UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DTG OPERATIONS, INC.

Employer,

and

Case 27-RC-8629

TEAMSTERS LOCAL UNION NO. 455,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

International Brotherhood of Teamsters, Local Union No. 455 ("Petitioner"), by its attorney, Michael J. Belo of Berenbaum Weinshienk PC, submits this supplemental brief in support of its position that the petitioned-for unit of rental service agents ("RSA") at the Employer's car rental facility is an appropriate unit for bargaining and that, accordingly, the Regional Director's Decision and Order ("Decision") should be reversed.

I. Introductory Statement

On April 29, 2011, the Board granted Petitioner's Request for Review of the Regional Director's Decision. On May 10, 2011, the Board ordered that briefs on review must be submitted by today's date, May 27, 2011. Petitioner submits this brief to supplement its position set forth in its Request for Review, which was a comprehensive brief of 19 pages. In addition, Petitioner incorporates its post-hearing brief to the Regional Director, in which Petitioner

extensively discussed the issues and the evidence in the record, as an attachment to this supplemental brief.

Petitioner seeks to represent an appropriate, functionally distinct unit of all full-time and regular part-time rental sales agents (25 employees) and lead rental sales agents (6 leads) employed by the Employer at the DIA facility, excluding all other employees, office clerical employees, supervisors, and guards as defined in the Act. The Regional Director erroneously found that the only appropriate unit must include *all* employees (109 in total) at the sprawling 13-acre facility. The Regional Director failed to give sufficient weight to the facts that a majority of the classifications have essentially no daily interaction or interchange with RSAs; the other classifications, as service and maintenance employees, work primarily outside (or in separate buildings) in substantially different conditions compared with the RSAs who work at the Thrifty Car Rental ("Thrifty") and Dollar Rent-A-Car ("Dollar") rental counters; and no other classifications are subject to the unique incentive plan imposed on RSAs, the only employees who are subject to discipline and potential discharge for not complying with their incentive plan.

Petitioner has discussed the facts extensively in both its post-hearing brief to the Regional Director and its Request for Review. Rather than repeat the facts and arguments in the Request for Review, Petitioner will focus on major points which, in our view, are crucial to the Board's determination of the unit issue.

II. Argument

A. The minor amount of interchange, interaction, or overlap between the requested unit and other classifications does not override the distinct community of interest among RSAs.

In the Request for Review, Petitioner discussed in detail the evidence that, with limited exceptions, RSAs do not have significant interchange or daily interaction with other classifications. Moreover, the limited interchange or interaction is not enough to override their distinct community of interest. The allegedly "extensive amount of interchange" found by the Regional Director (Decision at 34) is predominantly among classifications of employees **other than RSAs**.

In this context of determining whether the unit requested by Petitioner is **an** appropriate unit or the smallest appropriate unit pursuant to *Overnite Transportation Co.*, 322 NLRB 723 (1996), the relevant criterion in evaluating interchange is whether employees in the petitioned-for unit have significant temporary interchange with classifications outside the requested unit, not whether the outside classifications have interchange among themselves. In *Montgomery Ward & Co.*, 230 NLRB 366, 367 (1977), the Board found that the requested unit of "warehouse and retail bargain store employees share a sufficiently distinct community of interest apart from other employees." The Board reasoned as follows:

> In reaching our conclusion, we rely particularly upon the lack of interchange between the employees in the requested warehouse unit and the repair service and drapery workroom employees, the separate supervision for each group, the different work locations, lack of significant contacts between the groups, and the different work skills. While the record reveals a small degree of functional overlap between the duties of warehousemen and service employees, it is, in our opinion, insufficient to negate the separate community of interest shared by warehouse and retail bargain store employees. Also, no union is seeking to represent the employees herein on a broader basis.

Id. at 367 (citations omitted).

Similarly, in *J.C. Penney Co., Inc.*, 196 NLRB 708 (1972), the Board considered circumstances analogous to those here and in the car rental cases previously discussed by Petitioner in the Request for Review, where the union requested a unit of service employees and the Board consistently rejected the employer's contention that sales employees must be included. *Avis Rent-A-Car System, Inc.*, 132 NLRB 1136 (1961); *Budget Rent-A-Car of New Orleans, Inc.*, 220 NLRB 1264 (1975); *Alamo Rent-A-Car*, 330 NLRB 897 (2000). In *J.C. Penney* the Board held that "service employees constitute an identifiable and homogenous grouping, with a community of interest sufficiently distinct from the sales specialists to warrant separate representation." 196 NLRB at 709 (citations omitted). The Board explained as follows, for reasons that are just as applicable herein:

> Thus, the sales specialists are primarily salesmen who work in a separate air-conditioned enclosure, are paid a draw against commissions, have little contact with the service employees, and there is no interchange between the two groups of employees. The service employees perform manual work in connection with the repair and maintenance of automobiles exercising varying degrees of mechanical skills.

Id. at 709. *Accord, J.C. Penney Co.*, 196 NLRB 446, 447 (1972) (separate unit of service employees is appropriate, despite employer's contention that sales employees should be included).

Even in *United Rentals, Inc.*, 341 NLRB 540 (2004), the case relied upon by the Regional Director, the Board found that the relevant interchange consisted of employees outside the requested unit regularly performing the duties of the requested unit, and vice versa: "This method of operation has resulted in the excluded employees regularly and frequently performing

duties of employees in the petitioned-for unit. . . . Conversely, yard employees have performed the duties of counter employees and filled in for them when they are sick." 341 NLRB at 541.

The Employer contends that the car rental cases cited by Petitioner—the only car rental cases in Board R-case annals—are outdated (Employer's Opposition to Petitioner's Request for Review, p. 5). Like the Regional Director, the Employer contends that its "CHOICE" method of operation—the customer selects a car classification at the rental counter rather than a specific car, chooses his or her car outside, and the exit gate booth agent enters the specific car into the computer system—results in greater functional integration. As Petitioner discussed in the Request for Review (p. 8), however, the additional amount of functional integration is minimal, because even in a non-CHOICE operation, the booth agent must verify that the car selected by the customer is correct. The CHOICE method actually reduces integration to the extent that the lot agent, rather than showing the customer to a specific car assigned by an RSA, instead merely points the customer to the area where the customer's classification of car is located. In any event, the arguable increase in functional integration under the CHOICE method does not override the evidence that RSAs share a distinct community of interest apart from other employees.

As discussed extensively in the Request for Review (pp. 4-8), the only classification with which RSAs have any significant regular interaction, interchange, or overlap are the two staff assistant I employees, who primarily engage in office clerical functions upstairs in the supervisory offices except when they assist at the rental counter as needed (as do excluded supervisory personnel). The day shift RSAs cover breaks of lot agents—but not vice versa, because the work of RSAs requires technical expertise with the computerized rental system that other employees do not possess.

Evening and night shift RSAs perform some of the duties of lot agents and return agents after approximately 9:00 to 10:00 p.m. at night, because the Employer does not schedule lot agents or return agents after that time. This is not entitled to significant weight, however, because it does not show interchangeability of job functions, but instead reflects only that lot or return agents are not scheduled then. In *Home Depot USA, Inc.*, 331 NLRB 1289, 1289-90 (2000), the requested unit of drivers regularly spent time "pulling" merchandise inside the store when "pullers" were not scheduled. The record reflected that drivers spent 30 to 40 percent of their workweek pulling merchandise, a far greater percentage of time than evening or night shift RSAs spend doing lot or return agent duties at DTG. In *Home Depot* the Board found this kind of "overlap" to be insignificant. "Because the work schedules of the pullers and the drivers do not overlap, the drivers do not have significant interaction with the pullers." 331 NLRB at 1290.

The Board found that, despite some common interests—as RSAs have here with other classifications, just as all employees of DTG, including supervisors, share some common interests—the drivers had a "sufficiently distinct community of interest" to constitute a separate appropriate unit. The Board reasoned, in terms that are equally applicable here:

> Although it is undisputed that the drivers do share a number of common benefits, terms, and conditions of employment with the Employer's other employees, share common supervision with other employees, and have some degree of interaction and integration with other employees, we find that these similarities are substantially outweighed by the factors supporting a conclusion that the drivers as a group share a distinct community of interest, and therefore constitute an appropriate unit.

Id. at 1291.

In *Yuengling Brewing Co.*, 333 NLRB 892, 893 (2001), the Board rejected the employer's contention that the requested maintenance unit was inappropriate and that the only appropriate unit was all production and maintenance employees. Just as dayshift RSAs cover

breaks for lot agents at DTG, or evening or night shift RSAs perform lot or return agent duties when those classifications are not scheduled, in *Yuengling Brewing* the maintenance employees relieved production employees on breaks. Similarly, the production and maintenance employees cooperated to get production started at the beginning of the day. The Board found that these circumstances did not constitute either the kind, or the degree, of interchange, overlap, or functional integration that would override the maintenance employees' distinct community of interest.

> Although the production and maintenance employees perform some overlapping unskilled functions, there is little evidence of temporary interchange. A maintenance employee may, on occasion, relieve a production employee during a break. However, when a production employee is absent, another production employee will replace that employee. Similarly, when a maintenance employee is absent, another maintenance employee will fill in for the absent employee.

333 NLRB at 893.

Similarly, there is no true interchangeability here. When an RSA is absent, he or she is not replaced by an excluded employee, with the possible exception of a supervisor or a staff assistant I, as we will discuss below. When an employee in a non-RSA classification is absent, he or she is not replaced by an RSA. The work done by RSAs when covering a break for a lot agent during the day, or doing lot or return agent duties at night, is less-skilled work. No other nonsupervisory job classification—aside from the two staff assistant I employees—regularly performs or substitutes for the job duties of RSAs.

Covering breaks of lot agents, or doing lot or return duties at night when such employees are not scheduled, is peripheral to the RSA's primary function of renting cars at the rental counters and selling upgrades and other items expected by the Employer as part of the mandatory RSA incentive program. As the Board reasoned in *Yuengling Brewing*:

> Further, as noted above, the overlapping functions performed by production and maintenance employees involve unskilled work. For example, the production and maintenance employees cooperate to get the production line started and to complete production at the end of the day. Maintenance employees may lend a hand to take glass out of the drop pack, help on the palletizer, and pull bottles and cans out of the pasteurizer. Production employees perform minor electrical and mechanical work, and provide assistance to maintenance employees, such as jogging a machine or helping to get it lined up, when repairing production equipment or performing special projects. The maintenance employees, however, perform all major repairs. **The Board has found that this type of overlap and "lending a hand" does not require the inclusion of production employees in a maintenance unit, since this work is unskilled and peripheral to the regular repair work performed by the maintenance employees.**

Id. at 893 (emphasis added).

The Employer asserts that Herman Moss, a lead service agent and former RSA, regularly works as an RSA (Employer's Opposition to Request for Review, p. 7). The Regional Director found that Moss "occasionally fills in for absent RSAs" (Decision at 16). As Petitioner discussed in the Request for Review, however, the indisputable documentary evidence shows that **such substitution is increasingly rare.** The pertinent record, the "RSA Peer Ranking," shows that Moss did only 7 rental agreements for Dollar and zero agreements for Thrifty in October 2010, whereas a typical RSA does hundreds of rental agreements during a one-month period (Union Ex. 6, p.20, and Ex. 7). By December 2010, Moss did **no** RSA work whatsoever at either the Dollar or the Thrifty rental counter (Employer Ex. 24 and 25). Similarly, a return agent, April DeBerry—who volunteered for training at the rental counter, rather than being required by the Employer as part of its organization of work duties—did 5 rental agreements at Dollar and zero agreements at Thrifty in October 2010; she did zero agreements in December 2010 (Tr. 161, 167). The lead staff assistant, Taira Wright, did 1 rental agreement at Dollar in October and 1 agreement in December 2010, 2 agreements at Thrifty in October, and zero agreements at Thrifty in December 2010. (Union Ex. 6 and 7, Employer Ex. 24 and 25.)

The only nonsupervisory classification that truly overlaps or interchanges, at least in part, with RSAs is the two staff assistant I employees, who assist at the rental counters as needed. The significance of this evidence for unit determination purposes is diminished, because supervisors—all the way up to General Manager Rick Klier—also assist at the counters when needed. As Petitioner discussed in the Request for Review (pp. 16-17), the primary duties of the staff assistant I's are office clerical in nature. The Employer's own witness, General Manager Klier, in his direct examination by the Employer's attorney, described their primary functions as office clerical rather than relating to production (Tr. 55). The staff assistant I's do their primary work in the supervisory offices upstairs, rather than in a "production" area such as the rental counter area where the RSAs work. Moreover, the types of reports that they prepare, including reports on discounts offered by RSAs, suggest that they have interests adverse to RSAs. In summary, the staff assistant I's are office clerical employees who should be excluded from the appropriate unit of RSAs.

Even if the Regional Director was correct in categorizing the two staff assistant I's as plant clerical rather than office clerical employees, their occasional performance of RSA duties does not render the requested unit of RSAs inappropriate. At most, it means that the two staff assistant I employees could be added to the RSA unit. There is no evidence that the staff assistant I's, other than performing RSA duties as needed, interchange or interact in any significant manner with any other classification of employees asserted by the Employer to be part of the unit. Hence, the partial interchange between RSAs and the two staff assistant I's does not make an overall unit appropriate.

B. Rental sales agents have distinct terms and conditions not applicable to other employees, including an incentive plan that provides disciplinary penalties for noncompliance.

First, the physical conditions and location of work for RSAs are decidedly different. RSAs are primarily sales employees. They work behind rental counters in the Dollar or Thrifty rental buildings, prepare rental agreements for customers, and operate computers. Service agents, lot agents, and return agents work outside and perform basically manual labor related to preparing, renting, or returning vehicles (other than the return agents' task of closing out the contract on a handheld electronic device). Exit booth gate agents work in a booth that is hundreds of yards distant from the rental buildings on the 13-acre site. Mechanics work in the maintenance building performing mechanical and maintenance work under separate supervision. Courtesy bus drivers operate buses from the airport to the facility and back. Exit booth agents, mechanics, bus drivers, and the remaining classifications included by the Regional Director (the fleet agent, building maintenance technician, lead staff assistant, and shuttler) have essentially no daily contact or interaction with RSAs.

Second, although all employees are subject to the same overall policies and benefits, this factor is diminished for unit determination purposes because all supervisors and, indeed, all employees of the entire corporation are subject to these same provisions. Only RSAs, however, are subject to an incentive program that **requires** them—as a condition of continued employment as an RSA—to sell upgrades and other products aggressively to customers. The "Incentive Compensation Plan" for RSAs provides credits for each of the extra products under the plan (Union Ex. 2 and 3). The company calculates a "threshold" for each month—if the RSA does not reach the threshold, he or she does not receive incentive pay even if he or she has sold extra products (Union Ex. 4 and 5; Tr. 260-64).

Unlike all other employees, if RSAs do not meet the incentive goals established by the company, they are subject to disciplinary action and discharge, as they are placed into the euphemistically-named "Core Model for Sales" (Union Ex. 1). If the RSA fails to achieve the specified goals for any month, the RSA's performance is deemed unacceptable, and he or she is placed into a five-step disciplinary process culminating in either discharge or reassignment to a different job (Union Ex. 1, p. 2). The Regional Director mentioned this fact briefly in describing RSAs, but then disregarded it completely in her analysis (Decision at 13, 32).

The other incentive plans mentioned by the Regional Director, such as the incentive for service agents depending on the number of cars they wash or the incentive for exit gate agents for the number of prepaid fuel agreements, are merely options for those employees to earn a little extra cash. In contrast, the incentive plan for RSAs is a **mandated** term and condition of employment, with which they must comply or face levels of discipline culminating in termination of their employment or assignment to a different job.

Herman Moss, the aforementioned service agent—whom the Regional Director and the Employer cited as an example of a non-RSA who allegedly does occasional work at the rental counter, but whose RSA work diminished to nothing by December 2010—is instead an example of a former RSA who transferred out because he could not comply with the "Core Model" incentive program. Similarly, the Employer's witness attested to other lot agents and employees who have transferred out of the RSA position (the record does not reflect whether they transferred voluntarily or involuntarily) because they suffered discipline under the Core program (Tr. 117-18). This evidence underscores the significance of the RSA incentive program in determining that RSAs, even though they share some conditions in common with other classifications, face other major conditions that are different in a legally significant manner for

unit determination purposes. In short, the Core program is the difference between some employees being RSAs and some employees not being RSAs for the Employer.

Third, the Regional Director erroneously found that RSAs are under common supervision (Decision at 32-33). She failed to account for the fact that although all employees on a given shift are subject generally to the overall supervision of the Operations Manager(s) on duty, the RSAs have separate immediate supervision in significant respects. As the Employer's witness testified, Senior Operations Manager Todd Trueblood is directly responsible for scheduling them, granting time off, and other administrative tasks for RSAs, with assistance from Operations Manager Margaret Savelio (Tr. 121, 192-93). Even if this is not rigidly separate supervision, it is entitled to weight when considered with the other factors warranting a separate unit. "Further, although there is some evidence of 'cross-supervision' of classifications, there is also evidence of separate immediate supervision. Thus, the evidence regarding supervision is insufficient to support the Employer's contention that a wall-to-wall unit is the smallest appropriate unit." *Overnite Transportation Co.*, 331 NLRB 662, 663-64 (2000).

Finally, the Regional Director's finding that RSAs have an "overwhelming community of interest" with all of the other classifications she included in the unit—which is partly a factual determination but mainly a legal conclusion—is erroneous, as a matter of fact and a matter of law (Decision at 30). The Regional Director's Decision fails to accord sufficient weight to the Board's well-established rule that, in order to assure employees the "fullest freedom in exercising the rights guaranteed by the Act," the Board will select the smallest appropriate unit encompassing the petitioned-for employee classifications. *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Bartlett Collins Co.,* 334 NLRB 484 (2001); *The Boeing Co.,* 337 NLRB 152, 153 (2001).

The evidence demonstrates that RSAs have a distinct community of interest among themselves. Their primary function is sales, while the other employees perform mainly service, maintenance, and support functions. RSAs share a unique work location, physical conditions of work, and work duties. They are subject to a unique incentive plan. They are the only employees who face discipline and discharge, and who have been disciplined and transferred out of their classification, for failing to comply with their incentive plan. Although they share some interests in common with their fellow employees—as any employers of the same employer share some common interests—those terms and conditions do not override the separate community of interest among RSAs..

In summary, the Board's conclusion in *Home Depot* is directly applicable here:

> It is well settled that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnite Transportation Co.*, supra at 723. On balance, we find that although drivers share a number of similarities with other employees, and have contact with other employees, the weight of evidence supports a finding that the petitioned-for unit of drivers **share a sufficiently distinct community of interest**, and therefore constitute an appropriate unit under the Act.

331 NLRB at 1291 (emphasis added).

III. Conclusion

First, the Regional Director's Decision fails to accord sufficient weight to the Board's procedure for determining the smallest appropriate unit encompassing the petitioned-for job classifications. Second, the minor amount of interchange, interaction, or overlap between the requested unit and other classifications does not override the distinct community of interest among RSAs. Most of the alleged interchange or interaction relied upon by the Regional Director is among classifications of employees outside the requested unit, rather than interchange between the RSAs and outside classifications as provided by Board law.

Third, RSAs share a unique community of interest as sales employees, with different working conditions and duties from the other employees who provide service and support functions. RSAs are subject to a unique incentive plan that subjects only RSAs and no other classification to potential disciplinary consequences. They have separate immediate supervision in significant respects and other factors that warrant a separate bargaining unit.

Therefore, Petitioner requests the Board to reverse the Regional Director's decision, to find that the unit requested by the Petitioner is appropriate for collective bargaining, and to direct an election in the requested unit.[1]

Respectfully submitted on this 27th day of May, 2011.

s/ *Michael J. Belo*

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[1] On February 21, 2011, Petitioner notified the Regional Director that although we maintain that the requested unit is appropriate, Petitioner is willing to participate in a larger unit if the Board finds that a larger unit is the only appropriate unit.

CERTIFICATE OF SERVICE

I hereby certify that I served the PETITIONER'S SUPPLEMENTAL BRIEF by email and by placing a copy in the U.S. Mail, with first-class postage affixed, and addressed to the following:

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s/*Michael J. Belo*

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Petitioner.

PETITIONER'S POST-HEARING BRIEF

International Brotherhood of Teamsters, Local Union No. 455 (the "Petitioner" or "Union"), submits this brief in support of its position herein.

I. Introductory Statement

The Petition was filed on December 15, 2010. The hearing was conducted by Hearing Officer Kristyn Myers on January 3 and 4, 2011. The Petitioner seeks to represent a bargaining unit consisting of all full-time and regular part-time rental sales agents and lead rental sales agents employed by the Employer at its facility at Denver International Airport ("DIA"), excluding all other employees, office clerical employees, supervisors, and guards as defined in the Act. The unit proposed by the Petitioner consists of 24 rental service agents and 6 lead rental sales agents (Employer Ex. 3).

DTG Operations, Inc. (the "Employer" or "DTG"), asserts that the only appropriate unit consists of all employees at the facility, including return agents, lot agents, service agents, exit gate agents, the fleet agent, courtesy bus drivers, mechanics, assistant mechanics, staff assistants,

the building maintenance technician, and certain lead employees in the above classifications. The unit proposed by the Employer consists of 109 employees (Employer Ex. 3). The parties stipulated that the following persons, as listed on the supervisory organizational chart (Employer Ex. 2), are supervisors as defined in the Act and should be excluded: General Manager, City Fleet Manager, Fleet Maintenance Manager, Senior Operations Manager (two persons), and Operations Managers (five persons).

In summary, the Petitioner contends that the rental sales agents and lead rental sales agents constitute an appropriate bargaining unit, because they share a distinct community of interest among themselves. The rental sales agents work primarily inside the Dollar Rent-A-Car ("Dollar") or Thrifty Car Rental ("Thrifty") rental buildings behind customer service counters. Their primary task is renting vehicles to customers and operating computers for that purpose. Unlike other employees, they have a unique incentive program that provides strong incentives, in terms of potential financial gain as well as disciplinary consequences, to "sell" additional products to the customer such as insurance, vehicle upgrades, GPS units, and similar options. The other employees work primarily outside or in other locations in much different capacities, such as preparing cars for rental, receiving vehicles as customers return the vehicles, and maintaining the vehicles (which occurs in a separate maintenance building far away from the customer service counters). Although a unit comprising all employees might be appropriate, it is not the only appropriate bargaining unit.

II. Summary of Pertinent Facts

The Employer operates a facility near DIA at which it rents cars, sport utility vehicles ("SUVs"), and other vehicles under the separate brand names of Dollar and Thrifty. Both brands are located at the same thirteen-acre facility along "rental car row" near the airport, with separate

Dollar and Thrifty rental buildings, but a common maintenance garage and a common carwash building each located several hundred yards away from the rental buildings (Employer Ex. 1; Tr. 14-15).[1]

The duties of the rental sales agent ("RSA") are to meet customers upon their arrival at either the Dollar or the Thrifty rental building, depending upon the customer's reservation or preference for brand. The RSAs are assigned to either Dollar or Thrifty, typically alternating on a monthly basis, but may be assigned to either brand whenever necessary. The RSA works primarily behind the customer service counter and utilizes a computer to enter information about the customer, car rental, upgrades, and other extras into the Employer's database. The basic duty of the RSA is to rent the vehicle in the vehicle classification reserved by the customer, but the RSAs are encouraged strongly to sell or rent additional products to the customer, *e.g.*, upgrades to a more expensive vehicle class such as from an intermediate car to an SUV, several different types of insurance coverage, purchasing prepaid fuel, and rental of GPS navigation units. (Tr. 246-51; 272-76, 289-91.)

The RSAs do not make any incentive pay for simply renting the vehicle to the customer as reserved by the customer. They are subject to a unique and complex "Incentive Compensation Plan" that provides certain credits for each of the extra products under the plan (Union Ex. 2 and 3). The company calculates a minimum requirement or "threshold" for each month at the Denver location—if the RSA does not reach the threshold, he or she does not receive incentive pay even if he or she has sold extra products (Union Ex. 4 and 5; Tr. 260-64). The Company maintains detailed monthly records known as "RSA Peer Rankings" on the electronic database,

[1] References to the transcript will be in the form "Tr. ___."

which are accessible to RSAs, showing how they and fellow RSAs have performed and are ranked under the incentive program (Union Ex. 6, 7 and Employer Ex. 24, 25).

If RSAs do not meet certain incentive goals established by the company, they are placed into what the Employer euphemistically calls the "Core Model for Sales" (Union Ex. 1). The purpose of the Core Model is "to monitor and maintain acceptable sales performance numbers." If the RSA fails to maintain a certain yield for any month, his or her performance is deemed unacceptable and the employee is placed into a five-step disciplinary process culminating in either discharge or reassignment to a different job (Union Ex. 1, p. 2).

Although some other classifications of employees, such as service agents, exit gate booth agents, and mechanics, also have incentive plans, such plans are different from the incentive plans applicable to RSAs (Employer Ex. 26 – 30). For example, exit booth agents—the employees who check the rental car out of the employer's facility as the customer leaves the facility after renting and selecting a vehicle—are eligible to receive incentive pay if they sell a collision damage waiver or sell a toll booth pass for Colorado Highway E-470, a toll highway (Employer Ex. 28).[2] Mechanics are eligible for incentives if they exceed a specified percentage of preventive maintenance tasks or warranty recoveries (Employer Ex. 30). Unlike RSAs, however, there are no penalties or disciplinary consequences to any other classification of employee for not reaching what the Employer deems to be acceptable sales performance (Tr. 226-27).

[2] Although the plan for exit gate booth agents lists GPS units and vehicle upgrades as incentive items for them, at the Denver facility there are no GPS units available at the exit gate booths and the percentage of vehicle upgrades sold by booth agents is very low (Employer Ex. 28;Tr. 222).

The other major classifications which, according to the Employer, should be included in the unit are building maintenance tech (1 employee), courtesy bus drivers (21 employees), lead courtesy bus drivers (2), exit gate booth agents (9), fleet agent (1), lot agents (6), mechanics and assistant mechanics (9), return agents (9), service agents (9), lead service agents (4), shuttlers (2), staff assistant I (2), staff assistant II (1), and lead staff assistants (2), for a total of 109 employees.

The courtesy bus drivers transport customers from the airport to the Employer's facility, and back to the airport after customers return the rental vehicles (Employer Ex. 10, 22). They have little or no work-related contact or interaction with RSAs (Tr. 253, 278). As stated above, the exit gate booth agents work in the exit booths on the extreme southeastern corner of the property, which is about as far away from the rental buildings as possible on the thirteen-acre premises (Employer Ex. 1, 8). The RSAs have no work-related contact or interaction with them (Tr. 256, 277). The fleet agent is responsible for "in-fleeting" and disposing of rental vehicles, including transporting vehicles to auctions (Employer Ex. 9). He has no work-related contact with RSAs (Tr. 256, 277). Service agents are responsible for cleaning and preparing vehicles for customer use (Employer Ex. 7). RSAs have no work-related contact with them (Tr. 256, 277). Similarly, RSAs have no work-related contact or interaction with the shuttler or the building maintenance tech (Tr. 257-58).

Mechanics and assistant mechanics are responsible for performing preventive maintenance and routine maintenance upon vehicles (Employer Ex. 11 – 13). They work in a separate maintenance building in the southeast corner of the property near the exit booths (Employer Ex. 1). They work under separate supervision by the maintenance manager (Employer Ex. 2). They have no work-related contact or interaction with RSAs (Tr. 257, 278).

Lot agents are responsible for monitoring car supply, placing cars on the lot in the "ready lanes" for customers to select, and directing customers to cars after the customers have rented the vehicles (Employer Ex. 6; Tr. 31-33). RSAs occasionally substitute for lot agents when agents are on breaks and lunch periods. The last lot agents are scheduled to end their shifts at approximately 7 to 9 p.m., after which RSAs perform the function of showing customers to their cars.[3] In addition, when an RSA has a disabled customer, the RSA may need to communicate with a lot agent to get the customer's rental car and bring it to the customer.

Other than this limited interaction, RSAs typically have little job-related contact or interaction with lot agents. Despite the alleged duty listed in the lot agent description that lot agents "coordinate" with RSAs on "fleet availability" (Employer Ex. 6), there is no regular practice at the DIA facility of lot agents communicating with RSAs about availability of cars—the RSAs either check out the vehicle supply themselves or assume that vehicles are available in all classifications, or they receive information from management when there is limited availability of certain classifications. (Tr. 252-53; 275-77.)

Return agents, sometimes known as "greeters," greet customers upon vehicle check-in, inspect vehicles for damage, log fuel levels and mileage, and close out rental agreements using handheld computers (Employer Ex. 5).[4] RSAs have little or not work-related contact with return agents, except occasionally when a return agent goes to the rental counter to get a blank

[3] The Employer's facility at DIA is a "CHOICE" location, which means that the customer is not usually assigned a specific car by the RSA, but instead is given the choice of selecting any vehicle within the classification selected by the customer (Tr. 20-22). Hence, the lot agent or other employee does not show the customer to a specific car, but instead to the area where vehicles are ready in the customer's chosen classification.

[4] There is some confusion in the record about whether the lot agent or the return agent is the "greeter," because one of the RSA witnesses testified that they refer to lot agents as greeters (Tr. 252, 254). The Company presented an incentive plan dated 2006 for "greeters" which appears to correspond to the job description of the return agent. The Employer's witness referred to this initially as the plan for return agents, but subsequently as the plan for return agents and lot agents (Employer Ex. 5, 27; Tr. 211-12).

accident report form. The swing-shift RSA testified that his contact with return agents is "pretty much none." He testified that there is so little communication that sometimes return agents will leave without notification to the RSAs, with the result that customers will come into the rental building to check in their rental cars because no return agent is available. Formerly, the Employer provided two-way radios to facilitate communications between RSAs and return agents, but the Employer took away the radios. Similar to the practice with lot agents, after the last scheduled return agents leave for the night, RSAs perform the function of checking in customers who are returning cars. On the midnight shifts, there are no lot agents or return agents scheduled, so RSAs perform some of their basic functions. (Tr. 253-54, 276, 281-84.)

None of the above classifications regularly assist or perform the work functions of RSAs at the rental counters, except for a very limited number of employees with special circumstances, such as one of the lead service agents, Herman Moss, who formerly worked as an RSA and assists at the rental counter on a very limited basis (Tr. 237, 268). The RSA Peer Ranking for October 2010 shows that Moss did only seven rental agreements for Dollar and zero agreements for Thrifty, whereas a typical RSA does hundreds of rental agreements during a one-month period (Union Ex. 6, p.20, and Ex. 7). In December 2010, Moss did not work at either the Dollar or the Thrifty rental counter (Employer Ex. 24 and 25). Similarly, a return agent, April DeBerry—who asked to be trained at the rental counter, rather than being required by the Employer as part of its organizational structure—did five rental agreements at Dollar and zero agreements at Thrifty in October 2010; she did not work at either counter in December 2010 (Tr. 161, 167). The lead staff assistant, Taira Wright, did one rental agreement at Dollar in October and one in December 2010, and did two agreements at Thrifty in October and none in December 2010. (Union Ex. 6 and 7, Employer Ex. 24 and 25.)

The only nonsupervisory employees who perform RSA functions with any frequency are two employees classified as staff assistant I, Mark Chiara and Desiree Newell (Employer Ex. 3, 15; Tr. 54-57). Their primary duties are office clerical, such as preparing reports for management, answering phone calls, and handling lost and found items for customers. Their offices are located in the Dollar rental building on the second floor, which houses administrative and management offices (the Dollar rental counter is on the first floor). There is a staff assistant II (Amber Ross), but her primary functions involve titling of vehicles, her office is located in the maintenance building, and she does not assist at the rental counter (Employer Ex. 16; Tr. 57-58).

The Peer Rankings for October and December 2010 show that Staff Assistant Chiara did 45 rental agreements for Dollar and 12 agreements for Thrifty in October; he did 19 agreements for Dollar and 13 agreements for Thrifty in December. Staff Assistant Newell did 143 rental agreements for Dollar and 49 agreements for Thrifty in October; she did 42 agreements for Dollar and 3 agreements for Thrifty in December 2010. (Union Ex. 6 and 7; Employer Ex. 24 and 25.)

The significance of the fact that the staff assistants, Chiara and Newell, assisted at the rental counters is diminished by the fact that Operations Managers, who would be excluded from any unit found appropriate, assisted at the rental counters on many occasions. For example, Operations Manager Tamara Birkedahl prepared 51 rental agreements at Dollar in October, more than Staff Assistant Chiara at Dollar. Operations Manager Jeffrey Pitts did 39 agreements, Margaret Savelio did 29 agreements, and Todd Trueblood prepared 25 rental agreements at Dollar in October 2010. In addition to General Manager Rick Klier, the following Operations

Managers also assisted at the rental counter when needed: Keith Johnson, Mark Peters, and Kirsten Sloan (Union Ex. 6 and 7).

III. Argument

1. The unit requested by the Petitioner is appropriate as it stands, without the necessity of adding other classifications that do not share the rental sales agents' close community of interest.

The Board has said countless times that there is nothing in the Act requiring a proposed bargaining unit to be the ***most*** appropriate unit or the ***ultimate*** unit; the Act requires only that it be ***an*** appropriate unit to ensure that employees in each case have "the fullest freedom in exercising the rights guaranteed by the Act." *Overnite Transportation Co.,* 322 NLRB 723 (1996). A union is not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons,* 141 NLRB 1103 (1963).

As summarized in *The Boeing Co.*, 337 NLRB 152, 153 (2001), the Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *See, e.g., Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded,* 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997). The Board generally attempts to select a unit that is **the smallest appropriate unit encompassing the petitioned-for employee classifications.** *See, e.g., Bartlett Collins Co.*, 334 NLRB 484 (2001), and *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967) (emphasis added). In determining

whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Ore-Ida Foods*, 313 NLRB 1016 (1994), *affd.* 66 F.3d 328 (7th Cir. 1995). It is well settled that the unit need only be ***an*** appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), *enfd. on other grounds*, 190 F.2d 576 (7th Cir. 1951).

2. The rental agents share a unique community of interest that is separate from the interests of other employees.

The Board has on several occasions considered the appropriateness of bargaining units in the vehicle rental industry. The Board has not determined a standard or presumptively appropriate unit in this industry. To the Petitioner's knowledge, however, there are no cases, including regional director decisions, supporting the Employer's contention that a "wall-to-wall" unit is the only appropriate unit when a petitioner has sought a smaller unit. To the contrary, the Board consistently has rejected contentions, in the face of alleged functional integration comparable to that reflected in the record herein, that all employees must be included.

For example, in *Avis Rent-A-Car System, Inc.*, 132 NLRB 1136 (1961), the union sought a unit of mechanics, "lotmen," "gasmen," "servicemen," and other classifications, excluding rental agents. Despite the antiquated titles, such employees performed tasks similar to the lot agents, service agents, mechanics, and other support employees that DTG urges the Regional Director to include in the present bargaining unit. The Board rejected the employer's contention that the unit should have included rental agents. The Board pointed out that, much as RSAs do here albeit under modern conditions, the rental agents worked behind a rental counter, prepared

rental agreements, and performed similar customer service tasks. The Board excluded them from the unit, despite evidence that rental agents occasionally delivered vehicles to customers or cleaned vehicles during rush periods.

Similarly, in *Budget Rent-A-Car of New Orleans, Inc.*, 222 NLRB 1264 (1975), the union sought a bargaining unit of service employees, who performed duties related to the movement, washing, cleaning, and conditioning of rental vehicles, which were similar to the duties performed here by lot agents, service agents, return agents, assistant mechanics, and mechanics for DTG. The employer contended that the only appropriate unit should include rental representatives. As here, the rental representatives occasionally moved vehicles in the absence of a service representative or performed duties such as refueling or cleaning a vehicle. Reversing the regional director, the Board held that the unit of service representatives was appropriate by itself. The Board found that as in the *Avis* case—and as in the instant case—the service representatives performed "basically manual functions and there is virtually no employee interchange between the service and the rental representatives." *Id.* at 1264.

The Board has continued to reject employer contentions that the only appropriate unit in the car rental industry must include all employees. In *Alamo Rent-A-Car,* 330 NLRB 897 (2000), the union sought a bargaining unit consisting of service agents, shuttlers, and other classifications similar to the service and support employees that DTG claims should be included herein. There was also a dispute about the unit composition, as the union requested a unit consisting of two locations in San Francisco, while the employer claimed that all four of its San Francisco locations were tightly integrated and must be included. On the unit composition issue, the regional director specifically rejected the employer's contention that the unit must be composed of all employees, including rental agents. *Alamo Rent-A-Car,* Case 20-RC-17501 (RD

Decision and Direction of Election dated March 25, 1999), p. 17-19.[5] The Board, while disagreeing with the regional director about limiting the unit to two locations, agreed with the regional director's determination of unit composition, with one exception that is not material here. 330 NLRB at 897.

In other decisions, regional directors have consistently rejected employer contentions that the only appropriate unit is a wall-to-wall unit including rental agents and service employees (a term broadly encompassing the service agents, lot agents, return agents, booth agents, and other employees who, according to DTG, should be included). In *ANC Rental Corp, d/b/a Alamo Rent A Car,* Case No. 8-RC-16145 (RD Decision and Direction of Election dated January 29, 2001), the employer asserted that rental agents must be included in the service employee unit sought by the petitioner, which included service agents, shuttlers, handheld/return agents, and related employees. The regional director considered the inclusion of rental agents at length. There were no substantial differences between the jobs of the rental agents in *Alamo* and the RSAs employed by DTG. Occasionally, as RSAs do here, the rental agents shuttled cars to cover gaps in the schedule, filled in for other employees such as return agents, and assisted other employees as needed. As in the present case, however, the day-to-day interaction of rental agents with other employees was minimal—despite the fact that, unlike the RSAs herein at DTG, the rental agents in *Alamo* had radio communications with service agents. The rental agents, like the RSAs here, had a unique incentive program. The regional director concluded that "neither the lead rental agents nor the rental agents employed at the Cleveland facility share a community of interest with the other employees in the petitioned for bargaining unit." *Id.* at 15.

[5] The RD decisions cited herein are all readily available on the NLRB website.

In *Dollar Rent A Car Systems, Inc.*, Case 12-RC-8544 (RD Decision and Direction of Election dated October 20, 2000), the predecessor of the Employer herein stipulated to the exclusion of rental agents from the service employee unit—undoubtedly in acknowledgment that rental agents do not share a community of interest with service employees. Similarly, in *M.H.T. Corp., d/b/a Dollar Rent-A-Car,* 250 NLRB 1361 (1980), the company had stipulated to a bargaining unit of garage, maintenance, and car shuttler employees.

The Employer's reliance on *DTG Operations, Inc.*, Case 28-RC-6704 (RD Decision and Direction of Election dated March 23, 2010), is misplaced. There, the petitioner, Ironworkers Local 509, sought to represent a combined unit of all employees, including rental sales agents and service employees. The parties stipulated that rental sales agents should be included in any unit found appropriate. Thus, the regional director had no reason to discuss the issue at the heart of the instant case: Whether RSAs share a unique community of interest that results in their being **an** appropriate unit. The main contested issue in Case 28-RC-6704 was the scope of the bargaining unit, not the composition of the unit. The regional director found that the scope of the unit had to include the Employer's facility at McCarran Airport as well as the petitioned-for facility at Swenson Street in Las Vegas, Nevada, because the Swenson Street facility was so functionally integrated with the Airport location that it had lost its separate identity.[6]

In summary, the Board and regional directors have consistently rejected employer contentions that the only appropriate bargaining unit in the car rental industry must include all employees, including rental agents and service employees. The application of traditional

[6] Contrary to the Employer's position in the present case, the regional director disagreed with its contention that mechanics, assistant mechanics, and building maintenance technicians must be included in the unit. The regional director found that they formed a separate "craft" unit. *Id.* at p. 12.

principles herein leads to the same conclusion: RSAs have a unique community of interest and comprise an appropriate separate bargaining unit.

First, the working conditions of RSAs are substantially different from the conditions of other employees. They work behind sales counters in the rental buildings, prepare rental agreements for customers, operate computers, and have as a primary component—indeed, a required component—of their duties to sell vehicle upgrades, GPS devices, insurance coverage, and other extras to customers. Service agents, lot agents, and return agents work outside and perform basically manual labor related to preparing, renting, or returning vehicles (other than the return agents' task of closing out the contract on a handheld electronic device). Booth agents work in a booth that is hundreds of yards distant from the rental buildings, and mechanics work in the maintenance building performing mechanical and maintenance work under separate supervision.[7]

Second, although all employees—including supervisors and managerial employees at DIA and all employees of the entire corporation—are subject to the same overall policies, fringe benefits, and employee handbook, only RSAs are subject to an incentive program that encourages and requires them to sell upgrades and other products aggressively to customers. Only RSAs are subject to an incentive program, the "Core Model," that penalizes them with disciplinary consequences leading to termination of employment, if they fail to reach certain thresholds set by the Employer (Union Ex. 1 – 4).

Third, although all employees on a given shift are subject generally to the overall supervision of the Operations Manager(s) on duty, the RSAs have separate immediate

[7] In *Alamo Rent-A-Car,* 330 NLRB at 897 n. 1, the regional director found that exit booth agents were statutory guards. See also the Decision and Direction of Election in the same case, p. 19 n. 5.

supervision. Senior Operations Manager Todd Trueblood is directly responsible for scheduling them, granting time off, and related administrative tasks specifically related to RSAs, with assistance from Operations Manager Margaret Savelio (Tr. 121, 192-93).

Fourth, the record does not demonstrate the high degree of functional integration with other employees sufficient to negate the unique community of interest among RSAs. Although RSAs sometimes cover other functions as needed, *e.g.*, covering breaks of lot agents during the day shift or handling some lot agent or service agent functions when such employees are absent on evening or night shifts, this occasional overlap is no different in kind or degree than the occasional overlap of functions that the Board or regional directors considered inconsequential in the aforementioned cases.

Even more important, with the possible exception of the two staff assistants, **no** other classification of nonsupervisory employees substitutes for RSAs or engages in temporary interchange with RSAs at the rental counters. In other words, while RSAs have sufficient knowledge and experience to perform basic functions of a lot agent or a service agent when needed—such as getting a car or checking fuel levels and closing out a contract—none of the service employees (with the two extraordinary exceptions noted earlier, Moss and DeBerry, who rarely work at the rental counters) have the knowledge, training, and experience, or the skill with the rental computer system, to do the jobs of RSAs.

Fifth, RSAs wear different uniforms from other employees, which are issued by the Employer. They wear ties or scarves and "classier" shirts and pants, as the Employer's witness put it, than other employees wear (Tr. 233, 240-42).

Sixth, the Petitioner's desire as to the appropriate unit is entitled to weight, even if it is not a determinative factor. Here, the Petitioner seeks a bargaining unit limited to the rental sales agents and lead rental sales agents.

In summary, the preponderance of the evidence supports the conclusion that the bargaining unit proposed by the Petitioner is an appropriate unit for bargaining. Rental sales agents and lead rental sales agents share a unique community of interest, with different working conditions and duties from other employees, a unique incentive plan that subjects only RSAs and no other classification to potential disciplinary consequences, separate immediate supervision, insufficient functional integration to override their separate community of interest, and other factors that warrant a separate bargaining unit.

3. The classification of staff assistant I should be excluded because they are office clerical employees.

The record shows that the two employees classified as staff assistant I, Chiara and Newell, provide assistance at the rental counters occasionally. The RSA Peer Ranking report for December 2010, however, shows that Chiara prepared a total of only 22 contracts at Dollar and Thrifty combined, and Newell prepared a total of 45 for both brands. These numbers pale in comparison to the number of rental agreements prepared by RSAs, *e.g.*, Rhoda Tagulinao did 288 agreements for Thrifty and 42 agreements for Dollar in December, while Jennifer Harvey did 373 contracts for Dollar (Employer Ex. 24 and 25). Moreover, the significance of the RSA work done by the staff assistants is diminished by the fact that the primary job classification that assists at the rental counters is Operations Managers, who are excluded as supervisors.

As the Employer's witness, General Manager Rick Klier, testified on direct examination, the primary functions of the staff assistants are office clerical in nature (Tr.53-57). They prepare

several daily reports for management, such as General Manager Klier, including reports on discounts offered by RSAs to customers during the day. Although Klier testified that the reports are not "confidential," preparing reports for management on discounts provided by RSAs is inconsistent with having a community of interest with RSAs.

Therefore, the staff assistants should be excluded as office clerical employees. The Board customarily excludes office clerical employees from other bargaining units, and there are no compelling circumstances justifying their inclusion here. *L.M. Berry and Co.,* 198 NLRB 217, 219 (1972) (excluding office clerical employees from sales unit). As in *L.M. Berry,* the rental sales agents or RSAs at issue here are primarily sales employees, whose main function and incentives are designed to increase the Employer's "production," *i.e.*, the sales of products (vehicles, upgrades, insurance, GPS devices, prepaid fuel, etc.) to customers. On the other hand, the primary function of staff assistants is to perform office clerical work related to the administration of the Employer's business, *e.g.*, preparing reports on discounts offered by RSAs, preparing "non-revenue" reports and other reports, and administering the lost-and-found system. Although staff assistants assist as needed at the rental counter, just as Operations Managers and even the General Manager assist at the counter when needed, this does not change the essential character of the staff assistant's primary duties as office clerical work.

IV. Conclusion

For all the above reasons, and for all other reasons supported by the evidence and the law, the Petitioner urges the Regional Director to find that the unit requested by the Petitioner is appropriate for collective bargaining, and to direct an election in the requested unit.

Respectfully submitted on this 13th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I served the Petitioner's Post-Hearing Brief on the Employer by email and by placing a copy in the U.S. Mail, with first-class postage affixed, and addressed to the following:

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