10 days/2 weeks.

2. Common Supervision

Vice-President John Lehman oversees all facilities. Two regional managers divide common supervision among the Employer's branches. Thus, Regional manager Lynch oversees employees at the San Diego and Orange branches; Regional Manager Glynn oversees employees at the San Fernando, Oxnard, and Santa Maria branches; and Branch manager Chacon oversees employees at the Vernon branch.

3. Similarity of Terms and Conditions of Employment

Regional Manager Lynch testified that in the southern region, which includes all six of the facilities at issue, the CIs have similar duties, documents, policies and procedures in regards to overtime approval. CIs at all six facilities receive the same training, commissions, range of salary, working hours, schedules, breaks, meals, holidays, and benefits. In addition, the CIs at all six facilities attend the same sales meetings, sales auction, complete the same paperwork, and have the same policies and procedures in regards to overtime approval.

#### 4. Functional Integration

The record reflects that C1s from the Orange and San Diego facilities attended the same company sales meetings for the past 2 years. The same C1s have also worked together during trade blitz periods. The record also disclose that C1s from the San Fernando, Oxnard and Santa Maria branches interact at meetings and weekend training sessions. The record reflects that in the last 2 years, the Employer has held sales auctions<sup>12</sup>, kick off meetings<sup>13</sup>, and a weekend training session<sup>14</sup> held in 2000 where all C1s, C2s and ASMs from all the branches interacted.

Within each branch, the record reflects that all departments interact daily. For example, delivery affects sales, and if there are any issues or problems, the ASM and the delivery supervisors attempt to resolve them.

#### 5. Geographic Proximity

The record reveals that the Redlands<sup>15</sup> facility is about 35 miles from the Orange facility. The Orange facility is about 75 miles from the San Diego facility and about 30 miles from the Vernon facility. The Vernon facility is about 35 miles from the San Fernando facility. The San Fernando facility is about 80 miles from the Oxnard facility. The Oxnard facility is about 90 to 95 miles from the Santa Maria facility.

#### 6. Bargaining History

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<sup>12</sup> In sales auctions, C1s spend their auction dollars earned throughout the year from the company for selling displays.

<sup>13</sup> At kick off meetings, the Employer reviews company promotions.

<sup>14</sup> The training sessions for C1s and C2s were seminars on the aspects of selling, conducted on 2 days for about 3 ½ hours.

The record reveals that there is no collective bargaining history between the Employer and the Petitioner concerning the petitioned-for unit.

7. Central Control over Labor Relations

The record revealed that there is centralized control over labor relations. Labor relations encompass what is identified as the Western Division, which includes California, Nevada, and New Mexico. Regional managers Lynch and Glynn also control labor relations in their regions, in accordance with the human resources department. Human Resources Vice President of Administration Doreen Thomas is responsible for the San Diego, Oxnard, Vernon, San Fernando, Santa Maria, and Redlands branches. Thomas is responsible for providing training to managers.

8. Similarity of Skills

The parties stipulated that all C1 employees at all facilities share the same duties and have the same authorities.

9. Other Unions

The record revealed that other unions represent the merchandisers, drivers, production, and maintenance employees at various facilities. Thus, the San Diego, Santa Maria, and Las Vegas employees are represented by the International Brotherhood of Teamsters, AFL-CIO. At the Redlands branch there is some representation by a union, but the record does not disclose the unit represented or the identity of the union.

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<sup>15</sup> No party contends that the unit should include the Redlands facility.

**C. Scope of Unit Analysis**

The Petitioner seeks to represent a unit consisting of only four of the six facilities located in Southern California. The Petitioner fails to identify the basis for its configuration of facilities into the unit sought. Thus, the record does not disclose any characteristics, and Petitioner does not cite any characteristics, among the four facilities that it seeks to include in the petitioned-for unit, that would render that grouping a cohesive group so as to satisfy the determination necessary that the group of four facilities would constitute "an" appropriate unit. With regard to proximity among the facilities, the San Diego (not sought) facility is closer to the Orange (sought) facility in comparison to the distance between the Orange facility and the Oxnard facility.

With regard to the organizational structure, the San Diego facility is supervised by Regional Manager Lynch who also supervises the Orange facility; and the Santa Maria facility is supervised by Regional Manager Gynn, who also supervises the San Fernando and Oxnard facilities. Thus, there is no common supervision among the four facilities in the petitioned-for unit as part of the unit sought is supervised by Lynch, and the other part is supervised by Gynn. Accordingly, based on the above-noted considerations, and because there is no separate cohesion among the four facilities described in the petitioned-for unit, I find that it is not an appropriate unit for collective-bargaining purposes. Purity Supreme, Inc., 197 NLRB 915 (1982).

Having determined that the unit sought is not appropriate, I next consider the Employer's proposed unit, which would include the four facilities sought by the Petitioner (Orange, Vernon, San Fernando and Oxnard), plus the San Diego and Santa Maria facilities. In this regard, it is notable that the six facilities are geographically located in the Southern California area, they all fall within the Employer's organizational structure, they share some supervision, there is some interchange among the employees from all of the six facilities, they share identical terms and conditions of employment, and their job responsibilities are identical. Under these circumstances, I conclude that the unit composed of the six noted facilities is an appropriate unit for collective-bargaining purposes, and I shall order an election be conducted in that unit. State Farm Mutual Automobile Insurance Co., 158 NLRB 925, 929 (1966).

There are approximately 83 employees in the unit.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this decision, including employees who did not work

during that period because they were ill, on vacation, or temporarily laid-off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are those employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Amalgamated Industrial Workers Union, NFIU/LIUNA, AFL-CIO.**<sup>16</sup>

#### LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters in the unit and their addresses

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<sup>16</sup> Since the size of the present unit substantially exceeds that initially petitioned for, I shall direct an election in this unit conditioned upon Petitioner's demonstrating within 10 days from the date of the Decision and Direction of Election that it has made an adequate showing of interest in the unit. Bell Aerospace Co., 190 NLRB 509 (1971). In the event the Petitioner does not wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this Decision and Direction of Election.

which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 US 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994).<sup>17</sup> In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9<sup>th</sup> Floor, Los Angeles, CA 90017, on or before May 1, 2002. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement herein imposed.

#### NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice.

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<sup>17</sup> The list may initially be used by the undersigned to assist in determining an adequate showing of interest. The undersigned shall make the list available to Petitioner when she has determined that an adequate showing of interest among employees in the unit found appropriate has been established.

Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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 14<sup>th</sup> Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5 p.m., EST on May 8, 2002.

DATED at Los Angeles, California, this 24th day of April, 2002.

/s/Victoria E. Aguayo  
Victoria E. Aguayo  
Regional Director, Region 21  
National Labor Relations  
Board

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