

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION THIRTY-THREE

WAL-MART STORES, INC.1/

Employer

and

UNITED FOOD AND COMMERCIAL1/
WORKERS LOCAL UNION 431

Petitioner

DECISION AND DIRECTION OF ELECTION

Case 33-RC-4636

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 proceeding2/, 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/

3. The labor organization involved claim(s) to represent certain employees of the Employer.4/

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 a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:5/

All full-time and regular part-time employees employed by the Employer in its Tire and Lube Express Division (Departments 10 and 37) at the Employer's store located at 4200 Dodge Street, Dubuque, Iowa, including service technicians, sales associates, night stocker, greeters, sales floor manager, service manager, and support manager, but excluding all other employees including guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) 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.^{6/} Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Local Union 431.

LIST OF VOTERS

In order to insure 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 and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969).^{7/} Accordingly, it is hereby directed that within 7 days of the date of this Decision *two* copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge for Subregion 33 who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the *33rd Subregion, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602*, on or before February 1, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by February 8, 2002.

Dated January 25, 2002
at: Peoria, Illinois

/s/ Ralph R. Tremain
Ralph R. Tremain, RD – Region 14

1/ The Employer's and the Petitioner's names appear as amended at the hearing.

2/ I have carefully considered the record evidence, the parties' statements on the record, arguments on the record and the briefs filed by the parties herein.

3/ The Employer is a Delaware corporation engaged in the operation of retail stores throughout the United States. During the past twelve month period, a representative period, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its Dubuque, Iowa facility, goods and materials valued in excess of \$50,000 directly from points outside the State of Iowa. There are approximately seventeen employees within the unit found appropriate herein.

4/ The parties stipulated and I find that the Petitioner is a labor organization within the meaning of the Act.

5/ The Petitioner seeks to represent a divisional unit consisting of all full time and regular part-time employees employed in the Tire and Lube Express (TLE) division (Departments 10 and 37) of the Employer's Dubuque, Iowa store. Contrary to the Petitioner, the Employer maintains that the unit sought is inappropriate because the employees therein lack any close and substantial community of interest separate and distinct from that which they share with all of the Dubuque store employees. Accordingly, the Employer asserts that the only appropriate unit is a store-wide unit. This scope of the unit issue is the only issue raised at the hearing. The parties stipulated that the TLE support manager, the TLE service manager (department 37 manager) and the TLE sales floor manager (department 10 manager) are not supervisors within the meaning of the Act and should be included in any unit found appropriate herein, and I so find.

HISTORY AND BACKGROUND

The Employer's store in Dubuque, Iowa (hereinafter referred to as the store) opened on January 1, 1994. On October 27, 1999, after significant construction and remodeling, the store reopened as a "Supercenter" offering a wide variety of general merchandise, services and a full line of groceries.

The store is a primarily rectangular one-story structure with a 202,000 square feet area. The store employs approximately 480 hourly employees within fifty-seven departments. The fifty-seven departments in alphabetical order are: Automotive Service; Automotives; Bakery; Bedding; Beer & Wine; Boyswear; Cameras; Candy & Tobacco; Chemicals; Curtains; Cut Meat; Dairy; Deli; Domestics; Dry Grocery; Electronics; Fabrics; Floral; Foundations; Frozen; Girlswear; Hardware; Health & Beauty Aids; Home Furnishing; Hosiery; Housewares; Impulse Merchandise; Infants; Intimate Apparel; Jewelry; Ladies Accessories; Ladieswear; Lawn & Garden; Live Goods; Meat; Menswear; Optical; Over the Counter; Paint; Paper Goods; Pets; Pharmacy; Photo Processing; Produce; Radio Grill; Seafood; Seasonal; Sheer Hosiery; Shoes; Small Appliances; Sporting Goods; Stationery; Swimwear; Toys; Vendor Bread; Vendor Goods; and Womenswear.

The public area of the store facility also features several leased sections. There is a credit union, an ATM, a hair salon, and a portrait studio which are all located at the front area of the store. Customers enter the store through two main customer entrances which are on opposite sides of the “front end” of the store which faces the main customer parking area and consists of twenty check-out lanes and the courtesy desk. One of the main customer entrances leads into the Employer’s grocery side and the other into its general merchandise side. Customers, during the warmer months, can also enter through an entrance which can be reached through the store’s outside patio and its “seasonal box” which is an enclosed area serving as the garden shop or the Christmas/Winter shop, depending on the season. Finally, customers can also enter the store through a door to the service area of the TLE division. The patio and the “seasonal box” are located on the front right side of the store. TLE is located at the far end of the right side of the facility.

Grocery receiving is done on the rear left of the store. General merchandise receiving takes place in a separate area behind the general merchandise section of the store. Also, at the rear of the

store are the store's office, training area, employee break room, washrooms, layaway and a large stockroom area.

THE HIERARCHY OF THE STORE AND THE CORPORATE STRUCTURE

The Dubuque store is headed by its Store Manager Marty Parkhurst. He is responsible for the overall operation of the store. Reporting to him and assisting him are two co-managers, Rebecca Wolf and Greg Brockemeier. Wolf is over the general merchandise departments, and Brockemeier is over the grocery departments. There are ten assistant managers. Six assistant managers report to Wolf and the other four report to Brockemeier. Two of the assistant managers reporting to Wolf are overnight assistant managers who are in charge of the entire store's operations during the "overnight" hours. The other eight assistant managers are assigned to and are responsible for various departments of the store during the day and evening hours.

Completing the Employer's Dubuque, Iowa store hierarchy are the salaried department managers. There are only four such positions. They are the managers for TLE, One-Hour Photo, Pharmacy and Optical (Vision Center). Store Manager Parkhurst testified that the salaried department managers were supervisors and part of the stores' managerial hierarchy. The TLE Manager is responsible for all TLE operations and the record establishes that the TLE manager interviews applicants and plays a significant role in hiring employees as well as having the authority to discipline, assign and evaluate employees. The TLE Manager schedules employee vacations and makes shift assignments. The three hourly and stipulated non-supervisory managers in TLE - the TLE support manager, the TLE service manager (department 37 manager), and the TLE sales manager (department 10 manager) - report to the TLE department manager. The TLE manager position was not filled during much of the hearing. The managerial functions primarily performed by the TLE manager were covered by the Assistant Manager Mark Denny while the position was unfilled. During the hearing, Dale Brently was appointed to the position. Based on the above, I find TLE Manager Dale Brently to

be a supervisor within the meaning of 2(11) of the Act and exclude him from the unit found appropriate herein. The supervisory status of the other three salaried department managers is not an issue here. I do note that neither party contends that Brently or any of the other salaried managers should be included in any unit found appropriate herein.

TLE Manager Brently reports to Assistant Manager Mark Denny. The other salaried department managers report to the assistant managers assigned to their department. Unlike the hourly department managers in TLE, all other hourly department managers also report to their assigned assistant managers.

The Employer's corporation is organized into an operational hierarchy. Store Manager Parkhurst reports to the District Manager of the Operations Division, Lee Autry. He reports to his regional Vice-President of Operations, Marion McDonough. McDonough is under Dave Jackson, a divisional Vice-President. Jackson reports to Jim Haworth, Operations Vice-President, who in turn reports to Tom Coughlin, the Chief Executive Officer over Wal-Mart Stores. Over him is Lee Scott, who is the President and Chief Executive Officer of the Employer.

The Employer is further organized into divisions. The Wal-Mart Stores structure also incorporates specialty divisions. These divisions, under the Employer's "store within a store" merchandising concept, have their own corporate management hierarchy distinct from the store management and the operations hierarchy described above. The Employer's Executive Vice-President of the Specialty Divisions is Dave Dible. He heads all Wal-Mart's specialty divisions. Those include TLE, Photo Processing, Optical, Pharmacy, and Jewelry/Shoes. Under Dible are seven vice-presidents including one for each of the specialty divisions. The Vice-President of the TLE Division is Mike Bennett. The TLE Division is referred to as Division 6. Division 6 has its own out-of-store hierarchy at the corporate level which includes two divisional managers (Divisions A and B), marketing manager, financial manager, equipment manager and training manager. The TLE Division is further

broken up into regions and districts. The TLE District Manager serving the Dubuque TLE is Dan Welles. He reports to George Alderman who is the TLE Regional Manager.

TLE District Manager Welles is responsible for both the monthly and the annual budgets of the Dubuque TLE. He has responsibility for sales and payroll. He has input on hiring and staffing, particularly relative to TLE profitability. Welles consults with and gives directions to the (in-store) TLE salaried manager in regards to procedures in the shop, safety, and merchandising operations. Welles has the responsibility to “manage” his stores, including the Dubuque TLE, to a certain payroll number and sales number. In such matters, Store Manager Parkhurst and Welles have discussed and made decisions in regards to TLE divisional directives relating to their impact on the Dubuque store and its TLE. Welles commonly visits the TLE departments of his assigned stores. Regional and Divisional personnel also visit stores, but on an infrequent basis.

STORE HOURS AND THE HOURS OF TLE

The Dubuque store is open twenty-four hours a day and seven days a week. However, several departments—TLE Service (Automotive Service-Department 10), Optical (Vision Center), Pharmacy, Jewelry, One-Hour Photo, Lay-Away, and Radio Grill—have limited or specialized hours. Optical and Pharmacy has merchandise for sale twenty-four hours a day, but have more limited hours for its service work. Certain departments are open twenty-four hours, but do not have department sales associates on duty for the overnight hours. TLE Automotive-Department 37 and the Jewelry Department are examples of this situation. Sales associates from other departments or assistant managers assist customers as required. The Sporting Goods Department is open and staffed twenty-four hours, but firearms are only sold during a limited period.

The TLE Service Department (Department 10) is open from 8:00 a.m. to 7:00 p.m. everyday except Sunday. Sunday hours are from 10:00 a.m. to 6:00 p.m. No service is performed except during those hours and the service area is locked during its “off” hours. The automotive sales side of TLE

(Department 10) is open to the public on a twenty-four hour basis. However, automotive sales associates do not work the overnight shift. During these hours, customers utilize self-service or avail upon the TLE night stocker. If the night stocker is not available, the night assistant manager, or a sale associate from another department will provide assistance to customers. If high ticket items like car stereos are involved, the night assistant manager is paged so he or she can unlock the security area where such items are stored and show the items to the customer.

THE OVERALL OPERATIONS OF THE STORE

All store employees are deemed “associates” by the Employer. All employees undergo the same hiring process which utilizes a screening committee which is composed of volunteer employees from all areas of the store. With the assistance of the store’s personnel manager, Jeri Barnhart, the committee screens out all but the most qualified applicants for the available positions. All applicants utilize the same application form. After screening, Barnhart conducts an interview with the “screened” applicants. At that time, every applicant completes an Orion Survey which the Employer characterizes as an “opinion” survey. Applicants also complete an availability form which indicates what hours they are available to work. The final interview is done by a member of management, who could be a co-manager, assistant manager or a salaried department manager such as the TLE or the pharmacy manager. All hiring decisions have to be approved by a co-manager or the store manager.

All store associates are subject to the same orientation process. All associates are subject to and utilize the same employee handbook and receive the same training, including the Employer’s computer based training system (CBL), in regards to the Employer’s philosophy and store-wide policies. Such training takes place in the store’s training area during new employee orientation under the direction of the store’s training coordinator.

The Employer has certain concepts and a corporate culture that it attempts to instill in all of its employees. For instance, it has a “ten foot” rule which applies to all employees. This rule directs

employees to invariably greet and assist customers who come within ten feet of them regardless of where they make their customer encounter, and when appropriate, escort the customer to the area in the store where the products sought are located. The Employer also maintains an “open door” employee complaint policy for all employees. If an associate has a problem or a complaint, he or she may approach their immediate supervisor to discuss and attempt to address the situation. If it is not resolved, the associate can continue all the way up the Employer’s hierarchy in an attempt to solve the problem. The Employer also has developed a “store within a store” (SWAS) program which essentially deems managers over assigned areas as responsible for their areas as if he/she was the store separately from the rest of the store in regards to merchandising, planning and profitability. The SWAS program is described thusly:

“In “Store Within A Store”, Department Managers manage their own business. Department Managers learn the costs of their goods, the freight costs, and the profit margins. They see how their store ranks with every other store in their Division. They order and promote their merchandise.”

All associates are subject to the same pay system, and are paid bi-weekly through the personnel office. All associates punch either of two time clocks, and are to enter or leave the store through either of two entrances. The associates receive the same benefits, including insurance, 401(k) plan, vacation system, and sick time benefits. The associates can utilize a common break room at the rear of the store, and have access to a set of lockers located in the same area.

The Employer has daily store meetings, at which store policies and sales and marketing plans are discussed. Associates are not required to attend, but those who are available attend the meetings which are generally short in duration. The store holds several store-wide events which are sometimes referred to as “morale building” events. These include Christmas celebrations, other holiday events, and store-wide cookouts. All associates in every of the Employer’s stores, have access to the

Employer's intranet system which is dubbed the "Pipeline". The "Pipeline" provides information including Employer's rules, regulations, CBL's, and various manuals. Certain departments, including Automotive/Tire & Lube Express (Departments 10 and 37) have their own web pages on the "Pipeline" which focus on specific TLE information.

Most associates and all sales associates wear the Employer's trademark vests over casual clothes. Most wear blue vests. However, night stockers and TLE service technicians do not wear vests. Garden Center associates wear green vests except during very warm weather when they can forgo the vests. Sporting Goods associates wear brown vests. Vision Center, Photo associates and Pharmacy technicians wear lab coats. Pharmacy sales associates (blue) and Cosmetics (pink) wear smocks. Grocery associates wear different colored vests and aprons depending on their departments. It appears from the record that TLE sales associates have traditionally worn red vests, but currently wear blue vests. TLE service technicians wear dark blue uniforms. Because the TLE service uniforms are commonly soiled with dirt, grease and oil, the Employer pays a service to supply and launder the uniforms. The uniforms are encribed "Wal-Mart Tire and Lube Express".

The store has a safety committee which is composed of associates from various departments within the store. TLE employees can and have been members of the committee. The Employer's corporate safety policies apply to all store and associates. Certain of the Employer's store departments have goods and services that require special safety requirements and procedures. For instance, OSHA required lockout/tag out safety procedures are practiced in those departments that utilize power equipment. TLE service technicians wear bump caps (safety hats) and safety glasses and utilize "burn sleeves".

The Employer utilizes a computerized store-wide network which is called the "Smart System" which permits the purchase of any item or service from any department at any cash register in the store. The registers interact with the store's main computer to track the inventory level of every item

sold by the store. TLE service also uses the system to write work orders. TLE, as well as Pharmacy, Jewelry, Layaway, and the Vision Center can access the history and the content of specific customer transactions in their departments. Finally, TLE has a special program that prioritizes its shop's work orders and can track the progress of each work order.

THE OPERATIONS OF THE TLE AT THE DUBUQUE STORE

As indicated above, the TLE or Automotive consists of two departments – Department 10 – Automotives and Department 37 – Automotive Service. Department 10 – Automotives is the automotive merchandise sales section of TLE and is located at the rear right side of the store's sales floor between the store's Sporting Goods and Paint departments. Adjacent and connected is the Automotive service area which extends out from the generally rectangular shape of the store. Between the sales area of TLE and its Service area is the TLE stockroom, a restroom and a customer waiting room. As indicated above, TLE has a customer entrance/exit that opens directly to the parking lot and to the TLE service waiting room. The stockroom in TLE is used to store TLE supplies as well as tires, car cleaners and waxes, batteries, air filters, oil filters, and other automotive supplies and accessories. There is an electronic storage room in the stockroom which is utilized to store securely electronic automotive items such as radar detectors and car stereo systems.

The TLE service area features three pull-through bays with entrances and exits on opposite sides with large overhead doors. The first bay has an open oil change pit and is used primarily for oil changes and lubrication jobs. Equipment used in the pit include tools to remove drain plugs, oil collection pans, lubrication equipment, and tools to remove and replace oil filters. In the upper bay, there is a computerized work station which, through its connection with the greeters hand held computer, informs the service technician of the services to be performed on each vehicle. The upper bay also has various "guns" that dispense air/water, windshield fluid, and oil. The other two bays are primarily used for installing and changing tires, tire rotations, and balancing. However, through the

use of a mobile piece of equipment, oil changes can be done in these bays as well. These bays are equipped with a number of hand tools, tire mounting and dismounting equipment, tire repair equipment, air tools used to remove lug nuts, and a computerized tire balancer. These bays also have various car-lift devices and equipment.

The TLE service area has a counter that has several cash registers, a computer terminal, a printer that prints service tickets that are generated by the computer, and a key-making machine. TLE has its own washroom which is located near the counter. Although the washroom is available for customer, its is primarily used by the service technicians to clean up and change uniforms. Dirty uniforms are kept there in a hamper until the outside source takes them and launders them.

As indicated above, the TLE sales area (Department 10) is adjacent and connected to the service area. Automotive products are displayed in a number of ways including shelves, floor displays and end caps (end of aisle displays). Tires are displayed on special racks. Tires not on display are stored in the stockroom on racks as well as in large trailer located in the back parking lot. Tires are generally delivered directly to TLE and are generally stacked and stored by TLE service technicians.

The service side of TLE (Department 37) has approximately twelve employees. There is an hourly-paid Service Manager, an hourly-paid Support Manager, a service writer and nine service writer/greeter service technicians. The sales side of TLE (Department 10) has approximately five employees. These include an hourly Sales Floor Manager, three TLE Sales Associates, and the TLE night stocker.

The Service Manager

The Service Manager is responsible for the condition of TLE service area as well as its equipment, including cash registers. The Service Manager is involved in training and safety regarding the TLE service side and also makes sure that there is a proper inventory for Department 10. She

makes sure that the shop runs properly and that customers are being served. She assists associates with their work and regularly performs the same tasks as the service technicians.

The Support Manager

The Support Manager backs up and assists the salaried TLE Manager. She also commonly fills-in for the Service Writer/Greeter, drives vehicles in or out of the service bays, and orders and stocks merchandise. The Support Manager also regularly performs service work with the Service Technicians, such tasks comprising about one-quarter of her work time.

The Service Technicians

The Service Technicians perform various mechanical functions and services on customers vehicles. They do routine maintenance on vehicles including a 15 point service job. They do oil changes, install new oil filters, air filters and batteries. They also fix, balance and rotate tires as well as installing new tires. Service Technicians do simple lube jobs, replace windshield wipers and refill windshield fluid, install headlight, interior and signal light bulbs, and do some interior cleaning.

Service Technicians are trained through CBLs and on the job training provided both by the Service Manager and by experienced service technicians. In order for a Service Technician to be fully qualified and to perform TLE services independently he or she has to be tested and certified. There are five certifications necessary – two tire certifications, an upper and lower bay certification, and a greeter certification – before a service technician is fully trained and can perform independently all the functions of the position. The certificates are posted on a wall in the TLE service area.

The Service Writer/Greeter

The Service Writer/Greeter welcomes customers and ascertains from them the kind of service they require. Usually with a hand held computer, the Greeter enters the service information into the computer system and gives the customer a bar coded slip which allows the customer to be able to pay for the service at any store register. The Greeter is cross-trained and can perform service technician's duties. Conversely, Service Technicians, Sales Associates and the Support Manager fill-in for the Greeter from time-to-time.

The TLE Sales Floor Manager

The TLE Sales Floor Manager has responsibilities in regards to the ordering and maintaining inventory for the TLE sales floor. The Sales Floor Manager also is responsible for the appearance of the sales area, the maintenance of the non-tire part of the stockroom, the sales cash register, and assuring that customer service standards are followed.

The TLE Sales Associates

The Sales Associates are primarily involved in performing customer service by finding products for them, providing them with information and advice about products, and performing normal sales functions. The Sales Associates also stock and maintain the department's shelves and displays. They also move merchandise and change displays when appropriate. As indicated above, they sometimes perform the duties of the Service Writer/Greeter and if a customer does not utilize the Greeter, Sales Associates can and do enter service orders into the computer system. Sales Associates in TLE often interact with the Service Technicians when an automotive product requires installation or when the Service Technicians need items such as windshield wipers, filters, and batteries.

The Night Stocker

The store has a large crew of night stockers that work the store's overnight shift (10:30 p.m. to 7:00 a.m.) stocking merchandise. Daryl Beck, the TLE night stocker, is assigned to TLE and is responsible for the overnight stocking of the TLE Department. He is under the supervision of the TLE Manager.

DISCUSSION AND CONCLUSION

Section 9(b) of the Act directs the Board to make appropriate unit determinations which will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act"; i.e., the rights of self-organization and collective bargaining Sears, Roebuck and Co., 261 NLRB 245 (1982); J. C. Penney Company, Inc., Store Number 1302, 196 NLRB 708, 709 (1972); Sears, Roebuck and Co., 184 NLRB 343, 346 (1970), and Montgomery Ward & Co., Incorporated, 150 NLRB 598, 600-601 (1964).

The Board has repeatedly stressed that the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit. See: Morand Brothers Beverage Co., 91 NLRB 409 (1950), *enfd* 190 F. 2d 576 (7th Cir. 1951); Dinah's Hotel Corporation, d/b/a Dinah's Hotel and Apartments, 295 NLRB 1100 (1989) and Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, 283 NLRB 475 (1987). To this end, the Board gives deference to the Union's petition and first considers whether that unit is appropriate. Overnight Transportation Company, 322 NLRB 723 (1996); and P.J. Dick Contracting, 290 NLRB 150 (1988). If it is an appropriate unit, the inquiry ends. If not, the Board will scrutinize the Employer's proposals. Black and Decker Mfg., Co., 147 NLRB 825 828 (1964); and Dezcon, Inc., 295 NLRB 109, 111 (1989).

Based on the above, the sole inquiry in the instant case is whether a unit consisting of

employees of the Employer's Tire and Lube Express is appropriate in the circumstances of this case. To this determination, it is irrelevant whether another unit would also be appropriate, more appropriate, or most appropriate. Sears, Roebuck and Co., 261 NLRB 245 (1982). In reaching the question of the appropriateness of the petitioned-for unit, a petitioner must demonstrate that the employees in the petitioned-for unit share a sufficient "community of interest" so as to constitute an appropriate bargaining unit. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). To this end, the Board has enumerated several factors which it utilizes in determining whether a given group of employees share a sufficient community of interest to form an appropriate unit. These include: similarity in the scale and manner of determining earnings; similarity in employment benefits; hours of work and other terms and conditions of employment; similarity in the kind of work performed; the qualifications, skills, and training of employees; frequency of contact and interchange among employees; integration of production processes; common supervision and determination of labor relations policy; and the history of collective bargaining. Kalamazoo Paper Box Corporation, 136 NLRB 134 (1962). Finally, to find a departmental unit to be appropriate in a retail store, that unit must have a close and substantial community of interest separate and distinct from that they share with other store employees. Sears Roebuck and Co., 261 NLRB 245 (1982).

Based on the record herein and the considerations outlined above, I find that the petitioned-for unit is appropriate. In reaching this conclusion, I acknowledge that the Employer's Dubuque store employees are subject to common policies, procedures and benefits as well as having common overall supervision by the store manager. I also recognize the Employer's strong emphasis on employee teamwork and the establishment of a store-wide corporate culture. Nonetheless, for the reasons set out below, I conclude that the employees employed in TLE division at the Employer's Dubuque store have a community of interest separate and distinct from other store employees sufficient to constitute an appropriate unit for collective bargaining within the meaning of the Section 9(b) of the Act.

First, I note that the TLE employees have a separate group identity that arises from working in a recognized and advertised product line which is separate and distinct from that of the rest of the store. While the Employer argues that TLE, in part, exists to draw customers into the store to shop, the distinct nature of its TLE operation remains. It is also significant that the TLE operation not only has separate immediate and second level supervision, but also a divisional hierarchy that extends into the very upper reaches of the Employer's corporate structure. The Employer maintains that the TLE specialty division supervision is "advisory" and "technical" in nature. The record belies that assertion. The TLE District Manager over the Dubuque TLE has the responsibility to "manage" the Dubuque TLE to certain payroll and sales numbers as well as giving directions to the Dubuque salaried TLE Manager in regards to staffing, shop procedures, safety, merchandising and other operational matters. While the store manager can "contest" Divisional directives in limited areas such as staffing, such occasions appear to be rare and are the exceptions that prove the rule. I note that the only instance of the store manager "overruling" the Division in evidence involved a situation where the Division Manager and the Store Manager agreed that the Dubuque TLE's profitability warranted an exception to the Division's directive to cut staffing. Moreover, TLE has its own profit and loss statement which is posted monthly in the TLE stockroom. The profit and loss statement has line entries for wages, payroll, overtime, sick pay, vacation pay, advertising, maintenance, insurance, accident costs, uncollected accounts, telephone, supplies, and rent. TLE's profit and loss is substantially more comprehensive than the profit worksheets sometimes utilized by Assistant Managers and its entries are charged against the TLE Division.

I also point to the separate, readily-identifiable work area utilized by the TLE service technicians as well as its separate customer entrance/exit, separate washroom (used primarily by TLE service technicians) and waiting room. Moreover, while the TLE service technicians are not highly skilled auto mechanics, their work requires mechanical skills and training and involves the use of

automotive machines, equipment and tools which are not used by any other employees in the store. The TLE service technicians perform heavy, often dirty work that requires special safety standards, special training, and certifications. Despite the comparison put forth by the Employer, their work and working conditions are much different than other employees, including those designated as technicians in the Pharmacy, One-Hour Photo and Optical departments. Additionally, TLE employees have different hours than other store employees, TLE service technicians wear work uniforms provided by the Employer and utilize safety equipment such as “bump” hats and burn sleeves not utilized by other employees. The TLE service technicians’ starting hourly rate is generally seventy-five cents over the Employer’s starting rate for other associates. Although the record is not clear, it appears that this differential is maintained in the Employer’s ongoing wage rates.

The record does establish a small degree of operational and functional interchange between the TLE employees and other employees in the store. However, such interchange is minimal compared to the daily interaction TLE employees have with each other. For instance, the “ten foot” rule might bring other sales associates into the TLE area, but the interaction is primarily between the sales associate and the customer. The fact that TLE service technician Dwight Paisley helps out assembling bicycles or grills from time-to-time on his “own time”, that TLE night stocker Dayrl Beck gives his girl friend occasional help in her department when she is swamped with work or that the TLE key machine is sometimes utilized by a non-TLE associate does not separate the TLE sales employees from the TLE service technicians from the petitioned TLE employees so to make them a non-homogenous grouping. The Employer urges that the number of permanent, voluntary transfers into or out of the unit sought demonstrate that there is a community of interest with other store employees. However, given the length of the time period encompassed by the Employer’s evidence, the number of transfers is not sufficient to require a different result herein. Further, permanent, voluntary transfers are a less significant determinant of community of interest than are temporary transfers and other interchange.

Bally's Park Place, Inc., 255 NLRB 63, 64 (1981). See, Penn Color, Inc., 249 NLRB 1117 (1980).

The Board has traditionally found units limited to automotive center employees in retail store settings to be appropriate units. For instance, in Sears Roebuck and Co., 261 NLRB 245 (1982), the Board reversed the Regional Director's finding that a single storewide unit was the only appropriate unit, and found that the petitioned-for unit of automotive center employees consisting of mechanics, tire and battery installers (who performed duties similar to the service technicians herein), parts employees, cashiers, service writers and a receiver in the automotive center constituted an appropriate unit.

In Sears, the Regional Director's determination that a storewide unit was appropriate was based on the role of the personnel department in hiring new employees and the common employee orientation. In addition, all store employees punched the same time clock, received the same fringe benefits, utilized the same storewide entrance and break room, were paid weekly and transferred on a temporary basis between departments as needed, and were required to assist customers regardless of departmental lines. There, as here, the cash registers permitted customers to select merchandise from any department and pay at the register. The Board recognized these factors which militated against finding the requested unit of automotive center employees to be appropriate. However, the Board noted that the high level of interaction between the employees within the automotive center, and the comparatively limited interaction with other store employees, such as the temporary assignment to work in other departments, assisting customers in other departments, and ringing up merchandise from other departments had a minor impact on the automotive center employees' day-to-day activities. The Board found that the strong community of interest shared by the automotive center employees was evidenced by their separate immediate and second-level supervision, their different working hours and separate vacation schedules, their departmental meetings, their separate and readily-identifiable work area, and, perhaps most importantly, their separate group identity arising from working in a recognized

product line separate and distinct from that of the retail store. In the instant case, the Employer seems to imply in its brief that a prerequisite for finding appropriate a unit limited to automotive center employees at a retail store is the existence of skilled mechanical employees within the unit composition. However, none of the cases cited by the Employer stand for the proposition that a separate unit of all automotive center employees cannot be found in the absence of skilled mechanical employees. The Board in Sears and other automotive center cases do not rely on the finding that the automotive employees complements have craft characteristics. In the context of another, traditional craft unit, the Board has found a separate unit appropriate based on community of interest factors, despite the failure of the unit employees to exercise the full range of craft skills, where the skills needed were distinct from those of the other store employees. Wal-Mart Stores, Inc., 328 NLRB 904 (1999).

As the facts of the above-cited Sears case are quite similar to the instant case, the Board's ruling in that case has application here. See also J.C. Penney Company, 196 NLRB 446 (1972). There is no labor organization seeking a wider unit herein. Accordingly, I find the petitioned TLE employees at the Employer's Dubuque, Iowa store to be an appropriate unit.

6/ Your attention is directed to Part 103, Subpart B, Section 103.20 of the Board's Rules and Regulations, Series 8, as amended, which provides, inter alia, that employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election, that failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed, and that an employer shall be estopped from objecting to nonposting or late posting of Notices unless it notifies the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received the Notices. You may wish to review the above rule in its entirety so that you are fully aware of its complete contents and the obligations imposed by it.

7/ The full first and last names and addresses of all eligible voters must be filed by the employer. North Macon Health Care Facility, 315 NLRB 359 (1994).

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