BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
THIRTIETH REGION Milwaukee, WI

MILWAUKEE CITY CENTER, LLC[1]

Employer

and **Case 30-UC-419**

UNITE HERE, LOCAL 122, AFL-CIO[2]

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER GRANTING PETITION FOR UNIT CLARIFICATION

I. INTRODUCTION[3]

The Employer operates the Hilton Milwaukee City Center ("Hilton"), which is an upscale hotel located in downtown Milwaukee, Wisconsin. Within the Hilton, the Employer operates bars and restaurants available to both guests and the general public. The Petitioner represents the employees who prepare and serve food and beverages at these establishments. In mid-2005, the Employer entered into a franchise agreement to open and operate a Starbucks coffee shop inside the Hilton. On November 16, 2006, the Petitioner filed a petition to clarify the existing bargaining unit to include the Baristas and Head Baristas working at this Starbucks coffee

---

[1] The name of the Employer was amended at the hearing. The Employer is a subsidiary of the Marcus Corporation.

[2] The name of the Petitioner was amended at the hearing.

[3] Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended ("Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is a corporation engaged in the hotel industry from its Milwaukee, Wisconsin facility. During the past calendar year, a representative period, the Employer realized gross revenues in excess of $500,000 and during the same period, purchased and received goods and materials valued in excess of $5,000 directly from suppliers located outside the State of Wisconsin. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of the Act.

4. The Petitioner is the collective-bargaining representative for all of the employees of the Employer who come within its jurisdiction, including housekeeping, housepersons, lobby porters, night cleaners/turn downs, housekeeping leads, bellpersons, servers, banquet servers, banquet captains, banquet setups, banquet setup supervisors, bartenders, Cabana Cove attendants, extra bartenders, bar porters, beverage supervisors, cocktail servers, cook 1s, cook 2s, cook 3s, stewards, lead stewards, food runners, and expediters. A more detailed list of bargaining unit classifications is contained in Joint Exhibit 1. The most recent, executed collective bargaining agreement is dated June 16, 2002 to June 15, 2006.

5. A timely brief from the Employer has been received and considered.

shop.[4] The issues to be decided are: (1) whether the Baristas and Head Baristas share a sufficient community of interest to be accreted into the existing bargaining unit; and (2) if so, whether the Head Baristas should be excluded as statutory supervisors. Based on a careful review of the evidence, and for the reasons set forth below, I find accretion of both the Barista and Head Barista positions to be appropriate and, therefore, grant the petition for unit clarification.

[4] Following the opening of the Starbucks coffee house, the Union filed a grievance over the inclusion of the Baristas and Head Baristas into the bargaining unit. An arbitration hearing was held, and, in October 2006, the arbitrator declined to apply the Board's traditional unit clarification and accretion analyses. The arbitration transcript and decision were entered into evidence at the hearing as Joint Exhibits 2 and 3, respectively. The Petitioner then filed this petition, and the parties stipulated at the hearing that the petition is timely.

II. FACTS

The Employer is a subsidiary of the Marcus Corporation, which owns several hotels in the Milwaukee metropolitan area, including the Hilton.[5] Prior to 2005, the Employer operated four food and beverage establishments within the Hilton: the Milwaukee ChopHouse, the Miller Time Pub, the Café, and the Cabana Cove. The Employer also offers in-room dining and banquet services at the Hilton. The Milwaukee ChopHouse is a fine-dining establishment with a full bar located in the lower lobby area of the hotel. The Milwaukee ChopHouse is staffed by cooks, food runners, expediters, servers, bartenders, and other wait staff who are members of the bargaining unit. The Miller Time Pub is a more casual lunch and dinner bar/restaurant also located in the lower lobby of the hotel. The bartenders, servers, and other wait staff also are members of the bargaining unit. The Café is a casual breakfast and lunch restaurant also located in the lower lobby area of the hotel.[6] The cooks, servers, and other wait staff are members of the bargaining unit. The Cabana Cove, located on the third floor near the indoor water park, is a casual food and beverage establishment. The attendant working in the Cabana Cove is a member of the bargaining unit. The food and beverages for the in-room dining and the banquets are prepared and served by bargaining unit employees, including bartenders who work at the banquet events.

Starbucks Corporation is a national chain known for its coffee and coffee-related beverages. In around November 2005, the Employer, through the Marcus Corporation, entered into a franchise agreement to open and operate a Starbucks coffee shop within the Hilton.[7] According to the testimony, the Starbucks Corporation imposes strict policies on how franchisees operate their stores, covering where to purchase products and supplies, where and how products should be displayed, how products should be prepared and served, how many people should be working in the store, etc. A district manager for Starbucks Corporation monitors the franchise stores in his/her area to ensure that they are complying with corporate polices and guidelines. The Starbucks' district manager will meet monthly with the store manager(s) of the franchise stores to discuss the store's

[5] The collective bargaining agreement also covers another hotel owned by the Marcus Corporation, but that hotel is not at issue in these proceedings.
[6] The Café also serves dinner on the weekends.
[7] The Employer could not enter the franchise agreement into evidence for confidentiality reasons.

performance. The Starbucks Corporation also uses secret shoppers who visit franchises and rate the quality of the product and service that they received. These ratings are used to evaluate the store's performance.

The employees who work at Starbucks franchises are referred to as Baristas. The Starbucks Corporation requires that all Baristas complete a 40-hour training course and pass a test that examines their ability to prepare and serve Starbucks products according to Starbucks' standards. If an applicant does not successfully pass this test, he/she will receive additional training, but the individual will not be allowed to work until they have passed the test. The Head Baristas complete an additional 40 hours of training that, upon completion, enables them to train and certify other Baristas. The Head Baristas also are responsible for ordering products and supplies for the stores.

At the Starbucks coffee shop at the Hilton, there is one store manager, two Head Baristas, and approximately ten to twelve baristas. The shop is open every day from 6:00 am to 10:00 p.m. There is always either the store manager or one of the Head Baristas in the coffee shop at all times.

III. ANALYSIS

A. *Appropriateness of Accretion*

The first issue is whether the Baristas and Head Baristas should be accreted into the existing bargaining unit. An accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have little or no separate group identity. Thus, the additional employees are properly governed by the larger group's choice of bargaining representative. *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3rd Cir. 1976); *Giant Eagle Markets Co.*, 308 NLRB 206 (1992); *Safeway Stores*, 256 NLRB 918 (1981). The fundamental purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2nd Cir. 1985). However, because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. The Board,

therefore, follows a restrictive policy in applying the accretion doctrine. *Safeway Stores*, *supra*; *The Wackenhut Corp.*, 226 NLRB 1085, 1089 (1976). Accretion is appropriate "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." See *E.I. Dupont De Nemours, Inc.*, 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).

In determining whether the requisite community of interest exists to warrant an accretion, the Board considers many of the same factors relevant to unit determinations in initial representation cases, i.e., integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision, and degree of employee interchange. See *E.I. Du Pont*, *supra*, at 608; *Compact Video Services*, 284 NLRB 117, 119 (1987). In applying these factors, I find for the following reasons that accretion is appropriate in the instant case:

Integration of Operations

The Employer argues that the Starbucks coffee shop must be viewed as an "island" unto itself because it is required, under the terms of the franchise agreement, to adhere to Starbucks' strict corporate policies and guidelines. I reject this argument. According to the Hilton website, the Employer does not treat the Starbucks coffee house as being a separate island. The website advertises the Starbucks coffee house, along with the Milwaukee ChopHouse, the Miller Time Pub, and the Café, as all being part of the "superb dining experience" offered at the hotel. Moreover, guests are encouraged to visit each of the establishments, and they can bill purchases from each of these establishments to their rooms. Finally, I note that certain of the supplies for the Starbucks coffee house (i.e., dairy products) are stored within the hotel in a cooler alongside supplies for the other restaurants.

The Employer further contends that, unlike the other bars and restaurants within the Hilton, the Starbucks coffee shop is a retail establishment that, in addition to serving coffees and pastries, also sells candy, coffee beans, mugs, compact discs, gift cards, and other merchandise to customers. The Starbucks manager who testified was not comfortable putting a percentage on the amount of the shop's revenues coming from these

"retail" sales. She did, however, acknowledge that a substantial portion of the business came from the sale of beverages and pastries. Frankly, I fail to see how these retail sales, which are not a substantial portion of the shop's business, are significant in determining whether accretion is appropriate. Regardless of whether the items are picked up off a sales display or prepared by an employee, the sale is handled in the same manner, meaning that the cashier will ring up the item on the register, the patron will pay for the item, and the sale will be completed. Moreover, there is little distinction between the sale of pre-made pastries purchased from outside suppliers and sold to customers and these "retail" items provided by outside suppliers and sold to customers.[8]

The Employer also notes that, unlike the other establishments within the hotel, most of the customers for the Starbucks coffee shop come in "off-the-street" as opposed to being guests of the hotel.[9] There is no evidence as to why this distinction is significant, particularly since each of the individuals who testified acknowledged that a customer from within the hotel is treated no differently than a customer who comes into the shop "off-the-street."

Centralized Control of Management and Labor Relations

The Employer's human resources department oversees and controls labor relations for the Milwaukee ChopHouse, the Miller Time Pub, the Café, other bargaining unit employees, and the Starbucks' coffee shop. It is involved in decisions regarding the hiring and firing of employees, establishing wages and benefits, and determining other terms and conditions of employment. Every applicant seeking a position at one of these establishments or at other locations in the Hilton fills out one of the Employer's standard applications, and the Employer's human resources department handles those applications. Before the applicant is offered a position, the Employer's human resources department will conduct a background check and handle the drug testing of the applicant. Upon hire, the Employer gives each employee the same employee handbook, regardless of where

[8] The Employer also presented evidence of a shop in another area hotel, not owned or operated by the Employer or the Marcus Corporation, which sells coffee and other food and beverage items that is not part of the bargaining unit representing the food and beverage employees working in the bars and restaurants in that hotel. The evidence presented on this other hotel has no bearing in this case, and it does not alter my conclusion.

[9] The only evidence the Employer offered concerning this point was the results of an informal inquiry the manager conducted last year over a week period in which she asked customers if they were guests of the Hilton. I do not find this evidence sufficient to support the more general proposition that the customers for the Starbucks coffee shop consistently come from outside the Hilton.

they work in the hotel, and those policies apply to every employee. Additionally, time keeping and payroll is handled centrally by the Employer's payroll department, using the same attendance sheets.

The Employer argues that Starbucks' corporate policies and guidelines dictate how a franchise coffee house is to be run, including staffing levels, and there are unspecified consequences if the operator of the franchise does not adhere to those policies and guidelines. While this may be true, it does not change the fact that all of the employees working at the Starbucks coffee shop, including the store manager, work for the Employer, not for Starbucks. The Starbucks Corporation does not influence their wages, hours or other terms or conditions of employment.

Geographic Proximity

The Starbucks coffee house is located within the hotel and approximately 75 feet from the Milwaukee ChopHouse, the Miller Time Pub and the Café, and it is downstairs from the Cabana Cove. Each of these establishments has an entrance in the hotel.

Similarity of Terms and Conditions of Employment

As stated above, every employee in the Hilton receives the same employee handbook. Every employee in the Hilton also has to go through the same security every shift, and each employee goes to the same location to pick up his/her paycheck. The bargaining unit employees, at least those who serve food and beverages, receive an hourly wage but most of their income comes from gratuities. The gratuities depend on a number of factors, such as the particular establishment where the employee works, the occupancy of the hotel, the generosity of the customers, etc. One of the bargaining unit employees working in the Café testified that she receives $4.80 an hour, and anywhere from $25 to $100 a shift in tips. The bargaining unit employees who are eligible also receive health insurance, pension, paid vacation time, and paid sick leave. The Starbucks employees receive a higher hourly wage ($11 an hour for Baristas and $13 an hour for Head Baristas) plus a nominal amount in tips (around $5 a shift). Eligible Starbucks employees also receive health insurance, participation in a 401(k) plan, profit-sharing, and paid vacation time. All of the employees wear some sort of a uniform when working, but the uniforms vary. It is unclear whether there is a changing area.

Similar Skills and Functions

The Baristas and Head Baristas prepare and serve food and beverages to customers. The primary products are coffee and coffee-related beverages (e.g., cappuccinos, espressos, lattes, etc.). The bargaining unit employees working in the other bars and restaurants in the Hilton also primarily prepare and serve food and beverages to customers. The Milwaukee ChopHouse and the Café both have machines that also allow them to serve coffee, cappuccinos, and espressos. The Employer holds the Starbucks employees and the bargaining unit employees to the same general standard of preparing and serving quality products in a fast and friendly manner. Every employee in the hotel is expected to provide excellent customer service.

The Employer, in an effort to draw a distinction, notes the employees working in the Starbucks coffee shop are required to adhere to Starbucks' corporate standards, which includes extensive training on how to use Starbucks' approved equipment, learning how to make the various Starbucks brand beverages, and performing other tasks in accordance with Starbucks' guidelines. The Baristas must take and complete a 40-hour course to learn how to make the various beverages Starbucks sells, and then they must pass an extensive test before being allowed to work. The Head Baristas also must take and complete additional training beyond the normal 40-hour course. However, the record establishes that the bargaining unit employees also receive training, including employees in the Café and the Milwaukee ChopHouse who are trained on, among other tasks, how to use the various machines to make coffee, espressos, cappuccinos, etc. And, similar to the Starbucks employees, the bartenders who work at the bars in the Milwaukee ChopHouse, the Miller Time Pub and the banquet services must be trained and licensed to serve alcohol.[10]

As for the different supplies, the Employer notes that Starbucks requires that its franchisees use certain approved items for cleaning and maintenance of the machines and the shops. However, there is no evidence as

[10] As another distinguishing difference, the Employer asserts that the Starbucks coffee shop only provides counter service, as opposed to the sit-down service provided at the other establishments. The evidence does not support this argument. Both the Milwaukee ChopHouse and the Miller Time Pub have full service bars, and the bartenders who serve patrons at these bars only provide counter service. The same is true of the bartenders who work the banquet events at the hotel.

to how these supplies—outside of being Starbucks approved—are materially different than the supplies used in the other bars and restaurants in the Hilton.

At its core, I find that all of the employees involved, whether they work in the Milwaukee ChopHouse, the Miller Time Pub, the Café, the Cabana Cove, or the Starbucks coffee shop, primarily prepare and serve food and/or beverages to customers.

Physical Contact Among Employees

As stated above, all Hilton employees must go through the same security area. They also all pick up their paychecks at the same location within the hotel. They also use the same cafeteria. One of the witnesses who is a bargaining unit employee working in the Café testified that she frequently talks with employees of the Starbucks coffee shop while in this cafeteria. Additionally, the Employer periodically has "rallies" and other employee-appreciation events, which the Starbucks employees attend along with the bargaining unit employees.

Collective Bargaining History

The Petitioner has been the bargaining representative of the employees in the Employer's food and beverage division for several decades. In the past, when the Employer opened a new establishment, including the Milwaukee ChopHouse, the Miller Time Pub, the Café, and the Cabana Cove, it recognized the food and beverage employees as members of the bargaining unit. From all accounts, this is the first instance in which the Employer has claimed that food and beverage employees in an establishment within the Hilton were not members of the bargaining unit. As stated above, I do not find any reason why these employees of the Starbucks coffee shop should not also be included in the bargaining unit.

Degree of Separate Daily Supervision

There does not appear to be common direct supervision among the bargaining unit employees. The bargaining unit employees are supervised by the manager or supervisor for the particular establishment where they work. The same is true for the Starbucks coffee shop. The Starbucks store manager is Nicole Junkins, who previously had been a manager in the Café. Junkins testified that, as the manager of the Starbucks coffee

shop, she does not supervise the employees from the other bars or restaurants, and the managers of the other bars and restaurants do not supervise the employees working in the Starbucks coffee shop.[11]

Junkins, however, testified that when an applicant applies for employment at the Starbucks coffee shop, she will interview the applicant and rate the applicant. If the applicant meets with her approval, Junkins will have a manager from one of the other bars or restaurants within the Hilton interview and rate the applicant. If both Junkins and the other manager approve of the applicant, the applicant will be referred to the human resources department for a reference check and drug testing. Although Junkins did not testify as to what would happen if the other manager did not approve of the applicant, it is reasonable to assume that the other manager's opinion would carry weight as to whether the applicant would be hired, otherwise the second interview would be unnecessary.

Degree of Employee Interchange

Four of the employees who initially came to work at the Starbucks coffee house came from other establishments within the Hilton, including from bargaining unit positions. However, witnesses testified that they were informed that employees from the Starbucks coffee shop were not allowed to work at other establishments within the Hilton. This edict apparently came from Starbucks, but there was no written document introduced confirming this to be true. Moreover, the witness testimony on this policy was based on hearsay statements, most of it involving multiple layers of hearsay. The bottom line is that there is no evidence that an employee from the Starbucks coffee shop has sought or been denied employment elsewhere in the Hilton. As such, this evidence does not alter my finding that the employees working at the Starbucks coffee shop share a sufficient community of interest for accretion to be appropriate.

The Employer relies upon *E.I. Du Pont De Nemours, Inc.*, supra, and *Westwood Import Company, Inc.*, 251 NLRB 1213, 1220 (1980) to support its position. The Employer notes that in *E.I. Du Pont De Nemours, Inc.*, the Board found that although there were several similarities between the new position and the bargaining

[11] The evidence further indicates that the human resources department is involved in most decisions concerning employees within the Hilton.

unit positions, the employees holding the new position had separate managers and more substantive contacts with non-bargaining unit employees than the bargaining unit employees. The common supervision matter is addressed above. As for the frequency of the contacts with non-bargaining unit employees, the evidence establishes that the bargaining unit employees have more, frequent contact with the non-bargaining unit employees working in the Hilton, such as the other employees working in the restaurants, the employees working in the waterpark, etc., than do the Baristas and Head Baristas working at the Starbucks coffee shop. Therefore, *E.I. Dupont* is not persuasive given the facts in this case.

The Employer notes that in *Westwood Import Company*, the Board also found that although there were certain similarities between the employees working at a new facility and the bargaining unit employees, there was not sufficient functional integration, interchange among employees, and daily supervision for accretion to be appropriate. As stated above, I do not find the same to be true in this case. Moreover, the employees at issue in the *Westwood* case were at a separate facility from the bargaining unit employees. Therefore, *Westwood* is distinguishable as well.

B. *Supervisory Status of Head Baristas*

The second issue is whether the Head Baristas are statutory supervisors and, therefore, excluded from the bargaining unit. Section 2(11) of the Act defines the term supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.,* 348 NLRB No. 37 (September 29, 2006) and two companion cases, *Croft Metals, Inc.,* 348 NLRB No. 38 (September 29, 2006) and *Golden Crest Healthcare Center,* 348 NLRB No. 39 (September 29, 2006). In *Oakwood Healthcare, Inc.*, the Board reaffirmed that the burden of proving supervisory status rests on the party asserting it. See *Oakwood Healthcare, Inc*., 348 NLRB No. 37, slip op. at 9 (citations omitted); and *Golden Crest Healthcare Center*, supra slip op. at 5. The Board further held the party seeking to prove supervisory status must establish

it by a preponderance of the evidence. *Oakwood Healthcare*, supra; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

In *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at 2 (October 31, 2006), the Board specifically held that generalized or conclusory testimony will not satisfy the evidentiary burden. *Id.* (citing *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip, op. at 5 (2006) (recognizing that "purely conclusory evidence is not sufficient to establish supervisory status," and pointing out that the Board "requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); *Sears Roebuck & Co.,* 304 NLRB 193, 193 (1991) (same)). There must be specific evidence regarding a purported supervisor's authority to take or effectively recommend one of the twelve supervisory indicia, as well as the individual's use of independent judgment in making those decisions. *Id.*

In considering whether the individuals at issue possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this Section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp., 273* NLRB 1677, 1688 (1985). Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Id*. at 1689. Indeed, such "minor supervisory duties" should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles,* 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital,* 322 NLRB 1107, 1114 (1997).

With regard to the Section 2(11) criterion "assign," the Board in *Oakwood Healthcare, Inc*. construed the term "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id.* slip op. at 4. The Board reasoned that, "It follows that the decision or effective

recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." *Id.* The Board, however, clarified that, "…choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id.*

The Board also defined the parameters of the term "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided the discretion is both 'responsible'…and carried out with independent judgment." *Oakwood Healthcare, Inc.*, supra at slip op. 7. The Board found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.*

Regardless of which one (or more) of the twelve indicia the purported supervisor possesses, he or she still must exercise independent judgment in taking those actions, and the decisions cannot be merely routine or clerical. In *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." Following the admonitions of the Supreme Court, the Board in *Oakwood Healthcare, Inc.* adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise….professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare, Inc.*, supra slip op. at 7. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or

clerical nature." *Id.* slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted). However, "…the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, Inc., supra slip op. at 9.

The Employer claims the Head Baristas are supervisory because they possess the authority to discipline, assign, and responsibly direct the Baristas. The Head Barista who testified discussed the extent of his authority with regard to these indicia. As for the authority to issue discipline, the Head Barista stated that when a Barista violates the Employer's attendance policy, he is responsible for issuing that individual discipline in accordance with the Employer's established attendance policy. He acknowledged that in exercising this authority he does not deviate from the policy (e.g., a no-call/no-show automatically results in suspension), and he cannot use his discretion to decide whether to issue an employee discipline, which means that there is no independent judgment exercised in making these disciplinary decisions. The Employer offered no specific evidence as to whether the Head Barista had the authority to take or effectively recommend disciplinary action in any other contexts.

As for the authority to assign or responsibly direct, the Head Barista testified that when he arrives for his shift he and the other Head Barista may be responsible for "deploying" the Baristas to one of the three established stations in the coffee shop. The three stations are either the bar station, the cashier station, or the drip coffee/pastries station. Each Barista is trained to work in each station, and the Head Barista offered no explanation as to how he, or the other Head Barista, goes about deploying them to the particular station. The

only testimony he offered on this point is that he may consider how much longer the Barista has on his/her shift in deciding whether to put he/she on the register, but he offered no further explanation. I find that without more substantive evidence as to if or how the Head Baristas use independent judgment in making these decisions, and how they are not merely routine decisions, the Employer has not met its burden of proof. See *Avante at Wilson, Inc.*, supra slip op. at 2.

On the matter of responsible direction, the Head Barista testified that he is not held accountable for his alleged supervisory (in)actions:

> Q Well, has the store manager, has she or he ever said to you if the baristas fail to perform their duties when I'm away that you will suffer some sort of adverse consequences because of that?
> A Yes, there are consequences for not following procedure.
> Q But in terms of if you -- if a -- as a head barista, if the baristas who basically are under you, they fail to perform their duties, would you, as the head barista, suffer any adverse consequences because of their failure to perform their work?
> A I don't know. It's never happened, and there's always consequences for the barista that does not perform their job or if they don't show up for a shift correctly. As far as if that goes up to me because I'm there at the time, I don't know.
> Q Okay. Well, has anyone explained to you whether you would suffer adverse consequences if a barista failed to perform their duties while on your shift?
> A No.

The manager for the Starbucks coffee shop, Nicole Junkins, confirmed this in her testimony:

> HEARING OFFICER SCHERER: Okay. On to disciplining and what the head baristas can do. Are they held accountable by you or the district manager, or the Hotel for that matter, if the baristas working on their shift do something improper, don't do what they're supposed to do, any of those things?
> THE WITNESS: Well, I mean, they're held responsible to the degree -- you know, "What happened?" and "Where were you when this happened?" "Why did this happen?" -- but they would never be punished for something.
> HEARING OFFICER SCHERER: So they're not -- they can't be or won't be disciplined, though, receive any type of warnings that you're aware of?
> THE WITNESS: Not that I'm aware of, no.

Based on this testimony, I find that the Head Baristas do not meet the Board standard for responsible direction because they are not held accountable for their actions concerning the Baristas. Consequently, I conclude that the Employer has not met its burden of proving by a preponderance of the evidence that the Head Baristas are supervisors within the meaning of Section 2(11) of the Act.

IV. ORDER

For the reasons set forth above, I conclude that the Baristas and Head Baristas share a sufficient community of interest with the bargaining unit employees for accretion to be appropriate. Additionally, I find that the evidence does not support a finding that the Head Baristas are statutory supervisors. As a result, it is hereby ordered that the petition for unit clarification is GRANTED.[12]

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 9, 2007.

VI. OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the

National Labor Relations Board web site: www.nlrb.gov.

Signed at Milwaukee, Wisconsin on February 23, 2007.

/s/Irving E. Gottshalk

Irving E. Gottschalk, Regional Director
National Labor Relations Board
Thirtieth Region
310 West Wisconsin Avenue, Suite 700
Milwaukee, Wisconsin 53203

[12] The Decision and Order Granting Unit Clarification herein does not constitute a recertification of the Union.