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Milwaukee City Center, LLC and Unite Here, Local 122, AFL-CIO, Petitioner. Case 30-UC-419

September 21, 2009

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The issue presented is whether the Regional Director properly accreted the Employer's employees who work as baristas and head baristas at a franchise Starbucks coffee shop located in the Employer's hotel to the existing bargaining unit of food, beverage, and other hotel employees.¹ On February 23, 2007, the Regional Director for Region 30 issued a Decision and Order granting petition for unit clarification. The Regional Director clarified the existing bargaining unit to include the approximately 10 to 12 baristas and 2 head baristas working at the Starbucks coffee shop.²

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. The Employer contended that the Regional Director failed to follow the well-established accretion standard set forth in *Safeway Stores*, 256 NLRB 918 (1981), and that under this standard,³ the Regional Director erred in accreting the baristas and head baristas to the existing unit. On April 25, 2007, the Board granted in relevant part the Employer's request for review.⁴

¹ The Petitioner represents all employees who prepare and serve food and beverages at the bars and restaurants within the Employer's hotel. The Petitioner represents, inter alia, housekeeping, housekeeping leads, housepersons, lobby porters, night cleaners/turn downs, bellpersons, servers, banquet servers, banquet captains, banquet setups, banquet setup supervisors, bartenders, Cabana Cove attendants, extra bartenders, bar porters, beverage supervisors, cocktail servers, cooks, stewards, food runners, and expeditors.

² The Regional Director also found that the head baristas are not supervisors under Sec. 2(11) of the Act. No party sought review of this finding.

³ See *Safeway Stores*, 256 NLRB at 918 (footnotes omitted) (“[T]he Board has found a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted.”).

⁴ The Employer also contended in its request for review that the Regional Director erred by declining to defer to an arbitration award that denied the Union's grievance seeking to include the baristas and head baristas in the existing hotel bargaining unit. The Board denied review on this issue.

We have carefully considered the entire record.⁵ Contrary to the Regional Director, we have decided, under the standard set forth in *Safeway Stores*, supra, and for the reasons set forth below, that the baristas and head baristas cannot be accreted to the existing unit. Accordingly, we reverse the Regional Director's decision to accrete the baristas and head baristas to the existing unit, and dismiss the petition.

I. BACKGROUND

The Employer operates the Hilton Milwaukee City Center (Hilton), an upscale hotel located in downtown Milwaukee, Wisconsin. The Employer is a subsidiary of the Marcus Corporation, which owns the Hilton and several other hotels in the Milwaukee metropolitan area. The Petitioner has been the bargaining representative of the employees in the Employer's food and beverage division for several decades. The Petitioner represents all of the hotel employees who prepare and serve food and beverages located in the bars and restaurants within the Hilton.

Prior to 2005, the Employer operated four food and beverage establishments within the Hilton (the Milwaukee ChopHouse, the Miller Time Pub, the Café, and the Cabana Cove) and offered in-room dining and banquet services. The Milwaukee ChopHouse is a fine-dining establishment with a full bar located in the lower lobby area of the hotel. The ChopHouse is staffed by cooks, food runners, expeditors, servers, bartenders, and other wait staff who are members of the bargaining unit. The Miller Time Pub is a more casual lunch and dinner bar/restaurant also located in the lower lobby level of the hotel. The bartenders, servers, and other wait staff are members of the unit. The Café is a casual breakfast and lunch restaurant (open for dinner on weekends) located in the lower lobby area of the hotel. The cooks, servers, and other wait staff are members of the bargaining unit. The Cabana Cove, located on the third floor near the indoor water park, is a casual food and beverage estab-

⁵ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

ishment. The attendant working in the Cabana Cove is a member of the unit. The food and beverages for the in-room dining and the banquets are prepared and served by unit employees, including bartenders who work at the banquet events.

In mid-2005, the Employer entered into a franchise agreement with the Starbucks Corporation to open and operate a Starbucks coffee shop located within the hotel. There is no evidence in the record that the Employer opened any of the other establishments under a franchise agreement with another corporation. The coffee shop is located approximately 75 feet from the Milwaukee ChopHouse, the Miller Time Pub and the Café, and downstairs from the Cabana Cove.⁶ All of the Starbucks employees, including the store manager, work for the Employer and not the Starbucks Corporation, and the Employer determines the wages, hours, and most other terms and conditions of employment of these employees. The Starbucks baristas and head baristas prepare and serve food and/or beverages to customers. The primary Starbucks products are coffee and coffee-related beverages, such as cappuccinos, espressos, and lattes.

The Starbucks Corporation imposes strict policies on how franchisees operate their stores, including where to purchase products and supplies, where and how products should be displayed, how products should be prepared and served, how long the preparation time of an order should take, and how many people should be working in the store at any given time.

Unlike the other establishments, Starbucks has retail sales that, according to Nicole Junkins, the Employer's Starbucks manager, constitute "[m]aybe 30, to 35 percent" of its gross income. These sales include candy, coffee beans, mugs, compact discs, gift cards, and other merchandise.

In the past, when the Employer opened a new food establishment at the hotel, it recognized the food and beverage employees as members of the bargaining unit. This is the first time that the Employer opposed the inclusion of food and beverage employees when opening a new establishment.

II. THE REGIONAL DIRECTOR'S DECISION

Although the Regional Director set out *Safeway Stores'* accretion standard (see fn. 3 above) in clarifying the unit to include the baristas and head baristas, he did not apply that standard here. Thus, he did not find that the Starbucks employees⁷ had little or no separate iden-

tity from the bargaining unit employees and therefore could not constitute a separate appropriate unit, or that the community of interest between the two groups of employees was overwhelming. Instead, the Regional Director found that the employees shared a "sufficient community of interest."

Applying this incorrect test, the Regional Director found accretion appropriate based on his findings that the Starbucks coffee shop is integrated with the other Employer establishments, that the Employer exercises centralized control over management and labor relations,⁸ that the Starbucks and bargaining unit employees share many terms and conditions of employment,⁹ and that they have similar skills and functions with respect to food preparation and customer service. The Regional Director also relied on the Starbucks employees' close geographical proximity to the bargaining unit employees, the contacts between them, and the Employer's bargaining history. But, as we explain next, the Regional Director did not address other critical factors under the correct accretion standard, and certain factors relied on by the Regional Director to find accretion actually militate against such a finding.

III. ANALYSIS

Under the well-established accretion standard set forth in *Safeway Stores, Inc.*, 256 NLRB at 918 (footnotes omitted), "the Board has found a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." See also, *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005); *E. I. Du Pont, Inc.*, 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).

In determining whether a new operation is an accretion, the Board has given weight to a variety of factors including integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, degree of separate daily supervision,

⁸ The Employer's human resources department oversees and controls labor relations for all of the Employer's establishments, including Starbucks. It is involved in decisions regarding the hiring and firing of employees (the department handles initial employee applications for hire, conducts background checks, and handles the drug testing of applicants), establishing wages and benefits, and determining other terms and conditions of employment.

⁹ The policies in the Employer's employee handbook, which is provided to every employee, apply to all employees who work in the hotel, including the Starbucks employees.

⁶ All of these establishments have an entrance in the hotel.

⁷ Although we use the term "Starbucks employees" in this decision, we emphasize, as explained above, that they are the Employer's employees.

and degree of employee interchange. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). However, the Board has held that the “two most important factors”—indeed, the two factors that have been identified as ‘critical’ to an accretion finding—are employee interchange and common day-to-day supervision,” and therefore “the absence of these two factors will ordinarily defeat a claim of lawful accretion.” *Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1271 and fn. 7.

Applying these criteria here, we find that the baristas and head baristas have a separate identity from the bargaining unit employees and constitute a separate appropriate unit. In reaching this conclusion, we rely especially on the “critical” factors of employee interchange and day-to-day supervision, as well as on other factors set out below.

A. Employee Interchange

As to the first “critical” factor, employee interchange, there is no evidence that Starbucks employees have temporarily interchanged with employees in the Employer’s other establishments, or that employees from the Employer’s other establishments have temporarily worked at Starbucks. Significantly, several witnesses testified that Starbucks has a policy against Starbucks employees working at the Employer’s other establishments, and therefore employees who could temporarily interchange among the establishments when they worked for an establishment in the existing unit could no longer do so once they began working at Starbucks. The Regional Director dismissed this testimony because of the lack of documentation and as hearsay, and because there is no evidence that any employee from the Starbucks coffee shop has sought or been denied employment elsewhere in the building. We find, however, that the testimony is sufficient to support a finding that Starbucks forbids interchange between the Starbucks baristas and head baristas and the food and beverage employees in the existing unit.¹⁰

¹⁰ Significantly, Jonathan Farah, Starbucks’ head barista and a former bargaining unit employee, testified that he was told when he was inquiring about the head barista position that Starbucks is considered an “island department,” and that he (and other Starbucks employees) were no longer permitted to work in other establishments as he had done when he was a member of the bargaining unit. He did not know where the rule came from, but only that since he began working at Starbucks he has not been permitted to perform work at any other establishment. Nicole Junkins, the Starbucks manager, testified that she learned during the opening week from Starbucks trainers that Starbucks employees were not permitted to work in the Employer’s other establishments. She also testified that the Starbucks trainers insisted that the Starbucks operate as an “island.” Karen Spindler, the director of human resources for the Marcus Corporation, has oversight responsibility over the Employer’s human resource department. She testified that when an employee transfers to Starbucks from another Employer establishment, the

Further, although permanent interchange between Starbucks and other Employer establishments is permitted, there is no evidence to establish any frequency. Four employees initially transferred to Starbucks from bargaining unit positions in the Employer’s establishment. There is no evidence of permanent transfers in or out of Starbucks since then, and only two former bargaining unit members are currently working at Starbucks. In any event, permanent interchange is a less significant indicator of community of interest than temporary transfer and thus is given less weight by the Board in deciding unit scope issues. See, e.g., *Bashas’, Inc.*, 337 NLRB 710, 711 fn. 7 (2002); *Red Lobster*, 300 NLRB 908, 911 (1990). Moreover, the Board has historically given little weight to such transfers where, as in this case, the transfers are from an existing location to a newly-opened facility. See *Alamo Rental Car*, 330 NLRB 897, 898 (2000), and cases cited there.

B. Day-to-Day Supervision

As to the second “critical factor”, day-to-day supervision, there is no immediate common supervision between bargaining unit employees and the Starbucks employees. Further, there is no common immediate supervision among the bargaining unit employees themselves. Thus, the manager or supervisor of each of the four preexisting establishments supervises the bargaining unit employees who work there. The Starbucks coffee shop manager, Nicole Junkins, supervises the Starbucks employees. Junkins does not supervise employees from other bars or restaurants, and the managers of other bars and restaurants do not supervise the employees working in the Starbucks coffee shop.

C. Other Factors Weighing Against Accretion

Other factors also weigh against accretion. We find, contrary to the Regional Director, that there is (1) a lack of functional integration between the Starbucks coffee shop and the Employer’s other establishments and (2) minimal contact between the Starbucks employees and other food and beverage employees. We also find that the Starbucks Corporation exerts significant control over the baristas’ and head baristas’ terms and conditions of employment due to the requirements of the franchise relationship.

employee is told by the Employer’s director of human resources that the employee cannot work in another department, unlike other restaurant employees who commonly work in multiple departments. She also testified that she was told by the human resources director at the Hilton Milwaukee that Starbucks does not permit employees to work in other departments. Finally, Terry Wisman, a server/cashier at the Café, testified that Starbucks employees never work at other outlets in the hotel.

1. As to the first of these factors, the evidence fails to establish that there is functional integration between the Starbucks coffee shop and the Employer's other establishments.¹¹ The Starbucks employees perform their food and beverage service functions and retail sales functions on their own, without any reliance on the employees or functions performed in the other establishments. Further, unlike the other establishments, Starbucks has a substantial retail aspect to its business because it sells its own candy, coffee beans, mugs, compact discs, gift cards, and other merchandise to customers.

2. As to the second factor, the Regional Director found that the Starbucks employees and the bargaining unit employees have significant personal contact because they pass through the same security area, pick up paychecks in the same location, use the same cafeteria, and are invited to periodic employee "rallies" or appreciation events. We find that these contacts are outweighed by the fact that the Starbucks employees work in a separate area from the bargaining unit employees and have no contact with the bargaining unit employees when performing their job duties. See *Archer Daniels Midland Co.*, 333 NLRB at 676.

3. Finally, while we agree with the Regional Director that the Starbucks employees and the bargaining unit employees share many terms and conditions of employment, we also find that the Starbucks Corporation exerts significant control over the baristas' and head baristas' terms and conditions of employment due to the requirements of the franchise relationship. Thus, the Starbucks Corporation dictates how products should be prepared and served,¹² and staffing levels in the store (e.g., Star-

bucks must have at least two employees working at all times, and a third to cover for breaks; the number of required employees on staff increases with the number of customers expected per hour). A district manager for Starbucks Corporation meets monthly with the store manager to discuss the store's performance,¹³ and if there are deficiencies, the district manager sets up an action plan with the store manager.¹⁴

D. Factors Favoring Accretion

As discussed, in support of his finding of accretion, the Regional Director relied on several additional factors, including centralized control over management and labor relations, many common terms and conditions of employment set forth in the Employer's employee handbook, geographic proximity, similar skills and functions, and bargaining history. We find that these factors do not outweigh the countervailing factors discussed above, particularly the "critical" factors of lack of interchange and common day-to-day supervision.¹⁵ See *Frontier Telephone of Rochester, Inc.* supra.

Conclusion

Under these circumstances, we find, contrary to the Regional Director, that the baristas and head baristas

specifications (3 minutes or less from the time that the customer places the order), and meet cleanliness standards.

¹³ The district manager uses ratings from secret shoppers to evaluate the store's performance in areas such as cleanliness, speediness, and customer service.

¹⁴ To the extent it appears that Starbucks Corporation may require that the baristas and head baristas perform cleaning functions in the Starbucks coffee shop, we find that such a requirement would weigh against a finding of accretion, inasmuch as the unit employees do not perform similar functions.

¹⁵ Chairman Liebman finds, in agreement with the Regional Director, that the similarity of skills and training of the Starbucks and unit employees and the parties' bargaining history weigh in favor of an accretion finding. Bartenders in the unit are trained and licensed to prepare and serve a variety of alcoholic beverages and unit employees are trained to make coffee, espressos, cappuccinos and the like. Further, food and beverage service employees have similar face-to-face customer contact. As to bargaining history, Petitioner has represented food and beverage employees for decades. In all previous instances, food and beverage employees have been included in the bargaining unit when a new establishment has opened. Member Schaumber, however, finds that their skills and training do not significantly favor a finding of accretion because the training that the baristas and head baristas receive is far more detailed and rigorous than the training that the bargaining unit employees receive, thereby establishing that the Starbucks employees have greater skills than the bargaining unit employees in preparing various coffee and related beverages. Member Schaumber also finds that the collective-bargaining history does not weigh in favor of a finding of accretion in light of the fact that, in contrast to its other operations, the Employer opened the Starbucks coffee shop under a franchise arrangement with the Starbucks Corporation, unlike its other food establishments, and that under the arrangement Starbucks Corporation exercises strict control over important aspects of the Starbucks coffee shop operation.

¹¹ In finding to the contrary, the Regional Director relied on the fact that the Hilton website advertised Starbucks, along with the four other food and beverage service operations, as all being part of the "superb dining experience" at the Employer. He also relied on the facts that guests could bill purchases from each of the establishments, including Starbucks, to their rooms, and that certain supplies for the Starbucks coffee house (i.e., dairy products) were stored within the hotel cooler along with supplies for the other restaurants. We find that this evidence does not establish that there is a *functional* integration between the Starbucks coffee shop and other establishments. See, e.g., *Towne Ford Sales*, 270 NLRB 311, 311(1984) (the daily operations of two facilities located across the street from one another—Towne Ford Sales and Town Imports—were found to be separate and autonomous, notwithstanding that "[t]he two enterprises engage[d] in joint advertising and had a joint salesmen corps," mechanics at Towne Ford Sales occasionally worked on Town Imports cars, and Town Imports mechanics used some of Towne Ford Sales equipment and tools).

¹² Baristas undergo at least 40 hours of training by corporate Starbucks (head baristas, who undergo additional training, are trained to train baristas in the future), where they learn how to make drinks and handle customers to meet Starbucks specifications, as detailed in the training manuals. In order to work at Starbucks, baristas must pass a test showing that they can make drinks to specification, including time

have a separate identity from the existing unit and may constitute a separate appropriate unit. Accordingly, we find accretion to be unwarranted.

ORDER

The Regional Director's Decision and Order Granting Petition for Unit Clarification is reversed, and the petition is dismissed.

Dated, Washington, D.C. September 21, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD