

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**ALLIED UNIVERSAL SECURITY SERVICES
AND ITS AFFILIATES,**

Case 02-RC-228532

Employer,

and

**NATIONAL LEAGUE OF JUSTICE AND
SECURITY PROFESSIONALS,**

Petitioner,

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ,**

Party of Interest.

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ's
STATEMENT IN OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW**

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PRELIMINARY STATEMENT

Service Employees International Union, Local 32BJ submits this Statement in Opposition to Petitioner’s Request for Review. Petitioner seeks to represent guards employed at four locations comprising the Statue of Liberty and requests review of Region 29’s October 29, 2018 Decision and Order (the “Decision”) dismissing the petition. The Decision should be affirmed and the Request for Review denied. The Decision correctly concluded that the petitioned-for unit – full-time and regular part-time guards employed at the Statue of Liberty – was part of a multi-location, employer-wide unit in New York City. In doing so, Region 29 followed well-established Board precedent that parties may merge units through contract, bargaining history and course of conduct. It further correctly found that Petitioner failed to meet its “heavy” burden of showing “compelling circumstances” for disturbing the merged unit. Indeed, Region 29 concluded that Petitioner had failed to present any evidence to show that the employer-wide unit is inappropriate. In its Request for Review, Petitioner fails to show, as it must, any clear and substantial factual error by the Region, a deviation from Board law by the Region, or compelling reasons for a change in Board policy.

Additionally, the Request for Review should be dismissed because Petitioner filed it more than 14 days after the Region’s final disposition in this proceeding, making it untimely under the Board’s Rules and Regulations.

FACTS

The Petitioner seeks to represent a unit of full-time and regular part-time guards employed at the four locations comprising the Statue of Liberty (Battery Park Coast Guard Station, Ellis Island, Liberty Island and Liberty State Park). Those employees have been represented by Local 32BJ since June 4, 2011 pursuant to a card check procedure and

recognition agreement. *See* Local 32BJ Hearing (“32BJ”) Exhibit (“Exh.”) 2 (exhibits referenced in this Opposition to Petitioner’s Request for Review are to those introduced into evidence at the October 12, 2018 hearing in this matter).

Local 32BJ’s Bargaining Structure and History with the Employer

Local 32BJ represents approximately 13,000 to 14,000 security guards in New York City, including employees of FJC Security Services, Inc. (“FJC” or the “Employer”), the employer of the guards at the Statue of Liberty. *See* Decision, at 2.¹ Local 32BJ and FJC have been parties to a series of collective bargaining agreements dating back to 2007. *See id.* The first agreement between Local 32BJ and FJC, entered into in 2007, covered FJC employees working at the Port Authority of New York and New Jersey. *Id.* They then entered into a collective bargaining agreement dated March 29, 2009, which was effective March 1, 2009 through February 29, 2012. *See* Decision, at 2; 32BJ Exh. 2. That agreement covered FJC security employees working at a variety of locations in New York City, including “work contracted by public agencies.” *See id.*; 32BJ Exh. 1, at 1 (Art. 1.1). FJC and Local 32BJ entered into two successor agreements, for the periods of March 1, 2012 to April 30, 2016 (the “2012 CBA”) and the second for the period of May 1, 2016 through April 30, 2020 (the “2016 CBA”). *See* Decision, at 2; 32BJ Exhs. 4 and 6 (the 2012 CBA and 2016 CBA are collectively referred to at times below as the “master agreements” or the “CBA”).

The 2012 CBA and 2016 CBA covered all FJC security officers employed in the greater New York City and New Jersey metropolitan areas where FJC has recognized Local 32BJ. *See* Decision, at 2; 32BJ Exhs. 4 and 6 (Article I of each agreement). Those

¹ The Decision’s pages are unnumbered. References to page numbers in the Decision exclude what appears to be an unintentionally blank second page.

agreements also provide for a process for recognition when FJC takes over an account where Local 32BJ already represents the incumbent security officers; *i.e.*, a process for a contractor transition from one employer to another. *See* Decision, at 2; 32BJ Exhs. 4 and 6 (Article IX of each agreement). That process requires, among other things, a new contractor to assume the applicable collective bargaining agreement of the predecessor employer. *See* 32BJ Exhs. 4 and 6 (Article I.4 of each agreement.).

The 2012 CBA and 2016 CBA further provide that at certain sites covered by the agreements, the parties are able to negotiate supplements – referred to as “riders”– to the master agreements. *See* Decision, at 2; 32BJ Exhs. A and B (Art. I.2 and Art. I’s preamble, which states “This Agreement is subject to any side-letters and/or riders . . .”). Those rider agreements may, among other things, provide better economic terms or preserve or specify different working conditions that are not covered by the master agreements. *See* Decision, at 2.

Local 32BJ’s Representation of the Guards at the Statue of Liberty

When Local 32BJ first came to represent the guards at the Statue of Liberty, the Employer was Paragon Systems, Inc. (“Paragon”). Upon a showing of Local 32BJ authorization cards signed by a majority of Paragon’s employees at the Statue of Liberty, Paragon recognized Local 32BJ as the employees’ representative, and Local 32BJ and Paragon entered into a Recognition Agreement dated June 14, 2011. *See* 32BJ Exh. 2. Paragon and Local 32BJ then entered into a collective bargaining agreement for those employees, effective for the period of August 21, 2012 to December 31, 2015. *See* Decision, at 2-3; 32BJ Exh. 3 (commencing on the second page). Shortly after the Paragon agreement was signed, FJC was awarded the Statue of Liberty work and took over operations there from

Paragon. *See* Decision, at 3. As required by the 2012 CBA, FJC assumed the Paragon agreement covering the Statue of Liberty. *See* Decision, at 3; 32BJ Exh. 4, at Art. I.4 (requiring FJC to offer employment to and hire incumbent employees and to “assume the terms of any collective bargaining agreement” applicable to an account acquired during the term of the 2012 CBA where Local 32BJ was the recognized bargaining representative of the employees).

The Paragon agreement covering the Statue of Liberty, which FJC assumed, expired on December 31, 2015. *See* 32BJ Exh. 3. FJC and Local 32BJ then entered into a successor agreement identified on its face as a “Rider Agreement” for the Statue of Liberty guards. The Rider Agreement (the “Rider”) is effective January 1, 2016 through December 31, 2018, and explicitly states that it is a rider to the 2012 CBA and its successor. *See* Decision, at 3; 32BJ Exh. 5. Throughout, the Rider identifies sections of the 2012 CBA that it adopts and notes any sections of it that it modifies. *See* Decision, at 3; 32BJ Exh. 5.

The Rider, the 2012 CBA and 2016 CBA maintain several provisions that apply across FJC’s New York City portfolio. *See* Decision, at 3. For example, under the 2012 CBA, if an employee is laid off or removed from a location for reasons other than a just cause discharge, the employee must be placed at another FJC location covered by the agreement. *See* Decision, at 3; 32BJ Exh. 4 (Art. 7.4); 32BJ Exh. 6, at 13-14 (Art. VII.4). The Rider memorializes that obligation to place displaced employees at other locations covered by the 2012 and 2016 CBA. *See* Decision, at 3; 32BJ Exh. 5 (Rider Agreement), at 7 (Art. 5.4) (requiring Employer to place employees at other locations covered by Article I of the master agreements). Promotional opportunities, too, are available to any unit employee, regardless of

location, and recall is by unit seniority, provided that the employees being recalled are otherwise qualified. *See* Decision, at 3.

ARGUMENT

The Regional Director’s Decision to dismiss the petition is amply supported by the evidence presented at the hearing, and correctly applies long-standing Board precedent regarding the merged-unit doctrine. At the hearing petitioner bore the “heavy” burden of demonstrating “compelling” circumstances as to why the historical merged unit in this case was no longer appropriate. The Regional Director correctly found that Petitioner failed to meet that heavy burden.

In its Request for Review, Petitioner cannot identify any clear, substantial factual errors in the Decision, cannot establish that the Regional Director’s decision departs from established law or policy by deviating from Board precedent, and cannot provide any “compelling reasons for reconsideration” of Board policy. *See* 29 CFR 102.67(d). The Request for Review should also be denied because it is untimely, having been filed more than 14 days after the Region’s final disposition of the petition. The Decision should therefore be affirmed and the Request for Review denied.

I. The Regional Director Correctly Found that Petitioner Failed to Present Evidence for a Compelling Reason to Disturb the Multi-Location Unit.

The Regional Director found that “the record evidence shows that . . . [FJC’s Statue of Liberty] employees have been effectively merged into a multi-location bargaining unit, including various work sites in the greater New York City area described in the NYC-wide agreement.” Decision, at 4. As noted in the Decision, “parties to a collective bargaining agreement may merge existing units by contract, bargaining history, and course of conduct and thereby destroy the separate identity of the individual units.” Decision, at 4 (citing

Anheuser-Busch, Inc., 246 NLRB 29, 31 (1979)). Indeed, “The Board has long recognized the ‘merger doctrine’ under which an employer and a union can agree to merge separately certified or recognized units into one overall unit Where such an agreement has been reached, the larger, merged unit is the only unit appropriate for purposes of a representation election.” *Wisconsin Bell, Inc.*, 283 NLRB 1165 (1987).

Further, where “there is evidence that the parties have included two or more plants in a single collective-bargaining agreement, the bargaining history becomes controlling, and the only appropriate unit becomes the one consisting of all the employees covered under the agreement.” *Arrow Uniform Rental*, 300 NLRB 246, 248 (1990). *See also Gibbs & Cox, Inc.*, 280 NLRB 953 (1986) (employer violated the Act by withdrawing recognition from union at a single site of a historic multi-location unit); *The Green-Wood Cemetery*, 280 NLRB 1359, 1359(1986) (the “nature of the established bargaining relationship must be recognized in order to guarantee the Section 7 rights of employees in the overall unit and to further the statutory objective of maintaining industrial stability”); *W.A. Foote Memorial Hospital, Inc.*, 230 NLRB 540 (1977) (reversing direction of a decertification election for a single unit where employer had recognized incumbent union at multiple locations).

The Board has repeatedly found multi-location units appropriate, even when terms of employment vary among the locations. In *General Electric Company (“GE”)*, 180 NLRB 1094 (1970), a nearly identical case to this one, a petitioner sought to decertify the union at a single plant in Iowa. The employer and the national union had traditionally engaged in national multi-site bargaining, which had culminated in a series of collective bargaining agreements covering units across the country. *Id.* The recognition clause negotiated by the parties provided that if a new local unit were certified, the national agreement, which

contained most substantive terms and conditions of employment, would apply to the employees of that unit, but local unions could still negotiate some terms, such as layoffs and holidays. *Id.* at 1095.

The Board found that the single Iowa site was inappropriate because, from the beginning of the bargaining relationship, the parties had “obliterated separate units by negotiating on a multiplant basis.” *GE*, 180 NLRB at 1095. The Board found that “[t]he multiplant bargaining is the rock on which the collective bargaining relationship has been built.” *Id.* Although certain terms were bargained at the local level, as the terms were not inconsistent with the national terms, they were insufficient to block the merger of the unit. *Id.* The Board also found that the automatic coverage of the CBA to newly organized units helped establish that a merger existed. The Board found that “the long continuous bargaining history, and the manner of negotiation, execution, coverage, and application of the agreements between parties... are consistent with a finding of a single multiplant unit. Moreover, such a finding is more in step with the realities of the relationship between the parties than would be a contrary finding.” *Id.*

In *Westinghouse Electric Corp.*, 227 NLRB 1932 (1977), a petitioner attempted to decertify a single plant a year after the union had been certified. Although the union organized the employer on a plant-by-plant basis, the parties had a history of negotiating collective bargaining agreements on a nationwide basis, the recognition clause provided that newly organized locals could assent to the national agreement, and although there were some differences in local terms, the national CBA provided the majority of substantive terms for the unit. *Id.* The Board denied the petition, finding that the multi-site unit was the appropriate unit.

In *Albertson's, Inc.* 307 NLRB 338 (1992), a petitioner filed a decertification petition at a single grocery store that the employer and the union had agreed to merge into a larger, preexisting grocery unit. The Board dismissed the petition and found that the multi-site unit was the appropriate unit, finding that “the larger unit here is composed entirely of the Employer’s employees and has existed longer than the smaller unit...there is a fully-agreed upon merger of the units, and there is no significant history of bargaining on a narrower basis.”

In *Albertson's*, the single store had existed as a separate entity for four months before it was merged into the larger unit and the decertification petition was filed ten months after the merger. *Id.* at 338. As the Regional Director noted in this case, “The Board has determined that even a 1-year bargaining history on a multi-plant basis can be sufficient to bar a petition seeking an election in a segment of that unit.” Decision, at 4 n. 6 (citing *Met Electrical Testing Co.*, 331 NLRB 872 (2000)). See also *Wisconsin Bell*, 283 NLRB 1165 (bargaining unit existed for 11 days prior to merger into larger unit); *Gould Nat'l Batteries, Inc.*, 150 NLRB 418, 420 (1964) (unit existed for 30 days prior to merger into larger unit).

The Regional Director found several factors supported his finding that a multi-location, merged unit exists, comprised of FJC’s New York City-wide portfolio. First, when FJC first took over the Statue of Liberty work from Paragon, the New York City master agreement with Local 32BJ compelled FJC to assume the Local 32BJ-Paragon collective bargaining agreement that was already in place there. See Decision, at 4. That, in itself, established that the Statue of Liberty, site-specific agreement relied on the master agreement. Further, the Statue of Liberty rider agreements explicitly rely on and adopt, both with and without modification, the New York City master agreements (*i.e.*, the 2012 CBA and the 2016

CBA). *See* Decision, at 4. Finally, the Regional Director credited evidence that “employees have transferred from one site to another in accordance with the terms of the NYC-wide agreement,” which provided “further evidence of the multi-location operation of that contract.” *Id.*

The concept of an Employer-wide unit is central to the operation of the master agreement and the benefits it confers on employees. The recognition clause in the master agreements is clear that it applies to regular full and part time security officers who work in the geographic scope and types of buildings detailed in Article I. By the express terms of the CBA, once FJC recognized Local 32BJ as the exclusive bargaining representative for the Statue of Liberty locations officers, those locations were merged into the larger unit, and the master agreement automatically applied to the workers. The Rider Agreement likewise confirms in express terms that it is a rider to the master contracts.

The Regional Director found that “While many of the economic terms for employees in the multi-location bargaining unit vary from site to site . . . some contract provisions apply across locations and customers, most notably seniority, placement, and recall rights.” Decision, at 3. For example, if an employee is laid off or removed from a location for reasons other than a just cause discharge, the employee must be placed at another FJC location covered by the CBA, regardless of the customer or location. *See* 32BJ Exh. 4 (Art. 7.4); 32BJ Exh. 6, at 13-14 (Art. VII.4). The Rider Agreement memorializes that obligation to place displaced employees at other locations covered by the CBA. *See* Decision, at 3; *see also* 32BJ Exh. 5, at 7 (Art. 5.4) (requiring Employer to place employees at other locations covered by Article I of the NYC Master Agreement).

Employees who are moved in accordance with those transfer provisions retain their seniority and, if the site to which they are moving has the same health and other benefits plans, the employees move without a break benefits and without having to restart their qualifying periods. Employees who are laid off retain their seniority for up to six months and can be recalled to any location in the Employer's portfolio, greatly increasing the likelihood that they are recalled. *See e.g.*, 32BJ Exh. 4, at 17 (Art. X.3 and X.4); 32BJ Exh. 6, at 17 (same). Additionally, under the CBA, an employee involuntarily transferred to another location for non-economic reasons or due to a reduction in hours does not lose his or her health care benefits. *See* 32 BJ Exh. 4 (Art. 10.7) (permitting Employer to temporarily transfer employees to other locations without loss of seniority or health benefits); 32BJ Exh. 6, at 17-18 (Art. X.7) (same). The transfer and recall provisions also confer benefits on the Employer, allowing it to move employees when it does not have just cause for discharge.

The merged unit concept is bolstered by the CBA's requirement that the Employer enter into a rider agreement for sites such as the Statue of Liberty. If the Employer and Local 32BJ are unable to reach an agreement for a new rider, Local 32BJ's enforcement mechanism would be to file a grievance under the CBA for violating Article I.2's requirement that the parties negotiate and enter into rider agreements for the locations identified in that section.

The mere fact that the Union bargained with the Employer for certain other terms that differ from the master agreement does not preclude a merger of the Statue of Liberty locations into the larger multi-site security unit. *See Radio Corp. of Am.*, 135 NLRB 980 (1962) ("Surely the Board is not such a prisoner of a narrow interpretation of its own findings concerning appropriateness of a separate bargaining unit that it cannot recognize a workable pattern of bargaining developed by the parties which, while giving due recognition to such

separate units, also seeks to accommodate the interests of local and national bargaining.”); *Gold Kist Inc.*, 309 NLRB 1 (1992) (differing terms between units did not preclude merger of smaller unit into larger existing unit).

II. The Petitioner Failed to Meet its Heavy Burden of Showing that Compelling Circumstances Exist to Disturb the Merged Unit.

Following well-settled Board precedent, the Regional Director found that “Petitioner has not met its burden of establishing compelling circumstances required to break up the established multi-location unit.” Decision, at 4. “The Board normally will not disturb an historical, multilocation unit absent compelling circumstances. The party challenging an historical unit bears the burden of showing that the unit is no longer appropriate. This evidentiary burden is a heavy one.” *Met Elec.*, 331 NLRB at 872 (citation omitted); *see also Anheuser-Busch*, 246 NLRB at 31 (“[A] collective-bargaining relationship may by contract, bargaining history, and course of conduct merge existing certified units,” thereby destroying “the separate identity of the individual units.”).

Petitioner presented no evidence that the Employer-wide unit that includes the Statue of Liberty within the Employer’s larger New York City area unit was inappropriate. *See* Decision, at 5. Instead, Petitioner argued that the Statue of Liberty should not have been merged into Employer-wide unit. *See id.* Petitioner rehashes that unavailing argument in its Request for Review. Petitioner seemingly argues that somehow because the Statue of Liberty is part of a federal agency (the National Parks Service) that contracts its security work to a third-party contractor, such as FJC, and because the McNamara-O’Hara Service Contract Act of 1965, as amended (the “SCA”), 41 U.S.C. §§ 6701, *et seq.*, applies, it could not be merged into a larger unit. The distinction made by Petitioner based on the SCA’s applicability is immaterial. The SCA empowers the U.S. Department of Labor (“DOL”) to issue wage

determinations that set the minimum wages and benefits that federal contractors must provide. *See* 41 U.S.C. § 6703. Alternatively, it permits, as FJC and Local 32BJ have done, collective bargaining agreements negotiated at arm's length to become the wage determination. *See* 41 U.S.C. § 6703(1), (2); *see also* 29 C.F.R. § 4.104 (noting that the SCA provides for minimum wages and benefits for federally-contracted employees, which wages and benefits may be established by the DOL or through collective bargaining). Since Local 32BJ entered into an agreement with Paragon in 2012, the terms and conditions of employment, including wages and benefits, for the guards at the Statue of Liberty have been established through collective bargaining. It is simply wrong to claim, as Petitioner does, that the wages, benefits and other terms of conditions of employment are “laid out” in the SCA.

But even if the SCA set the wages and benefits for the Statue of Liberty guards, the merged unit doctrine would still apply. Board precedent, as discussed above, makes clear that there is no requirement to have the same economic terms across different locations of a multi-location, merged unit. *See GE*, 180 NLRB at 1094; *Anheuser-Busch*, 246 NLRB at 31 (multi-location unit affirmed even though national level agreement permitted supplemental, local-level agreements). The Regional Director was, in any event, aware that the SCA applied to the Statue of Liberty contracted security work, but correctly concluded that the master agreements contemplated riders for public work that might have different economic terms. *See* Decision, at 3 n.4. At the hearing before Region 29, Petitioner failed to offer any compelling reason for deviating from the Employer-wide unit established by the FJC-Local 32BJ master agreements.

And in its Request for Review, Petitioner fails to present any evidence that the Regional Director made a “clear, substantial factual” error; that the Decision deviated from

established Board law (in fact, the Regional Director is wholly consistent with Board law); or any “compelling” reason to deviate from well-established Board policy, other than that Petitioner does not like the law on merged units. The Board has held that “a desire by one party to alter the historical multilocation unit; a showing of interest for a single-facility by those facility’s employees; varied bargaining history; or differences in degree among the employees’ community of interest (geographical separation, local autonomy, and limited interaction)” do not constitute “compelling circumstances” that warrant disturbing a historical, multi-location unit. *Met Elec.*, 331 NLRB at 872.

Petitioner seeks to disturb the merged unit by making the precise arguments the Board already rejected in *Met Elec.* Petitioner contends that the Statue of Liberty, because it is a federal site at which employees must pass background checks in order to work, cannot be merged into a larger employer-wide unit. In making that argument, Petitioner claims that the Statue of Liberty is not some “freewheeling” location to which employees rejected at other sites may be moved. But Petitioner hides its head in the sand in making that claim. The Regional Director specifically found that employees have transferred between sites covered by the FJC master agreements, including the Statue of Liberty. *See* Decision, at 4; *see also* Order Admitting Employer Exhibit 1, Board Exhibit 6, and Closing Hearing, Case No. 02-RC-228532, dated October 22, 2018. Whatever background checks may apply, they are not insurmountable barriers to employee transfers.

Petitioner also appears to argue – again, erroneously – that the Regional Director did not consider evidence it presented that the FJC master agreements did not apply to the Statue of Liberty. Specifically, Petitioner points to testimony by the Employer’s local manager and a bargaining unit member at the Statue of Liberty that they were unfamiliar with the master

agreements. *See* Request for Review, at 2-3. But the Decision specifically addressed that testimony and determined that even if true, it did not contradict other testimony regarding the bargaining history merging the Statue of Liberty into the larger employer-wide unit. *See* Decision, at 3-4. That conclusion in the Decision is correct. First, the Employer's local manager had only been employed at the Statue of Liberty for about ten months at the time of his testimony, so his familiarity with the overall bargaining history between FJC and Local 32BJ was limited. Additionally, simply because he happened not to be aware of the master agreement, the testimony of other witnesses, who actually engaged in bargaining both the FJC master agreements and the Rider Agreement, stands un-rebutted regarding the bargaining history on the merged units. Those witnesses presented evidence that FJC and Local 32BJ, through bargaining, contract and course of conduct, intended to merge the Statue of Liberty into the Employer-wide unit.²

In sum, the Regional Director correctly found that the Statue of Liberty is part of an Employer-wide, merged unit. The Petitioner fails to make any argument to justify not affirming the Decision.

III. Petitioner's Request for Review is Untimely.

Finally, Petitioner submitted its Request for Review late, and it should therefore be denied. The Board's rules provide that Requests for Review must be submitted within 14 days of a final disposition of proceedings by a Regional Director. *See* NLRB Rules and Regulations, Section 102.67. The Regional Director issued the Decision on October 29, 2018.

² Petitioner misrepresents bargaining unit member Gary Brutus's testimony. Brutus did not testify that Local 32BJ representative Israel Melendez told him that the Statue of Liberty was not covered by the FJC master agreement. Brutus stated that he was told that by Melendez that the "City" agreement did not apply to him. On cross-examination, Brutus confirmed that the City agreement could have been a reference to a separate rider agreement between Local 32BJ and FJC covering guards performed work contracted by the City of New York.

To have been timely filed, Petitioner should have filed the Request for Review no later than November 12, 2018. Petitioner filed it on November 13, claiming that the NLRB's website was under repair and prevented it from filing on a timely basis. If true, Petitioner knew or should have known prior to November 12 that the NLRB's website was inaccessible on the due date for filing its request, and should have arranged for alternative ways to file on a timely basis. Petitioner also could have requested additional time to submit its Request for Review, but it did not seek such permission. Petitioner's late-filing prejudice's Local 32BJ and the Employer by creating uncertainty, even after the Decision became immune from further challenge as of November 12.

CONCLUSION

Petitioner's Request for Review should be denied. The Decision correctly found that the Statue of Liberty work performed FJC guards was effectively merged, through bargaining history, course of conduct and contract, with an employer-wide unit. Petitioner has failed to show, as it must, any substantial factual errors by the Region, any deviation from established Board law, or a "compelling" reason to change Board policy. Additionally, the Request for Review should be dismissed because it is untimely.



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Certificate of Service

I hereby certify that a copy of **Service Employees International, Local 32BJ's Objection to Petitioner's Request For Review** was served on this 19th day of November via electronic mail, on the following parties:

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