

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

FRED MEYER STORES, INC.

Employer

and

Case 19-RC-15068

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1439, 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 four stores of Fred Meyer Stores, Inc. (“the Employer”) in Spokane, Washington (herein either “Francis”, “Sullivan”, “Wandermere”, “Thor”, or collectively, “stores”). Petitioner in this case seeks a self-determination election for employees working in the nutrition department of the Francis store to decide whether they wish to be included in the existing multi-facility grocery unit.³ There are two employees in the voting group sought.

The Employer opposes the petition on two main grounds. As a threshold matter, the Employer argues that Petitioner has waived its right to organize the petitioned-for nutrition employees by promising in January of 1995 not to organize the general merchandise employees at the Francis and Sullivan stores in exchange for a grant of access to the grocery department, CCK (checkers) department and meat department employees, and the Employer’s agreement to recognize Petitioner based upon a majority card showing in each of these units.

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

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. Accordingly, the Employer contends that because the Petitioner-represented employees in the four Spokane stores constitute a multi-facility unit, the appropriate unit for the petitioned-for nutrition employees is a four store-wide unit comprised of general merchandise employees totaling 270-280 employees.

In response to the Employer’s waiver argument, Petitioner asserts that it did not “forever” waive its right to organize the petitioned-for Francis nutrition employees. With regard to the Employer’s remaining arguments, Petitioner contends that the nutrition employees at the Francis store share a community of interest with the Petitioner-represented grocery employees, and that the bargaining history of the parties and industry practice establish a clear history of organizing individual locations by departments into the multi-store unit, and that therefore, a self-determination election is appropriate among the Francis nutrition employees. Finally, Petitioner alternatively argues that the Region should conduct an election among the Francis nutrition employees in a stand-alone unit.

Based on the record as a whole and the parties’ respective briefs, I find that Petitioner has not waived its right to represent nutrition department employees. I further find, contrary to the Employer, that the petitioned-for nutrition department employees share a community of interest with the Petitioner-represented grocery employees at the Francis store. Therefore, a self-determination election among the nutrition employees at that store is appropriate.

Below, I have summarized the record evidence detailing the parties’ bargaining history, and the Employer’s operations. 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. RECORD EVIDENCE

A. Relevant Bargaining History

1. General Background

The Employer is a State of Delaware corporation that operates 128 stores in Alaska, Washington, Oregon and Idaho, 120 of which are large one-stop retail stores over 100,000 square feet that sell a full line of products, including groceries and general merchandise. The remaining eight stores are “marketplace” stores which primarily sell grocery items and a more limited line of general merchandise. Petitioner currently respectively represents meat department, grocery department and the CCK department employees⁴ in three separate units under three contracts covering Employers’ four Spokane area stores.

2. Francis and Sullivan Stores

The Francis Store was remodeled and expanded as a full service store during the early 1990s after originally opening on September 28, 1975 as a non-food general merchandise

⁴ The CCK department includes food and non-food checkout department employees consisting primarily of cashiers, customer service desk and teller employees.

store. Beginning in the mid 1970's, but prior to March 28, 1995, all Francis Store employees were represented by Petitioner. The Employer operated a non-food general merchandise store at a Spokane Sprague Street location that was opened in the 1980s and where employees were represented by Petitioner. The Sullivan store was opened on November 17, 1993, as a full service store, replacing the Sprague store. Between July 31, 1993 and March 28, 1995, Petitioner sought to negotiate a successor contract covering non-food employees, in the Francis and Sullivan stores, failed to do so, and believed it had lost majority support in the unit. Petitioner disclaimed interest in the general merchandise Sullivan/Francis unit on March 28, 1995.⁵

The record reveals that in late 1994 and early 1995, Employer's Group President of Human Resources, Carl Wojciechowski and then Petitioner President Jim Milsap discussed Petitioner representing grocery, CCK, and meat employees at the new Sullivan store and the newly remodeled Francis store. When Petitioner disclaimed interest in the non-food unit at the Sullivan and Francis stores, the Employer agreed to grant access to Petitioner to the Sullivan and Francis stores for the purpose of organizing grocery, CCK, and meat employees.

Specifically, the parties agreed that upon presentation to the Employer of a majority of cards signed in each department,⁶ the Employer would grant recognition to Petitioner and adopt with limited exceptions the terms and conditions of the labor agreement between Petitioner and Safeway. A letter confirming the agreement between the parties regarding Union access to the Francis and Sullivan stores, recognition upon presentation of a majority of cards in each department, and the parameters of a collective bargaining agreement was signed by Wojciechowski and Milsap on January 18, 1995. The letter contains no mention of Petitioner waiving its right to organize the Employer's general merchandise employees, in exchange for the Employer allowing Petitioner access to its stores for the purpose of organizing grocery, CCK and meat employees. Nor does the letter contain any reference to the Employer allowing Petitioner access to its Sullivan and Francis stores to organize grocery, CCK and meat employees in exchange for disclaiming interest in the general merchandise employees at those two stores. A letter dated March 16, 1995, was sent from Petitioner's Milsap to the Commissioner of the Federal Mediation & Conciliation Service with a copy to Wojciechowski, advising the FMCS that Petitioner no longer represented a majority of employees in the general merchandise unit at the Spokane Sullivan and Francis locations.

With respect to the agreement reached by the parties in late 1994/early 1995 regarding Petitioner's organization of the grocery, CCK and meat employees at the Francis and Sullivan stores, Wojciechowski initially testified that he was of the understanding that Milsap agreed not to represent general merchandise employees at the Francis and Sullivan stores "forever" in exchange for Petitioner's right to freely organize the grocery, CCK and meat employees. However, later in his testimony, Wojciechowski admitted that the parties never said "forever," and that Milsap never indicated how long Petitioner would refrain from organizing general merchandise employees.

⁵ The most recent collective bargaining agreement for the Francis and Sprague/Sullivan unit, prior to Petitioner's disclaimer of interest, had an effective period of July 29, 1990 through July 31, 1993, and covered employees in present and future stores of the Employer in the Spokane metropolitan area, specifically, employees employed in the shoe and automotive sales departments, general sales clerks, merchandise specialists in home improvement, nursery and photo departments, pharmacy A Assistants, registered pharmacists, intern pharmacists, and excluding (among other managers) Nutrition Center managers.

⁶ Grocery, CCK and meat.

On March 3, 1995, Petitioner presented a majority of cards in each of the grocery, CCK, and meat units to the Employer, which granted recognition to the Petitioner on March 24, 1995. The first collective bargaining agreements (one for each of the three units) between Petitioner and the Employer were executed by the parties with effective dates of April 1, 1995 through January 2, 1999.⁷ The contracts for the Sullivan/Francis grocery, CCK, and meat units have been extended several times by the parties. The most recent contracts in these units, effective by their terms from January 2, 2005 through January 5, 2008, also include employees in the Wandermere grocery, CCK and meat units.⁸

3. Wandermere Store

On February 9, 1998, Petitioner's Milsap signed a letter dated January 6, 1998, authored by Wojciechowski in which the Employer waived its right to insist on a secret ballot election and agreed to recognize the Petitioner as the representative of its Wandermere store grocery, meat and CCK department units based upon a showing of card majority in each of those units. The January 9, 1998 letter states that the non-food department employees at both the Francis and Sullivan stores are not represented by the Petitioner, therefore Petitioner agrees not to solicit or organize the non-food employees in the Wandermere store. The Wandermere Store opened on February 11, 1998.

On May 19, 1998, Petitioner provided bargaining cards evidencing majority status respectively in the grocery, meat and CCK departments of the Wandermere store. The Employer then recognized Petitioner as the collective bargaining representative of its employees in the three departments and agreed to append the Wandermere store into the existing grocery, meat and CCK labor agreements currently in effect between the Employer and Petitioner at its Francis and Sullivan store locations effective May 24, 1998. At no time have any employees in any other departments at the Wandermere location been represented by Petitioner.

4. Thor Store

On July 2, 2001, Petitioner signed a letter dated June 25, 2001, in which the Employer waived its right to insist on a secret ballot election and agreed to recognize the Petitioner as the representative of its Thor store grocery, meat and CCK department employees based upon a showing of card majority in each of those units. The July 2, 2001, letter states that the non-food department employees at the Francis, Sullivan and Wandermere stores are not represented by the Petitioner, therefore Petitioner agrees not to solicit or organize non-food employees in the Thor store. The Thor store opened on August 15, 2001.

⁷ The Recognition clause of the first grocery agreement covers employees working as journeypersons, helper clerks, and courtesy clerks in the grocery and produce departments, head journeyperson, journeyperson, and apprentices working in the bakery sales and bake-off classifications and journeyperson and apprentices working in the deli department at the Employer's Spokane Sullivan and Francis stores. There is no after-acquired store provision in this contract.

⁸ Although the employees of the Thor store are not included in the Recognition clause of this agreement, a November 9, 2001, letter from Employer's Vice President of Employee Relations Cynthia Thornton to Petitioner's President Sue Bonnett, indicates that the same terms and conditions of the Francis/Sullivan/Wandermere labor agreements apply to the grocery, meat and CCK Thor store employees in those units.

On November 4, 2001, Petitioner provided bargaining cards evidencing a majority status in each of the grocery, meat and CCK departments of the Thor store. The Employer then recognized Petitioner as the collective bargaining representative of its employees in the three departments and agreed to apply to them the same terms and conditions of the grocery, meat, and CCK labor agreements in effect between the Employer and Fred Meyer at its Francis, Sullivan, and Wandermere store locations. At no time have any employees in any other departments at the Thor location been represented by a labor organization.⁹

5. Further Bargaining History between the Parties

Current Petitioner President Larry Hall worked with Jim Milsap for 15 years while Milsap was president of Petitioner's Local. Hall had discussions with Milsap in 1994 to 1995 over the Petitioner's agreement not to represent general merchandise employees at the Francis and Sullivan stores. According to Hall, Milsap told him that Milsap had agreed not to organize general merchandise employees at the Sullivan and Francis stores for a period of 3 years. Later, according to Hall, during Petitioner's organization of the Wandermere grocery, meat and CCK employees in 1998 or 1999, Milsap told Hall that Petitioner agreed it would not organize the general merchandise employees at the Wandermere store for a period of 5 years in exchange for access and a card check agreement.

In January 2005, Hall and Thornton exchanged a series of correspondence which began after Petitioner apparently began to organize general merchandise employees in Employer's Spokane stores. Hall initially told Thornton in a January 14, 2005, telephone conversation that he believed there was a 3 year limitation on Petitioner's agreement not to organize general merchandise employees in Spokane and requested copies of any agreements that Thornton had regarding this issue. Thornton provided a 1995 letter from Milsap to the Employer disclaiming interest in the general merchandise employees at the Spokane and Sullivan stores, the 1998 Wandermere store agreement and the 2001 Thor store agreement. In correspondence between the parties, Thornton admitted that there was no time limitation on any of the agreements. On January 26, 2005, Hall sent a letter to Thornton after reviewing the agreements Thornton had sent to him. Hall told Thornton that he had apparently been mistaken about his understanding about the (3 or 5 year) time limitation as none of the documents sent to him by Thornton indicated that Petitioner had given up the right to organize general merchandise employees "forever." Hall contrasted this with an agreement dated January 21, 2000 entered into between the parties regarding a Fred Meyer store in East Wenatchee, Washington in which Petitioner forever disclaimed its right to represent general merchandise employees in exchange for access to organize grocery, meat and CCK employees at the East Wenatchee location.

6. Local Industry Practices

Petitioner is party to several other collective bargaining agreements with other Spokane-area employers who sell similar nutrition products as does the Employer. Nutrition employees at these employers, which include Rosauers, Albertson's and Safeway, are covered by the area's grocery agreement. Certain fuel center employees are also covered under multi-facility grocery agreements between Petitioner and Albertson's (within Petitioner's jurisdictional area), and Safeway (within the Spokane area).

⁹ Petitioner also represents grocery, CCK, and meat department employees at two other Employer stores in Wenatchee and Yakima, Washington.

B. The Employer's Operations

1. Overview of the Francis Store

Within the operations of the Francis store as a whole, I will now set out the various departments that exist, the supervisory structure of the store, the freight processing function that all employees perform along with the functional integration of these products throughout the store, the customer service and/or selling functions performed by employees, and general terms and conditions of employment for store employees. Next, I will briefly discuss the similarities and differences between the Francis, Sullivan, Wandermere and Thor stores, and will also briefly discuss interchange of employees between each store. Finally, I will summarize the operations of the Francis nutrition department including its location within the store and the types of products carried, its supervisory structure, employee duties and responsibilities, skills and training of nutrition employees and contact and interchange of nutrition employees such that their community of interest vis-à-vis the Francis grocery unit may be analyzed.

The Francis store, which is approximately 138,000 square feet, is typical of the Employer's other one-stop stores. The Employer divides its one-stop stores into three general sections: Food, Home, and Apparel. Each section is run by a section manager, who reports to the Store Director. The Spokane Store Directors report to the Regional Director of Sales for Zone 6, which comprises the geographical area of Idaho and Eastern Washington.

(i) Departments and Supervision

Within each general section are discrete areas for particular products or classes of products. For example, the Food section is divided into areas for, among other products, produce, meat and seafood, bakery, service deli, frozen foods, general grocery, health and beauty aids (HABA), pharmacy, and nutrition items. The Home section includes the garden center, floral department, toy department, sporting goods, auto and hardware departments, home electronics, tool and housewares, domestics and stationery, and furniture and décor. The Apparel section is divided into various sub departments of clothing, as well as shoes, cosmetics, bridge jewelry and accessories.¹⁰

The following department managers report directly to the Store Director: Food Manager, Home Manager, Apparel Manager, Home Electronics Manager, Customer Service Manager, Loss Prevention Manager, and Human Resources Coordinator. The Meat, Bakery, Service Deli, Produce, Pharmacy, and Nutrition department manager report directly to the Food Manager and to his/her Assistant and Food Relief Manager.¹¹

Each of these managers is responsible for and is actively involved in the operation of their respective section and/or department. For example, Food section managers have plenary

¹⁰ This list of subsections is not exhaustive; the record more fully describes the various departments and the products sold within each department.

¹¹ Reporting to the Home Manager are the Merchandising Assistant, Operations Assistant, and Relief Assistant. Reporting to these four managers are various section managers including the Garden Center Manager, Home Electronics Assistant Manager, and Home Electronics Relief Assistant Manager. Reporting to the Apparel Manager are the Apparel Assistant and the Apparel Third or Relief Assistant. Reporting to these four managers are various section heads such as the Shoe Department Manager, and the Jewelry Department Manager. Reporting to the Customer Service Manager are the Assistant and Relief Assistant managers.

authority over the produce, nutrition, meat and seafood, bakery, service deli, health and beauty, and pharmacy departments. Section managers also 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, and participate in interviewing and hiring employees in their section. 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.

(ii) Freight Processing Function

Employees in virtually every department storewide at the Francis location 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.¹² Most freight is delivered in the evenings to the Francis store and most departments 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 the Food section where canned foods, dry goods and frozen foods are stocked), which is required to “throw” freight at a rate of 60 cases per hour per person.

Each Francis store 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 Employer estimates that the Francis grocery department receives 1500 pieces of freight every other day in the evening, with the closing PIC (Person in Charge) of the food division responsible for unloading the truck, and three to four grocery department clerks placing the freight in an appropriate area for each grocery department in the store stockroom. For example, nutrition department products are placed in or about an area of the stockroom dedicated to the nutrition department. If excess product is left over after stocking the shelves, grocery and nutrition clerks place their respective excess product in a U-boat,¹³ and the following night or day, one to two food clerks and a nutrition clerk return their respective excess product via a U-boat back to their respective stockroom areas.¹⁴ Moreover, nutrition clerks will re-stock nutrition products throughout the course of their shift, as is the case with grocery clerks.

(iii) Customer Interaction and Sales Function of Employees

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,¹⁵ and

¹² Each section has its own stockroom, which is divided into areas for each department in that section.

¹³ A cart used for stocking fast moving freight. Fast moving freight consists of products that are on advertisement because of the seasonality of the product. For example, pumpkin pie mix during the holidays is a fast mover.

¹⁴ Generally, grocery clerks return excess product (“back-stocking”) during the night and nutrition clerks perform the function during the day.

¹⁵ 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 employee working in intimate apparel, who works closely with customers and has a loyal following. Another example offered by the Employer is an employee working in the photo department who sells a television to a customer and may offer to sell them a cable for the TV or offer a warranty program to go along with the TV.

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 bakery department¹⁶ employees, have greater customer contact. Food section employees, with the exception of the hot bake bakery employee, are not expected to perform selling functions similar to what is expected of General Merchandise employees.

(iv) Additional Terms and Conditions of Employment of Francis Store Employees

With regard to pay and benefits, the vast majority of Food section employees are represented by Petitioner and their terms and conditions of employment are governed by the grocery, meat and CCK collective-bargaining agreements discussed herein. 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.

2. Operations at the Employer's Sullivan, Wandermere and Thor Stores

Store Directors for the Employer's Sullivan, Wandermere, and Thor stores testified with respect to the operation of their respective stores. The main differences between the four stores were size and volume driven, that is, the number of employee hours dedicated to a particular store is based upon the size and sales volume of each store. The number and types of departments, management and supervision, reporting hierarchy, products sold, product ordering, handling of freight, hours of operation, scheduling of employees, productivity standards, and general operations are the same as the Francis store. The main differences between the stores with respect to the handling of freight is that while the Francis and the Thor stores each have two separate areas for receipt of General merchandise and Food department products, the Sullivan and Wandermere stores both have one centralized freight receiving area. Finally, each store is in relative close proximity to the other - the Wandermere store is 4 miles to the north of the Francis store. The Thor store is 4 miles south of the Francis store and the Sullivan store is 14 miles from the Francis store.

3. Intra-store Interchange and Transfers between the Four Spokane Stores

There is some general interchange and "borrowing" of employees between all of the Employer's four Spokane stores. With respect to permanent transfers, job openings are posted at all four Spokane stores. Any Spokane employee can apply for these openings, even if the openings are at another Spokane store. If an employee transfers from one store to another, their seniority travels. For example, the Francis full-time nutrition clerk was formerly an apparel employee at the Wandermere store and a Francis music market employee transferred from the Thor store. With respect to temporary transfers or borrowing of employees between the Spokane stores, this has occurred exclusively among the Petitioner represented unit employees. Additionally, all stores regularly exchange meat cutters, bakery employees and grocery clerks.

¹⁶ Between 4:00 pm - 6:00 pm, a bakery department employee does a "hot bake" and provides samples to customers in an effort to actively sell products in the department.

4. The Francis Store Nutrition Department

Within the Food section at the Francis store is a nutrition department where the Employer stocks organic foods, vitamins, supplements, a small selection of dairy and frozen food products, other grocery items, and certain non-food items that the Employer markets as “natural choices.” The nutrition department at the Francis store consists of approximately 2,000 square feet and 2 1/2 aisles, with weekly sales of \$18,000 - \$20,000. Nutrition department products are also cross-merchandised, and carried in other departments. The department is surrounded by the grocery, produce, deli, meat, bakery, and service deli departments.

The nutrition department includes a Nutrition Manager, and one full-time and one part-time clerk and is open from 7:00 am to 9:00 pm 7 days per week. Generally, the full-time clerk works three 12:00 pm to 9:00 pm shifts and two 7:00 am to 4:00 pm shifts. The part-time clerk works from either 1:00 or 2:00 pm to 9:00 pm, 4 days per week. The Francis Nutrition Manager works 5 days per week from 7:00 am to 5:00 pm Monday - Thursday and 5:00 am to 3:00 pm on Sundays. The nutrition department is under the control of the Food Manager who utilizes input from the Nutrition Manager in scheduling the nutrition clerks for work, and who participates along with the Nutrition Manager in interviewing and hiring nutrition clerks.

The Francis nutrition clerks are not present when freight arrives at the store. However, they are responsible for breaking the freight down off the pallet in the stockroom, and dividing the freight up into dry, bulk, and dairy sections, placing it on dollies or U-boats, wheeling it out to the aisles, and stocking the freight onto shelves.¹⁷ In addition to breaking the freight down, which arrives every other day, nutrition employees perform other tasks such as assisting customers, ordering product, filling coolers, performing back-stocks washing bins and sweeping the bin area.

Francis nutrition clerks are required to have the freight thrown within 24 hours, and throw about 165 - 300 pieces per day. On freight days, the full-time clerk spends 75% of her time throwing freight and the remainder of her time doing orders¹⁸ and helping customers. On non-freight days, the full-time clerk spends 30-40% of her day doing back stocks, and the remainder of her time assisting customers and cleaning. However, time spent on each task is also dependent upon the day of the week, as weekends involve much more customer contact. The part-time clerk spends a similar amount of time as the full-time clerk interacting with customers.

Specifically, nutrition clerks have regular customer contact, usually helping customers find a particular product in the department, or helping customers 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. Approximately twice per week, clerks assist customers to special order a product using a catalog of products available to the Employer. Although the Employer argues on brief that Francis nutrition department clerks are expected to up-sell, similar to general merchandise employees, Francis store clerks denied being required to up-sell, and have not been evaluated or disciplined in this regard. Moreover, the Employer provided no documents to establish that

¹⁷ Dairy products arrive with produce products. Frozen nutrition food items are retrieved by the nutrition clerks from a frozen food area where grocery products are also stored. However, nutrition products are separately stocked in this frozen grocery products area.

¹⁸ Clerks order three types of products, dry products (which need to be ordered by 3:00 pm), dairy and then frozen products.

discipline or evaluation of this nature has taken place within the nutrition department at the Francis store.

While nutrition clerks are expected to become familiar with the products in their department, they gain that knowledge over time through experience in their department, particularly with input from their department manager. Nutrition department employees are not required to have, and do not receive any specialized knowledge or training.¹⁹ Aside from the Pharmacy department employees, there is no evidence that any Francis store employee is required to possess any technical knowledge or receive special training prior to their employment.

Francis nutrition department employees share a desk, located in the middle of the produce section of the store, with produce employees. Schedules and sales data are kept at the desk. This area also has sinks, a garbage disposal, mops, brooms, dust cloths, and feather dusters. Nutrition employees share this equipment with the produce employees. This shared space leads to occasional interaction between nutrition and produce employees. When nutrition employees and produce employees take breaks, they cover the nutrition and produce areas for each other.

Because many nutrition department products are cross-merchandised in other departments (for example, pet food, Martinelli's sparkling cider, Celestial Seasonings products, peas, and peanuts are carried in both the nutrition and grocery departments), Francis nutrition department employees have regular,²⁰ 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. 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.

Produce clerk Vance Rose frequently substitutes in the Francis nutrition department. When the Francis store full-time nutrition clerk began working in the nutrition department, produce clerk Rose worked alongside her for her first 40 hour shift. Rose performed nutrition freight and back stock functions and assisted customers. Rose testified that over the course of the last year, he has worked intermittently approximately 30-60 days, or a month and a half to 2 months, in the nutrition department, including 2 consecutive weeks during the Nutrition Manager's vacation. While working in the nutrition department, Rose performed the functions of regular nutrition clerks, including assisting customers with questions. In addition to working in the nutrition department, Rose has also filled in a few shifts in the dairy and grocery departments.²¹ Further, a grocery employee named Corey worked a night shift when the part-

¹⁹ Although the Francis full-time clerk has a 2-year nutrition degree, neither party claims this is a job requirement. A couple of weeks after beginning work in the nutrition department, the Francis full-time clerk attended a 1 to 2 hour seminar about a particular line of products (Nature's Way), intended to show employees what the new products were. Her attendance at the seminar was not required. The part-time Francis nutrition clerk neither formally applied nor interviewed for the nutrition position, but rather, was moved permanently into the department after filling in temporarily while floating back and forth between the Nutrition and HABA departments.

²⁰ Although this contact is regular, the Full-time clerk agreed with the Employer's attorney on cross-examination, that time spent on cross-merchandise stocking amounted to perhaps 1 out of the approximate 112 employee hours scheduled per week in the nutrition department.

²¹ In addition to Rose, evidence was adduced at the hearing that a grocery clerk filled in at least three times in the last 6 months due to absences and a grocery employee named Corey who worked a night shift when the part-time nutrition employee was out sick.

time nutrition clerk was out sick.

Francis store nutrition employees have not worked in any other Francis store departments, and the evidence does not indicate that any Francis general merchandise employees have worked in the Francis nutrition department.²² Although the Francis Store Director testified and the Employer on brief states that the preference is to first look for substitutes for nutrition clerks in non-unionized departments such as health and beauty aids (HABA), home apparel and home electronics, in that order, employees in those departments have not substituted in the nutrition department at the Francis store.

III. ANALYSIS

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

The Employer contends Petitioner expressly and forever waived its right to seek representation of the Employer's general merchandise employees, including nutrition employees, at each of its four stores in Spokane and that this express waiver was contained in a series of letters setting forth the parties' recognition agreements for each of the four stores. The Employer further contends that in exchange for this series of waivers, it agreed with Petitioner to enter into separate card check agreements for three units -- grocery, meat, and CCKs -- at each of the four Spokane stores. However, Petitioner contends that its waivers were not unlimited or "forever;" rather, they were for a limited time that has long since passed.

In Briggs Indiana, 63 NLRB 1270 (1945), the Board held that an agreement in which a union agrees not to seek representation of certain employees bars a petition by that union for the specified employees during the life of the agreement. See also Cessna Aircraft Co., 123 NLRB 855 (1959). In Lexington House, 328 NLRB 894 (1999), the Board held that the agreement does not have to be part of the collective-bargaining agreement. In Lexington House, the Board also stated the requirements of the "Board's rule in Briggs Indiana," by setting forth the requirements for an effective waiver or promise not to organize, "namely that the promise be express, for a reasonable period of time and the result of bargaining between equals" Id. at 897.

Waivers of statutory rights "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" Greensburg Coca-Cola Bottling Co., 311 NLRB 1022, 1028 (1993); Georgia Power Co., 325 NLRB 420 (1988), enfd. mem. 176 F.3d 494 (11th Cir. 1999), citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).²³ Further, the party asserting such a waiver bears the burden of establishing all the requirements necessary to find such a waiver. See Roosevelt Memorial Park Inc., 187 NLRB 517 (1970). Here, that burden rests with the Employer.

In the instant case, there is no collective bargaining agreement in existence between Petitioner and the Employer whereby Petitioner has waived its right to organize nutrition

²² Francis nutrition employees have not substituted in any of Employer's other Spokane stores. Similarly, Sullivan, Wandermere and Thor nutrition employees have not worked in nutrition departments of other Employer Spokane stores.

²³ See Also Northern Pacific Sealcoating, Inc., 309 NLRB 759 (1992) (holding that parties to collective-bargaining agreements may waive certain of their rights, including some fundamental statutory rights, and that the Board will generally enforce such waivers when they are clear, knowing, and unmistakable).

employees in any of the Employer's Spokane stores.²⁴ Thus, I turn next to letters of agreement between the parties and specifically to the parties' letter dated January 19, 1995, covering the Francis and Sullivan stores. That letter confirms the agreement between the parties regarding Petitioner's access to those two stores; regarding recognition upon presentation of a majority of cards in the grocery, meat, and CCKs units; and regarding the parameters of a collective bargaining agreement. This letter is signed by Carl Wojciechowski for the Employer and by Jim Milsap for Petitioner. Most significant, that letter contains no mention of Petitioner waiving its right to organize the Employer's general merchandise and/or nutrition employees. The letter also does not contain any reference to the Employer allowing Petitioner access to its Francis and Sullivan stores to organize grocery, meat and CCK employees in exchange for disclaiming interest in the general merchandise employees working at the same stores. In sum, the January 16, 1995, letter between the parties fails to meet the Briggs Indiana requirements, as the letter does not evidence a waiver at all.

In conjunction with the January 16, 1995, letter, the Employer offered the testimony of its witness, Carl Wojciechowski, who testified that Petitioner President Milsap orally agreed to refrain from organizing the Employer's general merchandise employees at the Employer's Francis and Sullivan stores. Wojciechowski further testified that even though he understood that this waiver meant "forever," he admitted that there was never any statement by Milsap that Petitioner was "forever" waiving such a right.²⁵ However, the Board has held that that a waiver or promise not to seek to represent a 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.²⁶ Here, Wojciechowski's "alleged understanding" was neither express nor for a defined period of time. Thus, the Employer has failed to carry its burden of establishing all of the requirements necessary to find a waiver by Petitioner with respect to the Francis and Sullivan stores.

As for the Wandermere and Thor stores, the parties executed letters, respectively dated January 6, 1998, and June 25, 2001. Those two letters do contain waivers by Petitioner of its right to organize general merchandise employees employed at the Wandermere and Thor stores. However, the waivers in both letters do not contain a reasonable time period, or any time period for that matter. Consequently, the letters fail the Board's requirements for establishing a valid waiver.²⁷ In sum, none of the applicable contracts, written correspondence, or alleged understandings between the parties contains an express waiver by Petitioner to

²⁴ The Board in UMass Memorial Medical Center, 349 NLRB No. 35 (February 20, 2007) 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." Id., slip op. at 2, citing Briggs Indiana Corp., 63 NLRB 1270 (1945).

²⁵ Current Petitioner President Larry Hall testified at the hearing that he recalled that Milsap told him at the time that Petitioner was agreeing not to organize general merchandise employees at the Francis and Sullivan stores for a period of 3 years.

²⁶ See UMass Memorial, above, quoting Cessna Aircraft Co., 123 NLRB 855, 857 (1959).

²⁷ Contrast the parties' letters for the Francis, Sullivan, Wandermere and Thor stores with their letter of recognition agreement dated January 21, 2000, wherein Petitioner agreed not to organize or represent any general merchandise employees outside the grocery, meat, and CCK units and *forever* disclaimed its interest in and waived its right to represent such employees at the Employer's East Wenatchee, Washington store, whose employees are not the subject of this petition. While the January 21, 2000, letter was executed subsequent to the Francis, Sullivan and Wandermere letters and prior to the Thor letter, it does evidence the parties' ability to set forth definitive waivers in their agreements.

"forever" waive organizing and/or representing the Employer's general merchandise employees at the four Spokane area stores.

In light of the above and the record as a whole, I find that the Employer has failed to meet its burden of establishing all the requirements necessary to find a waiver by Petitioner.²⁸

B. The Appropriateness of a Self-Determination Election for Nutrition Employees

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.²⁹

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 may only represent the employees in the residual unit by adding them to the existing unit, usually by means of a self-determination election.³⁰ 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."³¹

Neither party argues that Francis nutrition employees alone constitute a "residual" unit and I do not find those employees to be a residual unit in the circumstances of this case. Accordingly, I then must turn to the parties' contentions regarding whether the Francis nutrition employees share a community of interest with the grocery unit employees to warrant the self-determination election sought by Petitioner in this case.

The Employer asserts that nutrition employees do not share a community of interest with grocery unit employees and that to include nutrition employees in the multi-facility grocery unit would effectively create an inappropriate unit.³² 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.³³ Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for

²⁸ The Employer cites *Lexington House*, supra, in support of his contentions regarding waiver. However, as noted above, that case supports finding no waiver in the circumstances of this case.

²⁹ *Warner-Lambert Co.*, 298 NLRB 993 (1990).

³⁰ *St. John's Hospital*, 307 NLRB 767 (1992).

³¹ *Warner-Lambert*, 298 NLRB at 995. See also *University of Pittsburgh Medical Center*, 313 NLRB 1341 (1994).

³² While the Employer asserted on the record that if the Francis nutrition department employees were found to be an appropriate unit for a self-determination election, that an election should be held among all nutrition department employees of the Employer's four Spokane stores, based upon the parties' history of multi-facility bargaining units, and while Petitioner, on the record also asserted that it would proceed to an election of employees working in the Employer's four Spokane store nutrition departments, on brief, the parties changed their positions on these issues.

³³ *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).

voting group. If the petitioned-for unit is *an* appropriate unit, the inquiry ends.³⁴ 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.³⁵ To determine whether the petitioned-for unit of Francis nutrition employees should be allowed to vote in a self-determination election to become part of the multi-facility grocery unit, the Board evaluates the following community of interest factors: functional integration; employee contact and interchange; employees' skills and functions; common management and supervision; terms and conditions of employment; and bargaining history.³⁶

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 sufficient community of interest with other Petitioner-represented grocery unit employees.

1. Functional Integration

The record establishes that the nutrition department at the Employer's Francis store is functionally 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. The fact that some of the food items sold in nutrition may be exclusive to nutrition does not diminish the record evidence regarding nutrition's identity as part of the food operation.

In its brief, the Employer claims that nutrition is not functionally integrated with the Employer's food operation because it is considered a "general merchandise department." Yet, the record evidence does not reveal how nutrition is functionally integrated with the Employer's general merchandise operation. Moreover, the Employer's assertions that nutrition "is not identified as a food department" and that nutrition is "surrounded by" non-food departments are belied by the record evidence. Thus, the functional integration factor supports finding that the nutrition employees share a community of interest with the grocery unit.

2. Contact and Interchange

Nutrition employees have some work-related contact with grocery unit employees when cross-merchandising products. However, at the Francis store nutrition employees' main contact occurs on a regular basis with grocery unit produce employees, with whom they share a common work area in the middle of the produce area, comprised of a desk and sink. Nutrition and produce employees at this store also share the same cleaning supplies and tools and have contact with each other when soliciting coverage of each others' work areas during breaks. Although the Employer argues on brief that general merchandise employees, including nutrition employees do not have regular contact or interchange with grocery unit employees, that argument ignores the evidence that such contact occurs while sharing a common work area in the produce area, sharing of tools and supplies, and while cross-merchandising products.

³⁴ Bartlett Collins, Co., 334 NLRB 484, 484 (2001).

³⁵ Overnite Transportation Co., 331 NLRB 664, 663 (2000).

³⁶ See, e.g., Bashas', Inc., 337 NLRB 710 (2002) and cases cited therein.

With respect to interchange, grocery employees are the only department employees substituting for absent nutrition employees at the Francis store. This includes one produce employee, Vance Rose, who estimated spending 1 1/2 to 2 months out of the last 12 months substituting for nutrition employees in the nutrition department, a grocery clerk filling in at least three times in the last 6 months due to absences and a grocery employee named Corey who worked a night shift when the part-time clerk was out sick. The Employer argues on brief that the evidence of interchange between nutrition employees and grocery employees is an anomaly due to a shortage of staff, resulting in "occasional" substitution of grocery employees. Again, the evidence suggests much more than occasional substitution between food and nutrition employees at the Francis store. On the other hand, contact and interchange between nutrition and general merchandise employees at the Francis store is limited or non-existent.

The record evidence as described above, establishes that nutrition employees' contact with grocery employees is substantial at the Francis store. Accordingly, Francis nutrition employees' contact and interchange with grocery employees support finding a community of interest between the nutrition and grocery employees.

3. Skills and Functions

Nutrition employees and grocery unit employees possess 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, "work" freight, re-stock their departments and assist customers. Like grocery employees, nutrition employees do not require any specialized training as a condition of employment, and any knowledge they gain regarding products in their departments is obtained through on-the-job training. Moreover, in contrast to general merchandise employees and because of the demands of "working" freight in their departments, grocery and nutrition employees are expected to perform only a limited selling function. Despite the Employer's argument in its brief that the nutrition department is considered to be a selling department, the Francis nutrition employees testified that they have never been told that selling was a requirement of their job, neither have they been evaluated nor disciplined with respect to selling requirements.

Because the Employer places such an emphasis on sales in non-food departments, general merchandise employees must possess sales skills and perform sales functions which are significantly different from those required of grocery and nutrition employees. The record shows that general merchandise employees, like nutrition and grocery employees, "work" freight, engage in recovery, provide customer service, and perform a selling function. However, the primary focus for general merchandise employees is to encourage customers to buy as many products as possible. In stark contrast, nutrition employees and grocery unit employees may help customers find certain products or offer basic information or opinions regarding certain products, but they are not expected to actively sell. Thus, I find that in this regard, nutrition employees at the Francis store share a community of interest with grocery unit employees.

4. Common Management and Supervision

Nutrition employees, like grocery employees, are under the authority of the Food section Manager. The Food Manager has ultimate authority over Food section employees' schedules, and was involved in the interviewing and hiring of the full-time nutrition clerk at the Francis

store.³⁷ The record also shows that nutrition employees coordinate with the Food Manager or the Food PIC to obtain fill-ins when they need to go on breaks. Contrary to the Employer's assertions that the Food Manager "has little impact on the clerks in the nutrition department" I find that in this regard, nutrition employees share a community of interest with grocery unit 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 grocery unit employees. The record, however, suggests that the nutrition employees' hours are not dissimilar from many other Food section employees, particularly those charged with engaging in stocking products throughout the day. Regardless, as discussed above, nutrition employees are required to approach and offer assistance to customers, but they are not actually required to perform the same "selling" functions that, for example, a photo department employee, or apparel salesperson might. Thus, the customer service function performed by nutrition employees is more akin to that performed by other grocery employees and would support finding a community of interest with grocery employees.

The record shows that the Employer's nutrition employees are paid according to the same pay scale and receive the same benefits as the Employer's general merchandise employees. The record further shows that the Employer's general merchandise employees' pay, benefits, and working conditions are significantly different from grocery unit employees' pay, benefits, and working conditions. However, those differences are the direct result of the parties' collective-bargaining agreement covering grocery unit employees throughout the Employer's four Spokane stores. As such, evidence regarding this community of interest factor is inconclusive.

The Employer expresses concern that if nutrition employees at the Francis store are permitted to vote in a self-determination election to become part of the existing multi-store unit, that this could result in an anomaly because the other nutrition employees at the Employer's other Spokane stores would remain unrepresented. As such, nutrition employees at Francis will not be able to transfer to other nutrition departments or substitute at another store. As an initial matter, the record evidence indicates however that nutrition employees do not currently substitute for each other at any of the Employer's Spokane stores. Therefore, the Employer's concern in this regard, is thus theoretical.

Moreover, with respect to permanent transfers of employees between stores, the testimony presented at the hearing indicates that transfer opportunities are open to all of Employer's store employees into all positions, irrespective of their representational status.

Lastly, as will be discussed more fully in the bargaining history section below, the bargaining history between the parties with respect to one-stop stores in Spokane, is that since 1995 these stores have been organized on a department by department, per store basis, with recognition being granted after Petitioner presents a majority card showing in each of the Employer's three main departments respectively; grocery, CCK and meat. Thus, the bargaining history between the parties contemplates that if the presentation of bargaining cards in any

³⁷ Contrary to the Employer's assertion on brief, the record is silent with respect to the Food Manager's authority to discipline employees.

department falls short of a majority, that department would not be represented by Petitioner, wherein the same department in another store might be represented. As such, the Employer's concern with respect to the Francis nutrition employees being represented by Petitioner if they so voted, while the nutrition employees in the Employer's other stores remain unrepresented, appears to have been already contemplated and addressed by the parties in bargaining.

6. Bargaining History

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective-bargaining if the unit is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. See, e.g., Canal Carting, 339 NLRB 969 (2003); Ready Mix USA, Inc., 340 NLRB 946 (2003). A party challenging a historical unit as no longer appropriate has a heavy evidentiary burden. See Trident Seafoods, 318 NLRB 738 (1995); Canal Carting; Ready Mix.

Petitioner has not represented any general merchandise or non-food employees, including nutrition employees, at any of the Employer's four Spokane stores since the stores became full-service stores and after disclaiming interest in the Francis and Sullivan general merchandise unit in 1995. Since 1995, the nutrition department in the Employer's stores has however evolved. Where it once only sold vitamins and other supplements, it now sells a variety of grocery, dairy, frozen food, and bakery products. The nutrition department is now a part of the food department, the latter of which did not exist at the Sprague and pre-remodeled Francis stores.³⁸

Moreover, the parties' Spokane bargaining history with respect to the recognition of the grocery, meat, and CCK units establishes that recognition of Petitioner by the Employer has occurred based on a majority card showing on a per department, per store basis. Thus, although the Francis and Sullivan stores were organized at about the same time, recognition occurred on store-by-store, department by department basis.³⁹ Accordingly, the bargaining history since 1995 has been for the Employer to agree to recognize Petitioner as the representative of its employees in each department in each store at its Spokane stores, **only** after Petitioner demonstrates a card majority in each of the departments that it has sought to organize.⁴⁰

In light of the parties' bargaining history since 1995 of seeking majority status on a department by department and store by store basis, it would be inappropriate to direct an election in a Spokane four-store wide unit of nutrition employees. As such, I reject the Employer's argument that the bargaining history between the parties establishes a community

³⁸ I do note that Petitioner represented nutrition employees in the general merchandise unit at the newly remodeled Francis and new Sullivan one stop stores. However, the parties were unable to negotiate a successor contract to the 1990 through 1993 contract for the general merchandise employees in that unit.

³⁹ Note that after-acquired store clause language does not exist in any of the collective-bargaining agreements negotiated between the parties since 1995. Such language was a significant factor in my decision in 19-RC-15057 involving this Employer. There, the after acquired store clauses laid out details regarding unit placement of employees. Thus, such bargaining history was a significant factor in finding against the petitioned-for unit of employees in 19-RC-15057. However, that particular bargaining history is not evident among the parties in the Employer's Spokane area stores.

⁴⁰ Within Petitioner's jurisdiction, there exist industry examples of multi-facility bargaining units that do not contain the same departments of represented employees at each facility. These include Safeway and Albertson's fuel centers. Some centers are part of the Petitioner's grocery unit, others are not.

of interest between the nutrition employees and the general merchandise employees, and I therefore reject the Employer's position that the appropriate unit in a self-determination election is one that includes nutrition employees and general merchandise employees in each of its Spokane stores.

In these circumstances, I find that the parties' bargaining history, including its practice of granting recognition on a department by department and store by store basis, supports finding that Francis nutrition employees share a sufficient community of interest with grocery unit employees. This bargaining history factor in conjunction with other community of interest factors noted above further supports my finding that the petitioned-for employees are an appropriate voting group. I do recognize that the nutrition department employees at the four Spokane stores may also share a community of interest with employees in the grocery unit and could be an appropriate voting group. However, neither party sought such a voting group either as primary or alternative position. Moreover, the parties did not fully develop the record with regard to the community of interest shared by nutrition department employees at all four stores with the unit of grocery employees. Accordingly, I find the petitioned-for employees constitute an appropriate voting group for the purposes of a self-determination election.

IV. CONCLUSION

I find, in light of the above and the record as a whole, that the Petitioner has not waived its right to petition to represent the nutrition department employees at the Employer's Spokane stores. Further, I find that the petitioned-for Francis nutrition employees share a sufficient community of interest with employees in the grocery unit. Evidence regarding functional integration, work-related contact, common management and supervision, similarity of skills, interchange and contact among Francis nutrition employees and grocery employees, and bargaining history supports a finding that those groups of employees share a community of interest. Thus, I shall direct a self-determination election among the Francis nutrition employees to determine whether this voting group wishes to be represented by Petitioner in the collective-bargaining unit of all grocery employees working for the Employer at its Francis, Sullivan, Wandermere and Thor stores located in Spokane, Washington.

Accordingly, I shall direct an election in the following appropriate voting group:

All regular full-time and part-time employees working in the nutrition department at the Employer's retail store located at 525 E. Francis Avenue, Spokane, Washington; excluding the Nutrition Department Manager, managerial employees, confidential employees, guards and supervisors as defined in the Act.⁴¹

There are approximately two (2) employees in the voting group found appropriate.

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

⁴¹ Because I find the petitioned-for unit to be appropriate, I will not address Petitioner's alternative stand-alone Francis nutrition department unit argument.

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 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 1439, 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 multi-facility Spokane grocery 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).

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 **March 14, 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 **March 21, 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.⁴²

DATED at Seattle, Washington, this 7th day of March, 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

⁴² 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.