

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

In the matter of

Home Depot U.S.A., Inc.

NLRB Case No. 20-RC-067144

and

Home Depot Associates Union #1

PETITIONER'S REQUEST FOR REVIEW

Rory Thompson

238 Munich St.

San Francisco, Ca 94112

(415)734-6916

Representing

Home Depot Associates Union #1

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. PRELIMINARY STATEMENT.....1

II. PROCEDURAL HISTORY..... 3

III. STATEMENT OF FACTS 4

A. EMPLOYEES IN THE PETITIONED-FOR UNIT 4

B. EMPLOYEES EXCLUDED FROM THE UNIT 10

1. Freight Team Associates..... 10

2. Special Services Associates..... 10

3. Commercial Sales Associates 10

4. Cashiers 11

5. Receiving and RTV Associates..... 11

6. Delivery Puller..... 11

7. Lot Associates 12

8. Pro Account Sales Associates 12

9. Bay Integrity Associates..... 12

10. Phone Center Associates..... 12

11. Office Associates..... 13

12. Customer Order Specialists 13

13. Schedule Writer..... 14

C. INTERACTION BETWEEN THE PETITIONED-FOR EMPLOYEES..... 14

D. INTERCHANGE 14

TABLE OF CONTENTS

(continued)

	Page
IV. ARGUMENT	15
POINT I.....	15
COMPELLING REASONS SET FORTH HEREIN DEMONSTRATE THAT THIS REQUEST FOR REVIEW SHOULD BE GRANTED.....	15
POINT II	16
THE DECISION DEPARTS FROM THE LEGAL STANDARD THAT THE BOARD SET FORTH IN SPECIALTY HEALTHCARE.....	16
V. CONCLUSION.....	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

	Page
Cases	
Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, Petitioner. Case 15–RC–8773 August 26, 2011	2 , 15, 16, 18
General Mills Restaurants, Inc., d/b/a Red Lobster and United Steelworkers of America, AFL–CIO–CLC. Cases 7–RC–18925 and 7–RC–18926 December 14, 1990	17

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I.

PRELIMINARY STATEMENT

Home Depot Associates Union #1 (Petitioner) submits this Request For Review pursuant to Section 102.67(c) of the National Labor Relations Board Rules and Regulations. Compelling reasons exist for reconsideration of the November 18, 2011 Decision and Direction of Election ("Decision"), which determined the petitioned-for unit did not constitute an appropriate unit.

The Employer operates a business that sells home improvement products to the public at its store 0639 location at 2 Colma Blvd, Colma California. The Union seeks to represent a unit of sales floor merchandising department product specialists. The Employer maintains that, in addition to the sales

floor product specialists, the smallest appropriate unit must also include its cashiers, phone operators, computer repair and maintenance employees, freight handlers, delivery coordinators, shipping and receiving employees, lot attendants, bookkeepers, inventory management employees, door greeters, sign makers, and shelf stocking employees. There are approximately 74 sales floor merchandising department product specialists in the petitioned for unit and approximately 144 employees in the unit The Employer maintains is the smallest appropriate unit.

The Request for Review must be granted pursuant to Section 102.67(c)(1) and (2)

of Board Rules because the Decision ignores the legal standard set forth in *Specialty Healthcare* for determining an appropriate bargaining unit under Section 9(a) of the Act.

In *Specialty Healthcare*, the Board held that the traditional community of interest test must be applied to determine whether a petitioned-for unit constitutes an appropriate unit. 2011 WL 3916077, at *14. Further, if consideration of traditional community of interest factors demonstrates that employees in the petitioned-for unit share a community of interest, the employer will have to make a heightened showing to demonstrate that the petitioned-for unit is nevertheless inappropriate because it excludes additional employees. *Id.* at *16. In essence, the employer will have to show that included and excluded employees share an overwhelming community of interest.

In this matter, the Regional Director departed from the legal standard set forth in *Specialty Healthcare*.

When community of interest factors are properly considered, it is clear that that the excluded employees do not share an overwhelming community of interest with the petitioned-for employees. Employees in the petitioned-for and excluded departments have minimal work-related and casual contact, no significant permanent interchange and nonexistent temporary interchange, a substantially dissimilar degree of skills and training, and minimal job overlap.

II.

PROCEDURAL HISTORY

On or about October 19, 2011, Rory Thompson (“Thompson”), on behalf of Petitioner Home Depot Associates Union #1 (“Petitioner”), filed a Petition for Certification of Representative. (Tr. 7, 9; Bd. Ex. 1(a)). In its petition, Petitioner seeks to represent “Dept. 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 59, 70 (non-supervisory merchandise department specialists from: lumber, building materials, flooring, paint, hardware, plumbing, electrical, garden/seasonal, kitchen and bath, millwork, décor, and appliances)” at the Employer’s Store No. 639 located in Colma, California (“Store 639”). (Bd.-1(a)). The Representation Hearing in the above-styled matter commenced on November 3, 2011, and concluded on November 7, 2011.

During the hearing, Petitioner amended its petition and stated that it now also seeks to represent the sales associates in Department 85 – Kitchen and Bath Aisle. (Tr. 155, 297-98)

The Employer contends the following employees must also be included in the unit:
bay integrity associate, bilingual cashier, bilingual lot associate, bilingual sales

associate, cashier, customer order specialist, delivery puller, freight team associate, head cashier, lot associate, office associate, phone center associate, pro account sales associate, receiving associate, RTV associate, schedule writer, and special services associate. (Tr. 18, 48, 223; R-4).

III. STATEMENT OF FACTS

Store 639 in Colma Ca. is open seven days a week from 6:00 a.m. to 10:00 p.m., Monday - Saturday, and 7:00 a.m. to 9:00 p.m. on Sundays. (Tr. 16). The store is open 363 days a year. (Tr. 16). The employees at Store 639 sell lumber, building materials, hardware tools and products, plumbing and kitchen and bath products, electrical and lighting products, garden products, doors and windows, and appliances. Store 639 carries approximately 40,000 different products. (Tr. 17). Employer has two separate stores in Colma, California—Store 639 and Store 6655, but Store 639 is the only facility at issue in the petition. (Tr. 15-16). There has been no history of collective bargaining at Store 639. (Tr.317).

A. Employees in the Petitioned-For Unit

The associates in the petitioned-for unit have very similar job duties as they are sales associates in the Colma store. Employees in the petitioned-for unit apply the FIRST principles in selling to customers, pack down, take inbound calls, perform shelf maintenance, check the returns desk for return carts, restock the merchandise from the return carts,

sell product from other departments, and help in other departments. (Tr. 59, 63, 67, 70-71, 75, 80, 84-85, 90-94, 96-98, 100-04, 108-09, 112-19, 123-24, 127-28, 138-39, 153, 155-56, 232, 236). They also restock chip clips, which often requires going to another department to get the product for the chip clip. (Tr. 72-73, 75, 92)

Sales associates in the petitioned-for unit also conduct price checks for customers over the phone or in person by either finding the product on the shelf, scanning it at a register or POS, scanning it with a FIRST phone, or looking it up on a computer.⁹ (Tr. 75-78, 92-93, 96-97, 104, 109, 114, 116, 119, 124, 129, 139, 156). They also assist cashiers with price checks and locating SKU numbers when a product is missing a barcode at checkout. (Tr. 75-78, 92-93, 96-97, 104, 109, 114, 116, 119, 124, 129, 139, 156).

Many departments also require sales associates in the petitioned-for unit to create special orders. (Tr. 98, 122-23, 127). Specifically, associates in Lumber, Floor and Wall, Paint, Hardware, Garden, Millworks, Appliances, and Décor, as well as kitchen designers, all create special orders. (Tr. 98-99, 104, 109, 119, 122-23, 127). For example, special orders in the Floor and Wall and Décor departments typically involve hardwood floor, tile, and blinds that are displayed on the showroom floor. (Tr. 98). In Hardware, customers special order house numbers or a tool that the store does not stock. (Tr. 109).

Associates in the petitioned-for unit are also responsible for completing paperwork. (Tr. 86, 94, 105, 111, 114-15, 117, 122, 126, 129, 141, 156). For example, sales associates must perform markdowns, which entail completing a form and entering information into the computer. (Tr. 68, 86, 94, 111, 115, 117, 122, 126, 129, 141, 156). Special orders and BOPIS sales also require the processing and completion of paperwork. (Tr. 87, 94, 105, 111, 122, 126, 129, 141, 156). Associates in the petitioned-for unit also complete paperwork when enrolling customers in Pro Paint Rewards, which is a discount program for high volume purchasers of paint. (Tr. 106). Associates handling hazardous materials, such as in Paint and Electrical/Lighting, must also process paperwork whenever dealing with the disposal, spill, or leak of hazardous materials. (Tr. 107, 117). Sales associates in the petitioned-for unit also complete paperwork when they generate leads and arrange for installs. (Tr. 100, 115).

Hardware and Kitchen and Bath sales associates and appliance sales associates also complete paperwork when green tagging—i.e., discounting—tools and products previously used in demos. (Tr. 111, 136, 141). Garden associates must also process paperwork associated with the receiving of live plants on Mondays and Thursdays. (Tr. 120-21). Millworks associates complete paperwork during crown molding audits. (Tr. 126). Associates in Millworks, Appliances, Floor and Wall and Décor complete return goods authorizations (RGAs), which are required when a customer refuses the delivery of a specially ordered product. (Tr. 136-37, 141).

Sales associates in the petitioned-for unit also conduct bay validations, which is the process of confirming that products are listed in the correct bay in the computer system. (Tr. 190-91). Sales

associates and designers in Millwork, Floor and Wall, Kitchen and Bath, and Appliances also process pro credit card applications. (Tr. 611).

Sales associates in the petitioned-for unit also assist with will-call pickups. (Tr. 86, 105, 115, 117, 122, 126). Not only do the sales associates have to pull and stage the product for pickup by the customer, but they must also process the corresponding paperwork. (Tr. 86-87, 105, 115, 126, 149).

Although the delivery puller and pro account sales associates handle about 80 percent of all BOPIS orders because of the dedicated BOPIS phone at the Pro Desk, (Tr. 36, 80, 295), sales associates in the petitioned-for unit handle the remaining 20 percent of BOPIS orders. (Tr. 80, 150, 295, 616). Moreover, because the last associate working at the Pro Desk leaves at 6:00 p.m., all BOPIS orders after 6:00 p.m. are handled by sales associates in the petitioned-for unit.

(Tr. 80).As a result, almost all sales associates in the petitioned-for unit spend approximately 70 percent of their time providing customer service and 30 percent tasking. (Tr. 81, 101, 105, 111, 114, 117, 122, 125, 129, 156). The appliance sales associate position spends approximately 85 percent selling and 15 percent tasking. (Tr. 136, 141). Similarly, the designers in Kitchen and Bath spend 85 percent of their time selling and 15 percent tasking as they do not perform as much tasking and do not do BOPIS. (Tr. 133-36).

In addition to those duties, Floor and Wall, Millworks, Décor, and Kitchen and Bath associates create measures, which involve an outside contractor going to the customer's home to measure the area where products are to be installed. (Tr. 99-100, 124, 129, 135). After getting the

measurements from the contractor, the sales associate calls the customer and tries to close the product sale. (Tr. 100).

Floor and Wall, Paint, Plumbing, Electrical/Lighting, Garden, Millworks, and Kitchen and Bath sales associates also generate leads, which is a referral to a contractor for the home installation of products sold by Home Depot. (Tr. 99-100, 104-05, 114, 116, 119, 124, 135).

Similarly, appliance sales associates arrange for the delivery and install of appliances from Home Depot's warehouse. (Tr. 140).

Garden sales associates' additional duties including trimming plants on request, cutting Christmas trees, and caring for live plants. (Tr. 118-19). In addition, Garden associates are responsible for receiving the live plant deliveries on Mondays and Thursdays in the Receiving department. (Tr. 120-21, 282).

Associates in the sales specialist classification are found in the Kitchen and Bath, Millworks, Floor and Wall, and Garden departments.¹⁰ (Tr. 129-32). The only difference between sales specialists and sales associates are that the sales specialists have sales goals and their sales are tracked. (Tr. 130-31). Sales specialists sell the exact same products as the sales associates, and have the same tasking responsibilities. (Tr. 130-32).

Associates in the petitioned-for unit generally use the same equipment. For example,

sales associates in Lumber, Building Materials, Floor and Wall, Paint, Hardware, Garden

Millworks, and Appliances use lift equipment such as the forklift, the reach truck, and the order picker. (Tr. 63, 93, 101, 105, 110-11, 121, 125, 140). Trained associates in the petitioned-for unit, regardless of department, also use the radial arm saw, hand saw and miter saw to cut wood; the carpet cutting machine; bolt cutters to cut wire shelving; the rope burning machine; and equipment to cut plumbing pipe, shower pan liners, vinyl, blinds, keys, and wire. (Tr. 83, 93, 97, 101, 110, 125, 153-54).

Moreover, almost all of the associates in the petitioned-for unit use gloves, eye and ear protection, tape measures, safety knives, knee pads, and tin snips. (Tr. 83, 93, 95, 105, 110, 121-22, 125, 136, 140).

The Millworks sales associates and the designers in Kitchen and Bath also use the 20/20 design program, where they can show the customer the layout of a design on the computer. (Tr. 125, 133, 136, 589). Paint sales associates also use paint mixers and tint machines. (Tr. 103, 105).

A. Employees Excluded From the Unit

1. Freight Team Associates

The freight team associates take fresh products from receiving and pack it out into the overhead shelving throughout the store, and they also pack down by moving product from the overhead shelving to the selling shelves. (Tr. 142, 281, 741-42). The freight team associates in the Freight Team Pack Out department work from 10:00 p.m. to 6:30 a.m. (Tr. 142).

The store closes at 10:00 p.m. and opens at 6:00 a.m.

2. Special Services Associates

Special services associates function primarily as cashiers, they perform *most* BOPIS checkouts, they create special orders and tool rental checkouts. (Tr. 152), they create will-call orders, they contact customers to follow up on those orders once they are ready, and they create deliveries.¹³ (Tr. 147, 149, 151, 187). In addition, they do credit account managing, audit paperwork, audit will-call deliveries, and research “special” markdowns (Tr. 152).

3. Commercial Sales Associates

Two employees in the store work as “Commercial Sales Associates”. The first serves as a door greeter for the bulk of his shift (Tr. 157, 284, 606-07) and stocks shelves for the remainder. The second makes signs, runs the kids clinic, and runs the do-it-herself clinics. She is also a backup cashier. (Tr. 158).

4. Cashiers

Cashiers scan merchandise, manually enter UPC or SKU numbers into their registers, handle cash and credit cards and make change, and contact employees in the petitioned-for unit when an item cannot be scanned or is missing its UPC or SKU number (Tr. 75-78, 92-93, 96-97, 104, 109, 114, 116, 119, 124, 129, 139, 156, 158-59, 427).

5. Receiving and RTV Associates

The receiving associates work Monday through Friday during the day, except for one who works overnight from 8:30 p.m. to 4:00 a.m. (Tr. 165). Their primary duties are to receive and ship all freight and customer special orders for the entire store, stage will-calls, dump trash, and maintain the back dock. (Tr. 166, 438).

6. Delivery Puller

The Deliveries Department's delivery puller is responsible for all orders sold in the store with a delivery attached to it. (Tr. 174). Accordingly, the day before the delivery occurs, he pulls product from the sales floor or Receiving where it is staged and gets it ready to be picked up by third-party delivery services. (Tr. 174).

7. Lot Associates

The lot associates retrieve carts and help customers load their merchandise into their cars. (Tr. 177, 179).

8. Pro Account Sales Associates

Pro account sales associates sell to professional customers—i.e., contractors—the same products sold to DIY customers by the sales associates, but typically in larger quantities. (Tr. 183-85). The pro account sales associates work at a desk with a POS and two cash registers, which enables them to open up and manage pro accounts. (Tr. 183).

9. Bay Integrity Associates

The bay integrity associates are part-time associates that work from 5:00 a.m. to 9:00 a.m. Monday through Friday. (Tr. 190). Their duties include packing down, scanning each and every hole on the shelf throughout the entire store to create a pack down list, making price changes, conducting cycle counts, and conducting bay validations. (Tr. 190-91).

10. Phone Center Associates

Phone center associates are primarily responsible for handling inbound calls. (Tr. 180-81). When a customer calls the store and requests the operator, a phone center associate answers the call and greets the customer, and asks how he or she can help the customer. (Tr. 180). If the customer is asking about the price of a product or if a product is in

stock, the phone center associate will look it up on the computer. (Tr. 180-81). If the caller needs more information, the phone center associate will transfer it to the appropriate department. (Tr. 181).

11. Office Associates

The office associates work in the Vault department and perform all of the bookkeeping. (Tr. 193). They count the cash and everything that was rung up on the registers, balance the safe, create register tills, create increases when the cashiers need more money or need change, order supplies, and repair computers, printers, registers, and POS pin pads(Tr. 193). The office associates also process markdowns. (Tr. 238).

12. Customer Order Specialists

Customer order specialists work in the Lead Generator department, and their job is to expedite any install, measure, and special order that is created by following up with customers and the installers to close out sales. (Tr. 201).

13. Schedule Writer..... 36

Karina Phan, the schedule writer, assists the ASDS in writing the schedule. (Tr. 472).

Phan also assists with training and runs training reports. (Tr. 472). She also works as a cashier and sometimes serves as a head cashier. (Tr. 472).

C. Interaction Between the Petitioned-For Employees and the Other Employees

Interaction between petitioned-for employees and excluded employees is minimal (Tr. 682-83, 685-86, 688, 690-91).

D. Interchange

The Employer has failed to show evidence of temporary interchange between the petitioned for departments and the non-petitioned for departments.

As for permanent interchange, in Respondent’s Exhibit 13 The Employer has shown evidence of approximately 20 permanent transfers in a combined workforce of approximately 144 between petitioned-for departments and excluded departments in store 0639 over a period of approximately 6 years, minimal for a workforce of this size.

IV. ARGUMENT

Point I

COMPELLING REASONS SET FORTH HEREIN DEMONSTRATE THAT THIS REQUEST FOR REVIEW SHOULD BE GRANTED

Compelling reasons set forth herein demonstrate that the Board should grant this Request for Review pursuant to Section 102.67(c), which states: (c) The Board will grant a request for review only where compelling reasons exist thereof. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That substantial question of law or policy is raised because of (i) the absence of, or (ii) departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

This Request for Review must be granted based upon the grounds set forth in Section 102.67(c)(1). The Regional Director's Decision, which determined the petitioned-for unit does not constitute an appropriate unit, raises a substantial question of law and policy by departing from the legal standard set forth in *Specialty Healthcare*, 357 NLRB No. 83, *slip op.*, 2011 WL 3916077 (2011),

POINT II
THE DECISION DEPARTS FROM THE LEGAL STANDARD THAT THE
BOARD SET FORTH IN *SPECIALTY HEALTHCARE*

The Decision Departs From the Legal Standard Set Forth in *Specialty Healthcare* by Failing to Determine Petitioned-For Employees Constitute An Appropriate Unit

The Regional Director's Decision in this matter departs from the legal standard that the Board set forth in *Specialty Healthcare* for determining an appropriate unit under Section 9(a) of the Act. 2011 WL 3916077, at *14, *16.

In *Specialty Healthcare*, the Board held that if consideration of traditional community of interest factors demonstrates that employees in the petitioned-for unit share a community of interest, the employer will have to make a heightened showing to demonstrate that the petitioned-for unit is nevertheless inappropriate because it excludes additional employees. *Id.* at *16. In essence, the employer will have to show that included and excluded employees share an overwhelming community of interest. *Id.*

The Petitioner in case 20-RC-067144 maintains the employees in the proposed unit of sales floor merchandising department product specialists are readily identifiable as a group and clearly share a community of interest with one another. The sales floor merchandising department product specialists all occupy the same job classification and perform the same duties. They share common supervision are all hourly employees, all are eligible for overtime, and all receive the same benefits. They are all subject to the same work conditions, the same employee handbook and are all subject to random drug testing.

Although the larger unit proposed by the Employer might also be appropriate, The Petitioner contends that the additional employees in the larger unit proposed by The Employer do not share such an overwhelming community of interest with sales floor merchandising department product specialists that their inclusion is required.

There is virtually no temporary interchange between the petitioned-for departments and the non-petitioned for departments.

As for permanent interchange, which the Board has found to be a less significant indication of actual interchange than temporary interchange, in Respondent's Exhibit 13 The Employer has shown evidence of approximately 20 permanent transfers between petitioned for departments and excluded departments in store 0639 over a period of approximately 6 years. This number of permanent transfers in a combined workforce of approximately 144 employees over a 6 year period is minimal

Red Lobster 1 (11 permanent transfers in a combined work force of 185 employees within a one year period is minimal).

Interaction between petitioned-for employees and excluded employees ranges from infrequent to Nonexistent. The Employer's claims of frequency of interaction and working in close proximity have no basis in reality. Employees in department 38 begin work as the store closes and rarely interact with petitioned-for employees or customers.

Employees in departments 91, 95, and 97 work in closed-door private offices and are almost never seen on the sales floor.

Employees in department 96 are rarely seen inside the store.

Employees in Departments 31, 42, and 90 spend 99% of their time at their registers ringing up sales.

Employees in department 93 spend the majority of their time in the receiving area, which is closed to the public and rarely entered by petitioned-for employees.

In sum, it cannot be said that the community of interest factors between the petitioned for employees and the remaining employees “overlap almost completely”. The interests of the sales floor merchandising department product specialists are sufficiently distinct from those of the excluded departments that a unit limited to the petitioned for employees is an appropriate unit.

V. CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that The Board review the Decision and Direction of Election in this matter. The overwhelming record evidence establishes that under proper application of the legal standards set forth in *Specialty Healthcare*, the Petitioned-For Unit is an appropriate Unit.

CERTIFICATE OF SERVICE

I hereby certify that the within Request For Review has been served this date upon the Regional Director, National Labor Relations Board, Region 20, via electronic filing and upon Richard Hankins, Home Depot Representative, via electronic mail at rhankins@mckennalong.com

/s/Rory Thompson

Rory Thompson

Petitioner

DATED: December 2, 2011