

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

In the matter of

Home Depot U.S.A., Inc.

and

NLRB Case No. 20-RC-067144

Home Depot Associates Union #1

**EMPLOYER'S RESPONSE IN OPPOSITION TO PETITIONER'S REQUEST
FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION**

Richard B. Hankins
Mark L. Keenan
Brennan W. Bolt
McKenna Long & Aldridge LLP
303 Peachtree Street NE
Suite 5300
Atlanta, GA 30308
(404) 527-4000

Attorneys for
Home Depot U.S.A., Inc.

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**I.
INTRODUCTION**

Home Depot U.S.A., Inc. (“Employer” or “Home Depot”) respectfully submits this Response in Opposition to Petitioner’s Request for Review of the Regional Director’s Decision and Direction of Election (“DDE”) dated November 18, 2011 pursuant to Section 102.67(e) of the Board’s Rules and Regulations.

**II.
OVERVIEW**

On November 18, the Regional Director for Region 20 issued a Decision and Direction of Election finding that the Petitioner’s requested unit, which sought some, but not all, of the sales associates at the Employer’s Colma retail store, was inappropriate, and that the only appropriate unit, under long-standing Board precedent, was a traditional retail wall to wall unit.

Petitioner’s Request for Review of that decision suggests that the Regional Director either “ignored the legal standard” set forth in Specialty Healthcare, 357 NLRB No. 83 (2011), or that the decision somehow “departs” from that standard.

Petitioner’s Request for Review must be denied because it fails to raise a compelling reason for review and simply misstates the Regional Director’s decision. The DDE contains a

detailed factual and legal analysis of the community of factors that have been historically applied in a retail setting, carefully analyzed the Board's traditional community of interest factors, and specifically assessed the petitioned-for unit in light of the Board's holding in Specialty Healthcare. Based on that analysis, the Regional Director found the petitioned for unit inappropriate given that the petitioned-for unit consisted of an arbitrary and fragmented segment of the Employer's work force at the Colma store -- the precise type of unit which is, and always has been, inappropriate under long-standing Board precedent including Specialty Healthcare.

The Regional Director then concluded that the only appropriate unit was a traditional retail wall to wall unit given the functional integration, interchange, and common sales duties performed by the Associates at the Colma store:

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.[footnote omitted].

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.

(DDE, p. 15).

As set forth in greater detail below, Petitioner's request for review raises no issues compelling review of the Regional Director's DDE. Therefore, the Request for Review must be denied.

III. **PROCEDURAL HISTORY**

On or about October 19, 2011, Petitioner Home Depot Associates Union #1 filed a Petition for Certification of Representative. (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 Employer's retail Store No. 639 located at 2 Colma Blvd., Colma, California ("Store 639"). (DDE, p. 1).

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 also sought to represent the sales associates in Department 85 – Kitchen and Bath Aisle. (DDE, n.1).

Because Store 639's operations are highly integrated and because substantially all the employees at Store 639 share a substantial community of interest, Home Depot asserted that the only appropriate unit was a wall-to-wall unit including all employees at Store 639. (DDE, p.1). Petitioner stated that it would proceed with the election if the Regional Director directed an election in a unit that included all of these employees. (Tr. 732).

On November 18, 2011, the Regional Director issued the DDE finding that that the smallest appropriate unit was a wall to wall unit. (DDE, p. 15). On December 2, 2011, Petitioner filed a request for review.

IV. STATEMENT OF FACTS

A. Store 639

The Employer's employees ("associates") 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 to two types of retail customers: do-it-yourself customers and "pro" customers (contractors). (DDE, p. 2; Tr. 5, 17, 19). Store 639 has approximately 150 hourly associates that are assigned to work in one of 28 departments. (DDE, p. 2). There has been no history of collective bargaining at Store 639. (DDE, p. 2).

The associates report to department supervisors, who report to assistant store managers, who in turn report to the store manager. (DDE, p. 1-3). However, all supervisors and managers have authority and responsibility to assign associates belonging to other departments. (DDE, p. 3). For example, Assistant Store Manager Rhosseau "Duke" Despanie oversees the Hardware, Plumbing and Kitchen and Bath departments, but he also provides direction to cashiers in the Cashier Department. (DDE, p. 3).

All supervisors and managers also have authority to discipline any associate regardless of his or her department. (DDE, p. 3; Tr. 353, 356-57; R-14, R-15). Moreover, multiple supervisors and managers are involved in processing requests for leave. (DDE, p. 3). The management team members also issue performance recognition awards to any associate regardless of department or job classification. (DDE, p. 3).

B. Policies, Duties, and Responsibilities Common to All Employees

Nearly all associates wear the Home Depot uniform consisting of a collared shirt or blouse and an orange Home Depot apron stating “I put customers FIRST.” (DDE, p. 2; Tr. 20-21, 23; R-2). The FIRST program, a sales and customer service oriented program, requires all associates to:

- Find: seek out customers;
- Inquire: ask open-ended questions about customers’ projects;
- Respect: respect all customers by making eye contact, listening, and behaving in a respectful manner;
- Solve: address the customers’ needs and ensure they have everything for their projects;
- Thank: thank every customer for shopping with Home Depot and invite them back to the store.

(DDE, pp. 2-3).

All associates must also receive FIRST and product knowledge training. (DDE, p. 3). All associates, regardless of whether they are merchandising, cashiers, receiving lot attendants, bay integrity or other classifications, receive FIRST training because they all regularly interact with customers. (DDE, p. 3). While there are slight variations of FIRST training for certain job classifications like cashiers and pro account sales associates, the FIRST training received by all associates is generally the same. (DDE, p. 3).

The Employer uses the same performance review process for all job classifications based primarily on each associate’s adherence to the FIRST principles. (DDE, p. 3). To determine an associate’s rating, Store 639 uses a “roundtable” process in which the entire leadership team—

store manager, all assistant managers, and all department supervisors—provides feedback on every associate's performance in the store. (DDE, p. 3; Tr. 34, 204, 498).

All Store 639 associates have access to the same human resources (HR) services. (DDE, p. 11). Romina Gutierrez, the Associate Support Department Supervisor (ASDS) responsible for employee relations, staffing, training, and employee schedules, is Store 639's only HR representative onsite, and she supports all Store 639 associates. (Tr. 240, 468-69, 479-80). All associates can also call Home Depot's corporate HR service center regarding any human resources or benefits issue or the 800 Aware line to seek help resolving any dispute or disagreement they have with management. (DDE, p. 11).

Store 639 uses the same process to hire associates for all departments and job classifications. (DDE, p. 4; Tr. 469, 486, 488). In hiring new associates, there are no special qualifications needed for any position; however, the Company does give consideration to a candidate's experience in the type of position for which it is hiring. (DDE, p. 4). All new associates receive the same product knowledge training and four-hour orientation from the ASDS regardless of their job classification. (DDE, p. 4; Tr. 470, 488; R-7).

All associates also receive training on forklifts, reach trucks, and order pickers. (Tr. 60-61). While all associates take a computer class on lift equipment before working on the sales floor, not all take the hands-on training that is also required before they can use the lift equipment. (Tr. 61). Store 639 does not require any associate to drive lift equipment, but any employee can receive the required training upon request. (DDE, p. 5). Store 639 has about 50 associates certified to drive a forklift. (DDE, p. 5).

All associates clock in and out on the same time clock, (DDE, p. 11), and all associates' work schedules are created by the ASDS. (Tr. 468). Under the Employer's scheduling system,

associates are scheduled to work in both their primary and secondary departments. (DDE, p. 4). Based on this scheduling process, receiving employees are scheduled to work in Lumber, Building Materials, and Floor and Wall; sales associates in the petitioned-for unit are scheduled to work at the Pro Desk; and pro account sales associates are scheduled to work in Millworks, Paint, Appliances, Electrical, Lumber, Building Materials, and Hardware. (DDE, p. 4; Tr. 517; R-10).

Despite the fact that associates are assigned to specific departments, associates are often found by customers in other departments and aisles throughout the store. (DDE, p. 4; Tr. 52, 53, 55). Because almost all associates wear the same orange apron, customers cannot distinguish between sales associates, cashiers, freight team associates, receiving associates, designers, etc., and thus seek help from any associate they encounter. (DDE, pp. 4-5). Indeed, Mr. Thompson, Petitioner's representative and an electrical associate, testified that he travels the entire store performing his duties and is required to assist customers regardless of the product. (Tr. 669-670). Associates' 15-minute break periods are extended by a five minute grace period because the Employer knows that customers frequently stop employees to and from their break. (DDE, p. 4).

All associates, regardless of department and classification, are paid hourly, and none are eligible for any commission payment. (DDE, p. 10). All job classifications have a max hire rate. (DDE, p. 10). For example, the max rate is \$9.65 for lot associates; \$10.50 for cashiers; and \$12.00 for both sales associates and freight associates. (DDE, 10). All associates, regardless of classification and department, receive pay raises annually after one year, and all associates receive merit increases based on their individual performance reviews. (DDE, pp. 10-11). Accordingly, although a cashier starts at a lower rate, some cashiers now earn more than sales associates because of their tenure and performance. (DDE, p. 11). Other potential compensation

for associates is monetary awards under the Homer Awards Program and bonuses based upon store performance under the Success Share program in which all associates participate. (DDE, p. 10).

All associates, regardless of department or job classification, are eligible for Home Depot's corporate-wide benefits:

- Four hours of sick time per month if full time;
- Paid vacation (amount dependent upon years of service and varies between full time and part-time employees);
- Medical benefits from HealthNet or Kaiser (level of benefits varies between full time and part-time employees);
- Dental for full time employees;
- Vision for full time employees; and
- 401(k) after 90 days (company matching for full time employees after one year).

(DDE, p. 11).

All associates, regardless of department, that work between 10:00 a.m. to 2:00 p.m. Mondays through Fridays and from 8:00 a.m. to at least 5:00 p.m. on weekends must participate in Power Hours, which is a program designed to boost customer service during the store's busiest hours. (DDE, p. 3). Accordingly, during Power Hours, all associates stop tasking and focus on customer service.¹ (DDE, p. 3). During Power Hours, operational employees are staged in the front of the store near the Garden, Floor and Wall, Plumbing, Hardware, Building Materials, and Lumber departments to greet and assist customers. (Tr. 57-58).

¹ Tasking is the Employer's term for non-selling tasks such as pack downs, which is a restocking process that involves taking product located overhead (i.e., on metal shelving higher than eight feet) and bringing it down to the selling shelves (i.e., shelving below eight feet). It also includes receiving products from the back dock and chip clip loading. (DDE, p. 5).

The Employer's registers are located at the front of the store, where customers can pay with cash, credit cards, and debit cards. (DDE, p. 4). Cashiers and associates trained as a backup cashier are permitted to use any register in the store at any time. (DDE, p. 4). All newly hired associates are required to receive training in operating a cash register. (DDE, p. 4). However, Pro Desk, Floor and Wall, Millworks, Appliances, Kitchen and Bath, and Specials Services all have a point of sale (POS) terminal, where customers can pay with debit and credit cards. (DDE, pp. 3-4; R-3). Accordingly, any associate, regardless of department, can use any POS in the store to ring up any type of merchandise for a customer paying by debit or credit. (DDE, pp. 3-4; Tr. 41-43, 45-46).

C. Duties Common to the Petitioned-For Unit

All associates share common duties. (DDE, p. 5). First, the associates in the petitioned-for unit apply the FIRST principles in selling to customers, pack down (when merchandise that is located overhead on the racks is lowered by a lift to the "selling" shelves), take inbound calls, perform shelf maintenance, retrieve products from Receiving, check the returns desk for return carts, restock the merchandise from the return carts, 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 Home Depot's Buy Online Pick-up In Store (BOPIS) program. (DDE, p. 5). 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. (DDE, p. 5).

Associates in the petitioned-for unit generally use the same equipment such as the forklift, the reach truck, and the order picker to help customers load their cars and to pack down. (DDE, p. 5). Trained associates in the petitioned-for unit 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. (DDE, pp. 5-6). Paint sales associates also use paint mixers. (DDE, p. 5). 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. (DDE, pp. 5-6).

D. Classifications Petitioner Sought to Exclude

The duties for the petitioned-for unit are similar to those performed by the associates Petitioner sought to exclude:

1. Cashier Department Associates

Cashiers primarily work at the cash register area of the store and are responsible for “[t]aking care of the customer” and “making sales.” (DDE, p. 6; Tr. 418). Accordingly, for every customer that comes to the register to check out, cashiers apply the FIRST principles. (Tr. 159, 418, 422, 496-97). Cashiers use FIRST in the checkout process by greeting the customer; asking if they found everything he or she needed; “read the cart” to determine if there are any additional products the customer might need for his or her project such as nails, wood, hardware, tools, drill bits, paint key for paint cans, etc. to promote attachment sales; and respect the customer. (DDE, p. 6; Tr. 26-27). When not busy with a customer, cashiers stand in front of their registers to greet and assist customers. (DDE, p. 6).

Cashiers spend about 30 percent of their time on the sales floor as well. (DDE, p. 6; Tr. 429). For example, Ms. Candiller, a cashier, testified, that she goes onto the sales floor to show customers where product is located. (DDE, p. 6; Tr. 421). Indeed, approximately 40 percent of customers ask cashiers where to find product as opposed to simply looking for it themselves. (DDE, p. 3; Tr. 421). Cashiers are also pulled off registers weekly to help in the sales departments. (Tr. 161-62, 388-89). Accordingly, cashiers spend 100 percent of their day

selling—80 percent at their registers while ringing up customer’s purchases and the remaining 20 percent on the sales floor.² (Tr. 160-61, 423-24).

2. Commercial Sales Associates

Two sales associates work in the Commercial Sales department. (DDE, p. 6; Tr. 157). They spend at least 30 percent of their work time selling. (DDE, p. 6; Tr. 157-58). 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. (DDE, p. 6).

3. Receiving Associates

The receiving associates primarily unload trucks and ship and transfer freight using machinery such as a reach truck and manual and electric pallet jacks. (DDE, p. 6). However, receiving associates also interact with customers and sell merchandise as they are used weekly during Power Hours as greeters and apply FIRST principles. (DDE, p. 7; Tr. 167). Also, because the receiving area is not blocked off from the store, receiving associates assist customers wandering back into Receiving daily by walking the customer back to the store floor to locate the product or to find a sales associate if the customer needs more specific knowledge about a product. (DDE, p. 7). They also respond three or four times a day to calls from the “call box,” which is signaled when a customer needs assistance and cannot find a free associate. (DDE, p. 7).

4. RTV Associates

Part of the Receiving Department is the return to vendor (RTV) associate who processes all returned merchandise that is either defective or otherwise non-salable. (DDE, p. 7). The RTV

² The Cashier department also has head cashiers, or line managers, who are responsible for managing the lines at the registers to ensure they do not get too long, assisting in ringing up customers, and handling voids and price markdowns. (DDE, n.2).

associate also oversees the disposal of hazardous waste materials by any associate in the store. (Tr. 107).

In addition to those duties, the RTV associate is part of the Power Hours greeting schedule. (DDE, p. 7). Moreover, throughout the day she is walking to and from the front of the store and during that time customers frequently stop her seeking assistance. (DDE, p. 7). Further, like the other receiving associates, she also assists customers that wander into the receiving area. (Tr. 173). Accordingly, the RTV associate assists customers 30 times a day in addition to her customer interaction during Power Hours. (DDE, p. 7; Tr. 173).

5. Delivery Puller

The Deliveries Department's delivery puller is responsible for all orders sold in the store with a delivery attached to it. (DDE, p. 7). However, the delivery puller is a greeter during Power Hours. (DDE, p. 7; Tr. 174). In addition to Power Hours, the delivery puller goes onto the sales floor selling like a sales associate. (DDE, p. 7; Tr. 175). The delivery puller spends approximately 50 percent of his time pulling merchandise and 50 percent on the sales floor selling. (Tr. 175). The delivery puller uses the forklift, reach truck, order picker, slip sheet machine, electric pallet jack, manual pallet jack, tape measure, safety knife, tin snips, ratchet strap, and gloves. (DDE, p. 7; Tr. 176, 181).

6. 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. (DDE, p. 7). Freight Team associates interact with and assist customers for about 20 to 30 minutes every evening at the beginning of their shift and approximately 30 minutes at the end of their shift. (DDE, pp. 7-8).

Like the associates in the petitioned-for unit, the freight team associates are trained in and use the FIRST principles to sell to customers, they perform price checks, they cut products, they mix paint, they make keys, they are responsible for shelf maintenance, and they clean. (DDE, p. 8; Tr. 144, 146). Like the sales associates in the petitioned-for unit, the Freight Team associates must also complete paperwork. (DDE, p. 8). The freight team associates also use some of the machinery and tools as some of the associates in the petitioned-for unit. (DDE, p. 8).

7. Special Services Associates

Special services associates have multiple functions: they ring as cashiers, they perform most BOPIS checkouts,³ they create special orders, they create will-call orders, they contact customers to follow up on those orders once they are ready, and they create deliveries.⁴ (DDE, p. 8). Moreover, just like the associates in the petitioned-for unit, special services associates pull and stage will-call orders. (DDE, p. 8). They also get involved with leads for installs as customers frequently approach them entering the store stating that they need something installed. (DDE, p. 8). Special services associates also serve as greeters. (DDE, p. 8). Accordingly, special services associates spend about 50 percent of their work time selling versus tasking. (DDE, p. 8).

8. Pro Account Sales Associates

Pro account sales associates sell to professional customers—i.e., contractors—the same products sold to do-it-yourself customers by other associates, but typically in larger quantities. (Tr. 183-85). The pro account sales associates spend about four to five hours of their work day at a desk with a POS and two cash registers, which enables them to open up and manage pro

³ Again, BOPIS is Home Depot's Buy Online Pick-up In Store program, and customers who ordered products online pick them up from the Special Services desk. (DDE, pp. 5, 7).

⁴ The special orders and will-call orders are exactly the same types of orders made by the sales associates. (Tr. 148).

accounts. (DDE, p. 8; Tr. 183). They spend the remainder of their time working on the sales floor assisting customers. (DDE, p. 8).

However, pro account sales associates are not the only associates who interact with pro customers. (Tr. 184). Indeed, Lumber and Building Materials sales associates as well as associates from Hardware, Floor and Wall, Appliances, and Plumbing interact with pro customers about 50 to 100 times a day. (Tr. 184). Similarly, pro account sales associates also assist do-it-yourself customers about 50 to 100 times a day. (Tr. 40, 85, 184). Pro account sales associates also help other departments with pack downs, delivery pulls, and retrieving will-calls and special orders from receiving. (DDE, p. 8; Tr. 187-88). The pro account sales associates also serve as cashiers and assist with paperwork and handle BOPIS orders. (DDE, p. 8). Accordingly, pro account sales associates spend 70 percent of their time selling. (DDE, p. 8).

9. Bay Integrity Associates

The bay integrity associates are regular part-time employees whose 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. (DDE, pp. 8-9). Bay integrity associates also assist customers about 20 to 30 times a day while they are working in the various departments scanning merchandise, and are trained in the FIRST principles. (DDE, p. 9).

10. Pack Down Associates

The freight team associates in the Pack Down department have the same direct supervisor as the bay integrity associates. (DDE, p. 9). Their primary duty is to pack down overhead freight from shelving, and they work side by side with associates in the petitioned-for unit every day during the week in the pack down process. (DDE, p. 9; Tr. 742). Moreover, the Pack Down associates have customer service duties and apply the FIRST principles. (Tr. 743). Similar to

many of the other associates, the freight team associates use the forklift, reach truck, and order picker. (DDE, p. 9; Tr. 146).

11. Phone Center Associates

Phone center associates are primarily responsible for handling inbound calls, and thus greet customers on the telephone and inquire as to what they are looking to purchase. (DDE, p. 9; Tr. 180-81). To the extent possible, the phone center associate will try to answer the caller's question. (DDE, p. 9; Tr. 180). For example, 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. (DDE, p. 9). If the caller needs more information, the phone center associate will transfer it to the appropriate department. (DDE, p. 9).

Phone center associates also have face-to-face interactions with customers. (DDE, p. 9). For example, one phone center associate spends a considerable amount of time on the sales floor and takes inbound calls from the Special Services desk. (DDE, p. 9; Tr. 181). He is also in the aisles selling—i.e., taking customers to products—about 30 to 40 times a day. (DDE, p. 9).

12. Office Associates

The office associates work in the Vault department and perform all of the bookkeeping. (DDE, p. 9). 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 come out to the floor to fix computers, printers, registers, and POS pin pads. (DDE, pp. 9-10). Like all other associates, office associates are trained in FIRST principles. (DDE, p. 10).

13. 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. (DDE, p. 10). Typically, the customer order specialists deal with kitchen installs, kitchen measures, countertops, doors and windows, flooring and blinds similar to the Floor and Wall, Kitchen and Bath, and Décor sales associates. (DDE, p. 10; Tr. 99, 127-28, 202). Moreover, because of their knowledge in custom orders, they also work on the floor and sell like the associates in the petitioned-for unit. (DDE, p. 10). As a result, they interact with customers about 10 to 13 times a day. (DDE, p. 10).

14. Lot Associates

The lot associates primarily retrieve carts and help customers load their merchandise into their cars in the same manner as the sales associates. (DDE, p. 10). Because lot associates are typically the first associate customers see, lot associates also apply the FIRST selling principles to greet customers and inquire about their projects. (DDE, p. 10; Tr. 158, 177). When customers are on their way out of the store, lot associates again apply the FIRST principles to greet the customer, ask if they found everything they needed, ask if they need loading assistance, treat the customer with respect, solve any problems they might have had, and thank them for shopping at Home Depot. (DDE, p. 10; Tr. 177).

Lot associates also frequently interact with customers inside the store as lot attendants are used to help pull special orders, pull will-call orders, and to help out in the sales departments. (Tr. 178, 290). Some of the lot attendants are also trained on how to ring on registers, work the self-checkout lanes, and how to cut keys, rope, chain, and lumber. (Tr. 178). Accordingly, lot associates help customers all day, with 30 percent of their day being on the store floor selling products to customers. (Tr. 178-79).

15. Schedule Writer

Karina Phan, the schedule writer, assists the ASDS in writing the schedule. (Tr. 472). However, Phan also assists with training and runs training reports. (Tr. 472). Phan previously

worked in different departments and is bilingual, so she still helps out on the registers and on the sales floor with customers. (Tr. 472). For example, she sometimes works and translates in Appliances and at the Pro Desk. (Tr. 472). She also works as a cashier and sometimes serves as a head cashier. (Tr. 472).

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

Contrary to Petitioner's claim that interaction between the petitioned-for employees and the other employees is "infrequent to [n]onexistent," the record is replete with interaction between the petitioned-for unit and all job classifications the Petitioner seeks to exclude.⁵

Specifically, associates in the petitioned-for unit (and sales specialists) interact with:

- the bay integrity associates in connection with the pack down lists (Tr. 195, 198);
- the delivery puller 15 to 20 times a day (Tr. 195, 198);
- the freight team on a daily basis (Tr. 195, 198);
- cashiers 100 to 200 times daily with price inquiries alone (Tr. 194-95, 198, 200-01);
- lot associates on a daily basis in connection with bringing out pallets or units of lumber and drywall to help customers load (Tr. 196)
- phone center associates when inbound calls are transferred to their department or when the sales associate contacts the phone center associate to get a telephone number for another store (Tr. 196-98);

⁵ Mr. Thompson was the only witness who testified in support of the fragmented unit requested. In contrast, the Employer presented testimony from store management about overall store operations, as well as testimony from a cashier, receiver, and freight team associate. Mr. Thompson's familiarity with store operations and the functional integration of the stores' associates was obviously limited given that he is a part-time employee who works only three days a week, rarely opens or closes the store, and admitted that he has only seen some employees work one time. (Tr. 682-83, 685-86, 690-91). For example, his testimony about associates' alleged lack of interaction with customers and their alleged inability to assist customers was not credible because he admitted he had little interaction with the associates in question and thus does not witness their interaction with customers. (Tr. 688, 691, 708). This was true for the bulk of Mr. Thompson's testimony about store operations and associate integration.

- pro account sales associates on a daily basis to verify products for customers, in pulling orders, and helping customers load (Tr. 197-98);
- special services associates in the coordination and pick-up of will-call and special orders as well as in completing the paperwork for those orders (Tr. 198, 200);
- the front-end associates such as cashiers and special services associates when customers stop them on their way to the restroom and need product information⁶ (Tr. 511);
- cashiers frequently go onto the sales floor to show customers where product is located and partner with a sales associate who is knowledgeable about the product (Tr. 420-21);
- cashiers are pulled off of their register weekly to work alongside sales associates in the sales departments (Tr. 161-62, 388-89);
- receiving associates when there is not enough product on the floor or when an appliance is not in the showroom (Tr. 198, 447, 511-12);
- pack down associates as they work with the sales associates every day and when pack down associates are helping customers (Tr. 742-44);
- the RTV associate in connection with hazardous materials and pulling products to be returned to a vendor (Tr. 198-99); and
- the schedule writer as she often serves as a translator for sales associates and non-English speaking customers, still works on the sales floor, also works as a cashier, conducts and coordinates training for sales associates, and participates in a safety program with them. (Tr. 473).

Other examples of interaction include Lumber sales associates assisting pro account sales associates with their customers about 50 to 100 times daily. (Tr. 85). The cashiers assigned to the outside garden registers assist the Garden sales associates with watering plants. (Tr. 120). The Garden associates work alongside the receiving associates when the Garden associates receive live plant deliveries in the receiving area. (Tr. 121). Millworks associates partner with the RTV associates to audit the crown molding. (Tr. 126). Millworks, Appliances, Floor and Wall, and Décor sales associates partner with the RTV associate to complete RGAs. (Tr. 137). Also,

⁶ This still occurs even if the associate removes his or her orange apron and are holding it because customers can still see the apron and know that the associate works there. (Tr. 511).

anytime a sales associate uses lift equipment, they usually use a lot associate as their required spotter. (Tr. 196, 198). Moreover, the sales specialists in Kitchen and Bath and in Millworks interact with the receiving associates to verify special orders. (Tr. 199). The Appliance sales associates also have considerable interaction with the special services associates. (Tr. 199). The undisputed record evidence also establishes that while they work overnight, the freight team associates work side by side with sales associates about three to four hours a shift. (Tr. 366-67).

There is additional interaction between all job classifications at store-wide meetings held every quarter in which all associates in all job classifications are asked to attend. (Tr. 344-45, 505; R-10). In addition, every six months there is a store-wide Success Share meeting and breakfast for all associates. (Tr. 507; R-10). In addition, associates from different departments often take breaks at the same time in the break room, (Tr. 446), and they all attend special events. (Tr. 507-08; R-10).

F. Interchange

Similar to his claim regarding interaction, Petitioner's assertion that there is "virtually no" temporary interchange and only "minimal" permanent interchange is unsupported by the record evidence. Rather, the undisputed record evidence conclusively demonstrates considerable temporary and permanent interchange between the petitioned-for unit and all other job classifications at Store 639. For example, with respect to temporary interchange, it is undisputed that Michelle Wong, a sales associates, serves as a backup cashier, and that all new sales associates, sales specialists, and designers must train as backup cashiers. (Tr. 64-65, 305, 306, 368, 227, 229). Also, freight team associates cover for Millworks sales associates, and lot associates cover for lumber sales associates. (Tr. 310, 312). Very recently, a receiving employee temporarily worked in the Garden department to fill in for a sales associate. (Tr. 451-52). Moreover, because many associates have worked in multiple departments during their tenure,

many associates assist customers in departments to which they are no longer assigned. (Tr. 53-54).

In addition, temporary interchange will increase as a result of Home Depot's corporate-wide enhanced scheduling system called FaST, which has already been implemented at many locations, and will be implemented at Store 639 this month. (Tr. 512). In preparation for the new system, associates completed FaST profile worksheets designating a secondary department where the associate is a product knowledge expert. (Tr. 513-14; R-11). Once the new scheduling system is implemented at Store 639, associates will be scheduled to work in both their primary and secondary departments. (Tr. 514). Based on the completed FaST profiles in the record, this will result in receiving employees working in Lumber, Building Materials, and Floor and Wall; associates in the petitioned-for unit working at the Pro Desk; and pro account sales associates working in Millworks, Paint, Appliances, Electrical, Lumber, Building Materials, and Hardware. (Tr. 517; R-10). Similarly, the schedule writer can be scheduled to work as a head cashier, and cashiers can be scheduled to work in Garden and at the Pro Desk. (Tr. 516).

There is also substantial permanent interchange as it is common for associates to move from merchandising associate roles into other positions and vice versa. (Tr. 308, 372, 440-41, 449, 475, 523, 655). For example, the record evidence establishes that at least 25 employees alternated between merchandising and operations-type positions within the past few years. (Tr. 378; R-13). A receiving associate testified that he could think of approximately 15 examples of sales associates moving to operations within the past five years. (Tr. 449). In addition, the record evidence establishes that Mr. Thompson himself started as a cashier and is now a sales associate. (Tr. 378, 655).

V.
ARGUMENT

Petitioner asserts that the Regional Director’s decision is at odds with Specialty Healthcare, 357 NLRB No. 83 (2011). Specifically, it claims that the Regional Director erred in ignoring the general principle, repeated in Specialty Healthcare, that a bargaining unit need only be appropriate and not the most appropriate when he found a wall to wall unit is the smallest appropriate unit at Store 639. However, the Regional Director’s decision is consistent with existing Board law and fully supported by the record evidence. Accordingly, Petitioner’s request for review must be denied.

A. Specialty Healthcare Did Not Modify The Board’s Community of Interest Test

While the Board in Specialty Healthcare sought to clarify the legal standards for determining when petitioned-for units are appropriate for certification under Section 9(b) of the Act, it also took care to explain that it was not modifying the Board’s historical community of interest test. In Specialty Healthcare, the Board reaffirmed its long standing policy that a unit need not be the most appropriate unit, but instead, only an appropriate unit:

Procedurally, the Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds no further. As the Board recently explained, “the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board’s inquiry ends.”

Specialty Healthcare, 357 NLRB No. 83, slip op. at 8. However, the Board also recognized that the Act limits the relevancy of the unit requested by the petitioner:

Section 9(c)(5) of the Act provides that “the extent to which the employees have organized shall not be controlling.” But the Supreme Court has made clear that the extent of organization may be “consider[ed] . . . as one factor” in determining if the proposed unit is an appropriate unit. NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438, 442 (1965). In Metropolitan Life, the Court made clear that “Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization.” Id. at 441 (emphasis added). In other words, the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional

grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit.

Id. at 9. Moreover, the Board reiterated that an employer's administrative or organizational structure must factor into the analysis of whether a unit is appropriate:

A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit. Pratt & Whitney, 327 NLRB 1213, 1217 (1999). "[T]he Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis." Seaboard Marine, 327 NLRB 556, 556 (1999). If the proposed unit here consisted of only selected CNAs, it would likely be a fractured unit: the selected employees would share a community of interest but there would be "no rational basis" for including them but excluding other CNAs. If the proposed unit here consisted of only CNAs working on the night shift or only CNAs working on the first floor of the facility, it might be a fractured unit. Cf. Wheeling Island Gaming. In other words, no two employees' terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries.

Id. at 13.

Thus, understanding that the Board must do more than simply accept the unit requested by the petitioner, the Board reaffirmed that determining an appropriate unit requires the application of its traditional community of interest test while taking into consideration the employer's organizational structure:

We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Id. at 12-13. As such, the Board did not alter its traditional community of interest test, and expressly stated as much in Specialty Healthcare. Id. at n.22. Rather, it simply applied the

Board's historic community of interest test to determine if the petitioned-for unit was appropriate. Id.

B. The Regional Director Correctly Found That The Employer's Proposed Wall To Wall Unit Is The Only Appropriate Unit Given The Retail Nature Of the Employer's Colma Store.

1. The analytical framework for units in the retail industry.

Given that Specialty Healthcare went to great lengths to disclaim that it was applying a "new" community of interest test, the Board's extensive precedent governing retail stores clearly has not been overruled or altered by Specialty Healthcare. In that precedent, the Board has repeatedly held that typically the only appropriate unit at an employer's retail location is a wall to wall unit absent evidence that the employees in the requested unit consist of employees who do not share a mutuality of interests with other employees. Bullocks, Inc., 119 NLRB 642, 643 (1958); May Department Stores Company, 97 NLRB 1007, 1008 (1951); Charrette Drafting Supplies, 275 NLRB 1294 (1985); A. Harris & Co., 116 NLRB 1628 (1956).

Specialty Healthcare did not abrogate the Board's preference for wall to wall units in a retail setting as the Board's precedent in the retail industry recognizes that the employees at a retail store generally share an overwhelming community of interest and cannot be divided without fracturing the unit. For example, in Levitz Furniture Company of Santa Clara, Inc., 192 NLRB 61 (1971), the employer operated a retail store location selling furniture. The Teamsters sought a unit consisting only of the warehouse employees. Although warehouse employees are routinely recognized as an appropriate unit, the Board nevertheless dismissed the petition, finding that the only appropriate unit, given the integrated nature of the employer's retail operation, was a wall to wall unit consisting of all employees at the location including the selling and non-selling employees (which included the warehouse employees). In so holding, the Board

specifically noted the substantial interrelation and functional integration necessary to generate sales in a retail establishment:

All employees enjoy substantially the same benefits and conditions of employment and are hourly paid, except for the salesmen who receive a guarantee plus commission. Selling and nonselling employees share the same lounge, have the same coffeekbreaks, punch the same timeclocks, and, except for the truckdrivers, have the same lunch periods.

The entire store activities are devoted to all phases of selling merchandise. Individual sales thus require the close cooperation of several selling and nonselling categories; in the course of such sales there is substantial contact between customers and most of the selling and nonselling employees, including salesmen, EDP clerks, cashiers, warehouse clerks, ACD employees except maids, truckdrivers, and customer service employees. There is likewise considerable movement by employees throughout the entire building in the performance of their primary duties,

Id. at 62.

Likewise, in Bullock's, 119 NLRB at 643, the Petitioner sought a unit consisting exclusively of shoe department sales persons. The Board rejected the requested unit and dismissed the petition given the absence of a community of interest among the shoe department salespersons distinct from other retail employees at the store. In so holding, the Board noted:

The Board has long regarded a storewide unit of all selling and nonselling employees as a basically appropriate unit in the retail industry. Smaller units of retail clothing store employees are appropriate when comprised of craft or professional employees or where departments composed of employees having a mutuality of interests not shared by other store employees are involved. As appears from the above, however, the record herein fails to establish any craft or professional skills or status among the shoe salesmen and it does not show that the skills, duties, interests, and conditions of employment of those employees are sufficiently different from those of other employees to warrant their establishment in a separate unit on any other basis. In these circumstances, the bargaining history described above cannot justify a Board determination that the Employer's shoe department employees constitute an appropriate unit.

Id. at 643.⁷

⁷ See also Richmond Dry Goods Co., 93 NLRB 663 (1953) (dismissing petitions which sought separate units of warehouse and retail sales employees as inappropriate where significant

Moreover, the Board's pre-Specialty Healthcare decisions governing the retail industry are consistent with the principles set forth in Specialty Healthcare as the Board has established three conditions under which it will make an exception and find a subsection of employees of a retail store operation 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." A. Harris, 116 NLRB at 1632. Simply stated, the Board's preference for a wall to wall unit in the retail industry is based on the historical functional integration present at most retail stores, like Home Depot, and is consistent with the Board's long-standing community of interest test re-confirmed by Specialty Healthcare. Thus, that preference still governs absent evidence that the employees in the requested unit consist of employees who do not share a mutuality of interests with other employees.

2. A wall to wall unit is the only appropriate unit at Store 639.

As the Regional Director found, this case falls squarely within the Board's long-standing line of retail cases that generally find a wall to wall unit to be the only appropriate unit as the petitioned-for unit is not geographically separated from the retail store operations, employees in the requested unit are overwhelmingly integrated with excluded employees, and employees in the requested unit do not have separate supervision.

interrelation of proposed units and their functional integration with respect to customer sales and service established that a traditional wall to wall unit was appropriate); S.H. Kress & Co., 92 NLRB 15 (1950) (noting that "[t]he Board has frequently pointed out the appropriateness of a unit embracing all selling and nonselling employees in a department store" (including cashiers), and confirming "the strong mutual interests which office clericals [cashiers] share with the sales personnel, and have for this reason included them in the over-all store unit").

a. *The associates share an overwhelming community of interest.*

A review of the Board's traditional community of interest factors, as set forth in Specialty Healthcare, conclusively demonstrates that all of the employees at Store 639 share a substantial community of interest, and there was no basis for carving out the arbitrary classifications or departments requested by the Petitioner because that proposed unit does not have a distinct identity or separate community of interest. The Board's traditional community of interest test assesses whether the petitioned-for unit possesses a separate and distinct identity. Publix Supermarkets, 343 NLRB 1023 (2004). In determining whether a proposed unit possesses a separate and distinct community of interest, the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision. Id. at 1024. See also Ore-Ida Foods, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995). Each of these factors supported the Regional Director's finding that the petitioned-for unit does not possess a distinct and identifiable community of interest, in contrast to the traditional retail wall to wall unit. As such, the Regional Director correctly found that a wall to wall unit is the only appropriate unit given the complete integration of the associates employed at Store 639.

(1) Functional Integration

As the Regional Director found, there was ample evidence of the functional integration of the entire Colma store. Merchandise to be sold is initially received by the store's receivers, where it is stationed in the receiving area for the freight team. The freight team then moves the merchandise to stations in the various merchandise aisles in the evening, while the store is still open, and the merchandise is then placed in the appropriate locations in the upper bins and shelves. As product is sold during a particular day, either sales associates or the pack down crew

move product from the upper bins and shelves to the lower shelves where customers can reach the product. During the course of the day, bay integrity associates move through the aisle using scanners to scan SKU numbers for products which are out or low in supply. Cashiers ring up customer sales and engage in sales activity both at their registers, and when they are not busy at their registers. Pro Desk and special sales associates assist specialty or contractor customers. In a nutshell, Store 639's associates are an integrated team, focusing on making sure products are available to the customers and providing excellent customer service.

More importantly, contrary to Petitioner's assertions, the record was quite clear that all associates are trained in and execute sales. All associates are trained in FIRST principles – a program specifically designed to help associates drive customer sales. All associates (except for pro desk) wear the same orange aprons and are available to assist customers and engage in sales activities while on the merchandise floor. In fact, as noted by Department Supervisor Near, during Store 639's Power Hours, the pack down associates (whose primary duty is to move merchandise from the upper shelves to the lower shelves where it is available to customer) are instructed to cease all tasking jobs, and assist with customers, exclusively performing sales activities. (Tr. 743). Cashiers also provide customer service and engage in sales activities both at their registers as they inquire about additional merchandise the customer may be interested in, (Tr. 26-27), or in the merchandise aisles. Quite simply, ALL Store 639 associates are trained in, and are expected to drive customer sales throughout the store. The record is undisputed that all of the Home Depot Associates are a functionally integrated retail work force. (Tr. 632-33). See Bullocks, 119 NLRB at 642 (rejecting requested unit of shoe sales department employees where employees were functionally integrated with other selling and non-selling employees, and were not restricted to just selling shoes within the department store).

(2) Frequency of Contact/Interchange With Other Employees

The Regional Director also correctly found that the various associates at the Colma store have daily, reoccurring contact with each other and across departments and classifications. Cashiers interact with sales associates while assisting customers at the register for price checks, or in the merchandise aisles when the cashiers partner with merchandise associates to assist customers. Pack down associates and sales associates work together packing down merchandise from the upper racks and the pack down associates engage in sales activities on a daily basis during Power Hours. Because they wear the same uniform as other associates, the pack down associates are also expected to assist customers upon request, which occurs every day. Likewise, the bay integrity associates and receiving associates are out on the sales floor checking product availability and moving product into the merchandise aisles. As with the other associates, they also assist customers in the merchandise aisles and partner with merchandise associates if they are confronted with a question they cannot answer. Associates in the petitioned-for unit frequently help cashiers with price checks. Lot attendants work with cashiers and merchandise associates while assisting customers loading their vehicles.

All employees attend in-store meetings together, where they frequently receive product training and merchandise updates. The associates share the same break room, and although lunch breaks are staggered, associates from the various classifications take their lunch breaks together. All employees partake in special events such as barbecues and retirement parties. Without question, Store 639's operations depend on the constant, daily interaction among petitioned-for associates and those excluded by the petition.

Petitioner's "evidence" on this issue was limited to his assertion that he personally has had "no contact" with the Freight or Pack Down team. Despite this testimony, Petitioner did not dispute the other evidence of frequent, reoccurring contact among the other associates, and

Petitioner's limited testimony on his personal interaction was flatly contradicted by former Pack Down supervisor who noted that Pack Down associates and merchandise associates interact all the time, as they assist each other with pack down tasks during the day. Likewise, Petitioner failed to contradict the evidence that during "Power Hours", the Pack Down associates actually stop their pack down tasks, and simply assist with customer sales. (Tr. 743).

The record also contained undisputed evidence that Colma store associates routinely transfer between the various classifications inside and outside the petitioned-for unit, as well as testimony of associates doing the same (Tr. 468-69; R-13). For example, there is temporary interchange with sales associates serving as backup cashiers and freight team associates supplementing sales associates in various merchandising departments. (Tr. 64-65, 305-06, 360). There is also extensive permanent interchange with operations associates becoming sales associates, cashiers becoming sales associates, and sales associates becoming operations associates. (Tr. 378; R-13). There are also associates who have cycled back and forth between positions in and out of the petitioned-for unit multiple times. (Tr. 378; R-13).

The record conclusively establishes that employees inside and outside the petitioned-for unit have constant, consistent interaction and interchange as is typical in the retail setting. Given this evidence, the Regional Director correctly found a wall to wall unit is the only appropriate unit. See Levitz Furniture, 192 NLRB at 61 (separate unit of warehouse men inappropriate where record demonstrated substantial contact and interchange among selling and non-selling employees due to close cooperation involved in selling merchandise).

(3) Degree of Skill and Common Functions

The Regional Director properly concluded that the nature of associates' skills are similar and that their job duties largely overlap. Degree of skill and common functions focuses on whether employees within the petitioned-for unit possess unique skills and functions. May

Department Stores, 97 NLRB at 1007 (unit of beauticians within department store was appropriate give common interests and singularly different work and training skills); Allied Stores, Inc., 150 NLRB at 799 (unit of non-selling employees appropriate where selling employees attended specialized training classes on how to sell, whereas non-selling employees received only on the job training).

As demonstrated at the hearing, although employees in the various departments have varying primary duties and expertise within their particular departments, the relative degree of skill within the individual departments is not unique, and all associates share a common function of customer service and driving customer sales. All associates interact with the store's customers at various points in time, and all associates receive training on products and merchandise sold throughout the store. As noted, there are no minimum qualifications to be hired at Store 639 for any position (selling or non-selling). As in Levitz Furniture, as well as other retail cases, the associates within the petitioned-for unit do not possess particular "craft" type skill or functions distinct from employees outside the petitioned-for unit. Indeed, as repeatedly noted at the hearing, Store 639 associates ultimately sell products to the store's customers, and employees in the petitioned-for unit do not receive unique training nor are they required to have unique experience or expertise. See, e.g., Levitz Furniture, 192 NLRB at 61 (combined unit of selling and non-selling employees only appropriate unit); John Wannamaker, 195 NLRB 452 (1972) (finding unit consisting exclusively of display employees inappropriate; display employees did not need any particular job qualifications and other employees performed display duties).

Instead, experience is developed via on the job training, as all of the various classifications become familiar with the store's products through experience. For example, even though the Petitioner is an electrical associate, he noted that he has become familiar with

plumbing products simply because the plumbing department is right next to the electrical department, and he has had frequent interaction with plumbing customers. The same is true for the other store associates. Given the absence of unique training, experience or expertise within the petitioned-for unit, it is clear that a finding that a wall to wall unit is the only appropriate unit is not erroneous.

(4) Commonality of wages, hours, and other working conditions

The Regional Director correctly found that Store 639's associates work under the same wages, benefits, and working conditions. The Board reviews wages, hours and other working conditions to evaluate whether there are unique wages, benefits or working conditions within the proposed unit such that the unit is distinct and identifiable based on these factors. For example, if sales associates receive different benefits, or their compensation and working conditions are distinct from other employees, this suggests the employer treats the sales associates as a discrete and identifiable department or subdivision. See, e.g., Allied Stores, 150 NLRB at 799 (finding separate units of selling and non-selling employees appropriate: only selling employees sold to customers, most were part-time, wage scales were different, selling employees were evaluated exclusively on sales figures, wore different uniforms, and had frequent contact with the public; whereas non-selling workforce consisted of full-time employees, work was largely manual, work was evaluated based on department productivity, and work involved no contact with the public).

In contrast to these cases, a review of the record confirms that these factors support the Regional Director's direction of an election in a wall to wall unit, and his finding that the amalgamation of merchandising departments selected by Petitioner was inappropriate. All of Store 639's associates work throughout the store, including in the merchandise aisles. Merchandise associates and lot associates also work together outside the store, loading customers' vehicles. Merchandise associates also frequently work at the front-end of the store

(by and with the cashiers), as well as in the receiving area. As noted above, there is frequent, daily interaction on the sales floor between all of the associates as opposed to selling and non-selling employees working discrete, segregated work areas. Cf. Allied Stores, 150 NLRB at 799 (selling employees stand apart from the conglomeration of non-selling employees, who perform work in segregated areas). Wage scales among the associates at Store 639 store are comparable. All associates are all paid hourly without any additional compensation (such as commissions) except for the Homer Awards and Success Share bonus payments which are paid to all associates based on store performance. The only notable difference in compensation is that some classifications have maximum starting hourly rates and individuals' hiring rates depend on their relative experience. After that point, all wage increases are based on merit as reflected by performance evaluations. Given this, it is not unusual for experienced cashiers or other associates to have higher hourly rates than sales associates.

All associates are hired under the same approval and application process. All employee benefits are the same among the associates, as the benefit package, which includes medical insurance, dental insurance, a 401k plan, and other benefits, are offered by corporate headquarters in Atlanta. Enrollment and benefit changes are handled by corporate, with associates interfacing directly with benefit specialists. All associates participate in the same recognition programs such as Homer Awards and employee of the month. All associates are subject to the same policies, have access to the same open door policy and human resources services to resolve workplace disputes; receive the same orientation, FIRST training, product knowledge training, and hands-on training; and are expected to adhere to the same standards of conduct. In fact, Romina Gutierrez, the ASDS who is responsible for new employee orientation, noted that it is common to conduct orientation with groups of new associates, which will

typically include associates within and without of the petitioned-for unit. All associates are subject to the same vacation policies, accrue vacation time and personal leave in the same manner, and the employees are scheduled for work days and days off based on a store labor data as opposed to scheduling by individual departments. All associates use the same or similar equipment and tools, and must perform the same sales and tasking duties. They typically clock in and out using the Kronos time-keeping system located in the employee break room. All of the associates wear the same Home Depot orange apron except for the pro account sales associates who wear a black apron.

In sum, the wages, benefits and working conditions of the Colma store associates are the same regardless of classification. For this reason, Petitioner's proposed unit was not a distinct, separate and identifiable group of employees with a separate community of interest. Rather, these factors establish that all Store 639 associates share a community of interest, and therefore, only a wall to wall unit as found by the Regional Director is appropriate.

(5) Shared Supervision

Finally, the Regional Director correctly determined that all associates at Store 639 share common supervision from the department supervisors, assistant store managers, and the store manager. Common supervision addresses the question of whether the employees in the petitioned-for unit have separate and distinct supervision apart from other employees such that they constitute a discrete, recognizable subdivision within the Employer's place of business, as reflected by the Employer's own management structure. To the extent employees outside the proposed unit share the same management, this suggests that a broader unit, such as the wall to wall unit proposed by the Employer is the appropriate unit. See, e.g., Interstate Co., 125 NLRB 101 (1959) (finding cashiers should be included in broader unit of food service employees given common supervision).

The record reflects that all Store 639 associates share the same supervisory structure, and that the petitioned-for unit is not comprised of discrete, separate and identifiable management structure. (Tr. 27, 31, 619). Moreover, the record also reflects that all supervisors provide direction to all associates, regardless of department, and that all managers, including department supervisors, both administer discipline and reward associates outside their assigned departments. (Tr. 31-32; 739-41; R-14, R-15, R-17). Indeed, supervisors and managers recommend associates for Homer badges under the Homer Awards program regardless of classification or department assignment. (Tr. 350; R-17).

Evaluations are conducted by a roundtable discussion consisting of all department supervisors, all assistant store managers, and the store manager, with the final evaluation decided by the majority of all managers and supervisors. (Tr. 34). Multiple managers, including the store manager and assistant managers, are involved in approving days off. (Tr. 633-34). Scheduling is centralized, with the initial schedule determined by the ASDS, and approved by the store manager. In a nutshell, the individual department supervisors are primarily responsible for paperwork within their assigned department, but all supervisors, including the store manager and assistant store managers, oversee store operations in their entirety, and likewise provide direction to all associates regardless of department. Quite simply, the petitioned-for unit does not possess a unique or independent management team, nor is it recognized as an identifiable subdivision or department with its own management structure. Based on the absence of separate supervision, it is clear that the petitioned-for unit is inappropriate, and that the Regional Director correctly found that the wall to wall unit is the only appropriate unit.

b. *None of the exceptions to the Board's preferred wall to wall unit apply.*

For the Board to reverse the Regional Director's decision that a wall to wall was the only appropriate unit, the record evidence must establish that the employees in the petitioned-for unit

are under separate supervision, are geographically separated from the bulk of the remaining employees, or are not substantially integrated with the other employees. The record evidence unequivocally established that none of these apply to the petitioned-for unit. First, as set forth above, all associates share common supervision from the department supervisors, assistant store managers, and the store manager. Second, it is undisputed that all associates work at the same store, and thus are not geographically separated.

Finally, as previously established, the record evidence demonstrated that Store 639 is a substantially integrated operation in which all employees work side by side and perform much of the same duties. In that regard, it must be noted that the petitioned-for unit consists of some, but not all, of the merchandising associates employed at Store 639. For example, although the Petitioner appears to have cherry-picked certain merchandising associates, he excluded certain associates who routinely work with customers and have sales responsibilities (cashiers), and he also excluded sales classifications that include associates whose primary duties are to sell to Store 639's retail customers (pro account sales associates, sales associates in Commercial Sales, special services associates, etc.). For this reason, the line of cases finding a "selling" unit to be appropriate are inapplicable. *See, e.g., Allied Stores of New York, Inc.*, 150 NLRB 799 (1965) (finding separate units of selling and non-selling employees appropriate given complete absence of interchange among employees; lack of functional integration of two groups, and the fact that non-selling unit had no contact with the public); *Lord & Taylor*, 150 NLRB 812 (1965) (petitioned-for unit of non-selling merchandisers inappropriate due to lack of specificity of unit, but finding unit of all non-selling employees appropriate given factors cited in *Allied Stores*).

For example, in *Allied Stores*, the Board noted that the employees in the "selling" unit were the only employees who sold merchandise to the customers, finding that "only salespersons

sell.” Allied Stores, 150 NLRB at 801. Because of this direct customer contact, the sales employees wore uniforms (full suits with shirt and tie) that were different from non-selling employees, and they participated in classroom training sessions on sales that were not attended by “non-selling” employees. “Selling” employees were compensated differently, their job performance was evaluated differently, as was productivity, and there were only rare examples of employee interchange between the two groups. Because of these significant and distinct differences between the two groups of employees, and the fact that the Petitioner had requested a bargaining unit for each group due to these significant differences, the Board found that “[t]he record demonstrates, with respect to the units requested--selling, nonselling, restaurant--that the employees' skills, duties, interests, and conditions of employment in each group are sufficiently different from each other as to warrant establishing separate units.” Id. at 802. Those facts are not present in the case at hand, and thus the exception does not apply.

There was no evidence that the petitioned-for unit was anything but an arbitrary grouping of employees, which is always inappropriate. See, e.g., Moore Business Forms, Inc., 204 NLRB 552 (1973); Glosser Bros., Inc., 93 NLRB 1343 (1951). Instead, the record unquestionably demonstrates that all Store 639 associates share an overwhelming community of interest as they are functionally integrated, have daily, reoccurring contact and interchange, share comparable wages, benefits and working conditions, and common supervision. There is, in fact, complete overlap in the community of interest factors between the included and excluded associates. Given this, the Regional Director had no basis to find the requested unit appropriate, but rather was compelled to find that the only appropriate unit is a wall to wall unit. Accordingly, Petitioner’s request for review must be denied.

VI.
CONCLUSION

For all the foregoing reasons, Employer respectfully requests that Petitioner's Request for Review be denied.

Respectfully submitted this 9th day of December, 2011.

s/Richard B. Hankins
Richard B. Hankins

s/Mark L. Keenan
Mark L. Keenan

s/Brennan W. Bolt
Brennan W. Bolt

MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE
Suite 5300
Atlanta, GA 30308
(404) 527-4000
rhankins@mckennalong.com
mkeenan@mckennalong.com
bbolt@mckennalong.com

Attorneys for Home Depot U.S.A., Inc.

CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the **Home Depot U.S.A., Inc.'s Response in Opposition to Petitioner's Request for Review of the Regional Director's Decision and Direction of Election** in Case No. 20-RC-067144 via electronic filing through the National Labor Relations Board's website, www.NLRB.gov, upon:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

A copy was also served, via electronic mail, upon Petitioner, as follows:

Rory Tod Thompson
238 Munich Street
San Francisco, CA 94112
rorytodthompson@gmail.com

This 9th day of December, 2011.

MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE
Suite 5300
Atlanta, GA 30308
(404) 527-4000

/s Richard B. Hankins
Richard B. Hankins
Attorney for Home Depot U.S.A., Inc.

ATLANTA:5350575.1