

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

HOME DEPOT U.S.A., Inc.

Employer

and

Case 20-RC-067144

HOME DEPOT ASSOCIATES  
UNION #1

Petitioner,

**DECISION AND DIRECTION OF ELECTION**

Home Depot U.S.A., Inc. (the Employer) is a Delaware corporation with approximately 2,500 retail stores throughout the United States. By its petition, as amended at the hearing, Home Depot Associates Union #1 (the Petitioner) seeks to represent a unit comprised of the following employees employed at the Employer's retail Store 639 located at 2 Colma Blvd., Colma, California:

**Included:**

[Departments] 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 59, 70, and 85<sup>1</sup> (non-supervisory merchandise department specialists from: lumber, building materials, flooring, paint, hardware, plumbing, electrical, garden/seasonal, kitchen and bath, millwork, décor, and appliances)

**Excluded:** [Departments] 0-20, 31-58, 60-69, and 71-10000 (cashiers, freight team, receiving, phone center, loaders, special services, in-home services, pro desk, bookkeeping, computer room, packdown team, installs, expeditors, IMA, commercial sales, pullers/delivery).

There are approximately 74 employees in the petitioned-for unit. The Employer asserts that the petitioned-for unit is inappropriate for collective bargaining purposes and that a 'wall-to-wall' unit—i.e., one that includes all departments that the petitioned-for unit would exclude, and excluding only security staff) is the only appropriate unit. The

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<sup>1</sup> The petition was amended on the record at the hearing to include Department 85 Kitchen and Bath Associates.

Employer also asserts that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act.

A hearing was held in this matter on November 3, 4 and 7, 2011. Testifying at the hearing were: Assistant Store Manager Rhosseau Despanie, Cashier Associate Chinit Candiller, Receiving Associate Jose Bustillos, Associate Department Supervisor Romina Gutierrez, Sales Associate Rory Thompson, and Hardware Department Supervisor Thomas Near.

I have considered the evidence and the arguments presented by the parties. As discussed below, based upon the evidence and relevant law, I have concluded that the petitioned-for unit is not an appropriate unit, and that the only appropriate unit for this retail store must be a wall-to-wall unit. I also find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The Employer's Store 639 is divided into 28 departments that together sell lumber, building materials, floor and wall tile décor products, painting products, hardware tools and other hardware products, electrical and lighting products, garden products, appliances, doors and windows. At Store 639, the Employer sells products to both "do it yourself" customers, as well as "pro customers," such as contractors. Approximately 170 persons work in Store 639, including the store manager, six assistant managers, and one or two department supervisors for each of the departments. All of the non-supervisory employees of the various departments are termed "Associates." As noted, approximately 74 employees work in the departments Petitioner seeks to represent, and about 75 employees work in the departments Petitioner seeks to exclude from the bargaining unit. There is no bargaining history between the parties.

Each of the Employer's Associates is assigned to work in a specific department. For instance, there are Lumber Department Sales Associates, Electrical/Lighting Sales Associates, Cashier Associates, Kitchen and Bath Sales Associates, and so on. Nearly all employees wear a similar uniform with an apron (most aprons are orange, some are black), with a badge that states "FIRST." FIRST stands for "Find" (customer); "Inquire" (as to the project the customer is working on); "Respect" (respect all customers and associates); "Solve" (solve the needs of the customer); and "Thank" (thank the customer and invite them back to shop again). All new associates in every department are trained

by the Employer in the FIRST program, with a degree of department-specific tailoring based on the department to which the Associate is to be assigned. Performance according to FIRST principles guides employee performance reviews, which are decided by Assistant Managers and Supervisors from all departments, in conjunction with the Store Manager, as a group, irrespective of the department to which the employee who is being evaluated is assigned.

All employees, regardless of the department to which they are assigned, participate in the Employer's "Power Hours" program. Power Hours occur in all of the Employer's stores, including Store 639, from 10 a.m. to 2 p.m., Monday through Friday, and from 8 a.m. to at least 5 p.m. on weekends. During the Power Hours, all Associates are dedicated to customer service (selling) as opposed to tasking (Associates' other duties in the store).

Any Supervisor or Assistant Manager, regardless of their assigned department, may direct or assign work to Associates from any department, as well as discipline or issue other corrective action to Associates regardless of the department to which they are assigned. For example, while Assistant Manager Rhosseau Despanie is directly responsible for only the Hardware, Plumbing, and Kitchen and Bath Departments, he also supervises employees in other departments, such as giving assignments and issuing discipline to employees in the Garden and Cashier Departments. Disciplinary action is administered by department-specific supervisors based on Standard Operating Procedures established in the Employer's corporate headquarters. Requests for leave are handled in the first instance by department-specific supervisors, but ultimately decided upon by the Store Manager. Performance recognition awards ("Homer Badges") are store-wide awards, but recognize Associates by department, and may be issued centrally or by a department-specific supervisor.

Though many customers go in and out of Store 639 without interacting with an Associate, finding the item(s) they wish to purchase on their own, and paying a Cashier Associate as they leave, customers may make purchases from Associates in five showroom areas of Store 639. As an example, customers in the Kitchen and Bath Aisle Department may pay for their kitchen or bath purchases by credit or debit card in that department with a Kitchen and Bath Sales Associate, instead of having an invoice printed

and waiting in line for a Cashier Associate to ring them up. Cashier Associates are trained, however, to ring up a customer at a register, though an indeterminate number of Associates in other departments have backup cashier training and may operate a cash register. All newly hired Associates are required to receive training in operating a cash register.

Associates are assigned to a specific department based on their job application, interview, and the Employer's decision as to where the individual would best fit. No specific background is required to work in any of the Employer's Store 639 departments, though a background or interest in a particular area of the Employer's business, say, plumbing or gardening, would be a relevant consideration as to which department the employee is assigned to work as an Associate. After an employee is hired, the employee undergoes a week-long computer training that includes Employer-wide, as well as department-specific information. All Associates also receive a four-hour orientation. Associates often move from department to department throughout their career at Store 639, and sometimes will fill in for an employee in another department if needed on a particular day when there are not enough employees available to work in that department, and there is an Associate available with product knowledge specific to that department. For this reason, Associates are classified in the Employer's new scheduling system based on their product knowledge, in which primary and secondary areas of product knowledge and experience are indicated, allowing for the Employer to more easily provide coverage. As an example, a sales Associate in the Millwork Department, which is included in the petitioned-for unit is also classified in the scheduling system with Pro Desk Department, which Petitioner seeks to exclude from the unit, as his secondary department.

While Associates from the various departments work primarily in the department to which they are assigned, they are also required to assist customers in any part of the store. All Associates, for instance an Associate in the Lumber Department, are required if asked for assistance by a customer seeking, say, a plumbing product, to assist the customer in finding a product the customer wishes to purchase. If the customer has more detailed questions related to plumbing parts, at that point, the non-Plumbing Department Associate connects the customer to a Plumbing Department Associate. For this reason, all employees' 15-minute break periods are extended by a five-minute grace period. In

this regard, the Employer is aware that all Associates walking to and from the common break area may be asked by customers for assistance after leaving their assigned department for break and before returning to their assigned department.

All Associates throughout Store 639 share common duties. Focusing first on employees in the petitioned-for unit, all of these Associates are required to engage in “packing down,” when merchandise that is overhead on the Store 639 racks must be lowered by a lift. There are several machines to reach such products, a reach truck machine, an order picker machine, and a forklift. If the packing down requires use of a forklift, an Associate with forklift certification operates the forklift. All employees from all departments may seek forklift training and certification from the Employer, and the record reflects that about 50 employees have a forklift certification. Associates in the departments included in the petitioned-for unit take inbound calls from customers, perform shelf maintenance, check the returns desk for return carts, relocate return products to the shelves, perform chip clip loading (items specifically set aside and featured in each department as suggested additional purchases), handle will-call orders, perform price checks, clean their departments, assist with paperwork, assist customers in loading their purchases in/onto their vehicle, and participate in the Employer’s Buy Online Purchase In Store (BOPIS) program. Associates from the departments in the petitioned-for unit spend at least 70 percent of their time dealing with customers (i.e., selling) versus 30 percent performing tasks specific to their department, which the Employer terms “tasking.”

Depending on an Associate’s assigned department, the specialized tools employed by the Associates may vary. For instance, concerning employees in the petitioned-for unit, Lumber Department and Building Materials Department Associates use a variety of saws and protective gear; Floor and Wall Department Associates use tools to cut carpet, vinyl and blinds; Paint Department Associates use paint mixers, safety knives and gloves; Hardware Department Associates cut rope, chains and keys; Electrical/Lighting Department Associates use tools to cut wire; Garden Department Associates utilize trimmers, pruners, safety knives and wear protective gear; and Millworks Department Associates use a miter saw to cut molding.

Employees whom Petitioner seeks to exclude from the unit include:

1. Cashier Department Associates

Cashier Department Associates primarily work at the cash register area of the store. They are also assigned to the sales floor about once a week, assisting in selling merchandise to customers when they are away from the register. Cashier Department Associates also are required by the Employer to suggest to customers additional products they might wish to purchase as they are ringing them up. For example, if a customer is purchasing paint, the Cashier Department Associate will suggest brushes or rollers to the customer before completing the sale. Cashier Department Associates routinely direct customers to a specific location of the store for the product they seek, and interface with Associates of the various sales floor departments included in the petitioned-for unit, by calling an Associate in the relevant department and alerting him or her to the customer who will be approaching them.<sup>2</sup>

2. Commercial Sales Associates

The Commercial Sales Associates spend 30 to 50 percent of their work time selling. The remainder of their time is spent handling returns, stocking chip clips, hanging signs in the store, and generating leads with customers on the floor. Like the Associates in the departments in the petitioned-for unit, the Commercial Sales Associates are classified by the Employer as Sales Associates.

3. Receiving Department Associates

Receiving Department Associates primarily unload trucks and ship and transfer freight using machinery such as a reach truck and manual and electric pallet jacks. They are also scheduled to greet customers during the Power Hours, and assist customers with finding a product if needed. Receiving Department Associates respond three to four times a day to calls from the “call box,” which is signaled when a customer needs assistance and cannot find a free Associate. Receiving Department Associates also, on

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<sup>2</sup> There are three to four Head Cashiers Associates, who manage customer lines, assist in ringing up customers, handle voids and price markdowns. They do not hire, fire, or discipline Cashier Associates or other Associates. They do, however, assign shelf maintenance and cleaning to Cashier Associates and direct Cashier Associates to cover registers depending on the length of the customer line. Petitioner seeks to exclude all Cashier Associates, but it should be noted that the evidence does not establish that the Head Cashiers constitute supervisors under Section 2(11) of the Act.

about a daily basis, are asked directly by a customer for assistance, and if able to assist the customer directly will do so. Otherwise, the Receiving Department Associate will connect the customer to an Associate assigned to the specific department from which the customer wishes to purchase products.

4. Return to Vendor Associates (“RTV Associates”)

Return to Vendor Associates (“RTV Associates”) are also located in the receiving department and their department number is included within the list of employees Petitioner seeks to exclude from the unit. Currently there is only one RTV Associate who primarily handles merchandise that customers return as defective. If it is truly not resellable, the merchandise is transferred to the RTV Associate, who picks up the items and scans and barcodes them. The RTV Associate directly assists customers about 30 times a day, either during Power Hours, or when walking through the store to pick up items that are not resellable and is approached by a customer for assistance.

5. Delivery/Puller Department Associates

Delivery/Puller Department Associates primarily pull product from the sales floor and prepare it for delivery. Presently, there is only one Delivery/Puller Associate in Store 639. The Delivery/Puller Associate spends about an hour of the work day on the sales floor, assisting customers during Power Hours, and also handles the BOPIS sales when a customer seeks to pick up an item purchased online. The Delivery/Puller also uses some of the same machinery and tools as some of the Associates in the petitioned-for unit, such as the forklift, reach truck and safety knife.

6. Freight Team Packout Department Associates

Freight Team Packout Department Associates, whom Petitioner would exclude from the petitioned-for unit, primarily take received merchandise from the truck to the Receiving Department and the sales floor. They also directly assist customers from 10 p.m. until the last customer leaves prior to the closing of the store, usually around 10:20 p.m. to 10:30 p.m., as well as during the first half hour of store hours from 6 a.m. to 6:30 a.m. They also perform price checks, mix paint, and handle some paperwork. Freight Team Packout Department Associates also use some of the machinery and tools as some of the Associates Petitioner would include in the petitioned-for unit, such as the forklift, reach truck, safety knife and safety gloves.

7. Special Services Associates

Special Services Associates perform many of the BOPIS checkouts, contacting the customer to let them know that merchandise ordered online has arrived for pickup. They answer inbound phone calls from customers, pull orders from will-call and handle customer purchases requiring off-site installation, such as water heaters. Associates in the departments in the petitioned-for unit may also handle off-site installation purchases. The Special Services Associates spend about six hours of their work day at the Special Services desk, and two hours as greeters and cashiers. Throughout their work day, the Special Services Associates spend about 50 percent of their work time selling versus tasking.

8. Pro Desk Sales Associates

Pro Desk Sales Associates spend about four to five hours of their work day at the pro desk. They spend the remainder of their time working on the sales floor assisting customers, in close proximity to the Associates in the petitioned-for unit. The primary duties of the Pro Desk Sales Associates is to locate customers in the store who appear to be professional builders. Once a connection is established, the Pro Desk Sales Associate attempts to satisfy the needs of the professional builder, who may require a large quantity of certain materials on short notice. The Pro Desk Sales Associates interact with other Sales Associates in the Lumber, Building Materials and other departments when performing their duties. The Pro Desk Associates also serve as cashiers for about an hour of their work day and assist with paperwork and handle BOPIS orders. In total, they spend about 70 percent of their work day selling.

9. Bay Integrity Associates

Bay Integrity Associates are regular part-time employees who work from 5:00 a.m. to 9:00 a.m., Monday through Friday. All merchandise in Store 639 is assigned to a specific bay, and Bay Integrity Associates are charged with ensuring that merchandise is in its proper location throughout the store, as Associates in the petitioned-for unit do in their respective departments. Bay Integrity Associates also assist throughout all departments of the store with scanning the shelves, creating pack down lists of items that need to be lowered from shelves and designating price changes. Bay Integrity Associates encounter customers while performing their duties throughout the store, and assist

customers when called upon, having been trained in the FIRST principles, like all Associates.

10. Pack Down Associates

Pack Down Associates have the same direct supervisor as Bay Integrity Associates. Their primary duty is to pack down overhead freight from shelving, which as described above, all Associates of the petitioned-for departments, also perform, utilizing a reach truck machine, an order picker machine, and a forklift, if certified to use it. Like all other Associates, Pack Down Associates are trained in FIRST principles, should they interact with a customer requiring assistance. Pack Down Associates also interface with employees throughout the store because they are required to pack down items from shelves throughout the store.

11. Phone Center Associates

Phone Center Associates greet customers on the telephone and inquire as to what they are looking to purchase. Phone Center Associates provide prices and availability of products to phone customers, but if the customer requires more information about a product, the Phone Center Associate transfers the customer to the relevant department. There are currently two Phone Center Associates, and one of them also spends time on the sales floor, taking calls from customers at the special services desk. When not taking calls from customers, the Phone Center Associate stationed on the sales floor talks to customers on the sales floor, taking customers to the location of various products. Phone Center Associates interact regularly with the Associates in other departments in the store.

12. Office Associates

The Office Associates (referred to in the petition as bookkeeping) count cash received from sales at the cash registers, balance out the safe, stock the registers with money for the Cashier Associates, order supplies, and fix computers on the sales floor. Like all of the other Associates, the Cashier Associates are trained in FIRST principles, should they interact with a customer requiring assistance.

13. Lead Department Associates

The Lead Department Associates are also referred to by the Employer as Expeditors, and are referred to as such in Petition. The Lead Department Associates follow up with customers after a “bigger ticket” sale has begun, going over the estimate,

and closing out a sale. The Lead Department Associates sell mostly kitchen installations, countertops, doors, windows, flooring and blinds. The Lead Department Associates sell the Employer's products on the sales floor and, when they are not following up with customers from sales that are already underway, come into contact with new customers 10 to 13 times a day.

14     Lot Associates

Lot Associates primarily retrieve customer carts, and help customers load purchases into their car. Lot Associates spend about six hours performing lot duties and two hours a day assisting Associates inside the store, helping to pull orders or cutting lumber in the Lumber Department with the requisite tools and protective gear used in the Lumber Department. Like all the other Associates, the Lot Associates are trained in FIRST principles, and ask customers as they leave the store if they were able to find everything they wished to purchase. If a customer tells a Lot Associate he or she could not find a particular product, the Lot Associate is required to direct the customer to the correct location of the product in the store before the customer drives away.

All Associates are paid on an hourly basis and receive additional merit-based bonus compensation through a Homer Award, discussed above. No Associates from any department receive sales commissions. Wage increases are considered annually for all Associates based on their performance evaluation. Associates' pay scale is determined by the department to which they are assigned: Lot Department Associates, Cashier Department Associates, and Sales/Freight Associates area on separate pay scales. In calendar year 2011, the maximum hourly pay rate was \$9.65 for new Lot Department hires, \$10.50 for new Cashier Department hires and \$12.00 for Sales and Freight Associates. Associates hired on a lower pay scale may ultimately make more than an Associate hired at a higher pay scale, based on employee evaluations. An Associate may be able to become classified as a Specialist, where their rate of pay is raised and they are held to standards concerning numbers of sales. Associates from a variety of departments are eligible to become a Specialist, including employees in petitioned-for departments such as Kitchen/Bath and Millworks, as well as employees in the Pro Desk Sales Department, who Petitioner seeks to exclude.

The Employer also provides a dispute resolution system (“My Apron”), which is available to all Associates at Store 639, regardless of the department to which they are assigned. If the issue is not resolved through the “My Apron” system, all Associates are permitted to call the Employer’s “800 Aware” corporate telephone line, or avail themselves of the Employer’s corporate-wide Human Resources Services. All Associates clock in and clock out on the same time clock.

All Associates share the same fringe benefits. All full-time Associates accrue four hours of personal/sick leave per month, and all part-time Associates accrue two hours of personal/sick leave per month. All full-time Associates receive 40 hours of vacation leave after their first year working for the Employer, and all part-time Associates receive 20 hours of vacation leave after their first year working for the Employer. The Employer offers medical insurance to all Associates through Healthnet and Kaiser, with differences in plan options depending on whether the Associate is working full-time or part-time. Dental and vision insurance is also offered to all Associates, again, with differences in plan options depending only on whether the Associate is a full-time or part-time employee. The Employer also offers a 401(k) plan to all Associates, with differences in plan options depending on full-time or part-time status. There is no evidence that petitioned-for Associates are predominantly full-time or part-time employees, as opposed to Associates Petitioner seeks to exclude from the unit.

With regard to the Petitioner’s status as a labor organization within the meaning of Section 2(5) of the Act, which is disputed, the record reflects that Petitioner is not affiliated with any other union and is not party to a collective-bargaining agreement with any employer. Petitioner’s membership consists of employees who work at Store 639. Membership in Petitioner is eligible to any non-supervisory, non-security guard employee. The members of Petitioner have held meetings two to three times per week since beginning in early September 2011, but have no elected leadership. The record reflects that Petitioner intends to conduct internal elections for leadership positions in the future, and to complete all necessary legal filings associated with a labor organization. At the time of the hearing, Petitioner had collected no dues, but had accepted donations to an individual’s Pay Pal account. The record further reflects that Petitioner organization was created for the purpose of dealing with the Employer concerning employees’

conditions of work, wages, rates of pay, and labor disputes. At their meetings, members of Petitioner have discussed alleged abuses of management towards employees in Store 639 and pay issues of Store 639 primarily.

### ANALYSIS

At the outset, I find that Petitioner is a labor organization under Section 2(5) of the Act. Though it has only recently formed, has no current bargaining relationships, internal leadership structure, and has not made any filings with governmental agencies concerning its operations, the record reflects that Petitioner is an organization in which employees participate and exists for the purpose of dealing with the Employer concerning conditions of work, labor disputes, wages, and rates of pay. Petitioner accepts non-supervisory, non-guard employees as members, and has been holding meetings with members concerning these subjects since early September 2011. The instant petition is further evidence that Petitioner exists for the purpose of dealing with the Employer concerning wages, hours and other terms and conditions of employment. See, e.g., *Michigan Bell Tel. Co.* 182 NLRB 632, 632 (1970); See also *Meijer Supermarkets, Inc.*, 142 NLRB 513 (1963).

Concerning the appropriateness of the petitioned-for unit, is well-settled that the Act does not require that a petitioned-for unit be the only appropriate unit, the most appropriate unit, or what could become the ultimate unit; it requires only that the unit be “appropriate.” See, e.g., *Overnight Transportation Co.*, 322 NLRB 723 (1996); *Dezcon, Inc.*, 295 NLRB 109 (1989); *Capital Bakers*, 168 NLRB 904 (1968). While a petitioner’s desire in regard to unit composition and scope is relevant, it is, however, in no way dispositive, see *Airco, Inc.*, 273 NLRB 348 (1984), because a proposed bargaining unit based on an arbitrary grouping of employees will always be inappropriate. See, e.g., *Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Additionally, the Act prohibits the Board from establishing a bargaining unit based solely on the extent of organization. See, e.g., *Motts Shop Rite of Springfield*, 182 NLRB 172 (1970).

The Board has also long favored wall-to-wall bargaining units in the retail industry. See, e.g., *Charrette Drafting Supplies*, 275 NLRB 1294 (1985); *Levitz Furniture Co.*, 192 NLRB 61 (1971); *A. Harris & Co.*, 116 NLRB 1628 (1956). In *A. Harris*, the Board set

forth three conditions under which it would make an exception for finding a subsection of employees of a retail store operation (in that case a warehouse unit) in the retail industry appropriate: where the employees “(a) are under supervision separate from other store employees; (b) perform substantially all of their work tasks in buildings geographically separated from those in which the bulk of the remaining employees of the Employer work; and (c) are not integrated, to any substantial degree, with employees in other divisions in the performance of their ordinary duties.” *Id.* at 1632.

The Board has held the restrictive test set forth in *A. Harris* inapplicable where retail and wholesale operations are combined, which is not at issue herein. See *A. Russo & Sons, Inc.*, 329 NLRB 402 (1999) (applying traditional community of interest test in a combination wholesale and retail operation). In *Charette Drafting Supplies*, the Board applied the *A. Harris* criteria to the petitioned-for unit operations employees, concluding such a grouping of employees did not have a community of interest distinct from the retail sales, telephone customer service employees, outside sales representative and office clericals. See *Charrette Drafting Supplies*, 275 NLRB at 1296.

Here, Petitioner is seeking a unit consisting of a grouping of retail store employees who do not meet any of the *A. Harris* criteria of being geographically separated from the retail store operations, without substantial integration with the other employees, or under separate supervision. All of the employees of the Employer’s Store 639 work at the same location. They also are substantially integrated, working under the same “FIRST” guidelines established by the Employer, and they are all engaged in various aspects of selling the Employer’s products to customers, with overlapping duties as set forth above. To a substantial extent the employees are fungible, as Associates from any department may assist a customer in any department of the store, connecting the customer to another Associate from a particular department only when that Associate is unable to assist the customer further. The employees also share common supervision, as each is subject to the direction of the Store Manager, Assistant Managers, and department supervisors, irrespective of the department to which s/he is assigned. All employees’ performance evaluations are decided upon by all of Store 639’s managers and supervisors as a group decision, regardless to which department the employee is assigned.

Moreover, applying traditional community of interest factors, I find that the petitioned-for unit is not an appropriate unit for collective bargaining. The factors the Board looks to in determining whether the employees at issue share a community of interest include: degree of functional integration; common supervision; the nature of employee skills and functions; interchangeability and contact among employees; general working conditions; and fringe benefits. *See, e.g., Overnite Transportation Co.*, 331 NLRB 662 (2000); *J.C. Penney Co.*, 328 NLRB 766 (1999); *K.G. Knitting Mills*, 320 NLRB 374 (1995); *Kendall Co.*, 184 NLRB 847 (1970).

Here, when considering these factors, anything but a wall-to-wall unit of all of the non-supervisory, non-security guard, employees working at Store 639 would be inappropriate because all of the Associates share an overwhelming community of interest. As noted, the employees work at the same situs with common supervision, require no particular background or experience, come into contact on a daily basis, and overlap in many duties, despite assignment to a particular department. Indeed, as detailed above, all of the employees Petitioner seeks to exclude from the unit perform at least some of the duties of the employees Petitioner includes in the petitioned-for unit. Because all Associates assist customers to a greater or lesser extent by department, all Associates are trained in FIRST. There is also a high degree of functional integration with regard to the tasks performed by the employees in the operations at Store 639, as all Associates in each department play a role in selling the Employer's goods to customers, and all of the Associates interface with Associates from other departments (including employees in the petitioned-for unit) in the course of their duties. The employees also share similar general working conditions (such as the Power Hour), similar wage scales, disciplinary system, employee evaluation process, and fringe benefits.

Though the Board has found separate units appropriate in retail store settings where employees with selling versus non-selling duties otherwise also shared no other community of interest, see *Stern's Paramus*, 150 NLRB 799 (1965), as established, here, all of the Associates in Store 639 are involved to some degree in the sales operations of the Employer and share an overwhelming community of interest.<sup>3</sup>

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<sup>3</sup> The Board has also held that a highly skilled, distinct and homogeneous departmental group of employees may constitute an appropriate unit in a retail setting, see *Foreman & Clark, Inc.*, 97 NLRB

Finally, it should be noted that the Board recently clarified in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) that in cases where a party contends that a “readily identifiable” group of employees, who share a community of interest, does not constitute an appropriate unit because of a lack of inclusion of additional employees, that the party so contending bears the burden of demonstrating an overwhelming community of interest with the included employees. Here, the Employer has overcome such a burden by demonstrating an overwhelming community of interest among the employees Petitioner seeks to exclude and the petitioned-for unit. It should also be stressed that *Specialty Healthcare* restates that a petitioner cannot “fracture a unit, seeking representation in ‘an arbitrary segment’ of what would be an appropriate unit.” *Id.* at \*13 (quoting *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999)).

The petitioned-for unit does not have a separate community of interest apart from the rest of the Employer’s non-supervisory employees at Store 639, and the petitioned-for unit would be a fractured unit, an arbitrary grouping of employees in this retail store setting. For all of the above reasons, the only appropriate unit is a wall-to-wall unit of all of the non-supervisory, non-security guard, employees.

As the unit found appropriate herein is larger than that requested, the Petitioner will be accorded a period of 10 days from the date of the Direction of Election in which to submit the requisite showing of interest to support an election. In the event the Petitioner does not wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this decision. See *ACL Corporation d/b/a Atlanta Hilton and Towers*, 275 NLRB 1413 (1985).

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record, I conclude and find as follows:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.

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1080 (1951), (finding that tailor shop employees were engaged in highly skilled work, distinct from the sales persons and will-call boys, constituting an appropriate unit on their own). Here, the petitioned-for unit of Associates does not share such characteristics in comparison to the Associates the Petitioner wishes to exclude, as all Associates share similar skill levels and training.

2. The parties stipulated, and I find, that the Employer is an employer as defined in Section 2(2) of the Act, is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

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

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer at its retail store 639 located at 2 Colma Blvd., Colma, California; excluding guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Home Depot Associates Union #1**, or no union. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

#### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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 which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit

employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I 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 National Labor Relations Board, Region 20, 901 Market Street, Suite 400, San Francisco, CA 94103, on or before **November 25, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>4</sup> by mail, or by facsimile transmission at (415)356-5156. The burden of

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<sup>4</sup> To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select *File Case Documents*, enter the NLRB Case Number, and follow the detailed instructions.

establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Because the list will be made available to all parties to the election, please furnish a total of **two copies** of the list, unless the list is submitted by electronic filing, facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) 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.

### **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, DC 20570-0001. This request must be received by the Board in Washington by December 2, 2011. The request may be filed electronically through E-Gov on the Board's web site, [www.nlr.gov](http://www.nlr.gov),<sup>5</sup> but may not be filed by facsimile.

**DATED AT** San Francisco, California, this 18<sup>th</sup> day of November, 2011.

/s/ J.F. Frankl  
Joseph F. Frankl, Regional Director  
National Labor Relations Board  
Region 20

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<sup>5</sup> Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

Decision and Direction of Election  
Home Depot U.S.A., Inc.  
Case 20-RC-067144

901 Market Street, Suite 400  
San Francisco, California 94103-1735