

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

WALT DISNEY WORLD CO.,
Respondent

and

Case No. 12-CA-25889

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1625,
Charging Party

**RESPONDENT, WALT DISNEY WORLD CO.'S REPLY BRIEF TO GENERAL
COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S BRIEF IN SUPPORT
OF EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent, Walt Disney World Co. (“Disney,” the “Company,” or the “Respondent”), submits its Reply Brief to the General Counsel’s Answering Brief To Respondent’s Exceptions And Brief In Support Of Exceptions To The Decision Of The Administrative Law Judge (“Answering Brief”).¹

I.

INTRODUCTION

The Company sets forth in Section II below its response to arguments made by the General Counsel in the Answering Brief. The company responds only to those arguments that raise additional issues not addressed in Respondent’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge.²

¹ Citations to the Answering Brief are formatted as follows: [A.B.: 1] refers to page 1 of the Answering Brief.

² Perhaps due to insecurity about its position on the merits, the General Counsel argues in the Answering Brief that Section 104.46(j) prohibits the Respondent’s attempt to incorporate into its Brief in Support of Exceptions to the Decision of the Administrative Law Judge (“Respondent’s Brief”) the Statement of Facts from its Post-Hearing Brief to the Administrative Law Judge. In addition to misapplying Section 104.46(j), which prohibits only the “combining” of briefs, the General Counsel gains nothing by seeking to dismiss the Respondent’s arguments by way of a perceived procedural defect—the evidence on which the Respondent relies for its arguments is amply

II.

ARGUMENTS IN RESPONSE TO ANSWERING BRIEF

A. The ALJ Erred In Failing To Find That The Union Waived The Right To Engage In Effects Bargaining

Although the General Counsel correctly notes that the Complaint, as amended, does not allege that the Company violated the Act³ by failing to bargain with the Union⁴ about the effects of the reorganization, the Administrative Law Judge (“ALJ”) nonetheless erred by failing to conclude that the Union *waived* the right to engage in effects bargaining by failing and refusing to respond to the Company’s efforts to engage in effects bargaining.

Where an employer offers to engage in bargaining about the effects of a unilateral decision and the union refuses, the refusal is treated by the Board as a waiver of the right to engage in effects bargaining, and the employer cannot be held liable for failure to bargain about the effects of its unilateral decision, whether or not the Company was obligated to decision bargain. *Noblitt Bros.*, 305 NLRB 329, 139 LRRM 1336, 1338 n. 10; *see also Michigan Ladder Co.*, 286 NLRB 21, 127 LRRM 1092, 1093 (1987) (finding union waiver of effects bargaining even though employer violated the Act by failing to decision-bargain). The Union consistently refused to engage in effects bargaining, despite repeated offers from the Company. [Trans. 614/9-618/15; 433/23-434/3; 504/20-505/10; GC Exh. 4, 5, 7; Resp. Exh. 15].⁵ Accordingly, the Union waived the right to engage in effects bargaining. The logical fallacy in the Board’s position is that it seeks an effects bargaining remedy for its allegations of a decision bargaining violation, a fallacy which the ALJ adopted by issuing his proposed remedy.

described both elsewhere in the Respondent’s Brief and in the numerous other papers that have already been filed in this case.

³ National Labor Relations Act (the “Act”).

⁴ United Food and Commercial Workers Union, Local 1625 is referred to as “Local 1625” or the “Union.”

⁵ Citations to the record are formatted as follows [GC Exh. 1] refers to General Counsel Exhibit 1. The same format is used for exhibits from the Charging Party (“CP”) and the Respondent (“Resp.”). Citations to the Hearing Transcript are formatted as follows: [Trans. 1/2-4] refers to page 1, lines 2 through 4.

B. Record Evidence Established That GSMs Were Supervisors⁶ Under The Act

Record evidence established that GSMs, as they existed both before and after the reorganization, had the authority to assign other employees using independent judgment. Accordingly, GSMs were and remain supervisors under the Act.

Prior to the reorganization, GSMs had the discretion whether to assign Captains and Bartenders to work on a specific function, as well as the number to be assigned. [Trans. 334/4-8, 21-25]. In addition, at a particular function, GSMs had the responsibility, for example, to ensure that housemen set up tables and chairs in appropriate locations. [Trans. 305/5-18]. In other words, GSMs had the authority to assign and direct employees in the performance of their duties. Therefore, prior to the reorganization, GSMs were supervisors under Section 2(11) of the Act.

C. Record Evidence Established That The Duties of GSMs And Captains Overlapped While They Worked A Function

Prior to the reorganization, the duties of Captains and GSMs overlapped during functions in which both classifications were working. For example, former Bartender and Bartender Captain Jeffery Kemp testified that both Captains and GSMs would deal with customer complaints. [Trans. 300/7-11]. Moreover, Kemp testified that even during functions at which Captains were present, managers would perform Captains' duties during "emergency" situations. [Trans. 306/8-19; 308/19-25]. Similarly, John Stafford testified that all of the duties listed in General Counsel Exhibit 12 that both GSMs and Captains performed were performed in unison when both GSMs and Captains were present at a function. [Trans. 339/7-18; GC Exh. 12].

⁶ Under Section 2(11) of the Act, a supervisor is defined as an individual who, among other things, has the authority to "assign . . . 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."

Accordingly, record evidence presented both by the Union and the Company established that the duties of GSMs and Captains overlapped when both classifications were present at a function.

D. The General Counsel's Claim That The Reorganization Was "Driven By Labor Costs" Is Directly Contradicted By The Record

The General Counsel asserts in its Answering Brief that Disney's reorganization decision was "driven by labor costs." [A.B.: 17]. This statement, based on a fragment of a sentence of Ann Williams' testimony, implies that Disney made the reorganization decision to reduce labor costs. The record demonstrates, however, that a desire to reduce labor costs did not motivate, and was not a factor in, the reorganization; in fact, labor costs were projected to increase dramatically as a result of it. [Trans. 601/17-602/22, GC Exh. 15; CP Exh. 1]. General Counsel has willfully misrepresented volumes of record testimony that contradict its claim.

E. The Union Had Advance And Sufficient Notice Of The Reorganization

Record evidence established that the Union had several months' advance notice of the proposed reorganization, yet failed to request decision bargaining about it. Jerry Vincent testified that Julee Jerkovich quoted from the January 2008 Disney Service Basics Proposal ("January DEC") as early as March or April, 2008. [Trans. 430/13-23]. He also testified that he told his superiors, including Phil Bernard and Rosemary Rose, about Jerkovich's quote from the January DEC. [Trans. 499/2-11]. Ann Williams, meanwhile, testified that Rosemary Rose notified Williams in February 2008 that the Union had already obtained a copy of the reorganization plan. [Trans. 594/2-24; 598/8-599/11]. Yet the Union failed to request bargaining about the proposed reorganization until after the May 5, 2008 announcement of the decision. Accordingly, the Union waived the right to bargain about the reorganization.⁷

⁷ A reasonable inference from the evidence is that Jerkovich failed to request decision bargaining as early as February, 2008 because doing so would have exposed her improper possession of the confidential, proprietary

Moreover, the General Counsel's assertion that advance receipt of the January 2008 DEC "certainly would not put the Union on notice that Respondent actually intended to eliminate the three bargaining unit classifications" is disingenuous. [A.B.: 19]. The January DEC expressly proposed eliminating the Captain and Bartender classifications, including all 27 Captain positions (which included the three Bartender Captains) and all 10 Bartender positions. [CP Exh. 1]. Such notice was sufficient to make the Union aware of the Company's plans. *American Buslines, Inc.*, 164 NLRB 1055 (1967); *U.S. Lingerie Corp.*, 170 NLRB 750 (1968). Accordingly, the Union's waived any right it may have had to bargain about the reorganization decision by failing to request decision bargaining prior to May 5, 2008. *Id.*

F. An Investment Of \$8,200,000.00 Constitutes A Major Entrepreneurial Change Regardless of the Employer's Annual Catering Revenues

The General Counsel asserts that the reorganization was not a major entrepreneurial change because the cost of the reorganization was "rather small" when compared to the annual revenues in the catering operations. [A.B.: 27]. However, he fails to cite (and the Respondent has been unable to locate) any authority for the proposition that *First National Maintenance* and its progeny require, that to be exempt from a decision bargaining obligation an entrepreneurial change must represent at least a certain percentage of an employer's annual revenues in order to qualify as entrepreneurial. In any event, in addition to the increase in costs, it is uncontroverted in the record that Disney's decision was entrepreneurial because, among other things, it was designed to significantly improve guest services ratings and, ultimately, profitability. [GC Exh. 15; Trans. 626/18-23]. Accordingly, the General Counsel's assertion that the reorganization was not a major entrepreneurial change is completely without merit.

January 2008 DEC. In light of the testimony of Ann Williams and Jerry Vincent, the Jerkovich testimony upon which the General Counsel relies is unworthy of credence.

G. Alteration Of The Scope Of The Bargaining Unit And Changes In The Terms And Conditions Of Employment Did Not Require The Union's Consent

The General Counsel asserts that an employer may not modify of the scope of the bargaining unit or change the terms and conditions of employment without first obtaining the consent of the union. [A.B.: 29-30]. While these propositions may generally be true, they do not apply if either (1) the employer makes a major entrepreneurial change pursuant to *First National Maintenance*, or (2) the Union waives the right to bargain about such subjects.

As *First National Maintenance* makes clear, an employer may make changes to the scope of the unit and the terms and conditions of employment if such changes are major entrepreneurial changes that are not amenable to resolution through collective bargaining. *See generally First Nat'l Maintenance*, 452 U.S. 666 (1981). Moreover, contrary to the General Counsel's assertions, the Board has found that a union may waive the right to bargain about the modification of terms and conditions of employment by failing to request bargaining over an employer's proposed change. *See Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990), *review denied sub nom. Graphic Communications Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991) (waiver of right to bargain about reclassification of employees where union failed to request bargaining despite learning of employer's plans 5 to 11 days before they were announced to employees).

The General Counsel also argues that the reorganization altered the scope of the unit and was therefore a permissive subject of bargaining, and that permissive bargaining subjects require the consent of the Union before they may be changed. [A.B.: 20]. Nevertheless, Board precedent is clear that a union may waive the right to bargain about a subject whether it is mandatory or permissive. *Acme Markets*, 277 NLRB 1656, 1658 (1986). As argued in the

Respondent's Brief In Support Of Exceptions, the Union waived the right to bargain about the reorganization.

Accordingly, because Disney was permitted under *First National Maintenance* to implement the reorganization without bargaining, and because the Union waived any right it may have had to bargain about the reorganization, Disney was not required to obtain the Union's consent prior to implementing the reorganization.

H. Deferral Is Appropriate Because The CBA Is Not Clear And Unambiguous

The General Counsel asserts that deferral of the Charge to arbitration is not appropriate because the CBA is clear and unambiguous. Record evidence established otherwise, however. For example, Jerry Vincent testified without contradiction that the minimum hours requirement within Article 13 of the CBA conflicts with the Management Rights clause and the "Staffing Guidelines" provision of Addendum B-5. [Trans. 474/9-18; 478/1-8]. In addition, Jerry Vincent also acknowledged that the matrix in Addendum B-5 providing minimum staffing levels for Bartenders conflicts with the "Staffing Guidelines" language that states that "Management reserves the right to staff functions as it deems appropriate," as well as with the Management Rights Article. [Trans. 464/21-465/8; 466/20-467/8]. Accordingly, contrary to the General Counsel's assertion, the CBA is ambiguous, and therefore it would be appropriate for an arbitrator to resolve the ambiguity.

I. The Union's Failure To Clarify The Relevance Of Its Information Requests Absolves The Company Of Any Liability For Failure To Furnish Information

The General Counsel argues that the Company was "on notice of the relevant purpose" of the information requests made by the Union, and therefore the Union was not required to respond to the Company's request for clarification and offer of accommodation. [A.B.: 36]. The General Counsel's argument turns the proper analysis on its head. In fact, it was the *Union's*

responsibility to clarify the relevance of the information it sought once the Company asked for such clarification. *See, e.g., Allegheny Power*, 339 NLRB 585, 173 LRRM 1125 (2003). But the Union failed to respond to the Company's requests for clarification. [Trans. 452/1-18]. The General Counsel cites no authority for the argument that the Union was relieved of its obligation to clarify the relevance of its requests because the Company was "on notice" of the relevant purpose, and there is no record evidence of the "notice" the Company was supposedly on.. That argument therefore must be rejected, and the Company cannot be held liable for failing to furnish information to the Union.

III.

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully requests that the Board vacate the Findings, Conclusions and Recommended Order and Notice of the ALJ and dismiss the Complaint in its entirety.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of August, 2009, a true and correct copy of the above and foregoing has been furnished by U.S. Mail to:

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