

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

**STARBUCKS CORPORATION**

**Employer**

**and**

**Cases 03-RC-282115  
03-RC-282127  
03-RC-282139**

**WORKERS UNITED UPSTATE**

**Petitioner**

**DECISION AND DIRECTION OF ELECTIONS**

Starbucks Corporation (“Starbucks” or “Employer”) is a company headquartered in Seattle, Washington that operates a chain of coffee shops with locations throughout the United States and the world. On August 30, 2021,<sup>1</sup> Workers United Upstate (“Petitioner” or “Union”) filed three representation petitions with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”). Petitioner seeks single-facility elections at three stores in and around Buffalo, New York. The three stores in question are store #7381 located at 933 Elmwood Avenue, Buffalo, New York (“the Elmwood store”); store #59087 located at 5120 Camp Road, Hamburg, New York (“the Hamburg store”); and store #23917 located at 4255 Genesee Street, Cheektowaga, New York (“the Cheektowaga store”).<sup>2</sup> Starbucks contends that a multi-facility unit consisting of 20 stores in and around Buffalo is the smallest appropriate unit.

On six days between September 22 and 30, a hearing officer for the Board conducted a hearing by videoconference, during which the parties were invited to present their positions and supporting evidence. Thereafter, the parties submitted post-hearing briefs. I have duly considered all testimony, evidence, and arguments.

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<sup>1</sup> All dates are in 2021 unless specified.

<sup>2</sup> Petitioner proposes the following unit description for the bargaining units: All full-time and part-time Baristas, Shift Supervisors, and Assistant Store Managers.

The parties disagree as to the supervisory status of Assistant Store Managers. Litigation on this issue has been deferred until after the election because the issue relates to the eligibility or inclusion of a portion of the unit or units involved, which does not significantly impact the size or character of the unit or units.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and hereby affirm them. I further find that the Employer is engaged in commerce within the meaning of the Act; it will effectuate the purposes of the Act to assert jurisdiction; the Petitioner is a labor organization within the meaning of the Act; and a question affecting commerce exists concerning the representation of certain of Starbucks' employees.

Based on the record and consistent with Board law, I find that the Employer has not sustained its burden of demonstrating that the petitioned-for unit must include the 20 stores it seeks. I shall therefore direct elections for the three petitioned-for units.

Lastly, I find that a prompt mail ballot election is appropriate.

### **Positions of the Parties**

Starbucks maintains that the smallest appropriate unit encompasses 20 stores in the "Buffalo market," which it defines as the trade area around the city limits, including the suburbs of Hamburg and Cheektowaga. It argues that the Union has cherry-picked three "random" stores in that area based on the "extent of organizing," which is prohibited under Section 9(c)(5) of the Act. In that regard, it notes that the Union withdrew petitions for two other stores in the Buffalo market, which it argues is evidence that the Union's organizing has not extended beyond the three stores in question.

Starbucks further argues that traditional Board analysis compels a multi-facility unit. It emphasizes the company's detailed and centralized operational protocols, which it contends demonstrate functional integration, eliminate distinctions between stores, and facilitate regular and frequent interchange of employees. It maintains that labor relations are standardized nationally and not controlled by store managers. It notes that employees throughout the market have the same skills and are entitled to the same benefits and wages. Finally, it asserts that the geographic proximity and lack of bargaining history within the Buffalo market support a multi-facility unit.

The Union rejects Starbucks' positions and characterizations. First, it emphasizes the strong single-facility presumption under longstanding Board precedent. It notes that Section 9(b) of the Act specifies that a plant unit is appropriate and cites cases that have applied this principle over the years, including in the retail context. It argues that Starbucks cannot distinguish itself in this regard. Rather, the Union maintains that centralization takes a backseat to other factors in the

context of a retail chain, where such is to be expected. It emphasizes instead that Starbucks' labor relations are largely conducted on a store-by-store basis while interchange of employees is limited and entirely voluntary. It also underscores the independent discretion store managers retain over a host of daily operational matters, including hiring, discipline, assignment of work, and resolution of employee grievances. Lastly, it notes that the geographic spread between the stores, differences in their immediate markets, and lack of bargaining history militate against a multi-facility unit in this case.

### **Summary of Record Evidence**

Starbucks is a multinational corporation that owns and operates coffee shops throughout the world, including nearly 9,000 stores in the United States. It organizes its retail operations in North America into twelve regions headed by regional vice presidents, including the Northeast Region which encompasses the stores at issue here. The Northeast Region is further divided into various administrative districts headed by a district manager.<sup>3</sup> A store manager heads each individual store and reports to one of these district managers. Shift supervisors support and cover for store managers. Some locations also employ an assistant store manager.

#### *Overview of Starbucks Operations in and around Buffalo, New York*

All Starbucks stores in question are owned by the Starbucks Corporation and are not separately incorporated. The three stores that are home to the petitioned-for units are located within three New York municipalities—Buffalo, Cheektowaga, and Hamburg. These stores range from about 8 miles to about 18 miles apart.

Starbucks seeks to include stores in a broader geographic area in a single unit. Specifically, it asks to include all stores in the “Buffalo market,” which Starbucks' Vice President of Operations defined as the trade area around the city limits, including proximate suburbs. The 20 stores in that area collectively employ approximately 400 employees.<sup>4</sup>

Starbucks' Administrative Districts 159 and 362 encompass, but are not coextensive with, the Buffalo market. While District 362 includes only stores in and around Buffalo, District 159 extends into Rochester, about an hour and fifteen-minute drive from downtown

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<sup>3</sup> Starbucks routinely redistricts to balance administrative burdens.

<sup>4</sup> The parties generally refer to Starbucks employees as “partners” consistent with Starbucks' internal nomenclature. I will favor the term “employee” throughout this decision to maintain consistency with the definitions of the Act and the language of Board precedent.

Buffalo. Starbucks does not contend that all stores in District 159 should be included in a multi-facility unit. Rather, it only seeks inclusion of those District 159 stores that fall within the geographic area near Buffalo and exclusion of those that, presumably, Starbucks considers to be within the Rochester market.

Within the Buffalo market, the company operates 20 stores, including one mall-based kiosk, five cafes without drive-thrus, and 14 cafes with drive-thrus. The stores are as far flung as 30 miles apart, although each store is within 15 miles and some are less than 5 miles from at least one other location.

Starbucks has no bargaining history with any of the stores in the Buffalo market.

#### *Store Operations*

Consistency is a touchstone for Starbucks and is sustained by a host of nationwide policies and procedures. All stores are subject to detailed operational plans which aim to ensure a consistent customer experience across locations, down to such granular details as the placement of food in display cases. Decisions about store design, equipment placement, marketing and promotions, store budgets, hours of operation, and contracts with vendors and contractors are made at the district level or above.

Starbucks' products, procurement, and pricing are also consistent across the stores in question. Accordingly, they share a supply logistics network. A distribution center in Rochester serves the "Buffalo market" as well as a region spanning Western, Central, and Upstate New York. A roasting plant in York, Pennsylvania supplies coffee to stores in the Buffalo market and to Starbucks' entire Northeast Region. There is no dispute that store managers play no role in distribution routes or decisions. However, with some regularity, they ask employees to pick-up out-of-stock supplies from another store, usually the closest in proximity.

To support its operations, Starbucks maintains various technologies to assist with supply orders, scheduling, and consistency in stores' application of human resources policies. For example, Starbucks has tools for ordering products and supplies. One such system automatically generates orders for all packaged foods, packaged coffee, merchandise, and gift cards, which cannot be adjusted by the store manager. Another program ensures auto-shipment of certain food and beverage items so the store manager "doesn't have to interact with the order." A third system

manages inventory by suggesting quantities of products not covered by automatic shipments. Store managers can and do revise these suggested quantities.<sup>5</sup>

Technology also supports employee scheduling. Starbucks' witnesses described and demonstrated a program called "the Partner Planning tool" which uses demand forecasts and information about employee availability to generate store schedules. Employees must indicate their availability to work on a standard form. The Partner Planning tool then generates a proposed schedule based on these availabilities and forecasted demand. Starbucks maintains that store managers merely execute the dictates of this tool.

However, the record reflects different facts on the ground as to scheduling. While the Partner Planning tool creates a starting point for schedules, store managers routinely make changes based on the circumstances of their stores. Their job descriptions, the company's employee guide, and witness testimony support the conclusion that store managers have authority to make such changes. The record reflects that managers take dedicated administrative time on Mondays, in part to work on scheduling. Employee witnesses testified that store managers edit schedules for discrepancies and secure additional coverage outside of stated availabilities to account for gaps in coverage, last minute time-off requests, and other availability issues. Store managers have asked them to work outside their stated availabilities. Contrary to Starbucks' representation that schedules are uniformly set three weeks in advance, an employee with firsthand knowledge of her store's practices testified that in the past several years she had received only one week's notice for her schedule. The record therefore reflects that store managers are responsible for developing employees' schedules.

Relatedly, the record shows that store managers are responsible for approving time-off requests, approving overtime, and ensuring the accuracy of timekeeping and payroll records. Starbucks contends that employees simply are not aware of upper-level management's involvement in approving time-off and overtime requests but offered no concrete examples or evidence of that involvement. In contrast, documentary evidence and testimony demonstrate store managers' verbal and electronic approval of time-off requests while the employee guide explicitly states that a store manager must approve overtime. Additionally, though employees must generally make time-off requests three weeks in advance through an electronic system,

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<sup>5</sup> Starbucks maintains that all food and beverage ingredient ordering will be fully automated in the Buffalo market by 2022.

which are then approved by managers, they often need to make requests with less notice. The record reflects that employees bring these requests to their managers, who have authority to approve them and do so in real time. Store managers also make hand-written changes to time-keeping records and likewise review payroll records to ensure accuracy.

The record also demonstrates that store managers assign and direct employees' work. Starbucks maintains that its technology – the “Play Builder” tool – allows managers to input information about employees' availability to generate appropriate work assignments, taking all discretion and judgment out of the process. In practice, the record reflects that store managers either do not use this tool or routinely deviate from its suggestions to build their own choreography. Witnesses testified to never having seen anyone use the tool and that they instead observed managers manually drafting assignments by hand. Other witnesses who have been involved in developing assignments stated that they had rarely or never used the tool. Indeed, a shift supervisor testified to having used the tool perhaps three or four times, stating that the tool fails to account for each store's particular circumstances. Instead, she will meet with the manager to review possible configurations and make assignments based on their knowledge of individual employee's strengths and preferences. Another employee who had worked as a shift supervisor stated that she had never used the tool at all. No evidence exists that anyone has ever been disciplined for failing to use the Play Builder tool.

The record further establishes that store managers broadly handle hiring, orientation and training, evaluations, discipline, and promotions. Starbucks maintains that upper-level management is involved behind the scenes, approving and guiding store managers' decisions in these matters, but offered little specific evidence of this involvement. For example, Starbucks witnesses testified that district managers are supposed to spend a portion of their time visiting stores in their districts. However, employee witnesses testified to rarely seeing them and interacting only briefly on those occasions. While witnesses' rare sightings of district managers may be a coincidence of scheduling, the inference is unavoidable that district managers are not consistent or regular figures in Starbucks stores. Indeed, the district managers who split responsibility for Buffalo market stores oversee too many stores to have enough time for them to be regularly present in each of them.<sup>6</sup> They therefore cannot be directing employees' work or

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<sup>6</sup> The district manager for District 362 oversees 13 stores in and around Buffalo while the District Manager for District 159 oversees 10 stores from around Buffalo to in and around

second-guessing store managers in the general course of business. Instead, the record supports the conclusion that district managers supervise and support store managers by auditing books, reviewing personnel files, setting procedures and expectations, and perhaps giving final approval to store managers' decisions around hiring, discipline, and other store-level matters that require the exercise of discretion by someone present. Inversely, the record is clear that store managers play a meaningful and consistent role in handling matters that require an in-person presence to observe and judge the circumstances.

Hiring is one such example of store managers' personal involvement in a matter that requires presence and discretion. While certain hiring functions take place centrally, the record establishes that store managers handle interviews and therefore evaluate candidates' merits. Interviews take place at the store level and employees are hired for a particular "home store," where they will work their regularly scheduled shifts. A candidate begins the application process, first, by submitting an application through a centralized database, where it is tracked and stored. A centralized human resources office prescreens candidates. Later, the central office will also conduct a background check after a candidate receives a conditional offer and issue a standardized offer letter when the candidate is cleared. The record contains no evidence that these centralized gatekeeping functions are anything but ministerial.

The substance of the hiring process occurs at the store level. Candidates apply to a posting for a specific store. That store's manager then conducts interviews. Ostensibly, a second manager from another store is supposed to be present for an interview but the record contains no specific evidence that this policy is enforced and indeed includes significant testimony that it is not.<sup>7</sup> Witnesses testified that they have been hired following interviews with only one store manager who in fact extended an offer on the spot. While store managers have a set of standard questions to ask, no evidence exists that they are circumscribed in evaluating candidates based on their unique answers. Indeed, the record includes no evidence that a store manager's

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Rochester. A Starbucks witness testified that district managers are supposed to be in their stores 60 to 70 percent of their time. She gave the example that a district manager who oversees 10 stores would visit a given store once every 10 days.

<sup>7</sup> Starbucks maintains that it regularly conducts market-wide hiring fairs, but witnesses testified that such events are rare. Starbucks also notes that it has centralized hiring due to recent staffing shortages caused by COVID-19 by engaging a recruiter for the market. There is no evidence that this practice pre-dates or will survive current labor market challenges.

recommendation to hire a candidate has ever been overridden on the merits of an interview. Rather, the company's interview guide and job descriptions indicate that store managers may exercise independent judgment about hiring.<sup>8</sup>

With respect to orientation and training, Starbucks has developed standardized new hire orientation procedures and training plans, including detailed protocols for the "First Sip" orientation. However, store managers conduct new hire orientations and are responsible for new employee training, which they may delegate to barista trainers. Store managers alone sign-off on a new employee's successful completion of orientation and training requirements. Accordingly, the record reflects that store managers assess a new hire's progress and understanding throughout the process based on standard guidelines. Starbucks provided no concrete evidence of higher-ups' involvement in implementing or evaluating orientation and training at the store level.

Store managers are also the only management on the frontline who regularly observe employees' performance. They therefore conduct evaluations and play a key role in promotions. Witnesses testified to meeting in "one-on-ones" with store managers about their job performance and working with store managers toward desired promotions. To the extent upper-level management is involved behind the scenes, there is no evidence of regular independent investigation into job performance or promotion recommendations. Starbucks' employee guide corroborates this conclusion, providing that employees must contact store managers about promotions and to receive coaching about performance and evaluations. It also specifically provides that store managers decide whether employees' work performance puts them in "good standing" such that they may be promoted. The store managers' job description also specifies these roles, indicating that they must monitor and manage staff development.

Store managers likewise observe and issue discipline. In particular, the responsibility of identifying conduct warranting discipline falls to them. This fact is corroborated by testimony from employees who have received coaching and been disciplined by store managers in real time. Starbucks maintains that a technology program called "Virtual Coach" curtails store manager's independent judgment to ensure that discipline is consistently administered. It is a program that walks store managers through questions to confirm whether observed conduct merits discipline and, if so, the appropriate degree. Starbucks did not provide testimony from

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<sup>8</sup> Similarly, employees seeking to change their "home store" will reach out to the manager of the store to which they wish to transfer.

anyone who actively used the tool. In contrast, employee witnesses, including shift supervisors, testified to not being aware of the program. Moreover, the tool itself specifies that the tool “is intended to complement, not replace, your active assessment and judgment.” So too, store managers’ job descriptions delegate discipline decisions to them.<sup>9</sup> Starbucks notes that, prior to Virtual Coach being introduced in 2019,<sup>10</sup> somewhere between 5 to 12 percent of corrective actions were overturned following employee appeals. Putting aside that such appeals are a subset of the total disciplines that store managers issue, this data demonstrates that, at a minimum, store managers’ decisions on corrective actions remained in effect 88 to 95 percent of the time. Indeed, no record evidence indicates that upper-level managers independently investigate or override store managers’ recommendations regarding disciplines.

Similarly, termination decisions originate with store managers, who observe the conduct and then fill out and deliver notices of separation. While employee witnesses did not have personal knowledge of what might happen behind the scenes, Starbucks also did not provide specific examples of how upper-level management is involved. The record therefore supports the conclusion that managers’ recommendations are effectively and regularly followed.

Starbucks has systems in place through which employees may affirmatively seek input on labor relations matters from outside the store. For example, Starbucks has a human resources hotline which employees may call to raise complaints, concerns, and questions. Starbucks maintains that those answering the calls adhere to scripts and triage protocols by, for example, sending harassment and ethics inquiries to a Business and Ethics Compliance team or human resources calls to the Partner Relations team. In practice, however, store managers handle most on-the-ground concerns. One witness testified to an incident in which she was assaulted by a vendor and called the Partner Resources hotline, which in turn directed her to raise the issue with her store manager. Other witnesses uniformly testified to not using the centralized resources but having store managers handle disputes and questions. One store manager even has a box which only he can open for employees to submit questions or raise problems. These anecdotes are consistent with documentary evidence, including the employee guide and store manager’s job

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<sup>9</sup> Although Starbucks’ witness testified that a store manager could be subject to discipline for failing to use Virtual Coach, there is no specific evidence of this having happened and other documentary evidence and testimony call this representation into question.

<sup>10</sup> Starbucks represented that it does not have more recent data for the timeframe after it introduced the Virtual Coach.

description, which set forth store managers as the point-people for resolving concerns, complaints, and conflicts.

*Employee Skills, Functions, and Working Conditions*

Little dispute exists that skills, wages, and benefits are generally the same among Starbucks employees. Baristas and shift supervisors across stores sell and prepare identical products, requiring a common skillset. Their wages and benefits are likewise the same. For example, the starting wage for a barista in the Buffalo market was \$15.97 as of October 3. All employees are paid weekly via direct deposit or check on Fridays and receive wage increases at the same time annually. Starbucks determines uniform increases for those with less and greater than three years' experience. Employees' benefits are also the same nationally. They receive the same vacation, time-off, and family leave benefits; health, dental, vision, life, and disability insurances; stock grants; investment and 401(k) plans; COVID-19 benefits; and free coffee and food while working.

Employees are also subject to the same national personnel policies and operating procedures. These procedures govern a range of functions, including opening the store, clocking in and out, stocking and displaying merchandise, placing and closing transactions, and preparing food and drinks.

However, functions and working conditions vary between stores in other respects. For example, the record shows that stores vary in their setups, services, and operating hours. The Cheektowaga and Hamburg stores operate cafés with drive-thrus, while the Elmwood store only operates a café. In the Buffalo market, 14 stores are cafés with drive-thrus, five are café only, and one is a mall kiosk. Kiosks, full café and drive-thrus, and café-only locations necessitate different lay-outs, sets of responsibilities, and operational considerations.

Likewise, the three stores in question – as with the stores throughout the Buffalo market – have different operating hours based on the needs of its location. Starbucks sets these hours, and store managers generally lack authority to change them, except for weather-related exigencies. For example, a store in the Buffalo market serving primarily downtown customers closes earlier in the day than the airport store, while the mall kiosk has more abbreviated hours than any other store in the area. Employees for each location therefore have different shifts.

### *Employee Interchange*

Employees in the Buffalo market are hired by and assigned to a “home store,” where they are generally interviewed, oriented, and trained. However, they can and do work shifts at other stores. The record evidence demonstrates that this interchange is typically voluntary, a prelude to a permanent transfer, or related to such extenuating circumstances as new store openings or temporary store closures.

Starbucks places significant emphasis on its “culture” of interchange. It maintains that it expects employees to work for other locations whenever necessary. Indeed, the form employees fill out to indicate their availability to work states: “[y]ou could also be asked to work at another location to meet the needs of the business or to attain your requested hours.” Its witnesses testified that the culture is such that employees would not decline to work at another location if asked and could not provide an example of employees being disciplined for declining to work elsewhere. It notes that employees share an informal group chat within the Buffalo market that the employees created primarily to obtain coverage for their shifts. Starbucks witnesses further testified to transferring employees to other locations to staff new store openings or to provide hours to employees whose stores are undergoing renovations. In contrast, the Union’s witnesses uniformly testified to rarely working elsewhere and to regularly or always declining shifts at other locations without consequence. The Union therefore emphasizes that taking shifts outside a home store is voluntary. One witness from the Elmwood store noted that a significant majority of employees there do not have cars, making it nearly impossible to work elsewhere. She and other witnesses testified to first asking colleagues at their home store if they needed to swap a shift, perhaps checking with the group chat if that failed, and approaching the store manager as a next step. They noted that, during store closures, they were given the option of taking vacation time or unpaid leave rather than working elsewhere.

Starbucks provided data about employees working shifts other than at their home stores.<sup>11</sup> This data provides compelling detail about the nature of interchange at the petitioned-for stores and throughout the Buffalo market. I note, however, one important proviso. The FY

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<sup>11</sup> I do not rely on public statements that organizers have made on Twitter or the press as dispositive of interchange. First, these statements were not subject to cross examination and therefore should be afforded little weight. Second, better evidence exists to quantify the degree and characteristics of employee interchange, including data and testimony.

2020 numbers reflect the extenuating circumstances of the new COVID-19 pandemic during which stores were closed temporarily. Those with drive thrus, such as the Cheektowaga store, were able to reopen more quickly than stores without drive thrus, such as the Elmwood store. Accordingly, although I have considered all statistics, I give greater weight to the statistics for 2021, when operations returned to relative normalcy.

Starbucks highlights the following statistics from its datasets:

- Throughout the Buffalo market, 45.5 percent of employees, or 392, worked at least one shift at another store in fiscal year (“FY”) 2021 and 40.9 percent, or 269, did so in FY 2020.
- Throughout the Buffalo market, stores recorded 32,771 “borrowed” hours<sup>12</sup> for the two-year fiscal periods.
- Each store in the Buffalo market borrowed an average of 836 hours in FY 2020 and 927 hours in FY 2021, relative to employees’ average of 1,144 hours annually.
- Each store in the Buffalo market borrowed an average of 151 shifts in FY 2020 and 178.8 shifts in FY 2021, relative to employees’ average of 108.44 shifts annually.
- Throughout the Buffalo market, there was the equivalent of one borrowed employee always working a part-time schedule in every store in FY 2021 and FY 2020.

The Union highlights data for the three petitioned-for stores as providing greater context and specificity regarding interchange.

At the Elmwood store:

- In FY 2021, 27.5 percent of employees (11 out of 40) worked at least one shift at another store. In FY 2020, 51.4 percent did (19 out of 37).
- In FY 2021, employees from other stores worked 7.1 percent of the shifts or 5 percent of hours scheduled for the Elmwood store. In FY 2020, they worked 3.5 percent of the shifts and 3.6 percent of the hours scheduled.

At the Cheektowaga store:

- In FY 2021, 23.9 percent of employees (11 out of 46) worked shifts at another store, and in FY 2020, 30.8 percent (12 out of 39) did.

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<sup>12</sup> “Borrowed” hours are hours worked by an employee in a store other than their currently designated home store.

- In FY 2021, employees from other stores worked 4.4 percent of the shifts or 3.8 percent of the scheduled hours. In FY 2020, employees from other stores worked 0.75 percent of the shifts and 0.8 percent of the hours.

The Hamburg store is an outlier in the data regarding “borrowed” employees. The data shows that:

- In FY 2021, 81 percent of employees, or 34 out of 42, worked at another store in FY 2021.
- In FY 2021, employees from other stores worked 3.4 percent of the shifts or 2.9 percent of the hours at the Hamburg store.

This outlier data reflects that the Hamburg store opened mid-way through 2021. Starbucks’ practice is to fully staff new stores with experienced employees initially, with many of them eventually transferring permanently to the new location. The data for the Hamburg store therefore reflects an intermediate step to a permanent reshuffling of employees and not necessarily an ongoing or typical dynamic.

The data and testimony do not clarify whether or when home store designations were changed for employees transferred to Hamburg or other new locations. The -Starbucks’ witness who prepared the data conceded as much. The Hamburg store data is therefore not representative of a typical situation for Starbucks stores in the Buffalo market, nor even for the Hamburg store going forward. Indeed, by the time the petition was filed for this store, there had been no borrowed employees at the location in the prior four months. I find, therefore, that the data of the other two stores give a more reliable indication of typical interchange because they are the product of a more stable and permanent situation.

The Union notes that, while the data shows that employees sometimes work at stores other than their home store, over 95% of hours at each petitioned-for store were worked by employees dedicated to that store. It presented an analysis of employee shifts for the three stores to corroborate this assertion. The schedules indicate that the three stores only minimally borrowed workers. In most cases, schedules were filled completely with home-store employees and always staffed by at least 93 percent of home-store employees. The Union points out that most deviations from 100 percent home-store staffing reflect new hires being brought in for training purposes. It further notes that, throughout the period, there was little turnover at the three petitioned-for stores, such that the same core groups worked continuously at each store.

## **Analysis and Decision**

### *Applicable Standard and Analytical Framework*

The Board has long held that a petitioned-for single-facility unit is presumptively appropriate unless it has been so effectively merged or is so functionally integrated with other facilities that it has lost its separate identity. *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631 (1962). The party contesting a single-facility unit bears a “heavy burden of overcoming the presumption.” *Sutter West Bay Hosps.*, 357 NLRB 197, 200 (2011).

To determine whether the single-facility presumption has been rebutted, the Board examines: (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) bargaining history, if any exists. *See, e.g., Trane*, 339 NLRB 866, 867 (2003); *J & L Plate, Inc.*, 310 NLRB 429, 429 (1993). These same factors apply in the retail chain setting. *See, e.g., Red Lobster*, 300 NLRB 908, 912 (1990); *Foodland Of Ravenswood*, 323 NLRB 665, 666 (1997).

Nearly sixty years ago, in *Sav-On Drugs*, the Board abandoned its prior general policy in the retail chain context of making unit determinations coextensive with the employer’s administrative division or the involved geographic area. 138 NLRB 1032 (1962); *accord Frisch’s Big Boy Ill-Mar, Inc.*, 147 NLRB 551 (1964). The Board decided that it would “apply to retail chain operations the same unit policy that it applies to multi-plant enterprises in general, that is . . . in the light of all the relevant circumstances of the particular case.” *Frisch’s Big Boy*, 147 NLRB at 551-52.

The Board expanded upon this policy in *Haag Drug*, stating, “Our experience has led us to conclude that a single store in a retail chain, like single locations in multilocation enterprises in other industries, is *presumptively* an appropriate unit for bargaining.” 169 NLRB 877, 877 (1968) (emphasis in original). It elaborated:

Absent a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity, the employees’ ‘fullest freedom’ is maximized, we believe, by treating the employees in a single store . . . as normally constituting an appropriate unit for collective bargaining purposes. *Id.* at 877.

However, as in other contexts, the single-facility presumption is rebuttable. The Board explained:

...(W)here an individual store lacks meaningful identity as a self-contained economic unit, or the actual day-to-day supervision is done solely by central office officials, or where there is substantial employee interchange destructive of homogeneity, these circumstances militate against the appropriateness of a single-store unit. *Id.* at 879.

Here, Starbucks has failed to carry its burden that the unit must consist, at a minimum, of the 20 stores in the Buffalo market. In so finding, I note first that the unit sought by a petitioner is always a relevant consideration. *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994). “Although other combinations of employees here may also constitute an appropriate unit,” the issue is only whether the employees at each petitioned-for store “alone constitute *an* appropriate unit.” *Foodland Of Ravenswood*, 323 NLRB at 666. “There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the most appropriate unit; the Act only requires that the unit be ‘appropriate.’” *Id.* (quoting *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950)); *see also Haag Drug*, 169 NLRB at 877 (“It is elementary that more than one unit may be appropriate among the employees of a particular enterprise.”).<sup>13</sup> The record in this case supports the conclusion that the units requested are individually appropriate.

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<sup>13</sup> This point is relevant to Starbucks’ characterization of the Union’s public efforts to organize the entire Buffalo market as a tacit admission that the only appropriate unit encompasses the full area. It may well be true that the entire market is an appropriate unit, but this does not compel a finding that single store units are inappropriate. Contrary to Starbucks’ contention, Section 9(c)(5) of the Act does not prohibit the Union’s apparent approach of first organizing individual stores in the Buffalo area. The cases Starbucks cite are distinguishable. All involve situations in which a union arbitrarily attempted to exclude from its bargaining unit certain employees within a single facility, not employees of separate facilities. *See NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442 (1965); *Lundy Packing Co.*, 68 F.3d 1577, 1580-83 (4th Cir. 1995); *May Dept. Stores Co. v. NLRB*, 454 F.2d 148, 150-51 (9th Cir. 1972). The Board examines multiple factors for assessing the appropriateness of a single-facility unit for a multi-facility employer. *See, e.g., Trane*, 339 NLRB at 867; *J & L Plate, Inc.*, 310 NLRB at 429. The presumption favoring a single-facility unit simply recognizes that organizing a single facility is presumptively less arbitrary than organizing only select employees performing similar work at the same location. An employer satisfies its burden of overcoming the single facility presumption when, in essence, it demonstrates that a single-facility unit is nevertheless arbitrary under the Board’s multi-factor analysis. The remaining analysis of this section addresses that question and answers Starbucks’ Section 9(c)(5) concern.

### *Centralization of Operations*

Certainly, Starbucks operates a highly centralized retail chain operation. Company leadership takes great pride in executing a standardized experience across its locations. Starbucks relies heavily on its centralized operating procedures, including distribution channels, store design, and product offerings, placement, marketing, and promotions, as evidence of functional integration.

However, the Board has long recognized that it “is common in retail chain operations, and particularly in food chains, [for there to be] a considerable degree of centralized administration in the functioning of ... stores.” *Angeli’s Super Valu*, 197 NLRB 85, 85 (1972). It has noted that, “though chainwide uniformity may be advantageous to the employer administratively, it is not a sufficient reason in itself for denying the right of a separate, homogeneous group of employees, possessing a clear community of interest, to express their wishes concerning collective representation.” *Haag Drug*, 169 NLRB at 878. Therefore, while this evidence of centralized operations is noted, such a circumstance is not considered a primary factor in the consideration of single-store units in this industry. *Id.*

I find that, in this case, the stores’ standardization is outweighed by other evidence of local autonomy in operations and labor relations.

### *Central Control Over Daily Operations and Labor Relations, Including the Extent of Local Autonomy*

The Board considers evidence of local autonomy in daily operations and labor relations to be key considerations in assessing the appropriateness of single-store units in retail chain operations. For example, in *Haag Drug*, the Board found that one of 11 restaurants operated by an employer in a geographic area was an appropriate unit despite a “high degree of centralized administration,” including central profit-and-loss records, payroll functions, and chainwide handling of purchasing, vendor payments, and merchandising which bore “no direct relation to the employees’ day-to-day work and employee interests in the conditions of their employment.” 169 NLRB at 877-79. The Board explained:

More significant is whether or not the employees perform their day-to-day work under the immediate supervision of a local store manager who is involved in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems. It is in this framework that the community of interest of the employees in a single store takes on significance, for

the handling of the day-to-day problems has relevance for all the employees in the store, but not necessarily for employees of the other stores. *Id.* at 878.

The evidence in this case demonstrates that store managers exercise discretion over many daily operational and labor relations matters. They make schedules, secure coverage outside of employees' stated availabilities, and make work assignments based on their independent judgment of employees' preferences and strengths. They interview job applicants and effectively recommend them for hire, conduct orientations and trainings, and issue or effectively recommend discipline and termination. They observe employees' performance, evaluate them, play a central role in promotions, and mediate daily grievances. While employee disciplines are occasionally overturned on appeal, store managers' decisions generally prevail without external input. The record contains no examples of district managers conducting independent investigations of disciplines, evaluations, or grievances,<sup>14</sup> nor that they participate in interviews.<sup>15</sup> District managers are simply not present in any individual store with enough frequency to serve as supervisory eyes and ears.<sup>16</sup> Accordingly, I find that Starbucks' store

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<sup>14</sup> *Red Lobster*, 300 NLRB at 911 (noting importance of independent investigation by upper-level management on matters such as discharges).

<sup>15</sup> There is also no evidence that a second store manager from another location regularly conducts interviews.

<sup>16</sup> *Red Lobster*, 300 NLRB at 908, fn.4 (finding local autonomy in case where upper level supervisors were present in stores for a full day about once each week and possibly also on store managers' days off in part because "there is insufficient staffing for persons in these two positions to be present in all restaurants at all times"); *Renzetti's Mkt., Inc.*, 238 NLRB 174, 175-76 (1978) (emphasizing that daily supervisor is "better able to comment on the job performance of employees over whom he has constant supervision").

managers are vested with significant autonomy in handling a range of operational and labor relations matters,<sup>17</sup> notwithstanding the existence of centralized policies and procedures.<sup>18</sup>

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<sup>17</sup> *Cargill, Inc.*, 336 NLRB 1114, 1114 (2001) (finding local autonomy when supervisors make assignments, supervise work, schedule maintenance inspections, impose discipline, handle initial employee complaints, and schedule vacations); *Eschenbach-Boysa Co.*, 268 NLRB 550, 551 (1984) (finding local autonomy where stores managers conduct interviews, hire employees, grant time off, and resolve employee problems and complaints even though upper-level manager “reserves for himself many management prerogatives [because] he necessarily must leave many of the day-to-day decisions . . . to his managers”); *Foodland of Ravenswood*, 323 NLRB at 667 (“[R]esponsibility . . . to hire part-time employees, to schedule and assign employees, to approve overtime, to grant time off, to impose and recommend discipline, to evaluate employees and recommend their promotion, and to resolve and handle formal and informal employee grievances, constitutes significant evidence of local authority over employees’ status such that centralized control over other matters does not overcome the appropriateness of a single-store unit.”); *Renzetti’s Mkt.*, 238 NLRB at 174 (finding merit to petitioner’s contention that such factors as centralized administrative control, uniform fringe benefits, and interdependence of the stores’ operations were outweighed by the “factor which is of chief concern to the employees,” the day-to-day working conditions, including discipline, scheduling, requests for leave, and handling routine grievances); *Bud’s Thrift-T-Wise*, 236 NLRB 1203, 1204 (1978) (finding that, though central labor policies circumscribed authority, store managers exercised autonomy in interviewing, scheduling, granting time-off, adjusting grievances, evaluating employees, and making effective recommendations for hiring, discipline, and firing); *Lipman’s*, 227 NLRB 1436, 1437 (1977) (“With regard to local autonomy, we find that supervisory personnel at the store level exercise considerable authority in personnel matters. While the personnel director makes final decisions as to discipline, schedules vacations, arranges for transfers, and handles grievances brought to her, in our opinion, the store manager and the personnel clerical at the downtown store also have and exercise substantial authority in the personnel area, in that the store manager evaluates and reprimands employees and the personnel clerical interviews, hires, schedules employee shifts, vacations, and overtime, and adjusts grievances.”); *Walgreen Co.*, 198 NLRB 1138, 1138 (1972) (finding store manager’s autonomy significant where district managers visited individual store, at best, monthly and manager had authority for most hiring); *Haag Drug*, 169 NLRB at 879-80 (1968) (stating that store managers are generally autonomous in rating employee performance, hiring and firing, and handling routine grievances).

<sup>18</sup> I have duly considered the cases Starbucks relies upon as support that this factor weighs in favor of a multi-facility unit. These cases are distinguishable. See, e.g., *Budget Rent A Car Systems, Inc.*, 337 NLRB 884, 885 (2002) (significant contact between employees of stores); *Kansas City Coors*, 271 NLRB 1388, 1389-90 (1984) (hearing occurred immediately prior to consolidation into a single facility where employees would regularly work side-by-side); *Big Y Foods, Inc.*, 238 NLRB 860, 861 (1978) (upper-level managers on location multiple times per week, independently resolved employee grievances, evaluated employee performance, and were responsible for interviewing and selecting prospective employees); *Super X Drugs of Ill.*, 233 NLRB 1114, 1115 (1977) (daily contact with district manager who were personally involved in interviewing); *Kirlin’s Inc. of Cent. Ill.*, 227 NLRB 1220 (1977) (upper-level management handled scheduling, hiring, and firing); *Malco Theatres, Inc.*, 222 NLRB 81, 82 (1976) (greater

### *Employee Skills, Functions, and Working Conditions*

No meaningful dispute exists that employees' wages and benefits are uniform throughout the Buffalo market and established by corporate leadership. However, "[w]hile employee benefits have been centrally established, and the uniformity thereof is of some significance, no greater control or uniformity has been shown here than is characteristic of retail chain store operations generally." *Haag Drug*, 169 NLRB at 879.

Likewise, employees' skill sets are largely the same. However, these facts are largely true of all Starbucks' stores, and not just the Buffalo market. Moreover, meaningful differences exist in job functions across the petitioned-for stores (and between stores throughout the market) that support the appropriateness of single facility units. For example, the Cheektowaga and Hamburg stores operate a café with drive-thru, while the Elmwood store operates only a café. These differences yield different layouts, equipment and staffing needs, and job responsibilities.<sup>19</sup> The stores also operate in different contexts, one serving a downtown customer base, another a suburban customer base, and the third airport-area customers. The differing hours of operation for the three stores demonstrate that the characteristics of each location matter to the working conditions of their staff.

I find, therefore, that differences in job functions and working conditions exist at each location, outweighing standardized wages, benefits, and skills that are to be expected in a large retail chain.

### *Employee Interchange*

The record is replete with data on employee interchange. Starbucks emphasizes that its data shows significant interchange throughout the Buffalo market, facilitated by a culture that "expects" employees to work anywhere and an informal group chat among employees to swap shifts. However, the data, as previously discussed, has serious limitations. For example, the datasets do not identify truly temporary transfers versus permanent transfers in which there is a

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degree of interchange and presence of district management on location as frequently as four times per week); *Quality Food Mkts.*, 126 NLRB 349, 350 (1960) (greater interchange and predating presumption that single-store unit is appropriate in retail context).

<sup>19</sup> See *Lipman's*, 227 NLRB at fn.7 (noting that two nearby stores had their own "identity as a distinct economic unit by virtue of the fact that one is known as the downtown store and the other is located in a shopping mall"); *Hot Shoppes, Inc.*, 130 NLRB 138, 141 (1961) (finding operations "functionally distinct" where some workers catered at airport and others served in normal restaurants).

delay in reassigning an employees' "home store" in the system. As a result, employees who permanently transfer to another location may be labeled in the dataset as a "borrowed" employee if their home store has not yet been changed. This may lead to artificial inflation of the number of temporary transfers throughout the market.<sup>20</sup> Similarly, although it is Starbucks' practice to staff new stores fully with experienced employees, the dataset does not account for which of the "borrowed" employees were assigned to a newly opened store. Without this information, the data again may show an artificially high number of "borrowed" workers at any given time.<sup>21</sup>

Other record evidence also calls the degree of interchange into question. For example, witness testimony establishes that interchange is largely voluntary. Employees may chat about swapping shifts amongst themselves and store managers may even seek coverage from other stores. Employee witnesses testified, however, that they routinely decline these requests without repercussions. Even when stores are closed temporarily, the testimony supports the conclusion that employees had the option of taking unpaid or vacation leave rather than temporarily transferring to another location. The Board has noted that voluntary interchange should be afforded less weight in rebutting the single-facility presumption.<sup>22</sup> Similarly, aside from a voluntary, informal group chat, there is little evidence of regular contact between employees of different stores.<sup>23</sup> Starbucks notes that employees regularly pick up out-of-stock supplies from

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<sup>20</sup> *Lipman's*, 227 NLRB at 1438 ("[P]ermanent transfers . . . are not relevant in determining employee interchange.").

<sup>21</sup> *See, e.g., Hilander Foods*, 348 NLRB 1200, 1203 (2006) ("[T]he Board traditionally has not accorded significant weight to staffing new stores temporarily by transferring employees who ultimately return to their permanent store assignments, or to transfers from an existing location to a new facility.") (citations omitted); *Point Pleasant Foodland*, 269 NLRB 353, 354 (1984) ("[I]nterchange has almost exclusively involved the opening of new stores and promotions, and thus is not entitled to much weight in determining the scope of the unit") (citing *Renzetti's Market*, 238 NLRB at 175 fn.8 (1978)).

<sup>22</sup> *New Britain Transp. Co.*, 330 NLRB 397, 398 (1999) ("[V]oluntary interchange is given less weight in determining if employees from different locations share a common identity."); *Red Lobster*, 300 NLRB at 911 (noting that "the significance of that interchange is diminished because the interchange occurs largely as a matter of employee convenience, *i.e., it is voluntary*") (emphasis added).

<sup>23</sup> *Hilander Foods*, 348 NLRB at 1203 ("There is no evidence that . . . employees have had frequent contact with employees at the other facilities as a result of central training, central meetings, community service projects, or the newsletter.").

nearby locations, but this point speaks more to the standardization of the Starbucks enterprise than to any loss of homogeneity of individual stores.<sup>24</sup>

Moreover, it is appropriate to give special consideration to interchange at the three petitioned-for stores, since it is their homogeneity that is the central question in assessing whether they each constitute appropriate units. Analysis of the stores' schedules reflect that each minimally borrowed other stores' employees. They were always staffed by at least 93 percent of home-store employees, most of whom worked continuously at each store throughout the two-year period analyzed. Starbucks' dataset corroborates this analysis. For the Elmwood store, it shows that employees from other stores worked only 7.1 percent of the shifts or 5 percent of hours in FY 2021 and 3.5 percent of the shifts and 3.6 percent of the hours scheduled in FY 2020. Similarly, for the Cheektowaga store, it shows that employees from other area stores worked 4.4 percent of the shifts or 3.8 percent of the scheduled hours in FY 2021 and only 0.75 percent of the shifts and 0.8 percent of the hours for FY 2020. While the data shows that employees from these stores worked with some frequency at other locations, the record evidence supports the conclusion that these were largely voluntary and, at least for FY 2020, likely inflated by the exigencies of the COVID-19 pandemic. Regardless, the 2021 numbers on interchange at the Elmwood and Cheektowaga stores are in line with what the Board has found to be insufficient to rebut the single-facility presumption, with 27.5 percent of Elmwood employees (11 out of 40) and 23.9 percent of employees of the Cheektowaga store (11 out of 46) working shifts at other stores.<sup>25</sup>

As previously noted, the data on the Hamburg store, showing 81 percent of employees working at other stores in FY 2021, is an outlier in the extent of interchange because it was newly opened and initially staffed by experienced employees from other stores. The data for the

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<sup>24</sup> *Eschenbach-Boysa Co.*, 268 NLRB 550 (1984) (finding single store units appropriate notwithstanding that “[o]nce or twice a week, uniforms, small equipment, or food is transferred between the two restaurants to relieve temporary shortages”).

<sup>25</sup> *Compare Cargill, Inc.*, 336 NLRB at 1114 and *Britain Transp.*, 330 NLRB at 398 with *Purolator Courier Corp.*, 265 NLRB 659, 661 (1982) (interchange factor satisfied where 50 percent of the work force worked at other facilities each day and were frequently supervised by managers at other terminals) and *Dayton Transp. Corp.*, 270 NLRB 1114 (1984) (presumption rebutted with 400 to 425 temporary employee interchanges between terminals among a workforce of 87 and the temporary employees were directly supervised by the terminal manager from the point of dispatch).

Hamburg store therefore reflects an intermediate step to permanent reassignments and not a typical dynamic.<sup>26</sup> More telling is that there were no borrowed employees at the Hamburg store in the four months leading up to the filing of the petition and that, once permanently assigned to that location, employees of the Hamburg store worked only 3.4 percent of their shifts or 2.9 percent of their hours at other stores. This data suggests the prevailing pattern now that the location is up and running.

Finally, I note that for the three petitioned-for stores, the same group of employees worked together regularly and consistently with minimal turnover during the period covered by the record data. This dynamic supports a conclusion that each store constitutes a “homogeneous group of employees” which has not been destroyed by the extent of the level of interchange.

Consequently, I find that the interchange factor lends support to the petitioned-for single-facility units.<sup>27</sup>

#### *Distance Between Locations*

The stores in the Buffalo market are not so proximate as to weigh strongly in favor of a larger 20-store unit. They are up to 30 miles apart, although each store is within 15 miles and some are less than 5 miles from at least one other location. The three petitioned-for stores range

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<sup>26</sup> As previously noted, the Board typically gives little weight to transfers during new store openings, especially permanent ones. See *Hilander Foods*, 348 NLRB at 1203; *Point Pleasant Foodland*, 269 NLRB at 354 (citing *Renzetti’s Market*, 238 NLRB at 175 fn.8).

<sup>27</sup> I have carefully considered the cases Starbucks relies upon for support that this factor weighs in favor of a multi-facility unit and find them distinguishable. See, e.g., *Budget Rent A Car Sys.*, 337 NLRB at 884-85 (regular daily contact between employees regarding shared fleet of rental cars and lack of local autonomy of branch managers); *Kirlin’s Inc. of Cent. Ill.*, 227 NLRB 1220, 1220-1221 (1977) (insufficient detail as to frequency of transfers coupled with other factors weighing in favor of multi-facility unit); *Super X Drugs of Ill.*, 233 NLRB at 1115 (transfer rate of up to 64.8 percent and no evidence that such was voluntary); *Gray Drug Stores, Inc.*, 197 NLRB 924, 924-26 (1972) (involuntary transfer rate of 42.8 percent with other factors weighing against single facility units); *McDonald’s*, 192 NLRB 878, 878 (1971) (transfers involuntary); *Twenty-First Century Rest. of Nostrand Ave. Corp.*, 192 NLRB 881, 882 (1971) (involuntary transfers and daily visits by upper-level management); *V.I.M. Jeans*, 271 NLRB 1408, 1408-09 (1984) (daily visits by managers, rotating relief manager, and two locations on same street); *cf Jerry’s Chevrolet*, 344 NLRB 689, 691 (2005) (stores only 1000 feet apart and other factors weighing against single facility unit); *White Castle System, Inc.*, 264 NLRB 267, 269 (1982) (daily visits by upper-level management and prior bargaining history encompassing all stores).

from about 8 miles to about 18 miles apart. The Board has regularly found a multi-facility unit inappropriate in cases involving closer or similar proximities.<sup>28</sup>

### *Bargaining History*

That Starbucks lacks a bargaining history for any store in the Buffalo market is at best a neutral factor. If anything, it lends some support to single facility units. *Lipman's*, 227 NLRB 1436, 1438 (1977) (in finding single store units in retail chain appropriate, emphasizing “the fact that there is no bargaining history for any of these employees, and the fact that no labor organization seeks to represent the employees on a broader basis”).

### **Conclusion**

In light of local autonomy over daily operational and labor matters, the differences in function and workplace conditions of employees, limited and largely voluntary interchange, relative distance between the locations, and lack of bargaining history, I find that Starbucks has failed to sustain its burden to overcome the single-facility presumption.

Therefore, consistent with the precedent set forth herein, the petitioned-for units are appropriate for bargaining. It is hereby ordered that the Elmwood, Cheektowaga, and Hamburg stores individually proceed to an election in the following unit:

Including: All full-time and part-time Baristas, Shift Supervisors, and Assistant Store Managers.

Excluding: All other employees.

### **Method of Elections**

The parties disagree as to whether the three elections at issue should be conducted manually or by mail. The Employer requests manual elections on the basis that they are generally preferable. It further urges the Region to analyze the need for mail ballot elections under *San*

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<sup>28</sup> *Lipman's*, 227 NLRB at fn.7 (1977) (finding stores located only 2 miles apart appropriate single-facility units); *Red Lobster*, 300 NLRB at 908, 912 (finding stores with an average distance of 7 miles apart and all within a 22-mile radius appropriate single-facility units); *New Britain Transp.*, 330 NLRB at 398 (“[G]eographic separation [of 6 to 12 miles], while not determinative, gains significance where, as here, there are other persuasive factors supporting the single-facility unit).

*Diego Gas & Electric*, 325 NLRB 1143 (1998), rather than under the standard articulated *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020) which considers pandemic circumstances. The Union requests mail ballot elections. Both parties agree on the need for neutral locations should the Region order manual elections.

The mechanics of an election, such as date, time, and place, are left to the discretion of the Regional Director. *Ceva Log. U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. *See Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998); NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2 (the determination over the method of election is not an issue subject to litigation).

Although the Board generally favors manual elections, it has a long history of conducting mail ballot when necessary. *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) (“From the earliest days of the Act, the Board has permitted eligible votes in appropriate circumstances to cast their ballots by mail.”). Thus, there are well-established procedures for conducting effective mail ballot elections set forth in the Board’s Casehandling Manual (Part Two), Representation Proceedings, at Section 11336, et seq.

Independent of the pandemic factors articulated in *Aspirus Keweenaw*, I find that mail ballot elections are appropriate here. In *San Diego Gas*, the Board stated that a mail-ballot election may be appropriate:

[W]here eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern.

The second circumstance identified in *San Diego Gas* applies to these elections. Starbucks’ employees at the three stores in question work shifts on different days and times which may vary week to week. Moreover, many, but not all, work part-time schedules. The Board held in *San Diego Gas* that eligible voters are “scattered” under such circumstances.

325 NLRB at fn.7 (“[E]mployees may be deemed to be ‘scattered’ where they . . . work different shifts, or work combinations of full-time and part-time schedules.”). Here, the combination of shift work and the high frequency of part-time schedules means that eligible voters are unlikely to be scheduled to work at a common time on a common day. Even setting an additional date and time for voting in each election may not coincide with all employees’ variable and changeable part-time schedules. *Id.* (“The ‘scattered’ criteria are intended to apply in any situation where all employees cannot be present at the same place at the same time.”) (citing *London’s Farm Dairy*, 323 NLRB No. 186; *Reynolds Wheels Int’l*, 323 NLRB No. 187 (June 20, 1997)). Mail ballot elections are therefore the best method to ensure ready voting access for all employees consistent with Section 7 of the Act.

Other considerations also support this conclusion. The record reflects that many eligible voters do not have cars which may make it difficult to reach an off-site neutral location if one is not available within walking distance to the employee’s home store. The Union favors a mail-ballot election, no reason exists to doubt that the employees would be unable to read or understand the mail ballots, and eligible voters’ addresses should be readily available. *Id.* at 1145. Additionally, though not the basis for the decision to order mail-ballot elections, manual elections would burden the Board’s resources because three separate elections would need to be conducted at multiple off-site locations over a period of several days in order to accommodate the various work schedules of the part-time employees. *Id.* (noting that “efficient and economic use of Board agents is reasonably a concern”).

Accordingly, I find that mail ballot elections are appropriate.

## **DIRECTION OF ELECTIONS**

Elections by secret ballot will be conducted by the undersigned among the employees in the units found appropriate in this Decision on the dates, times, places and manner set forth in the Notices of Election which will issue subsequent to this Decision. Employees will vote on whether they wish to be represented for purposes of collective bargaining by Workers United Upstate.

### **A. Elections Details**

The elections will be conducted by mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining units. At **5:00 p.m. on November 10, 2021**, ballots will be mailed to voters by National Labor Relations Board, Region 3 Office.

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.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 3 office by close of business on **December 8, 2021**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **November 22, 2021** should communicate immediately with the National Labor Relations Board by either calling the Region 3 Office at (716) 551-4931 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Zoom, Skype, WebEx, etc.) at **1:00 p.m. on December 9, 2021**. Each party will be allowed to have an observer attend the virtual ballot count.

## **B. Voting Eligibility**

Eligible to vote are those in the units who were employed during the payroll period ending **October 22, 2021**, 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 elections 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 elections date; and (3) employees who are engaged in an economic strike that began more than 12 months before the elections date and who have been permanently replaced.

## **C. Voter Lists**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Acting 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 for each voting unit. **The Employer must provide a separate voting list for each voting unit.**

The Petitioner waived the full ten days to receive the list. To be timely filed and served, the list must be *received* by the acting regional director and the parties by **November 1, 2021**. 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 lists in the required form, the lists 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 lists must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because each list will be used during the elections, 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 each list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, each list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The lists may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the 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(s) whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve each list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter lists 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 forthcoming in conspicuous places, including all places where notices to employees in the units 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 units 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 elections and copies must remain posted until the end of the elections. 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(s) for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Acting Regional Director. Accordingly, a party is not precluded from filing a request(s) for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the elections. The request(s) for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations. The request(s) for review must further identify by case number(s) which decision(s) directing election the party is asking the Board to review.

A request(s) for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request(s) for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number(s), and follow the detailed instructions. If not E-Filed, the request(s) for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request(s) for review must serve a copy of the request(s) on the other parties and file a copy with the Regional Director. A certificate(s) of service must be filed with the Board together with the request(s) for review.

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

Dated: October 28, 2021

/s/ Nancy Wilson

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NATIONAL LABOR RELATIONS BOARD  
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