

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

BIG LOTS

Employer,

and

Case 27-RC-8282

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL NO. 7, AFL-CIO

Petitioner.

DECISION AND DIRECTION OF ELECTION

On October 8, 2003, United Food and Commercial Workers Union, Local No. 7, AFL-CIO, (the Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act, as amended, (the Act), seeking to represent all employees engaged in stocking, checking, recovery, furniture handling and maintenance employed by Big Lots, (the Employer), at its facility in Aurora, Colorado, excluding guards and supervisors as defined in the Act. On October 22, 2003, a hearing was held before a Hearing Officer of the National Labor Relations Board, (the Board). At the conclusion of the hearing, the parties agreed that the following employees constituted an appropriate unit for the purposes of collective bargaining: All regular full-time and part-time employees employed by the Employer at its Store No. 4159, located at 779 Peoria Street, Aurora, Colorado, including customer service specialists, sales clerks/furniture, store associates,

and area merchandisers, excluding the store manager, assistant store managers, furniture department manager, office coordinator, and guards and supervisors as defined in the Act.

This case presents one issue to be resolved: whether the day-shift associate manager is a supervisor within the meaning of Section 2(11) of the Act who must be excluded from the unit. The Employer contends that the day-shift associate manager is a statutory supervisor, while the Petitioner maintains that the day-shift associate manager is an employee. As discussed below, I conclude that the Employer has failed to meet its burden of establishing that the day-shift associate manager is a statutory supervisor subject to mandatory exclusion from the bargaining unit sought by the Petitioner.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the parties stipulated, and I find, that the Employer is a Delaware corporation, with its principal place of business in Columbus, Ohio, engaged in the business of retail sales of household goods, clothing and furniture in several states, including a location at Aurora, Colorado. During the past twelve months, the Employer had gross revenues valued in excess of \$500,000. During the same period, the Employer

received goods valued in excess of \$5,000 at its Colorado operations directly from suppliers located outside the State of Colorado.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following group of employees:

INCLUDED: all regular full-time and part-time employees employed by the Employer at its Store No. 4159, located at 779 Peoria Street, Aurora, Colorado, including customer service specialists, sales clerks/furniture, store associates, and area merchandisers.

EXCLUDED: the store manager, assistant store managers, furniture department manager, office coordinator, guards and supervisors as defined in the Act.

STATEMENT OF THE CASE

The Employer is engaged at its Aurora, Colorado store in the retail sale of household goods, clothing and furniture. It employs approximately 30 employees in classifications of customer service specialists, furniture sales clerks, store associates, and area merchandisers. The store manager is in overall control of

the day-to-day operation of the facility. In addition, there are two assistant managers, a day shift associate manager, a night shift associate manager, a furniture department manager, and an office coordinator.

ANALYSIS AND CONCLUSIONS

As noted above, the sole issue to be determined is whether the day shift associate manager should be excluded from the unit as a supervisor within the meaning of the Act.¹

Section 2(3) of the Act excludes “any individual employed as a supervisor” from the Act’s definition of “employee”, thereby excluding supervisors from the Act’s protections. Section 2(11) of the Act defines a “supervisor” as:

[A]ny 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 to adjust their grievances, or effectively to 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 if independent judgment.

Section 2(11) has been interpreted to set forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the

¹ In its post-hearing brief, the Employer concedes that the record fails to demonstrate that the night shift associate manager is a supervisor within the meaning of the Act. I agree. What evidence is contained in the record shows that the night shift associate manager works with a crew of store associates responsible for stocking functions from 10 p.m. to 6 a.m. while the store is closed to the public. At most, the evidence shows that the night shift associate manager serves as a lead employee carrying out a list of duties prepared and provided to him by the store manager or an assistant manager.

interest of the employer. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S.Ct. 1861, 1867, 149 L.Ed.2d 939 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., supra; Michigan Masonic Home, 332 NLRB 1409 (2000). The Board has been careful not to construe the language of the statute relating to supervisory status too broadly, because once an individual is found to be a supervisor, that individual is denied the rights of employees protected by the Act. St. Francis Medical Center-West, 323 NLRB 1046 (1997); Hydro Conduit Corporation, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with genuine management prerogatives should be considered supervisors and not straw bosses, leadmen, set-up men and other minor supervisory employees. See Chicago Metallic Corporation, 273 NLRB 1677, 1688 (1985), affd. In relevant part 794 F.2d 527 (9th Cir. 1986). See also Providence Hospital, 320 NLRB 717, 725 (1996), citing McCullough Environmental Services, 306 NLRB 565 (1992). When the evidence is in conflict or inconclusive with regard to particular indicia of supervisory status, the Board will not find supervisory status based on those indicia. Davis Memorial Goodwill Industries, 318 NLRB 1044 (1995); Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

The task here is to determine whether the Employer has satisfied its burden of showing that the day shift associate manager is a supervisor by a “preponderance of credible evidence.” Star Trek: The Experience, 334 NLRB

246, 251 (2001). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See Willamette Industries, Inc., 336 NLRB 743 (2001). The fact that the Employer has given the position at issue the title of “associate manager” is of no consequence, as the Board has long held that a title is insufficient to establish supervisory status. See, e.g., Omnix International Corporation d/b/a Waterbed World, 286 NLRB 425 (1987).

The evidence shows that the position of day shift associate manager is currently vacant and has been since approximately August 29, 2003.² The Employer elicited testimony from Bill Armstrong, its regional human resources manager, regarding the typical or expected duties of the day shift associate manager. Thus, Armstrong testified that the associate manager is expected to fill in as manager on duty when the other management personnel are not in the store. According to Armstrong, this occurs on a daily basis and during those times the associate manager has all of the duties, responsibilities and authority of the store manager. These include the authority to change employee schedules,

² Mary Anne Jiron occupied the position of day shift associate manager from August 2002 until about August 29, 2003 when she resigned the position to become a stocker on the day shift stocking crew. Jiron testified that while day shift associate manager, she worked with a stocking crew of approximately five employees. She also testified that as day shift associate manager she would receive instructions from the store manager or assistant managers regarding what merchandise needed to be stocked on a particular day and would relay those instructions to the stocking crew. She testified without contradiction that as associate manager she had no authority to, and did not, perform any functions typically performed by statutory supervisors. Contrary to the Employer, I find that Jiron’s actions in relaying instructions to the stocking crew did not involve the exercise of independent judgment and that in doing so she served merely as a conduit for decisions made by management. See KGW-TV, 329 NLRB 378, 381-383 (1999). I also find the evidence of secondary indicia presented to provide an insufficient basis for finding supervisory status. See Central Plumbing Specialties, Inc., 337 NLRB No. 153 (2001); J.C. Brock Corp., 314 NLRB 157 (1994). Thus, the fact that Jiron was provided with keys to the store and the alarm code, as well as the fact that on occasion no management officials were present in the store during the first two hours of her daily shift are insufficient to demonstrate the existence of supervisory status. See Northwest Nursing Home, 313 NLRB 491, 500 (1993); see also Ken-Crest Services, 335 NLRB No. 63, slip op. at 4 n. 16 (2001).

call employees into work if needed, discipline employees, assign overtime, excuse employees from work. In addition, Armstrong testified that the associate manager was expected to give input as to employees' performance reviews and evaluations, assign work to employees, prioritize the work of employees, transfer employees from department to department on a temporary basis, and inspect the work performance of employees.

While Armstrong testified regarding what duties are typically expected of an associate manager, he also testified only that there is currently an opening in the day shift associate manager position at the Aurora store. The Employer offered no evidence regarding what efforts it had made to fill the position, or when it anticipated that the position would be filled.

The Board looks to actual duties performed, as opposed to speculation about those duties, in determining whether an employee possesses authority sufficient to exclude that employee from the coverage of the Act. For example, in Southwestern Bell Telephone Company, 222 NLRB 407 (1976), the Board held that “[w]hile it may be, as the employer asserts, that these positions will eventually possess supervisory authority or managerial discretion, our determination as to the proper unit placement at this time must be based on what the individuals filling these classifications actually do now, as opposed to what they speculatively may be doing some time in the future.” See also Ramona’s Mexican Food Products, Inc., 217 NLRB 867, 868 (1975)(employees being groomed for supervisory posts are not supervisors, since future assignments are at best speculative); Reliance Insurance Companies, 173 NLRB 985 (1968);

Hilton-Burns Hotel Co., Inc., 167 NLRB 221 (1967). In view of the current vacancy in the day shift associate manager position and the lack of evidence showing when, or if, this position will be filled, Armstrong's testimony regarding the anticipated duties and authorities is speculative and does not satisfy the Employer's burden of demonstrating that the day shift associate manager is a statutory supervisor who must be excluded from the unit.

In addition, the record is devoid of any evidence that might corroborate Armstrong's conclusionary testimony about the future authority of the day shift associate manager. "[C]onclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority." Tree-Free Fiber Co., 328 NLRB 389, 393 (1999); Sears, Roebuck & Co., 304 NLRB 193 (1991). This lack of corroboration is particularly significant here where the evidence regarding the actual duties and authority of the day shift and night shift associate managers is insufficient to demonstrate supervisory status.

Accordingly, I find that the evidence regarding the authority that the day shift associate manager may exercise if, and when, that position is filled is only speculative and insufficient to establish supervisory status. Therefore, I find that the Employer has failed to meet its burden of demonstrating the supervisory status of the day shift associate manager whom it seeks to exclude from the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the Unit found appropriate at the time and place set forth in the Notice of Election to

issue subsequently, subject to the Board's Rules and Regulations.³ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government 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 NO. 7, AFL-CIO**

³ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed. Please see the attachment regarding the posting of election notice.

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 in 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); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969); **North Macon Health Care Facility**, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an 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. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-54533 on or before **November 10, 2003**. 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 provision 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, DC 20570. This request must be received by the Board in Washington by **November 17, 2003**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 3rd day of November 2003.

B. Allan Benson, Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Plaza
Denver, Colorado 80202-5433

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