CAREN P. SENCER, Bar No. 233488
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: csencer@unioncounsel.net

Attorneys for Petitioner INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 856

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

SAN FRANCISCO ZOOLOGICAL SOCIETY, Employer, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 856, Petitioner.	No. 20-UC-210602 **INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 856'S OPPOSITION TO REQUEST FOR REVIEW OF DECISION AND ORDER CLARIFYING BARGAINING UNIT TO INCLUDE DIETICIAN**

I. INTRODUCTION

Animals eat, and animals at the San Francisco Zoo have their food prepared for them. For many years, this work has been performed by the animal keepers who are part of the bargaining unit represented by Teamsters Local 856. Late last year, the San Francisco Zoological Society ("the Zoo") unilaterally took portions of that work away and gave it to a new position entitled dietician. The work of the dietician is historically within the bargaining unit and should remain there.

In its request for review, the Zoo requests the Board overrule all current accretion case law and re-write the Code of Federal Regulations. Such a request is unwarranted and no portion

of the Regional Director's Decision and Order or the process used to issue the Decision and Order creates grounds for review.

II. THERE IS NO RIGHT TO A HEARING ON A UNIT CLARIFICATION PETITION

Unit Clarification petitions are specifically provided for in section 102.61(d) of the Board's rules and regulations. The following section, 102.63(a), makes clear that a hearing must be held when an RC, RD, or RM petition is filed but no mention is made of a UC. Instead, the processing of UC petitions is addressed in section 102.63(c) which states "the Regional Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing…" There is simply no statutory right to a hearing on a UC petition. This is reinforced through the Case Handling Manual, sections 11490-11498. Specifically, section 11492.1 addresses the methods to be used when investigating the petition and the possibility of a decision without hearing. Section 11494 makes clear that the Regional Director may issue her Decision and Order after an administrative investigation with or without a hearing.

The Zoo asserts that there is prejudicial error based on the failure to hold a hearing but no such right is granted under the law and there is no requirement of "evidence in the record" prior to issuing a decision on a unit clarification petition. (See Request for Review, p. 10).

III. APPLYING *PREMCOR, INC.* WAS APPROPRIATE GIVEN THE FACTS OF THIS CASE

There are multiple situations that a UC petition can be used to address. Here, the classic example of a newly established classification performing the same basic function as the unit employees is the base issue. As discussed in both *Premcor, Inc.*, 333 NLRB 1365 (2001) and *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166 (2001), the employer changing the job title but retaining the same function is not accretion. It is clarifying the existing unit to keep the work in the bargaining unit. In that regard, it is worthy to note that the Zoo does not assert that the work in question was previously performed outside of the bargaining unit and it specifically admits that animal keepers performed food preparation work both before and after the hiring of a dietician (See Employer Appendix, Exhibit 2, page 9).

The Zoo conflates the various tests that can be applied to unit clarification in completely discounting not just *Premcor, Inc.*, 333 NLRB 1365 (2001) but the series of cases that predate *Premcor* in determining the appropriate standard to use in unit clarification cases. *See, i.e. Brockton Taunton Gas Co.*, 174 NLRB 969 (1969). In its view, only a "restrictive policy" should be applied and an "overwhelming community of interest" must be shown between each and every position in the bargaining unit for accretion to be appropriate.

The broader question of the "overwhelming community of interest" standard for accretion cases has no place in the situation presented here. The Zoo has taken work traditionally performed by the bargaining unit and, while keeping some bargaining unit employees in the same position, has added a non-bargaining unit employee to complete a portion of the work.[1] This is *Premcor* on a smaller scale for the animal keepers who remain employed in the commissary. As a result, the appropriate inquiry is whether the work of preparing meals for the animals stays within the unit rather than whether the position of dietician is accreted into the unit.

The *Premcor* line of cases was applied as written; this is not a misapplication of precedent but rather an attempt by the Zoo to eliminate precedent.

IV. THE ALTERNATIVE BASIS OF ACCRETION ANALYSIS WAS CORRECTLY APPLIED

There is no basis for review on the application of accretion analysis as no accretion analysis was necessary. However, if the analysis needed to be applied, the application of the community of interest standards was appropriate. Traditionally, the Board looks to compensation, work hours, supervision, qualifications, skills, training, job functions, location, work contact, integration, interchange, and bargaining history to determine if accretion is appropriate. *See The Sun*, 329 NLRB 854, 857 (1999) *citing Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

[1] With a posted rate of roughly $10 an hour less than an animal keeper and without union protections, it is not surprising that current animal keepers did not apply for the position.

There is no bargaining history as the employer created the new position mid-contract term but the prior history between the employer and the union shows that the work in question was historically performed (and continues to be performed in part) by bargaining unit employees. Because the work continues to be done by animal keepers working along-side the newly created dietician position, there is both work contact and temporary interchange. Integration is demonstrated by the undeniable need to feed animals to keep them alive and the job description of the animal keeper requires the animal keeper to facilitate with the consumption of food and its preparation. (See Employer Appendix, Exhibit 2, p. 7). And all other bargaining unit job titles only have tickets to take, grounds to maintain, and guests to service if the Zoo has live animals to view. The supervision of all employees of the zoo is ultimately the same and the employees assigned to the commissary, regardless of animal keeper or dietician, report to the same Nutrition Kitchen Manager. (See Employer Appendix, Exhibit 2, p. 10).[2] The hours of the dietician and two of the animal keepers assigned to the nutrition center are the same. (See Decision and Order, p. 3).[3] Although there is a large wage differential, that difference is not determinative and carries little weight based on the existence of the collective bargaining agreement. *Unisys Corp*., 354 NLRB 825 (2009).

The qualifications, skills, training and job functions of the dietician and the animal keepers overlap. (See Decision and Order, pp. 3-4). And although the successful candidate for the dietician position had the preferred education of a bachelor's degree, the requirement to hold the job is merely "relevant experience." (See Employer Appendix, Exhibit 4). Neither the animal keeper or dietician are required to have specialized higher education. (Compare Employer Appendix, Exhibit 4 with Exhibit 6).

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[2] The Zoo's insistence that all direct supervision must be the same is nonsense. It would be highly irregular for a curator, responsible for animal care, to also oversee gardeners and cashiers. Similarly, while ultimately in the same reporting structure, puffer train engineers are not directly supervised by individuals in the payroll department, nutrition services, or animal care.

[3] Although disputing the application of case law, the request for review does not allege there are factual inaccuracies in the Regional Director's Decision and Order.

The two "critical" factors to finding accretion under the overwhelming community of interest test – employee interchange and common day-to-day supervision, have been satisfied along with the remaining factors. *Towne Ford Sales*, 270 NLRB 311, 312 (1984). If this analysis is applicable, it has been satisfied and clarification based on accretion is appropriate.

V. THE RESIDUAL UNIT IS APPROPRIATELY ADDRESSED

There is no basis for review based on the residual unit analysis as it was not necessary to the decision.

The limitations on accretion for residual units is inapplicable when there is only one employee in question because the individual cannot, on their own, form an appropriate separate unit. *Cf. Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969). If the dietician does not share a community of interest with the bargaining unit, the position shares a community of interest with no one and thus would be permanently denied the right to representation.

The "non-consenting individual" concern raised by the Zoo is a mischaracterization of a long recognized need for industrial stability. (See Request for Review, p. 14.) *CHS, Inc.*, 355 NLRB 914, 916 (2010). Any new employee hired by the employer into a bargaining unit position is "denied" the opportunity to vote. Here, the position was already in the unit and the Decision and Order clarifies that the work remains in the unit. This is not denying the dietician the right to vote; it is allowing the union to preserve the scope of the bargaining unit while maintaining industrial peace. *See, i.e., The Sun*, 329 NLRB at 860.

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CONCLUSION

The Zoo presents no grounds for review to be granted. The request for review should be denied as it raises no substantial issues of law, is factually accurate, and non-prejudicial.

Dated: June 1, 2018

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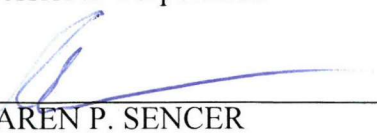


By: CAREN P. SENCER

Attorneys for Petitioner INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 856

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On June 1, 2018, I served the following documents in the manner described below: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 856'S OPPOSITION TO REQUEST FOR REVIEW OF DECISION AND ORDER CLARIFYING BARGAINING UNIT TO INCLUDE DIETICIAN

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

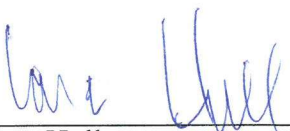
Jill H. Coffman
Regional Director
NLRB, San Francisco Office, Region 20
901 Market St. Suite 400
San Francisco, CA 94103
Email: Jill.coffman@nlrb.gov

Yasmin Macariola
Field Attorney
NLRB, San Francisco Office, Region 20
901 Market St. Suite 400
San Francisco, CA 94103
Email: yasmin.macariola@nlrb.gov

David S. Durham
Christopher M. Foster
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
Tel: (650) 815-7515
Email: ddurham@mwe.com
Email: cfoster@mwe.com

I certify under penalty of perjury that the above is true and correct.

Executed at Alameda, California, on June 1, 2018.



Lara Hull

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