

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

KING SOOPERS,

Case No. 27-RC-104452

Employer,

and

UNITED FOOD & COMMERCIAL UNION,
LOCAL 7,

Petitioner.

REQUEST FOR REVIEW AND REQUEST TO STAY THE ELECTION

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Comes now the Respondent, King Soopers (“King Soopers,” “Respondent,” or the “Company”), pursuant to Section 102.67 of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, and requests review of the Regional Director’s Decision and Order (the “Decision”) in the above-referenced case, dated July 11, 2013. The Regional Director’s Decision is attached to this Request for Review as Exhibit A.

King Soopers seeks review of the Regional Director’s findings that the scope and composition of the petitioned-for unit is appropriate. The Decision is based on clearly erroneous findings of substantial fact, which are prejudicial to King Soopers. Moreover, the Decision is a clear departure from reported Board precedent.

I. INTRODUCTION

United Food & Commercial Union, Local 7 (“UFCW,” “Union,” or “Petitioner”) filed the instant Petition, 27-RC-104452, to represent all retail employees and coffee shop employees¹ at King Soopers’ Store No. 135. (Ex. B(1)(a)).² King Soopers’ position is that a unit comprising of its Store No. 135 retail and coffee employees is an inappropriate unit for two reasons: 1) the coffee employees and retail employees do not share a community of interest; and 2) an overwhelming community of interest exists between the retail employees employed in Store No. 135, Store No. 13 and Store No. 89, because the employees at these three stores are functionally-integrated into a geographic grouping referred to as the Louisville/Lafayette geographical area.³

¹ Throughout the hearing, “coffee shop” and “Starbucks” are used interchangeably. (Tr. 7:23-24; Tr. 83: 1-20.)

² Citations will be as follows: “Tr. ___:___” to indicate the hearing transcript’s page and line numbers respectively; “Decision at ___” to indicate the page number of the Regional Director’s Decision and Direction of Election; “Ex. B(1) ___” to indicate an exhibit from the Board’s formal papers; and “E. Ex. ___” to indicate an Employer’s exhibit.

³ King Soopers’ other geographical areas include: Denver Metropolitan Area, Boulder, Parker, Pueblo, Colorado Springs and Castle Rock. (Decision at 4.)

King Soopers presented evidence concerning the reasons for separating its stores into geographical areas and the impact these geographical areas have on the employees' terms and conditions of employment. (Tr. 70: 12-25; Tr. 71: 1-2.) In particular, the evidence showed two underlying reasons for maintaining the geographical area: 1) to effectively staff the stores to provide customer service; and 2) to protect employees' seniority and the employees' rights and benefits tied to the employees' seniority including promotions, vacations, and work schedules. (Tr. 70: 12-25; Tr. 71: 1-2.) The evidence also showed: 1) King Soopers' centralized control of the stores' daily operations and labor relations; 2) the similarity of employee skills, functions, and working conditions; 3) the degree of employee interchange among the employees within the three stores; 4) the three-mile distance between each store (Tr. 54: 5-12); and 5) the parties' bargaining history in other geographical areas including Region 27's 2003 certification in 27-RC-8272 (Exhibit B), which concerned the same parties and the appropriateness of a two-store geographical unit.⁴

Finally, the evidence also showed the lack of a community of interest that exists between the approximately 113 retail employees and the five coffee shop employees. (Decision at 3.) The coffee shop employees will be disenfranchised if included in a unit of employees whose terms and conditions of employment are distinct from those of the retail employees. (Decision at 3; see generally, testimony of Laura Ann Bustos (Tr. 118-132); testimony of Elijah Moreno (Tr. 133-143); and testimony of Cristela Luna (Tr. 157-162).)

⁴ These are the five factors that must be considered when determining whether the single-unit presumption has been rebutted and whether a multi-facility unit is appropriate. Trane, 339 NLRB 866, 867 (2003); see also, Hilander Foods, 348 NLRB 1201, 1201 (2006) (listing the same five factors).

The Regional Director disregarded the evidence concerning the impact of the geographical area on the employees' terms and conditions of employment, the overwhelming community of interest that exists among retail employees employed at the three stores, and the lack of community of interest that exists between the retail employees and coffee shop employees in order to arrive at an incorrect Decision to direct an election. The Decision is a substantial departure from Board precedent on several issues and unjustifiably disrupts the law in areas of significance to Board policy. The Regional Director's decision creates confusion and discord on the important legal issues surrounding the "community of interest" factors and the test to use when determining whether a multi-facility unit is appropriate as established by Board precedent. The Board should grant review, stay the election, reverse the Decision, and dismiss the petition.⁵

II. PROCEDURAL BACKGROUND

On May 6, 2013, the Union filed the Petition with Region 27 of the NLRB, seeking to represent "all employees actively engaged in the handling and selling of merchandise, including part-time workers who work regularly one (1) day or more a week, employed by the Employer in the grocery store or stores owned or operated by the Employer at 480 U.S. Highway 289, Lafayette, CO 80026, specifically including the Starbucks department." (Id.) The Petition sought to exclude, *inter alia*, the meat department and delicatessen department employees. (Id.)

On May 16, 2013, this matter came before Hearing Officer Michelle Devitt of the NLRB, Region 27, at 600 17th Street, Suite 700, Denver, Colorado 80202. During the hearing, the parties presented evidence on the following issues: (1) the lack of a community of interest

⁵ Because the Union is unwilling to proceed to an election on any unit, other than the one for which the Union petitioned, the Region must dismiss the petition. (Tr. 163: 3-10.)

between the retail employees and coffee shop employees; and (2) the overwhelming community of interest that exists between the retail employees at Store No. 13, Store No. 89 and Store No. 135.

Eight weeks later, on July 11, 2013, the Regional Director issued her Decision and Order. The Regional Director decided that the “single-store petitioned-for unit is appropriate, and that the Starbucks coffee shop employees share a sufficient community-of interest with the other petitioned-for retail employees to warrant inclusion in the unit.” (Decision at 3.) The Regional Director directed an election on the petitioned-for unit. (*Id.*)

III. ARGUMENT AND AUTHORITIES

King Soopers requests review of the Decision pursuant to the Board’s Rule § 102.67 (c) (1), (2), and (4).

A. **The Regional Director’s Decision Is Clearly Erroneous On Substantial Factual Issues.**

1. The Regional Director’s Fact Findings Concerning King Soopers’ Centralized Control Are Clearly Erroneous.

a. The Regional Director’s Fact Findings Concerning the Corporate Office’s Control Over King Soopers’ Policies and Procedures Are Erroneous.

The Regional Director’s Decision ignored the overwhelming evidence showing King Soopers’ centralized control over King Soopers policies and procedures. The Regional Director erroneously found that “[t]he Employer’s corporate office [only] broadly oversees employment policies and procedures, as well as merchandizing and marketing across all of the Employer’s stores, but day-to-day employee relations matters are handled at the store level, with input from the district manager or corporate office only for the highest discipline levels.” (Decision at 12.)

It is undisputed that King Soopers' corporate office does not "broadly oversee" employment policies and procedures, but implements and administers the policies and procedures, which all stores follow as is also the case in multi-store bargaining units with the Petitioner. (Tr. 12: 10-12; Tr. 17: 23-25; Tr. 18: 1-5.) Similarly, the undisputed testimony supports the finding that King Soopers' corporate office determines the merchandise that will be sold at each of its stores and the marketing that will be implemented. (Tr. 43: 3-17.)

b. The Regional Director's Fact Findings Concerning Labor Relations' Control Over Staffing Issues Are Erroneous.

The Regional Director's Decision erroneously concluded that King Soopers Labor Relations department did not have direct control over staffing issues at the Louisville/Lafayette geographic area. (Decision at 8-13.) Yet, it is clear from the record that King Soopers' Labor Relations Department and Manager of Labor and Employee Relations, Stephanie Bouknight, control all staffing decisions, including work schedules, number of hours of worked, promotions, transfers and layoffs. (Tr. 12: 10-12; Tr. 17: 23-25; Tr. 18: 1-5; Tr. 34: 14-26; Tr. 35: 5-25; Tr. 36: 1-24; Tr. 41: 24-25; Tr. 42: 1-16; E. Ex. 2; E. Ex. 3.) Labor Relations maintains one seniority list,⁶ which combines all the employees employed in the three stores in the Louisville/Lafayette geographical area. (Tr. 16: 23-25; Tr. 17: 1-3; Tr. 19: 23-25; Tr. 20: 1-12; E. Ex. 1; E. Ex. 2.) All staffing decisions are made based on this seniority list, with the exception of vacations. (Tr. 39: 5-6.) This is exactly the same policy and process used with King Soopers multi-store bargaining units with Petitioner. (Tr. 19: 23-25; Tr. 20: 1-12; Tr. 39: 3-9.)

⁶ Seniority lists are maintained by the Labor Relations department at King Soopers corporate office located in Denver, Colorado. (Tr. 11: 19-22; Tr. 20: 13-14.)

In terms of scheduling, it is undisputed that King Soopers' employees are bound by a corporate-based process known as "select a shift." (Tr. 41: 24-25; Tr. 42: 1-16; Tr. 72: 17-20.) The corporate office conducts studies, which determine the particular number of hours a department within each store will have to fill, based on the customers' needs and customer traffic. (Tr. 41: 24-25; Tr. 42: 1-3; Tr. 42: 19-22.) Based on the hours the corporate office grant to a department, a blank matrix for the week is created identifying the shifts available per department. (Tr. 42: 4-16.) Shifts are shown as blocks on the matrix. (Tr. 42: 10-16.) Employees review the blocks and select their shifts based on their seniority with the geographical bargaining unit, the most senior employees making the first selections. (Tr. 42: 12-16.) The select a shift system is the same used with the Petitioner. (Tr. 72: 17-20.)

An employee's seniority also controls the employee's ability to obtain a promotion or advancement from a part-time to a full-time position. (Tr. 19: 23-25; Tr. 20: 1-12; Tr. 26: 5-10.) King Soopers' corporate office creates two promotional pool lists on an annual basis for the Louisville/Lafayette geographical area. (Tr. 20: 1-12; E. Ex. 3; E. Ex. 4; E. Ex. 5; E. Ex. 6; E. Ex. 7.) One list is created in January and the other in July. (Tr. 31: 6-14.) During January and July, employees are notified that the promotional pool lists are open. (Tr. 66: 16-21.) If an employee is interested in obtaining a promotion, the employee will sign the promotional pool list during the first fifteen days of the month and will write which positions he or she is willing to consider. (Tr. 66: 16-21.)

Labor Relations maintains the lists in the main office. (Tr. 20: 5-14; Tr. 22: 4-7.) The lists are reviewed when promotions are available at any of the three stores. (Tr. 22: 15-23.) The Labor Relations department determines who is the most senior employee and provides the store

with the name of this employee, who will receive the promotion within the geographical unit. (Tr. 22: 19-23.) This is the same process followed at King Soopers' multi-store units with Petitioner. (Tr. 19: 21-25; Tr. 20: 1-4; Tr. 22: 19-23.)

In terms of layoffs, the Regional Director erroneously found that when layoffs or reductions of hours occur, the store managers merely "verify seniority" with the corporate office. (Decision at 12.) Contrary to the Regional Director's findings, Labor Relations, and not store management, determine who will be laid off based on seniority and provides these employees with their layoff rights, which may include displacing other employees from their store or the other two stores in their geographical area. (Tr. 35: 16-22.)

Finally, when a position becomes available within one of the three stores, the store managers cannot simply hire someone or assign an existing employee to that position. Rather, Bouknight will review the seniority of employees within the geographic unit and provide the store with information about the employee who is entitled to the opening. (Tr. 19: 21-25; Tr. 20: 1-12.)

The Regional Director erroneously failed to find that the centralized control over labor relations favors finding that the three stores share an overwhelming community of interest. The Regional Director's Decision requires review.

c. The Regional Director's Fact Findings Concerning Store Management's Autonomy Are Erroneous.

The Regional Director erroneously found that Store 135's management has significant local autonomy. (Decision at 22.) The Regional Director found that "individual store managers at Louisville Area stores have independent authority to determine personnel needs, make work assignments within their stores, make work assignments to other stores in their geographic

grouping upon request, and to fill temporary vacancies, all without involvement from the district manager or corporate office.” (Decision at 12.) The Regional Director also found that day-to-day employee relation matters including discipline, grievances, and “routine problems” were handled by store-level management. (Decision at 12-13.)

The Regional Director’s findings are unsupported by the evidence. As addressed above, store managers are bound by the policies and procedures promulgated by the corporate office, by corporate’s select a shift system, and by the geographically-based seniority list. Moreover, disciplinary issues and grievances are controlled by the corporate office. (Tr. 44: 4-8; Tr. 87: 14-16.) Contrary to the Regional Director’s baseless assertion that District Manager, Richard Paul Zwisler,⁷ only has “some involvement in employment matters such as higher level discipline,” the evidence showed that for discipline other than verbal and written warnings, Zwisler must be consulted before the discipline may be issued. (Decision at 9; Tr. 87: 11-16.) When store management wants to suspend or terminate an employee, Zwisler must be consulted. (Tr. 44:4-5; Tr. 87: 11-16.) Any termination decision for employees with five or more years of seniority must be reviewed not only by Zwisler, but also by Bouknight. (Tr. 44: 4-8; Tr. 87: 14-16.) Additionally, when an employee wants to contest any discipline or any other term and condition of employment, the employee’s grievance is processed by Labor Relations and not local management. (Tr. 18: 9-13.) This is the exact same system that is used with the Petitioner in the multi-store units.

In conclusion, the Regional Director’s findings that King Soopers lacked sufficient central control and that store management possessed sufficient autonomy to find that a single-

⁷ Zwisler is the District Manager of a district that includes the Louisville/Lafayette geographical area and other multi-store units. (Tr. 85: 22-25.)

store unit is appropriate, were erroneous and prejudiced King Soopers. In St. Luke's Health Sys., Inc., 340 NLRB 1171 (2003), the Board held that the employer accorded little autonomy to local management despite local management's authority to implement smoking policies, schedule employees for shifts, grant time off, and perform annual evaluations, because this authority was mere "pro forma." Id. at 1173. The Board found that HR directed the labor functions, determined employee salaries, was consulted for disciplinary matters, administered the grievance procedure and was responsible for issuing personnel policies and procedures. Id. at 1172-73. Just like in St. Luke's, the local management's authority is mere "pro forma." Because of the Regional Director's erroneous findings, the Decision must be reviewed.

2. The Regional Director's Fact Findings Concerning the Interchange Among the Stores in the Louisville/Lafayette Geographical Area Are Clearly Erroneous.

The Regional Director erroneously found in contradiction to the undisputed record evidence that there was insufficient interchange among the stores in the Louisville/Lafayette geographical area to find that this factor supported the Employer's position that a multi-store unit was the only appropriate unit. (Decision at 18-19.) The Regional Director's Decision in regards to this factor was erroneous and prejudiced King Soopers by: 1) ignoring the undisputed evidence; 2) misinterpreting the evidence; and 3) disregarding evidence of interchange among the other two stores within the Louisville/Lafayette geographical area. (Decision at 17.)

Virtually every witness, including the Petitioner's witnesses, testified as to the extensive interchange that exists among the three stores. The witnesses testified as to the different types of interchange that occurs, i.e., promotions, temporary transfers based on the needs of the stores, selection by part-time employees of additional work hours at the other two stores, permanent

transfers and layoffs. (Tr. 21: 5-19; Tr. 22: 9-23; Tr. 35: 14-22; Tr. 41: 24-25; Tr. 42: 1-9; Tr. 44: 9-24; Tr. 126: 12-13.) The Petitioner's witnesses corroborated this interchange. (Tr. 110: 13-23; Tr. 113: 20-23; Tr. 114: 24-25; Tr. 115: 1-4; Tr. 126: 12-13.) Clerk, Enrique Meza, who works at Store No. 135, testified that he has been assigned to work at the other two stores in the Louisville/Lafayette geographic area. (Tr. 110: 13-23.) Sara Mendoza, a pharmacy technician employed at Store No. 135, testified that within the past two years she has been assigned three to four times to work at Store No. 13 and an additional three to four times at Store No. 89. (Tr. 113: 20-23; Tr. 114: 24-25; Tr. 115: 1-4.) Starbucks lead, Laura Ann Bustos, testified that while she did not work at the other stores because of her full-time status, the part-time employees in her department sought additional hours in the other two stores. (Tr. 126: 12-13.) The Regional Director did not address the testimony of any of these witnesses, thereby prejudicing King Soopers by ignoring and disregarding undisputed evidence of interchange.

Not only did the Regional Director disregard the evidence, but misinterpreted and mischaracterized other evidence concerning the interchange among the three stores. The Regional Director misinterpreted the information contained in Exhibit 9. (E. Ex. 9.) The exhibit shows eight weeks during a four-month period, as opposed to the nine weeks during a six-month period claimed by the Regional Director. (Decision at 15-16.) Moreover, Exhibit 9 does not reflect all of the hours of interchange between the three stores during this four-month period, but only a representative sample. (Id.; Tr. 89: 8-24.) The exhibit does not include the promotions made from one store to the other or other permanent transfers. (E. Ex. 3; E. Ex. 4; E. Ex. 5; E. Ex. 6; E. Ex. 7.) Nor does it include select a shift selections made by the employees. (Tr. 89: 8-

10.) The exhibit only includes hours that were transferred based on requests made to the store.
(Id.)

The Regional Director also improperly declined to take into account evidence of interchange between Store No. 13 and Store No. 89. In St. Luke's, 340 NLRB at 1173, the Board found that the Regional Director erroneously issued a Decision and Direction of Election for a single-location unit because of the “absence of temporary interchange” in the petitioned-for location, where there was evidence of interchange between the other locations. Id. In the instant case, not only did King Soopers introduce evidence of the interchange of the employees working at Store No. 135, but also evidence of interchange among the employees working at Store No. 13 and Store No. 89. (E. Ex. 3; E. Ex. 4; E. Ex. 5; E. Ex. 6; E. Ex. 7.) King Soopers’ promotional pools, which are created by geographical area, showed various requests and grants for promotions between Store No. 13 and Store No. 89, in addition to requests for promotions to any of the three stores, noted as a request to “LOUI-099,” the geographical area designation. (Id.; Tr. 28: 14-20.) Yet, the Regional Director, once again, ignored this evidence.

Because the Regional Director disregarded and misinterpreted much of the evidence provided to show the interchange among the three stores, a review of the Decision is required.

3. The Regional Director’s Finding that King Soopers Did Not Raise Its Opposition to the Petitioned-For Unit Is Clearly Erroneous.

The Regional Director claimed that the Respondent did not contend that a unit of retail employees and coffee shop employees is an inappropriate unit. (Decision at 24, 29.) This contention is directly contradicted by the hearing transcript. (Tr. 7: 20-22.) When counsel for the Employer was asked to state King Soopers’ position, counsel stated that “the appropriate unit would be retail employees, but not Starbucks employees.” (Id.) Evidence was introduced to

show the community of interest that exists between the deli and coffee employees, which was juxtaposed to the lack of community of interest that exists between the retail and coffee employees. (See generally, testimony of Laura Ann Bustos (Tr. 118-132); testimony of Elijah Moreno (Tr. 133-143); and testimony of Cristela Luna (Tr. 157-162).)

As addressed fully below, the Regional Director's error in this regard prejudiced King Soopers because the Regional Director failed to conduct an appropriate analysis of whether the petitioned-for unit consisting of the two classifications was an appropriate unit. (Decision at 29-32.)

4. The Regional Director's Fact Findings Concerning the Coffee/Starbucks Employees' Daily Assignments Are Clearly Erroneous.

The Regional Director erroneously found that the coffee employees and the retail employees were an appropriate unit because, *inter alia*, “[t]he record is replete with evidence that Starbucks counter employees regularly assist in other store departments on a daily basis, including help with tasks like bagging groceries.” (Decision at 27.) This assertion is completely baseless.

Contrary to the Regional Director's findings, the testimonial evidence demonstrated that Starbucks employees may be asked to assist with bagging groceries or with scan-outs, which entails scanning the items on the shelves to determine what product is missing. (Tr. 119: 3-11; Tr. 121: 14-17; Tr. 134: 5-21.) However, bagging groceries and conducting scan-outs are not a requisite part of the coffee shop employees' job and coffee shop employees only perform these tasks when they are not busy at the coffee shop and when assistance is needed. (Tr. 119: 3-11; Tr. 124: 14-24.) Additionally, the time spent bagging groceries is minimal. (Tr. 134: 17-21.) Moreover, there is no evidence, let alone “replete” evidence, of Starbucks employees assisting in

other store departments including the fuel department, grocery department, produce department, bakery department, pharmacy and floral department, which are the departments included in the petitioned-for unit. (Ex. B(1)(a)). The obverse is also true – no retail employee can work in the coffee shop. (Tr. 130: 6-12; Tr. 158: 8-18.) The coffee shop employees must go through a 40-hour certification training through Starbucks. (Tr. 129: 25; Tr. 130: 1-12; Tr. 132: 13-19.) The retail employees do not go through this training.

The Regional Director's error in this regard prejudiced King Soopers by finding that the retail and coffee shop employees are an appropriate unit. (Decision at 3.)

B. The Regional Director Departed from Reported Board Precedent.

The Regional Director's Decision departed from reported Board precedent in many respects. The Decision improperly asserts that Specialty Healthcare⁸ has changed Board law concerning how to analyze whether the employer has overcome the single-facility presumption and whether employees at various employer locations share a sufficient community of interest compelling a multi-facility bargaining unit. (Decision at 23.) The Regional Director has also established new standards for determining when employees' skills, functions and working conditions support a finding that a multi-facility unit is appropriate and when there is sufficient evidence of centralized control to also support a finding that a multi-unit location is appropriate. (Decision at 12, 23-23.) Finally, the Regional Director's finding that the petitioned-for unit is appropriate contradicts established Board precedent. (Decision at 28-32.)

⁸ Specialty Healthcare and Rehab. Ctr. of Mobile, 357 NLRB No. 83 (Aug. 26, 2011).

1. The Regional Director's Decision Improperly Applied *Specialty Healthcare* to Determine Whether a Multi-Facility Unit Is Appropriate.

a. *The Regional Director's Reading of Specialty Healthcare is Erroneous.*

The Regional Director erroneously asserts that the standard for rebutting the single-facility presumption⁹ has changed and that she cannot consider the 2003 decision where the same Region found in 27-RC-8272, a two-store bargaining unit between the same parties to be an appropriate unit. (Exhibit B). The Regional Director justified its disregard of the prior decision by stating that “[t]he analytical landscape has changed since that case was decided.” (Decision at 23). The Regional Director does not explain how the “landscape” has changed. (*Id.*) Instead, she acknowledges that:

[w]hile the Board has not yet discussed its Specialty Healthcare analytical framework in a reported multi-facility case, there is no basis to conclude that it would not apply that analysis. Accordingly, I find that even applying such an alternative analysis under the Board's *Specialty Healthcare* framework results in the same determination that the Employer has not met its burden of establishing that the single-store presumption has been rebutted.

(Decision at 23.) The Regional Director, again does not explain what “alternative analysis” she is describing or referencing. (*Id.*) Such is the essence of an arbitrary decision ruling and administrative caprice.

Contrary to the Regional Director's baseless assertions, the Board in Specialty Healthcare stated that it was overruling Park Manor,¹⁰ a case concerning the standard for determining units in non-acute health care facilities and would “return to the application of our traditional community-of-interest approach in this context.” *Id.* at 83. King Soopers is not a health care

⁹ In Trane, 339 NLRB 866, 867 (2003), the Board articulated the factors to consider when determining whether the single-facility presumption has been rebutted.

¹⁰ Park Manor Care Center, 305 NLRB 872 (1991).

facility and thus, overturning Park Manor does not change the “legal landscape” to apply in the instant case.

The Board also clarified in Specialty Healthcare that the employer has the burden of contending that excluded employees share an “overwhelming community of interest” in cases where the employer asserts that the composition of the petitioned-for unit is inappropriate because it does not contain additional employees. Id. at 83. The Board did not explain that it would be applying the same standard to multi-facility units. In fact, the Board did not mention multi-facility units. Thus, Specialty Healthcare has not changed the analysis to apply in this case. However, given the Board’s articulated policy of finding the smallest-possible unit to be appropriate in a single-location unit, the only appropriate unit in this case would be one including only the retail employees or only the coffee employees, but not both.

Since the Board’s Specialty Healthcare decision, the Board has reaffirmed that Specialty Healthcare only clarified the allocation of the burden of proof where the employer asserts that the composition of the unit must be larger. DTG Operations, Inc., 357 NLRB No. 175, n. 19 (Dec. 30, 2011). Otherwise, the decision is not a “significant departure from well-settled area of the law.” Id. (internal citation omitted). Additionally, other Regional Directors have found, contrary to the Regional Director here, that Specialty Healthcare is not instructive in determining the scope of a unit because “*Specialty Healthcare*, as well as its progeny, involved a single facility and question of unit composition; that is which classifications at the facility were properly included in the bargaining unit.” See, e.g., Jaspers Foods Mgmt., Inc., Case No. 19-RC-088681, 2012 NLRB Reg. Dir. Dec. LEXIS 129, slip. op. at *25-26 (Oct. 11, 2012).

The Regional Director's failure to consider the Region's prior decision in 27-RC-8272 because of its erroneous reading of Board law, and her failure to articulate the standards and factors she used as part of the alleged new "analytical landscape," presents compelling reasons to review this Decision. The Regional Director has confused the law and prejudiced King Soopers.

b. The Board has Not Affirmatively Overruled its Precedent and Has Not Followed the Proper Procedure to Deviate From Its Established Precedent.

As established above, the Regional Director erroneously asserted a change in Board law concerning overcoming the single-facility presumption without being able to cite to a single portion of Specialty Healthcare decision that describes this change. (Decision at 23). The Regional Director cannot cite to any portion, because the Board has not followed the channels to deviate from established Board law. The Board has not used its rulemaking powers under Section 6 of the NLRA. American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610-613 (1991) (holding that the Board has the power to draft rules concerning appropriate bargaining units.) The Supreme Court held that in order to determine whether a unit is appropriate, "the Board's decision is presumably to be guided not simply by the basic policy of the Act but also by the rules that the Board develops to circumscribe and to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority." Id. at 611-612.

The Board has also not given notice and opportunity to comment on this alleged change in the law. Mortg. Bankers Assoc. v. Harris, No. 12-5246, 2013 U.S. App. LEXIS 13470, slip op. at *2 (D.C. Cir. March 22, 2013) ("When an agency has given its regulation a definitive interpretation, and later significantly revised that interpretation, the agency has in effect amended

its rule, something it may not accomplish [] without notice and comment.”) (internal quotes and citation omitted.)

When the Board has made significant changes to Board law, it has given interested parties an opportunity to comment. See, e.g., Specialty Healthcare & Rehab. Ctr. of Mobile, 356 NLRB No. 56 (Dec. 22, 2010) (inviting parties and interested amici to file briefs); Oakwood Healthcare, Inc., 348 NLRB 686 (2006) (the Board changed the analysis to be applied in assessing supervisory status in Case No.7-RC-22141 after having issued notice and an invitation to interested parties to file briefs in light of the Supreme Court’s decision in NLRB v. Kentucky River Cmty. Care, 532 U.S. 706 (2001).) Moreover, in cases where the Board overrules its precedent, the Board notes that it is overruling its precedent and usually applies its rules prospectively. See, e.g., WKYC-TV, Inc., 359 NLRB No. 30 (Dec. 12, 2012) (overruling Bethlehem Steel, 136 NLRB 1500 (1962), and requiring employers prospectively to check-off union dues after the expiration of a collective bargaining agreement); Piedmont Gardens, 359 NLRB No. 46 (Dec. 15, 2012) (overruling Anheuser-Busch, Inc., 237 NLRB 982 (1978), and holding that a balancing test will be used when the employer wants to protect witness statements from disclosure but that this holding will be applied prospectively).

Given that the Board has neither invited interested parties to comment nor affirmatively articulate that it is overruling Board precedent, no change in the law exists. The Regional Director’s erroneous assertions prejudiced King Soopers because the Regional Director failed to analyze the evidence supporting the multi-store bargaining unit for the Louisville/Lafayette geographic area based on established Board law and precedent with the Region between these two bargaining parties.

2. The Regional Director's Decision Improperly Sets a New Evaluation Standard When Determining Whether the Community of Interest Factors Concerning Skills, Functions and Working Conditions Favor a Multi-Facility Unit.

The Regional Director's Decision conflicts with Board precedent by finding that King Soopers must show that employees in other geographical areas have different skills, functions and working conditions when compared to the employees working in the Louisville/Lafayette geographical area. (Decision at 22-23.) Although the Regional Director found that employees within the Louisville/Lafayette geographic area had the same job skills, functions and working conditions, the Regional Director disregarded this evidence, because the similarities in skills and job functions were not unique to the three stores. (Decision at 22-23.)

Yet, the Board has not articulated a need for this difference. In fact, in Star Market Co., 172 NLRB 1393 (1968), the Board found that the Regional Director's direction of election for a single-location retail store was not appropriate. Id. The Board held that a division of five retail food stores was the appropriate unit due to the centralized control, lack of local autonomy, and interchange that existed among the five stores. Id. at 1394. Notably, the Board did not address whether the skills and functions of the employees employed at the five stores were different from that of the other retail stores not included in the unit. Id. 1394-95; see also, Spartan Dept. Stores, 140 NLRB 608, 609-610 (1963) (two-store bargaining unit found appropriate even though the employer owned and operated a number of other stores in a number of other states); Cellco P'ship, 341 NLRB 483 (2004) (multi-facility unit in three of the employer's retail facilities found to be an appropriate unit rather than a single-location or system-wide unit.)

3. The Regional Director's Decision Improperly Sets a New Evaluation Standard When Determining Whether the Community of Interest Factor Concerning Centralized Control Favors a Multi-Facility Unit.

The Regional Director erroneously set a new standard requiring proof that district managers and corporate level managers must “routinely overturn” the decisions of the store managers in order to show centralized control. (Decision at 12.) The Regional Director found that “[w]hile the store managers are required to follow proscribed reporting procedures depending on the length of service of the employee at issue, the Employer has not provided any evidence establishing that the store managers’ suspensions and termination decisions are routinely overturned by the district or corporate level managers.” (*Id.*) Notably, the Regional Director did not cite to a single Board case for this erroneous interpretation of the law. She can’t because the Board does not require such a showing.

In St. Luke’s Health Sys., Inc., 340 NLRB 1171 (2003), the Board found that local management lacked sufficient autonomy because although management at each of the employer’s locations had the authority to issue verbal or written warnings, management had to coordinate with human resources when issuing suspensions and termination. *Id.* at 1171-72. While the Board noted that human resources had a “veto” power to change the discipline issued to any employee, no mention was made as to the number of times this “veto” power was exercised and whether decisions were “routinely overturned,” as the Regional Director is requiring in this case. *Id.* In fact, the Board noted that the human resources director had admitted that he would “defer” to the local management’s disciplinary recommendations, showing that he did not routinely overturn disciplinary decisions. *Id.* at 1173.

Just like in St. Luke's, it is undisputed the King Soopers' corporate office promulgates the policies and procedures, which all employees must follow. Although local management enforces these corporate policies by issuing verbal and written warnings to employees without consulting with anyone outside the store, when store management contemplates issuing higher discipline, including suspensions and terminations, the store managers must discuss with Zwisler and/or Bouknight. (Tr. 43: 18-25; Tr. 44: 1-8; Tr. 87: 14-16.)

Because the Regional Director required a showing of proof not set forth in Board law, the Regional Director's Decision must be reviewed.

4. The Regional Director's Decision Concerning the Appropriateness of the Petitioned-For Bargaining Unit Departs from Established Board Precedent.

a. The Regional Director Provided No Basis for Finding that the Petitioned-For Unit is Appropriate.

The Regional Director deviated from Board precedent by finding that the retail employees and the Starbucks employees share a community of interest and constitute an appropriate unit. (Decision at 28-32.) While the Regional Director listed the correct factors¹¹ to consider when determining whether two distinct classifications share a community of interest, the Regional Director failed to consider these factors when making her determination. (Decision at 25.)

The factors, which the Regional Director should have considered are whether the employees: 1) are organized in a separate department; 2) have distinct skills and training; 3) have distinct job functions; 4) are functionally integrated with other employees and have frequent

¹¹ The Regional Director cited to Specialty Healthcare, 357 NLRB No. 83 (August 26, 2011), which quoted the factors enumerated in United Operations, Inc., 338 NLRB 123, 123 (2002).

contact and interchange with other employees; 5) have distinct terms and conditions of employment; and 6) are separately supervised. United Operations, Inc., 338 NLRB 123, 123 (2002).

The undisputed evidence shows that all these factors support a finding that the two classifications do not share a community of interest. The coffee employees are a part of the deli department and report to the deli manager. (Tr. 122: 25; Tr. 123: 1-2.) The coffee employees are required to go through a 40-hour certification process, which the retail employees do not receive. (Tr. 129: 25; Tr. 130: 1-3.) The coffee employees have distinct job functions; they mainly “prepare coffee and related beverages.” (Decision at 28.) None of the retail employees are able to cover for the coffee employees, because they neither possess the certification, nor are able to make the coffee drinks. (Tr. 130: 6-12; Tr. 158: 8-18.) The only job overlap that exists between the two classifications are bagging groceries and scan-outs, which are not duties assigned to the coffee employees, and are only performed when the coffee employees are not busy performing their regularly assigned duties. (Tr. 123: 5-10.)

The evidence also does not support a finding that a community of interest exists between the retail and coffee employees due to interchange. The coffee employees work in the coffee shop, which is located near the entrance to the store. (Tr. 127: 8-12.) The coffee shop employees are usually segregated from the other employees, with the exception of the deli employees, who routinely cover for the coffee employees during breaks and lunches. (Tr. 129: 17-24.) Finally, the coffee employees are paid on a scale different from that applicable to retail employees. (Tr. 160: 9-18.)

The Regional Director incorrectly found that the petitioned-for unit is appropriate based on her failure to consider each of the factors enumerated above. Her failure to do so will disenfranchise the five coffee employees who will be represented in a bargaining unit along with approximately 113 other employees whose terms and conditions of employment are different and whose interests are not aligned. South Prairie Const. Co. v. Operating Eng'rs, Local 627, 425 U.S. 800, 804-805 (1976) (Holding that Section 9(b) of the Act directs the Board to determine the appropriate unit by assuring the employees have the fullest freedom to exercise their rights under the Act.).

b. The Regional Director's Determination Contradicts Board Precedent.

The Regional Director's Decision contradicts Board precedent, which holds that where the various classifications do not share a community of interest, these classifications should not be combined into one unit. Indep. Linen Serv. Co., 122 NLRB 1002 (1959) (The Board excluded clerical employees from a unit of drivers finding that the tasks performed by the two classifications were not directly related); Mitchellace, Inc., 314 NLRB 536, 537 (1994) (the Board excluded office employees from a unit with production line employees in part because the tasks performed by the two were different, they were paid differently, were located in a separate area of the employer's facility and were supervised separately.)

In fact, the Regional Director was overturned for holding that a wall-to-wall unit was the smallest appropriate unit, where some of the employees did not share a community of interest with the other employees. DTG Operations, Inc., 357 NLRB No. 175, slip op. at *5 (Dec. 30, 2011). In overturning the Regional Director's decision, the Board found that two classifications of employees were an appropriate unit but that these two classifications did not share a

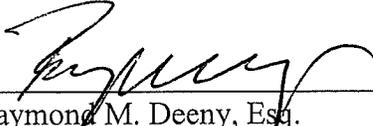
community of interest with other hourly employees because the other employees performed distinct tasks, possessed different qualifications, were in different grades of pay, worked separately from the other two classifications, had distinct job duties and suffered distinct consequences for failing to meet their job duties. Id.

The Regional Director has again found a community of interest between two classifications where none exist. The Regional Director's decision must be reviewed.

IV. CONCLUSION

For all of the reasons set forth above, King Soopers requests review of the Regional Director's Decision dated July 11, 2013 and a stay of the election. Because this Request presents substantial and numerous issues impacting fundamental Board principles and because the Regional Director's Decision obliterates these principles, King Soopers requests oral argument before the Board on the matters raised in its Request for Review. King Soopers requests that the Regional Director's decision directing an election be reversed and that the Union's petition be dismissed.

Respectfully submitted this 25th day of July, 2013.



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CERTIFICATE OF MAILING

I hereby certify that on July 25, 2013, a true and correct copy of the foregoing **REQUEST FOR REVIEW AND REQUEST TO STAY THE ELECTION** was served to the following:

National Labor Relations Board (Via E-FILE):

Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Regional Director, National Labor Relations Board (original and one copy), via Hand Delivery:

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EXHIBIT A

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

KING SOOPERS,

Employer,

and

Case 27-RC-104452

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL NO. 7,¹

Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer, King Soopers, owns and operates 134 retail grocery stores in Colorado and one in Wyoming. The Petitioner, United Food & Commercial Workers Union, Local No. 7 (Petitioner or Union), filed a petition on May 6, 2013 with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a single location unit of employees employed by the Employer at Store No. 135 located in Lafayette, Colorado.² On May 16, 2013, a hearing officer of

¹ The Petitioner's name appears as amended at the hearing.

² The unit described in the petition included: "all employees actively engaged in the handling and selling of merchandise, including part-time workers who work regularly one (1) day or more a week, employed by Employer in the grocery store or stores owned or operated by the Employer at 480 U.S. Highway 289, Lafayette, CO 80026, specifically including the Starbucks Department;" and excluded: "store managers, first assistant managers, associate managers, office and clerical employees, meat department employees, delicatessen department employees, demonstrators, watchmen, guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended." Although the petitioned-for unit stated that the unit included "store or stores," the Petitioner clarified that it was seeking to represent employees at only one store, Store No. 135, located at 480 North Highway 287, Lafayette, Colorado.

the Board held a hearing on the issues raised by this petition. Thereafter, the parties timely filed briefs.

The issues to be resolved in this case relate to the appropriate scope and composition of the unit.³ The Petitioner seeks only to represent employees at Store No. 135 located in Lafayette, Colorado. The Employer contends that the petitioned-for unit is not an appropriate unit unless it includes employees working in two additional nearby stores (Store No. 13 located in Louisville, Colorado, and Store No. 89 located in Broomfield, Colorado) because these three stores comprise a functionally-integrated geographic grouping used by the Employer for employee staffing purposes. The Employer refers to this three-store grouping as the "Louisville geographic area." The parties also disagree on the unit placement of the Starbucks coffee shop employees. The Petitioner seeks their inclusion in its petitioned-for unit. The Employer, however, contends that the Starbucks coffee shop employees should be excluded from the bargaining unit because they share a community-of-interest with the delicatessen department employees whom the parties agree should be excluded from the bargaining unit.⁴

Petitioner asserts that the Employer has not rebutted the single-store presumption, and that the Starbucks employees share a sufficient community-of-interest

³ At the hearing, the parties stipulated that an appropriate unit should include the following classifications of retail employees: service manager; service clerks (without regard to the product they handle); courtesy clerks; teleshop clerks; fuel clerks; the grocery department, (including the grocery manager, the night crew foreman, and clerks on the night crew without regard to the product they handle); the produce manager; produce clerks; bakery manager; clerks; baker; cake decorator; pharmacy technologists; floral manager; and floral clerks. The parties also agreed that the exclusions from the unit as described in the petition are appropriate, except that the exclusion of "first assistant managers" should more appropriately be stated as "assistant managers."

⁴ The Starbucks coffee shop is alternatively referred to throughout the record as "Starbucks department" or the "coffee shop." The record establishes that the Starbucks coffee shop employees are employed by the Employer and no party contends that the Starbucks Corporation is in any way involved in the employment of these employees. The Employer employs a coffee lead employee and about four coffee clerks in the Starbucks coffee shop.

with the other petitioned-for employees to warrant inclusion in the bargaining unit. The unit sought by the Petitioner has approximately 118 employees, including the five Starbucks coffee shop employees, while the unit the Employer urges would include approximately 292 employees.

I have considered the evidence and the arguments presented by the parties on each of these issues. As explained below, based on the record and relevant Board precedent, I have concluded that the single-store petitioned-for unit is appropriate, and that the Starbucks coffee shop employees share a sufficient community-of-interest with the other petitioned-for retail employees to warrant inclusion in the unit. Therefore, as set forth below, I shall direct an election in the single-store bargaining unit consisting of the Employer's employees at Lafayette, Colorado Store No. 135.

To provide a context for my discussion of those issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my determinations on the issues.

OVERVIEW OF EMPLOYER OPERATIONS

The Employer has grouped its stores in Colorado and Wyoming into "bargaining units" and "geographical areas." The term "bargaining unit" in this context refers to a store or group of stores where at least some of the employees are already represented by the Petitioner or another labor organization.⁵ The term "geographical area" is generally used to describe a certain store or group of stores where the Petitioner does not represent some or all of the Employer's employees.⁶

⁵ While the Petitioner represents the bulk of bargaining units at the Employer's stores, United Steelworkers also represents pharmacists at some of the Employer's Colorado and Wyoming stores.

⁶The terms "bargaining unit" and "geographic area" appear to have a specific meaning, but these terms were used somewhat interchangeably throughout the record.

The Employer's bargaining unit and geographical area groupings include: Boulder, Fort Collins, Greeley, Broomfield, Denver Metropolitan area, Evergreen, Conifer, Parker, Pueblo, Colorado Springs, Castle Rock, and Louisville. The Louisville geographical area (Louisville Area) is the only geographical area at issue in this matter. The Louisville Area encompasses Store No. 135 located in Lafayette (the petitioned-for store), Store No. 13 located in Louisville, and Store No. 89 located in Broomfield. The Employer's three stores in the Louisville Area each include a retail section, meat department, deli department, and coffee shop.

While Petitioner does not currently represent any employees at the petitioned-for Lafayette store, it does represent some of the employees at the other two Louisville Area stores. Specifically, Petitioner represents meat department, deli department, and the Starbucks coffee shop employees at Louisville Store No. 13. Petitioner also represents meat department employees at Broomfield Store No. 89.⁷

The Employer has a corporate office located in Denver, Colorado. The corporate office establishes corporation-wide employment, merchandizing, and marketing policies and procedures. The corporate office also selects all the merchandise vendors and establishes the merchandise distribution system. Each store places merchandise orders that are either delivered directly to the appropriate store or to a warehouse and then the store. These delivery processes are the same for all of the Employer's other stores in Colorado and Wyoming. There are some occasions when a store is short on product, so it attempts to "borrow" product from other stores in its respective bargaining

⁷ It is unclear from the record whether the employees at Store Nos. 13 and 89 are represented by Petitioner in single-store units or are combined with employees outside of the Louisville area.

unit or geographical area. The record does not reveal how often this occurs, or whether product is ever sought from outside of a geographical area or bargaining unit.

As discussed below, the Louisville Area stores interact with the Employer's corporate office in Denver on the same basis and in the same manner common to all of the Employer's stores in Colorado and Wyoming. This interaction includes personnel matters. In this regard, employee personnel files are maintained at the store where the employees work throughout their employment, but are permanently maintained at the corporate office once employment ends. The Employer also maintains corporate office personnel files containing certain employee documents, such as medical records. Grievance files are also maintained at the corporate office.

The record establishes that employees in all of the retail positions in the three Louisville Area stores perform the same functions as employees in those positions perform in every other store in Colorado and Wyoming. The job descriptions for the various retail classifications are established by the corporate office and are the same across all stores. Likewise, the Employer's employment policies and procedures apply to employees at all of its stores in Colorado and Wyoming. Among the stores in the Louisville Area, unrepresented employees in retail positions have the same rates of pay and same benefits as employees in those positions at the Employer's other unrepresented stores. All unrepresented employees, including office employees, have the same benefits administrator. Union represented employees' benefits are administered according to collective-bargaining agreements governing their terms and conditions of employment. The Employer adheres to the grievance and arbitration

procedures contained in the collective-bargaining agreements with the Petitioner or other unions and has a separate grievance procedure for all unrepresented employees.

The Employer's seniority system for the purpose of bumping and transfer rights is the same for all of its Colorado and Wyoming stores. An employee's seniority is determined by comparing employees at all stores in the same bargaining unit or geographical area. In particular, seniority for an employee in the petitioned-for Lafayette store is based on the employee's start date as compared with all employees in the same classification at the three Louisville Area stores. If an employee transfers into a different bargaining unit or geographical area, that employee initially loses his seniority date in the new unit or area, but the original seniority date is restored after the employee has worked more than 30 days in the new geographic grouping.

SCOPE OF BARGAINING UNIT ISSUE

As noted, Petitioner maintains that the petitioned-for single-store unit for Lafayette Store No. 135 is an appropriate unit. The Employer contends that the single-store unit is not an appropriate unit because of its regional administrative grouping system, and that the smallest appropriate unit must include retail employees, excluding coffee shop employees, at all three Louisville Area stores, including Louisville Store No. 13 and Broomfield Store No. 89.

A. Applicable Legal Principles

The Board has consistently held that a single-facility unit is presumptively appropriate, "unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Hilander Foods*, 348 NLRB 1200, 1200 (2006). "The burden of rebutting this presumption falls on the party arguing in favor of a multi-facility unit." *Id.* *Hilander Foods*, was cited affirmatively

by the Board in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) for the proposition that a single-facility unit is presumptively appropriate in the grocery industry. *Id.* at fn 16.

The Board in *Specialty Healthcare* also discussed at length the framework for analyzing the appropriateness of a petitioned-for unit:

The Act further declares in Section 9(b) that “[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” The first and central right set forth in Section 7 of the Act is employees’ “right to self-organization.” As the Board has observed, “Section 9(b) of the Act directs the Board to make appropriate unit determinations which will ‘assure to employees the fullest freedom in exercising rights guaranteed by this Act.’ i.e., the rights of self-organization and collective bargaining.” *Federal Electric Corp.*, 157 NLRB 1130, 1132 (1966). [Footnote omitted.]

The Board has historically honored this statutory command by holding that the petitioner’s desire concerning the unit “is always a relevant consideration.” *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964). See also, e.g., *Mc-Mor-Han Trucking, Co.*, 166 NLRB 700, 701 (1967), (reaffirming “polic[y] ... of recognizing the desires of petitioners as being a relevant consideration in the making of unit determinations”); *E.H. Koester Bakery Co.*, 136 NLRB 1006, 1012 (1962). Section 9(c)(5) of the Act provides that “the extent to which the employees have organized shall not be controlling.” But the Supreme Court has made clear that the extent of organization may be “consider[ed] ... as one factor” in determining if the proposed unit is an appropriate unit. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965). In *Metropolitan Life*, the Court made clear that “Congress intended to overrule Board decisions where the unit determined could *only* be supported on the basis of the extent of organization.” *Id.* at 441 (emphasis added). In other words, the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner’s preference), that the proposed unit is an appropriate unit. Thus, both before and after the adoption of the 9(c)(5) language in 1947, the Supreme Court had held, “[n]aturally the wishes of employees are a factor in a Board conclusion upon a unit.” *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941).

Based on this framework, the Board held that where, as here, an employer contends that the smallest appropriate bargaining unit must include additional employees or classifications beyond those in the petitioned-for unit, the Board first assesses whether the petitioned-for unit is an appropriate bargaining unit by applying traditional community-of-interest principles. If the petitioned-for unit satisfies that standard, the burden is on the employer to demonstrate that the additional employees it seeks to include share an overwhelming community of interest with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude the employees" at issue from the larger unit because the traditional community-of-interest factors "overlap almost completely." *Id.*, slip op. at 11-13.

While the Board has not discussed its *Specialty Healthcare* "overwhelming community-of-interest" analytical framework in a case involving a multi-location scope of unit determination, the Board's reasoning is instructive in weighing the evidence and analyzing the issues presented herein.

As established in *Hilander Foods*, and the cases cited therein, the Board examines the following factors in determining whether a party has overcome the presumption that a single-facility unit is appropriate: "(1) central control over daily operations and labor relations, including extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) degree of employee interchange; (4) distance between locations; and (5) bargaining history, if any." *Id.*

B. Central Control over Operations and Local Autonomy

Stephanie Bouknight is the Employer's Manager of Employee Relations and works in the Employer's labor relations department at the Employer's corporate office, in

Denver, Colorado. Bouknight handles employment policies and procedures for all of the Employer's represented and unrepresented stores, including oversight of seniority applications, promotions, and permanent transfers.

The Employer's stores are organized into districts, which in turn are divided into bargaining units or geographical areas. The district that encompasses the Louisville Area stores is District 3. Richard Zwisler is the District 3 manager. District 3 encompasses Colorado stores in North Denver (from Arvada to Thornton), Northglenn, Boulder, Lafayette, Louisville, and Broomfield. Zwisler oversees stores that are grouped into both bargaining units and geographical areas. Ten of the stores in his district are organized by the Petitioner and ten are either non-union or have varying degrees of union organization. Zwisler primarily oversees the Employer's marketing and merchandising policies and procedures at the 20 stores in District 3, but he does have some involvement in employment matters such as higher level discipline.

Each store has a store manager who is responsible for administering the Employer's employment, merchandizing and marketing policies and procedures. The store managers for the three Louisville Area stores report directly to Zwisler.

Each store manager usually has two assistant managers, one for perishable goods and one for non-perishable goods. Each store also has several department managers who report to the assistant store managers. For instance, the deli, bakery, or meat department managers report to the perishable assistant store manager, and the grocery manager reports to the non-perishable assistant store manager.

The record contains some evidence regarding the division of authority among Bouknight, Zwisler, and the store managers. District Manager Zwisler is usually not

involved for low level discipline such as issuance of a conduct report, or verbal or written warning, but he is usually involved once discipline reaches the suspension level. In that regard, he is usually informed of the suspension and discusses it with the store manager. Zwisler also reviews terminations with the store managers for any employee with less than five years of service. In termination cases for individuals with five or more years of seniority, both Zwisler and corporate manager Bouknight are involved. This practice regarding terminations is the same for every store, whether union or non-union.

Local store managers have autonomy to determine whether department heads may issue low level employee discipline without approval of the store manager or assistant store managers. For example, some store managers may direct their department heads to discipline their employees up to a certain level, such as a written warning, but require that any discipline above that level must be reviewed with the store manager or assistant store manager. Other store managers may be more restrictive in the authority they grant their department heads.

Day-to-day shift and vacation scheduling is done within each store, without involvement from the district manager or corporate office. Employees' work schedules are determined within their store by a process called "Select-a-Shift," which is discussed in more detail below. Store managers also have and exercise the authority to fill temporary shifts as needed. For example, if a store in the Louisville Area needs temporary help due to leaves of absences, sick calls, or family emergencies, the store manager first looks in-store to find a replacement. If no in-store replacement is available, the store manager contacts another store in the Louisville Area to find a replacement. The store manager may also have to seek replacement help from other

bargaining units or geographical areas. Store managers do not have the authority to mandate that employees from other stores work as replacements, but they can require employees at their stores to work at another store. In the event that a disciplinary issue arises while an employee is assigned to another store, the store utilizing the temporary replacement contacts the store manager from the supplying store to inform that manager of the problem. Any disciplinary decision is handled by the manager from the supplying store. This process of finding temporary help occurs without involvement from the district manager or corporate office.

Store managers have autonomy to determine when a store or department is overstaffed and layoffs are necessary. When such situations arise, the store managers notify the corporate office that they need to lay off employees in a particular department or classification. The corporate office verifies the names of employees with the lowest seniority, and the store manager then informs those employees that they are being laid off and explains their layoff options. The layoff options include bumping rights within the bargaining unit or geographic area as discussed in more detail below.

Employees who need medical leave must provide their respective store manager with the appropriate paperwork from their doctor certifying the need for the leave. Finally, the record establishes that store managers are responsible for overseeing the assignment of work within their stores and determining the need for additional employees, or the need for layoffs.

Analysis of Control and Local Autonomy Factor

Although there is evidence that the Employer has some centralized control over all of its stores in Colorado and Wyoming, I find that there is significant evidence of local

autonomy at the store level for Lafayette Store No. 135 to warrant a finding that the single-facility unit is appropriate. The Employer's corporate office broadly oversees employment policies and procedures, as well as merchandizing and marketing across all of the Employer's stores, but day-to-day employee relations matters are handled at the store level, with input from the district manager or corporate office only for the highest discipline levels. While the store managers are required to follow proscribed reporting procedures depending on the length of service of the employee at issue, the Employer has not provided any evidence establishing that the store managers' suspension and termination decisions are routinely overturned by the district or corporate level managers.

The record also reflects that the individual store managers at Louisville Area stores have independent authority to determine personnel needs, make work assignments within their stores, make work assignments to other stores in their geographic grouping upon request, and to fill temporary vacancies, all without involvement from the district manager or corporate office. Likewise, the individual store managers determine when layoffs are necessary, and while they verify seniority with the corporate office before implementing the layoffs, there is no evidence that the corporate office is involved in the determination of when a layoff is necessary.

These facts regarding local autonomy are similar to the facts in *Hilander Foods*, 348 NLRB 1200, where the Board found that a petitioned-for single store was an appropriate unit based in part on the local autonomy factor. In *Hilander Foods*, the Employer had a similar management structure with a central corporate office and several levels of management within each store, and the store managers were vested

with similar authority to make assignments, set work and vacation schedules, and arrange temporary inter-store transfers. The Board held that evidence of centralization did not rebut the single-store presumption where there was significant local autonomy over labor relations matters. *Id.* at 1203. The Board emphasized that employees performed "day-to-day work under the supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems." *Id.*

C. Similarity of Employee Skills, Functions, and Working Conditions

As noted, the record establishes that all of the retail positions in the Louisville Area stores perform all the same functions as employees in those positions in every other store in Colorado and Wyoming. The job descriptions for the various retail classifications are also the same across all stores. Among the stores in the Louisville Area, unrepresented employees in retail positions have the same rates of pay and same benefits as employees in those positions at the Employer's other unrepresented stores.

While the Employer has administratively grouped stores into bargaining units and geographic areas for purposes of certain conditions of employment including integrated seniority, which facilitates the ability of employees to maximize the number of hours they can work in a given week and a store director's ability to make temporary assignments to other stores in the group, disciplinary matters are handled on a specific store basis even if the employee was temporarily assigned to a different store. Similarly, the number of available vacation slots is determined by each store, and vacations are granted to employees based on the employee's seniority within their store, not the entire geographical area.

Analysis of Skills, Functions, and Working Conditions Factor

With regard to the similarity of employee skills, functions, and terms and conditions, I find that this factor also weighs in favor of finding that the petitioned-for single-store unit constitutes an appropriate unit. The record establishes that employees across all of the Employer's Colorado and Wyoming stores are subject to the same general policies and procedures, thus for the most part, there are no terms and conditions of employment unique to the Louisville Area as apposed to the Employer's employees working at stores in other store groupings. Additionally, the job descriptions and rates of pay for various classifications at stores in the Louisville Area are the same as in all other stores. Finally, non-union employee benefits are uniform across all of the Employer's stores, not just those in the Louisville Area. These facts weigh against the Employer's proposed multi-facility unit. *See, e.g., Hilander Foods*, 348 NLRB at 1203 (although employees at the six stores in the proposed multi-facility unit had same skills and functions, they did not differ significantly from the employer's many other stores).

In reaching this conclusion, I am mindful that the Employer asserts that the smallest appropriate bargaining unit must comprise the three Louisville Area stores because it has a unique area-wide seniority system for the Louisville Area as well as its other administrative groups of stores. I find however, that the Employer has failed to meet its burden of establishing that application of its seniority system requires a finding that the three stores are so functionally integrated as to extinguish their separate store identities.

D. Degree of Employee Interchange

The Employer's method of scheduling employees in both union and non-union stores is called "Select-A-Shift." This computerized Select-A-Shift process is first performed within each store in the administrative grouping, and then opened to other employees in the grouping to fill any remaining shifts. After the store managers have determined the number and nature of available shifts based on projected customer traffic, employees in the store select their shifts in order of seniority. Full-time employees select shifts in their respective departments up to 40 hours per week. They also select two days off each week. After the full-time employees have selected their shifts, the part-time employees sign up for shifts in their respective stores. These employees may then sign up for additional shifts in other stores in their same bargaining unit or geographic area. If there are open shifts at other stores within the same geographic area, any employee not scheduled for 40 hours may sign up for the remaining shifts up to 40 total hours per week.

The record reflects that the need for temporary transfers among the Louisville Area stores can also occur when one store has an unexpected absence due to illness, in-store events, or other staffing shortages. In such circumstances, the affected store attempts to fill the shift in-store and if it cannot, the store will seek employees from other stores in the geographical area. The employee's hours for that covered shift are attributed to the receiving store. The record reflects that the amount of hours transferred from one store to another in the Louisville Area ranged from 1.9 hours to

43.8 hours per week during the past six months.⁸ Such temporary transfers occurred between the Louisville Area stores during approximately nine different weeks within that time period. The record, however, does not reflect how many different employees were involved in such transfers. The record also establishes that stores occasionally "borrow" employees from outside their geographic area, and that some Louisville Area employees have worked outside their geographic area, the record does not establish how frequently this occurs.

The Employer utilizes a "Promotional Pool" process to effectuate permanent transfers between stores in the Louisville Area, and elsewhere. Twice a year, notices are posted in all the stores notifying employees that they have between January 1 and January 15, and July 1 and July 15, to make requests through the Employer's computer system for promotions, or for advancement from part-time to full-time positions, within their bargaining unit or geographical area. After the application period closes, the Employer's corporate office collects the employees' requests for promotions and generates a report called a Promotional Pool for each of the bargaining units and geographical areas. The Promotional Pool lists are maintained at the corporate office and utilized during the applicable six-month period.

Each store submits a "needs list" to the corporate office on a weekly basis listing the positions that the store needs to fill. The corporate office reviews the Promotional

⁸ The Employer introduced Exhibit 9 in an attempt to quantify how many hours employees work in a store other than their own in the Louisville area. There is no record evidence as to the source of the information on Exhibit 9 except for District 3 Manager Zwislser's testimony that he had the store secretaries look at the "numbers" for the previous six months. The record does not indicate whether the entries on Exhibit 9 represent the number of hours for one employee or multiple employees, and there is no explanation about the circumstances under which employees temporarily transferred from one store to another. Due to this lack of context, the data on Exhibit 9 is of little evidentiary value since the Employer did not introduce evidence about the percentage of temporary hours to the total number of hours worked. Similarly, there is insufficient evidence about the percentage of the total employees involved in temporary interchange.

Pool list for the corresponding bargaining unit or geographical area and selects the employee with the highest seniority out of the entire bargaining unit or geographical area and notifies the applicable store manager of the selection. The manager verifies that the employee is still interested in the requested position and implements the promotion accordingly. If no one has requested a position that becomes available, or the Promotional Pool list is exhausted, the Employer posts the position in the store with the opening. If there is no one to fill the position from that particular store, the position is posted for employees within the bargaining unit or geographical area. Finally, if no one from the bargaining unit or geographical area takes the position, the Employer can post the position for transfers outside the bargaining unit or geographical area, or hires a new employee off the street.

The record establishes that many employees from within the Louisville Area, and elsewhere requested positions in the Louisville Area from January 2011 to present, but that there have only been three employees promoted in the Louisville Area through the Promotional Pool process during that time period. Two of the three employees accepted new positions in their same store and a third employee from outside the Louisville Area accepted a position in the Louisville Area.

The record reflects that there were also approximately four lateral transfers to or from the Lafayette store in 2011, and that one or more such transfers has occurred in most years since 2004.

Aside from the temporary and permanent transfers described above, there is no evidence in the record that employees at the three stores within the Louisville Area

interact for events such as training or employee picnics, as those are held separately within each store.

Analysis of Employee Interchange Factor

The evidence does establish that there is some interchange among the Louisville Area stores relating to temporary employee transfers. In this regard, the Employer has devised its geographic Select-a-Shift system to assist the stores in filling temporary staffing needs, which also benefits part-time employees seeking to increase their work hours. The evidence also establishes that the Louisville Area stores with some regularity lend and borrow employees in emergency situations. The record, however, does not establish the number or portion of the unit that is engaged in such temporary transfers. The party arguing for a multi-facility unit bears the burden of presenting sufficient evidence, and "the presumption has not been rebutted where an employer's Interchange data is represented in aggregate form rather than as a percentage of total employees." *New Britain Transportation*, 330 NLRB 397, 398 (1999) (Citations omitted). See also, *Cargill, Inc.*, 336 NLRB 114, 1114 (2001) (instances of interchange between two facilities not supported by documentation or testimony regarding context surrounding the incidents and, therefore, have little evidentiary value). Moreover, I note that these instances of interchange are usually voluntary. Such voluntary interchange is given less weight in determining if employees from different locations share a common identity. *New Britain Transportation*, supra; *Red Lobster*, 300 NLRB 908, 911 (1990). Thus, even if it is determined that there is sufficient evidence to support the frequency and context of such temporary assignments to other stores in the Louisville area, such voluntary assignments are given less weight.

As to permanent transfers, I find that the number of recent permanent transfers among the Louisville area stores is too insignificant to support a finding of significant interchange. *See, e.g., Hillander Foods*, 348 NLRB at 1203 (8 or 9 permanent transfers over a three and a half year period among 550 employees constitutes little permanent interchange). In this regard, while the Employer asserts that its evidence was merely a sample of the permanent transfers involving stores in the Louisville geographic area, as noted above, the Employer bears the burden of proof and has not provided sufficient evidence to establish that there are significant permanent transfers within the Louisville Area to support a finding that the Employer's proposed multi-store unit is the smallest appropriate unit.

E. Geographical Proximity of Stores in the Louisville Area

The petitioned-for Lafayette Store No. 135 is located at 480 North Highway 287, Lafayette, Colorado. The Louisville Store No. 13 is located at 1375 South Boulder Road, Louisville, Colorado, which is about three miles southwest of the Lafayette store. The Broomfield Store No. 89 is located at 1150 Highway 287, Broomfield, Colorado, which is about three miles southeast of the Louisville store, and about five miles straight south of the Lafayette store.⁹

Analysis of Geographic Proximity Factor

The distance between the three stores in the Louisville Area weighs in favor of the Employer's proposed multi-store unit. The three Louisville Area stores are located only about three miles apart. Although it appears that there are additional stores

⁹ The record establishes that there is another store located in Broomfield, Colorado, Store No. 86. Store No. 86 is not part of the Employer's Louisville Area administrative grouping. Moreover, the evidence establishes that the Petitioner represents the retail clerks and deli department at Store No. 86 in a single unit. The Petitioner also represents the meat department at Store No. 86, as part of a larger Denver area meat department bargaining unit.

located in the same general vicinity as the Louisville Area stores such as Store No. 86 in Broomfield and Store No. 33 in Boulder, this does not diminish the fact that the three stores in the Louisville Area are located in close geographic proximity. See *ITT Continental Baking Co.*, 231 NLRB 326 (1977) (geographic proximity between two bakery thrift stores weighs in favor of two-store unit where the stores are approximately five miles apart and the next closest store is also about five miles away).

F. Bargaining History

The record reflects that there is no bargaining history between the parties for any employees at Lafayette Store No. 135, which is the petitioned-for unit. There is, however, some bargaining history between the parties for certain employees working at the Louisville Store No. 13 and the Broomfield Store No. 89, the other two stores that the Employer seeks to include in its proposed multi-location unit. Specifically, the Petitioner currently represents employees in the meat, deli, and Starbucks departments at the Louisville store.¹⁰ Petitioner also represents the meat department at the Broomfield store.¹¹ The record does not establish whether these bargaining units resulted from Board unit determinations, election agreements, or voluntary recognition.

The record also establishes that the parties have bargaining relationships at other stores in Colorado and Wyoming, outside the Louisville Area. As noted, the Petitioner represents two units at Broomfield Store No. 86, which is part of a different administrative grouping. Petitioner also represents two multi-store bargaining units in the Colorado Springs area; one unit is an eight-store retail clerk unit and the second is

¹⁰ The record evidence is unclear as to whether this unit is a single location bargaining unit. However, the record is clear that the represented unit does not encompass all three stores in the Louisville Area.

¹¹ Similarly, the record is unclear as to whether the meat department at this Broomfield store is a single location unit, but it is clear that this unit is not coextensive with the three Louisville Area stores encompassed within the multi-location unit sought by the Employer.

an eight-store meat department unit. Similarly, Petitioner represents two multi-store units in the Pueblo, Colorado area. There is no evidence in the record as to whether the above-referenced bargaining units resulted from Board representation proceedings, stipulated elections, or voluntary recognition. Finally, the record establishes that in 2003 a Decision and Direction of Election issued in Case 27-RC-8272, directing an election in a two-store retail unit in Greeley, Colorado, based on a determination that the two stores in that administrative grouping were so functionally integrated as to warrant a determination that the two-store unit was the smallest appropriate unit.

Analysis of Bargaining History Factor

The Employer argues that the Region should take into consideration other multi-store bargaining units that are not involved in this proceeding. In *Cargill, Inc.*, 336 NLRB 1114 (2001), the Board stated that "the fact relevant to the analysis" is the bargaining history at the facilities involved in the proceeding. In *Cargill*, the Board found that bargaining history between the parties did not outweigh the single-facility presumption where there was no bargaining history at the two facilities at issue. The Board did not consider it significant that the parties had two-facility bargaining units at other facilities not involved in the proceeding. *Id.*

The evidence is undisputed that there is no bargaining history at the Lafayette store involved in this proceeding. Accordingly, I find that the lack of a bargaining history between the parties for employees is at most a neutral factor insofar as the petitioned-for Lafayette store is concerned. However, since the Employer is seeking a multi-location unit of the three stores that comprise the Louisville Area, the evidence does

establish that the Employer has already acquiesced in collective bargaining units that are not coextensive with the three stores in the Louisville Area.

G. Conclusion and Finding on Scope of Unit Issue

Based on the entire record, I find that the Employer has failed to meet its burden of establishing that the three stores comprising the Louisville Area are so functionally integrated as to require a finding that they have lost their separate store identities and, accordingly, comprise the smallest appropriate unit. As noted above, the Board has consistently held that a single-facility unit is presumptively appropriate, "unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Hilander Foods*, supra. See also, *Specialty Healthcare* supra, at fn 9.

In determining that the Employer has not rebutted the single facility presumption, I have carefully considered the evidence and weighed the various factors that bear on this determination. Applying the traditional factors, I find that geographic proximity weighs in favor of the Employer's proposed three-store unit. The evidence regarding geographic proximity, however, is insufficient to support a finding that the three Louisville Area stores are so functionally integrated that the Lafayette store does not also constitute "an appropriate unit." In this regard, the degree of employee interchange established by the Employer and the geographic proximity are outweighed by the fact that the individual store managers are vested with a significant amount of local autonomy regarding day-to-day employment matters. The Employer has also not established that there is a similarity of employee skills, functions and working conditions

unique to the Louisville Area stores as opposed to all of the Employer's 135 stores. While there is no bargaining history involving the Lafayette store in the petitioned-for unit, I find that the bargaining history factor supports the single-store presumption because the Employer has already acquiesced to collective bargaining units that are not coextensive with the three stores in the Louisville Area. In these circumstances, I find that the Employer has failed to establish that the petitioned-for single-facility Lafayette unit has been merged into a more comprehensive unit that must include the two stores located in Louisville and Broomfield.

In reaching this determination, I am mindful the Employer urges me to find functional integration based on an earlier determination in the 2003 Decision and Direction of Election involving the Employer's Greeley, Colorado stores. I am not bound by this 2003 determination. The analytical landscape has changed since that case was decided.

While the Board has not yet discussed its *Specialty Healthcare* analytical framework in a reported multi-facility case, there is no basis to conclude that it would not apply that analysis. Accordingly, I find that even applying such an alternative analysis under the Board's *Specialty Healthcare* framework results in the same determination that the Employer has not met its burden of establishing that the single-store presumption has been rebutted. Thus, the Employer has failed to demonstrate that the additional employees it seeks to include share an "overwhelming community of interest" with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude the employees" at issue. In this regard, the Lafayette store petitioned-for unit constitutes a readily-identifiable group of employees who share a community-of-interest

based on the fact that they work at a single geographic location, under separate supervision of a store manager vested with significant autonomy over their day-to-day terms and conditions of employment. Under this particular analysis, the Employer has not demonstrated that the employees at, Louisville Store No. 13 and Broomfield Store No. 89, the other two Louisville Area stores, share such an overwhelming community of interest with the Lafayette Store No. 135 employees such that the traditional factors "overlap almost completely." *Id.* at 11-13.

UNIT PLACEMENT OF STARBUCKS COFFEE SHOP EMPLOYEES

The Union seeks to represent a petitioned-for retail unit including employees in the Starbucks coffee shop, but excluding employees in the deli department and meat department. The Employer asserts that the petitioned-for unit is not appropriate because it includes the Starbucks employees along with the other retail employee unit sought by Petitioner. The Employer does not assert that the Starbucks employees do not share a community-of-interest with the retail employees, but instead asserts that because the Starbucks employees share a stronger community-of-interest with the deli department employees, whom the parties agree should be excluded from the bargaining unit, the Starbucks employees should also be excluded.¹²

A. APPLICABLE LEGAL PRINCIPLES

In *Specialty Healthcare*, supra, the Board, in examining a bargaining unit stated: "the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends." *Specialty Healthcare*, 367 NLRB at 8 (quoting *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2 (2010)). In this first step, the

¹²As discussed above, in many units where the Petitioner represents deli department employees, the Petitioner also represents Starbucks employees as part of the same unit, which is at odds with the position Petitioner is taking in this proceeding.

Board considers the petitioner's desires concerning the unit (the extent of organization) as a relevant consideration, but not a controlling one. The Board focuses on "whether the employees share a community of interest." *Id* at 9, (internal quotations omitted). To determine if there is a community of interest among employees in the petitioned-for unit, the Board examines the following:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id*.

Based on these considerations, if the petitioned-for employees share a community of interest, the unit is appropriate and the inquiry ends. The unit sought need not be the *only* appropriate unit, or even the *most* appropriate unit; it must merely be *an* appropriate unit. *Id*. Thus, under *Specialty Healthcare*, in order to prevail on this issue, the Employer must show that "there is no legitimate basis upon which to exclude" the Starbucks department and that they must also be included in the unit in order for the unit to be an appropriate bargaining unit. *Id* at 11.

The Board made clear that the "overwhelming community of interest" examination in *Specialty Healthcare* applies when the Employer seeks a *larger* unit than the petitioned-for unit, where herein, the Employer is arguing for a *smaller* unit by contending that the Starbucks employees share such an overwhelming community of interest with excluded deli employees that the Starbucks employees must be excluded from the petitioned-for unit in order for it to be appropriate. While the Board has not

applied the "overwhelming community of interest" examination in these circumstances, its *Specialty Healthcare* analysis is nonetheless instructive.

B. RELEVANT FACTS

All employees in the petitioned-for unit, in both retail classifications and the Starbucks coffee shop work within the confines of the Lafayette store. The coffee shop is located near the entrance of the store and the deli department is located nearby on the same side of the store. The Starbucks coffee shop is organized administratively as part of the deli department. The Starbucks lead clerk and coffee clerks are directly supervised by the deli department manager. Department heads report to either of two assistant store managers, one who oversees perishable goods and one who oversees non-perishable goods. The record does not establish whether the deli department manager reports to the perishable or non-perishable assistant manager.

Store employees are allowed to transfer into the Starbucks department from other departments. In this regard, at least one employee has transferred to Starbucks from the meat department, and another employee has transferred from the deli department. The record reflects, however, that the coffee shop employees must be certified to work at the Starbucks counter. This certification process includes completing 40 hours of work in the coffee shop. In addition to the five Starbucks clerks, the deli manager and one deli clerk have also obtained their Starbucks certifications. Other retail clerks outside of the deli department were previously certified, but they have lost their certifications because they have not worked at the Starbucks counter for at

least one eight-hour shift during a three-month time period, as required by Starbucks to maintain certification.

The Starbucks employees work in the coffee shop and sell coffee beverages and related products. The coffee shop does not offer other non-Starbucks products, such as store deli products for sale at the coffee counter. However, customers are allowed to purchase other store items at the coffee shop when purchasing Starbucks products. Deli employees are assigned to provide Starbucks counter coverage during breaks and lunches, particularly to allow the Starbucks evening employees to take their breaks. If the deli employees covering for breaks are certified by Starbucks, they can cover the whole coffee counter. If they are not certified, they just stand at the Starbucks counter and tell customers when the Starbucks employees will be back.

There is no evidence that any Starbucks employees currently work in the deli section or cover when deli employees take their breaks. There is evidence that some time ago, a deli employee transferred to a Starbucks position and was frequently asked to work in the deli, but this has not occurred for over a year. While there is no evidence the special certification is required for deli employees, they are specifically trained to operate slicers and receive specialized computer training for processing deli items, which includes learning the product codes for packaged goods to order items they prepare for customers. When an employee transfers from the deli department to Starbucks the employee retains his deli department seniority.

The record is replete with evidence that Starbucks counter employees regularly assist in other store departments on a daily basis, including help with tasks like bagging groceries. Such requests for assistance from Starbucks counter employees are

routinely made by a store manager, head clerk, or so-called "desk operator." Calls can be placed directly to the Starbucks counter to request the assistance of a specific employee, but sometimes the entire Starbucks department is paged to assist elsewhere in the store retail operations. There is no evidence that deli employees or meat department employees are similarly called out of their department to assist elsewhere in the store.

Starbucks employees are also occasionally asked to perform "scan outs." A scan out is when an employee goes around the store to see if there are any empty spots on the shelves. One person does this for the perimeter of the store and another person does this in the aisles of the store. It is not clear which specific classification of employee normally performs this task, but it appears to be a retail function. Once the scan out is completed, the Starbucks clerk reports the results to front end head clerk or to upper management.

There are different pay scales within the store based on the department in which an employee works. The Starbucks employees are paid on the deli department pay scale. The wage rates within the entire store range from \$7.54 to \$17.31, and the highest pay rate a deli department or Starbucks employee can achieve is \$14.92.

C. ANALYSIS OF UNIT PLACEMENT ISSUE

As an initial matter, I find that the Starbucks employees at the Lafayette store are a readily identifiable classification of employees that are distinct from the deli employees. First, although the Starbucks employees are administratively under the deli department, they are trained to perform a completely separate function than the deli department employees, namely to prepare coffee and related beverages, and work in a

specific section of the store that is separate from the deli department. The evidence also establishes that there are separate schedules for the Starbucks counter and deli section. Second, while the Starbucks employees are overseen by the deli manager, no party asserts, or presented evidence that, the deli manager possesses Section 2(11) authority. In this regard, the parties stipulated that the various retail department managers do not possess such authority. The next higher authority in the store is an assistant manager, which oversees numerous areas in the store. Thus, there are various lines of supervision within the retail classifications themselves, which no party argues prohibits the classifications from being combined into one unit. Even assuming that there is common supervision specific to the administrative unit called the deli department, this does not negate the separate identity of the Starbucks employees as a readily identifiable classification.

Turning to the traditional community-of-interest analysis, I find that the record establishes that the Starbucks employees share a community of interest with retail employees in the same store. The Employer does not seem to dispute this. The Starbucks employees work in the same location as retail employees and have many opportunities for contact. Although the Starbucks employees are on a different pay scale as retail classifications, the range between the lowest wage rate and the highest wage rate on all pay scales is roughly ten dollars. Also, the Starbucks employees have the same benefits as retail classifications, and all employees in the store. Finally, there is evidence of some functional integration and employee interchange. Starbucks employees can check out customers purchasing other store items at the coffee counter. Additionally, on a daily basis the Starbucks employees are asked to help bag groceries,

which is a function normally performed by the retail classification of courtesy clerk. In these circumstances, the Starbucks employees have a sufficient community-of-interest with the retail employees to constitute an appropriate unit.

While the Employer asserts that the Starbucks employees share a community of interest with the deli department employees, this is true for many of the same reasons that the Starbucks employees share a community-of-interest with the other retail employees. The Starbucks employees and deli employees are located close to each other in the store and have opportunity for contact. The Starbucks employees and deli employees have the same pay scale and enjoy the same benefits, as do all non-union employees. There is also evidence that two deli employees are certified to work in Starbucks, and fill in for employees' breaks. Beyond filling in for breaks, it is not apparent that deli employees regularly cover Starbucks shifts or have other work-related contacts. For all these reasons the Starbucks employees do share a community-of-interest with the deli employees.

However, it is not sufficient for the Employer to show that there may be more than one appropriate unit configuration. It is well settled that a petitioned-for unit need not be the only appropriate unit, or even the most appropriate unit; it need only be *an* appropriate unit. *Specialty Healthcare*, 357 NLRB at 9. In this case, the fact that Starbucks employees also share a community of interest with the deli employees does not diminish the fact that the petitioned-for unit is also an appropriate unit based on the strong community-of-interest the Starbucks employees share with other retail employees.

To the extent that the Employer may seek to apply the *Specialty Healthcare* "overwhelming community of interest" test in this case, although the Board has not applied it in circumstances where the Employer seeks to diminish the petitioned-for unit, I find that the Employer has not established that the community-of-interest shared by the deli department employees is more overwhelming than that shared between the Starbucks and front end retail employees. In order to establish an overwhelming community of interest between Starbucks and deli employees, the Employer must show that in applying the traditional community-of-interest factors to these groups of employees the factors "overlap almost completely." *Id.* Although the deli employees do cover breaks in the Starbucks department, there is no evidence that the interchange flows the other way and that Starbucks employees temporarily work in the deli for any appreciable amount of time. This may be due to the fact that the deli department requires specific training on slicers and with computer codes that the Starbucks employees do not necessarily have. It is also evident that the deli employees and the Starbucks employees have separate functions. The Starbucks department employees' main function is to serve coffee beverages and related products, although they can check out customers with other products. The deli department employees operate slicer machines and produce and package deli products for sale in that department. There is no evidence that the deli employees check out customers. Because the deli department functions and Starbucks functions do not significantly overlap, the employees in those departments do not share an "overwhelming community of interest" so that one group must be excluded from the unit along with the other.

I find that the Starbucks employees share a community of interest with the retail employees in the petitioned-for unit. The fact that the Starbucks employees also share a community of interest with deli employees does not diminish the fact that the petitioned-for unit is an appropriate unit. Therefore, I find that the Starbucks employees should not be excluded from the petitioned-for unit.

CONCLUSIONS AND FINDINGS

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. Specifically, I find that the Employer is a Kansas corporation with multiple facilities and places of business in Colorado, where it is engaged in the business of operating retail grocery stores.
3. During the past twelve months, a representative period, the Employer, in conducting its retail grocery operations, has derived gross revenues in excess of \$500,000 and purchased and received at its Colorado facilities goods valued in excess of \$50,000 directly from points outside of Colorado.
4. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. 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.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time¹³ retail employees actively engaged in the handling and selling of merchandise, including: service manager; service clerks (without regard to the product they handle); courtesy clerks; teleshop clerks; fuel clerks; the grocery department, which includes

¹³ The Petitioner petitioned for part-time workers "who work regularly one (1) day or more a week". This description of part-time employee is in the unit description on the petition, but the Employer did not state its position on the issue and no evidence was offered on the matter. It cannot be ascertained the number of hours that are required under the petitioned-for description for a regular part-time employee. I find that there is no basis to deviate from the Board's *Davison-Paxon* formula for eligibility of regular part-time employees. In the absence of express agreement by the parties to a different formula, or any evidence on the matter, this is the appropriate formula to determine eligibility. *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1978).

the grocery manager, the night crew foreman, and clerks on the night crew (without regard to the product they handle); the produce manager; produce clerks; bakery manager; clerks; bakers; cake decorators; pharmacy technologists; floral manager; floral clerks; coffee leads and coffee clerks employed by Employer in Store #135 located at 480 North Highway 287, Lafayette, Colorado.

EXCLUDED: All store managers, assistant managers, associate managers, meat department employees, delicatessen employees, demonstrators, watchmen, professional employees, office clerical employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by:

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 7

The date, time, and place (or dates, times, and places) of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Direction of Election.

VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit as described above who were employed by the Employer during the payroll period ending immediately preceding 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 not 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 a 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) employees engaged in a strike who have been discharged for cause since the commencement of that strike and who have not been rehired or reinstated before the election date; (3) and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

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

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

To be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Towers, 600 Seventeenth Street,

Denver, Colorado 80202-5433 on or before **July 18, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by electronic filing through the Agency's website, www.nlr.gov,¹⁴ by mail, by hand or courier delivery or by facsimile transmission at (303) 844-6249. The burden of establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of two (2) copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to the 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 three (3) working days prior to 12:01 a.m. the day 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) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full 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.

¹⁴ To file the list electronically, go to www.nlr.gov and select *E-File Documents*, enter the NLRB Case Number, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions 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, DC 20570-0001. This request must be received by the Board in Washington by 5 p.m. EDT on **July 25, 2013**. *The request may be filed electronically through the Agency's website, www.nlr.gov,¹⁵ but may not be filed by facsimile.¹⁶*

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Dated at Denver, Colorado this 11th day of July, 2013.

/s/Wanda Pate Jones
Wanda Pate Jones
Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Towers
Denver, Colorado 80202-5433

¹⁵ To file the request for review electronically, go to www.nlr.gov, select **E-File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The process is similar to the process for described above for electronically filing the eligibility list, except on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

¹⁶ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as utilized in filing the request with the Board.

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

KING SOOPERS

Employer

and

Case 27-RC-104452

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL 7

Petitioner

AFFIDAVIT OF SERVICE OF: Decision and Direction of Election, dated July 11, 2013.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **July 11, 2013**, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

STEPHANIE BOUKNIGHT, MANAGER
LABOR/EMPLOYEE RELATIONS
KING SOOPERS, INC.
65 TEJON ST
DENVER, CO 80223-1221

LORENZO SANCHEZ, DIRECTOR
7760 W. 38TH AVE., SUITE 400
WHEAT RIDGE, CO 80033

RAYMOND M. DEENY, ATTORNEY
SHERMAN & HOWARD, L.L.C.
90 S CASCADE AVE STE 1500
COLORADO SPRINGS, CO 80903-1639

JOHN BOWEN, GENERAL COUNSEL
UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL NO. 7
7760 W 38TH AVE STE 400
WHEAT RIDGE, CO 80033-6159

KING SOOPERS
480 U.S. HIGHWAY 289
LAFAYETTE, CO 80026

JAMIE R. SCUBELEK, ASSOCIATE
GENERAL COUNSEL
UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO.7
7760 W 38TH AVE STE 400
WHEAT RIDGE, CO 80033-6159

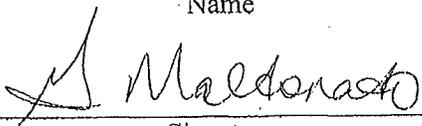
July 11, 2013

Georgette Maldonado, Designated Agent of
NLRB

Date

Name

SHERMAN & HOWARD L.L.C.
RECEIVED


Signature

JUL 12 2013

Ref. to _____

EXHIBIT B

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

KING SOOPERS, INC.,

Employer,

and

Case 27-RC-8272

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL NO. 7, AFL-CIO,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On August 15, 2003, United Food and Commercial Workers, Local No. 7, AFL-CIO, filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent certain employees of the Employer employed at Store 11, located at 2100 35th Avenue, Greeley, Colorado. Barbara D. Josserand, a hearing officer of the National Labor Relations Board, conducted a hearing on August 26, 2003. Following the hearing, the parties filed briefs.

The sole issue to be resolved in this case relates to the appropriate scope of the unit. The Petitioner seeks to only represent the employees in Store 11. The Employer contends that, because of the functional integration and close proximity of the stores, the petitioned-for unit is not appropriate and an election must be directed in a unit that includes employees working at Store 11 and Store 32. I conclude for

the reasons fully enunciated below that the petitioned-for unit is not appropriate and that the only appropriate unit must include both Greeley stores.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing on January 14, 2003 are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the Employer is a corporation engaged in the retail sale of grocery and household products with facilities in various Colorado cities, including Greeley. During the past 12 months, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its Colorado facilities goods or materials valued in excess of \$5,000 directly from points and places located outside the State of Colorado.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:¹

INCLUDED: All employees engaged in the handling and selling of merchandise employed by the Employer at Store 11 and Store 32, located in Greeley, Colorado.

EXCLUDED: All store secretaries, represented pharmacists, represented meat and seafood employees, professional employees, demonstrators, guards, store managers, assistant store managers and other supervisors as defined by the Act.

STATEMENT OF THE CASE

1. Facts

A. Background:

The Employer, King Soopers, Inc., is engaged in the retail grocery industry in the State of Colorado. It currently has about 90 stores, primarily located on what is referred to as the Colorado "front-range." The Employer has organized its operations into geographic areas, which it refers as "bargaining units", irrespective of whether those units are actually represented by a union.

The Employer has grouped stores together into "bargaining units" in each of the following geographic areas: Denver metropolitan area, Colorado Springs metropolitan area, Pueblo, Fort Collins, Boulder, Broomfield, Longmont, Loveland, Castle Rock, Monument and Greeley. The Petitioner currently represents multistore

¹ The Petitioner did not state a position on the record or in its post-hearing brief regarding its willingness to proceed to an election in a unit different from that for which it petitioned. In the absence of a stated position, it is assumed that the Petitioner is willing to proceed to an election in any unit determined to be appropriate.

meat and seafood department units and/or multistore, storewide units which exclude meat and seafood departments and pharmacists in some of these geographic areas.² Specifically, the record reflects that the Petitioner represents a two-store unit in Pueblo; a nine or ten store unit in Colorado Springs; and a much larger, multistore-unit in the Denver metropolitan area.³

The Petitioner also currently represents the meat and seafood employees at the two Greeley stores at issue in a combined unit. The record is also silent as to whether the meat and seafood unit involving the two Greeley stores was created by recognition, an election pursuant to a Stipulated Election Agreement, or an election pursuant to Decision and Direction of Election.

B. Employer's Organizational structure

The Employer's corporate headquarters is located at 65 Tejon Street, Denver, Colorado. This headquarters is the central location from which all merchandising, marketing, advertising, purchasing, and labor and employee relations policies and procedures are established. Each individual store budget is also set at the corporate level. The district managers, who directly oversee the stores in their respective districts, monitor the implementation of all corporate policies and individual store budgets. The store budgets are adjusted based upon

² The Employer's pharmacists, including those at the two stores in Greeley, are currently represented in a multistore unit by PACE. Accordingly, the parties stipulated that any appropriate unit should specifically exclude the pharmacists.

³ The record is silent as to whether these multistore units resulted from recognition, stipulated elections, or Board Decisions and Directions of Election.

competitor store openings. Budget adjustments, including employee layoffs, are presently under way for the two Greeley stores because new Safeway and Super Wal-Mart stores have opened in Greeley since January 1, 2003.

The Employer's Vice President of Retail Operations is Dave Savage. His responsibilities include direct involvement in termination decisions for employees with more than five years of service with the Employer.

Stephanie Bouknight is the Employer's Manager of Labor and Employee Relations for both represented and non-union stores. Her responsibilities include involvement in all discipline and termination decisions for employees with more than five years of service and involvement in all termination decisions for employees with less than five years of service. Her department also maintains the seniority lists for each "bargaining unit." Because the Employer bases all promotions, demotions, layoffs and transfers within various bargaining units on strict seniority, the final decisions on employee placement all emanate from the corporate level. The Employer's seniority system, and that system's effect on the scope of unit issues in this proceeding, will be addressed more fully below.

The district manager for the Employer's Northern District is Gary Prickett. His district encompasses stores in the northernmost Denver suburb of Broomfield, north to Cheyenne, Wyoming. This district includes the two Greeley stores. He oversees the merchandise presentation and profitability of the stores in his district. Prickett is also involved in hiring of any managerial employees, including the department managers for the bakery, deli, general merchandise, produce, service counter and

the head clerk. The store managers have the independent discretion to do other hiring, as long as their store is meeting its budget. In the event a store is not operating within the budgetary goals established for it by corporate, hiring decisions must be approved by Prickett. Finally, Prickett is involved in all termination decisions for employees with less than five years of service. He also seeks guidance and approval from Bouknight and/or Savage for employees with more than five years of service.

The store manager for Store 11 is Joe Hernandez. Reporting directly to Hernandez are assistant store manager Carlotta Demianew and store secretary Terri Coatman. Dan Melaragno, is the store manager at Store 32. Reporting directly to Melaragno are assistant store manager Jim McKenna and store secretary Cheryl Rossell.⁴

All of the various department managers also report directly to these store managers. The parties stipulated that the department managers should be included in the bargaining unit because they do not possess or exercise any of the Section 2(11) indicia. Since there is no record evidence contradicting the parties' stipulation regarding the lack of supervisory indicia for the various department managers, I shall include the bakery, deli, general merchandise, produce, and

⁴ The parties stipulated that the store managers and assistant store managers should be excluded from the unit on the basis that they possess and exercise supervisory indicia. The parties further stipulated that, consistent with the other units represented by the Petitioner, the store secretaries should also be excluded from the unit. Based on the support in the record for these stipulations and the past bargaining history of the parties, I shall exclude the store managers, assistant store managers, and store secretaries from the unit.

service counter department managers, and the head clerk in the unit pursuant to that stipulation.

C. Community of Interest Factors

In **Trane, an operating unit of American Standard Companies**, 339 NLRB NO. 106 (2003), citing **R & D Trucking, Inc.**, 327 NLRB 531 (1999) and **J & L Plate, Inc.**, 310 NLRB 429 (1993), the Board listed the community of interest factors which bear on a determination as to whether the single-facility presumption has been rebutted. Specifically, the Board enumerated the following relevant factors: "(1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions and working conditions; (3) the degree of employee interchange; (4) the distance between the locations; and (5) the bargaining history, if any exists."

The facts applicable to each of these factors will be addressed immediately below.

1. Central control over daily operations and labor relations, including the extent of local autonomy

While the store managers are responsible for the day to day operations of their respective stores, all of the policies and procedures governing employees' wages, hours, and working conditions are set at the corporate level. Similarly, all policies relating to merchandising and product marketing are set at the corporate level. While each store keeps employee personnel records for its own employees, the centralized labor and employee relations department maintains computerized

employee records because it administers all employee movements based on seniority.

With regard to hiring decisions, as noted above, while managerial hiring requires approval from corporate personnel, the record establishes that the store managers have the authority to make hiring decisions for unit employees if they are operating within their respective store's budget. The record establishes that nine of the current parttime courtesy clerks in Store 11 were hired between March 27 and July 6, 2003. Store 32 hired one bakery clerk on May 30, 2003, one checker on April 13, 2003, and one plant floral clerk on January 15, 2003. Again, the record is silent as to whether the store managers of the two Greeley stores at issue had to seek the district manager's authorization for these particular hiring decisions and whether these stores are operating within budget.

Store managers participate in the disciplinary process up to and including terminations, but their authority is somewhat proscribed in that authorization to terminate employees with less than five years of service must be sought from the district manager and authorization to discipline employees with more than five years service even short of discharge must be sought from the district manager and labor and employee relations department. Moreover, at the request of the district manager or the labor and employee relations manager, the vice president of retail operations may participate in termination decisions for employees with more than five years of service. The record establishes that approximately 106 employees of

Stores 11 and 32 have more than five years of service and are therefore directly affected by this policy.

The authority of store managers to set work schedules, vacations, and days off is also somewhat proscribed by the store budget as well as by the "select-a-shift" program which operates on a strict seniority basis. Specifically, the budget determines the number of shifts available and the various department managers determine what shifts need to be covered. The highest seniority employee in that department or work group then selects his shifts. After the most senior employee has made his selection, the opportunity is made available to the next most senior employee and so on down the line until all the shifts are covered. There is no evidence that the store manager has direct involvement in the select-a-shift system or that he overrides the selections of the employees. This select-a-shift system also applies to selecting vacations and days off and is used in both Greeley stores, as well as in all the Employer's other unrepresented and represented stores.

(2) Similarity of employee skills, functions and working conditions

There is no dispute that the two stores function identically. They both operate 24 hours a day, 7 days a week and sell the same products in the same departmental structure. Both stores employ employees in the same job classifications. The employees all have and exercise the same rights afforded them by the Employer's unique dovetailed seniority system described below.

The terms and conditions of employment for the employees in Store 11 and 32, as well as all of the Employer's unrepresented employees, are established at

the corporate level and set forth in a booklet entitled "King Soopers General Conditions of Employment for Union-Free Stores." Many of the terms of employment are identical to those set forth in the various collective-bargaining agreements between the Employer and Petitioner for the Denver, Colorado Springs, and Pueblo multistore bargaining units. Specifically, the wage rates, wage progressions, and annual increases are identical for represented and unrepresented employees.

The Employer has also established a policy whereby seniority is dovetailed for employees in stores within a geographic area. The geographic areas established by the Employer are noted above. The only Employer-established "geographical bargaining unit" at issue in this matter consists of the two Greeley stores. The nearby cities of Loveland, Fort Collins and Longmont, which are variously located 25-45 miles from Greeley, also have their own "bargaining units" consisting of the all stores in each city. The Employer's stated basis for its policy of dovetailing seniority within a geographic area is that it provides the Employer the ability to staff its stores under almost all circumstances and also provides greater opportunities for long-term employee advancement to fulltime positions or other promotions employees might seek. Thus, the application of the dovetailed seniority system to the two Greeley stores specifically affects the ability of employees in Stores 11 and 32 to bid on job openings, seek promotions, advance to full time positions, transfer between the two stores, and avoid layoff by bumping less senior employees. This dovetailed seniority system also affects employee recall from layoffs.

The labor and employee relations department prints out dovetailed seniority lists weekly and administers the bumping process when layoffs occur. Thus, if there is a reduction in force, the laid off employee then has the right to exercise his seniority within the bargaining unit, so that if there was a less senior employee at another store in the bargaining unit, the laid off employee can bump the less senior employee to layoff status.

As noted above, the represented and unrepresented stores also all utilize the scheduling system referred to as "select a shift." This system is not based on the geographic seniority system, but is confined to work groups or departments within each individual store.

(3) The degree of employee interchange

a. Temporary interchange between the Store 11 and Store 32

Both store managers testified that there is some temporary interchange of employees between the two Greeley stores almost weekly. For the most part, however, the record does not establish the nature and duration of such purported weekly interchange. There were, however, several specific examples cited and both Petitioner witnesses confirmed that they were aware of temporary exchanges of employees between the two stores. In particular, Petitioner witness Christina Nance testified that she was aware of use of employees from the other store in the deli. Petitioner employee witness Penny Martinez generally confirmed that she was aware of the temporary interchange of employees from the other store. The specific examples provided in the record include the fact that the floral clerk from Store 11 is

currently working two days a week at Store 32 to cover the ten-week leave of absence of the floral clerk in Store 32. There is also evidence that a deli clerk assigned to Store 32 actually sought and obtained a transfer to Store 11 after being temporarily assigned to work in Store 32. The two store managers also testified that there is temporary interchange between the stores to cover vacation schedules, leaves of absence, unexpected sick leave, store parties, and store picnics if one of the stores cannot cover the absences with its own employees. Finally, there is specific record evidence that Store 32 used a cake decorator from Store 11 this past summer to cover vacations in the bakery department and during the recent graduation season because of a high volume of business.

b. Permanent transfers

Permanent transfers between the two Greeley stores occur in several different ways. One way is through the Employer's so-called "promotional pool" and "fulltime employee advancement" programs. The labor and employee relations department maintains these two lists which it administers on the basis of strict seniority. Employees have an opportunity to sign up for the promotional pool or fulltime advancement list from January 1 through January 15, and July 1 through July 15 each year, and expressly state the specific positions to which they aspire. The labor and employee relations department then enters the employee information into a database and sorts the information by seniority within the bargaining unit (in the case under consideration, the two Greeley stores). As openings become available, the labor and employee relations department checks the database and interested

employees are promoted into the positions based on their seniority. This same system is also used in other unrepresented bargaining units and in bargaining units of represented stores.

If no employees have requested particular openings through the promotion pool or fulltime advancement list, the job openings for Store 11 and Store 32 are then posted in the employee lounges in both stores. Employees in either store can then request a transfer to the other store by filling out a transfer request form. If an employee transfers between stores within a bargaining unit, there is no loss of seniority.

Employees can also express their desire to transfer outside their bargaining unit by filling out an employee transfer request form and then waiting until an opening arises in the store or geographic area to which they seek a transfer. If, however, an employee seeks to transfer to a store in another geographic area, hence another "bargaining unit," the employees within that unit have first opportunity for any job opening. Thus, such transfers between bargaining units generally result in an employee transferring into the lowest level position in the store. After a waiting period of 30 days, the employee establishes seniority within the new bargaining unit, but the transferring employee can only move up in that bargaining unit on the basis of his new seniority within that specific unit.

With regard to permanent transfers, the evidence establishes that there have been nine permanent transfers between Store 11 and Store 32 in the past year. These include promotions, demotions and lateral transfers.

c. Layoffs and exercise of bumping rights

As noted above, the Employer's dovetailed seniority system within a bargaining unit allows employees in one store to bump employees in another store in their bargaining unit on the basis of strict seniority. In February 2002, the Employer closed Store 32 for six weeks to remodel the store. As a result of that temporary store closure, about 27 employees from Store 32 exercised their seniority bumping rights to transfer to positions in Store 11. The remaining employees in Store 32 and displaced Store 11 employees, who lacked the seniority to bump other employees, either were forced into layoff status and elected to take the time off and receive unemployment compensation or found openings in other bargaining units, and transferred into those positions, thereby giving up their seniority rights in the Greeley "bargaining unit."

Currently, because of the competitor store openings referenced above, the two Greeley stores are in the process of laying employees off from various departments. These layoffs have activated the employees' bumping rights. There is no record evidence of how many employees have been or will be affected by employees exercising their bumping rights, although one of the Petitioner witnesses testified that she was demoted from her checker position as a result of the competitor openings, and based on her seniority rights, she elected to take a position in the deli rather than the least senior all-purpose clerk position initially offered to her.

(4) The distance between the locations

The evidence is undisputed that the distance between Store 11 and Store 32 is about two miles.

(5) The bargaining history, if any exists.

There is no history of collective bargaining in the wall-to-wall unit, excluding pharmacists and meat and seafood department employees, for either Store 11 or Store 32. However, there is a long history between this Employer and this Petitioner of bargaining on a citywide, multistore basis. As noted above, the Petitioner already represents a unit consisting of meat and seafood department employees in the two Greeley stores at issue herein.

ANALYSIS

1. Legal Framework

It is well settled that single facility units are presumptively appropriate. As noted above, in *Trane, an Operating Unit of American Standard Companies*, 339 NLRB No 106, a July 29, 2003 decision,⁵ the Board re-stated the community of interest factors relevant to whether the single-facility presumption has been rebutted. In that decision the Board held:

With respect to unit determinations regarding employees at a single versus multilocation units, the Board has long held that a petitioned-for single-facility unit is presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated that it has lost its separate identity. *J & L Plate, Inc.*, 310 NLRB 429 (1993). The party opposing the single-facility unit has the heavy burden of rebutting its presumptive appropriateness.

⁵ See also, *Cargill, Inc.*, 336 NLRB No. 118 (2001).

However, in *Trane*, the Board went on to state that it:

... has never held or suggested that to rebut the presumption a party must proffer 'overwhelming evidence . . . illustrating the complete submersion of the interests of employees at the single store,' nor is it necessary to show that 'the separate interests' of the employees sought have been 'obliterated.' *Petrie Stores Corp.*, 266 NLRB 75, 76 (1983).

The Board engages in a case-by-case balancing test between the five factors cited above to determine whether the single facility presumption has been rebutted. In this regard, the Board in *Waste Management of Washington, Inc.*, 331 NLRB 309 (2000), in reversing a Regional Director's decision and finding that the single plant presumption had been rebutted stated:

We find that the functional integration of the Employer's operations; centralized control over personnel and labor relations policies; lack of local autonomy and common supervision of employees at both locations, identical skills, duties and other terms and conditions of employment; and the evidence of interaction and coordination between these two groups outweighs two factors which would favor the single-facility presumption – the 42-mile geographical distance between the two locations and the Employer's failure to introduce relevant affirmative evidence demonstrating more than minimal interchange. [Citations omitted.]

2. Unit Determination

I conclude that the Employer has met its burden of rebutting the presumption favoring single facility units, and I shall direct an election in the two-store unit proposed by the Employer. Initially, I note that the factors regarding similarity of employee skills, functions and working conditions and distance between the locations fully support a finding that the single facility presumption has been rebutted. In this regard, there is no dispute that the employees in Store 11 and

Store 32 share identical benefits, perform the same duties in the same departments within the two stores, and that the stores are located within about two miles of each other.

With regard to the degree of employee interchange, I also conclude that the evidence supports my finding that the single facility presumption has been rebutted. I note that by dovetailing the seniority of the employees in the two stores (a system that has been long established in Greeley as well as in the Employer's other represented and unrepresented bargaining units), the Employer has merged the two stores in a way that has a significant effect on major terms and conditions of employment including promotions, transfers and layoffs. Moreover, this is not just a "paper system", but one that has been utilized in the past year and a half by approximately 40 employees. Additionally, as regards this factor, I note that in two recent cases, the Board placed emphasis on whether the employees in the facilities at issue had the ability to bid on jobs in the other location; a factor that is present herein both because of the dovetailed seniority system and the fact that job openings in either store are posted in both stores. Thus, in **R&D Trucking**, supra at 533, in reversing the Regional Director and finding that the single facility presumption had been rebutted, the Board stated, "Moreover, before the Employer hired employees to serve the newly reacquired Textron account, it offered that work to drivers at the Interstate facility." In **Cargill**, supra, in finding that the presumption had not been rebutted, the Board stated, "There is no evidence of permanent transfers of employees between facilities, and employees at one facility do not bid on job openings at the other facility."

With regard to bargaining history, I conclude that this factor also generally supports my finding that the single facility presumption has been rebutted. In doing so, I am mindful that when the Board looks at bargaining history, it typically is looking at bargaining history in the actual unit at issue. See, e.g., **Canal Carting, Inc.**, 339 NLRB No 121 (2003), and the cases cited therein. I am also cognizant of the fact that the Board does not find bargaining history in recognized or stipulated units to be dispositive, but rather, is bound only by units based on Board-directed elections. See, e.g., **Coplay Cement Company**, 288 NLRB 66 (1988). Nevertheless, the fact that the Petitioner herein has acquiesced to bargaining units structured on a geographic basis by this Employer, including combining the meat and seafood employees into a one unit at the two stores under consideration, favors a combined unit of the two Greeley stores for the remaining employees.

As to the final factor to be analyzed, central control over daily operations and labor relations, including the extent of local autonomy, I conclude that, while there is no dispute that the day-to-day operations at each store are overseen by the respective store managers and their assistant managers and such daily supervision is relevant to the issue under consideration, this is outweighed by the other factors discussed above that favor a finding that the single store presumption has been rebutted.⁶ Moreover, although each store at issue has local supervision, the evidence establishes that there is a high degree of central control over labor

⁶ In numerous cases the Board has found that the single facility presumption has been rebutted, notwithstanding separate on-site supervision. See, e.g., **Neodata Product/Distribution, Inc.**, 312 NLRB 987 (1993); **Queen City Distributing Co., Inc. t/a Sol's**, 272 NLRB 621 (1984); **Ohio Valley Supermarkets, Inc. d/b/a Point Pleasant Foodland**, 269 NLRB 353 (1984); and **Petrie Stores**, supra.

relations policies and procedures, including significant control over disciplinary decisions for employees with more than five years of service.

Further, because of the Employer's dovetailed seniority system with all of its ramifications discussed above, the "day-to-day problems and concerns among employees at one" store, are shared by employees who are separately supervised at the other store as regards layoffs, transfers and promotions. **Renzetti's Market, Inc.**, 238 NLRB 174 (1978). Additionally, because of this seniority system, the fortunes of the employees at one store rise and fall based on the fortunes of the employees at the other store. For example, the record evidence discloses that the competitive opening of a new Safeway store within two miles of Store 11, is currently adversely affecting employees in both Greeley stores. Also, I note that the store managers' authority regarding traditional supervisory functions has been proscribed by many of the Employer's corporate policies and procedures. This is not only true as regards discipline, promotions, transfers, and layoffs, but also as to scheduling employees for work as well as time off because of the select-a-shift system. Finally, all wage rates, wage progressions, and annual increases are set at the corporate level. Thus, there is no record evidence that store managers or assistant managers can effect many of the vital areas of interest to employees.

There are approximately 135 unit employees at Store 11 and approximately 115 employees at Store 32.

DIRECTION OF ELECTION⁷

An election by secret ballot shall be conducted by the Undersigned among the employees in the Unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁸ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not 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 a 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 Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement

⁷ Because the unit found appropriate is larger than that sought by the Petitioner and because the showing of interest currently provided is inadequate to support an election in the broader unit determined, I will accord the Petitioner a period of fourteen days in which to submit the additional showing of interest necessary to support an election in the unit found appropriate. In the event the Petitioner fails to submit a sufficient showing of interest within the time allowed, the petition will be dismissed, unless it is withdrawn. Should the Petitioner not wish to participate in an election in the unit found appropriate herein, it may withdraw its petition, without prejudice.

⁸ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed. Please see the attachment regarding the posting of election notice.

thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL NO. 7, AFL-CIO**

LIST OF VOTERS⁹

In order 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 in 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); **North Macon Health Care Facility**, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the *full* names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-54533 on or before **September 25, 2003**. No extension of time to file this list shall be granted

⁹ The list of voters shall be made available when, and if, it has been determined that an adequate showing of interest has been established by the Petitioner among the employees in the unit found appropriate.

except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, DC 20570. This request must be received by the Board in Washington by **October 2, 2003**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 18th day of September 2003.

Wayne L. Benson, Acting Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Plaza
Denver, Colorado 80202-5433

440-6750-3350