

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

GRISTEDE'S FOODS, INC.

Employer

and

CASE NO. 2-RC-22800

UFCW, LOCAL 342, 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. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2. Upon the entire record ¹ in this proceeding, it is found that:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Gristede's Foods, Inc. (the Employer) is a Delaware corporation, engaged in the operation of retail grocery stores in the New York City area. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$500,000 and purchases and receives at its New York facilities goods and supplies valued at more than de minimis amounts directly from suppliers located outside the State of New York. Based upon the record and the

¹ Briefs were filed by the Employer and Petitioner and have been duly considered. In addition, after the close of the hearing certain exhibits were requested for the record, and given an exhibit number, by the Hearing Officer. These are Joint Exhibit 1, consisting of the collective-bargaining agreement between the Employer and the Petitioner and Employer's Exhibit 2 which is a recognition

stipulations of the parties, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that UFCW, Local 342, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner seeks an election to represent a unit comprised of all Internet department drivers and helpers employed by the Employer, and excluding all other employees and supervisors as defined in the Act. The Employer contends that the petition should be dismissed inasmuch as it seeks an election among employees whose terms and conditions of employment are covered by an existing collective-bargaining agreement between the Employer and RWDSU Local 338 (Local 338). The Employer asserts that this collective-bargaining agreement constitutes a bar to the further processing of the petition. The Employer further asserts that the employees that Petitioner has labeled as drivers and helpers are, in fact, delivery employees, and perform the same function that is performed by the delivery employees that are currently represented by Local 338. The Employer argues that inasmuch as these employees perform the same work they should be found to be part of the contractual unit. The Employer further argues that, to the extent it may be determined that the employees sought by the petition do not perform the same functions as the existing delivery employees, the Board should find that those employees are accreted into the existing Local 338 bargaining unit. Moreover, the Employer argues, the employees sought by the petition have an overall community of interest with Local 338 employees that would warrant their placement in that unit. Petitioner, to the contrary, argues that the employees sought by the petition are currently not represented by another labor organization, no

agreement entered into as of March 24, 2003 by the Employer and RWDSU Local 338. These exhibits are hereby made a part of the record herein.

other labor presently is seeking to represent these employees, and that the petition seeks an election in an appropriate unit. Despite notice of the petition and date of hearing, Local 338 did not appear at or participate in the hearing nor indicate any interest in representing the employees in the petitioned-for unit.

Overall Structure and Classifications at Issue

The Employer has its corporate offices at 823 Eighth Avenue, New York, New York and operates 45 stores in the borough of Manhattan, as well as several in the neighboring suburbs. The day-to-day operation of all the Employer's stores is overseen by Chief Operating Officer Charles Criscuolo, who testified on behalf of the Employer. Criscuolo reports to John Catsimatidis, who is the Chief Executive Officer and Chairman of the Corporation. Reporting to Criscuolo are a Vice-President of Operations and two District Managers. Additionally, each store has a store manager and certain stores may have a co-manger as well. According to Criscuolo, all personnel policies and practices are created and implemented on a corporate level.

The Employer has historically offered its customers home delivery services. Customers may telephone, or send an order by facsimile transmission to, any of the Manhattan stores, or request home delivery at a store checkout line. Since March 2003,² the Employer has employed approximately 60 delivery persons to deliver groceries ordered in this manner, usually employing one to three individuals per store. These delivery persons generally deliver groceries within a two to three block radius of any given store.

In October 2003, the Employer commenced an Internet delivery service. Internet orders are placed through a website called "XpressGrocer.com." All orders coming through this web are filled at, and delivered from, the Employer's store located at 64th

² Prior to March 2003, these delivery persons were employed by an outside contractor.

Street and West End Avenue, designated as Store # 561. This store is one of the Employer's "mega-stores."³ The Internet delivery area originating from Store # 561 covers the entire borough of Manhattan. The Employer currently has four delivery trucks and employs approximately nine drivers and nine drivers' helpers to deliver these Internet orders. The parties do not dispute that these are the employees sought by the petition, although the Employer contends that it does not employ drivers and helpers in separate classifications and asserts that they are all delivery employees.

The record establishes that the Employer employs various classifications of delivery persons. There are those employees who are employed at various stores throughout Manhattan to make foot deliveries in the immediate vicinity (2-3 blocks) of the Manhattan stores pursuant to phone or facsimile orders or customer request. These employees are referred to herein as walkers/deliverymen, which is the title used by Local 338, their exclusive collective-bargaining representative. Those employees employed to deliver groceries throughout Manhattan out of Store # 561 pursuant to Internet orders are referred to herein as drivers or helpers, as appropriate.

Representation of Employees

Petitioner currently represents the Employer's meat cutters, meat wrappers and seafood clerks (in those stores which have seafood departments).⁴ There are approximately 145 employees in this collective-bargaining unit, which is covered by one master collective-bargaining agreement.⁵ Petitioner seeks to represent the employees in the petitioned-for unit separately from this existing unit.

³ A "mega store" is one with a floor area in excess of 10,000 square feet and which stocks a wider variety of merchandise than other stores.

⁴ The collective-bargaining agreement sets forth the unit as follows: "employees who. . . are engaged in the cutting, wrapping and selling of all fresh and smoked meats, poultry, fish and such products customarily handled in the Meat Department and at retail in the Employer's retail stores or supermarkets. . ."

⁵ The recognition clause of this collective-bargaining agreement provides: "The Employer recognizes the Union as the sole and exclusive collective bargaining agent for its employees who, in the

The record establishes that Local 338 represents unit employees in 32 of the Employer's 45 Manhattan supermarkets. There are approximately 900 employees in this unit. There is a collective-bargaining agreement with the Employer, effective from October 6, 2002 through October 7, 2006 (the Local 338 collective-bargaining agreement), which is asserted as a bar to the instant petition. This agreement provides as follows:

This agreement covers, and the term "employee" or "employees" as herein used includes, all of the Employees present and future full-time and part-time employees (other than store managers, butchers and meat wrappers) employed in all departments in all of the present and future supermarkets and stores operated by the Employer in the City of New York and the State of New York.

The seniority provisions of the agreement list the following departments: "Front End, Grocery, Produce, Deli-App, Dairy-Frozen, and Scratch Bakery." The record further establishes that in the remainder of the Employer's Manhattan stores, employees are represented by UFCW Local 1500 and are under the coverage of another labor agreement. The classifications of employees covered by the Local 1500 agreement include produce clerks, grocery clerks, dairy clerks, frozen food clerks, deli clerks, cashiers and assistant managers.

As noted above, Local 338 was provided notice of the instant petition and hearing and the opportunity to participate herein. Local 338 failed to participate in this hearing in any manner. Prior to the hearing, counsel for Local 338 sent a letter to the Region, dated January 16, 2004, which states, in relevant part, as follows:

Local 338 is the exclusive bargaining representative for all Gristedes employees including walkers/deliverymen, dispatchers and assistant dispatchers, but excluding motor vehicle drivers and supervisors as defined in the Act.

Counties of New York and Bronx in the City and State of New York are engaged in the cutting, wrapping and selling of all fresh and smoked meats, poultry, fish and such products customarily handled in the Meat Department and at retail in the Employer's retail stores and supermarkets, and such additional classifications previously recognized by the Employer as set forth herein in Schedule A. . ."

With respect to the walkers/deliverymen referred to above, the record establishes that Local 338 was recognized as the exclusive collective-bargaining representative of such employees in March 2003, as part of an overall settlement of certain federal court litigation relating to their employment. On cross-examination, Criscuolo testified that the walker/deliverymen did not fall within any of the departments set forth in the seniority provisions of the Local 338 collective-bargaining agreement. He further testified that he did not know whether there was any signed agreement covering the walker/deliverymen and that the parties were currently negotiating over the terms of an addendum to the Local 338 collective-bargaining agreement that would cover "delivery people." When asked to whom he was referring when he used the term "delivery people", Criscuolo replied, "I believe the sixty people that are delivering." When asked to clarify whether he meant "on foot," Criscuolo replied, "[o]n foot and whoever is added to deliveries, yes." When asked about the written document presently being negotiated, Criscuolo stated, "Right now, its - - delivery people is, basically what it says, --" Criscuolo further testified, however, that he has not participated in the negotiations for the addendum, which commenced sometime around April 2003, and have not been concluded, to date. He further testified that he personally has not been part of any discussion with Local 338 regarding drivers, was not aware of any discussions held with Local 338 regarding drivers and that as of April 2003, when the parties commenced negotiations for the addendum, there were no internet delivery drivers.⁶

An agreement, dated March 24, 2003, signed by representatives of Local 338 and the Employer, provides, in relevant part, as follows:

The undersigned employer designates Local 338, RWDSU as the exclusive collective-bargaining representative, and being satisfied that Local 338, RWDSU represents an un-coerced majority of employees in said unit, hereby recognized

⁶ The record does establish, however, that the Employer historically has employed one driver employee, operating from another one of its stores, who makes local deliveries to long-term customers on the East Side. This driver is included in the Local 338 bargaining unit.

Local 338, RWDSU as the exclusive collective-bargaining representative of said employees.

The parties agree to negotiate a collective bargaining agreement covering the above-described unit of employees in a timely manner.

Positions of the Parties

The Employer contends that the instant petition should be dismissed because the petitioned-for employees are included in the existing bargaining unit represented by Local 338. The Employer further asserts that the petition is barred by the existing contract between the Employer and Local 338. In support of this contention, the Employer argues that all of the Employer's delivery employees are represented by Local 338, that the Local 338 collective-bargaining agreement governs their employment and that the employees sought by the petition are simply an expansion of the existing unit. In support of this argument, the Employer asserts that the employees sought by the petition perform the same basic functions as its other Local 338-represented delivery employees.

Alternatively, the Employer asserts that the petitioned-for employees should be added to the existing Local 338 bargaining unit under the Board's accretion analysis. In support of this contention, the Employer argues that the record demonstrates that a number of factors would support a determination that the new employees should be accreted into the existing Local 338 bargaining unit. These include employee interchange, common day-to-day supervision and centralized control of labor relations, functional integration, common terms and conditions of employment, common skills and training and bargaining history. In addition, the Employer asserts that the Petitioner's attempts to undermine the existing contract bar must fail in that Local 338 has not disclaimed interest in representing the petitioned-for employees, and that the Local 338 collective-bargaining agreement covers such employees. Finally, the Employer contends that the petition

should be dismissed because the petitioned-for unit is not appropriate insofar as it is arbitrary and merely based upon the extent of the Petitioner's organizing activity, that it disregards the parties' bargaining histories and that under traditional community of interest factors, the existing Local 338 multi-store unit is the only appropriate unit⁷.

Petitioner, to the contrary, argues that the record establishes that the employees sought by the petition are not covered by the collective-bargaining agreement between the Employer and Local 338. Additionally, Petitioner contends that the record is clear that Local 338 was provided with full notice and an opportunity to appear in these proceedings and has made it apparent that they represent only the walker/deliverymen. Thus, Petitioner argues, this is a clear disclaimer of any interest in the bargaining unit that Petitioner seeks to represent.

Contract Bar

The major objective of the Board's contract bar doctrine is to achieve a balance between the conflicting statutory aims of stability in labor relations and the exercise of employee free choice in selecting a bargaining representative. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958). In order for an existing collective-bargaining agreement to serve as a bar to an election, Board doctrine requires that the agreement (1) be in writing; (2) be signed by the parties prior to the filing of the petition that it would bar; and (3) contain substantial terms and conditions of employment; (4) encompassing the petitioned-for employees; and (5) covering an appropriate unit. *Seton Medical Center*, 317 NLRB 87 (1995); *Appalachian Shale Products Inc.*, supra. A contract having a fixed term of more than three years operates as a bar for as much of its term as does not exceed three years. *General Dynamics Corp.*, 175 NLRB 1123 (1962). An agreement to arbitrate the provisions of a new agreement does not constitute a bar "for to constitute

⁷ The Employer does not contend that it is inappropriate at this time to conduct an election because this unit is expanding. In fact, the evidence as to expansion was vague and unspecific as to when

a bar, a contract must be in writing and signed by all parties at the time the petition is filed.” *Herlin Press*, 177 NLRB 940 (1969). Further, when an employer has not applied the contract to the employees covered, and the union has not sought to administer it as to them, the contract “does not establish the existence of a stabilizing labor agreement which bars a representation election.” *Tri-State Transportation Co.*, 179 NLRB 310 (1969). Finally, the burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970).

In the instant case, the Local 338 collective-bargaining agreement would appear, at first blush, to have the prerequisites of a valid contract bar as it is in writing, signed by the parties, in the second year of a four-year term and by its terms encompasses “all of the Employees present and future full time and part time employees. . . employed in all departments in all of the present and future supermarkets and stores operated by the Employer. . .” As the Employer notes, when newly-hired employees are normal accretions to the existing unit, the contract will bar a petition. *Firestone Synthetic Fibers Co.*, 171 NLRB 1121, 1123 (1968).

In the instant case, however, the record as a whole fails to support a finding that this collective-bargaining agreement covers or has ever been applied in any way to the newly-hired employees sought by the petition. Moreover, the evidence establishes that this agreement does not apply to the walker/deliverymen, the classification in which the Employer claims that the petitioned-for employees belong. In particular, the evidence establishes that Local 338 collective-bargaining agreement was executed at a time when the Employer was not the employer of the walker/deliverymen, and certainly well before the drivers and helpers were hired. Moreover, as Criscuolo admitted, there presently is

any expansion would occur and how large the unit might become.

no signed agreement covering the Local 338-represented walker/deliverymen, as the parties are currently in negotiations for such an agreement.

Furthermore, the Local 338 collective-bargaining agreement is not a bar to the petition herein, because Local 338 does not represent motor vehicle drivers. Moreover, as the Petitioner notes, the recognition agreement placed into evidence, which the Employer argues supports its contention that the drivers and helpers are part of the recognized Local 338 unit, refers to a wholly undefined unit. This ambiguous document thus fails to provide sufficient evidentiary support to the Employer's contention that its recognition of Local 338 encompassed all delivery employees, even those in classifications that were not in existence at the time of the recognition.

Further, the evidence fails to establish that the Local 338 collective-bargaining agreement has been applied either to the walker/deliverymen or to the drivers and helpers. In this regard, there is no specific evidence regarding what aspects of the Local 338 collective-bargaining agreement currently apply to the walker/deliverymen. Moreover, notwithstanding Criscuolo's testimony that the petitioned-for employees are "eligible" to receive benefits under the Local 338 collective-bargaining agreement, the record fails to establish that the terms of this agreement have actually been applied to the drivers and/or the helpers. Rather, Miranda's testimony points to a contrary conclusion as it appears that he does not receive contractually-mandated health and welfare benefits or that the overtime provisions of the Local 338 collective-bargaining agreement have been applied to him.

In support of its contentions, the Employer relies upon *Premcor, Inc.*, 333 NLRB 1365 (2001) and *Developmental Disabilities Institute, Inc.* 334 NLRB 1166 (2001), among other cases. In *Premcor*, supra, the union therein, through the filing of a UC petition, was seeking to accrete a newly-created position of process control coordinator into an

existing bargaining unit of “all production and maintenance” employees. The Board found that the newly-created position should be clarified into the unit because it was established that the new classification was performing the same basic function that the certain unit classifications had historically performed. Accord *Developmental Disabilities Institute*, supra. (Board clarified unit to include therapy assistant/psychology classification as the new classification performed the same basic functions as those historically performed by a unit classification). Even if one were to assume for purposes of argument that the drivers and helpers generally are performing the same functions as those performed by the walker/deliverymen, a contention which Petitioner disputes, the cases relied upon by the Employer are inapposite as to the issue of whether or not the collective-bargaining agreement in evidence is sufficient to act as a bar to the petition.⁸ Based upon the foregoing, I cannot conclude that the Employer has met its burden of proof in establishing that the existing, signed Local 338 collective-bargaining agreement bars a representation petition in the unit sought by Petitioner.

Accretion

In the alternative, the Employer argues that the drivers and helpers should be accreted into the existing Local 338 collective-bargaining unit. The Employer further argues that by virtue of this accretion, the Local 338 collective-bargaining agreement bars the petition, and the petition should be dismissed.

The Board has defined an accretion as “the addition of a relatively small group of employees to an existing unit where these additional employees share a community of interest with the unit employees and have no separate identity.” *Safety Carrier*, 306 NLRB 960, 969 (1992); see also *Progressive Service Die Co.*, 323 NLRB 1182 (1997). In *Safeway Stores, Inc.*, 256 NLRB 918 (1981), the Board described its test as requiring

⁸ In this regard, I note that neither Local 338 nor the Employer has sought, through the filing of an appropriate UC petition, to clarify these newly created classifications into the existing unit.

that the group to be accreted have “little or no group identity” and “have an overwhelming community of interest with the unit.” Where employees are found to be an accretion to an existing unit, a current contract covering that unit bars a petition. *Firestone Synthetic Fibers Co.*, 171 NLRB 1121 (1968).

Although accretion may be appropriate in some circumstances, the Board has acknowledged that the process fails to accord employees any representational choice and has followed a restrictive policy in its application. *Dennison Mfg. Co.*, 296 NLRB 1034, 1036 (1989). Because the Board seeks to insure employees’ rights to determine their own bargaining representative, the Board has been cognizant that employees accreted to other bargaining units are denied any kind of self-determination election. *Gitano Distribution Center*, 308 NLRB 1172 (1992). Accordingly, the Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the Section 7 rights would be better preserved by denying the accretion. See *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980). Thus, the accretion doctrine is not applicable to situations in which the group sought to be accreted would constitute a separate appropriate bargaining unit. *Passavant Health Center*, 313 NLRB 1216 (1994); *Beverly Manor-San Francisco*, 322 NLRB 968 (1997).

While it is true, as the Employer asserts, that there are a variety of community-of-interest factors that might arguably support a finding that the drivers and helpers could properly be placed into an overall unit of store employees, under the circumstances of this case, I do not find this to be controlling, in light of the strong policy favoring employee free choice. For the following reasons, I conclude that the petitioned-for employees constitute a separate, appropriate unit and, thus, it would not be appropriate to find that they had been accreted into the overall Local 338 bargaining unit.

Thus, a question concerning representation exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

5. Petitioner contends the petitioned-for unit is a presumptively appropriate unit insofar as they work in a newly established cohesive operation run from a centralized location, and perform a unique and new function that has never been performed by employees of the Employer. Further, Petitioner argues that if the Board fails to grant the Petitioner the right to an election, it is possible that the employees sought by the petition would remain without representation in an unrepresented residual bargaining unit. The Employer, as noted above, contends the petitioned-for employees do not constitute a separate appropriate unit.

Daily Operations

The walkers/deliverymen make, in the aggregate, approximately 5,000 deliveries per week based upon phone or facsimile orders or customer request. Such phone or facsimile orders are generally processed at the store where they are received initially by the store manager, co-manager or bookkeeper. At that time, the order is given to a clerk who will “shop the order” for the customer. It is then brought to the cashier and packed. The order is then given to a walker/deliveryman to deliver to the customer’s home. In this process, in the stores where Local 338 represents employees, the store bookkeeper, clerk, cashier and walker/deliveryman are all represented by that union.⁹ According to Criscuolo, deliveries are usually waiting for the walker/deliverymen upon their return to the store, and they generally spend 90% of their time making deliveries.

Walker/deliverymen are scheduled to work during two shifts: 9:00 a.m. to 5:00 p.m. and

⁹ Local 342 represented employees may also be involved in the event the clerk cannot find the right cut of meat or package of fish or a special order was placed by the customer.

3:00 p.m. to 9:00 p.m. Store #561 currently employs one walker/deliveryman who is in the Local 338 bargaining unit.

As noted above, all Internet orders for delivery in Manhattan are currently processed in and out of Store #561. This store was selected due to the fact that it is one of the Employer's mega stores, and contains a large variety and selection of products. This store also has a back room that is used for packing orders and a loading dock where the delivery trucks are loaded. In addition, there is a nearby parking lot where the trucks are parked when not in use.

After a customer accesses the dedicated website and places an order, the store manager or co-manager will download the order to a hand-held scanner. Or, the order may be printed on paper. The order is then transmitted to the various departments for preparation. In addition, a clerk is assigned to gather and pack the items for delivery. At this time, there are approximately 12 to 15 clerks, all represented by Local 338, who participate in the preparation of Internet orders.¹⁰ The Employer operates four trucks that are dispatched into one of four geographic zones. The orders are separated by zone and the drivers and helpers are assigned to deliver to those zones and they then load the trucks and make their deliveries. Generally, there are four delivery periods during the day: 8:00 a.m. to 11:00 a.m., 11:00 a.m. to 2:00 p.m., 4:00 p.m. to 7:00 p.m. and 7:00 p.m. to 10:00 p.m. The deliveries for the first two of these periods will be loaded in the morning. Then, the driver and helper will return during the day and reload their truck for the deliveries that occur later in the afternoon. There are approximately 70 to 80 Internet orders processed daily. The record reflects that the Employer generally tries to have a particular driver and helper consistently assigned to one particular zone so they will become familiar with the streets, parking rules, building doormen and customers.

Although the driver may assist the helper with unloading the truck and making deliveries, it appears that, in general, the driver remains with the truck while the helper actually delivers the groceries to the customers.

The record reflects that when the Employer initially recruited for the driver position, it transferred over certain employees who were completing construction work for the Employer in connection with an ongoing multi-store renovation project. Helpers were similarly recruited from a group of carpenter's helpers who had also worked on store renovation. These employees were not represented by any labor organization at the time. Other employees recruited for the Internet delivery service were hired from outside the company.

Drivers are not required to have a commercial vehicle license, and the record reflects that, from time to time, drivers have worked as helpers, and helpers have served as drivers. In addition, Criscuolo testified that one of the Local 338-represented walker/deliverymen in Store #561 has been used to make Internet deliveries, and that another employee from Store #34, located on 8th Avenue and 54th Street, has been called in as well. Further, Criscuolo testified that approximately 10-12 employees from other stores, who are Local 338-represented clerks, have come over to ride on the trucks as deliverymen. Although Criscuolo testified that he "thinks" that the drivers and helpers may also deliver phone and fax orders, and that they "can" walk a delivery to a location within a two block radius of store 561, there is no specific evidence that the phone, facsimile and Internet delivery operations of this location have been integrated in this manner. To the contrary, driver Jorge Miranda, testifying on behalf of Petitioner, stated that he works anywhere from 14 to 16 hours per day making deliveries for XpressGrocer.com. In describing his job functions, Miranda testified that after he clocks

¹⁰ As is the case with phone and facsimile orders, employees represented by Local 342 also participate in the preparation of these orders when products are sought from the meat or seafood

in and gets his truck, he waits for his orders to be completed. He then assists the helper in loading the truck and leaves for his route. While he may spend time in the Employer's facility during breaks, or waiting for orders to be completed, Miranda testified that he did not have anything to do with the Employer's foot delivery operation, and there is no evidence that he receives any work assignments other than those relating to the Internet order process.

Criscuolo testified that the Employer is in the process of recruiting to fill additional driver and helper positions due to a planned expansion of the Internet delivery schedule. He stated that the Employer plans eventually to employ about 15 drivers and 15 helpers to operate out of Store #561. In addition, Criscuolo stated that the Employer has started to convert another one of its stores, (Store #562), to enable it to process Internet orders as well. Such a process generally takes between two and three months. After this process is complete, the Employer plans to have a delivery schedule similar to the one that will be in place in Store #561. The record does not reflect, however, any specific date or time frame when this anticipated expansion would be operational.

Employee Skills and Terms and Conditions of Employment

Criscuolo testified that employees currently represented by Local 342 are "skilled" in that they work in positions where it may take between two and three years before they are eligible to be classified as journeyman. Additional training is required to achieve the title of "manager." By contrast, most of the positions that fall under the Local 338 labor agreement, including that of walker/deliveryman, do not require prior experience and new hires receive a one- or two-week training period. As noted above, the driver position requires a valid driver's license; however, a commercial vehicle license is not required.

departments.

Drivers earn between \$10.00 and \$15.00 per hour, depending upon whether they were previous employees or are new hires. Helpers generally earn between \$6.00 to \$7.00 per hour. Criscuolo was asked a series of questions regarding whether or not drivers and their helpers were “entitled” to receive the same wage increases and benefits, holidays and vacation as the deliverymen currently represented by Local 338, and he answered in the affirmative. The Local 338 collective-bargaining agreement provides for nine days of sick leave per contract year, in addition to seven paid holidays and a sliding scale of personal days, depending upon length of employment. In addition, employees are entitled to vacation pay, the amount of which is determined by a formula based upon seniority. The agreement further provides that the Employer shall make contributions on behalf of unit employees to a Health and Welfare Fund, a Retirement Fund and, as of October 2006, a Dental and Legal Services Fund. Miranda testified that he receives 6 personal and 4 sick days per year and he is not sure if he receives any legal benefits. With respect to medical benefits, Miranda testified that when he was employed as a maintenance employee he received a letter from the Employer regarding health coverage and that he opted not to take it. He has not been offered any additional health benefits since he transferred over to his driving position and he has not been told that a union contract does or does not apply to him. Miranda additionally testified that he does not receive overtime for hours worked in excess of 8 hours in one day unless he accumulates over 40 work hours in any one week. Section 7(a) of the Local 338 collective-bargaining agreement provides that employees are eligible to receive overtime payments for any work in excess of 8 hours in any day, or 40 hours in any week.

Appropriate Unit

It is well-settled that there is nothing in the statute requiring that the unit for bargaining be the only, the ultimate or the most appropriate unit; the Act requires only that the unit be “appropriate,” that is appropriate to insure to employees in each case “the fullest freedom in exercising the rights guaranteed by this Act.” *Bartlett Collins Co.*, 334 NLRB No. 76 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996).

In the instant case, the record fails to establish that Local 338 represents the employees sought by the petition. I find it significant that although Local 338 was provided notice and an opportunity to appear herein, it declined to do so. Moreover, Local 338 has represented that it does not represent motor vehicle drivers, employees who constitute approximately half of the petitioned-for unit. It has made no affirmative representation that it represents the helpers. I find Criscuolo’s general and vague testimony regarding the coverage of the yet-to-be negotiated addendum to the Local 338 collective-bargaining agreement to lack sufficient evidentiary weight to establish that Local 338 represents the drivers and helpers in addition to the walker/deliverymen. In particular, I note that he was unable to speak from personal experience regarding the negotiations. Moreover, the terms of the recognition agreement entered into evidence are too vague to provide any guidance in this area. I conclude, therefore, based upon all the circumstances herein, that the drivers and helpers sought by the petition constitute a separate group of unrepresented employees.

However, in the instant case, I find it appropriate to treat the unit sought by the petitioner as a separate residual unit of employees and to direct an election in such a unit. Groups of employees omitted from established bargaining units constitute appropriate “residual” units, provided they include all the unrepresented employees of the type covered by the petition. *Carl Buddig & Co.*, 328 NLRB (1999); *Fleming Foods*, 313 NLRB 948 (1994). My reasons for this determination are based upon the fact that the

express terms the collective-bargaining agreement in evidence, in conjunction with Criscuolo's testimony, establishes that the Employer's supermarket employees, other than those in the petitioned-for unit, are currently represented either by the Petitioner, Local 338 or Local 1500,¹¹¹² that the Internet delivery operation is a newly-established and discrete service offered by the Employer for which employees were separately hired, and that, as noted above, the Board traditionally finds it preferable, and consistent with the policies underlying the Act, that employees be afforded the opportunity to decide for themselves whether they wish to be represented by a labor organization and, if so, which one.

Inasmuch as, for all the reasons set forth above, I find the petitioned-for unit to constitute an appropriate residual unit, I am accordingly directing an election in that unit.

Based upon the record, I find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Internet delivery drivers and helpers employed by the Employer.

Excluded: All other employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time¹³ and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and

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¹² In the event there are other unrepresented employees who are of the type covered by the Petition, the Employer should notify the Region of this fact as soon as practicable.

¹³ Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

Regulations.¹⁴ 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 the period because they were ill, on vacation or temporarily laid off. Employees engaged in any 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 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 who are in the unit 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.¹⁵ Those eligible shall vote on whether or not they

¹⁴ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

¹⁵ In order to assure 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. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, 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 at the address below, on **March 1, 2004**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

desire to be represented for collective-bargaining purposes by UFCW, Local 342, AFL-CIO.¹⁶

Dated at New York, New York
February 23, 2004

Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Rm. 3614
New York, New York 10278

¹⁶ 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 Fourteenth St., NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 8, 2004**.