

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 24**

WHM ST. THOMAS, INC.,

Employer

and

OUR VIRGIN ISLANDS LABOR UNION,

Case No. 24-RC-8681

Petitioner

and

VIRGIN ISLANDS WORKERS UNION,

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* (hereinafter “the Act”) as amended, a hearing was held on August 25, 2010, before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine the appropriate unit for collective bargaining. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>1</sup>

---

<sup>1</sup> The Employer filed a brief in support of its position that has been duly considered. Upon the entire record in this proceeding the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The record reflects that the employer, WHM St. Thomas, Inc. d/b/a Wyndham Sugar Bay Resort, is a U.S. Virgin Islands corporation with an office and place of business in St. Thomas, U.S.V.I., where it is engaged in the operation of a tourist resort and hotel providing

## I. THE PETITIONED UNIT AND THE PARTIES' POSITIONS

The Employer is a resort-style hotel specializing in providing luxury hotel and spa accommodations to its guests. Our Virgin Islands Labor Union ("Petitioner" or "OVILU"), filed the instant representation petition, on August 11, 2010, seeking to be certified as the exclusive collective bargaining representative of the following unit of food and beverage service employees (the "F&B Employees") of the Employer:

### Included:

All full time and regular part time food and beverage service employees including bartenders, waiters, waitresses, cooks, dishwashers, food preparation employees.

### Excluded:

All other employees, guards, and supervisory personnel as defined by the Act.

Virgin Islands Workers Union ("Intervenor" or "VIWU")<sup>2</sup> was certified on July 28, 2008 in case 24-RC-8601 as the exclusive collective bargaining representative of a unit that includes all full time and regular part time Rooms Division employees of the Employer (hereinafter the "Rooms Division Employees"), and excludes all other

---

food and lodgings, with a volume of business exceeding \$500,000 annually. During the last twelve months, a representative period, it purchased and received goods valued in excess of \$50,000 directly from places located outside St. Thomas, U.S.V.I.

c. Based upon the facts in section b above, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

d. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. I take administrative notice that VIWU is also a labor organization within the meaning of the Act by virtue of their Certification in Case 24-RC-8601.

e. The record also reflects, and I find that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

f. There is no current and effective collective bargaining agreement covering the employees in the unit sought in the petition.

g. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c) (1) and section 2(6) and (7) of the Act.

<sup>2</sup> The Hearing Officer granted VIWU intervention status on the basis of a showing of interest submitted on the day of the hearing.

employees, guards and supervisors as defined in the Act.<sup>3</sup> The Intervenor herein, and the Employer have not concluded negotiations on what would be their first collective-bargaining agreement.

The Employer, contrary to the Petitioner, objected to the scope of the petitioned-for unit, arguing that only a wall-to-wall unit comprised of all Rooms Division employees and Food and Beverage employees (hereinafter F&B) is an appropriate unit.<sup>4</sup> The Petitioner argued, that the petitioned for unit is an appropriate unit and that the Rooms Division employees and the Food and Beverage Division employees have sufficiently distinct duties, and that are not interchangeable, therefore making each employee division sufficiently independent so as to constitute separate appropriate bargaining units.

The Intervenor did not articulate a position on the issue of whether the petitioned-for unit is appropriate. Both the Petitioner and the Intervenor are willing to proceed to an election in whatever unit the Board finds appropriate.

A total of 110 employees work in different classifications and shifts in the Rooms Division, and a total of 144 employees work in different classifications and shifts in the F&B Division.

---

<sup>3</sup> The Certification of Representative issued in Case 24-RC-8601 on July 28, 2008, defining the appropriate unit as including all full time and regular part-time Rooms Division employees, including bellman/drivers, carpenter, drivers, guest services employees, houseperson employees, HVAC technicians, Kids Club attendants, laundry attendants, engineers, lobby attendants, painters, PBX employees, pool attendants, public space employees, and room attendants employed by the Employer at its facility in St. Thomas, USVI. The unit excludes all other employees, guards and supervisors as defined by the Act.

<sup>4</sup> The wall-to-wall unit proposed by the Employer would include all full and regular part time rooms and food and beverage division employees including bellmen, drivers, carpenters, guest service employees, housekeeping employees, HVAC technicians, kids club attendants, laundry attendants, engineers, lobby attendants, painters, PBX employees, pool attendants, public space employees, room attendants, bartenders, servers, cooks, dishwashers, hosts, bussers, stewards, banquet employees and food preparation employees, but exclude all other employees, guards, and supervisors and managers as defined by the National Labor Relations Act.

## **II. THE ISSUE**

Whether the unit of employees identified in the Petition is an appropriate bargaining unit?

## **III. FACTS**

### **A. The Employer's Operations**

The Employer's argument that a wall-to-wall unit including all Rooms Division and F&B Division employees is the appropriate unit is based on changes to its business operation that were implemented on July 1, 2010. On this occasion, the hotel was converted from a European Plan ("EP") (or pay-as-you-go plan) to an All Inclusive Plan ("AIP"). The EP is a business model where guests pay separately for their stay at a hotel room and the food and services they consume therein. The guest stays at the hotel and pays for the room night and taxes. Guests have the choice of whether or not to use the hotel services, including restaurant and bar, and they pay additional charges (in addition to the room night cost) for the food and beverage they consume. Under this business model, the hotel's restaurants and bars are operated as "a la carte" system, where food and beverages are at the guest's request. The F&B Division employees are required to perform a series of administrative duties, including the preparation of bills and processing of payments from guests.

In the AIP plan, the nightly hotel rate includes a charge that pays for most hotel services in advance, including food, beverage, tips, taxes, and other associated charges. This has resulted in an increased use of around 90% of the resort dining and bars, as well as other included services in the AIP plan. In contrast, the regular daily use of the hotel's dining facilities and bars under the EP model hovered around 40% to 50%

because guests have a choice in their selection of food and beverages and the hotel facilities competed with other available providers.

## **B. Changes in Compensation Structure**

As a result of changes to its business model, and the increment in use of dining facilities, the Employer has changed the F&B Division from an “a la carte” service, to a buffet style service. This has changed the way in which F&B Division employees perform their work. It also has eliminated the need to prepare individual checks/bills for dining guests, and eliminated the traditional tips that some F&B Division employees received under the EP business model.

The Employer has instead implemented a comprehensive tip distribution system that takes into account resort occupancy, use of the facilities, and the amount of guest interaction that different resort employees have on a particular day. The tips are paid to these employees from a portion of the revenues earned in a particular day, since under the AIP charges, a portion of the rate goes to tips, which are prepaid. The Employer calls this portion of the nightly rate the “tip pool.” In order to calculate each employee’s share of the “tip pool” collected on a particular day, the Employer assigns points per hour of work to some employees that traditionally have relied on tips as the greater part of their compensation.

Therefore, although the General Manager expressed that eventually all Rooms Division and F&B Division employees may participate in the tip pool, presently only servers, bartenders, and hostesses participate in it. These classifications of employees are employees whose job requires a great deal of guest interaction and greatly impacts guest satisfaction, and they are employee classifications whose compensation traditionally has been predominantly tip based. They are paid a smaller fixed hourly rate

in comparison to other classifications, but in contrast to other employees, received a larger participation in the tip pool for the day.

The record shows that not all F&B Division employees currently participate in the tip pool. For example, cooks, food preparation employees, bussers, back-of-the-house employees, and non-servers, currently do not receive a share in the tip pool. None of the employees in the Rooms Division participate in the tip pool.

The General Manager testified that the company wants to have all Rooms Division and F&B Division employees eventually share in the “tip pool,” with different amounts of point participation per hour for each employee depending on the amount of guest interaction each engages in on a daily basis. The Employer believes a tip pool sharing system that incorporates all employees in both the petitioned-for unit and the unit represented by VIWU will promote efficiency. This is because the tip amounts received by employees will vary depending on the number of employees that share in this same pool of money on a particular. Thus, employees receive the most money in tips when there are fewer employees working on a particular day. The General Manager believes that this system will encourage further integration and cooperation among employees in both the Rooms and the F&B Division, and discourage employees in a collective bargaining agreement from insisting that a set number of employees be assigned to a particular job classification and/or shift.

The Employer also assumes that all employees in all classifications in the two units will want a share in the tip pool and that because there is a finite amount of money, their competing interests for the same pool of money will make bargaining with two different unions that represent two different units of employees extremely difficult, if not, impossible, as both unions and employee units will compete with each other for “a piece

of the same pie.” The Employer concludes that because all employees working at the hotel facility will share a strong community of interest concerning part of their compensation (“the tip pool”), only a wall-to-wall unit is appropriate.<sup>5</sup>

**C. Increased Integration**

As a result of its change from the EP business model to the AIP model, the General Manager stated that the hotel’s operations have become more integrated with increased interchange between employees in the Rooms Division and the F&B Division. The General Manager states that employees in the Rooms Division have to be able to help out in the F&B Division and vice versa, and that this has become more pronounced in light of the fact that the hotel’s occupancy rate during the day has increased, and the use of the hotel’s food and beverage services has also increased.

The General Manager has also testified that the hotel’s new business model now goes beyond just renting out a room per night, but instead promotes and sells to guests an “experience.” According to the Employer, this concept, combined with the changes in proposed compensation for a shared tip pool for all employees, promotes that the hotel cross-utilize employees from one department to another, when hotel occupancy, or events require additional coverage or services in a particular area of the hotel, whether they be employees that work at the reception desk, housekeeping, or restaurants. The General Manager stated that all classifications of employees have, within their job description, a requirement that in addition to their core duties, they are required to perform other tasks as assigned.

---

<sup>5</sup> The Petitioner objected to allowing this testimony in the record as speculative. In addition, the Petitioner states that this is a statement of opinion, and the witness is not testifying as an expert. While there was no gross miscalculation or prejudicial error in allowing the testimony, its probative value is properly weighed in the context herein as merely the opinion of the General Manager.

However, when asked during cross examination to be more specific as to what this meant on a daily basis, the General Manager had to admit that different classifications of employees have primary job duties that other classifications of employees are not trained to perform, and that employees are not being cross-trained to perform the primary job duties of other classifications.

He stated that to help in the guest experience, some employees may be assigned for a short period to assist others in more discrete general tasks, for example, removing bed sheets when rooms need to be prepared for an unpredictable surge of guests, such as when a flight is cancelled, and all guests are referred by the airline to the hotel at the same time. Although only housekeeping employees are trained to get a room ready in a professional manner, and to arrange the room and beds to the requirements of the hotel and housekeeping supervisors, other employees can assist removing bedspreads, sheets and towels, which requires no specialized training. Employees are not trained to substitute and replace each other across Room and F&B Divisions, or even among classifications. The record reflects that only three employees have received training to perform the main duties of other job classifications, and that this was because these employees voluntarily requested training in other classifications as part of the company's policy in employee development and advancement.

#### **IV. LEGAL ANALYSIS**

In *Boeing Co.*, 337 NLRB 152, 153 (2001), the Board described its policy with respect to determining appropriate units as follows:

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the

parties. See, e.g., *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

It should be observed that 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 requires only that the unit be “appropriate,” that is, appropriate to insure to employees in each case “the fullest freedom in exercising the rights guaranteed by this Act.” *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless “an appropriate unit compatible with that requested does not exist.” *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger’s Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, “the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees.” *Bartlett Collins Co.*, *supra*. A petitioner’s desire as to a unit is always a relevant consideration but cannot be dispositive. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); *Airco, Inc.*, 273 NLRB 348 (1984).

In making the determination as to whether the petitioned-for unit is, indeed, appropriate, the Board principally considers whether the petitioned for employees share a community of interest that sets them apart from other employees. In making this determination the Board generally looks at: (1) the degree of functional integration, (2) common supervision, (3) the degree of similar qualifications, training, and skills, (4) interchangeability and contact among employees, (5) work situs, (6) general working conditions, (7) fringe benefits, (8) differences in job functions and amount of working time spent away from the employment or plant situs, and (9) bargaining history. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

Although hotels generally tend to operate a functionally integrated enterprise, the Board takes a case by case approach that looks at factors like distinctions in the skills and functions of particular employee groupings, their separate supervision, the employer's organizational structure, and differences in wages and hours. See *Omni International Hotel*, 283 NLRB 475 (1987). In *Stanford Park Hotel*, 287 NLRB 1291, 1292 (1988), the Board found that a unit of housekeeping and maintenance employees was appropriate because of such factors as: "common supervision of the housekeeping and maintenance employees, the minimal amount of permanent transfers into or out of these two classifications, and the seemingly infrequent nature of temporary interchange with employees in other departments." In that case the Board noted that "the fact that all hotel employees receive the same fringe benefits and are subject to the same personnel policies does not compel a contrary finding." *Stanford Park Hotel*, *supra*. The Board concluded "that such similarities fail to establish that the requested unit is not an appropriate unit for bargaining -- though such facts undoubtedly would show that an overall unit, if sought, also would be an appropriate unit." *Stanford Park Hotel*, *supra*, quoting from *Omni*, *supra*.

Similar cases, as cited in *Stanford Park Hotel*, *supra*, include *Ramada Inn West*, 225 NLRB 1279, 1280 (1976), where the Board observed that "[T]here is not such a high degree of integration of functions and mutuality of interest between the requested housekeeping and maintenance department employees and the other motel employees as to require their combination in a single unit." There, the Board found that the petitioned-for unit of housekeeping and maintenance employees was appropriate, noting in particular the requested employees' separate supervision, lack of interchange with other employees on a regular basis, and "performance of distinctive manual functions in

furtherance of the objectives of their respective departments." *Id.* See also *Holiday Inn --- Troy*, 238 NLRB 1369 (1978), finding a unit of housekeeping employees and the maintenance employee to be an appropriate unit; *Ramada Inns* 221 NLRB 689 (1975), finding a unit of housekeeping and laundry employees, maintenancemen, and bellmen to be an appropriate unit.

In this case, like in *Stanford Park Hotel*, *supra*, and *Omni International Hotel*, *supra*, the Employer has failed to show that the petitioned-for unit is not an appropriate unit and that the only appropriate unit would be a wall-to-wall unit as it contends. Thus, it is noted that while employees in the F&B Division have generally been compensated according to a different wage structure than employees in the Rooms Division, F&B employees have depended heavily on tips as part of their compensation, and this has continued after the hotel's change to an AIP model. Thus, the record showed that the only employees currently participating in the tip pool are employees that had traditionally received most of their compensation from wages. In this respect, the Employer failed to show that it sufficiently changed other aspects of its operations to no longer make a Rooms Division unit appropriate, a unit that is currently represented by VIWU. Employees in the Rooms Division and F&B Division continue to have separate supervision, and their work schedules continue to be assigned by their particular division supervisors. Additionally, there is insufficient evidence of cross-training and interchange of employees to establish that employees have lost their distinct areas of responsibility and core duties.

## **V. CONCLUSION**

For the reasons stated above, I conclude that the petitioned-for unit as clarified in the hearing is an appropriate unit and thus I shall direct an election among the following appropriate unit employees.

### Included:

All full time and regular part time food and beverage service employees including bartenders, waiters and waitresses, cooks, dishwashers, hosts, bussers, stewards, banquet employees, and food preparation employees.

### Excluded:

All other employees, guards, and supervisory personnel as defined by the Act.

There are approximately 144 employees in the appropriate bargaining unit.

## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Our Virgin Islands Labor Union (OVILU), Virgin Islands Workers Union (VIWU) or "Neither". The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any 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 which commenced less than 12 months before the election 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 election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **September 28, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>6</sup> by mail, or by facsimile transmission at (787) 766-5478. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

---

<sup>6</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

## VII. 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, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **October 5, 2010**. The request may be filed electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>7</sup> but may not be filed by facsimile.

**DATED:** September 21, 2010



/s/

---

Luis F. Padilla  
Acting Regional Director, Region 24  
National Labor Relations Board  
La Torre de Plaza, Suite 1002  
525 F.D. Roosevelt Avenue  
San Juan, Puerto Rico 00918-1002  
Website: [www.nlr.gov](http://www.nlr.gov)

H:\R24com\24 R Cases\24-RC-008681\Regional Determination\DDE.24-RC-008681.DDE issued 09-21-10.doc

---

<sup>7</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlr.gov](http://www.nlr.gov).