

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

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

**Employer**

**and**

**UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 7**

**Petitioner**

**Case No. 27-RC-264824**

**PETITIONER'S BRIEF IN OPPOSITION TO EMPLOYER'S  
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION**

## Table of Contents

I.	INTRODUCTION	1
II.	LEGAL STANDARD	2
III.	ARGUMENT	2
	a. The Decision on a Substantial Factual Issue Is Not Clearly Erroneous or Prejudicial to the Employer	2
	i. The Regional Director’s Factual Findings that Deli, Cheese, and Starbucks Can be Understood as a Single Department are Consistent with the Record and not Clearly Erroneous	3
	ii. The Regional Director’s Fact Findings Concerning the Starbucks, Cheese, Deli and Meat Department Employees’ Skills, Training, and Job Functions are Consistent with the Record and not Clearly Erroneous	10
	iii. The Regional Director’s Fact Findings Concerning the Contact Between Starbucks, Cheese, Deli and Meat Department Employees are Consistent with the Record and not Clearly Erroneous	14
	iv. The Regional Director’s Fact Findings Concerning Common Supervision are Consistent with the Record and not Clearly Erroneous	17
	b. The Decision Correctly Applies Applicable Board Law, and the Employer Failed to Raise a Substantial Question of Law or Policy Because of a Departure from Officially Reported Board Precedent	19
	i. The Regional Director Did Not Disregard Board Precedent in Finding that Starbucks, Cheese, and Deli are a Distinct and Identifiable Unit	19
	ii. The Regional Director did not Misapply the Board’s Traditional Community of Interest Test	23
	c. The Employer Failed to Present any Compelling Reasons to Reconsider an Important Board Rule or Policy	27
IV.	CONCLUSION	28

## Table of Authorities

### **Case Law**

<i>The Boeing Co.</i> , 368 NLRB No. 67 (2019)	27, 28
<i>Budd Co.</i> , 136 NLRB 1153 (1962)	19
<i>Capital Cities Broadcasting Corp.</i> , 194 NLRB 1063 (1972)	19, 20
<i>Dillon Companies v. NLRB</i> , 809 Fed. App'x 1, No. 19-1118 (D.C. Cir. Feb. 21, 2020)	1
<i>FAA Concord T, Inc., d/b/a Concord Toyota</i> , 2020 BL 361161	21
<i>In re Local 1575, Intl. Longshoremen's Assn.</i> , 227 N.L.R.B. 471 (1976).	22
<i>International Bedding Co. (IBC of Pennsylvania)</i> , 356 NLRB 1336 (2011)	18
<i>Kellogg Company</i> , (Unpublished), 2015 BL 277639 (Aug. 27, 2015)	22
<i>King Soopers</i> , 27-RC-104452, Decision and Direction of Election (Jul. 11, 2013)	7, 23, 8
<i>King Soopers, Inc.</i> , 27-RC-215705, Decision and Direction of Election (May 1, 2018)	1, 18, 23
<i>King Soopers, Inc.</i> , 27-RC-215705, Order Denying Request for Review (Aug. 21, 2018)	1, 18, 20, 23
<i>King Soopers</i> , 27-RC-257949, Decision and Order (June 16, 2020)	1, 20, 22, 24
<i>MTM Transit d/b/a Ride Right</i> , 16-RC-260984, Decision and Direction of Election (July 21, 2020).	28
<i>Overnite Transportation Co.</i> , 322 NLRB 723 (1996)	22, 23, 24
<i>PCC Structural, Inc.</i> , 365 NLRB No. 160 (2017)	8, 27, 28
<i>Public Service Co. of Colorado</i> , 365 NLRB No. 104, slip op. at 1 (2017)	25
<i>Publix Super Markets, Inc.</i> , 343 NLRB 1023 (2004)	15
<i>Specialty Healthcare &amp; Rehabilitation Center of Mobile</i> , 374 NLRB 934 (2011)	8, 27
<i>Warner-Lambert Co.</i> , 298 NLRB 993 (1990)	2, 3, 19, 21, 27, 28

### **Other Board Authorities**

National Labor Relations Act	22
NLRB Rules and Regulations, Part 102	1, 2

Petitioner United Food and Commercial Workers Local 7 (“Petitioner” or “Local 7”), pursuant to Section 102.67(f) of the National Labor Relations Board’s (“Board”) Rules and Regulations, hereby submits the following brief in opposition to the Employer’s Request for Review, dated October 19, 2020, of the Regional Director’s Decision and Direction of Election in this matter, issued on October 7, 2020.<sup>1</sup> For the reasons set forth below, the Request for Review should be denied in its entirety and the Decision affirmed.<sup>2</sup>

## I. INTRODUCTION

The Employer’s Request for Review is nothing more than an unappetizing and warmed over rehash of arguments previously rejected several times in the context of *Armour-Globe* self-determination petitions, both regionally and by the Board itself. The Decision and Direction of election aligns with other decisions issued by the Regional Director concerning the same parties,<sup>3</sup> for which the Board has previously denied review. *See King Soopers, 27-RC-215705*, Order Denying Request for Review (Aug. 21, 2018).<sup>4</sup> The Employer simply, though heatedly, disagrees with the law and merely wishes that the facts which support the Decision were otherwise. This is thin legal and factual gruel upon which to base an essentially meritless request for review. The Employer has failed to provide any persuasive reason for reconsidering the well-reasoned Decision here, and the Request for Review should be denied.

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<sup>1</sup> References herein to the Regional Director’s Decision and Direction of Election will be designated “Decision” and references to the Employer’s Request for Review of the Decision will be designated “Request for Review.”

<sup>2</sup> The Employer also filed an Emergency Motion to Stay the Election (“Motion to Stay”) on October 19, 2020. Petitioner filed a Response in Opposition to Emergency Motion to Stay the Election (“Opposition to Stay”) on October 21, 2020. On October 26, 2020, the Board denied the Motion to Stay.

<sup>3</sup> *See King Soopers, 27-RC-215705*, Decision and Direction of Election (May 1, 2018); *King Soopers, 27-RC-257949*, Decision and Order (June 16, 2020).

<sup>4</sup> *See also Dillon Companies v. NLRB*, 809 Fed. App’x 1, No. 19-1118 (D.C. Cir. Feb. 21, 2020) (denying King Soopers’ Petition for Review and granting the Board’s Cross-Application for Enforcement).

## II. LEGAL STANDARD

Request for Review of a Regional Director’s Decision, such as the instant one, will be granted “*only*” for “*compelling* reasons,” 29 CFR § 102.67(d) (emphasis added) – and there are only four, enumerated bases on which review may be granted. The Employer, unconvincingly, contends three such bases (*see* Request for Review at 3 (citing Board’s Rule § 102.67(c)(1), (2), and (4))) exist here: (1) the Regional Director erroneously decided a substantial factual issue, which prejudiced a party; (2) the Regional Director departed from Board precedent; and (3) there are compelling reasons to reconsider Board rule and policy on *Armour-Globe* elections. Where, like here, the Employer has woefully failed to establish that any of these enumerated bases exist – or indeed that *any* basis exists – for reviewing the Regional Director’s well-reasoned Decision, review must be denied.

## III. ARGUMENT

### a. The Decision on a Substantial Factual Issue Is Not Clearly Erroneous or Prejudicial to the Employer

The Employer’s contention that the Decision “misstate[s] the factual record and cherry pick[s] facts, while disregarding all other substantial record evidence,” Request for Review at 4, is entirely without merit. The Employer’s real complaint here is that the Regional Director – correctly applying the law – based her Decision on the community of interest between the Petitioned-for-Unit and the existing Meat Bargaining Unit to which the Petitioned-for-Unit is to be appended. The Regional Director did not (because it is not part of the applicable *Warner-Lambert Co.*, 298 NLRB 993 (1990) test) compare the *Warner-Lambert* community of interest to the supposed community of interest with the Employer’s proposed wall-to-wall unit. This, of course, does not mean that the Regional Director “cherry picked” or “disregarded” any substantial record evidence, or that if she had not done so, she would have reached a different

conclusion. Rather, the Regional Director appropriately looked at the evidence relevant to the inquiry at hand, applied the well-settled law, and found the Petitioned-for-Unit appropriate. Indeed, it is the Employer who self-servingly selects evidence favorable to its incorrect contentions throughout its Request for Review, as will be outlined further below.

Because the Employer has not established that the Regional Director *disregarded* any record evidence – only that she accorded little or no weight to evidence advanced by the Employer because the *Warner-Lambert* test affords the Employer’s evidence in this case little or no weight – there is no reason for the Board to review the Decision on this ground. The Employer’s objections to the factual determinations of the Regional Director are not actually disputes about the evidence in the record, but rather a thinly veiled attempt to have the Board reconsider the longstanding *Warner-Lambert* test itself. The Employer has provided no compelling basis for the Board to do so.<sup>5</sup>

**i. The Regional Director’s Factual Findings that Deli, Cheese, and Starbucks Can be Understood as a Single Department are Consistent with the Record and not Clearly Erroneous**

The Employer wastes considerable energy bemoaning the Regional Director’s categorization of Starbucks and Cheese as “sub-departments” of the Deli. *See* Decision at 4; Motion to Stay. This undue emphasis is a red herring. Whether or not the term “sub-department” exists in the record does nothing to undermine the clear, sound finding of the Regional Director that the Petitioned-for-Unit is distinct and identifiable under *Warner-Lambert*. This, rather than nomenclature, is the mainstay of the Employer’s complaint, and it is entirely without merit.

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<sup>5</sup> *See also* Request for Review at 15 (arguing there are compelling reasons to reconsider Board rule or policy) and *infra* Section III.c.

The Regional Director plainly states, as the Employer quotes, that Cheese and Starbucks are “*essentially* sub-departments of the deli.” Request for Review at 4 (quoting Decision at 10) (emphasis added). This conclusion follows naturally from the record evidence concerning the Petitioned-for-Unit – outlined further below – and is not contradicted by the fact that Deli, Cheese, and Starbucks are each “departments” within King Soopers. Calling the use of the term “sub-department” a quote-on-quote “fact” (Decision at 4), the Employer endeavors to insinuate that the Regional Director invented this apt characterization of the Petitioned-for-Unit to the exclusion of the actual, record evidence. But this is plainly not so.

Rather, by calling Cheese and Starbucks “essentially” sub-departments, the Regional Director appropriately characterized the record evidence, which makes plain that Deli, Cheese, and Starbucks are indisputably considered part and parcel of the larger Deli Department. For example, weekly schedules list Cheese employees under the header “Deli.Service Cheese.” Em. Ex. 14. Deli service cheese is a synonym for the Murray’s Cheese Department. Tr. at 89. Likewise, the Time Card History Reports contained within Employer Exhibits 4-10 denote Cheese employees as *Deli Service Cheese* – “DELISVCCHZ,” *e.g.*, Em. Ex. 4 at 1, and Starbucks employees as *Deli Coffee* – “DELICOFFEE,” *e.g.*, Em. Ex. 8 at 1. Starbucks and Cheese also report to the Deli Manager. Decision at 8. *See also infra*.

Although The Employer contends that this erroneous sub-department characterization is the “sole” support for the Regional Director’s finding that Starbucks, Cheese, and Deli are a distinct and identifiable group, Request for Review at 4 (citing Decision at 10), it completely and conveniently ignores the fact that the Regional Director stated she would *still* find the Petitioned-for-Unit was identifiable and distinct even if Cheese and Starbucks were considered fully separate departments. Request for Review at 6-7 (citing Decision at 10). Of course, the same

bases upon which the Regional Director found Cheese and Starbucks *essentially* sub-departments of the Deli support the overall conclusion that the three constitute a distinct and identifiable voting unit – regardless of the terminology. The nomenclature is essentially irrelevant – it is the “facts on the ground” that drove the Decision. Nonetheless, each of the Employer’s meritless contentions will be addressed in turn.

First, the letter agreements concerning Murray’s Cheese and Starbucks do not indicate that the parties consider them “distinct from one another and distinct from the Deli Department” such that the Petitioned-for-Unit is not distinct and identifiable. Request for Review at 5. Quite the contrary, when these letter agreements were introduced at the Hearing, Union Secretary-Treasurer Kevin Schneider explained, “coffee falls under the deli department” because the King Soopers delis served coffee for years, so “when they expanded into a separate area *under the deli*, they continued to serve coffee, so that was covered *under the deli*.” Tr. at 313 (emphasis added). Likewise, Schneider explained that “cheese falls *under the deli* department,” Tr. at 314 (emphasis added), because the King Soopers delis have sold cheese for years. So, when King Soopers expanded and rebranded its cheese departments under the Murray’s label, Cheese continued to *fall under* the Deli department. Tr. at 314.

Second, the Employer cites other evidence supposedly undermining the contention that Cheese and Starbucks are “sub-departments” of the Deli – citing work locations, third-party corporate oversight and training from the branded entities, separate scheduling, and separate work functions (Decision at 5) – the Employer again misses the mark. *See infra*.

As the Regional Director soundly noted (Decision at 8), the job descriptions for Cheese and Starbucks make plain that Deli, Cheese, and Starbucks are all supervised by the Deli

Manager (and store management), and all fall under the Deli. *See* Pet. Ex. 17 (emphasis added), which includes the following:

- Title: Coffee Shop<sup>6</sup>
- Department: *Deli*
- Reports To: Coffee Lead, *Deli Manager*, Store Manager, Assistant Store Manager

*See* also Pet. Ex. 15 (emphasis added), which includes the following:

- Title: Cheese Steward
- Department: *Deli*
- Reports To: *Deli Manager*, Store Manager, Assistant Store Manager

The Employer urges that *its own job descriptions* be given short shrift – to state that proposition is to rebut it. Further, the same contentions were reiterated and affirmed by other record evidence. The Employer’s contention that the Regional Director relied “heavily (if not exclusively) on a 2012 ‘job description,’” Request for Review at 2, is misplaced. The Employer takes issue with the citation to the job description (*produced by the Employer*) for the Cheese Steward as evidence that Cheese reports into the Deli and is part of the Deli. Request for Review at 6. The Employer says that, *contrary to its own job description*, Store Manager Fedorchak testified that Store 74’s Cheese Lead, Peppard, “reports to the Store Manager and Assistant Store Managers, *not necessarily* the Deli Manager.” Request for Review at 5 (citing Tr. at 188) (emphasis added). Of course, Peppard himself served as a witness at the Hearing, and knows to whom he reports – Peppard testified that he reports to the Deli Manager. Tr. at 345. Likewise,

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<sup>6</sup> Coffee Shop is synonymous with Starbucks. Tr. at 101.

Harrison (testifying Starbucks barista) testified that clerks report to the Starbucks Lead, who in turn reports to the Deli Manager. Tr. at 458. Notably, the Employer’s own listing of the Petitioned-for-Unit employees (*See* Bd. Ex. 4 at Amended Attachment B) includes only *one* department manager – Rachael Wolf, designated as Deli/Dept Leader. The employees designated as Cheese and Starbucks include only clerks/lead clerk (Cheese) and barista/lead barista (Starbucks). *See id.*

Although it is not clear what the Employer means by “administrative irregularities” (Request for Review at 6), the Employer’s reference to the finding in *King Soopers*, 27-RC-104452, 2013 BL 469274 (July 11, 2013) that Starbucks is distinct from the Deli is misplaced, and mischaracterizes the Regional Director’s decision in that case. As the Employer later notes, in 27-RC-104452, the Regional Director stated that Starbucks employees “are administratively *under the deli* department.” Request for Review at 12 (quoting *King Soopers*, 27-RC-104452, 2013 BL 469274 (July 11, 2013)) (emphasis added). Moreover, in 27-RC-104452, the Region found that “the Starbucks employees *do* share a community-of-interest with the deli employees” but 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.” *King Soopers*, 27-RC-104452, Decision and Direction of Election (Jul. 11, 2013) (emphasis added). In that case, the relevant inquiry was whether Starbucks shared a community of interest with other retail employees because the petition at issue sought to include Starbucks with retail, but not the deli employees. *Id.* Putting aside whether the evidence finding Starbucks and retail shared a community of interest in 27-RC-104452 exists here, it is evident the Regional Director

was undertaking a different analysis, under the specific facts and circumstances there, and thus her finding does not require finding it inappropriate to group Starbucks and Deli here.<sup>7</sup>

Finally, the Employer laments, but also recognizes, that the Regional Director also reached a broader finding – stating that she would *still* find the Petitioned-for-Unit distinct and identifiable even if Cheese and Starbucks were fully separate departments. Request for Review at 6. Hoping to minimize this finding, the Employer baselessly contends this is a “hedge” against an erroneous finding – but in reality, it serves to underscore the self-evident appropriateness of grouping Deli, Cheese, and Starbucks. The only contention offered against this broader finding is that the Employer’s corporate office groups the Bakery with Deli, Starbucks and Cheese *for merchandising* at the district level. Request for Review at 7 (citing Tr. at 49). The limited testimony to this point, however, hardly makes this point. After urging from Employer’s counsel (Tr. at 49) (“ . . . and in fact, in the corporate organization of – of divisions, is – is bakery grouped with other departments?”), Store Manager Fedorchak cautiously explained, “so from our merchandising team, deli and bakery are – are considered the – from a merchandising perspective *kind of in a similar plane . . .*” Tr. at 49.

It is not clear to Petitioner, from the Request for Review or the testimony purportedly supporting the Request for Review, what it means to be grouped from a “merchandising perspective.” But, in any event, this does nothing to further the Employer’s argument. First, this

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<sup>7</sup> Moreover, the petition in 27-RC-104452 did not seek an *Armour-Globe* election. The Board applied *Specialty Healthcare & Rehabilitation Center of Mobile*, 374 NLRB 934 (2011) to examine the Employer’s argument (even though it had not been applied in such a context before) that Starbucks shared a stronger community of interest with the deli than the retail, and therefore, Starbucks should be excluded from the unit because the parties agreed to exclude the deli from the unit. *Specialty Healthcare* has since been overruled by *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), and moreover, the Petition here *does* seek an *Armour-Globe* election. Thus, here, there is no basis for comparing the community of interest between Starbucks (or Deli or Cheese) and retail to find there is community of interest between Starbucks, Deli, Cheese, and Meat – and certainly no basis for finding it inappropriate to group Starbucks and Deli together (with Cheese) as a distinct and identifiable voting group. Simply, the Regional Director evaluated the appropriateness of the proposed unit in 27-RC-104452 under a different standard, and it is not applicable here.

supposed grouping is admittedly something done by the corporate office, at the district level (Request for Review at 7), and the record does not reflect or explain how or why this means that Deli, Cheese, and Starbucks are not distinct and identifiable based on the in store experience such they do not constitute an appropriate voting group for the *Armour-Globe* election sought here. Further, Fedorchak did *not* say that either Starbucks or Cheese would not be included in any such “merchandising” grouping along with the Bakery and Deli as part of the Deli. In fact, the only other reference to grouping Deli and Bakery together undermines the relevance of any such grouping.

When asked about the reference to “DELISVCCHZ” in reference to the Time Card History Report contained within Employer Exhibit 4, Fedorchak evasively refused to admit this label was because Cheese is part of the Deli – explaining this is “how our company groups - - just like they group the deli and bakery together, just like they group produce and floral together . . .” Tr. at 142. Of course, there is no comparable Time Card History Report evidencing any reference to the Bakery. In contrast, there *are* references to Deli Service Cheese (“DELISVCCHZ”), *e.g.*, Em. Ex. 4 at 1, Deli Service Coffee (“DELICOFFEE”), *e.g.*, Em. Ex. 8 at 2, and even references pairing Produce and Floral (“PRFLORAL”), *e.g.*, Em. Ex. 4 at 7. Nor is there any evidence – in a job description, testimony, or otherwise – that anyone in the Bakery reports to the Deli Manager. *Compare* Pet. Ex. 15 (Cheese reports to Deli Manager), *accord* Tr. at 345 (Cheese Lead Peppard reports to Deli Manager); Pet. Ex. 17 (Starbucks reports to Deli Manager), *accord* Tr. at 458 (Starbucks reports to Deli Manager); *see also* Em. Ex. 25 (revised Employers List of Employees to be Included in Election) (listing no Department Leader for Starbucks or Cheese, but listing a Department Leader for Bakery).<sup>8</sup>

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<sup>8</sup> *See also* Decision at 3 (“Each department has a department manager also called a department ‘leader,’ who in

**ii. The Regional Director’s Fact Findings Concerning the Starbucks, Cheese, Deli and Meat Department Employees’ Skills, Training, and Job Functions are Consistent with the Record and not Clearly Erroneous**

The Employer’s contention on this point is almost laughable – after quoting a lengthy passage from the Decision, Request for Review at 7 (quoting Decision at 11), the Employer contends that the cited evidence “either does not exist or not supported by the record.” This contention would be humorous if it were not so blatantly false. Each of the Employer’s arguments will be addressed in turn.

First, it is clear that the records supports the Regional Director’s finding that in connection with preparing and customizing food for customers, Meat, Deli, Cheese, and Starbucks *usually* provide samples but *currently* are restricted from doing so because of the COVID-19 pandemic. Tr. at 353-354, 402-403, 418, 471, 505; *compare* 402-403 (not all departments give samples). And, because of their work directly with unpackaged food products, they wear gloves, Tr. at 354-355, 414, 471, 507, and head coverings, Tr. at 356-357, 413, 470-471, 506 – a requirement *not* mandated in all departments throughout the store, *e.g.*, Tr. at 133-134, 355, 413, 476, unless they enter an area or work a shift in a department where such covering is required. Tr. at 131-132.

It is not true that Starbucks is not required to monitor temperatures just because it now uses a “FAST Alert” temperature tracking system. *Compare* Request for Review at 7-8. Rather, as Starbucks barista Harrison explained, “we have FAST Alert, which tracks our fridge temperatures. If there's anything wrong with those, it'll send us an alert. We will [*sic*] notified.” Tr. at 472. Thus, if something goes awry with the temperatures, Starbucks needs to address the

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turn reports to the store manager, and many departments have non-supervisory leads. Both Murray’s Cheese and Starbucks have a lead, but not a separate department manager/leader.”); *accord* Decision at 8.

issue – whether or not they are manually logging temperatures throughout the day is not the salient point. Rather, what *is* important is that Starbucks, like Deli, Meat, and Cheese have products that must be kept at a certain temperature, regardless of how precisely it is monitored – unlike, for example the Front End or E-Commerce.

Nor is it even marginally persuasive to complain that Starbucks, Deli, Cheese, and Meat do not use the “same tools” (Request for Review at 8) – since as is obvious from the language quoted by the Employer, the Regional Director was abundantly clear in her analysis that she was stating only that given the common nature of these departments – that they *prepare* food or beverages – all of them use tools (*not* necessarily the exact *same* tools) to prepare and modify products for customers. She did not obscure this fact, rather, she enumerated a variety of tools and machinery (“ . . . whether cutting with knives and slicers, operating an espresso machine, or heating and cooking with ovens.”). Her point was not that the tasks are identical, but merely that all have the same primary function: preparation and presentation of products for customers, and customizing products to customer specification. *See* Decision at 11; *see also* Pet. Post-Hearing Brief at 14; Pet. Exs. 15 and 17.

In contrast, employees in other departments like the Front End or E-Commerce do not need tools to modify or prepare products. The Employer goes to lengths to detail the purportedly different tools used by various departments, stating that the finding that ““these departments use tools that modify their food products’ disregards the clear record evidence.” Request for Review at 8. But stating it does not make it so – the Regional Director’s finding, in line with the record, was the broader point that these departments prepare food products for customers. Decision at 11 (“To the extent the Employer argues that other departments, such as grocery and ecommerce, ‘prepare’ food by placing it on a shelf or collecting it for an online delivery I find this is

fundamentally different.”). Thus, the Regional Director aptly noted, as the Employer apparently ignores, that this is *markedly different* from the primary task of other departments, even if the Employer’s witness desperately (and unconvincingly) attempted to characterize the tasks of other departments as “preparation” as well. *See* Tr. at 197 (alleging that placing soup cans or other non-perishable items on a shelf is “preparing” them analogous to the work done in Meat, Deli, Cheese, and Starbucks: “They’re preparing that product for the customer. We face the labels, so that they’re out so it’s prepared for the customer, so the customer knows what they’re purchasing. Preparing to me, it’s the same.”). Simply put, the Employer’s position that stocking canned soup is the same as *preparing actual food for consumption* is patently ludicrous. Under that theory, every stocking clerk is in actuality a chef.

The Employer’s complaints regarding the Regional Director’s findings regarding training fail for similar reasons. The Employer argues that the Regional Director ignores “almost all the record evidence concerning the differences in training between the Petitioned-for Departments, mainly the Starbucks and Murray’s Cheese, with the Meat Department employees.” Request for Review at 8. The Employer’s attempt to minimize the relevant, accurate citation to the fact that in contrast to many retail departments, all of Deli, Cheese, Starbucks, and Meat receive food safety training is unavailing. *All* of the testifying employees from each of the Deli, Cheese, Starbucks and Meat departments testified to receiving food safety training. Tr. at 357 (Peppard in Cheese); Tr. at 415 (Sangiorgio in Deli); Tr. at 468 (Harrison in Starbucks); Tr. at 504 (Donahue in Meat). But, basic food safety training is not provided to all employees – it is provided only to employees in any department, or being cross-trained for any department, that handles food. Tr. at 531, 541; *see also* Tr. at 421, 525.

Nor does anyone contend that training is identical among different departments – there are of course distinctions between departments that necessitate some different training. The Employer puts undue emphasis on the supposed unique and highly specific training Starbucks and Cheese receive from the third-party branding entities (Starbucks and Murray’s) – overlooking the fact that the testifying witnesses from these departments are first and foremost King Soopers employees, who based on *their own personal experience* testified to receiving most of their training on the job, at the store, and from employees of the Employer and not the third-party. *See* Tr. at 357-358, 385-386, 464, 469-470.

While Peppard (Cheese) and Harrison (Starbucks) underwent somewhat specialized training and/or certification to perform their jobs, the Employer’s attempt to trump up the intensity of these processes with branded, third-party materials (Em. Exs. 22 and 23) ignores the actual, employee experience. It is the Employer, *not* the Regional Director, who tellingly disregards critical aspects of the record in this regard. Although Fedorchak described associates in Cheese as receiving “red jacket certification,” Tr. at 71, the actual Cheese associate, Peppard described the process of “red jacket training” as only “sort of like a certification.” Tr. at 359. There is a “test” at the end of red jacket training, but it is predominantly education, and associates are unlikely to ever fail. Tr. at 359-360. Likewise, although Fedorchak testified that Starbucks administers the certifications for baristas in Starbucks, Tr. at 71, Harrison testified that she was certified after her Lead (a King Soopers employee) determined she was “ready” after observing her make a variety of drinks. Tr. at 470.

Moreover, although there is *limited* direction by Murray’s or Starbucks, the overwhelming majority of training and oversight occurs at the *store* level by King Soopers employees. For instance, Peppard attended Murray’s training for Cheese Leads in New York –

however, his observation, based on first-hand experience, not supposition, was that *most* training comes on the job, at the store level. Tr. at 385-386. Only the Cheese Lead attends training in New York, the remainder of the Cheese clerks receive only the red jacket training, which occurs at a store in the region. Tr. at 394-395. Likewise, no evidence was presented that *any* Starbucks associate receives training outside the store – rather “corporate” Starbucks is responsible for opening a kiosk at a new store, but ongoing training once a kiosk exists within a store takes place in the store and is given by employees of the Employer and not the third-party – “it is the Starbucks’ lead’s role to complete the training.” Tr. at 221. Harrison likewise explained that the Barista Trainer and Lead (King Soopers employees) are responsible for certifying baristas, Tr. at 494, 497, and the Lead is responsible for daily oversight at the kiosk. Tr. at 487.

Moreover, like the Employer’s desperate, undue focus on the use of the term “sub-department,” the emphasis on the alleged intensity of the branded third-party training overlooks a key point – unlike other retail departments, where employees can easily pick up work or cover shifts, Deli, Cheese, Starbucks, and Meat require training and skill development over time, and thus employees in other departments cannot and do not work in these departments. *See, e.g.*, Tr. at 137-138, 263, 272, 378-379, 462, 464, 504; *see generally* Pet. Post-Hearing Brief at 9-11. This uncontested fact, in and of itself, warrants sustaining the Regional Director’s Decision.

**iii. The Regional Director’s Fact Findings Concerning the Contact Between Starbucks, Cheese, Deli and Meat Department Employees are Consistent with the Record and not Clearly Erroneous**

It is clear from testimony and the schematic introduced as Employer Exhibit 1 that the relevant departments are within proximity of one another. *See* Em. Ex. 1; Tr. at 418-419, 451, 516. Thus, inherently, employees in Deli, Cheese, Starbucks and Meat have frequent contact. Even if this causes some incidental non-work contact, this is properly considered under the

community of interest analysis. *See, e.g., Publix Super Markets, Inc.*, 343 NLRB 1023, 1025 (2004) (finding community of interest where “employees do not have a great deal of work-related contact with employees outside of their work areas,” but “there is some contact,” when employees “take garbage and recycling from the work areas to the support dock.”). Here, however, the record also includes further evidence of contact by and between employees in the relevant departments.

For example, Deli, Cheese, Starbucks, and Sushi<sup>9</sup> share the backroom storage area, cooler, and freezer behind the Deli department. *E.g.*, Tr. at 363-364, 374, 422-423, 468-469. Employees cannot access these cold and dry storage areas behind the Deli without crossing through the Deli. Tr. at 367-369, 423. From Starbucks, employees must walk through Cheese’s corridor and the Deli to get to the back room. Tr. at 475. As a result, Cheese, Starbucks, and Deli employees frequently walk through the Deli and interact on a daily basis while performing their jobs. Tr. at 369. Meat, Deli, Cheese, and Starbucks all order, receive, and break down product loads – often together. When a shared load arrives, it is brought on a pallet to the meat cooler where it will get broken down – typically, the Meat manager and another Meat associate break it down, but Deli employees will also help since it contains their products. Tr. at 510-511, 417-418. Sometimes, Peppard (Cheese) will go to the “meat prep” area to retrieve his items. Tr. at 371-372. By necessity, employees enter the Meat department to get their load because the meat cooler and prep area are located right behind the seafood and meat counter. Tr. at 502, 373-374, 418, 512-513; Em. Ex. 1. Sometimes, products get mixed up as the load is broken down, and

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<sup>9</sup> To the best of the Union’s knowledge, Sushi uses only subcontracted employees, and is not included on the Employer’s List of Employees to be Included in the Election (Em. Ex. 25). *See also* Tr. at 211 (Sushi department is a third party).

employees will bring them over to the respective department, entering one another's areas. Tr. at 425.

Likewise, the employees are cross-trained or help out across departments. For example, Cheese Lead, Peppard, assists the Deli "frequently" on the hot bar, and sometimes on the slicers. Tr. at 375. Indeed, *all* of the Cheese clerks have helped out in the Deli. Tr. at 376. And Sangiorgio (Deli Clerk) testified that in the Deli, he interacts with people in Cheese "several times an hour," Tr. at 423, and several times a day with Starbucks. Tr. at 424. Although only the Deli has a slicer, Meat and Cheese use the Deli's slicer for their products as well. *See* Tr. at 393, 424, 425, 445, 452-454, 515. While Fedorchak, who had no personal knowledge of what actually happens, was adamant that the Meat department never slices meat, Tr. at 183, the testifying witnesses who work in the Deli and Meat departments indicated this actually happens relatively frequently. When Sangiorgio worked the closing shift in the Deli, an employee who worked the closing shift in the Meat department would come to the Deli to slice something approximately every other day. Tr. at 452-453. When new employees started covering the closing shift in the Meat department, Sangiorgio would see one of them using the slicer approximately once a week. Tr. at 452. Donahue, a Meat department employee, testified that he has used the Deli's slicer himself, as recently as a few weeks prior to the Hearing. Tr. at 517. The overwhelming weight of the testimony, as contrasted with the Store Manger's mere speculation, highlights the frivolous nature of the Employer's objections to the well-reasoned Decision.

In addition to routine assistance from Cheese employees in the Deli, the *only* employees Sangiorgio could recall working in the Deli who were not strictly Deli employees were the two employees cross-trained in both Deli and Starbucks. Tr. at 421. Likewise, Harrison, who was hired into Starbucks, was previously cross-training to work in Cheese. Tr. at 458. Even the fairly

limited schedules in evidence make clear that it is common for Deli, Cheese, and Starbucks employees to be scheduled (and thus trained or in training) in one of the other departments within the petitioned-for unit. *See* Pet. Ex. 14; Tr. at 161, 162, 165, 167-171.

Contrary to the Employer's contentions, the Regional Director did not "invent" evidence that the Petitioned-for-Unit and Meat Unit have contact in shared spaces such as breakrooms. Request for Review at 9. Although Donahue (Meat) testified that he *personally* usually goes to his car on break or lunch, when asked where Meat employees take his breaks he explained that other "people go to the break room as well" and there is only one store-wide break room. Tr. at 526. Sangiorgio (Deli) likewise testified that he leaves the store for lunch but goes upstairs to the break room for his fifteen minute break periods. Tr. at 442. The Employer's own main witness, Fedorchak likewise testified that *all* employees use the same time clocks, and proceed straight there when they arrive at work, or after putting their personal items in their lockers in the break room, which is a common area for *all* store employees. Tr. at 36-37.

**iv. The Regional Director's Fact Findings Concerning Common Supervision are Consistent with the Record and not Clearly Erroneous**

The Employer cannot meaningfully dispute that Meat, Deli, Cheese and Starbucks share common supervision. Tr. at 113, 118, 255; Pet. Exs. 15 and 17. Thus, the Employer's contention that the Regional Director erred in finding common supervision supported a finding of community of interest is based solely on the fact that Store 74 Store Manager testified that he personally does not supervise employees at Store 44, some of whom are in an existing bargaining unit along with Meat employees at Store 74. *See* Request for Review at 10 (citing Tr. at 34). But, the Employer has not cited any authority – or indeed even stated without citing authority – why this is problematic. To the contrary, in a similar petition between the same parties here, the

Regional Director likewise found that shared supervision supported a finding of community of interest where “employees have departmental manager, but the authority resides with the store managers and assistant store managers” finding that “all departments discussed in the record have shared supervision.” *King Soopers*, 27-RC-215705, Decision and Direction of Election (May 1, 2018). There, like here, the petition sought to add employees from a department in one store (Store 89) to a multi-store unit including employees in the same store (Store 89). *Id.* The Board affirmed the appropriateness of proposed unit over the Employer’s request for review. *King Soopers*, 27-RC-215705, Order Denying Request for Review (Aug. 21, 2018). Indeed, the vast majority of Petitioner’s bargaining units covering the Employer’s Colorado stores are comprised of *multiple* stores within a geographic area. *See* Pet. Ex. 1 at Arts. 1; Tr. at 304-306.<sup>10</sup>

Likewise, the Employer contends – without citing any record evidence – that the Starbucks’ District Manager supervises the Store 74 Starbucks Department. *See* Request for Review at 10. To the contrary, the Starbucks Lead (a King Soopers employee, *see* Bd. Ex. 4 at Amended Attachment B) is responsible for daily oversight and management at the store’s kiosk. Tr. at 487. Starbucks baristas reports to Starbucks Lead who reports to Deli Manager, both of whom are King Soopers employees. Tr. at 458; Bd. Ex. 4 at Amended Attachment B. *See also* Tr. at 219, 235 (Employer witness Phillips – who is currently the Division *Cheese* Specialist but was previously the Division *Starbucks* Subject Matter Expert (and Starbucks Lead) – is and was at all times an employee of King Soopers). Moreover, even if the Starbucks’ District Manager did supervise Starbucks employees, this is of no import. *See International Bedding Co. (IBC of Pennsylvania)*, 356 NLRB 1336, 1336 (2011) (finding sufficient community of interest where

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<sup>10</sup> The Employer of course essentially conceded that Store 74 employees share community of interest with the two-store Meat Unit (and thus, shared supervision) by arguing that a wall-to-wall unit comprised of all unrepresented Store 74 employees would be an appropriate voting unit for an *Armour-Globe* election to join the two-store Meat Unit. *See* Bd. Ex. 4 (Employer’s Statement of Position); Em. Ex. 25.

there was “some evidence of common supervision” where some but not all employees were supervised by the same manager); *Budd Co.*, 136 NLRB 1153, 1155 (1962) (finding appropriate a unit of technical and clerical employees where “some” of the technical and clerical employees share common supervision). Thus, common supervision clearly supports finding community of interest here, and there is nothing clearly erroneous in the Regional Director’s finding.

**b. The Decision Correctly Applies Applicable Board Law, and the Employer Failed to Raise a Substantial Question of Law or Policy Because of a Departure from Officially Reported Board Precedent**

The Employer’s complaint that the Regional Director mis-applied applicable Board law is nothing more than the Employer’s wish that the well-settled law was otherwise. *See* Request for Review at 15 (arguing there are compelling reasons to reconsider Board rule or policy); *compare infra* Section III.c. Because the Employer has failed to establish that the Decision incorrectly applies any applicable Board law, there is no meaningful reason to review the Decision on this ground.

**i. The Regional Director Did Not Disregard Board Precedent in Finding that Starbucks, Cheese, and Deli are a Distinct and Identifiable Unit**

Perhaps recognizing the evident lack of merit in its lengthy argument against the Regional Director’s reference to Cheese and Starbucks are “sub-departments” of the Deli, *see supra*, the Employer also makes a broader statement alleging that the Regional Director mis-applied *Warner-Lambert* in finding the Petitioned-for-Unit distinct and identifiable. *See* Request for Review at 10-11. The Employer’s criticism, however, relies on an incorrect statement of the applicable law. The Employer contends that the Regional Director erred in failing to “analyze the interests of the excluded employees” and thus, “whether the three Departments are an arbitrary segment of the unrepresented employees.” Request for Review at 11. The Employer relies on *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972) for the prohibition against “arbitrary

segments” of the unrepresented employees. Request for Review at 11. And yet, despite quoting the Regional Director’s citation to *this same case*, the Employer contends that she got it wrong. She did not.

In *Capital Cities*, the petition sought to include a handful of employees from various departments, but not the *entirety* of any of those departments. 194 NLRB 1063. The Board there agreed that the employees did not have interests “sufficiently separate and distinct from those which they share with *other employees in their respective departments* to warrant a finding that they are an appropriate voting group.” *Id.* at 1063 (emphasis added). There was no articulable basis for which employees were included in the proposed unit – thus, it was arbitrary. In contrast here, the petition seeks to add all employees within Deli, Cheese and Starbucks, and as such, *Capital Cities* is clearly inapposite. Thus, the voting group does not “unduly fragment” the workforce, and is identifiable and distinct. *See King Soopers, 27-RC-257949*, Decision and Order (June 16, 2020) (citing *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972)); *see also King Soopers, 27-RC-215705*, Order (Aug. 21, 2018) (denying Request for Review where, *inter alia*, there was “no contention that there are additional employees in [the petitioned-for] department who [were] not included in the petitioned-for voting group.”).

This is precisely the conclusion the Regional Director references when she says the Petitioned-for-Unit in the instant case is appropriate for a self-determination election because it is *not* like the proposed unit in *Capital Cities*. It is irrefutable that the Petitioned-for-Unit here includes *all* Deli, Cheese, and Starbucks employees. *See* Bd. Ex. 1(a) (Petition); Bd. Ex. 4 at Amended Attachment B (List of Employees in Petitioned-for-Unit); *compare* Em. Ex. 25 (revised Employers List of Employees to be Included in Election – proposed wall-to-wall unit does not include any additional Deli, Cheese, or Starbucks employees). Nor is there error in the

Regional Director’s contention that the instant case accords with *St. Vincent* in that the employees here “work together under a single department and in the same location.” Decision at 10. As articulated *supra*, the Regional Director aptly described Cheese and Starbucks as sub-departments of the Deli, but also correctly found the Petitioned-for-Unit distinct and identifiable even if they constituted separate departments. The Employer has not pointed to any applicable Board law stating that a proposed unit must be comprised of employees from *only* a single department, or that a proposed unit that includes the entirety of departments, but not every department is inherently arbitrary – indeed, that proposition would preclude any units except those that are wall-to-wall.

The Employer’s citation to *FAA Concord T, Inc., d/b/a Concord Toyota*, 2020 BL 361161 is also inapposite. There, the Board took issue with the Regional Director’s finding that the petitioned-for employees shared community of interest showed they were an identifiable and distinct segment, thus conflating and melding the two prongs of the *Warner-Lambert* analysis into one. The Board did not state that it is necessary to compare the petitioned-for-unit and excluded employees in order to determine whether the petitioned-for-unit is distinct and identifiable, or not arbitrary. Far from “analyzing” any evidence (*compare* Request for Review at 11-12), the Board noted a variety of similarities among the petitioned-for-unit, only briefly contrasting the job duties of excluded employees in a short paragraph. The Board did not lay out or dictate it was providing a new framework for evaluating whether a proposed unit is distinct and identifiable – nothing here supports a contention that proper application of the law requires more than the Regional Director’s sound analysis of the commonalities among Deli, Cheese, and Starbucks, *see* Decision at 9-10, in order to find the proposed unit distinct and identifiable, and not arbitrary.

It is evident that the Employer's critique here is driven by two other concerns. First, the Employer is endeavoring to circumvent the well-established principle that the community of interest analysis compares only the petitioned-for-unit and the unit it seeks to join – stubbornly refusing to accept this fact, the Employer expended most of its case-in-chief putting on supposed evidence of storewide community of interest. *See also infra*.

Second, the Employer has repeatedly castigated the Union for filing petitions based on the purported extent of its organizing and supposed organizing strategy. *See* Request for Review at 1, 2; Tr. at 21-23. The Regional Director noted, and rejected, this fallacy, explaining “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.” Decision at 10 (emphasis added). This is consistent with the Regional Director's previous treatment of this same specious argument. *See King Soopers, 27-RC-257949, Decision and Order* (June 16, 2020). The overwrought arguments of counsel in this regard do not make it so – statements of counsel, no matter how impassioned, do not constitute evidence. *See, e.g., Kellogg Company, (Unpublished), 2015 BL 277639 at n.2* (Aug. 27, 2015); *In re Local 1575, Intl. Longshoremen's Assn., 227 N.L.R.B. 471, 472 n.2* (1976).

The Employer's counsel recognized that this Region has, rightly so, rejected the Employer's previous attempts to argue that the extent of organizing is driving the petitioned-for-unit under Section 9(c)(5). Tr. at 21. Moreover, although the National Labor Relations Act “forbids the *Board* to make extent of organization controlling, it does not forbid a *union* to seek a particular unit that is otherwise appropriate.” *Overnite Transportation, 322 NLRB 723, 725*

(1996). Rather, the Union may seek different appropriate units at different locations – to permit otherwise “would require the Board to decide which is the best, or most appropriate unit at each” location, and the Board has expressed it does not believe Congress intended such an outcome. *Id.*

What is more, here, the Union is seeking a unit that is *the same* as the vast majority of other meat units represented by the Union at the Employer’s stores, and there is no scintilla of evidence supporting counsel’s naked assertion that the petitioned-for unit was controlled by the extent of Union organizing. It is the Employer who seeks to create a unit which does not align with the bargaining history between the parties. Thus, although the Regional Director did not find it *necessary* to rely on the parties’ bargaining history to draw her conclusion, Decision at 10, it is undeniable that, far from *arbitrary*, the proposed unit here aligns with the vast majority of the bargaining units represented by Local 7 at the Employer’s stores throughout the State of Colorado.<sup>11</sup> The Employer’s reference here to the decision in 27-RC-104452 from 2013 does not dictate otherwise, as explained more thoroughly above.

**ii. The Regional Director did not Misapply the Board’s Traditional Community of Interest Test**

The Employer’s initial complaint against the Regional Director’s analysis of community of interest is that she “disregards all facts and evidence that support a finding that the Union’s Petitioned-for Unit is not appropriate.” Request for Review at 13. Underlying this critique again

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<sup>11</sup> Currently, Petitioner represents meat bargaining units in 104 King Soopers stores in Colorado, three of which were added in the last few years. Tr. at 301-304. The deli is excluded from the meat bargaining unit in only eight of the 104 stores (Tr. at 311) – and one of those eight is currently in bargaining after this Region found a self-determination election *appropriate* for the Deli at Store 89 to decide if it wished to join the existing 3-store Broomfield Meat Bargaining Unit. *See King Soopers, Inc.*, 27-RC-215705, Decision and Direction of Election (May 1, 2018); *see also King Soopers*, 27-RC-215705, Order Denying Request for Review (Aug. 21, 2018). Although not all of the Employer’s stores in Colorado have a Murray’s cheese shop or Starbucks kiosk, in those that do – where the deli is part of the meat bargaining unit, both Murray’s and Starbucks are as well. Tr. at 312-314. There is only one store out of the 104 King Soopers in which the Deli (including cheese and Starbucks) are in a bargaining unit with retail employees, which resulted from particular circumstances not apt here, Tr. at 318-319 – and there is no store with a wall-to-wall unit like the one proposed by the Employer here. Tr. at 300-301.

is the Employer's insistence on a legal standard that does not exist – the Employer wants the Regional Director to look at the supposed evidence in its case-in-chief supporting an alleged community of interest among *all* employees for a wall-to-wall unit. Naturally, inherent in this position is a recognition that there is a community of interest among *some* of the employees in that wall-to-wall unit if they apparently *all* share a community of interest. The Regional Director has again recently made clear, consistent with controlling Board law, that there is no obligation to compare the proposed unit with other potential units. *See King Soopers, 27-RC-257949, Decision and Order (June 16, 2020):*

However, at no point in an *Armour-Globe* analysis must this community of interest — the voting group sought and existing unit — be balanced against another community of interest — the voting group sought and the remainder of employees at the Bennett store — as the Employer posits. In short, the Petitioner does not have a burden to prove the pharmacy technicians' community of interest with the Denver clerk unit is stronger than would exist in a wall-to-wall unit, and I have not applied that analysis.

Rather, as long as a unit is appropriate, it need not be the *best* (or even necessarily the most logical or appropriate) unit. *See Overnite Transportation Co., 322 NLRB 723, 725 (1996).*

Although the Employer complains that the Regional Director disregarded *all* facts and evidence finding the proposed unit inappropriate, the Employer cites only one purported example – the Regional Director finding that from an “organization perspective” the departmental arrangement (that each departments specializes in a specific product) does not support or contradict a finding of community of interest, and thus it is essentially neutral in the analysis. Request for Review at 13 (citing Decision at 10-11). The Employer cannot seriously contend that there is no community of interest among different departments within the store – the Employer here has proposed a wall-to-wall unit which would by its nature include *all* departments.

The Employer’s final contention fares no better – although the Employer repeatedly criticizes the Regional Director for “holding” (relying on *Public Service Co. of Colorado*, 365 NLRB No. 104, slip op. at 1, n.4 (2017)) that she is *prohibited* from considering differences that exist because of a collective bargaining agreement, Request for Review at 14, in actuality, the Regional Director cited the *same* language cited by the Employer – that differences in employment terms “do not mandate exclusion” in the self-determination context where the terms result from a collective bargaining agreement covering only some of the employees. *Compare* Decision at 9 *with* Request for Review at 14. As explained in *Public Service Co.*, in the *Armour-Globe* context, it is axiomatic that only *some* employees are subject to a collective bargaining agreement, which presumably sets forth *some* terms and conditions not shared by the remainder of the employees, who are *not* represented. Thus, to put much weight into these differences would essentially prevent the Board from finding any unit appropriate for an *Armour-Globe* election – a result which the Employer transparently craves, but not one that is consistent with the law.

Far from giving “no weight” to contractual differences, the Regional Director appropriately explained that “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.” Decision at 12 n.15. The Regional Director did *not* ignore the contractual differences – or the fact that the contract does not prohibit Meat employees from working in Deli, Cheese, and Starbucks, only the reverse. The Decision expressly notes that there is “no

evidence, however, of interchange with meat department employees working in the deli, Murray's Cheese, or Starbuck's," Decision at 12, and further, the Regional Director explained that "while interchange is strong within the petitioned-for voting group, it is not present with the meat department, *largely* due to contract limitation." Decision at 12 (emphasis added).

Notably, the Regional Director did *not* say that the lack of interchange was *entirely* due to contract. That this difference is *largely* due to the contract follows directly from the evidence. Employees outside the Meat department are *prohibited* from working in the Meat department under the collective bargaining agreement covering the Meat department – though not the reverse. *See* Tr. at 121, 321-324; Pet. Ex, 16 at Arts. 2 and 6. And yet, *because of this contractual limitation*, it is *management* who does not schedule other employees in the Meat department because they cannot be cross-scheduled both ways. As the Store Manager explained: "when I'm pulling people from another department, typically we call it giving them their time back or helping them. So in the case of meat department, if meat department – if I pull associates from meat department and I make them help in another department, I can never pay back the meat department with associates from another department to help them." Tr. at 121. The sole testifying witness from the Meat department confirmed that he *would* help out throughout the store, but he has *never been asked* to work in another department, and was not aware of anyone in Meat being asked and refusing. Tr. at 508-509.

This being the only example put forth by the Employer clearly fails to show any erroneous application of the law here. The Employer also apparently overlooks that the Regional Director did expressly acknowledge other terms and conditions that are distinguishable and comparable among represented and unrepresented employees because of the collective bargaining agreement – noting fringe benefits, wage scales, and other terms and conditions such as the "just

cause” provision in the contract. *See* Decision at 7-8. If the Regional Director did not accord them great weight, that is entirely consistent with Board law.

**c. The Employer Failed to Present any Compelling Reasons to Reconsider an Important Board Rule or Policy**

The Employer woefully failed to provide any *compelling* reason for the Board to consider whether the three-step *Boeing* analysis should be used to compare the interests of unrepresented and represented employees to determine whether a petitioned-for-unit is appropriate for an *Armour-Globe* election. *Compare* Request for Review at 15. Therefore, there is no basis for granting review of the Decision on this ground.

First, the Board made clear in *The Boeing Co*, 368 NLRB No. 67 (2019) that it sought to “clarify” how to determine what constitutes an appropriate bargaining unit under *PCC Structural, Inc.*, 365 NLRB No. 160 (2017). The Board in *PCC Structural* overturned *Specialty Healthcare & Rehabilitation Center of Mobile*, 374 NLRB 934 (2011), which was *never controlling* in the *Armour-Globe* context to begin with. Thus, *PCC Structural* – and *Boeing* which clarifies *PCC Structural* – do not govern the *Armour-Globe* analysis. *Warner-Lambert* is and remains the standard, which the Regional Director correctly applied.<sup>12</sup>

The Employer’s citation to one decision from one Region purportedly using the *Boeing* analysis in the *Armour-Globe* context is likely the worst candidate for launching this campaign against well-established Board law. Presumably, if the Employer could locate a more convincing decision, it would have done so. While the Region 16 Decision pays lip service to *Boeing’s* three-step analysis, it does *not in fact apply* the all three steps to its analysis to the petition at

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<sup>12</sup> Further, *Boeing* makes clear that even under *PCC Structural*, a unit need only be *an* appropriate unit, *not the most* appropriate, 368 NLRB No. 67 (citing *PCC Structural*) and, the inquiry into the appropriate unit begins with the petitioned-for unit, and ends if such unit is appropriate. *Id.* (citing *Boeing, Co.*, 337 NLRB 152, 152 (2001).

issue. See *MTM Transit d/b/a Ride Right*, 16-RC-260984, Decision and Direction of Election (July 21, 2020). Rather, in *MTM Transit*, the Regional Director, without explanation, ignored Step 2, which per the Regional Director, asks whether the excluded employees “have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *Id.* (quoting *Boeing*, 368 NLRB No. 67, slip op. at 4 (quoting *PCC Structuralists*, 365 NLRB No. 67, slip op. at 11)).

Instead, the Regional Director analyzed the relevant community of interest under Step 1, which asks whether there is internal community of interest among the proposed unit – the petitioned-for unit and the represented unit it would join. This inquiry mirrors the community of interest properly analyzed in the *Armour-Globe* context under *Warner-Lambert*. Thus, the Regional Director did *not* in fact balance or compare the interests of the petitioned-for-unit against those of the excluded employees – the legal standard the Employer desperately hopes will replace the consistent, uniform Board law. There is no compelling reason to reconsider well-established Board law.

#### IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Request for Review be denied and the Decision of the Regional Director affirmed.

Dated: October 26, 2020

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

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL NO. 7,**

**Petitioner,**

**and**

**KING SOOPERS**

**Employer.**

**Case No. 27-RC-264824**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of October, 2020, Petitioner's Brief in Opposition to Employer's Request for Review of the Regional Director's Decision and Direction of Election was e-filed with the Executive Secretary of the National Labor Relations Board and the Regional Director for Region 27, and served via email on counsel for the Employer, Patrick Scully (pscully@shermanhoward.com) and James Korte (jkorte@shermanhoward.com).

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