

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

STARBUCKS CORPORATION

Employer

and

Cases 03-RC-289785

WORKERS UNITED

Petitioner

**ORDER GRANTING MOTION TO PRECLUDE
AND DENYING MOTION TO BAR EVIDENCE**

On February 1, 2022,¹ Notices of Representation Hearing issued with respect to cases 03-RC-289785, 03-RC-289793, 03-RC-289796, 03-RC-289801, 03-RC-289802, and 03-RC-289805. Each Notice of Representation Hearing stated in pertinent part:

...[P]ursuant to Section 102.63(b) of the Board's Rules and Regulations, Starbucks Corporation must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on February 11, 2022.

On February 8, the undersigned issued an Order Consolidating Cases and Scheduling Hearings, consolidating cases 03-RC-289783, 03-RC-289796, and 03-RC-289805. The same order also consolidated cases 03-RC-289801 and 03-RC-289802. This order did not change the date and time on which the Employer's respective Statements of Position were to be filed. The Employer did not request an extension of time to file its Statements of Position.

On February 11, the Petitioner filed a Motion to Bar Receipt of Evidence Pursuant to 29 C.F.R. § 102.66(c) ("the February 11 motion"), arguing that previous litigation in petitions involving the same parties precludes the Employer's ability to present similar arguments absent a valid offer of proof. The Employer filed an opposition to this motion on February 16.

The timing with respect to the submission of the Employer's Statement of Position is undisputed. On February 11, the Employer timely filed with the Region its Statement of Position in cases 03-RC-289785. The Petitioner received the Employer's Statement of Position for at 12:08 p.m. on February 11.

On February 15, the Employer filed a letter with the Region ("the February 15 letter") conceding it did not serve the Statement of Position on the Petitioner until after the noon deadline. The Employer contended that this delay was minor and caused by issues it experienced in filing and serving its Statements of Position. The Employer argued that "an eight-minute delay is non-

¹ All dates are in 2022.

prejudicial” and asserted that the Region had excused similar delay on the part of the Petitioner in a related case concerning the filing of a post-hearing brief.² The Employer also argued that preclusion was unwarranted because of an allegedly analogous situation set forth in a regional director’s decision in *Loyola University Chicago*, case 13-RC-164618 (issued January 5, 2016). In that case, a regional director excused a one-minute delay in service of a Statement of Position by reasoning that the delay did not prejudice the petitioner in that case.

On February 17, the Petitioner filed a Motion to Preclude Pursuant to 29 C.F.R. § 102.66(d) (“the February 17 motion”). In this motion, the Petitioner argued that the Employer should be prohibited from presenting evidence or otherwise litigating the issues raised by it in the untimely-served Statements of Position.

On February 18, the Employer filed an opposition to the Petitioner’s February 17 motion, largely echoing the sentiments expressed in its February 15 letter to the Region. The Employer added that it had good cause for its failure to timely serve its Statement of Position and indicated that other regional directors had considered whether good cause existed to prevent preclusion of an untimely Statement of Position.

Having carefully considered the matter, I find that the Employer’s failure to timely serve its Statement of Position precludes it from litigating any of the issues raised in its untimely submission. As such, I am granting the Petitioner’s February 17 motion.³

Section 102.66(d) of the Board’s Rules and Regulations, as amended, states as follows regarding the consequences of failing to timely file and serve Statements of Position:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement of Position.

As further set forth in Section 102.63(b)(1), an employer “shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing.” This subsection elaborates that “[t]he Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause.” The Employer made no such request here.

The Employer’s reliance on the decision and direction of election in *Loyola University Chicago* is misplaced. It is well-established that the decisions of regional directors are of no precedential value. Indeed, as noted in *Watkins Security Agency of DC, Inc.*, a regional director’s decision cannot be binding precedent unless the Board “effectively make[s] the regional director’s

² Specifically, the Employer asserts that the Petitioner untimely filed its post-hearing brief in cases 03-RC-285929, 03-RC-285986, and 03-RC-285989 and that this brief was nonetheless accepted and considered by the Region.

³ In so doing, I do not rely on the Petitioner’s arguments regarding the Employer’s allegedly specious positions before the Board or before various regional offices.

decision its own, which would...require[] the Board to *grant* review and then to *adopt* the decision.” 357 NLRB 2337, 2338 (2012) (emphasis in original).⁴

Additionally, the *Loyola University Chicago* decision was issued before the Board rendered its decision in *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016). In the latter case, the involved union timely filed its Statement of Position but did not serve this document on the other parties until 3:20 p.m. on the afternoon it was due. The Board found that the Regional Director “erred by receiving into evidence the Union’s statement of position and by not precluding the Union from raising [a] contract bar issue.” *Id.*, slip op. at 3. The Board specifically noted that “Section 102.66(d) does not require that prejudice to another party be shown to have resulted from a failure to comply with the statement-of-position requirement in order for preclusion to be imposed.” *Id.* Thus, the Employer’s argument in the instant matter that the Petitioner was not prejudiced by its delay in serving its Statements of Position is unpersuasive.⁵

As the Board noted in *URS Federal Services, Inc.*, 365 NLRB No. 1, slip op. at 2 (2016), a case involving a failure to timely serve a voter list, “it is...irrelevant that some other provisions of the Board’s Rules and Regulations afford discretion to regional directors in other areas.” Section 102.63(b)(1) clearly and unambiguously sets forth the timeline for submitting Statements of Position. Section 102.66(d) likewise clearly establishes the consequences for failure to meet this deadline. Indeed, in *URS Federal Services*, the Board specifically noted that in enacting the 2015 amendments to its Rules and Regulations, the Board “deliberately created certain new bright-line provisions and consequences for noncompliance...includ[ing] for the statement of position in 102.66(b) and (d).” *Id.*⁶

Though the Employer asserts that the delay in serving its Statement of Position could be excused for good cause, the Board’s Rules and Regulations do not provide for such in the context of an untimely-submitted Statement of Position. To be sure, other sections of the Rules and Regulations make reference to actions being permitted “upon request of a party showing of good cause.”⁷ Indeed, a regional director may postpone the due date and time for filing of a Statement of Position upon such a showing. However, the Employer made no such request here and the Rules and Regulations make no other allowance for the late filing and service of a Statement of Position,

⁴ For the same reason, the Employer’s reliance on decisions made by regional directors in *The New York Times Company*, case 02-RC-280769 (issued January 12, 2022) and *Austin Maintenance & Construction, Inc.*, 28-RC-288617 (issued January 5, 2021) is misplaced. I note, however, that in both cases, the regional director denied the motions and precluded the moving party from litigating matters contained in the untimely-submitted Statement of Position.

⁵ In subsequent cases, the Board has held that tardy service of a Statement of Position requires the imposition of preclusion. See *Ikea Distribution Services, Inc.*, 370 NLRB No. 109, slip op. at 1 (2021) (preclusion appropriate given delay in service of Statement of Position); and *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip op. at 1 (2017) (“...the Regional Director was correct to preclude the [e]mployer from litigating the appropriateness of the petitioned-for unit...based on the [e]mployer’s failure to timely serve its statement of position on the [p]etitioner...”).

⁶ The Employer’s argument that it is being treated disparately from the Petitioner insofar as the Petitioner was allegedly permitted to file an untimely brief is also unavailing. The filing of post-hearing briefs, unlike the situation presented here, is not governed by Section 102.66(d).

⁷ See, e.g., Section 102.63(a)(1) (regional director can postpone the date of a pre-election hearing upon the showing of good cause); and Section 102.66(h) (hearing officer can extend the deadline for filing post-hearing briefs upon the showing of good cause).

as acknowledged by the Board in *URS Federal Service* in denoting this deadline as a bright line rule.⁸

Given the above, I conclude that the Employer's failure to timely serve its Statement of Position on the Petitioner preclude it from raising arguments, presenting evidence, or otherwise litigating the issues raised in its untimely Statement of Position.

Because this conclusion effectively moots the issues raised in the Petitioner's February 11 motion, I hereby deny that motion as moot.

Dated: February 18, 2022

/s/LINDA M. LESLIE

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⁸ Even assuming that an untimely submission of a Statement of Position is excused for good cause, I would find here that the circumstances raised by the Employer do not constitute good cause. It is well-established that technological glitches or issues on the part of the party submitting or serving a document does not constitute good cause. See, e.g., *American Medical Response of Maricopa LLC et al.*, 2019 WL 2099721 (2019) and *Food Services of America, Inc.*, 2012 WL 2835262 (2012).