

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, Subregion 11

COPPER RIVER OF BOILING
SPRINGS, LLC d/b/a COPPER
RIVER GRILL

Employer¹

and

Case 10-RC-098046

NATIONAL WORKERS
ASSOCIATION

Petitioner²

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

The Employer, Copper River of Boiling Springs, LLC d/b/a Copper River Grill, operates a public restaurant in Boiling Springs, South Carolina. The Petitioner, National Workers Association, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time servers, bartenders, and hostesses employed by the Employer at its Boiling Springs, South Carolina, location, excluding office clerical employees, professional employees, guards, and supervisors as defined under the Act. A hearing officer of the Board conducted a hearing. The Petitioner orally set forth its position, and the Employer filed a post-hearing brief, both of which have been duly considered.

POSITIONS OF THE PARTIES

As evidenced at the hearing and set forth orally or by brief, three issues were litigated: (1) whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; (2) whether the cooks and dishwashers share a community of interest with the petitioned-for unit; and (3) whether the “key” employees are supervisors under Section 2(11) of the Act.

¹ The Employer's name appears as stipulated to at the hearing.

² The Petitioner's name appears as stipulated to at the hearing.

The Petitioner contends the following: that it is a labor organization under the Act; that the cooks and dishwashers do not share a community of interest with the petitioned-for unit to warrant their inclusion; and that the key employees are supervisors under the Act. The Employer asserts the following: that the Petitioner does not meet the standards of a labor organization under the Act; that the cooks and dishwashers share an overwhelming community of interest to warrant their inclusion into the petitioned-for unit; and that the key employees do not possess supervisory authority.

The Petitioner contended at the start of the hearing that there were 47 employees in the petitioned-for unit, but during the course of the hearing, asserted that employees serving as key employees were supervisors, and should be excluded.³ The Employer contends that the appropriate unit should include approximately 69 employees comprised of the petitioned-for employees and 15 cooks and 7 dishwashers.

As discussed more fully below, I have concluded that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; that the cooks and dishwashers do not share an overwhelming community of interest with the petitioned-for unit; and that the key employees are not supervisors and are appropriately included in the unit. There are approximately 47 employees in the unit found appropriate. The Petitioner is willing to proceed to an election in any alternative unit the Region might direct.

³ In this regard, the record establishes that key employees are servers or bartenders who are assigned key employee duties intermittently.

STATUS AS A LABOR ORGANIZATION

The Employer maintains that the Petitioner does not meet the statutory standard for being a labor organization within the meaning of the Act. This argument is unavailing, for the reasons set forth below.

The Petitioner was organized about 14 months ago. Its chief representative is Kevin Ballew, who has held that position for about seven months. The stated purpose of the Petitioner is to represent the employees by being their voice in negotiating with the Employer for a collective-bargaining agreement regarding working conditions, hours of work, wages, and grievances. The Petitioner does not currently represent any employees other than those of the Employer, and it has not negotiated a collective-bargaining agreement with any employer. It is not affiliated with any other organization. There are five officers on its executive board - chief representative, vice-president, public relations officer, secretary, and sergeant at arms.

The Petitioner consists of about 15 employees, but additional members are being added. It does not currently collect union dues. The Petitioner has conducted union meetings and its members have ratified parts of its constitution and bylaws, but that too is an ongoing process. The Petitioner has not yet registered with any government entity as a labor organization.

I find that the Petitioner is a labor organization within the meaning of Section 2(5). Two criteria must be met in order to be classified as a labor organization. First, it must be an organization in which employees participate. Second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-852 (1962).

In the present case, the record establishes that the Petitioner is an organization that has admitted employees to membership, has conducted meetings with its members, and has ratified

portions of its constitution and bylaws by its members. Moreover, the stated purpose of the Petitioner is to represent its members in collective bargaining with the Employer. Thus, the Petitioner has met each of the two criteria for a labor organization. See *Michigan Bell Telephone Company*, 182 NLRB 632 (1970); *Butler Manufacturing Company*, 167 NLRB 308 (1967); *Grand Lodge International Association of Machinists and Aerospace Workers, AFL-CIO*, 159 NLRB 137, 138 (1966).

In *Michigan Bell*, the petitioner, as in the current case, was formed to represent employees with respect to wages, hours, and other working conditions of employment for purposes of collective bargaining with the employer and eventually filed a petition for an election. 182 NLRB 632. See also *Grand Lodge International*, 159 NLRB at 138.

The “broad meaning” of labor organization was met even in *Butler*, supra, notwithstanding the petitioner’s lack of formal structure by not having a constitution or bylaws and not having dues collected from its members. 167 NLRB 308. In the present case, the Petitioner has a formal structure in place because its members have ratified portions of its constitution and bylaws and that process is continuing. It also has an executive board, and it has conducted internal union meetings. See also *Grand Lodge International*, 159 NLRB at 138.

Although the Petitioner has not filed any documentation with a government entity as a labor organization and its stated goal of representing employees for purposes of collective bargaining with the Employer is not certain to come to fruition, those factors are not essential to the existence of the Petitioner as a labor organization at this present time to become the employees’ certified bargaining representative. See *Comet Rice Mills Division Early California Industries Inc.*, 195 NLRB 671, 674 (1972).

THE EMPLOYER'S OPERATIONS

A. Overview

The Employer operates a restaurant featuring American cuisine in an open floor plan with the atmosphere of a large Alaskan cabin or lodge. It is decorated in a cedar wood look and has very tall ceilings. There are two distinct areas within the restaurant. One is the dining area that also includes the bar and drink station and the other is the kitchen area.

Upon entering into the facility, customers are greeted by a hostess. The hostess will search for a table and ensure that it is clean. When a table is available, the hostess leads the customers into the dining area to be seated. Along the way, the customers will see the kitchen straight ahead and the bar to the right. There are no floor-to-ceiling walls preventing customers from being able to see into the kitchen area.

The server assigned to the table is expected to greet the new guests quickly once they are seated in order to take their drink orders. The drink station is located in between the tables in the dining area and the cooking area in the kitchen and is referred to as the "expo," where food is expedited. The expo area is considered within the kitchen area and features two stainless steel tables with a shelf that runs across the top where completed orders are placed to be served to customers.

After the drink orders have been placed on the table, the server takes the entrée orders and walks to the closest computer terminal to log the orders into the system. The cooks in the kitchen prepare and cook the customers' orders. Ovens, fryers, and cooktops are located in the kitchen as well as a pizza station. In addition, there are freezers, sinks, and the dishwashing machine. A manager generally serves as an expediter who is stationed at the expo area. Cooks place the completed food orders upon a shelf with hot lamps overhead. When a completed order

is placed on the shelf to be served, the expediter will call for a food runner (an available server not necessarily the server for that particular table) who will take the food to the table and insure the customers received everything that was ordered.

While the customers are at the table, the server will remove unneeded drink glasses and plates and inquire if additional drinks are needed. Upon completion of the meal, the customers pay the server and exit the facility. The dirty dishes and glasses are “bussed” by a hostess, server, or dishwasher and taken to the dish pit area located in the kitchen area. The table is then cleaned and ready for the next customers.

Customers may also enter the restaurant and proceed to the bar section of the dining area. They can sit at the bar or sit at one of the few tables located nearest the bar. If customers sit at the bar, then their drink orders will be given to the bartender who will log the orders into the computer terminal located at the bar. Then the bartender will prepare the specific requests and serve them to the customers.

During the morning and early afternoon hours, the bartender is also responsible for taking food orders from customers sitting at tables nearest the bar. During the late afternoon and evening hours a server is responsible for tending to the needs of those customers. Orders that are telephoned in as “to-go” are sometimes taken by the bartender if available.

B. Supervisory Hierarchy and Shifts

There are three managers at the restaurant, stipulated by the parties to be supervisors within the meaning of Section 2(11). Joshua Walker is the owner and operator, and Nathan Reese and Keith Means are managers. One or two of the three managers are present at the restaurant during its normal operating hours of 11:00 a.m. to 10:00 p.m., Monday through Friday, and 11:00 a.m. to 11:00 p.m., Saturday and Sunday.

Typically, a manager will be assigned to direct the functions of the kitchen area, which include the cooks and dishwashers engaged in cooking food and washing dishes, to insure that the orders are correctly and timely prepared. Another manager is assigned to direct the dining area, which includes the hostesses, servers, and bartenders who are meeting with and providing for the needs of the customers in an efficient manner. Managers can assist in the prepping and cooking of food in the kitchen area, as well as in the seating of customers and cleaning of the dining area. The number of managers on a shift varies depending upon the day of the week, with Friday, Saturday, and Sunday being the days when more managers are present. In addition to managers, either servers or bartenders can serve as key employees, who assist the manager(s) on duty in whatever capacity needed.

Any of the three managers can prepare the work schedules but Walker must approve them before being implemented. Managers most often prepare the floor plan for each shift, meaning that they assign servers to specific tables. Managers have the authority to instruct employees to perform certain job tasks and the authority to instruct employees to leave when business is slow. They accept job applications and are involved in the interviewing process to hire employees. Walker has the final decision to hire applicants and to discipline employees.

There are three work shifts: opening, staggering, and closing. Employees' responsibilities vary depending upon the shift. An opening shift includes cooks arriving about two hours before the restaurant opens to prepare food. Bartenders, hostesses, and servers are scheduled to arrive fifteen to thirty minutes before opening in order to stock items and insure the restaurant is clean.

Depending on the day of the week and the anticipated volume of customers, some employees work a staggered shift, meaning they arrive and work portions of the busiest hours of the day. Throughout employees' shifts they are to keep the restaurant clean by removing

unneded glasses and dishes from tables and booths. The employees who work until the restaurant closes will clean the facility and prepare for the next work day.

C. Job Duties

1. Hostesses

Greeting customers coming into the restaurant is the primary duty of the hostess. Twelve hostesses are listed on the Employer's work schedule for the week beginning February 18, 2013, but of that number, four are also servers.

Hostesses also search for available tables for customers and, if necessary, remove any dirty dishes or glasses left on the tables and take them to the dish pit in the kitchen area. The hostesses seat customers at their tables and provide them with silverware and menus. Sometimes hostesses are responsible for to-go orders. Prior to the opening of the restaurant and throughout the day, hostesses keep the menus wiped off and the doors to the restaurant clean.

2. Servers

Approximately 33 servers are working anywhere from two days a week to six days a week according to the Employer's work schedule for February 18, 2013. Two servers are also listed as working as hostesses, three servers are listed as working as key employees, and two other servers are listed as working at the bar during that week.

Servers who work an opening shift are assigned several duties such as polishing then rolling silverware in napkins. They fill salt and pepper shakers, insure the drink stations have sufficient ice in the bins, and wipe down tables and booths. They also cut lemons in the kitchen area as well as retrieve supplies from the storage area located in the kitchen.

Servers are given a floor plan that identifies the three or four tables they will be waiting on during their shifts. They take customers' drink and food orders as well as serve them their

drinks and food. Each drink and food item ordered by a customer is logged into the computer system in order for a customer ticket to be created. Servers present the tickets to customers for food and drinks purchased and receive customers' cash or credit card payments, as well as tips for their service.

During their shifts, servers periodically remove unneeded dishes and glasses from customers' tables and retrieve ice from the kitchen to restock the ice bins in the drink stations. In addition, servers perform the ongoing duties of cutting lemons for drinks, filling salt and pepper shakers, and cleaning tables and booths. When necessary, servers return silverware to the dish pit when the utensils are not properly cleaned.

Servers working a closing shift are responsible for wiping down all of the tables and booths and leaving the restaurant clean for the next day. Before leaving the restaurant at the end of their shift, the servers meet with a manager to review their checkout reports and then compensate the tip pool for the hostesses who worked during their shift.

3. Bartenders

Seven bartenders were listed on the Employer's work schedule for the week beginning February 18, 2013, but two of them are also listed as servers. Bartenders' primary duties are to greet and service the guests who come to the bar. Some shifts may require only one bartender, whereas on other shifts, especially Friday and Saturday nights, there may be two or more bartenders present.

Those bartenders who work an opening shift are responsible for cutting fruit for drinks, stocking the bar with beverages and glasses, and insuring that the bar is clean. The bartender takes the customers' drink orders; enters the orders into the computer terminal; places the tickets for the orders in front of the customers; and prepares and serves the drink orders to the customers. The bartender also receives customers' payments for their orders and tips.

During a shift, a bartender removes dirty dishes and glasses, cleans the bar area, uses the dishwasher at the bar to clean dishes and glasses and later removes the clean ones, and keeps the bar stocked. Any overflow of dirty dishes and glasses in the bar area has to be taken to the dish pit in the kitchen while clean dishes and glasses are obtained.

A bartender working during lunch and early afternoon is responsible for taking drink and food orders from customers seated at the tables nearest the bar. In that case, the bartender acts as a server would and goes to the expo area to pick up the food orders from the expediter.

Telephoned to-go orders are also the responsibility of the bartender who receives the orders; enters them into the computer terminal; gathers utensils and condiments for the orders; bags the boxes containing the food; receives payment for the orders and any tips; and hands the food and drinks to the customers. Sometimes someone will bring the completed to-go food orders to the bartender to facilitate the servicing of customers.

Bartenders working a closing shift stay past the time the restaurant closes for the evening. They clean the bar area before leaving for the night.

4. Cooks

Fifteen cooks are listed on the Employer's work schedule for the week beginning February 18, 2013. Two prep cooks⁴ arrive at the restaurant about two hours before it opens each day.

Prep cooks are responsible for using the Employer's recipes and ingredients to prepare soups, salad dressings and meat dishes on each day's menu. Also, the prep cooks slice chicken and meat to specific sizes to be cooked and served.

⁴ The record indicates that the term "prep cooks" is used interchangeably with the term "prep crew". In any event, the term prep crew does not appear to constitute a separate and distinct job classification.

Another cook fills the salad expo position. This cook prepares the salads and interacts with servers who retrieve the salads and serve them to customers. Should a customer have a problem with a salad, the server notifies the expediter - not the salad expo cook. It is the expediter who insures that the salad problem is properly corrected.

Each cook who actually cooks the food in the kitchen has a different skill level. One cook operates the fry area where french fries are prepared and fish is battered and fried. Another cook position is assigned to the operation of the grill, where the meat and chicken are cooked. The expediter, generally a manager, serves to facilitate the cooking of food in an orderly and timely manner and serves as the communicator between the servers and the cooks. A server notifies the expediter, not the cooks, whenever there is a problem with a cooked order, such as the meat not being cooked as ordered. The expediter, in turn, will inform the cooks of the problem and the cooks will then take the necessary steps to correct the order for the customer.

Cooks working the closing shift are required to stay past the time the restaurant closes. They are involved in cleaning the kitchen area and making some preparations for the opening of the restaurant the following day. They receive no training outside of the restaurant.

5. Dishwashers

The primary responsibility of the seven dishwashers is to clean dirty dishes, glasses, utensils, and pans from all areas of the restaurant by placing them in a dishwashing machine or cleaning them in a sink. They work in the kitchen area, and the area known as the dish pit is located near them. Items removed from the dishwashing machine are not inspected by the dishwashers to insure they are clean. Dishwashers do not polish silverware or roll clean silverware in a napkin.

On occasion, a dishwasher goes into the dining area such as the bar and retrieves dirty dishes and glasses and returns to the kitchen area to clean them. The dishwasher places clean dishes and glasses in the expo area for the expediter's use.

At the end of a dishwasher's shift, the kitchen work areas are to be cleaned. Dishwashers working the closing shift use water hoses and other items to clean and sterilize their area.

6. Key Employees

As the need arises, the Employer asks servers and/or bartenders to work as key employees during certain times in order to provide some assistance to managers in the operations of the restaurant. The employees who agree are listed on the work schedules as key employees, and during the busiest hours more than one key employee may be assigned this role. It is common for a server or bartender within the same work week to perform normal job duties on certain days and shifts and perform key duties on other days and shifts.

The key employee sometimes serves in the dining area as another host/hostess or serves as a floating employee performing whatever tasks that need to be addressed including a bar function. On other occasions, the key employee works as an expediter or assists the salad expo cook.

In this capacity, a key employee may be asked by a server, hostess, or bartender to meet with a dissatisfied customer. Perhaps the customer's food or drink was not as ordered, or was not satisfactory, or the service was too slow. The key employee can simply, for example, return the improperly prepared food item back to the kitchen to complete the cooking process. Or, the key employee can inform management of the customer's problem and decide if a second order should be cooked for the customer. Should the situation be one that might justify discounting the customer's meal or providing the customer with a free dessert, the key employee must consult with a manager who will decide what, if any, action should be taken. The manager or a key

employee has the necessary card, called a focus card, to swipe in the computer to adjust a customer's order and ticket.

On occasion, key employees prepare a floor plan insuring that all tables are covered for customer service and distribute that to all servers before the beginning of their shifts. Upon seeing a need for certain jobs to be performed such as tables to be cleaned, customers to be seated, or food to be served, key employees can instruct other employees to perform those tasks. Key employees can also authorize an employee to clock in.

Key employees are not provided keys to the restaurant. They are, however, allowed a free meal per shift when working as a key employee.

D. Interchange of Employees

Besides servers working as hostesses or bartenders, there is one example of an employee who started as a cook and later began working as a server. Employee Marsha Horsley began working for the Employer the week of January 13, 2012 as a cook. According to her payroll register, she continued working as a cook until the week of July 13, 2012, when she began training as a server in addition to working as a cook. After successfully training to be a server, Horsley has worked as both a cook during some shifts and as a server on other shifts during the same payroll period from July 27, 2012 until the present. Since October 1, 2012, Horsley has worked as a server twice as many hours per pay period than she has worked as a cook.

Of the 15 cooks employed by the Employer, Horsley is the only cook who works or has worked as a hostess, server, or bartender. It is clear that employee Horsley's example of working as a cook and as a server is insufficient to establish common interchange between the two groups of employees.⁵

⁵ Although the parties do not raise the issue, the record substantiates that employee Horsley is a dual-function employee and as such will be permitted to vote. See *Medlar Electric, Inc.*, 337

E. Compensation, Hours, and Other Working Conditions

1. Compensation

Employees' compensation is divided into two categories - tipped employees and non-tipped employees. The tipped employees include the petitioned-for unit of hostesses, servers, and bartenders. Hostesses are paid an hourly base between \$8.00 and \$9.50 per hour. In addition, they receive tips from the tip pool comprised of three percent of each server's and each bartender's sales during the hours they worked with the hostess. A manager determines the amount a server or bartender owes the hostess. Servers and bartenders are paid \$2.13 per hour. Adding tips from customers increases the servers' average hourly wage to about \$12.00 to \$14.00 per hour. Bartenders' average hourly wage is increased to about \$12.00 to \$16.00 per hour because of tips from customers.

Non-tipped employees include cooks and dishwashers. Cooks are initially paid about \$7.25 per hour while they are being trained but that increases to about \$9.00 to \$12.00 per hour over time and with experience. Dishwashers' hourly wage rate is between \$8.00 to \$9.00 per hour. Cooks and dishwashers do not participate in the tip pool.

Those serving as key employees are paid an hourly wage of \$12.00 per hour and do not receive tips. However, upon returning to work in their normal job assignments as servers or bartenders, the employees are paid their regular hourly wage plus tips. All wage increases must be approved by Owner/Operator Walker.

2. Benefits

NLRB 796, 797 (2002); *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). The record also suggests, however, that Horsley could be entering into the Employer's MIT (manager-in-training) program, but that is speculative at this time. If her employee status changes, then her eligibility to vote may be challenged.

The Employer provides all employees with the same handbook and benefits such as medical and dental insurance upon eligibility regardless of whether they are a hostess, server, bartender, cook, or dishwasher. The same is true for the Employer's food discount program that is available for all employees.

3. Uniforms

The dining room area employees wear slightly different clothing from kitchen area employees. Servers wear black pants, belt, and shoes. They also wear black shirts with the Copper River emblem and aprons, and are the only employees who wear shirts with the Employer's emblem. Bartenders are required to wear black pants with either black blouses or black shirts. Hostesses wear black pants or black skirts and black shoes.

In the kitchen area, the cooks and dishwashers wear black pants, shoes, and shirts. Each cook also has to wear a white apron, hairnet or a hat, and gloves when cutting food. Managers in the kitchen area wear a red hat. When a server or a cook is trained, each receives a shirt or an apron. After that, each has to pay for an additional shirt.

4. Hiring and Training

The same job application is distributed to all applicants no matter the job position. The hostess or any employee can give an application to an applicant. Upon turning in the completed application, a manager will review it and meet with the applicant. They will discuss the job position sought, the applicant's work history, the applicant's work availability, and why the applicant is applying with the Employer. The manager will refer the application to Owner/Operator Walker with a recommendation. Walker has sole discretion whether or not to hire an applicant regardless of the job position. A key employee is not involved in the hiring process.

Once an applicant is hired for any job classification, the new employee will have an orientation as to personal wages, hours, and benefits and provided an Employer's handbook, which the new hire will acknowledge receipt in writing. The new employee will be informed about applicable employment laws.

Training of a new employee includes learning about the job by reading the Employer's manuals for that job position. The new employee will also "shadow" a similar employee. If hired to be a server, then the new employee will work alongside an experienced server. Actual working in the job comprises the majority of a new employee's training.

After a few days or weeks of training, depending upon the job function and availability to work, the new employee is validated by Walker or another manager - not a key employee. This process involves the new server, for example, treating a manager as if a customer for a meal in order for the manager to determine if the new employee is ready to work without continual direction. The same concept is applied to new employees in other job positions.

A new employee also undergoes testing by a manager to insure competency in performing job tasks. For a server the test includes being asked questions about items on the menu and what side dishes come with which entrée. A new bartender will be asked how a particular drink is made, and a new cook will be asked how to operate the fryer, the grill, or how to perform prep work. Newly-hired dishwashers are asked how to operate the dishwashing machine.

5. Schedules

Employees' work schedules are generated by a manager, not a key employee, and ultimately approved by Walker. One manager might create the dining area work schedule, whereas another manager might produce the kitchen area work schedule. Sufficient employees of various job classifications have to be scheduled to work the opening and closing times of the

restaurant, as well as additional employees to work staggered times to insure that peak business hours are properly staffed.

In order to prepare employees' work schedules, the managers have to know the availability of each employee to work that week. Some employees may only work a few days each week due to other responsibilities. Other employees may be attending school and their work schedules fluctuate around their class schedules. Another factor is if some employees are married and prefer to work during the day in order to be at home during the night.

6. Discipline

Discipline or counseling of an employee is the responsibility of a manager, not a key employee. Although a key employee might observe an employee violating a rule or incorrectly performing a task, the matter has to be brought to the attention of a manager who will investigate the situation and impose any discipline warranted.

COMMUNITY OF INTEREST ANALYSIS

I conclude that the petitioned-for unit is a distinct appropriate unit. Employees may constitute a readily identifiable group based upon the following factors: employees' job classifications; employees' job functions; employees' interchange into other job positions; employees' contact with other employees; employees' terms and conditions of employment; employees' supervision; and employees' functional integration with the Employer's other employees. *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 9 (2011). The employees in the petitioned-for unit herein are identifiable by their distinctive job functions and skills apart from the rest of the Employer's employees. The dining area employees constantly interact with customers; have limited interaction with kitchen staff; work in a different area of the restaurant; report to different managers; have limited interchange with kitchen staff; and have separate methods of compensation.

The Employer, in contending that a larger unit is the only appropriate unit, has the heightened burden of proving that the cooks and dishwashers share such an overwhelming community of interest with the petitioned-for unit as to require their inclusion. *Id.*, slip op. at 1. This burden is met when there is “. . . no legitimate basis upon which to exclude certain employees . . .” and where traditional community of interest factors “overlap almost completely.” *Id.* at 10, citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008). I find that the Employer has not satisfied this burden for the reasons set forth below.

A. Functional Integration and Job Skills of Employees

The focus of all the Employer’s employees is to enhance the customer’s dining experience by providing quality service, excellent food and drinks, in a pleasant, clean and efficient manner. However, the similarities between employees in the dining area and in kitchen area cease in regard to their respective functions and job skills.

Thus, dining area employees are centered upon tending to the dining needs of customers by greeting them in a hospitable manner, insuring their food and drink orders are correct and served in a timely manner, and continuing to remove dirty dishes and glasses from the tables. They, not kitchen staff, prepare and serve drinks to customers. Servers and bartenders are solely responsible for receiving payment from customers for their meals and drinks. As a result, they are in constant contact with customers and are focused upon tending to their needs.

Dining area employees do not prepare or cook customers’ food. They are required to keep the dining area, not the kitchen area, clean during their shifts and leave the restaurant clean for the next day.

Kitchen employees, on the other hand, have almost no interaction with customers. During the time the restaurant is open for business, the cooks’ center of attention is limited to

preparing and cooking customers' food orders correctly and timely. The cooks' job responsibilities confine them to the kitchen area only.

Dishwashers, too, spend a vast majority of their time in the kitchen area. Although on occasion they clean tables in the dining area, this exposure to customers is limited since dining area employees are expected to promptly remove dirty dishes and glasses from the dining area and place them in the dish pit. The dishwashers place the dirty tableware in the dishwashing machine to be cleaned.

Kitchen area employees do not greet customers, do not seat customers, do not serve food or drinks to customers, and do not receive payment for food or drink orders from customers. Also, kitchen area employees are responsible for only cleaning the kitchen area each night—not the dining area.

There is virtually no functional integration of the petitioned-for unit and the kitchen area employees. Different job skills are required to perform their separate functions. In addition, the two groups work in different areas of the restaurant. Therefore, these factors substantiate a finding that the two groups of employees are distinct. *Aztar Indiana Gaming Company, LLC d/b/a Casino Aztar*, 349 NLRB 603, 607 n. 12 (2007); *Washington Palm, Inc.*, 314 NLRB 1122, 1127-1128 (1994); *Western Lodging Corp., d/b/a Stanford Park Hotel*, 287 NLRB 1291, 1292 (1988).

B. Interaction Between Employees

Due to the physical separation of the two groups of employees in question to perform their jobs in different areas, there is only sporadic and limited interaction between dining area employees and kitchen area employees, which does not negate their separate identities. *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1020-1021 (1994). The limited interaction between the two groups of employees, as set forth below, and the performance of a few similar duties, for

example, dishwashers and bartenders both washing dishes, does not obliterate the clear functional distinction between the primary serving duties of dining area employees and the cooking and cleaning duties of kitchen area employees. *Washington Palm, Inc.*, 314 at 1127-1128; *Hilton Hotel Corporation*, 287 NLRB 359, 360 (1987); *Western Lodging*, 287 NLRB at 1292, *Sheraton-Anaheim*, 252 NLRB 959, 961 (1980).

Cooks do not have a reason to leave the kitchen area in order to perform their jobs. As a result, the cooks' opportunities to interact with dining area employees are limited to the few occasions when dining area employees come to the kitchen. Those occasions include when dining area employees return dirty glasses and dishes to the dish pit, where the dishwashers are located, but interaction with the dishwashers at these times appears to be brief and inconsequential. Servers also obtain clean silverware to polish and roll in a napkin from the kitchen area, and may retrieve condiments or restocking supplies from the kitchen.

As well, dishwashers may come to the bar to retrieve dirty dishes and glasses when the bartender is busy. On some occasions, bartenders are required to go to the kitchen area to obtain utensils and condiments for to-go orders to place in the bag with food obtained from the expediter. In addition, there are times when hostesses are responsible for to-go orders.

Much of the interface between the functions of the kitchen and the dining area, however, occurs through the expeditors, who, as noted above, are managers. For example, a server who encounters a problem with a customer's meal such as a steak not being cooked as ordered or an incorrect side item being served, brings it to the attention of the expediter, not the cook. The expediter is located on the dining room side of the table where completed food orders are placed. It is the expediter who notifies the cooks of the problem. Cooks then correct the order by continuing to cook the item in question or by adding the ordered side item to the plate. The cooks place the corrected food order back on the shelf under the hot lamps for the expediter to

retrieve. Then an expediter calls for an available server to return the corrected order to the customer. When bartenders take food orders from customers sitting at the bar or the tables nearest the bar, they receive the food from the expediter, however, not the cook, unless a food runner has already taken the food to the table. Finally, although servers do communicate salad orders to the salad expo cook, they address any problems customers have with salad orders to the expediter for correction.

C. Interchange of Employees

The difference in the functions and skills of the petitioned-for unit and the remaining employees in the kitchen area is also reflected in the minimal interchange of employees to jobs in other areas. Of the approximate 15 cooks, only one has requested to and trained for a job position in the dining area - as a server. As set out above, that employee currently works most of the time as a server and fewer shifts as a cook.

Such nominal interchange does not blur the distinction between the different job skills and functions between the dining area employees and the kitchen area employees. *Western Lodging*, 287 NLRB at 1292; *Hilton Hotel*, 287 NLRB at 360; *Sheraton-Anaheim*, 252 NLRB at 961. Moreover, permanent transfers, as in the case here, of a cook who volunteered to also work as a server, are a less significant indication of actual interchange than temporary transfers. See *Deaconess Medical Center*, 314 NLRB 677 fn. 1 (1994). Cf. *Red Lobster*, 300 NLRB 908, 911 (1990). The consequence of this lone employee working in both areas is further diminished by the fact it was voluntary. Cf. *Red Lobster, Id.*

D. Supervision of Employees

A manager is assigned to instruct kitchen area employees and that is most often the expediter. Another manager is assigned to direct dining area employees. Owner/Operator Walker serves as the manager in charge whenever he is in the restaurant. On occasion, a key

employee serves to direct dining area employees in a limited manner, but that individual is required to address any non-routine questions to the manager on duty.

The record reflects that it is not a common occurrence for the dining area manager, except Walker, to instruct or direct kitchen area employees unless that manager is the only one present. The same is true if it is a kitchen area manager and dining area employees. Thus, although the petitioned-for group shares common supervision at the highest level (Owner/Operator Walker) with the kitchen area employees, they are supervised at the first level by different managers.

E. Compensation, Hours, and Working Conditions of Employees

Although there is some overall commonality in this area, it is not sufficient to compel a finding that the petitioned-for unit is inappropriate. For example, all employees are subject to the same work rules in the employee handbook. They are also entitled to the same benefits such as medical and dental insurance, if eligible. As set forth above, employee uniforms are also very similar, with employees wearing variations of black shirts and pants. Only servers, however, wear shirts bearing the employer's logo.

Moreover, the hiring process of both dining and kitchen area employees is performed by a manager with Owner/Operator Walker being the final decision maker. Orientation, training, and evaluation of a new employee differs only in that the job skills vary. Trainees in each of the two areas are required to review Employer's manuals pertaining to their job classifications; receive on-the-job training with the assistance of other employees of similar job classifications; and perform their job skills for Walker's validation.

Finally, shift assignments are essentially the same between dining area and kitchen area employees. Work schedules include the opening shift, a staggered shift throughout the day, and

the closing shift. Prep cooks are the exception. They are scheduled to arrive about one to two hours before other opening shift employees in order to prepare various food items on the menu.

It is settled, however, that some commonality in terms and conditions of employment, occurring almost of necessity, does not render a smaller unit inappropriate. For example, that employees share the same fringe benefits does not negate a unit's separate identity. *Grace Chemical Co.*, 120 NLRB 1338, 1341 (1958); *Magma Copper Co.*, 115 NLRB 1, 2 (1956).

Most significant, the method of compensation is yet another differentiation between the petitioned-for unit and kitchen area employees, which demonstrates that the two groups of employees do not share an overwhelming community of interest. The Board has held that this factor is of particular significance because differences in methods of compensation “would inject significantly different issues into bargaining....” *The Washington Palm, Inc.*, 314 NLRB 1122, 1127 (1994). In regard to dining employees, servers and bartenders are paid a low hourly wage, \$2.13 per hour, which is offset by being able to keep substantially all of the tip income received from customers. As a result, the average hourly rate, consisting of the hourly rate and tip income, can range from \$12.00 to about \$16.00 per hour. Hostesses earn the bulk of their income from a higher hourly wage rate than other dining area employees—between \$8.00 and \$9.50 per hour. They receive a small amount of additional compensation from the tip pool, which only servers and bartenders contribute.

In contrast, none of the kitchen area employees receives income from tips. Rather, they receive an hourly wage. Cooks start at \$7.50 per hour and can increase to about \$12.00 per hour. Dishwashers are paid about \$8.00 to \$9.00 per hour.

The clear variation in compensation between the tipped dining area employees and the non-tipped kitchen area employees further emphasizes the lack of an overwhelming community of interest. *Casino Aztar*, 349 at 607 n. 12; *Washington Palm, Inc.*, supra at 1127-1128. Thus, I

find that this is a “significant factor that supports a finding that the petitioned-for unit is an appropriate one for collective bargaining.” *Washington Palm, Inc.*, supra at 1127.

F. Bargaining History

There is no history of bargaining between this Employer and Petitioner. Therefore, this factor does not support the Employer's position.

G. Conclusion on Community of Interest

Based upon the foregoing, I find that the cooks and dishwashers do not share an overwhelming community of interest with the petitioned-for unit. Rather, the dining area employees share distinct job functions, job skills, and methods of compensation so that they constitute an appropriate unit.

SUPERVISORY ISSUE

A. Applicable Case Law

The Petitioner contends the key employees should be excluded from the unit because they are supervisors within the meaning of Section 2(11) of the Act. As an initial matter, the record does not contain evidence on the percentage of time spent on key employee duties by any server or bartender. Because I find that the key employees do not possess any of the supervisory indicia while serving in that role, however, it will not be necessary to engage in analysis of part-time supervisory status.

The traditional test for determining supervisory status is: (1) whether the individual has the authority to engage in or effectively recommend any one of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the individual holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). The burden of proving supervisory status lies with the party asserting that such status exists. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2001).

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc., Id.* at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). “[W]henver the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

The Petitioner only asserts that key employees are supervisors without delineating any basis for its assertion. I find that the Petitioner has not established by a preponderance of the evidence that key employees are supervisors within the meaning of Section 2(11) of the Act, as there is no evidence that key employees possess any of the primary indicia of supervisory authority, and I shall, therefore, include them in the unit found appropriate here.

B. Lack of Indicia of Supervisory Authority

The key employees are servers and bartenders who on occasion serve in this capacity. They possess none of the traditional indicia of supervisory authority because they have no authority to hire employees, discipline employees, terminate employees, or effectively recommend they be hired, disciplined, or terminated. See *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423, n. 12 (2010); *Central Plumbing Specialties*, 337 NLRB 973 (2002); *Ten Broeck Commons*, 320 NLRB 806, 809 (1996).

Key employees also lack authority to increase employees’ wages, to approve employees’ leave requests, to evaluate employees’ job performances, or to prepare employees’ work schedules. These responsibilities are performed by managers, and many must be approved by

Walker. Hence, these are additional factors that reinforce the conclusion that key employees do not possess indicia of supervisory authority. See *Pacific Coast*, 355 NLRB at 1423, n. 12; *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

Although key employees are solely compensated with an hourly wage of \$12.00, other non-managerial employees such as cooks can earn a similar amount per hour. Key employees receive their normal compensation of an hourly wage plus tips when they return to their server or bartender duties.

The floor plan for servers is occasionally prepared by key employees. A floor plan denotes which tables each server is assigned to wait on during that shift. This task is normally performed by a manager. However, such assignment of tables to servers is routine since there are a certain number of tables to be served and a certain number of servers working each shift. It does not require the use of independent judgment by key employees. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

The same is true regarding key employees instructing other employees to perform certain job tasks such as clean dirty tables, seat customers at particular tables, check on the status of customers' orders, and obtain drinks for customers. These instructions are not based upon independent judgment by key employees but, rather, routine in nature based upon observation of the needs of customers. See *Oakwood Healthcare, Inc.*, 348 at 689, 693; *Croft Metals, Inc.*, 348 NLRB 717, 721-722 (2006); *Azusa Ranch Market*, 321 NLRB at 812.

One difference between key employees and other dining area employees is that key employees carry a focus card that allows them to lower the amount charged for an order when a customer's food order is not cooked or prepared as ordered or service is extremely slow. However, a key employee is to notify the manager when a customer problem exists that requires such action because it is the manager who decides what, if any, adjustment is to be made to a

customer's ticket amount. Thus, the key employee is merely implementing management's instructions. *Id.*

CONCLUSION

As set forth above, I find under a traditional community of interest analysis, that the appropriate unit includes all full-time and regular part-time servers, bartenders, hostesses, and key employees employed by the Employer and constitutes a clearly identifiable, functionally distinct group of employees and an appropriate unit.

CONCLUSIONS AND FINDINGS

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

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

All full-time and regular part-time servers, bartenders, hostesses, and key employees employed by the Employer at its Boiling Springs, SC location, excluding cooks, dishwashers, prep cooks, office clerical employees, and professional employees, guards, and supervisors as defined under the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees in this unit will vote on whether or not they wish to be represented for purposes of collective bargaining by the National Workers Association. The date, time, and place of the election will be specified in the Notice of Election that the Subregional Office in Winston-Salem, North Carolina, will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

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

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

To be timely filed, the list must be received in the Winston-Salem Subregional Office located at Republic Square, Suite 200, 4035 University Parkway, Winston-Salem, North Carolina, 27106-3325. No extension of time to file the list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (336) 631-5210. Because the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office located at Republic Square, 4035 University Parkway, Winston-Salem, North Carolina, 27106-3325. To

file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

C. Notice of Posting Obligations

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

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington D.C. 20570-0001. This request must be received by the Board in Washington by March 21, 2013. The request may be filed electronically through the Agency's website, www.nlr.gov,⁶ but may not be filed by facsimile.

Dated at Winston-Salem, North Carolina, on this 7th day of March 2013.



Claude T. Harrell Jr., Regional Director
Region 10, Subregion 11
National Labor Relations Board
4035 University Parkway, Suite 200
Winston-Salem, NC 27106

⁶ To file the request for review electronically, go to www.nlr.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.