

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

DILLON COMPANIES, LLC d/b/a KING SOOPERS

Employer

and

Case 27-RC-257949

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 7, AFL-CIO¹**

Petitioner

DECISION AND ORDER

The Employer operates numerous retail grocery stores in Colorado and surrounding states. Petitioner seeks, by an *Armour-Globe* self-determination election, to add unrepresented pharmacy technicians employed at the Employer's Store 112, located in Bennett, Colorado ("Bennett store" or "Store 112"), to an existing bargaining unit consisting of retail clerks employed at numerous Denver, Colorado area stores ("existing unit" or "Denver clerk unit"). Alternatively, Petitioner seeks to represent the petitioned-for employees in a standalone unit.

The Employer contends this voting group is not appropriate. As a threshold issue it contends the petition is precluded by the Board's contract bar doctrine. If the contract bar doctrine does not require the petition be dismissed, the Employer contends an *Armour-Globe* election is not appropriate because the employees in the petitioned-for voting group do not share a community of interest with the employees in the existing unit. The Employer further rejects the alternatively petitioned-for standalone unit as it maintains the only appropriate bargaining unit is a wall-to-wall unit of clerks at the Bennett store.

A hearing officer of the National Labor Relations Board ("Board") held a telephonic hearing in this matter on April 21-22, 2020.² Both parties filed briefs with me after the conclusion of the hearing. As explained below, based on the record, the briefs,

¹ The names of both parties appear as amended at hearing.

² On May 11, 2020, the Board issued its Decision in *Morrison Management Specialists, Inc. d/b/a Morrison Healthcare*, 369 NLRB No. 76 (2020). By that Decision, the Board held that representation hearings that involve witness testimony should be conducted by videoconference, not telephonically. *Id.*, slip op at 1. At the time of that Decision in this case the telephonic hearing had concluded, but a decision had not yet issued. The Region provided the parties an opportunity to reopen the record for purpose of examining witnesses via videoconference, consistent with *Morrison Healthcare*. Both parties waived their right to a videoconference hearing in writing. Accordingly, I have made my determination from the existing record before me.

and relevant Board law, I find that the record establishes the petitioned-for voting group is an identifiable, distinct segment of the workforce, but that it does not share a community of interest with the existing bargaining unit sufficient to make the petitioned-for *Armour-Globe* election appropriate. I have also considered Petitioner's alternative position, and I find that the petitioned-for unit is not an appropriate standalone unit for the reasons stated. Accordingly, I am dismissing the petition.

RECORD EVIDENCE

The Employer's Operation

The Employer's stores are organized into departments that correspond with the type of products for which they are responsible: grocery, bakery, deli, meat and seafood, general merchandise, front end, and floral. Stores may also include a pharmacy, the department at issue in the instant case. The Employer's corporate office is in Denver, Colorado, and the Bennett store at issue here is located approximately 20 miles east of Denver.

Physically, the Bennett store is arranged with the grocery department in the center, and specialty food departments such as bakery, deli, and meat and seafood oriented around the outside of that department. Non-food specialty departments, such as floral, are also located along the outside walls of the store. The front end contains check-out stands and self-check-out stations, as well as a customer service desk and a Starbucks kiosk. The general merchandise department consists of non-food items that are not specific to another department; items ranging from over-the-counter medicine to cookware, located throughout the store. The store also has restrooms and employee-only areas, such as a loading dock and employee breakroom.

The pharmacy at the Bennett store is a separate, locked room located in one of the front-end corners of the store. Due to the controlled nature of the medications in the pharmacy, the interior of the pharmacy is not open to customers or most employees; a pharmacy technician staffs a register and assists customers with their orders. Only pharmacists, pharmacy technicians, and store management can access the pharmacy.³

Petitioner currently represents approximately 8,100 employees, employed at 64 stores, in the Denver clerk unit.⁴ The Denver clerk unit includes employees in the all-purpose/nutrition clerk, pharmacy technician, certified pharmacy technician, bakery clerk/liquor store clerk, customer service clerk, and courtesy clerk classifications in a

³ The voting group sought consists of five employees in classifications identified by the Employer as "Pharmacy/SR certified technician," "Pharmacy/certified technician," and "Pharmacy/technician" classifications. There is no evidence in the record that, although these titles differ slightly from the titles used in the Denver clerk agreement, this difference in title is material. In this decision I have referred to the employees in the voting group sought and the parallel positions in the existing unit as "pharmacy technicians" for clarity.

⁴ The existing unit and collective-bargaining agreement are referred to by a variety of descriptors in the record. I use the terms "Denver Clerk unit" and "Denver Clerk agreement" as it is close to what the parties use on the title page of that agreement. The parties agree, and I acknowledge, the geographic scope is broader than the city of Denver and includes stores in the greater Denver metropolitan area.

variety of departments. Employees in the meat and seafood departments within this geographic area are covered by a separate collective-bargaining agreement. The Employer's pharmacists, including those at the Bennett store, are represented in a statewide unit by a separate labor organization.

The Employer operates numerous stores that, like the Bennett store, are outside the geographic scope of the Denver Clerk unit. The Employer groups many of these stores into geographic districts for administrative purposes.⁵

Denver Clerk Agreement

The Denver clerk agreement, in Article 1 "Recognition and Exclusion" states, in relevant part:

Section 1. The Employer recognizes the Union as the sole collective bargaining representative for all employees actively engaged in the handling and selling of merchandise, including part-time workers who work regularly one (1) day or more a week, employed by the Employer in the grocery store or stores owned or operated by the Employer within the metropolitan area of Denver, Colorado (such jurisdiction to apply to current stores represented by this Union and future stores only of the Employer)...

The parties separately negotiated the geographic scope of what entails the "metropolitan area of Denver, Colorado," drawing a line on a map. Article 1 also contains the following, addressing new stores that open within this area:

Within the geographical jurisdiction of this Agreement, any new stores opened by the Employer shall be accreted and shall be covered by the terms of this Agreement.

Article 31, "New Store Language," adds:

In the event the Employer opens new stores within the geographical area of this Agreement, as set forth in Article 1, not less than sixty percent (60%) of the initial staffing of the new store shall be made by employees covered by this bargaining Agreement, if available.

The Denver clerk agreement is effective April 5, 2019, to January 8, 2022, by its terms.

Community of Interest Factors

Organization of the Facility

As noted, the Bennett store is outside the Denver clerk unit and its clerks are unrepresented. While some unrepresented stores in close geographic proximity are organized in groups for administrative purposes, the Bennett store is not due to its

⁵ The Petitioner also has had, and may still have, other collective-bargaining agreements with the Employer covering geographical areas such as Pueblo, Colorado Springs, Parker, Broomfield, Boulder, Loveland, Longmont, Greeley, and Fort Collins, Colorado. Some are for meat units only, while others include clerks. Employees at a number of other store locations such as Bennett remain unrepresented by Petitioner.

relatively isolated geography; the nearest store operated by the Employer is located approximately 20 miles from Bennett.⁶ However, management at the Bennett store does report into an Employer-wide hierarchy. Management at this location consists of a store manager and two assistant managers, who are responsible for hiring and firing decisions, discipline, approving overtime, and approving vacation requests.⁷ The store manager reports to a district manager, one level above the store level.⁸

Each of the eight departments at the Bennett store has a department manager. The pharmacy manager, is a licensed pharmacist who supervises the operation of the pharmacy department. There is an additional pharmacist in the department. The supervisory status of the department managers, including the pharmacy manager, is disputed. Petitioner contends they are statutory supervisors; the Employer maintains they are not.

The record indicates that the pharmacy manager reports to the store manager on the issues addressed above: hiring, firing, discipline, approving overtime, and approving vacation requests. However, the record also indicates a second hierarchy, with the pharmacy manager interacting with managers at the district level, including a retail pharmacy director, regarding certain pharmacy related functions.⁹ The Employer's former Director of Human Resources and Labor Relations described the pharmacy manager as having a "dotted line" reporting relationship with the retail pharmacy director. Ultimately, the record does not identify the authority the district level manager or managers have over daily operations in the pharmacy.

Nature of Employee Skills, Training, and Job Functions

Pharmacy technicians are the point of customer contact for the pharmacy. They greet customers, collect information about the customer's prescription, retrieve the medication prepared by the pharmacist for the customer, and operate the cash register. They may also answer general questions or refer specific questions about medication to the pharmacist. When providing customers their orders the pharmacy technicians perform data entry at the register. Although they primarily deal with customers in person, pharmacy technicians do take orders and communicate with customers on the telephone. Pharmacy technicians also stock shelves in and around the pharmacy and order supplies.

The Employer does not require pharmacy technicians to hold any specific certification or licensing at the time they are hired. Like with other clerk positions, a high school education is required. However, an employee that is hired or transfers into the pharmacy technician position is required to become certified by the Colorado State

⁶ The town of Bennett is relatively small, with an estimated population of less than 2500 in 2013: <https://townofbennett.colorado.gov/about-bennett>

⁷ The parties stipulate that the store manager and the assistant managers are Section 2(11) supervisors and I accept this stipulation based on the record evidence of the factors listed.

⁸ At various points in the record the testimony of a former store manager, now employed by Petitioner, potentially differed from the testimony of current Bennett store manager, called by the Employer. To the extent there are differences in their testimony I note the former store manager was employed at a different location, not the Bennett store, and has not been employed in this capacity for two years.

⁹ The record also references a "pharmacy district coordinator" at the district level. It is not clear from the record if this is an alternative reference to the retail pharmacy director or a separate position.

Pharmacy Board within 18 months of hire. This certification process involves training on issues such as medical privacy and requires the employee to pass a test administered by the Pharmacy Board. In addition to Board certification pharmacy technicians must pass a background check prior to hire. Pharmacy technicians also participate in certain all-employee training, such as new hire training and customer service training.¹⁰

The State of Colorado recently required pharmacy technicians to additionally be licensed by the Colorado Department of Regulatory Agencies. The record does not indicate what is necessary to obtain this designation,

While the pharmacy technicians are the only employees required to hold a pharmacy technician certification, other clerks are required to have certifications or pass training that requires a test. Employees that operate forklifts and other power equipment must be certified by the Occupational Safety and Health Administration, and front-end employees must be trained on interventions procedures and take a test in order to sell tobacco and alcohol products.

Degree of Functional Integration, Contact and Interchange

The pharmacy operates both as part of the integrated store and somewhat separately. For example, pharmacy technicians order non-regulated products sold in the pharmacy, like over-the-counter medications and medical supplies, using the same ordering systems used by other departments. These supplies are delivered to the store in the same manner as other products, and the pharmacy technicians stock these products as would other employees in their respective departments. At the same time the pharmacy is unique, as the medications it utilizes are highly controlled and the ordering and delivery process involves a separate, specialized supplier, without the involvement of any other employees in the store.¹¹

Regarding the specifics of the pharmacy technicians' job duties, the record reflects limited integration with the store, as their work is almost entirely performed in the pharmacy interacting with the pharmacists and customers, not other clerks. Contact between the pharmacy technicians and other clerks appears limited to the type of contact that simply results from working in the same building, such as having shared break rooms, or having the same employer, such as receiving invitations to all staff training or meetings.

The record contains several examples of permanent interchange within the store, with clerks in other departments at the Bennett store transferring to the pharmacy and becoming pharmacy technicians. Currently three of the Employer's five pharmacy technicians transferred to that position from other clerk positions in the store. Regarding temporary interchange the record contains one example, from December 2017, of a pharmacy technician at the Bennett store working a shift outside the pharmacy department. There is no evidence that a clerk from outside the pharmacy has worked on a temporary basis in the pharmacy and, because of the background check and medical privacy requirements, it does not appear this is possible.

¹⁰ Along with all pharmacy staff, store managers, assistant store managers, and head clerks must have privacy (HIPAA) training and background checks so they may enter the pharmacy area.

¹¹ The meat and seafood and deli departments also receive some direct deliveries.

The record indicates an informal system exists whereby pharmacy technicians may cover shifts at stores that are not their own. The record contains some references to pharmacy technicians from the Bennett store working at other stores at other pharmacies, and open shifts at the Bennett store pharmacy being covered by pharmacy technicians from other stores, but these are vague references. There was some testimony that one pharmacy technician from outside of the Bennett store is tapped to cover shifts in Bennett, but there was little evidence as to frequency and the witness was uncertain which store this pharmacy technician was from.¹²

It appears pharmacies or pharmacy managers use a variety of mechanisms, from faxes distributed between stores to a Facebook group (not associated with the Employer), to obtain pharmacy coverage between stores. Although the evidence in the record is somewhat inconsistent, it appears that the position of the Employer and Union is unrepresented employees only work at stores outside the geographic area of the Denver clerk unit, and represented employees only work at stores inside this area.

Terms and Conditions of Employment

The lead pharmacy technician at the Bennett store is paid \$19.91 an hour, the same rate that applies to lead pharmacy technicians in the Denver clerk unit (a maximum rate of \$18.91 an hour, plus a \$1.00 an hour premium as lead). Although all employees receive similar fringe benefits, including paid vacation, sick leave, and health insurance, the details differ between employees in the existing unit, covered by a collective-bargaining agreement, and those outside the unit such as the pharmacy technicians at the Bennett store. The Employer has several policies that apply to all employees equally.

Common Supervision

As described previously in the section addressing departmental organization, the pharmacy manager is the first-line supervisor for the pharmacy, although the supervisory status of that position is disputed. The parties agree that the employees in the pharmacy report to the store manager and assistant store manager at either the first level, as the Employer contends, or second level, as Petitioner contends.

ANALYSIS

Whether a Contract Bar Exists

Section 9(c)(1) of the National Labor Relations Act states that establishing a question concerning representation is an essential precursor to directing any election. The Board's "contract bar" doctrine dictates that where employees are already covered by a collective-bargaining agreement no question concerning representation exists. *Hexon Furniture Co.*, 111 NLRB 342, 344 (1955). Accordingly, assuming the agreement meets certain requirements, the petition will be dismissed. *Id.*

¹² The witness thought this employee was from an Aurora, Colorado location – store #107 - but was unsure. The Denver metropolitan geographic delineation encompasses some Aurora, Colorado, stores, but the map provided with the Employer's Statement of Position (Board Ex. 3) shows store #107 being outside of the Denver Metropolitan area.

As addressed in more detail in the following section, Board procedures allow a petitioner to seek to add an unrepresented group of employees to an existing unit in a self-determination election. The Board has held that in this context a contract covering the existing unit does not act as a contract bar. *UMass Memorial Medical Center*, 349 NLRB 369, 370–371 (2007). Although not a bar, the existing contract is not applied to a group of employees that joins an existing unit by way of a self-determination election during the term of a contract. *Federal-Mogul Corp.*, 209 NLRB 343 (1974).

The Board does recognize that, where the contract itself contains an express promise to refrain from seeking representation of the employees, or to refrain from accepting them into membership, a contract can act as a bar; referred to as the *Briggs Indiana* rule. *UMass Memorial Medical Center*, supra at 369, citing *Briggs Indiana Corp.*, 63 NLRB 1270 (1945). However, such a promise must be express, such a promise will not be implied from employees' mere exclusion from the existing unit, or a claim that such a promise was understood. *UMass Memorial Medical Center*, supra at 370; *Women & Infants' Hospital of Rhode Island*, 333 NLRB 479, 479 (2001); *Lexington Health Care Group, LLC*, 328 NLRB 894, 895, 897 (1999); *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959).

Here, the Employer argues the following meet the requirements of the *Briggs Indiana* rule: (1) the geographic limitation in the Denver Metropolitan Agreement, and (2) the Denver Metropolitan Agreement contains contractual language regarding staffing, and Store 112 has not been staffed consistent with this contract language.¹³

I do not find the Denver clerk agreement acts as a bar to the instant petition. Regarding the first argument, the Employer infers, from the geographic limitation of the existing unit, a promise from Petitioner to refrain from seeking representation of employees outside that geographic limitation. The geographic limitation of the Denver clerk unit is a line on a map and the language of Article 1 of the Denver clerk agreement. I do not find this language, merely acknowledging a geographic limitation, and the map marking its limits, designates what that line represents regarding representation, or promises anything regarding representation in the future. Whether the Employer's inference is reasonable is not the issue, and I am not making a finding in that regard. What I do find is that the Employer's argument requires an inference, and this contradicts the Board's repeated exhortation that *Briggs Indiana* requires such an agreement to be explicit. Accordingly, I will not read a *Briggs Indiana* promise into the language as argued by the Employer.

Regarding the second argument, it is not disputed that the Bennett store is outside the Denver clerk unit geographic area. As such, it has not been staffed consistent with the new store language in Article 31 of the Denver clerk agreement and has not been the subject of the accretion mechanism in Article 1 in that contract. However, this does not preclude adding the instant voting group, assuming the *Armour-Globe* requirements are

¹³ In its statement of position, and at hearing, the Employer argued to the extent a question exists regarding interpretation of Article 1 and 31 of the Denver Clerk agreement the matter should be deferred to the grievance/arbitration mechanism. I decline to do so, as the Board has stated "questions regarding representation, accretion, and unit placement are not matters for arbitration, but rather, are matters within the exclusive province of the Board to resolve." *Williams Transportation Co.*, 233 NLRB 837 (1977).

met. To read the Denver clerk agreement in this way – to find that the failure to follow the contract precluded representation of those outside the contract – would essentially freeze the scope of the unit for the duration of the contract. To the extent this is what the Employer is seeking, it has not provided authority for such a claim, and I do not find a basis in the Board’s decisions for this conclusion.

In sum, I do not find the Denver clerk agreement requires dismissal of the instant petition, as neither the geographic scope of the contract nor the failure to follow contractual provisions are sufficient to meet the requirements of the *Briggs Indiana* rule.

Whether a Self-Determination Election is Appropriate

Board elections typically only present the question of whether employees wish to be represented by a labor organization. However, the Board will, under some circumstances, conduct an election that also resolves a unit placement issue, referred to as a self-determination election. One type of self-determination election is a so called *Armour-Globe* election, directed where a petitioner seeks to add a group of unrepresented employees to an existing unit, derived from *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937) and *Armour & Co.*, 40 NLRB 1333 (1942). An *Armour-Globe* election determines not only whether the employees wish to be represented, but also whether they wish to be included in the existing unit. *Warner Lambert, Co.*, 298 NLRB 993 (1990).

When a petitioner seeks an *Armour-Globe* election the first consideration is whether the voting group sought is an identifiable, distinct segment of the workforce. *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011), citing *Warner Lambert* at 995. Whether a voting group is an identifiable, distinct segment is not the same question as whether the voting group constitutes an appropriate unit; the analysis if a petitioner was seeking to represent the employees in a standalone unit. *St. Vincent* at 855. Instead, the identifiable and distinct analysis is merely whether the voting group sought unduly fragments the workforce. *Capitol Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

If the voting group sought is an identifiable and distinct segment of the workforce, the question then is whether the employees in that voting group share a community of interest with the existing unit. As stated by the Board, when petitioner seeks an *Armour-Globe* election “the proper analysis is whether the employees in the proposed voting group share a community of interest with the currently represented employees, and whether they constitute an identifiable, distinct segment.” *St. Vincent* at 855.

Identifiable and Distinct

In *St. Vincent*, the Board concluded a petitioned-for group of employees in a single classification constituted an identifiable and distinct group, appropriate for an *Armour-Globe* election, because the employees were employed in a single department, worked in the same physical location, and shared the same supervision. *St. Vincent Charity Medical Center* at 855-856. The Board reached the opposite conclusion in *Capitol Cities Broadcasting Corp.*, 194 NLRB 1063, 1064 (1972), finding the voting group sought arbitrary, and inappropriate for an *Armour-Globe* election, because the

employees in the voting group were scattered across various unrepresented departments and lacked such similarities.

In the present case, I find the pharmacy technicians are an identifiable and distinct group appropriate for a self-determination election. The voting group sought includes all the employees at the Bennett store in the pharmacy technician classification. As in *St. Vincent*, these employees work together in a single department, in the same location, for a single supervisor.

The Employer argues that the present case involves a situation where the extent of the Union's organizing is dictating the scope of the unit. While I agree that this is not an appropriate basis on which to make unit distinctions, I do not find that is the case here. The *Armour-Globe* test avoids this pitfall by analyzing whether the voting group sought is an identifiable and distinct group, and as described above I find that requirement is met here. I do not agree with the conclusion, reached by the Employer, that the mere fact Petitioner is seeking less than a wall-to-wall unit demonstrates it is motivated by the extent of its organizing. To reach this conclusion would essentially prevent anything less than a wall-to-wall unit in any case. The Board does not require such an approach.

Before turning to the community of interest question, I would note that, regarding seeking a self-determination election, I also do not agree with Respondent's contention that the voting group sought by Petitioner is inherently contradictory. Respondent asserts that, in seeking to add the pharmacy technicians to the Denver clerk unit, Petitioner is claiming both that the pharmacy technicians have a community of interest with the retail clerks of the Denver clerk unit, but also maintaining the pharmacy technicians have no community of interest with the Store 112 clerks. I disagree with this characterization.

The first part is true; under *Armour-Globe* the voting group sought must share a community of interest with the existing unit and I have addressed that consideration in the following section. However, at no point in an *Armour-Globe* analysis must this community of interest – the voting group sought and existing unit – be balanced against another community of interest – the voting group sought and the remainder of employees at the Bennett store – as the Employer posits. In short, the Petitioner does not have a burden to prove the pharmacy technicians' community of interest with the Denver clerk unit is stronger than would exist in a wall-to-wall unit, and I have not applied that analysis.

To the extent the Employer is referencing the requirement in *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 6 (2017), that the interests of the unit sought are sufficiently separate and distinct from those of the remainder of the workforce to constitute an appropriate unit for bargaining, the Board has not applied the *PCC Structurals* framework to the self-determination context. I have applied the *PCC Structurals* framework to the question addressed later in this Decision, as to whether the voting group sought can form an appropriate standalone unit.

Armour-Globe Community of Interest Factors

As noted above, because the instant petition seeks a self-determination election, once it has been determined the employees in the voting group are an identifiable and distinct group the question is then whether they share a community of interest with the existing unit. *St. Vincent Charity Medical Center*, 357 NLRB at 855. Although I have found the pharmacy technicians are an identifiable and distinct group, for the reasons described below I do not find they share a community of interest with the employees in the Denver clerk unit sufficient to make the petitioned-for self-determination election appropriate.

Organization of the Facility

The employees in the voting group work at a different location from the employees in the existing unit and as such I find this factor weighs against finding a community of interest. I recognize the record contains some evidence of a pharmacy-specific hierarchy that could, potentially, be a way in which the voting group sought and pharmacy employees in the existing unit are “organized” together. However, I do not find that the minimal evidence regarding this pharmacy hierarchy is enough to draw any such conclusion.

Nature of Employee Skills, Training, and Job Functions

I find the skills, training, and job functions of the voting group do give some support to finding a community of interest. The pharmacy technicians in the voting group and the pharmacy technicians in the existing unit share the same skills, training, and job functions. The other clerks in the existing unit have similar skills, training, and job functions as well, with responsibilities related to customer service and stocking products.

Degree of Functional Integration, Contact and Interchange

There is little evidence in the record of functional integration between the employees in the voting group sought and the employees in the existing unit. The Bennett store functions as an independent location within the Employer’s operations. To the extent functional integration exists at the district or Employer-wide level that is not detailed in the record.

The record does not address in detail the informal system that exists whereby pharmacy technicians employed at the Bennett store may work shifts at other locations, or pharmacy technicians at other locations may work at the Bennett store, other than identifying that some such system exists. While covering shifts does constitute temporary interchange, the record on this point is not developed sufficiently to determine whether this interchange is occurring with employees in the existing unit, as the coverage could also involve employees from other non-represented stores. In short, while I recognize the potential of temporary interchange, the record is insufficient to make any findings in support of Petitioner’s position. As such, there is insufficient evidence of contact between the petitioned-for voting group and the employees in the Denver clerk unit.

The record does not contain any evidence of permanent transfers from the voting group sought to the existing unit or the existing unit to the voting group. The transfers

within the Bennett store described in the record are not relevant to determining whether a community of interest exists between the pharmacy technicians and the existing unit.

Terms and Conditions of Employment

Regarding employees' terms and conditions of employment, I note the pay of the pharmacy technicians in the voting group is the same as pharmacy technicians in the existing unit. The two groups also are provided similar types of benefits by the Employer, such as paid vacation, sick leave, and health insurance. While the nature of those benefits differs, this is a function of the collective-bargaining agreement covering the employees in the existing unit.

Common Supervision

The employees in the voting group sought are separately supervised from the employees in the existing Denver clerks unit. At a minimum, the store manager and the assistant store managers at the Bennett store supervise the voting group sought, and clearly these supervisors do not supervise any existing unit employees.

Petitioner maintains the pharmacy manager is a statutory supervisor, but I have declined to reach that conclusion on the record evidence available. However, I note that even if the pharmacy manager was a statutory supervisor it makes no difference regarding this factor; as with the store manager, the pharmacy manager of the Bennett store does not supervise employees in the existing unit.

Conclusion Regarding Armour-Globe Community of Interest

Having considered the above factors, and particularly considering that the voting group sought is employed at a separate store, lacking functional integration, interchange and common supervision with any employees in the existing unit, I find a community of interest does not exist between the pharmacy technicians in the voting group sought and the clerks in the Denver Clerk unit. Having reached this conclusion, it is necessary to address Petitioner's alternative position: whether the pharmacy technicians at the Bennett Store can properly be represented in a standalone unit.

Whether a Standalone Unit is Appropriate

When examining the appropriateness of a unit, the Board need not determine whether the unit sought is the only appropriate unit or the most appropriate unit, but rather whether it is "an appropriate unit." *Wheeling Island Gaming*, 355 NLRB 637, 637 n.1 (2010), citing *Overnite Transportation Co.*, 322 NLRB 723 (1996). If the petitioned-for unit is deemed inappropriate, the Board considers alternate unit proposals. *Overnite Transportation*, 322 NLRB at 723 ("[t]he Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining").

To determine whether a unit is appropriate, the Board considers whether the petitioned-for employees share a community of interest. *PCC Structural, Inc.*, 365 NLRB No. 160 (2017). In making a community of interest determination, the Board considers its traditional factors, whether the employees: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4)

are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *PCC Structurals*, slip op. at 11 (citing *United Operations*, 338 NLRB 123 (2002)). The Board considers all the factors together, as no single factor is controlling. *Id.*

In *The Boeing Co.*, 368 NLRB No. 67 (2019), the Board described the three-step analysis to be applied under *PCC Structurals* when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit. *Id.*, slip op. at 2. The first step considers the shared interests within the petitioned-for unit, examining whether the interests of the included employees are too disparate, preventing a community of interest. *Id.*, slip op. at 3. The second step considers the shared interests of the petitioned-for and excluded employees, and specifically whether the excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. *Id.*, slip op. at 4. Third, the Board considers whether special considerations, such as guidelines for specific industries, are present. *Id.*¹⁴

Shared Interests within the Petitioned-for Unit

The pharmacy technicians in the petitioned-for unit have significant similarities that make a community of interest readily apparent. All the pharmacy technicians in the unit sought are located in the pharmacy department at the Bennett store. They have the same skills and training, including the requirement that they are certified by the Colorado State Pharmacy Board, and perform the same work. Their terms and conditions of employment are the same. In short, the record does not identify any significant differences between the pharmacy technicians.

Shared interests of the Petitioned-for and Excluded Employees

As stated by the Board in *Boeing*, step two requires a comparative analysis of excluded and included employees to determine whether the employees excluded from the unit “have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *Id.*, slip op. at 4, quoting *Constellation Brands*, 842 F.3d 784, 794 (2nd Cir. 2016). Accordingly, the question here is whether the pharmacy technicians are distinct enough from the other clerks at the Bennett store to make the petitioned-for unit appropriate. I find they are not.

Some aspects of the pharmacy technicians’ employment are unique and differ from other employees. The pharmacy technicians are the only clerks in the pharmacy department. Further, because they are the only clerks at the Bennett store that have their certification and medical privacy training, they are the only clerks allowed to access the inside of the pharmacy.

However, I find in regard to numerous other community of interest factors the pharmacy technicians are simply not sufficiently distinct from the other clerks at the Bennett store. While the pharmacy technicians are the only clerks to have the pharmacy technician certification, this is not the result of an advanced degree or other course of

¹⁴ In the instant case, no party asserts a specific industry standard or special consideration is present and I have omitted that portion of the *Boeing* analysis.

study. Pharmacy technicians are trained and take a test, but the background and education requirements for their position are the same as other clerks. Further, other training-and-test certifications or requirements do exist for other clerk positions.

While the work of pharmacy technicians involves a product other clerks do not handle, prescription medicine, their job duties with that product are essentially the same as other clerks; pharmacy technicians greet customers, collect information about the customer's needs, and retrieve the customer's product. They answer general questions and perform data entry at the register. When not interacting with customers, pharmacy technicians stock shelves and order supplies. They regularly stock some items outside of the Pharmacy, in the general merchandise area. While much of the deliveries to the Pharmacy are direct from the suppliers, other products come to the Pharmacy through pallet deliveries that must be broken down by other employees in the store. Further, other departments receive direct delivery of products, including the deli and seafood departments. The differences between the pharmacy technicians and other clerks do not appear distinct from two clerks working in any two departments, such as a deli clerk and a clerk in the floral department. The products are different, but the fundamental nature of their job duties is the same.

I also note that interchange, both temporary and permanent, occurs between the pharmacy technicians and other clerks. While other clerks cannot work in the pharmacy, on at least one recent occasion pharmacy technicians have covered the work of other clerks. Further, the record contains evidence of multiple clerks transferring into the pharmacy technician position.

The terms and conditions of employment of the pharmacy clerks and the other Bennett store clerks are similar, and in some ways identical. Many of the policies and procedures covering both employees are the same, including wage related policies such as vacation pay and overtime, and fringe benefits are identical. The pharmacy technicians' wage rates are on the high end of the rates paid to clerks, but they are within the same range paid to other clerks.

Finally, I find common supervision is another factor that weighs against finding pharmacy technicians are sufficiently distinct from other clerks. Although Petitioner asserts the pharmacy manager is a statutory supervisor, the record does not contain the evidence to support this contention. As such, the supervisor of the pharmacy technicians is the store manager, the same supervisor to which all other clerks report.

Conclusion Regarding Standalone Unit

In response to Petitioner seeking to represent a standalone unit of pharmacy technicians, the Employer asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the other clerks employed at the Bennett store. I have found that while the pharmacy technicians share similar interests among themselves, they do not have meaningfully distinct interests from the clerks Petitioner seeks to exclude, specifically in regard to their similar work, interchange and shared supervision. For that reason, I find the pharmacy technicians are not an appropriate standalone unit.

CONCLUSION

I do not find that a contract bar exists in this case. Additionally, I find that the voting group sought by Petitioner is not appropriate, for while it consists of an identifiable and distinct group, it is one that does not share a community of interest with the existing unit. Having considered then whether the employees at issue could constitute a standalone unit I have found they are not sufficiently distinct from the other clerks at the Bennett store to constitute an appropriate unit. Because neither the petitioned-for self-determination election nor the standalone election are appropriate, I have dismissed the petition.

ORDER

IT IS HEREBY ORDERED that the Petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by June 30, 2020.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Denver, Colorado on the 16th day of June 2020.

/s/ Paula Sawyer

PAULA SAWYER
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