

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Case No.: 12-UC-203052

Employer,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 385,

Petitioner.

**PETITIONER TEAMSTERS LOCAL 385'S CORRECTED RESPONSE IN
OPPOSITION TO "INTERVENOR EMPLOYEES' MOTION TO INTERVENE
OR, IN THE ALTERNATIVE, MOTION TO FILE AN AMICUS BRIEF
ON BEHALF OF THE EMPLOYER**

(CORRECTION MADE DUE TO SCHRIVER'S ERROR)

Petitioner INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 385 ["Local 385"] files this Corrected Response in Opposition to "Intervenor Employees' Motion to Intervene Or, in the Alternative, Motion to File an Amicus Brief on Behalf of the Employer" filed August 9, 2018, to address a Schriever's error made in identifying the proposed intervenor employees.

For the reasons that follow, the Motion to Intervene should be denied because it is untimely, and because in a UC case the employees who seek to intervene have no cognizable interest which is separate from the employer's interests. Even if intervention were to be improperly granted, the proposed Request for Review should be denied as untimely; and the challenges to the Board's accretion rules were not timely raised and are waived. Finally, the alternative motion to treat the proposed Request for Review as an *amicus* brief on behalf of the employer should be denied because, in addition to raising untimely/waived issues, the Employer

has adequately raised and addressed the other issues which the proposed intervenors seek to argue based on existing precedent; therefore, acceptance of the proposed “Request” as an *amicus* brief would effectively permit the employees to participate as though intervention had been granted which, as precedent, would result in endless untimely intervention/*amicus* requests by “everybody and his uncle with a claimed interest” which the Board has specifically disapproved.

BACKGROUND AND IDENTITY OF PROPOSED INTERVENORS

The UC Petition in this case was filed July 20, 2017. The hearing was held November 16, 2017. The Regional Director’s Decision was issued May 8, 2018. The Employer filed a timely Request for Review on May 22, 2018. The Proposed Intervenor Employees filed their Motion to Intervene together with a proposed Request for Review/*amicus* brief on August 9, 2018, 266 days after the hearing was held and motions to intervene were due pursuant to Section 102.65(b) of the Board’s Rules and Regulations, and 79 days after the 14-day deadline for filing Requests for Review had passed pursuant to Section 102.67(c) of the Board’s Rules and Regulations.

The Motion to Intervene was filed on behalf of (assertedly) 11 of the 74 Ride Service Associates [“RSAs”] which are the subject of the UC Petition and the Director’s Decision. Of those, six named employees (Hogan, Wimmer, Ingles, Knight, Wiggins and Katz) have filed declarations stating their interests in this case. The other five named employees (Boger, Wise, Shaw, Lamb, and Munoz) have not filed declarations, nor have their dates of employment as RSAs been stated.

Of the six who have filed declarations, Hogan has worked as a RSA since 5/13/17; Wimmer since “January 14, 2017” (presumably 2018, since the RSA classification did not exist in January, 2017); Ingles since 12/3/17; Knight since 5/30/17; Wiggins’ RSA employment is

unstated; and Katz since 8/27/17. The declarations show that, of the six RSAs who filed them, only two (Hogan and Knight) were RSAs when the Petition was filed, and only three (Hogan, Knight, and Katz) were RSAs on the date of the hearing. Hence, according to the information which has been provided, only three of the eleven named RSAs could have filed a *timely* Motion to Intervene under the Rules, because they occupied that position as of the hearing date; therefore, only those three have any arguable “standing” to intervene if timeliness were to be excused, as they argue. The rest were only employed as RSAs *after* the latest time to intervene under the Rules and Regulations – the hearing date -- had passed, and their alleged “interests” were after-acquired. Accordingly, as an initial matter, the Motion to Intervene should properly be considered *only* on behalf of Hogan, Knight, and Katz, because only those three were employed as RSAs at the time of the hearing on the Petition and have arguable standing to complain about lack of notice of the UC Petition pursuant to Board Rules and Regulations as an excuse for untimeliness.

Although *putative* standing to intervene should be initially determined on the basis of this initial identification, the following arguments apply to all of the proposed intervenors and warrant denial of the Motion.

**THE MOTION TO INTERVENE IS UNTIMELY PURSUANT TO SECTION 102.65(b)
OF THE BOARD’S RULES AND REGULATIONS**

Section 102.65(b) of the Rules and Regulations which are applicable to Section 9(c) proceedings provides that intervention may only be granted at the Regional level, and not thereafter, as a matter of discretion:

“Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding.

The Regional Director, or the Hearing Officer, at the specific direction of the Regional Director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the Regional Director may deem proper, and such intervenor shall thereupon become a party to the proceeding.”

Because the proposed intervenors did not file their Motion to Intervene by the hearing date (November 16, 2018) the Motion is untimely, and should therefore be denied. See, e.g., *Schuylkill Medical Center South Jackson Street, etc.*, Case Nos. 04-UC-200537 and 04-UC-200541 (January 25, 2018)(denying proposed intervenor employees’ untimely Motion to Intervene).

THE PROPOSED INTERVENOR EMPLOYEES HAVE NO COGNIZABLE INTEREST WHICH IS DISTINCT FROM THE INTERESTS OF THE EMPLOYER

Unlike a QCR presented in a RC proceeding in which the “desires of the employees” and/or “extent of organization” should be considered in determining the scope and composition of an appropriate unit, and unlike a QCR presented in a RD proceeding where petitions circulated or filed by employees desiring decertification may affect whether or not an election is held (see GC Memorandum 18-06 issued August 1, 2018), in a UC case the determination of whether certain new employee classifications are properly included within an existing bargaining unit is for the Board to determine without an election, based on bargaining history and a factual review of the subject classifications’ functions and relationships to other unit employees. No QCR exists because there is no required showing of interest and no election is directed as the result of the Petition; therefore, the employees’ “desires” – both individually and collectively -- are immaterial. Their stated interests, based on their “desires” to keep the RSA classification

non-union are identical to the Employer's interests in opposing unit clarification.¹ Conversely, the interests of employees who may be in favor of unit inclusion (*including* the 38,000 employees within the existing unit who have an interest in enhancing their collective bargaining power) are identical to the Union's.

The proposed intervenors implicitly acknowledge that under current Board Rules and decisions governing Unit Clarification proceedings they have no cognizable "separate interest", which is why they attempt to argue in their proposed Request for Review/*amicus* brief that the Board should create one (by abandoning, revising, and/or overruling its Rules and precedent). That bootstrap argument ("we have an interest in asking the Board to create an interest") should be summarily rejected because those issues are untimely raised, have been waived pursuant to Section 102.67(e) of the Rules and Regulations because they were not raised with the Regional Director, and should be determined *only* through Rulemaking procedures which require commentary and analysis *and* a precedential policy process after the Board invites briefing (as it has previously done before changing significant policy and/or longstanding precedent).

**THE PROPOSED INTERVENORS' ARGUMENT THAT THE BOARD SHOULD
ADOPT STANDARDS FOR INTERVENTION SEEKS TO CONVERT INTERVENTION
FROM A MATTER OF DISCRETION TO A MATTER OF RIGHT**

Decisions regarding permission to intervene in both Section 8 and Section 9(c) proceedings are, and have always been, discretionary under Section 10(b), the Rules, and long-standing precedent (see, e.g. *Medi-Center of America*, 301 NLRB 680, 680 fn. 1 (1991)). The proposed intervenors seek to bootstrap their asserted (but non-existent) "separate interests" for intervention on yet another argument which would require the Board to disregard its existing

¹ The proposed intervenors' alleged fears that they would be forced to participate in a Teamsters pension plan are factually unfounded. The Service Trades Council Union CBA does not require participation in a Teamster plan (See STCU CBA, EX 7, Article 23 (p. 36)).

Rules and precedent by arguing that the standards for intervention under the Federal Rules of Civil Procedure should be adopted by the Board, thereby giving them status to intervene as of right as “necessary” parties. That, too, would require both Rulemaking and briefing on a significant policy issue which would require overturning longstanding precedent, and would appear to contravene Section 10(b). For those reasons intervention based on that argument should be denied, and the argument should not be considered. (Parenthetically, Fed. R. Civ. P. 24 requires that motions to intervene be “timely”).

**PROPOSED INTERVENORS’ “I DIDN’T KNOW” EXCUSE FOR UNTIMELINESS
SHOULD BE REJECTED**

a. Initially, the proposed intervenors complain that they were not given notice because existing Board Rules and precedent did not require it; yet they (absurdly) blame the lack of such notice on Local 385, who concededly followed existing procedure when it filed and pursued its UC Petition. This begs the practical questions of how Local 385 could have provided notice to individual RSA employees under the circumstances of this case, when it had no idea who they were, or why the Employer (on whose behalf the employees seek to intervene) is not to blame for the lack of notice. The Employer unilaterally established the classification, established its terms and conditions, implemented the Minnie Van service, and hired the RSA employees, all without notice to Local 385. Because existing Board procedure in UC cases was admittedly followed by Local 385, and because the Rules and existing precedent do not require notice to the subject employees, the proposed intervenors’ “I didn’t know” excuse should be rejected as a reason for untimeliness.

b. Equally significantly, as Intervenors note in their Motion the Board has, with extremely rare exception, rejected untimely motions to intervene despite a claim that the proposed intervenor had no notice of a pending proceeding which could affect its interests, even

when the proceeding resulted in the conversion of a previous win into a loss because the Board overruled preexisting precedent. The Board has only rarely permitted late intervention, and then only due to a change in circumstances affecting the identity or direct interests of a party while the proceeding was pending. *The Boeing Company, et al.*, 366 NLRB No. 128, at fn. 3 (July 17, 2018). There, citing to the analogous (to R&R Section 102.65(c)) Section 102.29, the Board squarely held that

“Under Section 102.29, a “person desiring to intervene” may do so before the hearing begins or while the hearing is in process. The Board’s rules do not otherwise permit intervention. No provision is made in the Board’s rules for intervention after the close of the hearing . . .” (*Id.* At p.2)

As the Board pointed out, “it serves no purpose and certainly does not advance the fundamental purpose of the NLRA – to promote industrial peace – to keep workplace disputes unresolved while everybody and his uncle with a claimed “interest” lines up to reargue cases that have already been decided.” (*Id.* at fn. 3). Because the hearing in this case closed 266 days before the Motion to Intervene was filed, the inquiry ends; and the Motion to Intervene should be summarily denied.

THE PROPOSED REQUEST FOR REVIEW IS UNTIMELY PURSUANT TO SECTION 102.67(c) OF THE RULES AND REGULATIONS

Even if intervention were timely, the proposed Request for Review is not. Section 102.67(c) requires that all Requests for Review by “any interested person” must be filed within 14 days of the final Decision for which Review is sought. Because the proposed-intervenors’ proposed Request for Review was filed 79 days after the Director’s final decision on May 8, 2018 it is grossly untimely; therefore, even if intervention were timely or were to be granted despite untimeliness, permission to file the Request for Review should be denied.

THE REQUEST TO TREAT PROPOSED INTERVENORS’ REQUEST FOR REVIEW AS AN AMICUS BRIEF SHOULD BE DENIED

Local 385 acknowledges that the Board has sometimes treated briefs filed by attempted intervenors as *amicus* briefs when intervention has been denied; but this should not be permitted as a matter of routine particularly where, as here, such proposed briefs attempt to untimely raise legal issues which were never raised before the Regional Director and were not previously raised by the Employer (proposed Request for Review, Argument Sections A and B). It should also not be permitted when, as here, a brief merely rehashes, bolsters, and comments on the same issues, evidence, and case law asserted by the Employer on the merits of the dispute (proposed Request for Review, Argument Sections C 1, 2 and 3).

Neither *amicus* briefs nor responses to *amicus* briefs are permitted as a matter of right under the Rules and Regulations. Consideration of previously-unraised-and-waived arguments without an opportunity to respond would effectively deny Local 385 due process and would grant the Employer the ability to rely on untimely issues which it has not presented and could not now present under the Rules, which have been waived.

Similarly, *amicus* briefs are not designed for the purpose of merely duplicating arguments already made by parties (with slight twists). If they were, then consideration of arguments previously made by the Employer (without an opportunity for further response) would effectively permit argument as though full intervenor status had been granted. If intervention may properly be denied if an existing party adequately represents the proposed intervenor's interests (see, e.g. *DirectSat USA, LLC*, 366 NLRB No. 141 (July 25, 2018)(denying intervention even if timely because existing party adequately represented proposed intervenor's interests), then the ability to file an *amicus* brief making the same arguments previously made by an existing party should be denied as well.

In sum, permitting *amicus* briefs when intervention is denied effectively permits the denied intervention. If anyone (including, as here, an advocacy group attempting to advance its own institutional objectives in the names of others), and at any time, could raise new issues and could argue the merits and evidence as an *amicus* as if that person, attorney, advocacy group, company, or union were a party (and without the disclosures by proposed *amici* required by Fed. R. Civ. P. 29), there would be no need for the Rules governing intervention and timeliness, cases would become endless free-for-alls in which “everybody and his uncle” could contribute their two cents, and permitting untimely *amicus* argument would provide a material advantage to an existing party by injecting waived issues, to which the opposing party could not respond. For these reasons, the proposed intervenors’ alternative motion to treat its proposed Request for Review as an *amicus* brief should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Original of this Request was filed electronically with the National Labor Relations Board, Washington DC e-filing system and that a true and correct copy was sent via e-mail to David Cohen, Regional Director of the National Labor Board, Region 12 davidcohen@nlrb.gov; Andrew S. Hament, Esquire ahament@fordharrison.com; Aaron Zandy, Esquire azandy@fordharrison.com, and Bret C. Yaw, Esquire byaw@fordharrison.com, FORD & HARRISON LLP, 300 S. Orange Avenue, Suite 1300, Orlando, FL 32801 and Alyssa K. Hazelwood, Esquire, akh@nrtw.org, c/o National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, VA this 15th day of August, 2018.

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