

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

WALT DISNEY PARKS AND RESORTS U.S.
d/b/a WALT DISNEY WORLD

Employer

and

Case 12-UC-203052

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 385

Petitioner

EMPLOYER WALT DISNEY PARKS & RESORTS U.S.’
RENEWED MOTION TO STAY

The Employer, Walt Disney Parks and Resorts U.S. (“Employer” or “Company”), by and through its undersigned counsel and pursuant to Rule 102.67(j), hereby files this Renewed Motion to Stay and states:

I. INTRODUCTION

On May 31, 2018, the Board denied the Employer’s motion for a stay of the Regional Director’s Decision and Order Clarifying Bargaining Units (“RD’s Decision”) that clarified the bargaining unit to include Ride Service Associates (“RSAs”) without an election. Following the denial of the Employer’s motion to stay, what the Employer feared would happen happened. International Brotherhood of Teamsters, Local 385 (“Union”) prematurely demanded bargaining and then filed an unfair labor practice charge (“Charge”) against the Employer based on a technical refusal to bargain. The Parties, as well as the Government, are now faced with duplicative, unnecessary, and wasteful litigation proceedings.

The Employer is forced to make a choice: either bargain with the Union, thereby abandoning its due process rights to challenge the RD's Decision, or engage the Union and the Government in protracted, duplicative, and potentially unnecessary litigation. Additionally, should the Employer surrender to the Union's demand for bargaining, RSAs will be faced with the Employer and the Union potentially bargaining wholesale changes in their terms and conditions of employment without ever having elected the Union to bargain on their behalf. The need for a stay, therefore, is no longer theoretical in nature. As shown below, the prejudice to the Parties, RSAs, and the Government is real, and ongoing, unless these proceedings are stayed.

II. RELEVANT BACKGROUND

This matter originally came before Region 12 on a petition filed by the Union to accrete RSAs into the existing bargaining unit. On November 16, 2017, the Region's Hearing Officer held an evidentiary hearing. Despite an express disclaimer of interest contained in the Parties' collective bargaining agreement, as well as the facts weighing heavily against a finding of accretion, the Regional Director issued his Decision on May 8, 2018, clarifying the existing bargaining unit to include RSAs. The Regional Director disagreed that the disclaimer of interest applied to newly created job classifications, thereby distinguishing the *Briggs Indiana* doctrine. Ignoring both his own and the Union's framing of the issue, he then failed to base his Decision on the Board's accretion factors. Instead, the Regional Director relied upon the *Premcor* doctrine to find RSAs to be automatically included within the bargaining unit.

On May 22, 2018, the Employer filed its request for review ("Request") seeking an order granting review of the RD's Decision. In anticipation of the Union's demand for bargaining and to ensure that RSAs' terms and conditions of employment were not materially altered during the pendency of the Request, the Employer also filed a motion to stay, requesting a stay until such

time as the Board issued its final determination on the Request. On May 31, 2018, the Board summarily denied the motion to stay. It is apparent from Members Kaplan and Emanuel's comment that the Board's denial was based on the application of the Board's Final Election Rule ("Rule").

The very next day, on June 1, 2018, the Union sent a letter to the Employer. Instead of waiting until such time as the Board ruled on the Request, the Union demanded that the Employer bargain immediately over RSAs' terms and conditions of employment. This letter also contained the Union's express threat of economic penalty against the Company for failing to bargain with the Union, warning that such a penalty "may be severe." A copy of the Union's letter is at Exhibit A. Once the Union understood the Employer's position that it would need to engage in a technical refusal to bargain in order to preserve its appellate rights, the Union filed an unfair labor practice charge ("Charge") alleging a refusal to bargain by the Employer on June 25, 2018. Copies of the Charge as well as the Parties' related communications are at Composite Exhibit B. In response to the Region's July 9, 2018 request for evidence and its notice that it "intends to issue Complaint in this matter quickly," the Employer submitted its statement of position. Copies of the Region's request for evidence and the Employer's statement of position are at Composite Exhibit C. The Charge is currently pending before the Region.

III. THE EMPLOYER HAS DEMONSTRATED EXTRAORDINARY RELIEF IS NECESSARY TO PREVENT MATERIAL PREJUDICE TO ALL CONCERNED

A. The Board Should Consider Prejudice to the Parties.

When it promulgated the Rule, the Board stated that its purpose was to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures," whereby "[d]uplicative and unnecessary litigation is eliminated;

unnecessary delay is reduced; [and] procedures for Board review are simplified.” See *NLRB Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015*, Memorandum GC 15-06 (April 6, 2015). The Board adopted the Rule “to better fulfill its duty to protect employees’ rights by fairly, efficiently, and expeditiously resolving questions of representation.” *Id.*

In relevant part, the Rule establishes that “[a] request for review will not operate as a stay unless specifically ordered by the Board,” as well as a procedure and standard for requesting such a stay. 79 FR 74308, 74309. “The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.” *Id.* at 74409. Such relief is considered “extraordinary,” requiring a party to demonstrate a “clear showing that it is necessary under the particular circumstances of the case.” *Id.* at 74309, 77409.

The term “extraordinary form of relief” is left undefined by the Rule, as well as the Board’s Rules and Regulations. The Rule provides no guidance regarding how to apply this nebulous standard to individual circumstances. Yet, a reasonable interpretation of the Rule and its stated purpose (to among other things, protect employee rights and avoid duplicative and unnecessary litigation) suggests that the Board must consider and weigh the potential prejudice to the Parties should a stay not issue.

While the Employer acknowledges that “[t]he Board is...authorized to delegate to its regional directors its powers under section 159 of [the Act] to determine the unit appropriate for the purpose of collective bargaining,” the Board has reserved the ability to review the Regional Director’s exercise of power. 29 U.S.C. § 153(b). The Act requires that “[t]he 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 purposes of collective bargaining...” 29 U.S.C. § 159(b).

B. The Parties Will Suffer Material Prejudice Absent a Stay.

Denial of a stay of the RD’s Decision would pervert the Rule’s stated intentions. Absent a stay, the Employer is either forced to waive its due process rights and surrender to the Union’s demand for bargaining, or engage in protracted, duplicative, costly and potentially unnecessary litigation

Engaging the Union in bargaining forces the Employer to waive its ability to challenge the RD’s Decision in federal court. *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225-26 (D.C. Cir. 1996) (“Alternatively, the Company may avoid the unfair labor practice charge altogether by agreeing unconditionally to bargain. It may negotiate with, or challenge the certification of, the Union; it may not do both at once.... As we explained above, the employer must either bargain unconditionally or, if it wants to contest the union's right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding.”); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419 (4th Cir. 2001) (recognizing need for employer to engage in technical refusal to bargain in order to preserve employer’s challenge to regional director’s accretion determination which deprived the affected employees the right to determine whether they wished to be represented). It is, therefore, well-established that should the Employer surrender to the Union’s premature demand for bargaining during the pendency of the Request, the Employer will waive any further challenges to the RD’s Decision. This choice forces the Employer to abandon its due process rights and as explained below, results in significant prejudice to RSAs.

Alternatively, should the Employer choose to preserve its appellate rights, in the absence of a stay the Parties will be forced to engage in duplicative, unnecessary, and wasteful litigation

pending the Board's ruling. The Region clearly stated it intends on issuing a complaint on the Charge. *See* Ex. C. In a technical 8(a)(5) case, typically the Board has already ruled on (denied) the request for review and the case quickly proceeds on summary judgment. *See* NLRB Casehandling Manual §10282. Here, however, the Board has not yet had the opportunity to rule on the Employer's Request, meaning the underlying unit determination issues would now be litigated in two different forums. Forcing the Parties to engage in a second avenue of litigation on an issue still pending before the Board is by definition duplicative and wasteful. This stands in direct contradiction to this administration's emphasis on resource conservation. Worse still, the expenditure of these resources may all be for naught depending on the Board's final determination on the Request. That is, should the Board ultimately reverse the RD's Decision, the Charge will be rendered moot and the resources expended by the Parties and the Government will have been squandered.

Absent a stay, the Employer is faced with a Cornelian dilemma: either it surrenders to the Union, thereby waiving its right to due process and causing material prejudice to RSAs, or the Employer chooses to defend against the Charge, thereby engaging in duplicative, unnecessary and wasteful litigation. Either result contravenes the intent of the Rule.

C. RSAs Will Also Suffer Material Prejudice Absent a Stay.

Should the Employer surrender and bargain with the Union, RSAs will suffer material prejudice. This is not just a case of moving forward with an election pending a Board decision. Absent a stay pending the Board's consideration of the Request, the Employer **must** include RSAs in the bargaining unit without the benefit of knowing whether the RD's Decision is, in fact, final. Inclusion of RSAs in the bargaining unit will necessitate a wholesale shift in the terms and conditions of RSAs' employment, as the RSAs will be forced under the terms of a collective

bargaining agreement (CBA) they never ratified.¹ *The Baltimore Sun Co.*, 335 NLRB 163, 169 (2001) (affirming judge’s finding *inter alia* that “[a]pplicable law provides that when a group of employees is accreted to an existing bargaining unit, the Employer and the Union are required to apply the terms and conditions of the parties’ existing collective-bargaining agreement to the accreted employees.”). The prejudice to RSAs, however, does not end here. If the Board grants the Request and eventually reverses the RD’s Decision, RSAs will then once again find themselves not in the bargaining unit or covered by the applicable CBA. RSAs’ would then be further disrupted, as their terms and conditions are shifted back.

D. RSAs Deserve Clarification from the Board on their Certification Issues and the Regional Director’s Misapplication of Board Precedent.

Former Board Chairman Miscimarra (“Chairman”) has recognized that circumstances akin to those above warrant the issuance of a stay. Indeed, RSAs deserve clarification from the Board as to whether the RD’s Decision mistakenly included them in the unit, which necessarily requires an analysis of whether the RD’s Decision misapplied Board precedent. Such clarification will also prevent the material prejudice that will befall RSAs.

In *Yale University*, 2017 NLRB LEXIS 50 (2017), the Regional Director had directed separate elections to occur for nine separate bargaining units, which the employer sought to stay. *Id.* at *1-2. In his dissent, the Chairman argued that the Board should have granted the employer’s request, as he “believe[d] substantial questions are presented regarding whether the nine separate bargaining units are appropriate,” especially as these units departed from Board precedent and raised further questions about the application of Board precedent. *Id.* at *2-4. The Chairman contended that the outcome of the elections would “remain in dispute for a substantial period of

¹ The Employer refers the Board to the information provided in Section III.C of the Request regarding the significant differences in the terms and conditions of RSAs and bargaining unit members.

time,” especially given the complexity of the issues presented. *Id.* He concluded, stating that he “believe[d] all parties – particularly individuals encompassed within the nine separate bargaining units approved by the Regional Director – should be given the benefit of the Board’s resolution of election-related issues before voting takes place.” *Id.*

In *PCC Structural, Inc.*, 2017 NLRB LEXIS 487 (2017), the Board denied the employer’s motion to stay. In that matter, the parties had a dispute over the appropriateness of the petitioned-for unit, which necessarily involved the application of Board precedent. *See PCC Structural, Inc.* 2017 NLRB LEXIS 618 (2017). Dissenting from the majority, the Chairman found that the “[e]mployer’s Request for Review warrants staying the election because all parties – especially employees voting in the election – should have the benefit of the Board’s resolution of election-related issues before the election takes place.” *PPC Structural, Inc.*, 2017 NLRB LEXIS at fn.1.

Finally, in *The Washington University*, 2017 NLRB LEXIS 526 (2017), the Board again denied an employer’s motion to stay and, again, the Chairman dissented. In so doing, he stated “all parties would benefit from the Board’s resolution of election-related issues before voting takes place,” as application of Board precedent dictated that the Board “lack[ed] jurisdiction to conduct an election”. *Id.* at fn. 2 (citing to his dissent in *Columbia University*, 364 NLRB LEXIS 619 (2016)).

The instant circumstances are analogous to those in which the Chairman found a stay should issue. RSAs deserve to know whether they are, in fact, included within the bargaining unit. As explained in the Request, the Board “will not, ... under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.” *Melbet*

Jewelry Co., 180 NLRB 107, 110 (1969). The RD's Decision forces RSAs to join the Union without proper evidentiary support, thereby depriving RSAs of their freedoms of association and self-determination as to whether they desire a bargaining representative at all.

Additionally, the RD's Decision significantly departed from Board precedent. As explained more fully in the Request, the Regional Director failed to recognize and apply the Parties' clear and unmistakable waiver contained in their collective bargaining agreements pursuant to the *Briggs Indiana* doctrine. Had he held the Union to its promise, the Regional Director would have concluded that the Union waived any and all interest in representing RSAs. Moreover, the RD's Decision mistakenly applied the *Premcor* doctrine and failed to conduct the Board's traditional community of interest analysis, which if performed would have led the Regional Director to the inescapable conclusion that RSAs could not be accreted into the bargaining unit.

IV. CONCLUSION

The need for a stay is no longer theoretical in nature. A stay of the RD's Decision is necessary to prevent material prejudice to the Parties, the RSAs, and the Government.

The Employer respectfully requests that the Board grant its Renewed Motion to Stay the Regional Director's Decision until such time as the Board issues its final determination in this matter.

Dated this 2nd day of August, 2018.

Respectfully submitted,

By: /s/ Andrew S. Hament

Andrew S. Hament

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Attorneys for Walt Disney Parks & Resorts U.S.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2018, I electronically filed the foregoing **EMPLOYER WALT DISNEY PARKS & RESORTS U.S.' RENEWED MOTION TO STAY** with the National Labor Relations Board using its Agency website and served a copy via email on Thomas J. Pilacek, Esquire (tpilacek@pilacek.com) and, on August 2, 2018, I served David Cohen, Regional Director via email (David.Cohen@nlrb.gov).

/s/ Andrew S. Hament

Andrew S. Hament

WSACTIVELLP:9932789.1

EXHIBIT A



Teamsters Local Union No. 385

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

126 North Kirkman Road, Orlando, Florida 32811

Phone (407) 298-7037

Fax (407) 297-9097

www.local385.org

June 1, 2018

Walt Disney World Company
Bill Pace
Sr. Manager, Labor Relations
P.O. Box 1000
Lake Buena Vista, FL 32830
bill.pace@disney.com

Re: WDW Ride Service Attendants 12-UC-203052

Dear Bill,

Please construe this letter as Teamsters Local 385's demand to bargain over the wages, hours, and terms and conditions of employment of the Ride Service Attendants pursuant to the Regional Director's Decision clarifying the Service Trades Council bargaining unit to include them. Under current Board law you may not make unilateral changes after the date of the decision without affording the union an opportunity to bargain. Any such unilateral changes would become unfair labor practices.

We are, therefore, putting you on notice. We insist that henceforth you make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit, including the RSAs, without affording an opportunity to this union to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of such changes.

(1) No promotional position should be filled without bargaining; (2) No employee should have his/her hours changed without bargaining; (3) No employee should be warned, counseled, disciplined or terminated without bargaining; (4) No one should be hired without bargaining over the person who should fill the position; (5) No employee should be laid off without bargaining; (6) No health and welfare, pension or other fringe benefits should be denied without bargaining; (7) No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion; (8) No work location, assignment, classification or any other aspect of employment should be changed without bargaining; (9) No discipline should be imposed without affording the employee the Weingarten rights which we hereby demand. (10) No changes in the method and manner by which work is being performed should be made without bargaining; (11) No introduction of any new work techniques should be made without bargaining; (12) No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining; and (13) No changes should be made to the pay rates, methods of compensation, or benefits received by RSAs without bargaining.

Clay Jeffries, *President*

Rom Dulskis, *Secretary Treasurer*

Walt Howard, *Vice President*

Fred Rispoli, *Recording Secretary*

Nidia Grajales, *Trustee*

Joseph Richardson, *Trustee*

Shawn Britton, *Trustee*



Teamsters Local Union No. 385

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

126 North Kirkman Road, Orlando, Florida 32811

Phone (407) 298-7037

Fax (407) 297-9097

www.local385.org

In considering this list you should consider the risk which you bear if you choose to make those changes without bargaining. If positions open in the RSA classification and you do not bargain over the filling of those positions, we will argue that someone is entitled to back pay and you may end up paying back pay for a lengthy period of time. If you choose to promote one individual and refuse to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If you terminate someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that you should reinstate the person and/or owe back pay.

If you lay off any individuals we will take the position that you should have bargained over the decision as well as about the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the union forthwith may be severe.

Although we are reluctant to begin our relationship regarding the RSAs with these kinds of threats, it is sometimes necessary to make employers understand that there is a substantial economic penalty for delaying bargaining. We are hoping that you will not continue to challenge the Regional Director's Decision and, rather, that you will sit down and bargain with the union.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the union those *should be implemented in the normal course of business*. We insist, however, to be notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will be most likely a demand that the wage increases, or benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the union a chance to bargain over those decisions as well as the effects of those decisions.

Please consider this letter to be a continuing demand; and please immediately notify me of proposed dates for the commencement of bargaining. If you refuse to bargain, including refusal to meet at reasonable dates and times, we will have no choice except to pursue all available legal and/or economic remedies provided by law.

Sincerely,

A handwritten signature in blue ink that reads "Clay Jeffries".

Clay Jeffries
President

Clay Jeffries, *President*

Rom Dulskis, *Secretary Treasurer*

Nidia Grajales, *Trustee*

Walt Howard, *Vice President*

Joseph Richardson, *Trustee*

Fred Rispoli, *Recording Secretary*

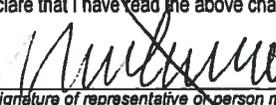
Shawn Britton, *Trustee*

COMPOSITE EXHIBIT B

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Walt Disney Parks and Resorts U.S.	
b. Tel. No. 407-828-5132	
c. Cell No. 321-230-9673	
f. Fax No.	
d. Address (Street, city, state, and ZIP code) P.O. Box 10000 Lake Buena Vista, FL 32830	e. Employer Representative Bill Pace, Senior Manager, Labor Relations
g. e-Mail bill.pace@disney.com	
h. Number of workers employed 77,000	
i. Type of Establishment (factory, mine, wholesaler, etc.) resort and entertainment complex	j. Identify principal product or service entertainment
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(a)(1) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)	
Within the preceding 180 days and continuing to this date, demand having been made, the Employer has unlawfully refused to recognize or to bargain with the Service Trades Council Union and Teamsters Local 385 as the exclusive bargaining representative of the Employer's Ride Service Associate employees, as required by the Decision of the Regional Director entered May 8, 2018 which clarified the bargaining unit to include those employees.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) International Brotherhood of Teamsters, Local Union No. 385	
4a. Address (Street and number, city, state, and ZIP code) 126 North Kirkman Road Orlando, FL 32811 Attention: Clay Jeffries	
4b. Tel. No. 407-298-7037	
4c. Cell No. 407-947-0993	
4d. Fax No. 407-297-9097	
4e. e-Mail cjeffries@local385.org	
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Brotherhood of Teamsters	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative of person making charge)	Thomas J. Pilacek, Esquire (Print/type name and title or office, if any)
Tel. No. 407-660-9595	
Office, if any, Cell No. 407-312-3502	
Fax No. 407-660-8343	
e-Mail tpilacek@pilacek.com	
Address 158 Tuskawilla Rd., Ste. 2320, Winter Springs, FL 32708	06/25/2018 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

From: Val H. Mayfield [<mailto:vmayfield@fordharrison.com>]

Sent: Tuesday, June 12, 2018 9:10 AM

To: Tom Pilacek

Cc: Andy Hament

Subject: Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters Local 385 NLRB Case No.: 12-UC-203052 [IWOV-WSACTIVELLP.FID1782504]

Mr. Pilacek:

Attached please see the attached at the request of Andrew Hament. Thank you.



Val H. Mayfield
Legal Assistant



1901 S. Harbor City Boulevard, Suite 501, Melbourne, FL 32901
vmayfield@fordharrison.com | P: 321-724-4586



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Writer's Direct Contact:

ANDREW S. HAMENT
321-724-5633
ahament@fordharrison.com

June 12, 2018

VIA EMAIL: (TPILACEK@PILACEK.COM)

Mr. Thomas J. Pilacek
Thomas J. Pilacek & Associates
Winter Springs Town Center
158 Tuskawilla Road, Suite 2320
Winter Springs, FL 32708-2805

Re: UC Petition, Case No. 12-UC-203052

Dear Tom,

Our client, the Walt Disney World Company, is in receipt of a demand for bargaining by Teamsters Local Union 385 with respect to its Ride Service Associates (RSAs).

As you know, we have filed a Request for Review, effectively appealing the NLRB Regional Director's decision that the RSAs should be included in the same unit as the bus drivers. You also know that in order to protect our position and not waive our claims, our client must engage in a technical refusal to bargain with the Teamsters. Of course, when our appeal rights are exhausted, our client will honor any final decision that is rendered, including, if required, bargaining with the Teamsters.

Sincerely,


ANDREW S. HAMENT

ASH

WSACTIVE LLP:9844131.1

From: Tom Pilacek <tpilacek@orlandolaborlaw.com>
Sent: Monday, June 25, 2018 1:48 PM
To: Andy Hament
Cc: Bret Yaw; Nadia A. Bonilla; Gwen Davis; Clay Jeffries (cjeffries@local385.org); Walt Howard (whoward@local385.org)
Subject: RE: Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters Local 385 NLRB Case No.: 12-UC-203052 [IWOV-WSACTIVELLP.FID1782504]

Thanks Andy. I was on vacation last week and saw your email when I returned today.

I now understand your position. I was confused b/c your June 12 letter appeared to indicate that the Company intended to abide by the Board's decision regarding the pending Request for Review and did not intend to seek review in the courts if it were denied, in which case our proposed waiver would have preserved your position. Now that I understand that the Company intends to seek judicial review of the Regional Director's Decision even if the Board denies your pending Request for Review, I will advise Local 385 to file a ULP.

Tom

Sincerely,

Thomas J. Pilacek, Esq.
Thomas J. Pilacek & Associates
Winter Springs Town Center
158 Tuskawilla Road, Suite 2320
Winter Springs, FL 32708
Phone: 407-660-9595
Facsimile: 407-660-8343
E-mail: tpilacek@pilacek.com
Website: www.pilaceklaw.com

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From: Andy Hament [mailto:AHament@fordharrison.com]
Sent: Monday, June 18, 2018 11:33 AM
To: Tom Pilacek
Cc: Bret Yaw; Nadia A. Bonilla
Subject: RE: Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters Local 385 NLRB Case No.: 12-UC-203052 [IWOV-WSACTIVELLP.FID1782504]

Tom,

As requested, please see the following cases holding that an employer waives its right to challenge the validity of a Regional Director's unit determination if it bargains pending a request for review:

Terrace Gardens Plaza, Inc. v. N.L.R.B., 91 F.3d 222, 225-26 (D.C. Cir. 1996) ("A Board order directing that an election be held, or thereafter certifying the prevailing union as the representative of the employees, is not final agency action subject to judicial review under § 10(f). ...Judicial review is available only if the employer refuses to bargain and is found, in a final order of the Board, to have violated § 8(a)(5). ...Alternatively, the Company may avoid the unfair labor practice charge altogether by agreeing unconditionally to bargain. ***It may negotiate with, or challenge the certification of, the Union; it may not do both at once*** When, as happened here, the employer reserves the right (*i.e.*, implicitly threatens) to challenge the union's certification in the court of appeals, it is trying to avoid the necessity to choose between the alternatives it has under the statute. As we explained above, ***the employer must either bargain unconditionally or, if it wants to contest the union's right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding.***").

Technicolor Government Services, Inc. v. N.L.R.B., 739 F.2d 323, 326 (8th Cir. 1984) ("In order to challenge certification of a collective bargaining unit, an employer must refuse to recognize a union after its certification. If the union files unfair labor practice charges for refusal to bargain, under § 8(a)(5) of the Act, the employer may then raise the issue of the propriety of the unit as an affirmative defense to the charges. An employer then obtains judicial review of a certification determination via a review of the unfair labor practice charges, under § 10(e) or § 10(f). ...An employer who fails to follow this procedural course waives the right to contest certification. ... **Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid.**")

Baltimore Sun v. N.L.R.B., 257 F.3d 419 (4th Cir. 2001) (Recognizing need for employer to engage in technical refusal to bargain in order to preserve employer's challenge to NLRB regional director's ***accretion determination*** which deprived the affected employees the right to determine whether they wished to be represented.)

It appears that the only way to preserve our objections to the Regional Director's determination through to the courts is to engage in a technical refusal to bargain. I do not see how a union's "waiver" would overcome this clear case law and preserve our client's ability to continue to challenge Regional Director's determination to the court of appeals if necessary. If you have any authority to the contrary, I would appreciate your providing same.

Andy



Andrew S. Hament - Attorney at Law
Board Certified Specialist, Labor & Employment Law



1901 S. Harbor City Boulevard, Suite 501 | Melbourne, FL 32901
AHament@fordharrison.com | P: 321-724-5633



LTC4 Certified Legal Professional | *FHPromise*

From: Andy Hament
Sent: Wednesday, June 13, 2018 9:25 AM
To: 'Tom Pilacek' <tpilacek@orlandolaborlaw.com>
Cc: Bret Yaw <byaw@fordharrison.com>; Nadia A. Bonilla <nbonilla@fordharrison.com>
Subject: RE: Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters Local 385 NLRB Case No.: 12-UC-203052 [IWOV-WSACTIVELLP.FID1782504]

Tom, thank you for your prompt response. We will forward you citations to the cases that give us and our client concern. We will also carefully consider 385's offer to waive any right to assert waiver on the company's part. I agree that it would be best to avoid an unfair labor practice proceeding if possible.

From: Tom Pilacek [<mailto:tpilacek@orlandolaborlaw.com>]
Sent: Tuesday, June 12, 2018 1:35 PM
To: Val H. Mayfield <vmayfield@fordharrison.com>
Cc: Andy Hament <AHament@fordharrison.com>; Gwen Davis <gdavis@orlandolaborlaw.com>; Stacey Kelley <skelley@orlandolaborlaw.com>; Clay Jeffries (cjeffries@local385.org) <cjeffries@local385.org>; Walt Howard (whoward@local385.org) <whoward@local385.org>
Subject: RE: Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters Local 385 NLRB Case No.: 12-UC-203052 [IWOV-WSACTIVELLP.FID1782504]

Dear Andy,

This is in response to your letter on behalf of the company which refuses Local 385's demand to bargain regarding the RSAs.

While I understand that the company wishes to preserve its right to seek review, I do not understand why bargaining while the Request for Review is pending would waive that right. If you have any case law which holds that bargaining would have any effect on the pending Request for Review, I would greatly appreciate it if you would provide citations.

As you know, the Board denied your motion to stay proceedings, with explicit knowledge that the result would be an obligation to bargain while the Request for Review was pending despite your explicit argument that bargaining would be "disruptive" to the employees if a stay were denied. Hence, while the Request for Review is pending the parties may bargain (and the company is under an obligation to bargain) without prejudice to the company's already-asserted right to seek review; and it therefore appears that your client's current position is merely an attempt to justify its refusal to comply with the Board's Order denying your motion to stay.

Notwithstanding, in order to allay the company's stated concern please construe this letter as (a) Local 385's express waiver of any right it may have to claim, in the currently-pending Review proceeding, that by engaging in bargaining the pending Request for Review has been waived or mooted; and (b) Local 385's continuing demand to bargain while the Request for Review remains pending, subject to this express waiver. Unfortunately, as you know, if the company refuses to bargain despite this waiver Local 385 will be forced to file a ULP which, I'm sure, neither party really wants.

Please let me know your client's position ASAP. Thanks.

Sincerely,

Thomas J. Pilacek, Esq.
Thomas J. Pilacek & Associates
Winter Springs Town Center
158 Tuskawilla Road, Suite 2320
Winter Springs, FL 32708

Phone: 407-660-9595
Facsimile: 407-660-8343
E-mail: tpilacek@pilacek.com
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From: Val H. Mayfield [<mailto:vmayfield@fordharrison.com>]
Sent: Tuesday, June 12, 2018 9:10 AM
To: Tom Pilacek
Cc: Andy Hament
Subject: Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters Local 385 NLRB Case No.: 12-UC-203052 [IWOV-WSACTIVELLP.FID1782504]

Mr. Pilacek:

Attached please see the attached at the request of Andrew Hament. Thank you.



Val H. Mayfield
Legal Assistant



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LTC4 Certified Legal Support Specialist | *FHPromise*

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COMPOSITE EXHIBIT C



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 12
201 E. Kennedy Blvd., Ste. 530
Tampa, FL 33602-5824

Agency Website: www.nlrb.gov
Telephone: (813) 228-2641
Fax: (813) 228-2874

Agent's Direct Dial: (813) 228-2662

June 1, 2018

Via Email

Andrew S. Hament, Esq.
Ford & Harrison LLP
1901 S. Harbor City Blvd., Ste. 501
Melbourne, FL 32901
ahament@fordharrison.com

Aaron L. Zandy, Esq.
Bret C. Yaw, Esq.
Ford & Harrison LLP
300 S. Orange Ave., Ste. 1300
Orlando, FL 32801
azandy@fordharrison.com
byaw@fordharrison.com

Re: Walt Disney Parks and Resorts U.S.
Case 12-CA-222842

Dear Msrs. Hament, Zandy, and Yaw:

As you know, I am assigned to the investigation of the above-referenced charge that was filed by International Brotherhood of Teamsters, Local Union No. 385 (the Union), alleging that Walt Disney Parks and Resorts U.S. (the Employer) has and continues to refuse to recognize and bargain with the Union as the certified collective-bargaining representative of the Employer's Ride Service Associate employees. The Union provided us with copies of its request to meet and bargain for an initial collective bargaining agreement, sent on June 1, 2018, and of the Employer's response, dated June 12, 2018, stating that the Employer needed to "engage in a technical refusal to bargain" with the Union. I understand that the Employer intends through this "technical refusal" to seek judicial review of the Regional Director's Decision and any subsequent Board Order that may issue in Case 12-UC-203052. Please let me know if my understanding is incorrect.

Please be advised that our office intends to issue Complaint in this matter quickly. If you intend to provide any additional information on the merits of the refusal to bargain allegation, please contact me at your earliest convenience by telephone, (813) 228-2662, or e-mail,

July 9, 2018

caroline.leonard@nlrb.gov. Any such additional information should be received in our office no later than the close of business on Monday, July 16, 2018. Your cooperation is appreciated.

Very truly yours,

/s/ Caroline Leonard

Caroline Leonard, Esq.
Field Attorney

ANDREW S. HAMENT
321-724-5633
ahament@fordharrison.com

July 16, 2018

VIA ELECTRONIC FILING

Caroline Leonard, Esq. - Field Attorney
National Labor Relations Board - Region 12
201 E. Kennedy Blvd., Ste. 530
Tampa, Florida 33602

Re: Walt Disney Parks and Resorts U.S.
Case 12-CA-222842

Dear Ms. Leonard:

On behalf of Walt Disney Parks and Resorts U.S. (the “Employer”), this responds to your July 9, 2018 letter seeking clarification regarding the Employer’s position with respect to the above-referenced unfair labor practice charge (“Charge”) filed by the International Brotherhood of Teamsters, Local 385 (“Union”). The Charge alleges that the Employer has violated Sections 8(a)(1) and (5) of the National Labor Relations Act by failing to recognize and/or bargain with the Union with respect to employees in the Ride Service Associate (“RSA”) job classification.

As you know, on May 8, 2018, the Region 12 Director issued his Decision and Order Clarifying Bargaining Units (“Decision”) in Case No. 12-UC-203052, granting the Union’s unit clarification petition and automatically including RSAs in the bargaining unit without an election. On May 22, 2018, the Employer timely filed a Request for Review (“Request”) with the National Labor Relations Board (“Board”), requesting that the Board review the Decision. In anticipation of the Union’s demand for bargaining and to ensure that RSAs’ terms and conditions of employment were not substantively and materially altered during the pendency of this Request, the Employer also filed a Motion to Stay the Decision until such time as the Board issued its final determination on the Request. Utilizing the “extraordinary relief” standard established by its Final Election Rule (“Rule”), the Board denied this motion. As of the date of this letter, the Board has not ruled on the Request.

Upon denial of the Employer’s Motion to Stay, the Union unsurprisingly demanded that the Employer bargain over the RSAs’ terms and conditions of employment with an express threat of economic penalty for failing to do so. Copies of the Union’s demand and the Employer’s response are attached (**Attachment A**). Through this demand and subsequent Charge, it is evident

that the Union is leveraging the Rule to force the Employer to make a decision: either bargain with the Union, thereby waiving its right to seek review of the Decision in federal court, or engage in a technical refusal to bargain, which forces the Employer to defend against the Charge and engage in protracted, duplicative, and potentially unnecessary litigation, which will result in considerable cost to all parties, including the United States taxpayers.

Engaging in bargaining with the Union would force the Employer to waive its right to challenge the Decision in federal court. *Terrace Gardens Plaza, Inc. v. N.L.R.B.*, 91 F.3d 222, 225-26 (D.C. Cir. 1996) (“Alternatively, the Company may avoid the unfair labor practice charge altogether by agreeing unconditionally to bargain. It may negotiate with, or challenge the certification of, the Union; it may not do both at once As we explained above, the employer must either bargain unconditionally or, if it wants to contest the union's right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding.”); *see also Baltimore Sun v. N.L.R.B.*, 257 F.3d 419 (4th Cir. 2001) (Recognizing need for employer to engage in technical refusal to bargain in order to preserve employer’s challenge to regional director’s accretion determination which deprived the affected employees the right to determine whether they wished to be represented.). It is, therefore, well-established that should the Employer bargain with the Union during the pendency of the Request, the Employer will waive any further challenges to the Decision. For this reason, the Employer declined the Union’s demand for bargaining, and will continue to do so, as it is unwilling to waive this right to due process. Accordingly, the Employer must engage in a technical refusal to bargain in order to challenge the Decision.

The Act gives the General Counsel of the NLRB “final authority...in respect of the investigation of charges and issuance of complaints.” 29 U.S.C. ¶ 153(d). “The General Counsel of the NLRB has the discretion to decide whether or not to issue a complaint.” *Williams v. NLRB*, 105 F.3d 787, fn. 3 (2d Cir. 1996). “Section (d) of the Act leaves to the general counsel the decision as to what is and what is not at issue in an unfair labor practice [case].” *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.3d 1343 (5th Cir. 1978). If a complaint will not effectuate the purposes of the Act, the General Counsel may decline to issue such a complaint. *See e.g. Pacific Nw. Reg’l Council of Carpenters*, 2008 NLRB GCM LEXIS 31, *5 (2008) (holding that “under the totality of the circumstances presented here, it would not effectuate the purposes of the Act to issue complaint.”). Such may be the case even where the facts may give rise to a technical violation. *See Teamsters’ Local Union No. 671*, 1983 NLRB GCM LEXIS 159 (1983). To avoid needless litigation and prejudice to all concerned, the General Counsel should exercise his discretion and defer issuing a complaint in this matter pending the Board’s final determination on the Request.

At the time the Employer moved for a stay in the representation proceedings, there was no demand to bargain, consequentially no refusal to bargain, and no pending unfair labor practice charge. As any prejudice or harm to the Employer or the RSAs was at best a theoretical potential at that time, under the “extraordinary relief” standard now utilized, the Board was forced to deny the Employer’s requested relief. Now, the circumstances are very different as the Union has actually insisted on bargaining (under threat of economic penalty) and filed the instant Charge against the Employer. Thus, the prejudice and harm to the Employer and RSAs is actual and inevitable.

National Labor Relations Board
July 16, 2018

When the Board promulgated its new representation rules, the Board stated that the Rule was intended to “remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures,” whereby “[d]uplicative and unnecessary litigation is eliminated; unnecessary delay is reduced; [and] procedures for Board review are simplified” *NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). The issuance of a complaint in the context of this matter would pervert the Rule’s stated purpose.

Should a complaint be issued, the parties will be forced to engage in duplicative litigation in two forums, which will result in the needless expenditure of the parties’ resources, as well as those of the government and the taxpayers. Worse yet, the expenditure of these resources may be all for naught. Should the Board grant the Request and reverse the Decision, this matter will be moot and, therefore, dismissed. Given this administration’s emphasis on conservation of resources, it is plainly in the best interests of all concerned to defer issuance of a complaint.

The issuance of a complaint at this stage also severely prejudices the RSAs. As reflected in the attached demand for bargaining, the Union is seeking wholesale changes in the RSA’s terms and conditions of employment. Yet, the basic issue of whether the Union can force the RSAs into the bargaining unit without an election remains pending before the Board, an issue that the Board is likely to resolve in short order in the underlying representation case. Forcing a change in the terms and conditions of the RSAs by means of an unfair labor practice proceeding before the Board has had an opportunity to consider their fate is a denial of basic due process and fairness.

The issuance of a complaint at this stage of the representation proceeding would open a second avenue of litigation on an issue already pending before the Board. This by definition is duplicative and wasteful. There is the distinct possibility that this litigation will be rendered moot by the underlying representation proceedings, and therefore unnecessary, should the Board reverse the Decision. Accordingly, issuing a complaint at this stage of the representation proceeding would not effectuate the purposes of the Act.

The Employer, therefore, requests that the General Counsel exercise his authority to refrain from issuing a complaint, at least until the Board issues its final determination on the pending Request.

Sincerely,



(FOR)

ANDREW S. HAMENT

ASH/BCY/nab

Enclosure

WSACTIVE LLP 9894902.2

ATTACHMENT A



Teamsters Local Union No. 385

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

126 North Kirkman Road, Orlando, Florida 32811

Phone (407) 298-7037

Fax (407) 297-9097

www.local385.org

June 1, 2018

Walt Disney World Company
Bill Pace
Sr. Manager, Labor Relations
P.O. Box 1000
Lake Buena Vista, FL 32830
bill.pace@disney.com

Re: WDW Ride Service Attendants 12-UC-203052

Dear Bill,

Please construe this letter as Teamsters Local 385's demand to bargain over the wages, hours, and terms and conditions of employment of the Ride Service Attendants pursuant to the Regional Director's Decision clarifying the Service Trades Council bargaining unit to include them. Under current Board law you may not make unilateral changes after the date of the decision without affording the union an opportunity to bargain. Any such unilateral changes would become unfair labor practices.

We are, therefore, putting you on notice. We insist that henceforth you make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit, including the RSAs, without affording an opportunity to this union to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of such changes.

(1) No promotional position should be filled without bargaining; (2) No employee should have his/her hours changed without bargaining; (3) No employee should be warned, counseled, disciplined or terminated without bargaining; (4) No one should be hired without bargaining over the person who should fill the position; (5) No employee should be laid off without bargaining; (6) No health and welfare, pension or other fringe benefits should be denied without bargaining; (7) No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion; (8) No work location, assignment, classification or any other aspect of employment should be changed without bargaining; (9) No discipline should be imposed without affording the employee the Weingarten rights which we hereby demand. (10) No changes in the method and manner by which work is being performed should be made without bargaining; (11) No introduction of any new work techniques should be made without bargaining; (12) No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining; and (13) No changes should be made to the pay rates, methods of compensation, or benefits received by RSAs without bargaining.

Clay Jeffries, *President*

Rom Dulskis, *Secretary Treasurer*

Walt Howard, *Vice President*

Fred Rispoli, *Recording Secretary*

Nidia Grajales, *Trustee*

Joseph Richardson, *Trustee*

Shawn Britton, *Trustee*



Teamsters Local Union No. 385

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

126 North Kirkman Road, Orlando, Florida 32811

Phone (407) 298-7037

Fax (407) 297-9097

www.local385.org

In considering this list you should consider the risk which you bear if you choose to make those changes without bargaining. If positions open in the RSA classification and you do not bargain over the filling of those positions, we will argue that someone is entitled to back pay and you may end up paying back pay for a lengthy period of time. If you choose to promote one individual and refuse to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If you terminate someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that you should reinstate the person and/or owe back pay.

If you lay off any individuals we will take the position that you should have bargained over the decision as well as about the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the union forthwith may be severe.

Although we are reluctant to begin our relationship regarding the RSAs with these kinds of threats, it is sometimes necessary to make employers understand that there is a substantial economic penalty for delaying bargaining. We are hoping that you will not continue to challenge the Regional Director's Decision and, rather, that you will sit down and bargain with the union.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the union those should be implemented in the normal course of business. We insist, however, to be notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will be most likely a demand that the wage increases, or benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the union a chance to bargain over those decisions as well as the effects of those decisions.

Please consider this letter to be a continuing demand; and please immediately notify me of proposed dates for the commencement of bargaining. If you refuse to bargain, including refusal to meet at reasonable dates and times, we will have no choice except to pursue all available legal and/or economic remedies provided by law.

Sincerely,

A handwritten signature in blue ink that reads "Clay Jeffries".

Clay Jeffries
President

Clay Jeffries, *President*

Rom Dulskis, *Secretary-Treasurer*

Walt Howard, *Vice President*

Fred Rispoli, *Recording Secretary*

Nidia Grajales, *Trustee*

Joseph Richardson, *Trustee*

Shawn Britton, *Trustee*

Writer's Direct Contact:
ANDREW S. HAMENT
321-724-5633
ahament@fordharrison.com

June 12, 2018

VIA EMAIL: (TPILACEK@PILACEK.COM)

Mr. Thomas J. Pilacek
Thomas J. Pilacek & Associates
Winter Springs Town Center
158 Tuskawilla Road, Suite 2320
Winter Springs, FL 32708-2805

Re: UC Petition, Case No. 12-UC-203052

Dear Tom,

Our client, the Walt Disney World Company, is in receipt of a demand for bargaining by Teamsters Local Union 385 with respect to its Ride Service Associates (RSAs).

As you know, we have filed a Request for Review, effectively appealing the NLRB Regional Director's decision that the RSAs should be included in the same unit as the bus drivers. You also know that in order to protect our position and not waive our claims, our client must engage in a technical refusal to bargain with the Teamsters. Of course, when our appeal rights are exhausted, our client will honor any final decision that is rendered, including, if required, bargaining with the Teamsters.

Sincerely,


ANDREW S. HAMENT

ASH

WSACTIVE LLP:9844131.1