

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

DILLON COMPANIES, INC. d/b/a KING SOOPERS

Employer

and

Case 27-RC-264824

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 7¹**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer operates numerous retail grocery stores in Colorado and surrounding states. Petitioner seeks, by an *Armour-Globe* self-determination election, to add unrepresented deli, cheese, and Starbucks department employees (“petitioned-for voting group”) employed at the Employer’s Store 74 located in Loveland, Colorado (“Store 74”), to an existing bargaining unit consisting of meat and seafood employees (“existing unit”). The existing unit is a multi-store unit, consisting of meat and seafood department employees at two stores: Store 74 where the petitioned-for voting group is located, and the meat and seafood department employees at Store 44, also located in Loveland (“Store 44”).

The Employer contends this voting group is not appropriate. The Employer contends an *Armour-Globe* election is improper because the employees in the petitioned-for voting group are not an identifiable and distinct segment of the workforce and because the employees in the petitioned-for voting group do not share a community of interest with the employees in the existing unit. The Employer additionally contends the only appropriate voting group or separate unit is a wall-to-wall unit of all unrepresented employees at Store 74.

A hearing officer of the National Labor Relations Board (“Board”) held a videoconference hearing in this matter on September 9 and 11, 2020.² Both parties filed briefs with me after the conclusion of the hearing. As explained below, based on the record, the briefs, and relevant Board law, I find that the record establishes the petitioned-for voting group is an identifiable, distinct segment of the workforce that shares a community of interest with the existing bargaining unit. Accordingly, I have directed the petitioned-for election in this case. Because of the ongoing COVID-19 pandemic, I have directed that election be conducted by mail.

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

² All dates are in 2020 unless otherwise indicated.

RECORD EVIDENCE

A. The Employer's Operation

The Employer operates over 100 grocery and general retail stores in Colorado and surrounding states, with a corporate office in Denver, Colorado. The Employer organizes its stores into 12 geographic areas for administration purposes. Store 74 is in the Loveland geographic area.

The Employer's stores are organized into departments that correspond with the type of products and services for which they are responsible: grocery, bakery, deli, meat and seafood ("meat department"), general merchandise, front end, pharmacy, floral and e-commerce.³ Stores may also include one or more additional departments that are operated by the Employer and staffed by the Employer's employees, but that have separate branding. These include a separate cheese department operated under the Murray's Cheese brand ("Murray's Cheese"), and a coffee shop operated under the Starbucks brand ("Starbucks").⁴

Petitioner and the Employer have a long collective bargaining history.⁵ Petitioner represents employees at 104 stores operated by the Employer, with those employees grouped in bargaining units and working under contracts that mirror the Employer's geographic divisions.⁶ All 104 stores with represented employees have what is referred to as a "meat unit," consisting of employees in the meat department, as well as potentially employees in other departments. Because each contract contains separate recognition language the specific composition of each meat unit varies by geographic area. For example, the Loveland meat contract excludes deli employees, while many of the other contracts include deli employees in the meat unit. Petitioner also represents retail clerk units at many of the stores in separate bargaining units.

Of the 104 stores with a meat unit, 96 stores include the deli department employees in the meat unit. Store 74, at issue here, is one of the 8 stores with a union presence where deli employees are not represented.⁷ At these 96 stores where the deli employees are included in the meat unit, the Murray's Cheese or Starbucks employees are included as well, although not all of

³ E-commerce department employees process incoming orders for pick-up, pulling ordered grocery items from shelves using a trolley and an hand-held device called a "baymax." The record also refers to the e-commerce department as "Clicklist."

⁴ Consistent with the usage in the record Murray's Cheese and Starbucks are referred to as "departments" in this Decision. As discussed *infra* they are considered specialty departments or sub-departments of the deli. The record reveals that the Employer also has a sushi area at the store. The record discloses that the sushi counter is operated by a third party and no party contends that personnel at that sushi counter should be included in the petitioned-for voting group. No evidence was provided concerning the staffing of the meat department at Store 44 that is part of the relevant "meat unit."

⁵ Numerous determinations have been made regarding a variety of representation case issues, including a Decision and Direction of Election dated July 11, 2013 in 27-RC-104452, a Decision and Direction of Election dated May 1, 2018 in case 27-RC-215705, and a Decision and Order dated June 16, 2020 in case 27-RC-257949. These decisions do not involve the store at issue here. I take administrative notice of these Decisions to the extent the parties reference them on brief but, unless noted, I have not relied upon these cases in reaching my determination in this case.

⁶ Accordingly, the contract covering the existing unit is referred to as the "Loveland meat contract," and I have referred to it as such in this Decision.

⁷ At one of the Employer's stores the deli employees are included in the retail clerk unit.

the Employer's stores have a Murray's Cheese or Starbucks. At stores like Store 74, where the deli employees are excluded from the meat unit, the Murray's Cheese and Starbucks employees are also excluded.

The only represented employees in Store 74 are the meat and seafood department employees.

B. Community of Interest Factors

i) Organization of the Facility

Like the Employer's other stores, Store 74 has a grocery, bakery, deli, meat, general merchandise, front end, dairy, pharmacy, and floral department. The store also has a Murray's Cheese department and a Starbucks kiosk. Approximately 175 to 200 employees are employed at Store 74, with 16 employees employed in the deli, 3 employed in Murray's Cheese, 5 employed in Starbucks, and 11 employed in the meat department.

Physically, the grocery department is in the center of Store 74, with the non-grocery departments arranged around the walls of the building.⁸ The deli, meat, bakery and other departments along the perimeter have a customer facing section and an employee-only back area, used for food preparation, containing ovens, coolers and freezers, and storage. These back areas also contain hallways passing between the departments and the loading dock. Store 74 also has a small mezzanine area where offices and the employee break room are located.

The checkout lanes are located at the front of the building along with a customer service desk and the main entrances, referred to as the "front end." Starting at the front end and moving past the customer service desk, in the direction of the deli, is the floral department, then the Starbucks kiosk, followed by a seating area with restrooms, all located in the front of the store. Turning the corner, comprising the entirety of one side wall of the building, are the deli and meat departments. The Murray's Cheese department is located on the sales floor, in front of the deli.

Each department has a department manager also called a department "leader," who in turn reports to the store manager, and many departments have non-supervisory leads.⁹ Both Murray's Cheese and Starbucks have a lead, but not a separate department manager/leader.

ii) The Nature of Employee Skills, Training, and Job Functions

(1) Deli

The deli serves a wide variety of ready-to-eat and packaged foods. These range from foods maintained in the hot case, prepared foods, and cold case items such as sliced meats. Some deli department items are in retail cases and can simply be selected by customers while some,

⁸ The Employer provided a schematic layout of the grocery store. See Employer's Exhibit 1.

⁹ The parties stipulate that the deli/department leader, deli assistant department leaders, deli/culinary head clerk, cheese shop/lead clerk, and Starbucks/lead barista classifications are not statutory supervisors consistent with Section 2(11) of the Act. Based on the evidence in the record I accept these stipulations.

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like sliced meats and cheese or rotisserie chicken, are ordered and served by deli clerks. Deli employees will slice, weigh, and wrap meats for customers. Unlike many departments, deli department employees cook and prepare some foods. Because the deli has both a hot and a cold case deli clerks are monitoring temperatures to make sure food is maintained within safe food handling guidelines. Deli employees use a variety of tools ranging from knives and slicers to ovens and dishwashers. Deli employees also act as cashiers for some of the products they sell.

Deli employees are trained to perform these duties by use of the Employer's computer training modules, used for a variety of Employer training, and on-the-job training. These modules cover topics such as general food safety and how to operate the tools used in the deli. Employees in the deli wear gloves and hair coverings.

(2) Murray's Cheese Shop

The primary duty of the Murray's Cheese employees is to prepare specialty cheeses for sale, a selection beyond what is normally sold in the cheese section of a grocery store. This includes breaking down large wheels or blocks of cheese into smaller retail packages and arranging the retail cases. The Murray's Cheese also contains an olive bar, although that is not currently available due to COVID-19 limitations. A significant portion of Murray's Cheese employees' time is spent providing samples of products to drive sales, although these too have been curtailed due to COVID-19.

The Murray's Cheese lead orders product and performs administrative tasks such as scheduling. Employees in Murray's Cheese work in close proximity to the deli, and assist in the deli on a regular basis. The Murray's Cheese lead testified the deli manager is probably the coworker with whom he has the most contact. The deli manager also assists with the product received by the store for Murray's Cheese. Murray's Cheese receives products from two deliveries, the Employer's daily warehouse delivery and a third-party delivery of imported and specialty goods. With both, the deli manager typically breaks down the loads and the Murray Cheese products are either brought to the kiosk or a Murray's Cheese employee collects the products from the deli. Murray's Cheese stock that is not on the sales floor is stored in the deli cooler.

Training for the cheese shop involves a basic set of training and shadowing, and followed in some cases by "red-jacket" training involving in-person classroom instruction. Once the red-jacket training is complete the employee is tested and, if they pass, the employee wears an actual red jacket when working in the cheese department. An employee does not need to have the red-jacket certification to work in the Murray's Cheese kiosk, and indeed on-the-job shadowing is a significant portion of the training. The record contains, for example, evidence of an employee from the e-commerce department being cross-trained in Murray's Cheese. Employees in Murray's Cheese wear hair coverings and gloves when preparing food.

(3) Starbucks

The coffee clerks, or baristas, employed at the Starbucks kiosk prepare coffee and other drinks for customers, and sell pre-manufactured pastries and sandwiches. Baristas also act as a

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cashier for the products they sell. All products sold at the kiosk are provided by Starbucks, which maintains extensive rules regarding how its products are sold. Because the products are provided by Starbucks and not the Employer's warehouse, the Starbucks employees must use an ordering system separate from the Employer's ordering system that is used by other departments. Starbucks employees will occasionally provide samples to increase sales, but this is not occurring at this time due to COVID-19 restrictions.

Baristas are trained to make drinks and operate the kiosk according to Starbucks rules and procedures. They learn to do so using training tools provided by Starbucks, such as video instruction. Employees also receive in-person instruction from the lead barista and practice making drinks in preparation for the Starbucks certification test. Passing this test, administered by the lead barista, is necessary before working in the kiosk. Employees in Starbucks wear hats (Starbucks rules allow only hats and no other hair coverings) and gloves at times, depending on the work being done.

(4) Meat Department

The meat department sells raw meat and seafood that is trimmed and packaged in the store, as well as pre-packed fresh and frozen meat and seafood products to customers. In doing so, meat employees interact with customers; load, transport, stock, rotate and monitor dated products; break down incoming loads; stock products in the cold display cases, maintain the conditions of cases, weigh, label and price products for sale. Because of the perishable nature of certain products, employees must regularly monitor temperatures in the fresh cases and log that information. Most meat is cut off-site, but employees use a knife to cut a product to a customer's request and to stock the display of fresh meat. Meat and seafood products are also prepared and offered for sampling at times, but that is not occurring at the present due to COVID-19 restrictions.

Meat department employees are trained via on-the-job training, addressing information specific to the meat department, as well as computer modules on general topics such as food safety. Employees in the meat department wear gloves and hair coverings

iii) Degree of Functional Integration, Contact, and Interchange

(1) Functional Integration

Operationally, each department has a separate function, although each of these separate functions combine to perform the Employer's goal: to provide customers a wide variety of fresh, packaged, and ready-to-eat food items, in addition to non-food merchandise. Ultimately, how much these departments are integrated is dependent on what the customer is purchasing. For the most part each department provides its products without relying on others, but there are obvious points of efficiency described in the following sections, such as the Employer's warehouse making deliveries to the store that combine the products of multiple departments. There is also some degree of integration in customer service. Both the deli and meat departments carry ham and turkey and packaged lunchmeats, albeit under different brand names. In that regard, meat department employees will on occasion use the deli slicer to prepare sliced ham or turkey from

the meat department for a customer. Further, all witnesses at hearing agreed that if a customer asked where a product is located or for assistance in a neighboring department that employee would direct or accompany that customer to the proper department.

(2) Contact

All employees at the facility have some contact as a result of shared spaces, such as the mezzanine breakroom and the restrooms. Specific to the employees at issue in this case, contact primarily occurs as a function of short-term coverage and shared tasks. Short term coverage is both a form of temporary interchange and a task that brings employees from different departments into contact with one another. Short term coverage involves an unplanned shift of staff from a department that have excess staff at a particular moment to a department facing a high volume of customers, such as an employee from another department bagging groceries when the check-out stands have long lines. This type of coverage does not involve a change in timekeeping and may last as briefly as a few minutes.

The record contains evidence of employees from Murray's cheese assisting the deli employees with the deli hot bar, slicing meat for customers when the deli is busy, or taking out compost to free up deli employees to assist customers. Deli employees' direct customers to particular products at the Murray's Cheese kiosk or refer questions to the Cheese Master. At hearing, a deli clerk testified the Murray's Cheese employees may assist the deli employees in the deli as frequently as a few times an hour. Deli and Murray's Cheese employees are not able to assist the Starbuck's kiosk with short term coverage because an employee must be certified by Starbuck's before working at the kiosk.¹⁰ Deli, Murray's Cheese, and Starbucks employees are not able to work in the meat department as a function of the Loveland meat contract.

Short term coverage is not limited to the departments at issue. The record indicates deli, Murray's Cheese, and Starbucks employees have assisted e-commerce on a short-term basis as e-commerce has dealt with an unprecedented increase in volume during the COVID-19 pandemic. Starbucks employees, near the front-end, will also assist bagging groceries.

The second primary way the employees in the voting group are in contact with each other is in the sorting, distributing and storing of deliveries. The departments at issue have some product overlap. The meat department sells prepacked sandwich meats in its retail case, and the deli also sells sandwich meat. The deli sells sliced cheese, and Murray's Cheese also sells cheese. As noted previously, the Employer's warehouse delivers product to the store daily, and specialty deliveries arrive every few days. Because of these product overlaps, these departments products will be combined in deliveries.

Regarding the daily warehouse delivery, it arrives at night, and the night crew at the store removes the pallet of product from the delivery truck and places it in the meat cooler. An employee from the meat department and the deli department then break down that pallet and take the product to their respective departments. As noted earlier, the deli manager then breaks down the products for the deli and Murray's cheese. Although Starbucks does not receive many, if any,

¹⁰ As described later, two deli clerks are certified to work at Starbucks and work shifts in that department. The record does not reflect if, when working a shift in the deli, these employees have been called upon to provide short term coverage at the Starbucks kiosk.

products in these deliveries, it does store items in the deli freezer. Murray's Cheese also stores its products in the deli storage space. In addition to collecting items from the deli freezer and storage, Starbucks and Murray's Cheese employees also spend time in the deli when ordering and sorting their inventory. The assistant lead manager for the Starbucks estimated she spends 20 minutes several days a week in the deli reviewing stock and preparing orders.

(3) Interchange

Some temporary interchange has been addressed already regarding short term coverage. However, the Employer also makes extensive use of cross-department scheduling. This is used when a department is short staffed and has a need for help, an employee is looking for additional hours, or the employee is seeking to cross-train in a different department. This type of cross-department scheduling has been particularly common during the COVID-19 pandemic as the Employer has had an increased need for assistance in its e-commerce department. The record reflects that deli and Starbucks employees, for example, have worked additional hours and shifts in e-commerce outside their normal shifts at their home departments. Similarly, an e-commerce employee that was cross-training in Murray's Cheese has almost completely returned to work in e-commerce because of the demand. Cross-scheduling is not limited to e-commerce. For example, the record shows one Murray's Cheese employee working shifts in the floral department during busy times such as around Valentine's Day.

Among the departments at issue there is some evidence of cross-scheduling. Two deli employees are certified to work in Starbucks, and the record evidence indicates they do work shifts at Starbucks in addition to the deli. However, as noted previously, certain limitations on the departments in question prevent cross-scheduling. Only certified employees are able to work in Starbucks, and employees in other departments are not cross-scheduled in the meat department because it is prohibited by the Loveland meat contract.

iv) **Terms and Conditions of Employment**

Store 74 is open from 5:00 a.m. to midnight, every day. The deli and meat departments open with the store at 5:00 a.m., with the meat department closing at 7:00 p.m. and the deli closing at 10:00 p.m. Murray's Cheese is open from 7:00 a.m. to 7:00 p.m., and Starbucks is open from 6:00 a.m. to 8:00 p.m. In each of these departments it is common for employees to be scheduled to begin 30 minutes to an hour before opening and remain 30 minutes to an hour after closing. The employees in both groups work behind counters serving customers under similar conditions, while wearing uniforms, head coverings, and gloves, and they stock or display food products in their respective areas. Deli and Starbucks employees operate a cash register, while meat department employees do not.¹¹

The Employer's unrepresented employees receive the same type of fringe benefits, including paid vacation, sick leave, holidays and health insurance. Some benefits and details concerning eligibility do differ from those of the employees in the existing unit who are covered by a collective-bargaining agreement, however, paid holidays, paid bereavement leave, and accrual of personal days and paid vacation days based on date of hire and years of employment are essentially the same between the existing unit and the petitioned-for employees.

¹¹ It is unclear whether employees in Murray's Cheese ever operate a cash register.

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Employees in the deli are paid on a range between \$12.25 and \$21.73, with the range for the Murray's Cheese and Starbucks employees is between \$12.25 and \$20.41. The Meat department employees are on a different wage scale, part of the Loveland meat contract, earning between \$12.25 and \$21.15 an hour. Certain terms and conditions of employment set by contract, such as a just cause provision, also differ between the meat department employees and others as a function of that contract.

v) Common Supervision

As noted previously, generally each department has a department manager/leader, who in turn reports to the store manager who, along with the assistant store managers, act as senior management at the store. The department manager for the meat department is the meat manager, and the department manager for deli is deli manager, who is assisted by several leads. The job description for the Murray's Cheese staff, the cheese steward classification, identifies the position as part of the deli department, reporting to the deli manager, the store manager and assistant store managers. Similarly, the job description for the baristas in Starbucks, the coffee clerk classification, identifies that position as part of the deli department. The job description also provides that the coffee clerks report to the coffee lead, the deli manager, assistant store manager, and assistant store managers. The parties agree that the only the store manager and the assistant store managers possess statutory supervisory authority.

ANALYSIS

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

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

If the voting group sought is an identifiable and distinct segment of the workforce, the question then is whether the employees in that voting group share a community of interest with the existing unit. As stated by the Board, when petitioner seeks an *Armour-Globe* election "the proper analysis is whether the employees in the proposed voting group share a community of

interest with the currently represented employees, and whether they constitute an identifiable, distinct segment.” *St. Vincent* at 855.

This inquiry requires application of the Board’s traditional community of interest test. *United Operations, Inc.*, 338 NLRB 123, 123 (2002). The Board has found that in the self-determination context, differences in employment terms that result from collective bargaining do not mandate exclusion. *Public Service Co. of Colorado*, 365 NLRB No. 104, slip op. at 1, n.4 (2017).

Before turning to the question of whether the petitioned-for voting group is appropriate I note the analysis I have not applied. The Employer argues the only appropriate unit including the petitioned-for voting group is a wall-to-wall unit of all unrepresented employees, in addition to asserting the petitioned-for voting group is not an identifiable and distinct segment and do not share a community of interest with the employees in the existing unit. Specifically, the Employer argues that the three-part test in *The Boeing Company*, 368 NLRB No. 67 (2019) must be applied here.¹² I do not find this framework applicable here where the Petitioner is seeking a self-determination election and has not indicated it would alternatively seek to represent these employees in a standalone unit or with other unrepresented employees in this store. Rather, Petitioner has indicated it will not go forward to an election in any alternative grouping. In this situation, the only applicable framework is that set forth in *Warner-Lambert*.¹³ If the petitioned-for voting group meets the *Armour-Globe* requirements, it is appropriate to direct the election sought. If Petitioner has not met these requirements, then I would dismiss the petition. I do not find the procedural posture of the present case requires a finding regarding the alternative voting group or unit argued by the Employer.

A. Identifiable and Distinct

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

¹² In *The Boeing Company*, the Board clarified *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), to set forth the following steps for examination where an employer seeks a unit larger than the petitioned-for unit: (1) internal shared interests within the unit sought, (2) shared interests of the petitioned-for unit compared to shared and distinct interests of the excluded employees, and (3) the Board’s decisions on units in the industry involved. *Id.*

¹³ Indeed, before *PCC Structural* overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), the Board rejected the argument that the “overwhelming community of interest” test under *Specialty Healthcare* was applicable in a self-determination context, noting that *Warner-Lambert* framework was the appropriate analysis. See *Republic Services of Southern Nevada*, 365 NLRB No. 145, fn. 1 (2017). Further, in *King Soopers, Inc.*, 27-RC-215705, the Board denied review of my determination that *PCC Structural*, to the extent it required that the interests of the unit sought be sufficiently separate and distinct from those of the remainder of the workforce to constitute an appropriate unit for bargaining, was not the applicable framework where the Petitioner sought a self-determination election to add the deli employees to an existing three-store meat unit. Indeed, a self-determination petition only requires that a voting group be established and not a separate appropriate unit.

an *Armour-Globe* election, because the employees in the voting group were scattered across various unrepresented departments and lacked such similarities.

In the present case, I find the deli, Murray's Cheese, and Starbucks employees are an identifiable and distinct group appropriate for a self-determination election. The voting group sought includes *all* the employees employed at Store 74 in these departments. The petitioned-for voting group does not select some employees from one department and some employees from another, as in *Capitol Cities*, but instead, as in *St. Vincent*, these employees work together under a single department and in the same location.

I do not find it necessary to rely on the parties' bargaining history to determine Murray's Cheese and Starbucks are essentially sub-departments of the deli; it is apparent from the record evidence. The position descriptions for the Murray's Cheese and Starbucks employees identify them as part of the deli department, reporting to the deli manager.¹⁴ However, even if Murray's Cheese and Starbucks were considered fully separate departments, I still find the petitioned-for voting group is identifiable and distinct because it tracks the Employer's organizational structure, it does not take fragments of one department and fragments of another, and the record shows that the deli manager or leader has oversight of all three areas, and not over any other departments.

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

B. Community of Interest Factors

As noted above, because the instant petition seeks a self-determination election, once it has been determined the employees in the voting group are an identifiable and distinct group the question is then whether they share a community of interest with the existing unit. *St. Vincent Charity Medical Center*, 357 NLRB at 855. I have found the deli, Murray's Cheese, and Starbucks employees are an identifiable and distinct group, and for the reasons described below I additionally find they share a community of interest with the employees in the existing unit sufficient to make the petitioned-for self-determination election appropriate.

i) Organization of the Facility

The meat department is a separate department specializing in a specific product, similar to the deli, Murray's Cheese, Starbucks, and the other departments in Store 74. From an organization perspective, this arrangement does not support or contradict finding a community of

¹⁴ The "iSeries Timekeeper" records introduced lists hours worked in the Murray's Cheese, Starbucks and the deli as "DELISVCCHZ," "DELICOFFEE," and "DELI."

interest and I find this factor is essentially neutral. To the extent shared supervision is a function of departmental organization I have addressed that in a following section.

ii) The Nature of Employee Skills, Training, and Job Functions

Employees in the meat department, deli, Murray’s Cheese, and Starbucks prepare food and/or beverages for consumption by the customer. As such, departments prepare and display food for customers, and customers can order products to their specification. This is certainly supported by the record. In the meat department the staff prepare packages for the retail case, and customers can make specific selections from the fresh case, which the meat department employees then prepare to that request. In the deli the staff maintain a hot case, sandwiches, and other ready to eat foods, and customers can also make specific orders. Other selections from the deli, such as sliced sandwich meat and cheese, are also made to customer specifications. Clerks at Murray’s Cheese similarly break down large products into smaller packages in the retail case, similar to the meat department, and take customer orders for items such as a cheese tray, similar to the deli. Finally, the Starbucks baristas are regularly taking orders from and preparing drinks for customers.

The focus of these departments on preparing either food or beverages is reflected in other aspects of the departments at issue. These are the departments that regularly provide samples to customers when not prohibited by pandemic restrictions. Employees in these departments use tools that modify their food products, whether cutting with knives and slicers, operating an espresso machine, or heating and cooking with ovens. These employees wear head coverings and gloves, at least when preparing food, while other departments may not. Employees in these departments are also trained on food safety, and monitor temperatures in hot or cold cases consistent with that training.

To the extent the Employer argues that other departments, such as grocery and e-commerce, “prepare” food by placing it on a shelf or collecting it for an online delivery I find this is fundamentally different. I do note that many of the items listed above that create a shared community of interest between the departments at issue – preparing products to order, hair covering – also appear to apply to the bakery department. However, I do not find that the existence of some of these factors in a department outside the petitioned-for voting group diminishes the shared aspects of the departments within the petitioned-for voting group. Overall, I find the shared skills, training, and job functions strongly support finding a community of interest between the existing unit and the petitioned-for voting group.

iii) Degree of Functional Integration, Contact, and Interchange

As noted in regard to the Employer’s organization, for the most part each department performs their own function and is not reliant on another department. However, I do note a degree of functional integration exists in that the meat department and some departments in the petitioned-for voting group have product crossover and share deliveries. To the extent functional integration supports Petitioner’s arguments I find it is not significant.

The petitioned-for voting group does have contact with the meat department employees. The petitioned-for group is relatively proximate to the meat department, with the deli being adjacent. While the Starbuck's kiosk with its five employees is more remote from the meat department than the deli and Murray's Cheese, the deli comprises by far the largest portion of the voting group with 16 employees, and the record indicates that they have the most contact with the meat department employees. They break down shared deliveries and meat department employees occasionally use the deli department slicer. Contact with the proposed voting group and the meat department also comes with shared spaces such as break rooms.

Employees in the petitioned-for voting group have contact and interchange among themselves as a result of short-term coverage, shared tasks such as delivery break downs and, to a lesser extent, cross-department scheduling. However, employees in the deli, Murray's Cheese, and Starbucks are not able to participate in short-term coverage or cross-department scheduling in the meat department because of the limitations of the Loveland meat contract. Because this limitation is a function of contract, I do not find the absence of short-term coverage and cross-department scheduling weighs against finding a community of interest between the petitioned-for voting group and the existing unit.¹⁵ There is no evidence, however, of interchange with meat department employees working in the deli, Murray's Cheese, or Starbuck's.

Overall, routine contact is present between the existing unit and the petitioned-for group but, while interchange is strong within the petitioned-for voting group, it is not present with the meat department, largely due to contract limitation.¹⁶ Thus, I find that functional integration is present but not significant, that interchange is limited by contract and training, and that there is regular contact with most of the voting group.

iv) Terms and Conditions of Employment

The employees in the existing unit and the petitioned-for voting group work within essentially the same band of hours. While the employees in the petitioned-for voting group share the same fringe benefits, these differ from the existing unit as a function of contract. While the wage scales also differ as a function of contract the employees in the existing unit and petitioned-for voting group nonetheless are paid on essentially identical wage ranges. Overall, this factor supports finding a community of interest between the petitioned-for voting group and the existing unit.

¹⁵ I find differences caused by contract are not useful in this determination because, in the *Armour-Globe* context, some employees are represented and some are unrepresented. Focusing on this aspect makes the arguments circular; i.e. it is not appropriate to include the employees at issue from an existing unit because they have differences from the existing unit, but the reason the differences exist is the very issue in the case, the difference in representation status.

¹⁶ I note the Employer makes arguments regarding interchange between the petitioned-for voting group and the other departments in Store 74, and the record contains extensive evidence of this type of contact and interchange. However, as stated in the previous section, I do not find that the existence of this factor outside the petitioned-for voting group and the existing unit diminishes the community of interest described above.

v) Common Supervision

All of the employees at issue, both in the meat department and the petitioned-for voting group, report to a department manager/leader and then to the store manager and assistant store managers. The store manager, and the assistant store managers, are the only managers that have the authority to hire, discipline, or terminate employees. Based on these criteria I find that, even with the layer of oversight by a department manager, the petitioned-for voting group and existing unit have shared supervision in the positions of the store manager and assistant store managers. Common supervision strongly supports finding a community of interest among the employees at issue.

C. Conclusion Regarding Community of Interest

For the reasons described above, I conclude that the petitioned-for voting group and the existing unit share a community of interest, particularly based on their skills, training, and job functions, contact, similar terms and conditions of employment outside those established by the existing unit's collective bargaining agreement, and shared supervision. Having found the petitioned-for voting group appropriate, I am directing the election sought.

METHOD OF ELECTION

A. Board Standard

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

On May 8, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas*

contemplated “extraordinary circumstances” beyond the considerations described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

On July 6, the General Counsel issued a memorandum titled “Suggested Manual Election Protocols.” *Memorandum GC 20-10*. In that memo the General Counsel reiterated that Regional Directors have the authority, delegated by the Board, to make “initial decisions about when, how, and in what manner all elections are conducted.” The General Counsel further noted Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

The memorandum then addressed suggested election mechanics, certifications and notifications required to verify a safe election can occur, and the need to include election arrangements in an election agreement. The memo concludes with additional notes regarding the assignment and travel of Board Agents.

B. A Mail Ballot Election is Appropriate

The instant case raises the question of whether the Region can safely conduct a manual election during the ongoing COVID-19 pandemic. COVID-19 is a contagious virus, for which there is currently no approved vaccine or antiviral treatment, that often causes a serious, and at times fatal, illness. Although the Board traditionally conducts manual elections in the workplace, guidelines currently in place at the Federal, state and county level recommend that individuals avoid unnecessary social contact and conduct business remotely when possible. Under these circumstances ordering a mail election, in a case where it would not normally be considered, may be the appropriate option.

While many aspects of COVID-19 remain not fully understood, the critical public health interventions for reducing the spread of the virus are well-established. The Centers for Disease Control and Prevention (CDC) emphasizes that “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.” *How to Protect Yourself & Others*.¹⁷ As a practical matter this has resulted in many Federal, state, and local government guidelines focusing on the same set of practices to avoid respiratory person-to-person transmission: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people. The CDC has also highlighted the risk posed by

¹⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

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pre-symptomatic and asymptomatic transmission, stating “transmission in the absence of symptoms reinforces the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*.¹⁸ Despite efforts to limit transmission, as of July 28, over 4.2 million people in the United States have been infected with COVID-19 and over 147,000 people have died.¹⁹

Loveland is located approximately 46 miles north of Denver, in Larimer County. To date, Larimer County has recorded approximately 2,662 cases of COVID-19 and 53 deaths. Both place Larimer County within the top 10 of counties in Colorado in these categories.²⁰ Colorado has in place a statewide face covering in public requirement, and is currently in phase 2 of its 3-step reopening plan, a plan that reduces the strict quarantine measures put in place at the start of the COVID-19 pandemic.²¹

Petitioner argues the election should be conducted by mail ballot because of the COVID-19 pandemic. Petitioner acknowledges the Employer committed to following the procedures suggested by *Memorandum GC 20-10*, but questions why the Region would take the risks associated with a manual election, particularly in a facility where the public is constantly coming and going, when the mail ballot alternative exists. The Employer, at hearing, stated its preference for a manual election, committed to providing the mezzanine break room or conference room for the election, affirmed that it would follow the suggestions contained in *Memorandum GC 20-10*, and made a proposal that polling be held between 11 a.m. and 1 p.m.

I am directing a mail ballot because of the current COVID conditions in Larimer County, where Store 74 is located, and because the proposed polling areas and times do not clearly lend to social distancing. Regarding the first issue, conducting an election in a facility open to the public in this location in Loveland County increases the possibility that those involved in the election are potentially exposed to COVID-19. Accordingly, strict measures must be taken by the Board agent and the parties to avoid unnecessary exposure between the observers, the parties, and the Board agent. While parties contemplated that the pre-election conference might be held remotely, that does not alleviate the 2-hour time span the observers would spend in an enclosed space with a Board agent with uncertain ventilation.

This brings me to my second reason for directing a mail ballot election, the details regarding how a manual election would be conducted at this location. The Employer committed to follow the guidelines suggested in *Memorandum GC 20-10*, but those suggestions are not exclusive to directed elections. Significant portions of that memo, addressing critical risk mitigation factors such as the polling area, the arrangement of the polling place, floor marking for ingress and egress, and plexiglass barriers should be determined in advance and included in any election agreement. In a directed election, as here, there is no election agreement and the ability to mitigate exposure to the virus should be apparent when directing a mail ballot election

¹⁸ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article

¹⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

²⁰ <https://covid.cdc.gov/covid-data-tracker/#county-map>

²¹ <https://covid19.colorado.gov/mask-guidance>; <https://covid19.colorado.gov/safer-at-home>

during the pandemic. A review of the schematic drawing entered into the record does not show that the break room or the conference room have multiple doors into each so that voters could have separate ingress or egress into the proposed polling areas. I am also concerned that the size of the conference room is not adequate as compared to the break room, and about how the latter would be closed and certified as sanitized prior to the commencement of an election. Further, there is an elevator and a staircase leading to the breakroom, but it is not clear how voters could be kept from passing each other in that stairwell (or the one at the other end of the mezzanine), or from congregating at the top of the stairwell.²² In that regard, it does not appear that there is enough space for the requisite tables and social distancing markings on the floor. Although the number of potential voters in this case is not great, approximately 25, no release schedule was proposed and it appears that only a fraction of this number could be accommodated in the mezzanine with the necessary social distancing.

For these reasons I am directing a mail ballot election in the instant case, as detailed below.

CONCLUSIONS

I have determined that the voting group sought by Petitioner is appropriate, and I shall direct a self-determination election among the employees in the petitioned-for voting group. Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²³
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

²² Schematics of the store in the record show a socially distanced polling place would likely extend into a hallway where voters would presumably wait.

²³ During the hearing the parties stipulated to the following commerce facts:

The Employer, Dillon Companies, Inc, d/b/a King Soopers, 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. During the past twelve months, a representative period, the Employer, in conducting its retail grocery operations, derived gross revenues in excess of \$500,000 and purchased and received at its Colorado facilities goods valued in excess of \$5,000 directly from points outside of the State of Colorado.

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5. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time employees in the Deli, Murray's Cheese, and Starbucks departments at Store No. 74, located in Loveland, Colorado;

Excluded: All other employees, Store Director, Assistant Store Director, confidential employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 7**. If a majority of valid ballots are cast for United Food and Commercial Workers International Union, Local 7, they will be taken to have indicated the employees' desire to be included in the existing meat unit currently represented by the Petitioner at Stores 74 and 44 in Loveland, Colorado. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

A. Election Details

I have determined that a mail ballot election will be held.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **3:00 p.m. on Monday, October 26, 2020**, ballots will be mailed by an agent of Region 27 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, November 2, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at **(303) 844-3551** or our national toll-free line at **1-866-667- NLRB (1-866-667-6572)**.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 27 office by 3:00 pm on Monday, November 23, 2020. **All ballots will be commingled and counted by an agent of Region 27 of the National Labor Relations Board at 3:00 p.m. on Monday, November 23, 2020**, by videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending September 26, 2020, 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 that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Friday, October 9, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the

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website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review

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must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Denver, Colorado on the 7th day of October 2020.

/s/ Paula S. Sawyer

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