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

STARBUCKS CORPORATION Employer and **WORKERS UNITED** Petitioner	Case Nos.: **03-RC-289785** **03-RC-289793** **03-RC-289796** **03-RC-289801** **03-RC-289802** **03-RC-289805**

STARBUCKS CORPORATION'S RESPONSE TO PETITIOINER'S MOTION TO PRECLUDE PURSUANT TO 29 C.F.R. § 102.66(d)

Starbucks Corporation ("Starbucks" or "Employer") opposes the Petitioner's Motion to Preclude Starbucks from presenting evidence before the Region in Case Nos. Case 03-RC-289785 (the "Buffalo Matter"); Cases 03-RC-289793, 03-RC-298796, 03-RC-289805 (the "Ithaca Matter"); and Cases 03-RC-289801, 03-RC-289802 (the "Rochester Matter."). The Petitioner's Motion should be denied in order to effectuate the purposes of the National Labor Relations Act ("NLRA"), and to ensure that the Regional Director has an opportunity to consider issues critical to the appropriateness of the petitioned-for units.

I. SUMMARY OF RELEVANT FACTS

All of Starbucks' Statement of Position documents for the Buffalo Matter, Ithaca Matter, and Rochester Matter were complete and ready to be filed and served well in advance of the filing deadline of 12:00 p.m. eastern on Friday, February 11, 2022. The documents were all in the possession of the legal assistant assigned to perform the filing and service by 10:45 a.m. This filing was uniquely complex, in that it involved the simultaneous filing and submission of six statements of position forms and 13 different employee lists covering approximately 1,542 employees, that

were to be filed in three separate matters in accordance with the Board's order consolidating some of the cases for processing. Due to a series of unforeseeable administrative difficulties, filing of the third Statement of Position was not complete in the NLRB's e-filing system until 12:03 p.m. and service was completed a few minutes thereafter.

By noon on February 11, 2022, filing in all three matters was completed or was mere moments from completion, and two attempts had been made to electronically serve the documents for all three matters on Union counsel. More specifically: The Buffalo Statement of Position was filed at 11:15 a.m.; the Ithaca Statement of Position was filed at 11:58 a.m.; the filing process for the Statement of Position in the Rochester Matter began before 12:00 p.m., however, filing was not time- stamped completed by the NLRB's website until 12:03 p.m. At 11:57 a.m., Starbucks' counsel, attempted to serve the Statements of Position for all three matters on the Union by email. When counsel attempted to do so, Microsoft Outlook crashed, and counsel was required to restart the application. Just before noon, counsel attempted to send the complete service email a second time but was again prevented from doing so when Outlook crashed again. Based upon information and belief, counsel states that these two crashes in the Outlook software were occasioned due to the size of the files. Indeed, Starbucks was only able to transmit these files in the same email after creating "zip files" which themselves contained "sub-zip files" that condensed the overall file size and enabled electronic transmission.

Starbucks' counsel worked diligently to ensure filing and service was complete before 12:00 p.m., and when that did not occur, the Employer made every effort to get the Statements of Position served as soon as possible. After the second failed service attempt, counsel restarted Outlook and proceeded to divide the Statement of Position documents into three separate emails, in the hopes that counsel would be able to send emails with smaller a number of attachments

without the Outlook application crashing. This worked. The first set of documents was sent to the Union at 12:05 p.m., the second set was sent to the Union at 12:07 p.m., and the final set was sent to the Union at 12:10 p.m.[1] While counsel was attempting to transmit the emails, another attorney also served the Union with the Statement of Position in the Rochester Matter. That email was sent at 12:06 p.m. At 12:08 p.m., the legal assistant who conducted the filing sent a service email containing materials for all three matters.[2] All filings and service were completed within eight minutes of the deadline, and the Union suffered no prejudice as a result of this miniscule delay.

II. LEGAL ARGUMENT

Section 9 of the Act requires the Board to determine whether the petitioned-for unit is appropriate for collective bargaining prior to an election. 29 U.S.C. § 159(b) ("The Board shall decide in *each case* whether, in order to assure to employees, the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.") (emphasis added). Although Section 102.66(d) provides that a party shall be precluded from raising any issue and presenting evidence or argument if it fails to timely submit its statement of position, this Section does not limit the Regional Director's discretion to direct the receipt of evidence on questions concerning representation matters. 29 C.F.R. § 102.66(b). Thus, the Regional Director is still obligated to determine the appropriateness of the unit based on record evidence, and its statutory obligation should not be diluted by the Union's harsh interpretation of Section 102.66(d).

The Union's assertion that the 12:00 p.m. deadline for service and filing found in Rule 102.66(d) is a "bright line requirement" to which the Regional Director must slavishly adhere

[1] Note: the delays between these emails are a function of security software that scans email attachments before sending is complete.

[2] Again, there were likely a few minutes between when this button was pressed and when the email was received due to security protocols.

Starbucks." Significantly, he noted, **"I'll also point out that the difference of a couple hours could not have prejudiced your client or the regional office. So while I don't have an excuse like a personal emergency, I don't believe the ARD will strike the brief from the record."** Starbucks did not pursue the issue further. Rather, Starbucks' counsel responded in part:

> *Instead of filing a motion to strike, however, I prefer to exercise professi*onal courtesy and not call out the missed deadline. (If for some reason you prefer to argue this point, then I can file the motion and you can defend the timing of the filing of your post-hearing brief.) I think professional courtesies make more sense in recognizing that we are going to be involved in Starbucks-related proceedings for the near future. For example, I'd expect that when we seek consent for extensions and the like due to personal or work issues, we consider professional courtesies instead of rote opposition such as I believe you've shown to date.

Thus, despite having the opportunity to move to strike the Union's post-hearing brief for three petitioned-for stores in Buffalo, Starbucks took no action. See emails at Tab A. Here, the Union appears to now be claiming that while a multi-hour delay is non-prejudicial and should not be cause to strike a brief, a maximum eight minute delay caused by numerous filing snafus (rather than an individual lawyer's work schedule) is prejudicial, and seeks to strike Starbucks' Statements of Position. What is good for the goose is good for the gander.

The maximum eight-minute delay here was a "minor deviation in timely receipt" and the administrative difficulties the Employer encountered while attempting to timely file and serve its Statements of Position, coupled with the lack of prejudice to the Union, constitute good cause to excuse the minimal delay in timely filing and service. Ultimately, were the Region to deny Starbucks the ability to present its arguments, Starbucks would be deprived of its rights under the Act due to a non-prejudicial minor email delay. This would be wholly inconsistent with the purpose of the Act and an improper elevation of technicalities over the substance of the issues raised in these petitions. In this case, the reasons for the delay, the extremely limited length of the delay,

minimizes the authority and discretion possessed by the Regional Director in order to carry out the purposes of the Act. Contrary to the Union's claims, the Regional Director can, and should, assess the particular circumstances at issue to determine whether preclusion is appropriate, just as her fellow Regional Directors have done.

Indeed, just last month, the Regional Director for Region 2 cited an employer's failure to show "good cause to permit [an] untimely filing" as the basis for his conclusion that preclusion properly applied. *The New York Times Company*, 02-RC-280769, Decision and Direction of Election (January 12, 2022). Similarly, the Regional Director for Region 28 recently considered whether an employer established "good cause" for its motion to extend the deadline for filing a statement of position after that deadline had already passed. *See Austin Maintenance & Construction, Inc.*, 28-RC-266617, Decision and Direction of Election, 2021 BL 1251 (January 5, 2021).

The use of a "good cause" standard to assess the application of preclusion under §102.66(d), as opposed to interpreting §102.66(d) as a wholly inflexible and punitively stringent requirement, is consistent both with §102.121 and with the specific purpose behind the adoption of the preclusion rule, which was concerned with the impact of intentional delays and omissions on an opposing party. When the final rule issued, the motivation behind the preclusion requirement was explained as follows:

> Preclusion regarding the statement of position is justified by the rulemaking record and the Board's experience demonstrating that non-petitioning parties sometimes do not share the information solicited by the statement of position form prior to the hearing, or they take shifting positions on the issues at the hearing. Such conduct impedes efforts to reach election agreements or hold orderly hearings. No such problems have been identified with petitions, and so no such change is needed.

Final Rule. Representation – Case Procedures, 79 FR 74308-01, 2014 WL 7007229 (December 15, 2014). In other words, the preclusion rule was implemented to ensure that parties had notice of a one another's positions prior to hearing and did not strategically refuse to share information with one another or the Regions, a tactic which wasted Board resources and party resources.

The Union cites *Brunswick* in support of its claim that the absence of prejudice is irrelevant, but fails to appreciate that, while the Board held that a showing of prejudice was not *required* in order for preclusion to apply, the Board did *not* conclude that the absence of prejudice or the reason for the delay was irrelevant. To the contrary, the Board specifically noted the absence of any explanation from the employer for its failure to serve the Union with its position statement until *three hours and twenty minutes* after the noon deadline, suggesting that the explanation for the delay was relevant and, therefore, that it did not perceive the rule at issue as "bright line requirement" for which the Union advocates herein.

The absence of prejudice is particularly relevant where a reasonable explanation is provided for an extremely brief delay. One example is the Decision and Direction of Election issued by then-Regional Director Sung Ohr in Case 13-RC-164618, wherein the absence of prejudice was a compelling consideration where the difference between a timely filing or service and untimely filing or service is a matter of minutes. In that case, the employer filed a Statement of Position, which the union received at 12:01 p.m. The union argued that the position statement was untimely because it was received after 12:00 p.m. while the employer argued that they "filed at exactly 12 noon and that if it was received by the Union at 12:01 p.m. such minor deviation in timely receipt did not prejudice the Union as the parties had discussed all issues in depth the evening before the position statement was due." After considering the parties' positions, Regional Director Sung Ohr made a decision in line with the dictates of Rule 102.121, which indicates that

all provisions of Section 102 ought to be "liberally construed to effectuate the purposes and provisions of the Act," and determined that "because the Union was not unduly prejudiced by this one minute delay, I accept and have considered the Employer's Statement of Position in my deliberations of this matter." *See Loyola University Chicago*, 13-RC-164618, Decision and Direction of Election, 2015 BL 428530, n. 3.

Like the union in *Loyola*, the Union will not be able to show any prejudice suffered by this miniscule delay. The arguments as to the appropriateness of the petitioned-for units made by Starbucks are well known to the Union – Union counsel represented the Union in the first petitions filed for the Buffalo Market stores in August of 2021 and has been representing the Union across the country since. In each matter, Starbucks has made consistent arguments, namely that Assistant Store Managers should be excluded from the petitioned-for units as Section 2(11) supervisors, and that the petitioned-for unit should be expanded from a single store to an appropriate multilocation unit of the market or district, dependent on the facts. Starbucks has now made these arguments consistently in 50 plus petitions over the course of six months. Thus, that Starbucks pursued these positions in these matters is no surprise, and the Union suffered no prejudice whatsoever by receiving the filings officially confirming Starbucks' position minutes after 12:00 p.m.

Indeed, Union counsel has previously taken the position that a ***multi-hour delay*** in filing its post-hearing brief was non-prejudicial. On December 17, 2021, Union counsel filed the Union's post-hearing brief in *Buffalo II* hours after the "close of business" 5:00 p.m. deadline. Before moving to strike, Starbucks' counsel raised the issue with Union counsel as a matter of professional courtesy. Union counsel explained that he had believed the deadline to be 11:59 p.m., and that his "personal work schedule last week made it so I filed the brief as early as I could on Friday." He explained he had been working on several other Starbucks matters, and other matters unrelated to

Starbucks." Significantly, he noted, **"I'll also point out that the difference of a couple hours could not have prejudiced your client or the regional office. So while I don't have an excuse like a personal emergency, I don't believe the ARD will strike the brief from the record."** Starbucks did not pursue the issue further. Rather, Starbucks' counsel responded in part:

> *Instead of filing a motion to strike, however, I prefer to exercise professi*onal courtesy and not call out the missed deadline. (If for some reason you prefer to argue this point, then I can file the motion and you can defend the timing of the filing of your post-hearing brief.) I think professional courtesies make more sense in recognizing that we are going to be involved in Starbucks-related proceedings for the near future. For example, I'd expect that when we seek consent for extensions and the like due to personal or work issues, we consider professional courtesies instead of rote opposition such as I believe you've shown to date.

Thus, despite having the opportunity to move to strike the Union's post-hearing brief for three petitioned-for stores in Buffalo, Starbucks took no action. See emails at Tab A. Here, the Union appears to now be claiming that while a multi-hour delay is non-prejudicial and should not be cause to strike a brief, a maximum eight minute delay caused by numerous filing snafus (rather than an individual lawyer's work schedule) is prejudicial, and seeks to strike Starbucks' Statements of Position. What is good for the goose is good for the gander.

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and the lack of any prejudice to the Union are all critical factors to be considered in any assessment of whether preclusion should apply, and each weighs heavily against preclusion applying.

Finally, the cases cited by the Union are clearly distinguishable and should not be accorded any weight by the Region. Unlike the instant petitions, the cases relied on by the Petitioner involve employers who entirely failed to comply with the service requirements or were significantly delayed and did not provide a justification or explanation. For instance, in *URS Federal Services Inc*, 365 NLRB No. 1 (2016), the employer completely failed to serve the union a copy of the voter list and did not provide an explanation for its failure to comply with the Board's rules. Similarly, in *Williams-Sonoma*, the employer did not serve its statement of position on the union until a day before the hearing was scheduled to begin. *Williams-Sonoma Direct, Inc*., 265 NLRB No. 13 (2017). Finally, in *Ikea*, the employer served its statement of position late by an hour and 41 minutes *IKEA Distribution Servs., Inc. & United Maint. Technicians of Tejon*, 370 NLRB No. 109 at *2 (2021). These cases are simply inapposite where there is no question that the Employer completed service within minutes of the filing deadline and provided an explanation for its delay.

III. CONCLUSION

For the aforementioned reasons, Starbucks respectfully request that the Petitioner's Motion be denied.

Dated: February 18, 2022

Respectfully submitted,

LITTLER MENDELSON, P.C.

/s/Alan I. Model

Alan I. Model, Esq.
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CERTIFICATE OF SERVICE

I certify that Starbucks Corporation's Response to Union's Motion to Preclude Pursuant to 29 C.F.R. §102.66(d), in Case Nos. **03-RC-289785; 03-RC-289793; 03-RC-289796; 03-RC-289801; 03-RC-289802;** and **03-RC-289805** was electronically filed on February 18, 2022, through the Board's website and also served via email on the following:

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/s/ Alan Model
Alan I. Model
Littler Mendelson, P.C.
Attorneys for Starbucks Corporation

TAB A

From: Model, Alan I.
Sent: Wednesday, December 22, 2021 10:40 AM
To: Ian Hayes <ihayes@cpjglaborlaw.com>
Cc: Hult, Erik <EHult@littler.com>
Subject: RE: Starbucks Buffalo

I hear you Ian. I'm about professional courtesy even if that's pushing back with a client for a few days. Enjoy the holidays too. Alan

Alan I. Model
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AModel@littler.com

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From: Ian Hayes <ihayes@cpjglaborlaw.com>
Sent: Wednesday, December 22, 2021 10:38 AM
To: Model, Alan I. <AModel@littler.com>
Cc: Hult, Erik <EHult@littler.com>
Subject: Re: Starbucks Buffalo

Hi Alan,

I appreciate what you say about the time briefs were due, and the fact that you're willing to move on this time. Obviously I don't want to argue over this. I'll bear it in mind for submissions going forward, and get clarity from the region for both of us if the issue comes up again.

In terms of professional courtesy on extensions, you can probably imagine how I feel personally about the briefing schedule we've had so far. In most things, I'm in favor of reasonable extensions and able to convince my clients to take the same attitude. But I'm sure you can appreciate that sometimes I just get firm directions from my client. That's happened with this case, because in every situation so far, workers have been trying to have the opportunity to cast their votes as soon as possible. I can't promise this, but I'd expect there

will be less of an issue in cases where a vote has already happened. This probably just sounds like a bunch of waffling, but I wanted to try to explain where I'm coming from. I'm sure you've been in a position like mine at some point.

Take care and talk to you soon. If you guys are celebrating, Merry Christmas.

-Ian

Ian Hayes
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He/Him

From: Model, Alan I. <AModel@littler.com>
Sent: Tuesday, December 21, 2021 9:13 PM
To: Ian Hayes <ihayes@cpjglaborlaw.com>
Cc: Hult, Erik <EHult@littler.com>
Subject: RE: Starbucks Buffalo

Ian, the order directed filing by the close of business which the NLRB's rules interpret as 5:00 p.n. That interpretation is consistent with the Region's prior Order for the initial round of Buffalo petitions to which you asked Tom Miller and Tom confirmed 5:00 p.m. (not 11:59 p.m.) was the deadline. The electronic filing rules you forwarded are not applicable. In fact the document you attached repeatedly refers to "close of business" as being distinct from 11:59 p.m.. Thus, your post-hearing brief was in fact filed late.

Instead of filing a motion to strike, however, I prefer to exercise professional courtesy and not call out the missed deadline. (If for some reason you prefer to argue this point, then I can file the motion and you can defend the timing of the filing of your post-hearing brief.) I think professional courtesies make more sense in recognizing that we are going to be involved in Starbucks-related proceedings for the near future. For example, I'd expect that when we seek consent for extensions and the like due to personal or work issues, we consider professional courtesies instead of rote opposition such as I believe you've shown to date. Alan

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From: Ian Hayes <ihayes@cpjglaborlaw.com>
Sent: Tuesday, December 21, 2021 2:56 PM
To: Model, Alan I. <AModel@littler.com>
Cc: Hult, Erik <EHult@littler.com>
Subject: Re: Starbucks Buffalo

Alan,

Thanks for letting me know about being the lead negotiator. I've passed that along.

Regarding the filing of the brief last week, I believe any electronic filing is timely as long as it's filed before midnight on the due date, according to local time. I'm attaching an NLRB document that speaks to that plainly. If you insist on filing a motion over this, my explanation to the ARD will be that my personal work schedule last week made it so I filed the brief as early as I could on Friday. I had been working on several other matters also involving Starbucks, including litigating the RC case hearing in Arizona and filing Objections in the first round of petitions the previous night, as well as other matters, including an oral argument in federal court on Friday. I'll also point out that the difference of a couple hours could not have prejudiced your client or the regional office. So while I don't have an excuse like a personal emergency, I don't believe the ARD will strike the brief from the record.

-Ian

Ian Hayes
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From: Model, Alan I. <AModel@littler.com>
Sent: Tuesday, December 21, 2021 11:46 AM
To: Ian Hayes <ihayes@cpjglaborlaw.com>

Cc: Hult, Erik <EHult@littler.com>
Subject: Starbucks Buffalo

Hi Ian.

For Elmwood, I will be Starbucks' lead negotiator. Please make sure all communications from the union come directly to me. Please let me know who will be the lead negotiator for the union.

As to the second round of Buffalo Market petitions, our post-hearing briefs were due close of business on Friday, December 17. I see that you filed and served the union's post-hearing brief after close of business. As a professional courtesy I am inquiring with you as to the reason for the late filing before I file a motion to strike. Please let me know today so we can assess before we file such motion tonight.

Thanks, Alan

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