

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

FRED MEYER STORES, INC.

Employer

and

Case 19-RC-15036

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 367, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

I. SUMMARY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“the Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“the Board”). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, I make the following findings and conclusions.²

Petitioner represents certain employees at Fred Meyer Stores, Inc. (“the Employer”) stores in Lacey and Tumwater, Washington (herein either “Lacey,” “Tumwater,” or collectively, “stores”).³ Petitioner in this case seeks a self-determination election for employees working in

¹ The Employer and Petitioner timely submitted briefs, which I have carefully considered.

² The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

³ The Employer has recognized and bargained with Petitioner as the exclusive collective-bargaining representative of “all employees employed in the Employer’s present and future grocery stores in Mason-Thurston Counties, State of Washington . . . excluding employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the [Act].” Lacey and Tumwater are both located in Thurston County. The parties’ most recent collective-bargaining agreement covering those employees is effective by its terms from May 6, 2007, until May 1, 2010.

the nutrition departments of the Lacey and Tumwater stores to decide whether they wish to be included in the existing multi-facility grocery unit.⁴

The Employer opposes the petition on three grounds. As a threshold matter, the Employer argues that Petitioner has waived its right to organize the petitioned-for nutrition employees by executing collective-bargaining agreements that have excluded those employees. The Employer, however, acknowledges that none of the collective-bargaining agreements has contained any express waivers to represent any group of employees, and concedes that its position is contrary to established Board precedent. The Employer next argues that the petitioned-for nutrition employees do not share a sufficient community of interest with the Petitioner-represented grocery employees; rather, the Employer claims, the nutrition employees share an overwhelming community of interest with the “residual unit” of unrepresented general merchandise employees. Finally, the Employer contends that the petitioned-for unit is inappropriate because it includes nutrition managers whom the Employer claims are supervisors as defined by Section 2(11) of the Act.⁵

Petitioner argues that it has never expressly or impliedly waived its right to represent nutrition employees. With regard to the Employer’s remaining arguments, Petitioner contends that the nutrition employees share a community of interest with the Union-represented grocery employees and, therefore, a self-determination election is appropriate. The Union also asserts that the alleged supervisors do not possess or exercise any supervisory authority. Finally, while Petitioner would proceed to an election in an alternate unit of all unrepresented employees, it will not proceed to an election for a stand-alone unit of only nutrition department employees, as it would arguably be too small to represent for purposes of collective-bargaining.

Based on the record as a whole and the parties’ respective briefs, I find that Petitioner has not waived its right to seek to represent nutrition department employees. I likewise find, contrary to the Employer, that nutrition department employees share a community of interest with the Petitioner-represented grocery employees and, therefore, a self-determination election among those employees is appropriate. However, because I find that nutrition managers possess and exercise some supervisory authority, I shall exclude them from the voting group.

Below, I have summarized the record evidence detailing the parties’ bargaining history, the Employer’s operations, and nutrition managers’ supervisory authority. My analysis of the record evidence, application of Board law, and conclusion follow the summary of evidence. Given my conclusion that there is no basis to dismiss the petition, the final section sets forth the direction of election.

II. EVIDENCE

A. Relevant Bargaining History

The Employer is a State of Ohio corporation that operates 120 “one stop” retail stores in Oregon, Washington, Idaho, and Alaska, as well as eight “marketplace” stores in Pierce County

⁴ No other labor organization seeks to represent the employees covered by the instant petition.

⁵ The Employer does not argue that a stand-alone unit of only nutrition department employees would be appropriate.

and Vancouver, Washington, and in Portland, Oregon.⁶ Among the Employer's one-stop locations are two stores in Lacey and Tumwater, Washington, which are the locations at issue herein.

In 2001, pursuant to a card-check, the Employer voluntarily recognized Petitioner as the exclusive collective-bargaining representative of three units of employees at the Lacey store: grocery employees, cashiers and checkers (also known as "common check" or "CCK"), and general merchandise employees.⁷ The parties executed contracts for each unit; grocery unit employees and CCK unit employees ratified the contracts for their units, but the general merchandise employees did not ratify their respective contract. After an additional unsuccessful attempt to have general merchandise employees ratify the contract, Petitioner disclaimed interest in that unit.

Later in 2001, the Employer opened the Tumwater store and agreed to a card-check among grocery and CCK employees. When negotiating the terms for the card check agreement at Tumwater, the Employer attempted to secure from Petitioner its agreement not to attempt to organize Tumwater general merchandise employees for a period of four years. The Union refused to execute such an agreement and, as a consequence, the Employer refused to allow Petitioner access to the general merchandise employees and would not agree to a card-check among those employees.

After Petitioner supplied the Employer with proof of Petitioner's majority support among grocery unit and CCK unit employees, the Employer accreted those employees into the existing Lacey unit (herein "the Lacey-Tumwater unit").

Since 2001, Petitioner and Employer have executed successor labor agreements covering the grocery and CCK employees. The most recent agreement covering Lacey and Tumwater grocery employees is a "me-too" agreement patterned after the agreement reached between other UFCW local unions and a multi-employer group to which the Employer belongs. The grocery contract excludes nutrition department employees.

Petitioner and the Employer are also parties to multi-employer collective-bargaining agreements that cover the Employer's grocery employees in Pierce County, Washington, and a single-employer, multi-facility agreement that covers the Employer's general merchandise employees in Pierce County.

B. The Employer's One-Stop Stores

The Employer's "one-stop" stores sell a full line of merchandise, including groceries and general merchandise. The Lacey and Tumwater stores are each about 190,000 square feet, and are typical of the Employer's other one-stop shops. The Employer divides its one-stop stores into three general sections: Food, Home, and Apparel. Each Section is run by a section

⁶ The Employer's eight "marketplace" stores sell primarily grocery items and a more limited line of general merchandise.

⁷ A different UFCW local union, Local 81, represents meat and seafood department employees at the Lacey and Tumwater stores.

manager, who reports to the Store Director. Store Directors report to the Regional Director of Stores who is responsible for a geographic area that includes a number of stores.

Within each general section are discrete areas for particular products or classes of products. For example, the Food sections are divided into areas for, among other products, produce, frozen foods, general grocery, and nutrition items; the Home sections include electronics, sporting goods, furniture, and automotive departments; and the Apparel sections are divided into areas for clothing, shoes, and luggage.⁸

Section managers are responsible for, and are actively involved in the operation of their respective departments. For example, Food section managers have plenary authority over the produce, nutrition, meat and seafood, bakery, service deli, health and beauty, and pharmacy departments. Section managers regularly circulate through their departments to ensure that they are operating properly, and meet with department managers to discuss matters relevant to their discrete department, as well as matters affecting the section as a whole. The Food section managers schedule employees in their section, approve overtime for Food section employees, and are responsible for issuing written discipline to Food section employees. Section managers' authority, however, is limited to their section; *e.g.*, the Food section manager has no authority over Home section or Apparel section employees.

The Lacey and Tumwater stores are open to the public daily from 7 a.m. to 11 p.m., but the Employer schedules employees for shifts around the clock. Many departments run a graveyard shift starting late at night (11 p.m. or midnight)⁹ to handle the heavy freight in their departments. Departments with less freight (*e.g.*, bakery, nutrition) run shifts that start between 3 a.m. and 5 a.m. Other employees work from 10 a.m. to 7 p.m. to assist customers, or start later to help close the store.

Employees in virtually every department storewide process freight. The work—known as “throwing freight”—involves department employees receiving freight specific to their area and moving it from the stockroom to their department where employees put it on shelves or racks.¹⁰ Most employees have a 24-hour window period, beginning from the time freight is delivered to the stockroom, to “throw” their freight. The only exception is the grocery department (defined by the Employer as employees working in the discrete area within a Food section where canned foods and other dry goods are stocked) who are required to “throw” freight at a rate of 65 cases per hour.¹¹

Each department is responsible for processing its own freight and the frequency and size of freight deliveries varies from department to department. In short, larger departments receive more freight and, therefore, must dedicate more employee-hours to “throwing” it. The

⁸ This list of subsections is not exhaustive; the record more fully describes the various departments and the products sold within each department.

⁹ For example, Home section maintains a graveyard shift throughout the year, as does the grocery department within the Food section. In addition, during the busy peak seasons, *e.g.*, holiday selling seasons, the Apparel section will run a graveyard shift.

¹⁰ Each section has its own stockroom, which is divided into areas for each department in that section.

¹¹ The record suggests that the 65 cases per hour requirement applies to the department as a whole, and not a per-employee requirement.

Employer estimates that the larger general merchandise departments receive freight four to five times per week, and can receive up to 16 pallets of freight. Other departments receive far less; the bakery department receives “minimal” deliveries of two to three pallets, 3 or 4 days per week, and the photo electronics department receives comparatively little freight. In every department, the bulk of the freight is processed before the stores open to customers. During the day, employees are required to continually restock racks and shelves. At the end of the day, employees scheduled to help close the store engage in “recovery,” when employees will restock shelves and racks, “front product” (bring product up to the front of each shelf), and generally neaten their departments for the next day.

The record establishes that employees in every department have some interaction with customers. Employees in the Home and Apparel sections (hereinafter referred to, collectively, as “General Merchandise”) are required to perform selling functions in their departments,¹² and are required to approach and offer to assist customers who come within seven feet of where the employees are working. Many Food section employees’ contact with customers is limited to directing customers from one area of the store to another, or helping a customer find a particular product. Other Food section employees, particularly the service deli and produce employees, have a great deal of customer contact. Food section employees are not expected to perform selling functions similar to what is expected of General Merchandise employees.

With regard to pay and benefits, the vast majority of Food section employees are organized and their terms and conditions of employment are governed by collective-bargaining agreements. However, within the Food section, nutrition department and health and beauty department employees are not organized; like General Merchandise employees, the unrepresented Food section employees’ pay and benefits are covered by the Employer’s non-union pay scale.

At each store, employees from every department use the same time clock and break room. All employees are invited to storewide meetings and receive on-site training.

C. The Nutrition Departments at Lacey and Tumwater

Within each Food section of the Lacey and Tumwater stores is a nutrition department where the Employer stocks organic foods and other grocery items, dietary supplements, and certain non-food items that the Employer markets as “natural choices.” The nutrition departments in the Lacey and Tumwater stores consist of several aisles, and are surrounded by the produce, bakery, and other food-related sections. The nutrition department is also under the control of the Food manager. Each nutrition department includes a nutrition manager, an assistant nutrition manager, and retail clerks.

The record evidence shows that the Employer’s nutrition departments have expanded greatly since they were first introduced in the early 1990’s. At that time, the nutrition departments were limited to vitamin and vitamin supplements, and were relegated to a small area within the Employer’s stores. Now, in addition to carrying vitamins and supplements, nutrition departments stock a wide array of products, including dry goods, bulk foods, dairy

¹² Selling includes suggesting to customers that they consider a more expensive product, or buy additional merchandise. One example offered by the Employer would be an Apparel employee suggesting that a customer choose a particular top to coordinate with a pair of pants, or a pair of shoes that would complement an outfit.

products, and frozen foods. Nutrition department products are also cross-merchandised, and carried in other departments.

Generally, one nutrition employee will arrive between 3 a.m. and 5 a.m. to “throw” freight, and is joined by another nutrition employee at 7 a.m. or 8 a.m. During the day, nutrition employees perform routine tasks, such as re-stocking the dairy as needed, fronting product, and assisting customers. Employees scheduled to close the department arrive later and stay until the area is restocked and cleaned.

Nutrition department freight is delivered with other grocery freight to the stores’ Food stockrooms. Grocery receiving clerks sort the nutrition department’s freight, which arrives on pallets. There is a separate bay within the Food stockroom for nutrition freight (dry goods), and dairy products for the nutrition department are kept in coolers there. Frozen foods for the nutrition department are kept in grocery freezers, separate from the nutrition bays. While processing freight, nutrition employees have regular contact with grocery shipping and receiving employees and cooperate with other Petitioner-represented Food employees in the stockroom to ensure that all freight is moved and stored efficiently.

Because many nutrition department products are cross-merchandised in other departments (for example, tofu is carried in both the nutrition department and the produce department), or are ordered by other departments (the service deli orders certain meats and cheeses that are stocked in the nutrition departments), nutrition department employees have regular, work-related contact with other Food employees. Nutrition employees will take products to other departments to stock them, or clerks from other departments will stock products in the nutrition departments. Occasionally freight meant for other Food departments is commingled or misdirected to nutrition; in those circumstances nutrition employees transport the misdirected freight to the appropriate department. After nutrition employees fully stock the shelves in their department, they return any overstock to the Food stockroom, but return as necessary to retrieve freight for re-stocking.

When the nutrition department is understaffed, the Food section manager will assign other Food section employees—either a non-Union employee from the health and beauty department or a grocery clerk—to nutrition for a shift.¹³ The Food manager has no authority to assign employees from outside the Food section to work in nutrition, and there is no evidence that non-Food employees have worked in nutrition. Likewise, there is evidence that nutrition department employees have worked in the health and beauty department, but have not been assigned to work in non-Food departments. In fact, the record shows that Food section employees (including nutrition employees) have very little, if any, contact with General Merchandise employees.

Nutrition employees have regular customer contact, usually helping customers find a particular product in the department, or helping the customer find another department. Nutrition employees also assist customers using an Employer-maintained computer to obtain information regarding products that might assist customers in treating ailments or conditions. Occasionally

¹³ The Employer uses non-Union health and beauty employees or represented grocery clerks solely because their lower pay is closer to that of nutrition department employees. There is no evidence that employees are assigned to the nutrition department based on their knowledge of the department or their relative skill.

a nutrition employee, most often the nutrition department manager, will help a customer special order a product using a catalog of products available to the Employer.

While nutrition employees are expected to become familiar with the products in their department, they gain that knowledge over time through experience in their department. Nutrition department employees are not required to have, and do not receive any specialized knowledge or training.¹⁴ The record shows that nutrition employees are typical of employees in the Food section. For example, produce employees are expected to learn through on-the-job experience the difference between organic and non-organic produce, and bakery employees would be required to know what ingredients are in particular items. Indeed, aside from the Pharmacy department employees,¹⁵ there is no evidence that any Lacey or Tumwater employee is required to possess any technical knowledge or receive special training prior to their employment.¹⁶

Like other Food section employees, nutrition department employees are not expected to perform any selling functions other than to assist customers find products in the stores.

D. Nutrition Managers' Additional Duties and Responsibilities

Like nutrition department employees, nutrition department managers at Lacey and Tumwater are responsible for “throwing” freight, but managers have additional responsibilities. As noted above, nutrition department managers are primarily responsible for fielding customers’ requests for specific products and in certain circumstances have the authority to order specific products for customers, or recommend that the Employer add a product or lines of products to the nutrition department stock.¹⁷ Nutrition department managers also receive and adjust customer complaints, and mark down products according to the Employer’s guidelines.

Nutrition department managers are largely responsible for identifying and communicating tasks that department employees need to perform during a given shift. Nutrition managers take time at the beginning or end of each shift to identify these tasks that need to be performed and list them on a pre-printed, Employer supplied “daily tour” sheet, which is kept in the nutrition department. Assistant nutrition managers and employees have also used the tour sheets to create a checklist for nutrition department employees.¹⁸ While most of the tasks

¹⁴ The Employer offered as an example of specialized knowledge Apparel employees’ knowledge of what clothing items might go well together.

¹⁵ The parties stipulated that Pharmacists should be excluded from any bargaining unit on the grounds that they are professional employees, and their work requires knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course of instruction and study in an institution of higher learning, and their work is predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical, or physical.

¹⁶ The record shows that the only educational requirement for many jobs is a high school degree or the equivalent, and no prior experience is necessary.

¹⁷ These “special orders” are limited to isolated orders for discrete customers. Nutrition department managers do not have the authority to order products for the store to carry on a regular basis.

¹⁸ Nutrition department managers are not required to create tour sheets every day, particularly if information regarding tasks can be communicated more directly. Nutrition department managers,

associated with “throwing” freight, recovery, and cleaning up are routine and, therefore, a daily tour may not be required, nutrition employees (also referred to as “clerks” in the record) will consult the tour sheet at the start of their shifts to find out whether there are any additional tasks that need to be completed, or whether the nutrition department manager has identified a particular order for completing the tasks. Nutrition managers and clerks understand that clerks are required to comply with the directives in the tour sheets, subject to the clerks’ schedule and the time available to perform the enumerated tasks. However, no employee has been disciplined for inadvertent failure to complete every task on a daily tour, and nutrition managers have not been held accountable for any employee’s failure to perform an assigned task.

Nutrition managers are also responsible for communicating to employees the Employer’s rules and policies (e.g., methods for “throwing” freight and cleaning up, uniform policies). To that end, nutrition managers are involved in training new clerks, either directly or by pairing them with a more experienced clerk. Nutrition managers also attend Food section department manager meetings.

Nutrition managers are also involved in personnel matters in their departments, most notably hiring. The Employer screens applicants, but the nutrition managers are responsible for interviewing the qualified applicants. Lacey nutrition manager Marlo Frownfelder testified that she alone interviewed eight or nine applicants for four openings in the Lacey nutrition department; Tumwater nutrition manager Anna Obremski testified that she would have interviewed applicants for openings in Tumwater, but asked the Food manager to handle that responsibility so she could attend to other work-related matters. Even then, all hiring decisions were run by Obremski for her approval; that is, she could have vetoed any choice made by others.

Nutrition managers are the only Employer representatives who interview applicants for employment in the nutrition department, and hiring decisions are based on their recommendations. The record evidence shows that after interviewing applicants, Frownfelder met with the Food manager, gave him her impressions and recommended whether to hire one applicant or another; the Employer followed Frownfelder’s recommendations. In at least one case, involving nutrition employee Deana Booth, Frownfelder was independently responsible for the hiring decision. Frownfelder independently identified Ms. Booth as a qualified employee, decided to hire her, and after advising the Food manager of her decision, offered Booth the job. While Obremski did not interview any applicants, the record shows that the Food manager consulted her regarding a qualified applicant and sought Obremski’s opinion, telling Obremski he would not hire a qualified applicant if Obremski did not want the applicant in her department. Because Obremski approved of the proposed hire, the applicant was offered employment.

The record evidence also shows that Obremski was involved in the transfer of two employees from her department. When Obremski started as the nutrition manager, she and the Food manager identified two incumbent employees as inadequate performers. Based on Obremski’s observance and subsequent assessment of the employees’ performance, the Food manager followed Obremski’s recommendation and had the employees transferred to non-Food sections of the store.

nutrition assistant managers, and employees also use a “pass down log” (a spiral notebook) to informally communicate work-related information to each other.

The Employer's handbook directs employees to take complaints first to their immediate supervisor. Nutrition employees consider the nutrition manager to be their immediate supervisor, and the record shows that Lacey employees have asked Frownfelder to use her authority to resolve their complaints regarding a co-worker's failure to perform required tasks. In that case, Frownfelder independently spoke with the problem employee, reviewed her responsibilities, and counseled her to complete all the necessary tasks.

Nutrition managers also engage in the ongoing evaluation of nutrition employees, documenting their assessment of those employees at regular intervals (e.g., conducting 60-day and annual appraisals), but those evaluations do not conclusively result in discipline or promotions. The record shows that nutrition department managers can identify employees' weaknesses and informally counsel clerks to improve. When necessary, nutrition department managers may send a clerk home for a rule infraction or when a clerk exhibits a poor attitude. In extreme cases, nutrition department managers may issue a verbal warning, or recommend that the Food section manager take disciplinary action.¹⁹ Nutrition managers do not have the authority to issue more severe discipline (e.g., written warning, termination).²⁰

III. ANALYSIS

A. The Union Has Not Waived Its Right to Represent Nutrition Department Employees

The Employer advances three related arguments as to why the Board should dismiss the instant petition. First, the Employer asserts that the Union waived its right to seek a self-determination election for nutrition when it executed the me-too agreement covering Lacey Tumwater grocery employees that excluded nutrition department employees. Second, the Employer contends that the Board ought to extend its policy barring UC petitions during the term of a collective-bargaining agreement to also prohibit self-determination elections during the term of a valid labor agreement. Third, the Employer urges the Board to apply its contract bar doctrine to self-determination elections. The Employer concedes that its arguments are foreclosed as a matter of law, but nevertheless urges the Board to overturn established precedent.

The Employer's first argument is without merit. The Employer argues that because Petitioner, during negotiations for the me-too agreement, never proposed adding nutrition department employees, it "waived its right to now challenge the unit description to which it agreed without objection." As the Employer concedes, the Board recently rejected this argument in UMass Memorial Medical Center.²¹ There, the Board reiterated its long-standing rule that a union is precluded from representing a specific group of employees during the term of a collective-bargaining agreement "only where the contract itself contains an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership."²² Thus, a promise not to seek to represent a

¹⁹ The Employer has an established progressive discipline process for its unrepresented employees. The first step in that process is a verbal warning, followed by written discipline, then more severe discipline up to and including discharge.

²¹ 349 NLRB No. 35, slip op. (February 20, 2007).

²² Id., slip op. at 2, citing Briggs Indiana Corp., 63 NLRB 1270 (1945). See also, Lexington House, 328 NLRB 894, 896-897 (1999).

particular group of employees may not be implied by way of an explicit exclusion from a contractual unit or on the basis of an “alleged understanding” between the parties during their negotiations.²³

UMass Memorial is controlling. The Employer acknowledges the established Board precedent,²⁴ and concedes there is no factual basis to distinguish UMass Memorial: no contract between the Employer and Petitioner contains an express promise not to represent, or include within the Petitioner-represented unit, nutrition employees, or any other employees. Moreover, there is no other basis to read the exclusionary language of the me-too agreement as Petitioner’s agreement to seek a self-determination election for any excluded employees. Particularly given the nature of the most recent contract negotiations (*i.e.*, Petitioner and the Employer did not directly negotiate the terms of the collective-bargaining agreement, but instead executed a me-too agreement) the Employer cannot establish that Petitioner agreed elsewhere to forego any attempt to represent the petitioned-for employees. Finally, the record shows that when the Employer has attempted to secure from Petitioner any promise that it would not attempt to represent certain employees, Petitioner has expressly refused. In these circumstances, I find that the Union has not waived its right to represent nutrition department employees.²⁵

The Employer’s argument that the Board should extend its prohibition against UC petitions during the term of a collective-bargaining agreement is likewise without merit. As the Board held in UMass Memorial when rejecting the same argument advanced here, a self-determination election allows unrepresented employees the opportunity to freely exercise their Section 7 rights. Accretion, on the other hand, imposes representation on employees without providing them an opportunity to vote. Whether the “result of each is the same,” as the Employer asserts, the manner by which employees are included in a bargaining unit is significant.

In addition, the evil the Employer warns against, *i.e.*, unions using self-determination elections to achieve through an election that which they cannot accomplish at the bargaining table, is not present here. The Employer does not claim, and indeed the record does not suggest, that Petitioner unsuccessfully attempted to induce the Employer to include nutrition employees in the bargaining unit, or that it “d[id] not intend to adhere” to the contractual unit description. Given the speculative nature of the Employer’s argument, there is no basis for me to dismiss the petition on these grounds.

Finally, the Employer urges the Board to apply its contract bar doctrine to preclude the petitioned-for self-determination election to prevent Petitioner from “bargain[ing for] contracts to

²³ UMass Memorial, above, quoting Cessna Aircraft Co., 123 NLRB 855, 856 (1959) (emphasis supplied).

²⁴ Indeed, the Employer acknowledges that the Board in UMass Memorial rejected each of the arguments the Employer makes in opposition to the instant petition.

²⁵ See, e.g., UMass Memorial, above, 349 NLRB No. 35, slip op. at 2 (union’s agreement to exclude per diem employees was not waiver of right to represent those employees); Women and Infants’ Hospital of Rhode Island, 333 NLRB 479, 479 (2001) (union’s agreement to contractually exclude respiratory therapists could not prevent union from seeking to represent them during the contract’s term). Accord: Lexington House, 328 NLRB at 897 (Board enforced petitioner’s express agreement not to organize unorganized employees and dismissed petition).

which it has no intention of adhering.” As discussed above, however, there is no evidence that the Union had no intention of honoring its agreement with the Employer. Absent some factual basis for doing so, it would be inappropriate to overturn precedent and obliterate the balance the Board has struck between allowing employee free choice and promoting industrial stability.²⁶

B. A Self-Determination Election is Appropriate

A union may petition to add unrepresented employees to an existing bargaining unit by petitioning for a self-determination election. In a self-determination election, if the majority of employees votes against representation, they remain unrepresented, but if the majority of employees votes for representation, they become part of the existing unit.²⁷

A union may petition for a self-determination election to represent a “residual” group of employees omitted from established bargaining units, or petition to represent a group of employees that does not belong to any existing bargaining unit but does not constitute a residual unit. When an incumbent union petitions to represent employees in a residual unit, the incumbent union can only represent the employees in the residual unit by adding them to the existing unit, usually by means of a self-determination election.²⁸ When the petitioned-for voting group does not constitute a residual unit, a self-determination election will be directed if the petitioned-for employees share a community of interest with the unit employees, and the employees to be added to the existing unit “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.”²⁹

Although the Employer asserts in its brief that the unrepresented General Merchandise employees at Lacey and Tumwater are “wholly distinct” from the unit of Petitioner-represented Food section employees, it nevertheless contends that I should dismiss the instant petition and find that the appropriate unit is comprised of nutrition department employees and all other unrepresented employees, or find that the appropriate voting group for the self-determination election includes the “residual group” of all unrepresented employees. I acknowledge that either the unit or the voting group proposed by the Employer could be appropriate for purposes of collective-bargaining and, if so, Petitioner could seek to represent those employees. But the record does not establish that such a unit is the only appropriate unit Petitioner might seek to represent.³⁰

²⁶ See, UMass Memorial, 349 NLRB No. 35, slip op. at 2.

²⁷ Warner-Lambert Co., 298 NLRB 993 (1990).

²⁸ St. John's Hospital, 307 NLRB 767 (1992).

²⁹ Warner-Lambert, 298 NLRB at 995. See also University of Pittsburgh Medical Center, 313 NLRB 1341 (1994).

³⁰ In this regard, I do not find that either the unit or voting group proposed by the Employer constitutes a residual unit that would be the only unit or group Petitioner could attempt to represent. Traditionally, a residual unit is defined as a group of unrepresented employees whose only unifying factor is their unrepresented status; they are neither cohesive nor homogenous. General Merchandise employees, as the Employer claims, form a large group with a community of interests “wholly distinct” from other groups of employees at the Lacey and Tumwater stores. Thus, I am not persuaded that a bargaining unit of General Merchandise employees would not constitute a separate appropriate unit, or that those employees must be included in any unit or voting with nutrition department employees.

The Board has held that in order for a unit to be appropriate for purposes of collective-bargaining within the meaning of the Act, the unit need not be the only appropriate unit or the most appropriate unit; it need only be *an* appropriate unit.³¹ Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for unit. If the petitioned-for unit is *an* appropriate unit, the inquiry ends.³² If it is not an appropriate unit, the Board then examines whether an alternative unit suggested by the parties or another unit not suggested by the parties is appropriate.³³ To determine whether a petitioned-for multi-facility unit is appropriate, the Board evaluates the following factors: functional integration; employee interchange; employees' skills and duties; terms and conditions of employment; common management and supervision; and bargaining history.³⁴

Based upon a careful review of the record evidence and analysis of relevant Board principles, I find, contrary to the Employer, that the nutrition department employees share a community of interest with other Petitioner-represented Food section employees.

1. Functional Integration

The record clearly establishes that the nutrition department is functionally and operationally integrated with the rest of the Employer's Food section. The nutrition department is identified as a Food department, under the authority of the Food section manager. Nutrition department products are stocked within the Food section with no discernible barrier between it and the rest of the Employer's grocery operation. Moreover, nutrition department products are received and stored in the Food stockroom, handled by Petitioner-represented grocery clerks, and cross-merchandised in many areas throughout the Food section.

In its brief, the Employer claims, without citation to the record, that there is no functional integration between the nutrition and grocery departments, arguing that the nutrition department has historically been a General Merchandise department. While the nutrition department may have been included in the General Merchandise unit when the Employer introduced the nutrition department in the early 1990's, the record establishes that the Lacey and Tumwater nutrition departments have always been considered part of the Food section under the Food section manager's authority. Moreover, the Employer does not suggest how, and the record does not support finding that the nutrition department might be functionally integrated with any General Merchandise section or department.

2. Interchange and Contact

Nutrition employees also have regular, work-related contact with Petitioner-represented employees, and there is evidence of interchange. To perform their jobs, nutrition employees must work with other Petitioner-represented employees. As noted above, nutrition employees

³¹ Barron Heating and Air Conditioning, Inc., 343 NLRB No. 58, slip op. at 3 (2004), citing American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991); Overnite Transportation Co., 322 NLRB 723 (1996).

³² Barlett Collins, Co., 334 NLRB 484, 484 (2001).

³³ Overnite Transportation Co., 331 NLRB 664, 663 (2000).

³⁴ See, e.g., Bashas', Inc., 337 NLRB 710 (2002) and cases cited therein.

work with grocery receiving clerks and other grocery employees (including service deli, produce, and bakery employees) when they stock cross-merchandised items. When closing, nutrition employees go to other Food section departments and use the equipment there to perform cleaning tasks. And, as the Employer concedes, Petitioner-represented grocery clerks work in the nutrition department when that department is short-staffed. On the other hand, the record shows that nutrition department employees, like Petitioner-represented Food section employees, have very virtually no work-related contact with non-Food General Merchandise employees. Given this record evidence, I reject the Employer's assertion that nutrition employees have "virtually no interchange or contact" with Petitioner-represented employees.

The Employer correctly points out that because Home and Apparel employees' primary function is selling, most are scheduled during hours when the stores are open to customers. The Employer also correctly points out that, because Food-section employees are primarily responsible for "throwing" freight, comparatively more Food employees work before and after the store is open to customers. Thus, I agree with the Employer that Petitioner-represented grocery employees' community of interest is "wholly distinct" from Home and Apparel section employees.

However, as the record demonstrates, these considerations regarding Home and Apparel employees do not diminish the fact that nutrition employees have regular work-related interchange and contact with Petitioner-represented Food section employees. Thus, nutrition employees work during the day, as other Food section employees do, restocking shelves and assisting customers. Moreover, nutrition employees, like other grocery employees, do not perform the same selling functions as Home and Apparel employees; and, while grocery employees do not substitute for Home or Apparel employees, they do fill in for nutrition employees when necessary. Thus, the Employer's arguments regarding Home and Apparel employees demonstrate, rather than discount, nutrition employees' community of interest with Petitioner-represented grocery employees.

3. Similar Skills and Functions

Petitioner-represented employees and nutrition department employees also have similar skills and perform similar functions. While it is true that the specific tasks in each department differ somewhat, all Food section employees, including nutrition employees, handle food, "throw" freight, and assist customers. Indeed, because nutrition employees' skills and functions are similar to those of other Petitioner-represented employees, the Food manager can assign grocery clerks to work in the nutrition department without regard to their skills or familiarity with the nutrition department or the products contained therein.

The Employer argues that General Merchandise departments are "selling" departments, carry "specialized products," and that employees working in those departments receive training regarding those products "so they may fulfill their primary function of selling those products to customers." While it may be that some products in the nutrition department differ from mainstream products carried in other departments (e.g., gluten-free breads, as compared with conventional bread using wheat flour), the record evidence shows that nutrition employees are not required to have, and do not receive, any special training. Rather, nutrition department employees are expected to learn through on-the-job experience what products are in the department and where they can be found. The same is true for employees in other departments.

Perhaps more significant, nutrition department employees do not perform the same “selling” function that employees outside the Food section are required to perform. Unlike Apparel or Home employees, who are required to approach and offer to assist customers in their departments and encourage customers to buy additional or more expensive items,³⁵ the record as a whole establishes that Food section employees are required only to assist customers in finding items in their department or elsewhere in the store, or explain why a product is contained in one section or another. Thus, nutrition employees perform no more a selling function than a produce employee explaining to a customer the difference between organic produce and conventional produce, or a bakery employee explaining what ingredients are contained in certain products.³⁶

4. Common Management and Supervision

Nutrition employees, like all Petitioner-represented Food employees, are under the authority of the Food section manager. The Employer correctly points out that nutrition department employees report directly to the nutrition manager, and concedes that the nutrition manager reports only to the Food manager. The Employer also asserts that some “general merchandise” managers—specifically Health and Beauty and Pharmacy managers—report to the Food manager. First, it is perhaps inaccurate to describe these two departments as “general merchandise” departments; unlike Apparel or Home section departments, the Health and Beauty and Pharmacy departments are indisputably part of the Employer’s Food operations at Lacey and Tumwater, under the exclusive authority of the Food manager. Moreover, the Employer stipulated that, given the relative skill and education levels required of Pharmacy employees, they would not be appropriately included in a grocery or general merchandise unit. Regardless, the fact that other unrepresented Food section employees also fall under the Food manager’s authority does not diminish the fact that the Food manager—and not the Apparel or Home section managers—directly impacts the terms and conditions of all Food-section employees, including nutrition employees, by scheduling them, approving or disapproving their overtime requests, and imposing discipline on them. The record also shows that the Food manager assigns other Food section employees to work in the nutrition department when nutrition is short-staffed. Thus, in this regard, nutrition employees share a community of interest with Petitioner-represented Food section employees.

³⁵ The Employer offered, as an example of an Apparel employee’s selling function, that the employee might suggest that a customer shopping for a particular item of clothing consider a coordinating garment, or a pair of shoes to complete an outfit.

³⁶ In its brief, the Employer mistakenly argues that the Board’s decisions in Ray’s Sentry, 319 NLRB 724 (1995), and Scolari’s Warehouse Markets, 319 NLRB 153 (1995), support its position that a single unit of all Lacey and Tumwater employees is appropriate. Given the record evidence here, however, those cases further support a conclusion that a self-determination election should be limited to nutrition employees. In Ray’s Sentry, the union-petitioner sought a separate unit of bakery/deli employees. Reversing the Regional Director, the Board considered traditional community of interest factors and found that the petitioned-for employees did not require specialized skills or extensive training to perform their work, and they shared a community of interest with other grocery employees. In contrast, the Board in Scolari’s held that, because the meat department employees at issue required skills distinct from other grocery employees, a separate unit of meatcutters was appropriate. If, as the Employer argues, Home and Apparel employees require and obtain specialized knowledge and training, they should not be included in a unit that would include the relatively unskilled nutrition department employees, or any other Petitioner-represented Food section employees.

5. Terms and Conditions of Employment

The Employer argues that nutrition employees are largely scheduled during the day to assist customers and perform a selling function which, the Employer asserts, suggests that nutrition department employees' terms and conditions of employment are more similar to General Merchandise employees than Petitioner-represented Food employees. The record, however, suggests that the nutrition employees' hours are not dissimilar to other Petitioner-represented Food section employees, including bakery clerks. Indeed, with the limited exception of a discrete group of grocery clerks, employees in every Food department are scheduled throughout the day to keep shelves stocked, assist customers, and prepare the store for business the next day. Regardless, as discussed above, nutrition employees are not required to approach and offer assistance to customers, and they are not required to perform the same "selling" functions that, for example, an apparel salesperson might. Thus, the customer service function performed by nutrition employees is more akin to that performed by other grocery employees.

The record reveals that Petitioner-represented Food section employees and nutrition department employees have different pay and benefits. Those differences, however, are the direct result of the collective-bargaining agreement between the parties. As such, evidence regarding this factor is of little material value.

6. Bargaining History

At first glance, the bargaining history would seem to support the Employer's position. However, the record evidence shows that the historic exclusion of nutrition employees from the Food unit is based on the original nature of the nutrition department rather than the parties' immutable agreement that nutrition employees could never share a community of interest with Petitioner-represented Food employees. In the early 1990's, the nutrition departments were much smaller departments, were stocked with far fewer products, and were in direct competition with smaller vitamin and supplement stores. However, the scope of nutrition has indisputably increased dramatically. In these circumstances, the limited bargaining history is not dispositive of whether the nutrition employees share a community of interest with Petitioner-represented Food employees.³⁷

Conclusion

In light of the above and the record as a whole, I find that nutrition employees share a community of interest with Petitioner-represented grocery employees.³⁸ The record evidence

³⁷ Canal Carting, 339 NLRB 969 (2003), does not support the Employer's claim that the parties' bargaining history is dispositive of this case. In Canal Carting, the petitioner sought to merge two groups of employees that were historically represented in two separate units by two separate unions. The Board found that bargaining history supported maintaining the existing units, and there was nothing intrinsically inappropriate about the existing units. Thus, the existing collective-bargaining agreement between the intervenor and the employer barred the petition. Here, the petitioned-for employees have long been unrepresented, no other union seeks to represent them and, as the record evidence shows, they share a community of interest with the Petitioner-represented employees.

³⁸ See, e.g., Payless, 157 NLRB 1143 (1966) (deli employees included within larger grocery store unit because the deli employees performed similar work under similar working conditions as the grocery employees, were commonly supervised, and were functionally integrated with the grocery department). See also, Valu King, 206 NLRB 1 (1973); Overton Markets, 142 NLRB 615 (1963).

shows that the nutrition department is functionally and operationally integrated with the Employer's food operation, and that nutrition employees have regular, frequent and work-related interchange and contact with grocery employees. Nutrition employees likewise possess similar skills and perform similar functions as grocery employees, and are subject to the Food manager's authority. Unlike Home and Apparel employees, nutrition employees do not perform a selling function, do not require and do not receive special training, and their customer contact is limited to assisting customers find specific products or department. Accordingly, the petitioned-for self-determination election to allow nutrition employees is warranted. However, because I find that the nutrition department managers possess supervisory authority, I shall exclude them from the voting group.

C. Nutrition Managers Possess Supervisory Authority

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of 'employee.'" Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or 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 of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. NLRB v. Kentucky River Community Care Inc., 121 S.Ct. 1861 (2001). The legislative history of Sec. 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. George C. Foss Co., 270 NLRB 232, 234 (1984). For this reason, the Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. St. Francis Medical Center-West, 323 NLRB 1046 (1997). Thus, the burden of proving supervisory status is on the party (*i.e.*, the Employer herein) alleging that such status exists. Kentucky River. That means that any lack of evidence in the record is construed against the party asserting supervisory status. Freeman Decorating Co., 330 NLRB 1143 (2000). Moreover, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. Phelps Medical Center, 295 NLRB 486, 490-91 (1989). Additionally, mere opinions or conclusory statements do not demonstrate supervisory status. Chevron U.S.A., 309 NLRB 59 (1991); St. Alphonsus Hospital, 261 NLRB 620 (1982), enfd.; 703 F.2d 577 (9th Cir. 1983). Rather, proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. Harborside Healthcare, Inc., 330 NLRB 1334, 1336 (2000); Crittenton Hospital, 328 NLRB 879 (1999).

Here, the Employer argues that nutrition managers are statutory supervisors because they possess Section 2(11) authority to hire, transfer, assign, responsibly direct, and adjust grievance for employees, or they possess the authority to effectively recommend such actions. Based on the record evidence, I agree that nutrition managers' role in the hiring process

establishes that they possess supervisory authority. I also find that the nutrition managers' role in disciplining nutrition employees and adjusting their grievances establish their supervisory authority. I find, however, that the record evidence fails to support the Employer's additional arguments regarding nutrition managers' supervisory authority.

1. Hire, or Effectively Recommend that the Employer Hire, and/or Transfer

The record evidence establishes that the nutrition managers possess and exercise the authority to either hire nutrition employees directly, or to effectively recommend the hiring of nutrition employees. While the Employer may screen applicants, the nutrition managers are responsible for interviewing, selecting, and hiring or effectively recommending for hire qualified applicants. Indeed, Frownfelder alone interviewed several applicants for openings in Lacey, and Obremski had the authority to veto any proposed hire.

The record evidence regarding Obremski's role in transferring two employees from her department also establishes nutrition managers' supervisory authority. Obremski and the Food manager identified two inadequate performers. Based on Obremski's observance and subsequent assessment of the employees' performance, the Food manager followed Obremski's recommendation and had the employees transferred to non-Food sections of the store.

In these circumstances, I find that the nutrition managers possess and exercise the supervisory authority to hire or effectively recommend that the Employer hire and/or transfer nutrition employees. See, e.g., USF Reddaway, 349 NLRB No. 32, slip op. (January 31, 2007). The Union's arguments that the nutrition managers exercise no independent judgment, or have only limited ministerial roles in the hiring process are belied by the record evidence.

2. Discipline

The record shows that nutrition managers have the authority to recommend verbal warnings, and that nutrition managers have been advised of their authority in this regard. Indeed, the record shows that if a nutrition manager believes that verbal discipline is warranted, she can issue it or consult with the Food manager, explain the circumstances warranting discipline, and issue it with the Food manager. Such collaborative efforts demonstrate that nutrition managers possess supervisory authority. See generally, Harbor City Volunteer Ambulance Squad, 318 NLRB 764 (1995); Trevilla of Golden Valley, 330 NLRB 1377 (2000); Mountaineer Park, Inc., 343 NLRB 1473 (2004). See also Progressive Transportation Services, 340 NLRB 1044 (2003) (authority to initiate disciplinary action was evidence of supervisory status).

However, I disagree with the Employer's assertion that nutrition managers have supervisory authority based on their authority to send employees home for rules infractions. The Board has found that sending employees home for flagrant misconduct is not evidence of supervisory status. See, e.g., Wilshire at Lakewood, 343 NLRB 141, n.10 (2004).

3. Assignment and Responsible Direction

The Employer argues that the nutrition managers exercise independent judgment when assigning tasks to nutrition employees. Specifically, the Employer argues that nutrition managers' use of daily tour sheets to prioritize tasks involves independent judgment. The

record, however, does not support the Employer's claim. In Oakwood Healthcare, Inc.,³⁹ the Board defined the term "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee."⁴⁰ The Board specifically excluded from its definition "ad hoc instruction that [an] employee perform a discrete task."⁴¹ Moreover, the tasks performed in the nutrition department are so routine that they do not involve the exercise of independent judgment.⁴²

The Record evidence also fails to establish that nutrition managers responsibly direct nutrition employees or any other employees. The Board has held that the authority "responsibly to direct" arises if rank and file employees report to "a person on the shop floor" and "that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment."⁴³ The Board further held that the element of direction that is "responsible" involves a finding of accountability, such that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" arising from his/her direction of other employees.⁴⁴ Despite the nutrition managers' sense that they are ultimately responsible for the overall condition of their departments or co-workers' performance, the record is clear that the Employer does not hold nutrition managers accountable for the failings of nutrition employees.

4. Adjustment of Grievances

Nutrition employees consider the nutrition manager to be their immediate supervisor, and Lacey employees have taken complaints to Frownfelder. In turn, Frownfelder has used her authority to independently resolve employees' complaints. Accordingly, I find that nutrition managers have the authority to adjust employees' grievances. See Sheet Metal Workers International Association, Local Union 68, 298 NLRB 1000 (1990).

Given that nutrition managers have the authority to hire employees and/or to effectively recommend that the Employer hire and/or transfer employees, discipline employees, and adjust employees' grievances, I find that the nutrition managers are supervisors as defined in the Act and, therefore, shall exclude them from the voting unit.⁴⁵

³⁹ 348 NLRB No. 37, slip op. (September 29, 2006).

⁴⁰ Id., slip op. at 4.

⁴¹ Id. See also, Croft Metals, above, 348 NLRB No. 38, slip op. at 5 (purported supervisors did not schedule employees; assign them to production lines, departments, shifts, or overtime; nor did they assign to employees their overall duties).

⁴² See Croft Metals, above, 348 NLRB No. 38, slip op. at 6.

⁴³ Oakwood, 348 NLRB No. 37, slip op. at 6.

⁴⁴ Id., slip op. at 7.

⁴⁵ The Employer claims that nutrition managers' role in training other employees establishes further that they possess supervisory authority. The Board, however, has found that training employees does not, without more, evidence 2(11) supervisory authority. See S.D.I. Operating Partners, 321 NLRB 111 (1996); Ohio River, 308 NLRB 686, 716 (1991). Based thereon, I find that the record evidence does not support a supervisory conclusion.

IV. CONCLUSION

There is no basis to dismiss the petition. Petitioner has not waived its right to represent the nutrition department employees. Contrary to the Employer's assertions regarding other appropriate voting units or bargaining units, the nutrition employees share a sufficient community of interest with the Petitioner-represented grocery clerks so that a self-determination election is appropriate among those nutrition employees. However, because nutrition managers possess certain indicia of supervisory authority, I will exclude them from the voting unit. Finally, there is no factual or legal basis to bifurcate the voting unit by conducting separate elections for the nutrition employees at each store.

Accordingly, I will direct an election⁴⁶ in the following appropriate voting group:

All full-time and regular part-time employees, clerks, and assistant managers working in the nutrition department of the Employer's Lacey and Tumwater, Washington stores, excluding nutrition department managers, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

There are approximately eight (8) employees in the voting group found appropriate.⁴⁷

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group 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. 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 that 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 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

The Employer also claims that Nutrition Managers are supervisors because they conduct 60-day and annual appraisals of nutrition employees that, the Employer claims, impact employees' continued tenure with the Employer. However, the record shows that the reviews have no effect on wages or other terms of conditions of employment. Rather, they are used to identify and address a clerk's weaknesses. In these circumstances, the Nutrition Managers' role in the appraisal process is not evidence of supervisory authority. See, e.g., Harborside Healthcare, Inc., above, 330 NLRB 1334.

⁴⁶ In its brief, the Employer requests that I direct "one election directed at each store, but the resulting unit should include the employees of both the Lacey and Tumwater stores, because the existing grocery contract applies to the grocery employees at both stores." I agree that a multi-site election to accommodate the employees at both stores is appropriate.

⁴⁷ The Parties stipulated that "the classification of nutrition assistant manager is not a statutory supervisor as that classification does not perfect any of the supervisory indicia in Section 2(11) of the Act."

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 367, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION. If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be taken to have indicated their desire to be included in the existing recognized Unit currently represented by the Petitioner, and it may bargain for those employees as part of that Unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented.

A. List of Voters

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 that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, 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, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before **January 11, 2008**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. RIGHT TO REQUEST REVIEW

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

be received by the Board in Washington by **January 18, 2008**. The request may be filed through E-Gov on the Board's web site, www.nlr.gov, but may not be filed by facsimile.⁴⁸

DATED at Seattle, Washington, this 3rd day of January, 2008.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

⁴⁸ To file a request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.