

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

TOLT SOLUTIONS, INC.¹

Employer

and

Case 04-RC-127744

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

If a petitioner seeks to represent a unit of employees that is readily identifiable as a group and shares a community of interest, the unit will be found appropriate unless a party seeking a broader unit demonstrates that employees in that unit share an overwhelming community of interest with the employees in the petitioned-for unit. The Petitioner, IBEW Local 98, seeks to represent a unit of Field Service Technicians (FSTs) in the Philadelphia Region who are assigned to a single customer, the Wakefern Group. The Employer, Tolt Solutions, Inc., contends that this unit is inappropriate and that a unit consisting of all FSTs and Regional Service Technicians (RSTs) in the Philadelphia Region is the smallest appropriate unit. Because the FSTs who are assigned to the Wakefern Group are a readily identifiable group that shares a clear community of interest, and work on different equipment and have different training than the other employees, receive different benefits, and have no contact or interchange with them, I find, in agreement with the Petitioner, that there is no overwhelming community of interest with the employees the Employer seeks to add, and that the petitioned-for unit is appropriate.²

I. OVERVIEW OF OPERATIONS

The Employer, a nationwide provider of information technology equipment and services, operates from about 15 Regions and is headquartered in South Carolina. The Employer was created in December 2013 when Tolt Service Group (TSG) merged with Kyru Solutions. The employees in the petitioned-for unit were employed by Kyru Solutions before the merger.

¹ The Employer's name appears as corrected at hearing.

² A Hearing Officer of the Board held a hearing in this case, and the parties filed briefs.

The approximately 25 FSTs in the petitioned-for unit provide information technology maintenance and repair services exclusively to ShopRite stores, which are operated by the Wakefern Group. FSTs work out of their homes and report directly to an assigned group of stores where they service various types of equipment, including cash registers, printing devices, and pharmacy systems.

The Employer also employs four FSTs and about 36 RSTs, who provide information technology services to other customers in the Philadelphia Region. These four FSTs, who were previously employed by Kyrus Solutions, are assigned to the Whole Foods/Key Foods Group. There are two Groups of RSTs, who generally perform the same work at their assigned stores as the FSTs perform at the ShopRite stores. The RSTs had been employed by TSG before the merger. One Group of about 23 RSTs is assigned to A&P supermarkets, and 13 RSTs work in a Group designated "Other Accounts" and provide services at Catalina Marketing and Michaels Stores.

The Employer is planning to further merge the two formerly separate entities. To this end, it has already combined certain financial systems, as well as its payroll and time and attendance systems. It has also implemented a new policy for all Employer-provided vehicles, the practical impact of which was to install GPS receivers in all of them.

II. THE RELEVANT LEGAL STANDARD FOR ASSESSING COMMUNITY OF INTEREST

The Act does not require that the unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, it requires only that the unit be *an* appropriate one. *International Bedding Co. (IBC of Pennsylvania)*, 356 NLRB No. 168 (2011); *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. *Bartlett Collins Co.*, 334 NLRB 484 (2001). It is only where the petitioned-for unit is not appropriate that the Board will consider alternative units, which may or may not be units suggested by the parties. *Bartlett Collins Co.*, *supra*; *Overnite Transportation Co.*, 331 NLRB 662 (2000). In *International Bedding*, *supra*, the Board emphasized that the petitioner's position regarding the scope of the unit is a relevant consideration, citing *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964).

In determining whether a proposed unit is appropriate, the focus is on whether employees share a community of interest. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). To make this determination, the Board examines such factors as employee skills and job functions; supervision; contact and interchange; wages, hours, and other terms and conditions of employment; functional integration; and bargaining history, if any. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004); *United Operations, Inc.*, 338 NLRB 123 (2002); *Home Depot USA*, 331 NLRB 1289 (2000).

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 10-13 (2011), the Board clarified the framework to be applied in making certain unit

determinations. Pursuant to this decision, the Board first looks at whether the petitioner seeks a unit consisting of employees “who are readily identifiable as a group” based on job classifications, departments, functions, work locations, skills, or similar factors, and whether these employees share a community of interest. If the Board finds a community of interest in a readily identifiable group, then the party seeking a broader unit must demonstrate “that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.” [Emphasis added]. Additional employees share an overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. See *Fraser Engineering Company, Inc.*, 359 NLRB No. 80, slip op. at 1 (2013); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 4 (2011). On the other hand, the Board will not approve a petitioned-for fractured unit that seeks “an arbitrary segment” of what would be an appropriate unit. *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011); *Specialty Healthcare*, supra, slip op. at 13; *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999).

III. FACTS

Supervisory Structure

John Kennedy, the Employer’s Regional Operations Manager for the Philadelphia Region, is ultimately responsible for all of the FSTs and RSTs in this Region. The RSTs also have intermediate supervisors; A&P Group RSTs report to Field Service Supervisor Chrisostomos Chrisostomides, and Field Service Supervisor Anne Browne supervises the Other Accounts Group.

Until May 2, 2014, the Wakefern Group FSTs also had an intermediate supervisor, Operations Manager Rob Mazzitelli, who had no supervisory responsibility for any of the other Groups. The Employer intends to hire a Field Service Supervisor for the Wakefern Group, but at present, the FSTs in the Wakefern Group and the Whole Foods/Key Foods Group report directly to Kennedy. The record does not indicate whether the Whole Foods/Key Foods Group FSTs will continue to report directly to Kennedy or will be assigned to an intermediate supervisor.

FSTs receive their work assignments directly from customers via service calls, not from their supervisors. Supervisors for different Groups at times conduct conference calls solely for employees in their Groups.

Duties, training, and qualifications

Each FST is assigned to service 10 to 17 stores in a particular geographic area. These stores are located at various sites from Boston to Baltimore. FSTs receive service calls from customers through a text message paging system on their Employer-provided cellphones. Each morning, they prioritize their service requests based on the importance of the equipment to be repaired, and they then perform their work at the stores. They also have administrative duties

such as responding to emails and entering information about service calls into the Employer's computer system.

The FSTs drive Employer-supplied vehicles, which are stocked with parts and equipment. When additional parts or equipment are needed, they are shipped to the FST for pickup at an assigned "FedEx Hold" location.

The RSTs' job duties are quite similar to those of the FSTs. The stores where they work are concentrated in northern New Jersey, but there are also a few stores in southern New Jersey, Pennsylvania, Delaware, and New York.

FSTs in the Wakefern Group are separately trained from other FSTs and the RSTs, because, as required by the customer, they work only on ShopRite equipment. The Employer trains FSTs at classrooms in South Carolina and on "ride-alongs" with other FSTs in the Wakefern Group.

The minimum qualifications for entry-level FSTs and RSTs are very similar. The FSTs are required to possess high school diplomas and to obtain "A+ certifications" in the first year of employment; the RSTs are required to possess a high school diploma and an industry certification such as A+, Net+, or Server+, or a degree in a technical field.³

All FSTs and RSTs are classified as either I, II, or III. FSTs require two and five years of experience to progress to the II and III levels, respectively, whereas the RSTs' job description states that two and three years of experience, respectively, are "preferred" in order to progress to the II and III levels.

Terms and conditions of employment

RSTs and FSTs are subject to separate employee handbooks and policies, though the Employer intends to integrate them eventually. Both RSTs and FSTs receive performance evaluations, for which Regional Operations Manager Kennedy is ultimately responsible. The record does not indicate what role, if any, Field Service Supervisors play in preparing these evaluations.

FSTs are paid, on average, about \$44,000 annually, which is approximately 10 percent more than RSTs. Currently, there are separate health insurance benefits for FSTs and RSTs. The Employer intends to move all employees to a single program on July 1, 2014, but has not yet selected an insurance plan. FSTs and RSTs have separate 401(k) plans and vacation policies, which the Employer intends to consolidate.

Wakefern Group FSTs are guaranteed to be paid for 40 hours per week regardless how many hours they work, but RSTs and Whole Foods/Key Foods FSTs do not have this guarantee. FSTs receive on-call pay for days that they are on call but do not work, whereas RSTs do not.

³ The RST job description states that an AS/BS degree in a technology or business-related field is "highly desired."

Like all other employees, Wakefern Group FSTs use the Employer's new time and attendance system to record their hours.

Both FSTs and RSTs receive shirts from the Employer, but are not required to wear them. The Employer provides all FSTs and RSTs with the same equipment.

Transfers, contact, and interchange

There is no evidence of interchange between RSTs and/or FSTs assigned to different Groups. There is only minimal evidence of contact. In this connection, although some of the FSTs pick up parts and equipment at the same FedEx Hold location as other employees, there was no testimony showing any actual interaction there between employees in different Groups. The record reflects only one instance of an FST in the petitioned-for unit meeting with an RST, and it occurred in the parking lot of a grocery store by happenstance.

Wakefern Group FSTs are assigned to substitute for other FSTs in this Group when those employees are scheduled to be off from work. They do not substitute for employees in the other Groups.

The Wakefern Group FSTs generally communicate with each other by email and telephone and only occasionally meet face to face, as they are each assigned to separate stores. They discuss work-related issues and problems and are in contact on a near daily basis with FSTs for whom they substitute. Wakefern Group FSTs exchange parts and supplies with each other, but not with FSTs or RSTs in other Groups, because they work exclusively on ShopRite equipment.

IV. ANALYSIS

In making unit determinations pursuant to *Specialty Healthcare and Rehabilitation Center of Mobile*, supra, it is initially necessary to determine whether the petitioned-for employees constitute a "readily identifiable group" that shares a community of interest. Id., slip op. at 12. The petitioned-for FSTs work in a separate Group, are assigned solely to ShopRite Stores, and work exclusively on ShopRite equipment. They share the same pay structure and benefits, they interact only with each other, and they do not work in the same locations as any other employees of the Employer. Thus, the FSTs in the Wakefern Group are readily identifiable as a group with a community of interest.

Therefore, the burden is on the Employer to show that the RSTs and the Whole Foods/Key Foods FSTs share an overwhelming community of interest with Wakefern Group FSTs. As the Board has explained, "additional employees share an overwhelming community of interest with the petitioned-for employees only when there 'is no legitimate basis on which to exclude [the] employees from' the larger unit because the traditional community-of-interest factors 'overlap almost completely.'" *Northrop Grumman Shipbuilding*, supra, slip op. at 3, quoting *Blue Man Vegas, LLC v. NLRB*, 529 F. 3rd 417, 421, 422 (D.C. Cir. 2008). The Employer has failed to meet this burden.

Importantly, the petitioned-for FSTs have a separate training program and work on different equipment than employees in the other Groups. It is also significant that they have regular contact and interchange with each other, but no interchange and virtually no contact with any other employees.

The Wakefern Group FSTs are currently supervised directly by Regional Operations Manager Kennedy, while the RST Groups are supervised separately by Field Service Supervisors. Until recently, the Wakefern Group FSTs had separate intermediate supervision, and the Employer plans to provide them with their own supervisor again.

The petitioned-for FSTs are the only employees at issue with a guaranteed 40-hour work week. Additionally, they currently have different 401(k) plans, health insurance benefits, and vacation policies than the RSTs, receive higher pay, and use a different employee handbook. Unlike RSTs, they receive on-call pay.

It is true that all FSTs and RSTs have similar skills, duties, and qualifications. However, the existence of the factors favoring separate units is sufficient to defeat any claim of an overwhelming community of interest between the FSTs and RSTs, and to reject the Employer's assertion that the smallest appropriate unit must include all FSTs and RSTs in the Philadelphia Region.

I have also considered the possibility that the petitioned-for unit is inappropriate without the inclusion of the four FSTs in the Whole Foods/Key Foods Group. Like the Wakefern Group FSTs, these FSTs were also employed by Kyrus Solutions and continue to share the same pay scale, benefits, and handbook. Nevertheless, I find the evidence insufficient to meet the burden to show that these employees share an overwhelming community of interest with the Wakefern Group FSTs. Initially, there is no contact or interchange between employees in these two Groups. The FSTs in the Wakefern Group and those in the Whole Foods/Key Foods Group are further distinguished by their assignments to different customers, their work on different equipment, and their different training programs. Moreover, only the Wakefern Group FSTs are guaranteed 40 hours of work per week, a significant benefit. Finally, the Wakefern Group employees were separately supervised until recently. Thus, the traditional community-of-interest factors do not overlap almost completely.

The Employer asserts that it plans to further consolidate its operations and that this new structure will result in further contact and interchange between FSTs and RSTs and eventually a single job title for all of these employees. However, all testimony in support of this assertion was uncertain as to what would occur and indefinite as to when it would occur. The Employer's Vice President of Maintenance Delivery, Timothy Gallegos, stated that this process is "ongoing," but he provided no details, and there was no documentary evidence to support his claim. Moreover, there is no timetable for any specifically planned changes, except the currently undetermined alterations to the health insurance plan, to be effective July 1, 2014. The Board generally declines to make election determinations based on employer plans that are indefinite, speculative, or remote in time. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309, 309 (1976); *Harold J. Becker Co.*, 343 NLRB 51, 52-53

(2004); cf. *Witteaman Steel Mills, Inc.*, 253 NLRB 320 (1980). Accordingly, the Employer's assertion that its operations will be consolidated is not supported by sufficient evidence to meet its burden.⁴

The Employer also asserts for the first time in its brief that the FSTs and RSTs are "technical employees" and cites *TRW Carr Division*, 266 NLRB 326 (1983) for the proposition that the smallest appropriate unit of technical employees consists of all employees working in similar jobs with similar working conditions and benefits.

However, the record is insufficient to demonstrate that the FSTs are technical employees. The Board defines technical employees as employees who do not meet the statutory definition of "professional employee," but whose work is of a technical nature involving the use of independent judgment usually acquired in colleges, technical schools, or special courses. *Audiovox Communications*, 323 NLRB 647 (1997). The Board has held that where employees possess only a high school diploma and are not licensed or certified, receive on-the-job training, and do not use independent judgment, they are not technical employees. *Audiovox Communications Corp.*, supra (cellular phone technicians); *PECO Energy Co.*, 322 NLRB 1074, 1089 (1997) (laboratory assistants). The FSTs are required to possess only a high school diploma and to obtain an A+ certification within one year of employment. The record does not indicate the requirements for receiving the A+ certification or show that the job requires independent judgment or that the FSTs perform work of a technical nature.

Even if all of the FSTs and RSTs were found to be technical employees, however, the Wakefern Group FSTs would constitute a separate appropriate unit. In *Northrop Grumman Shipbuilding*, supra, slip op. at 4-5, the Board called into question the holding of *TRW Carr Division*, supra, that the smallest appropriate unit must include all technical employees who share a community of interest. The Board explicitly declined to reach the "questions of whether a distinct test exists for technical employees or whether such a test constitutes a 'special . . . occupation rule' as contemplated by *Specialty Healthcare*." Rather, the Board found that under either the *Specialty Healthcare* test or the holdings of previous cases, the technical employees in question constituted a separate appropriate unit. In making its finding, the Board relied heavily on the fact that the petitioned-for employees had minimal contact and no interchange with a majority of the other technical employees, and were in a separate department. Assuming, *arguendo*, that the FSTs are technical employees, I rely on virtually the same factors to find that the Wakefern Group FSTs are sufficiently distinct from other technicals that separate representation is appropriate. Their work is not functionally integrated with employees in the other Groups, they have no interchange and virtually no contact with RSTs and other FSTs, and they are in a separate employee grouping.

⁴ The Employer cites *Stroock & Stroock & Lavan*, 253 NLRB 447 (1980), for the proposition that where a merger of two entities results in a shared community of interest, a unit consisting of employees from both entities is appropriate. This case is distinguishable because the Board found that employees of one law firm would be physically relocated to another firm's offices and one group would be entirely absorbed into the other firm. The record in that case also showed a definite date for the merger. The evidence in this case falls far short of what is needed to make a similar determination.

In sum, I find that the petitioned-for Wakefern Group FSTs constitute a readily identifiable employee grouping with a clear community of interest, and the Employer has failed to meet its burden to show that the FSTs and RSTs in other Groups share an overwhelming community of interest with them. Accordingly, I shall direct an election in a unit of all FSTs in the Wakefern Group.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Field Service Technicians employed by the Employer in the Philadelphia Region who are assigned to the Wakefern Group; **excluding** all other employees, Regional Service Technicians, Field Service Supervisors, guards, and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **International Brotherhood of Electrical Workers, Local 98**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the payroll period ending immediately before the date of the issuance of a Notice of Election, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

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

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Monday, June 16, 2014**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing

and receipt of the list will continue to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of three (3) copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

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

VII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

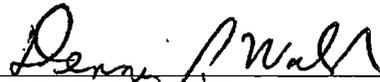
Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Monday, June 23, 2014, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁵ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed: June 9, 2014

at Philadelphia, PA



DENNIS P. WALSH

Regional Director, Region Four
National Labor Relations Board