

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

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

Employer

and

Case 12-UC-248568

SERVICES TRADES COUNCIL UNION

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER DISMISSING PETITION

On September 19, 2019, Services Trades Council Union (the Petitioner)¹ filed petition in this case pursuant to Section 9(b) of the National Labor Relations Act (the Act), seeking to clarify the existing bargaining units of a total of approximately 42,000 full-time and part-time employees employed by Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World (the Employer),² to include a group of approximately 65 NBA Experience Guides.

¹ The Petitioner is comprised of six local labor organizations and their corresponding international unions. The six local unions are International Alliance of Theatrical Stage Employees Local 631; International Brotherhood of Teamsters Local 385; Transportation Communications International Union, Local 1908, International Association of Machinists and Aerospace Workers; UNITE HERE! Local 362; UNITE HERE! Local 737; and United Food and Commercial Workers International Union, Local 1625. The parties stipulated, and I find, that the Petitioner is a labor organization with the meaning of Section 2(5) of the Act.

² Walt Disney Parks and Resorts U.S. is the corporate entity within The Walt Disney Company that operates all domestic Disney tourism-related businesses. The instant case only concerns the "Walt Disney World" in the area of Lake Buena Vista, Florida. The parties stipulated, and I find, that at all material times, the Employer, a Florida corporation, has been engaged in providing family entertainment, lodging, and retail services at its resort complex in Lake Buena Vista, Florida; during the past 12 months, in the course and conduct of its business, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its Florida facilities goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida; and the Employer is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act and is subject to the jurisdiction of the National Labor Relations Board (the Board).

The Employer and the Petitioner are parties to two collective-bargaining agreements, one covering all regular full-time employees, and the other covering all regular part-time employees, who are employed by the Employer in the job classifications listed in Addendum A of said agreements at Disney World in Lake Buena Vista, Florida, excluding all other employees, security guards, and supervisors as defined by the Act.³ Article 4, Section 1 of both of the parties' contracts specifies the "areas included in the agreement" at Disney World as the various theme parks, hotels, recreational areas, roadways, employee entrances, parking lots, guest/employee transportation service facilities on the Disney World property, and the main gate office complex, as well as all vehicles and boats which directly service any of these areas.⁴

Article 4, Section 2 of the parties' contracts specifically excludes from coverage the Reedy Creek Improvement District; concessionaires (third party vendors) who engage their own employees; Buena Vista Construction Company, Buena Vista Distribution Co., Inc., and any other present or future division of The Walt Disney Company except as specifically set forth in Article 4, Section 1. Article 4, Section 2 also includes the following disclaimer of interest by the Petitioner:

The Services Trades Council Union and its individual international and local Unions disclaim any interest now, or in the future, in seeking to represent any employees including the Animal Keeper classifications of the Company other than those in the classifications set forth in Addendum A, except as to the classification described in Case No. 12 RC 4531, affirmed 215 NLRB No. 89.⁵

³ The full-time and part-time agreements contain identical lists of job classifications in their respective Addenda A. Each of the six unions that comprise the Petitioner administers the collective-bargaining agreements with respect to certain job classifications within the full-time and part-time units, as determined by the Petitioner. Each of the six unions may negotiate separate addenda to the collective-bargaining agreements with the Employer, covering terms specific to employees in the job classifications for which they administer the agreements.

⁴ Certain temporary employees, such as employees in the Employer's "College Program," are excluded from the bargaining units.

⁵ *Walt Disney World Co.*, 215 NLRB 421 (1974). The job classification at issue in 12-RC-4531 was "pageant host/hostess," i.e., employees wearing costumes of Disney characters. At present, those employees are included in the Petitioner's existing bargaining units, represented by Teamsters Local 385.

The Employer contends that this long-standing disclaimer, which has been included in every collective-bargaining agreement between the parties since the late 1970s using the above language or similar language, precludes the inclusion of NBA Experience Guides in the units because that is not a job classification included in Addendum A to the parties' agreements. The Petitioner asserts that units should be clarified to include the NBA Experience Guides either because the NBA Experience Guides are misclassified and are actually Attractions Hosts/Hostesses (referred to herein as Attractions H/H or Attractions Hosts), a classification that is included in Addendum A, or because the NBA Experience Guides share an overwhelming community of interest with the employees in the existing units and therefore constitute a valid accretion to those units.

On October 8, 2019, I issued a Notice to Show Cause as to whether and why the instant petition should or should not be further processed. Both parties submitted responses to the Notice to Show Cause, and after considering them, I directed that a hearing be conducted regarding the issue raised by the petition. Thereafter, a hearing was held from December 11 through 13, 2019.

Based on the record as a whole and applicable Board law, I conclude that Article 4, Section 2, precludes any analysis as to whether accretion into the unit is appropriate, but does not prevent the Board from determining whether the NBA Experience Guides perform the same job functions as the bargaining unit Attractions Hosts so as to warrant their inclusion in the existing units. I find that although the NBA Experience Guides perform some job duties similar to those performed by Attractions Hosts, there are significant differences between these job classifications, and the units should not be clarified to include NBA Experience Guides. Accordingly, I am dismissing the petition, as fully explained below.

I. FACTS

A. Bargaining History and the Relevant Contractual Provisions

The Employer, a subsidiary of The Walt Disney Company, owns and operates Walt Disney World. On April 25, 1972, the Employer voluntarily recognized the Petitioner as the collective bargaining agent of the full-time unit employees. Since then, the parties have entered into successive collective-bargaining agreements. In 2003, the Employer recognized the Petitioner as the collective-bargaining representative of the part-time unit, and parallel collective bargaining agreements to those of the full-time unit have been negotiated successively since that date.⁶ Of the approximately 42,000 employees in these two units, there are approximately 29,000 in the full-time unit and 13,000 in the part-time unit. The current collective-bargaining agreements are effective by their terms from September 24, 2017 through October 1, 2022. During the parties' negotiations for these agreements in 2017 and 2018, the Petitioner proposed eliminating the disclaimer of interest language from Article 4, Section 2 as part of a package proposal, although it later withdrew that proposal. Article 4, Section 2, remains in both contracts.

Despite the Article 4, Section 2 disclaimer language, the full-time bargaining unit has expanded from 29 classifications in 1972 to approximately 121 classifications at present, and, as noted, a second bargaining unit of part-time employees was created in 2003. The Employer's Director of Labor Relations, Christie Sutherland, testified that the Employer is creating new job classifications "all the time" and that different areas in the resort are constantly opening or closing to introduce new experiences for guests.

⁶ The current full-time agreement states in Article 10, Section 2 that the workweek of full-time employees will be a minimum of 25 hours, and that the Employer will make an effort to "maximize the straight-time hours worked by Regular Full Time employees by providing as many thirty-five (35) to forty (40) hour schedules as possible, consistent with efficient operations." Additionally, the same section provides that non-tipped full-time employees who are employed continuously from January 1 to December 31 each year are guaranteed 1,800 paid hours (straight-time, overtime, and paid benefit hours) annually. Article 12, Section 11, provides that regular full-time employees who convert to regular part-time status retain their regular full-time rate of pay. Both contracts also set forth the procedure for employees to transfer between the two units.

According to Sutherland, historically, when newly-created job classifications have been added to Addendum A, it has only been by mutual agreement of the parties. The new classification's wage rate is established by the Employer, in accordance with the following language in Article 12 of the parties' contracts:

Section 1. Schedule of Wage Rates

The job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in Addendum A attached hereto and considered in all respects to be a part of this Agreement.

Section 2. Rates for New Jobs

If the Company hereafter establishes any new or substantially changed job classifications or work operation, prior to the implementation of any new or substantially changed job classification or work operation, the Company will discuss such action with the Union. The new job classification and wage rate for such classification will be established by the Company. If the Union does not agree with the rate for the job classification, the Union shall submit a written grievance at the Step 2 of the Grievance Procedure...

Thus, from time to time, the Employer determines that a newly created job classification entails duties within the scope of the work performed by employees represented by the Petitioner, and notifies the Petitioner of the new classification. The Petitioner then determines which affiliated union should administer the agreement for the added job classification, and the designated constituent union of the Petitioner then continues the "discussion" about the new classification and its rate of pay with the Employer, and may agree or grieve the Employer's wage determination. For example, when the Employer opened its new "Skyliner" gondola transportation system in 2019, the Employer determined that the work of Skyliner operators was similar to that of Attractions Hosts and monorail operators, and contacted the Petitioner, which determined that Transportation Communications International Union Local 1908 (TCU Local 1908) would handle representational responsibilities for the new employees. The Employer and TCU Local 1908 then met to discuss the position and the wage rate established by the Employer. There is also evidence

that on one occasion, the Petitioner and one of its constituent unions declined the Employer's offer of recognition regarding the employees in a new job classification.

A. Employee Work Locations and Job Duties

i. The Newly Created NBA Experience Guide Job Classification

In mid-July 2019, the Employer opened a new attraction, The NBA Experience, at the Disney Springs recreation area of Disney World,⁷ on the former site of an indoor theme park known as Disney Quest, which was closed for at least two years before the NBA Experience opened. A new building was erected at that location to house the NBA Experience.

The Employer licenses the use of the "NBA" name and logos from the National Basketball Association (NBA) and worked with the NBA to create the attraction. The NBA Experience is intended to offer guests a representation of the experience of being a player in the NBA or the Women's National Basketball Association (WNBA) "from going through the combine to being drafted, going through skills and eventually winning the trophy."

Unlike the Employer's theme parks such as the Magic Kingdom or EPCOT, the Disney Springs area is free to enter. It has a variety of entertainment, retail, and food and beverage locations operated by the Employer, as well as spaces leased to third parties such as the House of Blues and Cirque du Soleil. All Disney Springs guests may freely enter and make purchases in the NBA Experience merchandise retail shop. However, they must purchase tickets online or in the retail shop in order to enter the NBA Experience attraction itself. Prior to entering the attraction, all ticketed guests must complete a liability waiver at the ticketing desk in the retail shop.

⁷ The official opening date for the public was August 12, 2019. Starting in mid-July 2019, the Employer had a "soft opening" to Disney World employees and their personal guests, as well as some annual passholders and/or Disney Vacation Club members. There was a period between the soft opening and August 12, during which the attraction was closed so that portions of the technology could be fixed, and Guides could be retrained.

Ticketing for the attraction – as virtually everywhere at Disney World – is handled with radio-frequency identification (RFID) technology stored on cards or in guests' RFID wristbands (called "Magic Bands"). Bargaining unit employees called "Roamers" sell the tickets in the merchandise shop, ensure that liability waivers are in order, and oversee the RFID-reading "touchpoint" equipment at the entrance to the NBA Experience attraction to confirm that guests entering have paid the admission fee. Once within the attraction, the guests tap their RFID media at various stations to identify themselves. For example, the combine activity can record a guest's measurements and know that those measurements belong to that guest. The guests are also able to use the RFID system to identify their favorite team, give themselves an NBA nickname, and otherwise tailor the experience to themselves.

Testimony concerning the duties of the NBA Experience Guides was provided by the Employer's Director of Labor Relations, Christie Sutherland, and employee witnesses who visited the NBA Experience as guests and/or worked in the portion of the NBA Experience that does not require paid entry. Neither party presented an NBA Experience Guide, or any supervisor or manager who works in the NBA Experience attraction as a witness. The sole Employer witness, Director of Labor Relations Sutherland, testified as to how the Guide position was conceptualized and intended to function within the NBA Experience attraction, and described the specialized training the Guides received. However, she acknowledged that she and her department have had no work-related involvement with the Guides since the attraction opened.⁸ The Petitioner's witnesses provided anecdotal evidence of their observations of the work of NBA Experience Guides.

⁸ The Employer's Labor Relations Department only deals with bargaining unit employees, and therefore does not handle employee relations with NBA Experience Guides.

Director of Labor Relations Sutherland testified concerning the duties that NBA Experience Guides are expected to perform. One of their primary functions is ensuring guest safety and the efficient movement of guests through the experience. In addition, according to Sutherland, unlike unit employees staffing other Disney World attractions, the Guides are expected to proactively engage with the guests about the attraction and in general discussions about basketball, and to be the cheerleader and coach for guests who are in the Guides' area of the attraction.

Accordingly, the Employer expects Guides to approach guests as they enter the attraction to discuss the guests' basketball knowledge, experiences and expectations. Guides are expected to be "storytellers" and share their passion for basketball with the guests in an effort to create an individualized, immersive guest experience. For instance, a guest who is looking a little lost in the entrance atrium should be approached by a Guide and welcomed; the Guide should then initiate a conversation about favorite teams, players, or nicknames, to assess the guest's personal interest level in basketball and to help make recommendations to tailor the experience for them. The Guides' conversational talking points are not supposed to be scripted by the Employer and should not be a memorized "spiel." According to the Employer, the personal interaction with the Guides is as much a part of the guest experience of the attraction as the various available activities.

However, according to witnesses presented by the Petitioner, who are current and former employees of the Employer in positions other than NBA Experience Guide, who visited the NBA Experience as guests during the last few months, the Guides they encountered did not proactively engage with guests in discussion in the entrance atrium of the attraction or elsewhere in any of the activity sections. If they asked the Guide what an activity was or what they were supposed to do with it, the Guide explained it to them. Otherwise, the Guide merely directed them to an open bay and instructed them to "tap in" with their RFID media to begin the activity. One of the witnesses

formerly worked in the NBA Experience merchandising shop as a Roamer and did not receive NBA Experience Guide training. Although Roamers are cross-trained employees who can be assigned to work in several roles, including in NBA Experience ticket sales, monitoring the RFID touchpoint entry area, and in the merchandise shop, Roamers do not perform work as NBA Experience Guides and typically do not enter the attraction area of the NBA Experience.⁹ According to the Roamer who testified, although NBA Experience employees were told in training that the Guides would go up to guests and engage them, “most of the time” the Guides simply stand in the atrium.

The NBA Experience attraction does not have a set path, track, or agenda that guests must follow. Rather, guests can choose to spend as much or as little time in each of the available activity areas of the attraction as they would like. The attraction consists of two floors and Guides are stationed in the parts of the attraction and rotate between stations throughout a shift. These rotations are effectuated by the Cast Deployment System (CDS), the Employer’s facility-wide time-clock system. When an employee clocks in, CDS generates a work assignment slip for them, telling them where to go. If it is the opening shift, they stay at that initially-assigned station until another employee brings a CDS slip to that station and relieves them, either with a new work rotation, a break, or an end of shift “bump;” otherwise, they are the employee relieving someone else and, when they assume the post, hand off the CDS slip, which contains the relieved employee’s subsequent instructions. A second copy of each CDS slip is printed at the same time and placed in an envelope in the NBA Experience employee break room.

On the first floor of the attraction, guests pass through the RFID entry points into the large circular atrium that leads to different activity options, as well as the stairs and elevator to the second

⁹As described below, on occasion Roamers have been asked to enter the NBA Experience attraction area to serve as interpreters for guests who do not speak English.

floor, on its perimeter. Sutherland described the first floor as “free falling” and explained that Guides assigned to work on the first floor may move with groups of guests and personalize the guest’s experience. From the atrium, guests may enter a locker room displaying NBA memorabilia; have their picture digitally taken with the NBA Championship and MVP trophies and learn more about their favorite players or seminal games in the “champions corner;” watch two films about the NBA and WNBA; or go through “the combine area,” where technology measures their wingspan, vertical reach, and other physiological elements pertaining to basketball. There are no Guides dedicated to the locker room viewing area or the champions corner. Rather, the Guides stationed in the atrium may periodically enter the locker room or champions corner. In the movie areas, a Guide operates wall-panel consoles that open and close the theater room doors and start and stop the movies. That Guide also gives guests general information about the films’ contents and length and the procedure to exit on the opposite side of the theater after the show or, if necessary, while it is running. Sutherland testified that in the combine area, the Employer’s expectation is that Guides will give guests pointers to improve their vertical leap or improve their throw, cheer them on, and coach them. However, the former NBA Experience Roamer testified that the Guides stationed in the combine area merely stand at a podium at the front of the queue and ask guests how many are in their party, then direct them to the appropriate combine evaluation station, where a computer program gives all further directions to the guests.

The upper level of the NBA Experience attraction has more basketball-related activities, such as a shooting room, where numbers on the floor light up in various places to instruct guests where to stand to attempt a shot at a basketball hoop; a dribbling skills test; a dunking area with adjustable-height basketball hoops; “replay booths” where guests review footage from past games and make calls as though they were the referee; a touch-screen trivia game; slingshots for shooting Nerf-like or rubber basketballs into basketball hoops; a video game arcade; and a place for a photo

opportunity with one of two life-size mannequin-figures of the NBA Commissioner, as though the guest has just been drafted into the NBA. Guides on the second floor are “more assigned” to particular activities and will not accompany guests between activities. As on the lower floor, Guides stationed on the upper floor are expected to engage with guests, provide instructions on what to do in the activity area, and enhance the experience in a non-scripted way.

In the slingshot game, a Guide directs guests to open slingshot bays and to “tap in” to join the competition. The Guide then starts the competition by operating a console with buttons that are labeled “experience start” and “experience stop,” and numbered buttons or indicator lights that appear to correspond with the numbered slingshot bays. At the conclusion of the game, the Guide announces the winner and leads a round of applause for the guests, then directs the guests to exit in the appropriate direction so as not to interfere with the next batch of guests waiting in the queue for their turn to play. The control console also has communications functions, including a microphone and a telephone-type device. However, the former Roamer testified that if Guides need to get in touch with a manager, they walk downstairs to the merchandise shop and ask the coordinator or Roamer to make that call.

In the dribbling activity, a Guide directs guests into one of the partitioned cubicles, each containing a television screen showing a virtual “coach”¹⁰ who leads the activity. A motion-sensor bar measures the guest’s dribbling skill technique. The progression of difficulty in tasks presented by the televised virtual coach depends on the guest’s performance identified by the motion-sensor bar and programming of the dribbling activity, and is not determined by the Guide. The dribbling area also has a similar-looking control console with the same arrangement as the slingshot operator’s console, including “experience start” and “experience stop” buttons, indicator lights,

¹⁰ The televised virtual coach wears different clothing than the Guides and other NBA Experience employees.

and built-in communications equipment, but the use of the console is not clear from the record. It appears that guests initiate the televised dribbling activity by “tapping in” at the cubicle with their RFID media. The basketballs for the activity are available on the wall behind the cubicles; guests pick out which size ball they wish to use and take it into the cubicle to perform the dribbling activity.

In the shooting room, guests have 15 seconds to make up to four baskets by shooting basketballs from various designated points. Three different ball sizes are available for the activity and Guides are supposed to explain the differences to guests. Sutherland explained that Guides need to “read” the guest and may suggest that a guest select a certain sized ball. Guides were trained to act as the ball-return for the guest participating in the activity by performing a chest pass or bounce pass, but the former Roamer testified that because of safety concerns if the guest is paying more attention to the basket than the Guide standing beneath the basket and returning the ball, the Guide more often returns the ball with a gentler, underhanded toss instead of a chest pass or bounce pass. Guides may also participate in the activity on other parts of the court than the guests or suggest that a different size ball be used to adjust the difficulty of the activity.

One of the Union witnesses testified that she did not see any Guides in the arcade area, the replay booth area, or the draft day photo-op area during her approximately two-hour visit to the NBA Experience.

According to Sutherland, Guides who do not meet the Employer’s expectations for proactively engaging with guests will be, and have been, coached by the Guest Experience Managers. Failure to improve has resulted in “documentation.” No such documentation was entered in evidence, and it is not apparent that documentation constitutes discipline. However, Sutherland testified that the Employer would discipline and possibly discharge a Guide who continues to fail to meet the expectation of interacting deeply and proactively with guests.

Guides have authority to take certain actions to rectify negative guest experiences (perform “guest recovery”) without managerial permission. For example, if the activity technology in an area of the attraction is malfunctioning and prevents the guest from experiencing that activity, the Guide is authorized to issue them a pass to return to the entire attraction free of charge at another time. Guides are also required to keep records regarding the time and cause of downtime in the part of the attraction where they work.

All NBA Experience employees share the same break room in a non-guest area. Guides do not perform work in the merchandise shop, and for the most part, merchandise shop employees do not perform work within the attraction itself. Guides do not interact or interchange with other Disney World employees during the course of their regular work within the NBA Experience attraction. If a Guide is absent, employees in other job classifications are not used to fill in for them. Likewise, Guides do not fill in when employees in other classifications are absent. The Employer does not permit NBA Experience Guides to cross-train for other attractions or positions while maintaining the Guide position.

ii. Attractions Host/Hostess

The Employer has many¹¹ employees in the job classification of Attractions Host, who work at its attractions and theme parks to facilitate guests entering and leaving, assist with crowd control, and operate attractions using consoles that have various attraction-specific indicator lights, “start” and “stop” buttons, and built-in communications equipment. Certain ride attractions also have a “tower,” a non-guest area where an Attractions Host monitors the ride’s overall operation and can halt it if necessary. If there is downtime at a particular attraction, the Attractions Host is

¹¹ The record is not specific as to the number of Attractions Hosts/Hostesses. However, there is testimony that there are about 7,800 employees represented by UNITE HERE! Local 362, including Attractions Hosts/Hostesses, custodial employees, vacation planners, and attractions artists. Based on this information and the scope of the Employer’s operations at Disney World, it appears that number of Attractions Hosts/Hostesses may be in the thousands.

required to fill out a Capacity Limiting Event sheet, including a description of the time and cause of the downtime, and the extent of the impact of the downtime. No other bargaining unit employees record attraction downtime on these sheets.

Not all of the Employer's attractions are rides. Many are entertainment shows, and the Attractions Hosts at those venues assist guests with safely and efficiently seating themselves for the show. Some Attractions Hosts are trained to drive "Pargos," which are open-air vehicles similar to golf carts, some of which can seat 10 to 12 passengers. Pargos are used to shuttle guests, employees, and/or equipment between remote locations. Attractions Hosts perform crowd control, entry point, ticket sales, and parking lot job duties at the Employer's water parks, Blizzard Beach and Typhoon Lagoon, and at Wide World of Sports, Disney World's sports complex that has hosted baseball games (including Major League spring training games), basketball games, cheerleading and dance competitions, football games, and soccer games.

At present, no Attractions Hosts work at Disney Springs. However, Attractions Hosts worked at the former indoor theme park, Disney Quest, that occupied the land where the NBA Experience now exists, and Attractions Hosts also worked in the now-closed Cirque du Soleil entertainment venue nearby.¹² The Attractions Hosts currently working the closest to the NBA Experience building are about two miles away from Disney Springs, at the EPCOT theme park.

Due to the organization of the Employer's theme parks, Attractions Hosts are generally assigned to one of the "lands" or areas within a particular park (e.g., an area called "Dinoland" at the Animal Kingdom park). The Attractions Hosts are cross-trained on several (or all) attractions within that area (e.g., TriceraTop Spin, a Dumbo-like "flying" ride, and Primeval Whirl, a roller coaster in Dinoland) or may be cross-trained on attractions in multiple areas of the same park (e.g.,

¹² None of the former Disney Quest hosts now work as NBA Experience Guides. According to Director of Labor Relations Sutherland, the Employer is working on bringing a new Cirque du Soleil production to Disney Springs in the future, and may employ hosts there to perform ushering and possibly other functions, such as ticketing.

both Dinoland and Asia area attractions at Animal Kingdom). Attractions Hosts are able to perform crowd control duties anywhere within their area, but cannot work on a particular attraction unless and until they have received the specific training for that attraction and passed the post-training assessment of their ability to do so.

Typically, within a shift on a single attraction, the Attractions Hosts will rotate between different stations, such as loader, unloader, tower control, and greeter. On the Tower of Terror, for example, these rotations happen about every 45 minutes. Some rotations, such as at Dinoland, include positions on multiple individual attractions.

As with the Guides, these daily work assignments and rotations involving Attractions Hosts are handled by CDS slips being passed manually between Attractions Hosts as they relieve each other. Attractions Hosts who are cross-trained may switch between attractions within the same shift, or work overtime on an attraction different than the one where they started their workday, depending on the Employer's operational needs.

An Attractions Host's interactions with guests are generally initiated by the guest, or relate to facilitating the entry, exit, loading or unloading of guests at the attraction. Particularly in loading or line management roles, Attractions Hosts will ask guests how many are in their party and direct them to the appropriate space to experience the attraction together, or as near together as possible. On the Employer's "Test Track" attraction at the EPCOT park, before guests enter the ride portion of the attraction, there is a room where they use a self-guided program on touchscreen computers to "customize" their ride vehicle.¹³ Attractions Hosts ensure that the proper number of guests is at each customization station (i.e., that guests in the same party share whenever possible), and

¹³ Although all actual vehicles operating on the "Test Track" ride are identical, the attraction uses RFID processing to record the "performance" of each guest's custom-designed "test vehicle" on the "test track" and report to the guests which test vehicle "performed" best in each performance test, i.e., simulating digitally on screens the impact of guests' design choices, like selecting different tires or adding a spoiler to the test vehicle, as the actual ride vehicle moves through the attraction.

answers guests' questions about the design program or the attraction, but they do not proactively engage with guests about the design process or enthuse about cars with them. In another room, other Attractions Hosts then manage the process of loading and unloading guests on and off the ride vehicles, including performing safety checks before releasing each vehicle onto a track using the control panel for the attraction.

The job description for Attractions H/H notes that the position requires frequent and constant "spieling," and separately notes that spiels may be lengthy, and must be memorized. Among other things, "spiels" are used to deliver safety information to guests in a consistent manner. It is apparent that these "spiels" are generally delivered to groups of guests, rather than individual guests, and are not used to create a personalized experience. Attractions Hosts also use theming phrases, which are phrases taught during training that are used to enhance the guest experience. For example, Attractions Hosts working at the Tower of Terror are dressed as bellhops, and are to tell guests, "Enjoy your stay with us," to further the illusion that guests are checking into a hotel.

Attractions Hosts are also trained on "courtesy basics" about being courteous and respectful to guests of all ages, and treating "each guest as an individual." They may also "high five" park guests who hold up their hand for a high five. Attractions Hosts are also permitted to have unscripted conversations with guests if the guest initiates such conversations. There are also frequent two- to five-minute periods when Attractions Hosts wait in a queue with guests, i.e., at a merge point of the "FastPass" line and the "standby" line, and on these occasions they may engage in unscripted conversations with the guests to fill the time. For example, an Attractions Host might ask a guest how his or her day is going, or what the guest plans to do next. In the event of ride downtime, these waiting periods may become protracted and require further guest interaction by the Attractions Host. Attractions Hosts also engage directly with younger guests who may be

scared to ride the attraction by kneeling down to the children's level and talking directly to them to reassure them about the ride and otherwise reduce their fear.

Attractions Hosts who work at ESPN Wide World of Sports are frequently asked questions by guests about where teams are located and game times. They are also trained to proactively ask guests who look lost or who may be injured if they need assistance. The Attractions Hosts assigned to ESPN Wide World of Sports also have theming language they use, such as greeting guests by saying, "Welcome Champions." During basketball tournaments, they bring guests different sized basketballs based on the age and gender of the participants.

Other interactions between Attractions Hosts and guests are described as "Magical Moments" by the Employer. For example, an Attractions Host may single out a party with a small child and "just do special things for them" to make their Disney World visit more "magical," like giving them VIP seating for a show, a token item like a rose or wand, free popcorn, soda, or other snacks, a "no strings" book of vouchers to get free things in the parks, or, in the case of the Rock 'n' Roller Coaster, temporarily handing off one of the costume parking valet vests to the child so they can match the employees. Attractions Hosts are not required to engage guests in a certain number of "Magical Moments" per shift; it is just something they are to stay on the lookout for, in order to make guests happy and ensure they have a good time.

In addition, certain Attractions Hosts who work in a ticketing capacity are able to issue refunds or make changes to tickets in certain situations without needing to obtain approval from a manager. For example, if a guest purchased a 6-day ticket but was only going to be at the park for four days, the Attractions Host may refund two days of tickets. This is referred to by the Employer as "guest recovery." The former Roamer, who also previously worked in ticket sales at the

Blizzard Beach water park, explained the procedure for this as follows.¹⁴ The Attractions Host is required to create a “Magic File” in the Employer’s Automatic Ticketing System (ATS) for the guest; have the guest fill out their contact information on a physical Guest Recovery Form; add the reason for the refund to the form; and add it to the “Magic File” by inserting it into a device that prints that the refund has actually occurred. The Attractions Host then issues the refunded money to the guest. This witness testified that as a Roamer at the NBA Experience, she could also create Magic Files and create refunds, without managerial approval, for guests who were unhappy with their experience of the attraction, e.g., if the guests did not realize that the NBA Experience is not designed for very young children and wanted to leave.

iii. NBA Experience Employees other than Guides

Approximately 50 bargaining unit employees work in the NBA Experience building merchandise shop, including 30 to 35 Merchandise Host/Hostesses (Merchandise Hosts) and about 18 “Roamers” (cross-trained employees who may be assigned to work in several roles).¹⁵ As noted above, Roamers sell the attraction’s admission tickets, staff the waiver-signing desk, and perform the monitoring of the RFID-entry system of the attraction. Director of Labor Relations Sutherland was not sure how much or how often Guides communicate daily with the Merchandise Hosts and Roamers, but she was sure there was at least some interaction. The former NBA Experience Roamer testified that during her employment, because she is multilingual, she would sometimes go into the attraction portion of the NBA Experience and explain instructions for various activities to guests in Spanish or Portuguese. The printed signage/computerized instructions within the

¹⁴ Although this employee was in the job classification of Attractions H/H performing this function at Blizzard Beach and, on an ad hoc basis, at the Wide World of Sports, she testified that at the main four theme parks (Magic Kingdom, EPCOT, Animal Kingdom, and Hollywood Studios), ticket sales functions at the gate are handled by employees in the classification “Vacation Greeter” and handled within the parks by non-unit employees in Guest Relations.

¹⁵ The Employer is also in the process of opening an NBA-themed restaurant in the same vicinity, but it will be operated by a third party and its staff will therefore be excluded from the bargaining unit.

attraction are solely in English, and not all of the Guides speak additional languages. Guides sometimes came to the shop to get a bilingual Roamer to interpret for guests, or told the Guest Experience Manager, who then called the relief coordinator in the merchandise shop to get a bilingual Roamer to go into the attraction and communicate with the guests.

Additionally, custodial staff assigned generally to the Disney Springs area may be detailed to work at the NBA Experience. Besides the bargaining unit employees who work at the NBA Experience, there are many bargaining unit employees who work in various tipped and non-tipped classifications at the shops and restaurants in Disney Springs, generally in the same classifications as unit employees working in the shops and restaurants in the Disney World theme parks and hotels.

iv. Other Bargaining Unit Employees

The record does not contain detailed evidence describing the majority of the 121 job classifications included in the bargaining units, other than the names of the jobs and their respective pay ranges set forth in the current collective-bargaining agreements.

Many of the restaurants incorporate some show-like elements tied to the theme of the venue that enhance the guests' dining experience with entertainment. For example, at a restaurant called Cinderella's Royal Table, the servers are expected to proactively interact with guests and engage with them about being there to see "Cinderella." The servers may also hand out wands to young children. Both the servers and the individual playing Cinderella are represented by the Petitioner.

v. *Other Non-Bargaining Unit Employees*

The Employer employs unrepresented Wild Africa Trek Guides who perform personalized tours of the Kilimanjaro Safari area at the Animal Kingdom theme park.¹⁶ The Trek Guides provide private tours and are supposed to determine and adapt the tour based on the experience the guest is seeking. These tours provided by Trek Guides are longer, cover a more extensive area, and provide a more “individualized experience” than the semi-scripted Kilimanjaro Safari Ride included with the price of park admission, which is operated by Attractions Hosts. The Wild Africa Trek Guides do not share first-line supervision with the Attractions Hosts at the Kilimanjaro Safari Ride.

The Employer has a job classification called “Guest Relations.” Employees in that classification work in the theme parks. Their duties include staffing a Guest Services desk and providing “VIP Tours.” A VIP Tour is a premium 2 to 3 hour guided tour of a theme park or area. Like Wild Africa Trek Guides, VIP Tour Guides and Guest Relations employees are not in the bargaining units.

vi. *Supervision*

The NBA Experience Guides report on a daily basis to the “Guest Experience Managers” on duty at the attraction. There are six Guest Experience Managers at the NBA Experience. The record does not reflect how many are on duty at a given time. The Merchandise hosts and Roamers at the NBA Experience report to the same Guest Experience Manager(s) on duty. The Managers go back and forth between the merchandise shop and the attraction portions of the NBA Experience as needed.

¹⁶The Wild Africa Trek experience was introduced in 2009, and excluded the Guide position from the bargaining unit. UNITE HERE! Local 362 filed a grievance alleging that this job was the same as that of the Animal Kingdom Kilimanjaro Safari Ride operators (“Attractions H/H KSR”), a position which is in the bargaining unit. The grievance was denied at Step 4 of the procedure by a joint committee consisting of a representative from the Employer and one from the Petitioner.

The Managers report to the NBA Experience Proprietor, Jennifer Lindstrom, who in turn reports to the General Manager for Food & Beverage Operations of Disney Springs, Perry Crawley. Crawley reports to Vice President of Disney Springs Matt Simon. Simon reports to two Disney World Senior Vice Presidents, Tom Moslem and Jim MacPhee. The record does not disclose their specific titles, but MacPhee is higher in the Employer's managerial hierarchy than Moslem. MacPhee reports to Josh D'Amato, the President of Disney World, who in turn reports to Bob Chapek, the President of all Disney Parks, Experience, and Products. Chapek reports directly to The Walt Disney Company Chief Executive Officer, Bob Iger.

Each Disney World shop, restaurant, attraction or theme park area has a "proprietor" who, like Lindstrom, acts as the general manager of that location, who follows a chain of command similar to that above Lindstrom. Attractions other than the NBA Experience also have Guest Experience Managers who perform the daily supervision of employees, including Attractions Hosts.

B. Qualifications, Hiring Process, and Training

The Employer uses a computer-based assessment of applicants for bargaining unit job classifications, to determine their aptitude and suitability for customer service. Applicants who pass the assessment then have an appointment with Casting, where they are evaluated to determine "whether they understand the basic requirements like [the Employer's] appearance guidelines, ...compensation, ...scheduling process, that they are to be scheduled in accordance with seniority, and that they have the availability required for either a full-time or part-time position." The only time such employees are interviewed by operational personnel specific to their work area is if the job is at a new operation, as the NBA Experience was recently.

Employees may transfer between positions in the bargaining unit (within or outside of their job classification) using an intranet feature called the “Transfer Genie.”¹⁷ For example, an Attractions Host may list up to five attractions to which he or she would like to transfer. When an opening occurs at a particular attraction, Transfer Genie evaluates the seniority of all employees who have registered their interest and automatically generates the transfer for the senior employee, without the need for an interview. For example, the former Roamer used the Transfer Genie process to transfer from the NBA Experience to an Attractions Host position at Splash Mountain. Conversely, positions as Guides for the NBA Experience are not available on Transfer Genie. One of the Guides was previously an Attractions Host, but was required to interview for the Guide position. Before opening the NBA Experience, the Employer made nearly identical internal and external job postings to hire Guides. The posting noted the expectation that Guides will “deliver exceptional, high-energy, immersive experiences,” and “will be responsible for guiding and immersing our guests in their individualized and personalized player experience through interactive coaching, side-by-side skills demonstrations, and cheering players on in the challenge!” All applications were reviewed to understand the applicants’ experience with basketball and what they might bring to the experience for the guests. Along with the application, internal candidates were evaluated based on their “Record Card,” an Employer record of attendance and other issues in their employment history.

During the initial hiring of NBA Experience Guides, applicants selected for interviews had two rounds – the first with “Casting,” the Employer’s all-purpose hiring department, and the second with the operations managers for the NBA Experience. Particularly in the latter interview, the candidates were evaluated on their personal experience with basketball and their ability to talk

¹⁷ The record does not indicate whether other non-bargaining unit positions are available through Transfer Genie. At least one category of bargaining unit job classifications, that of Coordinator, is not available through Transfer Genie, and has a separate application process.

about it, as well as a basic basketball skills test, in which applicants had to demonstrate that they could perform 45 dribbles in 45 seconds, perform bounce passes and chest passes from minimum distances, bend over repeatedly to retrieve stray basketballs, hit the backboard while shooting the ball, demonstrate the slingshot technique, and perform an "authentic high-five." In sum, the Employer screened Guide position applicants for their basketball knowledge, experience, and enthusiasm, in addition to overall guest service skills. Prior to opening any new area or attraction, the Employer engages in similar two-round interviews, whereas when hiring a new employee for an opening in an existing position at Disney World, only Casting performs the interview. Sutherland testified that this will also be the case for any Guide openings going forward, but that the skills test will still be required.

Of 65 or 66 NBA Experience Guides hired by the Employer, approximately 10 were already employed by the Employer in some capacity in the Petitioner's bargaining units, including one Attractions Host. The rest were newly-hired employees. None of the Guides are former NBA players. One of the 66 may have been a former WNBA or college basketball player. Another has experience as a basketball announcer at Villanova University.

The record does not reflect the numbers of NBA Experience Merchandise Hosts and Roamers who were new hires or who transferred from other positions at Walt Disney World. At least one of the initial NBA Experience Roamers was a long-time employee who had previously been an Attractions Host who had also worked for the Employer in ticket sales. The former Roamer who testified was part of the initial NBA Experience work force. She was not required to demonstrate any passion, knowledge, or skill for basketball prior to being offered the position at the NBA Experience, but was subsequently trained on basketball terms like "the combine," "dribbling," and "wingspan."

The Employer uses the same generic Attractions H/H job description and hiring process for job openings at all existing attractions, except for positions designated Attractions H/H Trails, as described below. For the general Attractions Host positions, knowledge of the attraction's theme is not a prerequisite for hire or transfer to a position at that attraction. For example, according to Director of Labor Relations Sutherland, the "Pandora ride" is staffed by Attractions Hosts who do not have to demonstrate any knowledge of the movie *Avatar* from which the ride draws its inspiration.

Sutherland compared the NBA Experience Guides and Attraction Hosts at the Employer's new Star Wars Galaxy's Edge attraction, which the Employer bills as providing an immersive experience in the fictional Star Wars universe. She testified that applicants to be NBA Experience Guides were required to have some prior knowledge of basketball, whereas the Galaxy's Edge applicants were not required to have preexisting knowledge of Star Wars lore in order to be hired. However, Sutherland also testified that knowledge Star Wars lore demonstrated by an applicant during the initial staffing of Galaxy's Edge would have improved the likelihood the applicant would be hired, and that staff who work in all job classifications at Galaxy's Edge undergo specific training to learn Star Wars jargon and other ways to facilitate this immersive experience for guests.

The record also shows that applicants for the Attractions H/H Trails job classification are always required to interview for that job. These employees work at the Animal Kingdom theme park in animal viewing areas, providing crowd control as well as answering guest questions about the animals. Sutherland testified that the Attractions H/H Trails interview is "more about ability to memorize a lot of different facts about the animals," and that employees are assessed on their ability to do this as part of training for that job. She did not know specific questions asked in the interview for Attractions H/H Trails.

All newly-hired employees of the Employer, regardless of job classification, attend “Traditions,” a one-day orientation training program covering such topics as the history of The Walt Disney Company, the layout of the Disney World property, “the four keys” of safety, courtesy, show, and efficiency, and other Employer policies and procedures. Traditions takes place at “Disney University,” a building behind the Magic Kingdom theme park, and includes a tour of Magic Kingdom called “Once Upon a Time.”

The approximately 55 NBA Experience Guides who were newly-hired by the Employer underwent the Traditions training. All employees who were newly hired or transferred to work at the NBA Experience, regardless of job classifications, attended a half-day training specific to that attraction led by one of the Guest Experience Managers, Proprietor Jennifer Lindstrom, and area director Perry Crawley. After the half-day training, employees in each NBA Experience job classification attended a separate Disney Springs orientation tour called “Our Town.”

Before the “soft opening” of the NBA Experience during the summer of 2019, the Guides had one week of position-specific training that no other employees attended. Director of Labor Relations Sutherland testified that the training of Guides including training in engaging guests through role-playing, exuding their passion for professional basketball, and sharing their memories of favorite NBA games or players. Guides were also trained to identify guests with less initial enthusiasm – “a curious observer or [someone who] was dragged in there by one of their party” – and find ways to engage such guests and get them excited about the NBA. Following the soft opening, some of this training was repeated for the Guides before the hard opening. There is no evidence that Guides have been hired after the NBA Experience opened. However, the record reflects that if Guides are hired in the future they will receive the full one week of position specific training that the initial group of Guides received.

Before the NBA Experience opened, Merchandise Hosts and Roamers also had position-specific training. For example, Merchandise Hosts were taught to fold t-shirts “the NBA way” instead of “the Disney way” they may have previously been taught. Roamers spent about three days learning basketball jargon, including memorizing NBA teams, their cities, logos, mascot names, and colors. In addition, a trainer read to them from the NBA Experience Operating Guide, which described each of the 13 activities in the attraction in detail, but did not describe how to operate the activities. The Employer trained Merchandise Hosts and Roamers on how to describe the NBA Experience to guests because they are usually the first employees who guests interact with about the attraction before committing to purchase tickets for it.

Training for the Attractions Host positions includes the same general orientation of Traditions and certain area-specific and position-specific training. For example, all Disney Springs employees also attend the “Once Upon a Time” orientation tour of the Magic Kingdom and “Our Town” tour of Disney Springs. They then receive position-specific training that may take up to several days, and they have 45 days to pass the “assessment” for that attraction or area in order to be considered fully qualified for the position and continue working without a trainer. The record discloses that assessments for Attractions Hosts generally includes a written examination as well as a practical examination, such as operating the controls of the attraction and demonstrating ability to navigate the attraction, including, in at least one case, lengthy staircases.¹⁸

Attractions Hosts, like all employees, are responsible for the “show” of Disney World, and as such, are given attraction-specific training not only on technical items like ride operation controls and safety procedures, but also on “theming” jargon to enhance the guest experience. For example, the Tower of Terror is a thrill ride themed to imitate the experience of being inside an

¹⁸ Splash Mountain at the Magic Kingdom, a water log flume ride, includes several “drops,” including one with a 99-step staircase running alongside it. All Attractions Hosts assigned to Splash Mountain must demonstrate and maintain the ability to climb these stairs.

episode of the classic television program “The Twilight Zone,” recreating a paranormal event of the type typically portrayed on the show. An Attraction Host is trained on how to maintain the impression that the guest is actually entering “the Hollywood Hotel” as it existed in 1939, “when the event in question occurred.” Attractions Hosts at that location are dressed as vintage white-gloved hotel bellhops and say things like “Enjoy your stay with us,” and “Your rooms are not quite ready yet” to the guests waiting in the lobby-themed queue. In certain circumstances, they may also ride with a group of guests if there is an open seat in the ride vehicle, to ostensibly enhance the guest experience of being taken to their room by the bellhop.

C. Other Terms and Conditions of Employment

All Disney World employees, including the Guides, wear Disney-logoed nametags that include the employee’s hometown. The nametags may also state foreign languages spoken, if approved by the Employer. Guides, like all Disney World employees, are bound by the Employer’s grooming standards, maintained in an extensive policy called “Disney Look: Classic Magic.” The Disney Look regulates such appearance details as the length of fingernails, facial hair, and dresses/skirts; permissible and non-permissible hairstyling and hair accessory choices; and limit the amount and types of jewelry that may be worn. The overall guideline for all employees is that their appearance should not distract from the “show” of Disney World.

Virtually all bargaining unit employees working “on stage” (i.e. in guest areas) of Disney World wear a uniform provided by the Employer that is specific to their role and is themed to the park or area where they work. The Guides’ uniform consists of a polo shirt that is predominately blue, with a red collar and red and white detailing on the sides, and the NBA Experience logo opposite the space for the employee’s nametag; black shorts or pants; a black belt; and a whistle. There is also a matching blue pullover sweater with the NBA Experience logo for colder weather. In addition to these provided items, employees are required to furnish their own white socks and

white athletic shoes, and may choose to wear a white undershirt provided it meets the Employer's general "show quality" standards.

Roamers' and Merchandise H/H's uniforms at the NBA Experience are similar in styling to those of the guides, except that their predominant color is red instead of blue; their bottoms are khakis, not black; and their shoes are black, not white. They do not wear a whistle. All Merchandise Host employees at Disney World wear a lanyard around their necks.

Attractions Hosts wear a multitude of different costumes themed to the various attractions and park areas where they are assigned. For example, as noted above, Tower of Terror Attractions Hosts wear uniforms evocative of vintage hotel bell-hops. As another example, Attractions Hosts at the Rock 'n' Roller Coaster attraction, located in the same area of the Hollywood Studios theme park as the Tower of Terror, dress as if they are parking valets handling the ride vehicle for the band Aerosmith.

NBA Experience Guides are paid on an hourly basis and are eligible for overtime pay. Their hourly rate ranges from \$14.05 to \$20.35. The Employer will consider their experience when establishing their starting wage rate. Guides are eligible for merit wage increases. Attractions Hosts, Merchandise Hosts, and Roamers are paid between \$13.00 and \$17.87 per hour for both full and part-time. This pay range also applies to many other non-tipped bargaining unit job classifications.¹⁹ Attractions H/H Trails are paid \$13.50 to \$18.37 per hour; Attractions H/H KSR (Kilimanjaro Safari Ride) are paid \$14.00 to \$18.87 per hour, pursuant to the collective-bargaining agreements. The highest bargaining unit wage rates are for Entertainment Tech Rigger, currently from \$22.25 to \$29.28 per hour. The collective bargaining agreements provide for a night shift differential for work performed on an overnight or early morning-commencing shift.

¹⁹ Although Sutherland testified that the position is called Merchandise H/H, Addendum A to the collective-bargaining agreements does not list a Merchandise H/H classification, and instead lists a "Sales H/H" classification.

There is no evidence that Guides are eligible for any shift differentials. The record does not reflect the rates of pay of any non-bargaining unit employees in other guide classifications, such as the VIP Tour Guides or Wild Africa Trek Guides.

NBA Experience Guides' schedules are based on the operating hours of the NBA Experience attraction, from 12:00 p.m. to 11:00 p.m. Sunday through Thursday, and 12:00 p.m. to 12:00 a.m. Friday and Saturday. The NBA Experience merchandise store and ticketing area open earlier in the day than the NBA Experience attraction. The record does not reflect the actual work schedules of NBA Experience Guides or the unit employees who work at the NBA Experience. In addition, the record does not show either the operating hours of other attractions or the work schedules of Attractions Hosts at other attractions.

The job posting for the NBA Experience Guide position noted that to be eligible for full-time employment, applicants had to be completely available at least five days per week, including nights and holidays; for part-time consideration, they had to be completely available at least three days per week. Sutherland testified that full-time Attraction Hosts positions require full availability on all seven days of the week, and part-time Attractions Host positions require full availability on three days per week.

I. ANALYSIS

A. Legal Standard

Unit clarification is the appropriate method "for resolving ambiguities concerning the unit placement of individuals who . . . come within a newly established classification of disputed unit placement." *Union Electric Co.*, 217 NLRB 666, 667 (1975). The Board will view a new classification as already belonging in the bargaining unit (rather than being added to the unit by accretion) if that new classification performs the same basic work functions historically performed by unit employees. *Premcor [Inc.]*, 333 NLRB 1365 (2001); *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166 (2001). If, on the other hand, the Board finds that the *Premcor* test is not satisfied, it will add or "accrete" the new classification to the unit "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an

overwhelming community of interest with the preexisting unit to which they are accreted.” *CHS, Inc.*, 355 NLRB 914, 916 (2010), quoting *Frontier Telephone [of Rochester, Inc.]*, 344 NLRB 1270, 1271 (2005)] (internal quotation omitted).

AT Wall Co., 361 NLRB 695, 697 (2014).

In *Premcor* the employer introduced the new classification, “PCCs,” in order to phase out the job duties of a bargaining unit classification, “Operator 1,” performing the same fundamental function within its operation, an oil refinery. The existing bargaining unit consisted of all production and maintenance employees. Whereas Operator 1s had monitored and manipulated various conditions (temperatures, pressures, lab test data, etc.) on control boards located throughout the refinery, the PCCs operated modern computer consoles in a remote location to perform the same monitoring and manipulation of refinery conditions. All six of the PCCs selected by the employer were former Operator 1s or “spares” (cross-trained employees who could flex into jobs as needed) and had been members of the bargaining unit. The PCCs underwent about three weeks of special training for the new position. Remaining Operator 1s were slated to be “redeployed” to field work. The Board rejected the employer’s contention that the PCCs were “technical” employees because more sophisticated computers that permitted them to monitor more sections of the refinery at once and training required them to do so safely with appropriate discretion. Rather, the Board found that the employees in the newly created positions were performing the same basic function historically performed by members of the bargaining unit. The Board held that it was appropriate to clarify the existing unit to include the newly created classification, and an accretion analysis was not appropriate. Thus, in *Premcor*, the Board found that when a new classification of employees has “fundamentally the same” duties and responsibilities as employees already in the bargaining unit, it is not an “accretion” to place them into the unit. Rather, the employees simply remain in the unit because they perform the same basic functions as the unit historically performed. 333 NLRB at 1366.

In *Developmental Disabilities Institute, Inc.*, the employer provided educational, social, and health-related services for developmentally disabled children and adults, employing approximately 126 teachers and assistant teachers, who were in a bargaining unit together, and five or six therapy assistants who were not part of the unit. Classes were typically composed of six children, one teacher, and two assistant teachers. The collective-bargaining agreement provided that the teachers had overall responsibility for the administration and educational maintenance of their classes. Teachers also had to work closely with the employer's psychology supervisor and produce a lot of data sheets and notes. Teachers had either bachelor's or master's degrees and both teachers and assistant teachers were directly supervised by the principal. The dispute arose when the employer created the new position of therapy assistant/psychology, and hired six individuals in this classification to provide one-on-one instruction for six particular children whose behavior was deemed too self-injurious and disruptive for them to be included in the regular classrooms. The therapy assistant/psychology position did not require an academic degree and reported indirectly to the principal through an intermediate team lead. The therapy assistants/psychology generally performed the same duties that were performed by teachers and assistant teachers, such as greeting children at their school buses, escorting them to the classroom, monitoring and attempting to lessen the severity of their disruptive behaviors, recording behaviors on data sheets, and instructing them in other educational activities, including communication skills. The Board found that the therapy assistants/psychology were performing the same basic educational functions that had historically been performed by bargaining unit members and that they were appropriately included in – not accreted into – the existing bargaining unit, under the *Premcor* test.

In *AT Wall Co.*, 361 NLRB 695 (2014), the employer, a metal products manufacturer, was party to a collective-bargaining agreement that included 21 job classifications in six departments

in the unit. Prior to the unit clarification petition, the employer had utilized its Tubing department to manufacture sheet metal tubes used in microwave communications and its Stamping department to make small metal discs used in electronics. The other four departments – Inspection, Maintenance, Materials Handling, and Toolroom – provided common support functions for both product lines. The employer acquired the operations of another company and began performing the manufacture of that company’s product – gun magazines – in the employer’s original facility, using employees it hired specifically for that product line, but refused to include the new employees in the existing bargaining unit.

The employer created a new Metalform department and four new job classifications for the new product line, and also used two existing bargaining unit positions at the beginning and end of the gun magazine manufacturing process. The Metalform employees had the same general qualifications as the unit employees, but received significantly different on-the-job training, worked in separate work areas on different schedules, and had unique benefits.

Although there were similarities in the general manufacturing processes of the old and new product lines, and bargaining unit employees performed some of the work on the new product line, the Board found *Premcor* inapplicable because the employees in the four new Metalform job classifications produced an entirely different product using different processes under different working conditions that were not sufficiently related to the functions of employees in the other departments. 361 NLRB at 697-698. The Board also noted that the unit description in the collective-bargaining agreement grouped the classifications by department, and did not include the new Metalform department.

In *Walt Disney World Parks and Resorts U.S.*, 367 NLRB No. 80 (2019), the Board determined that *Premcor* did not apply when the Employer in the instant case created a new job classification, Ride Service Associates (RSAs) and that it was error for the undersigned to include

those new employees in the Petitioner's bargaining unit(s). The RSA position was created for the then-newly introduced on-demand guest transportation system, "Minnie vans," operated in partnership with Lyft, the ride-sharing mobile app. Teamsters Local 385, one of Petitioner's constituent Local Unions, filed a unit clarification petition to include those RSAs in the bargaining unit on the basis that they were performing the bargaining unit work of transporting guests around the Disney World property, work historically performed exclusively by the bargaining unit employees in the Bus Driver classification. The Board distinguished the work functions of the RSAs from the Bus Drivers thus:

[W]e find that the evidence does not demonstrate that RSAs perform the same basic functions as Bus Drivers (or, for that matter, PHHs).²⁰ RSAs operate minivans and sport utility vehicles, whereas Bus Drivers operate commercial buses. RSAs respond to specific customer requests for pick-up and drop-off and drive wherever the customer dictates, but Bus Drivers operate only on a predetermined route and must drive on that route whether or not they are currently transporting customers. In order to perform their basic functions, RSAs require only a driver's license, but Bus Drivers require a CDL. Differences in training also highlight the differences in basic functions. RSAs receive only two weeks of training, whereas Bus Drivers receive 14 weeks of training, including their CDL training that the Employer provides. Even more importantly, RSAs are imbued with the authority to independently respond directly to customer complaints, and they receive training on interacting with guests in a personal, unscripted, one-on-one capacity based on the guests' interests and needs. In contrast, Bus Drivers perform mere courtesy tasks for guests such as handing out stickers and reciting from memorized scripts; they receive no comparable training in unscripted guest interaction. As for the PHHs, they drive trams transporting guests between parking lots and parks, but it is unclear whether driving is the PHHs' primary function. In any event, they drive trams as opposed to minivans and SUVs, do not transport guests from point-to-point on demand, and do not interact with guests in a manner comparable to the RSAs while driving the trams.

Although RSAs and Bus Drivers (and PHHs) may all be engaged in driving vehicles that transport guests, this does not establish that they perform the same basic functions within the meaning of *Premcor*. As *AT Wall* teaches, the *Premcor* test does not compare employee functions at the broad level used by the Regional Director here. In that case, the Acting Regional Director essentially characterized both the Metalform employees and the Tubing and Stamping employees as engaged in "production and maintenance," *AT Wall*, 362 NLRB at 607, but the Board

²⁰ "PHHs" refers to "Parking Host/Hostess," yet another bargaining unit job classification. PHHs operate the parking lot trams at Disney World, thus also performing a guest transport function.

differentiated between them using a narrower analysis that relied on the specific types of products manufactured, the specific types of equipment used, and the training involved. Applying the *AT Wall* approach to defining the positions, the RSAs here drive different vehicles under different conditions, receive different training, and engage in different types of guest interaction than the Bus Drivers or PHHs.

Id., slip op. at 3. The Board also noted the significance of a lack of evidence of Bus Drivers or PHHs being displaced or replaced by the RSAs; only three of the 74 RSAs were former Bus Drivers. “Instead, RSAs perform brand-new functions using different equipment and different skills gained through different training to serve guests in a distinct manner, while unit employees continue to perform their functions as they did before.” *Id.*

B. The contractual “disclaimer” of representational interest does not prevent analysis under *Premcor*, and this matter is inappropriate for deferral, as the Board is the primary arbiter of representation issues.

Here, as in the RSA unit clarification matter, the Employer argues that the language of Article 4, Section 2 of the parties’ collective bargaining agreements (“the disclaimer”) forecloses an accretion analysis, because it indicates a waiver by the Petitioner to represent employees in new job classifications, regardless of the community of interest those employees may share with unit employees.

The Board did not reach this issue in the previous case involving Ride Service Associates.

The Employer relies on the following precedent:

A union which agrees by contract not to represent certain categories of employees during the term of a collective-bargaining agreement may not during that period seek their representation. However, this rule will be applied only where the contract itself contains an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership; such a promise will not be implied from a mere unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations.

The Cessna Aircraft Company, 123 NLRB 855, 857 (1959), citing *Briggs Indiana Corporation*, 63 NLRB 1270 (1945).

As noted above, the disclaimer of interest in Article 4, Section 2 of the parties' agreements states:

The Services Trades Council Union and its individual international and local Unions disclaim any interest now, or in the future, in seeking to represent any employees including the Animal Keeper classifications of the Company other than those in the classifications set forth in Addendum A, except as to the classification described in Case No. 12 RC 4531, affirmed 215 NLRB No. 89.

The parties agree that the Petitioner is contractually bound not to pursue representation of employees who do not perform the job duties of the employees set forth in Addendum A. The Employer contends that the disclaimer applies to any classification that is not one of those appearing in Addendum A or described in Case No. 12-RC-4531. The Employer further argues that the disclaimer gives it the exclusive authority to determine whether or not new job classifications it creates will be included in the bargaining unit. However, the Petitioner contends that the contract language does not give the Employer the right to essentially misclassify employees into a new classification not contained in Addendum A when the employees are performing job functions virtually indistinguishable from those performed by employees in unit classifications, as the Petitioner contends is the case with the NBA Experience Guides.

The Employer further posits that if the petition is not dismissed, it should be deferred to the parties' contractual grievance and arbitration procedure as a matter of contract interpretation. Preliminarily, I find that deferral of the issue raised by the petition to the parties' grievance and arbitration procedure is not appropriate because the parties have not clearly contracted to arbitrate whether newly-created job classifications should be included in the bargaining unit. The Board historically reserves representation questions for itself in the absence of an express agreement to do otherwise. In *Twedle Litho, Inc.*, 337 NLRB 686 (2002), the Board refused to defer to arbitration with respect to a unit clarification issue to determine whether newly-hired employees at a new facility were doing bargaining unit work, on the basis that the question of whether

employees should be accreted or otherwise added to an existing bargaining unit, presented representation issues that were properly before the Board. The Board noted that the parties had not expressly agreed to arbitrate matters related to voluntary recognition, an arrangement which had existed in *Verizon Information Systems*, 335 NLRB 558 (2001). In *The Boeing Company*, 349 NLRB 957 (2007), the Board reaffirmed that representation questions presented in an otherwise-appropriate unit clarification petition should not be deferred to an arbitrator for resolution, and found that its own *Premcor* analysis was needed to determine whether the disputed employees were already part of the unit.

In addition, I find that Article 4, Section 2 is not a waiver of the Petitioner's right to represent employees in newly-created job classifications established by the Employer if the employees in those new classifications perform duties that are functionally equivalent to the duties of employees in the bargaining unit. Thus, a *Premcor* analysis is appropriate in this case. However, I further find that Article 4, Section 2 is a waiver of the Petitioner's right to assert that the NBA Experience Guides constitute an accretion to the existing units in the full-time and part-time contracts.

C. Application

Unlike *Premcor* and *Developmental Disabilities Institute*, where the facts about the job duties performed by employees in each classification were undisputed, the parties here dispute certain facts about the job duties of the NBA Experience Guides. The Employer asserts the Guides are "coaches and cheerleaders" for guests moving through the attraction's myriad activities, and that Guides proactively approach guests to engage them in unscripted discussions about basketball. The Petitioner asserts that Guides have minimal personalized interaction with guests on a daily basis, and run the queues and address guest questions about how to use the interactive activities of the attraction, and that therefore perform the same duties as Attractions Hosts/Hostesses.

As noted above, neither party presented the NBA Experience Proprietor, an NBA Experience Guest Services Manager, or an NBA Experience Guide to testify. Director of Labor Relations Sutherland testified as to how the Guide position was conceptualized and intended to function within the NBA Experience attraction, and described the specialized training the Guides received and the Employer's expectations as to their performance, but had no basis for testifying about how the work has been performed since the "hard opening" of the attraction. On the other hand, the Petitioner's witnesses testified about their experiences as guests who visited the attraction for a short period of time, except for the witness who not only made several guest visits, but also worked as a Roamer at the NBA Experience attraction for about four months.

Based on the testimony of Sutherland, the Guides are expected to rely on their knowledge and passion for the sport of basketball to engage guests in conversation to create a personalized experience and enhance the guest's visit. The Guides are expected to participate in activities, offer guests coaching, and cheer for the guests. Guides on the first floor may accompany guests from station to station. Thus, the Employer likens the NBA Experience Guides to the non-unit VIP Tour Guides and Wild Africa Trek, as distinguished from Attractions Hosts, who mainly use scripted spiels in dealing with guests, acting as ushers, and operating rides.

However, based on the anecdotal observations of the Petitioner's witnesses, in practice the Guides are not routinely personalizing guest experiences in the manner expected by the Employer. Thus, each of Petitioner's witnesses who visited the NBA Experience as guests testified that the Guides performed routine tasks such as opening and closing the theater doors and directing groups of guests to combine stations. None of Petitioner's witnesses testified that the Guides coached or cheered them on during their visits. Rather, the record indicates that the RFID technology, which tracks and reports guests' progress at the activities and saves their pictures from photo-spots like

the champions corner, created much of the “individualized” experience during visits by the Petitioner’s witnesses.

Attractions Hosts’ interactions with guests are mainly limited to memorized “spiels” and “theming” statements. Although they may have some unscripted conversations with guests, these conversations are largely limited to common courtesy comments or providing scheduling information or other basic directions.

Based on the available evidence, it appears that the interview and hiring process for Guides differs significantly from that for Attractions Hosts. Thus, Guides must demonstrate a knowledge of, and enthusiasm for, the NBA, WNBA, and basketball in general. They are expected to be able to discuss specific teams and players with guests. The Guides must also demonstrate rudimentary basketball skills—dribbling, passing, and shooting. On the other hand, applicants for Attractions Host positions need not demonstrate any particular knowledge of the Employer’s attractions or any special skills prior to hire.

Although a small portion of the training of new hires in NBA Experience Guide positions, Attraction Host positions, and other bargaining unit positions is the same, it is undisputed that after the generic half day training session, the NBA Experience Guides received a separate one-week training session related to their job duties that focused on creating an immersive guest experience and that they received additional specialized training following the soft opening of the attraction. There is also evidence that future NBA Experience Guides will receive the specific one-week training. Attractions Hosts also undergo training related to their specific positions, but their training covers theming, memorized spiels, and operations of the attraction. Thus, while there are some similarities, it is apparent that the training provided to NBA Experience Guides significantly differs from the training provided to Attractions Hosts.

Furthermore, there are some notable differences in the job functions between the NBA Experience Guides and Attractions Hosts that are not in dispute. For example, at the NBA Experience, Roamers, not Guides, staff the RFID “touchpoint” entry and select the family to receive the “Magical Moment” experience in the first movie screening of the day at the NBA Experience. Such activities are typically performed by Attractions Hosts at other attractions. The Employer requires complete availability seven days per week for Attractions Host positions, but only five full days per week availability for a full-time NBA Experience Guide. Guides are also paid slightly more than Attractions Hosts, although their pay is comparable to the earnings of the the Attractions H/H KSR.

The Employer continuously creates and changes its attraction offerings. The NBA Experience is one of such new attraction. However, the NBA Experience is also a distinct product created in partnership with the National Basketball Association, the creation of the Guide position did not replace or displace any Attractions Hosts, and only one of approximately 65 NBA Experience Guides transferred from a position as an Attractions Host. Thus, the creation of the NBA Experience is arguably similar to the addition of the Metalform department in *AT Wall Co.*, 361 NLRB 695 (2014) or the Ride Service Associate in *Walt Disney World Parks and Resorts U.S.*, 367 NLRB No. 80 (2019). It is also noted that the Employer does not permit the NBA Experience Guides to cross-train for other attractions or positions while maintaining the Guide position. Similarly, in *AT Wall* the employer did not cross-train employees between its existing product lines and the new Metalform product line. 361 NLRB at 696. In contrast, an Attractions Host at the Tower of Terror may become an Attractions Host at the nearby Rock ‘n’ Roller Coaster by simply requesting to do so, then completing the requisite training. Attractions Hosts who have cross-trained may then work at multiple locations within a shift, as needed, or add open shifts at locations other than their primary work location.

Regardless of how much individualized conversation Guides actually have with guests on a daily basis, the Employer selected Guides on the basis of their ability to talk enthusiastically about basketball, and required them to demonstrate a personal history with the sport during their job interviews, unlike Attractions Hosts, who are trained on all the attraction-specific jargon they need upon being hired or transferring into that role. Guides bring their basketball knowledge to the job with them and are then trained on how to engage with the guests to make an individualized NBA-like experience for each guest.

On balance, based on the hiring criteria, the differences in training, and the Employer's expectation that Guides create an immersive personalized experience for guests, as well as the fact that the Guides have not displaced or replaced any Attractions Hosts, I conclude that the Guides are functionally distinct from the Attractions Hosts. Thus, unlike in *Premcor* and *Developmental Disabilities*, the work performed by the Guides is not work that had formerly been performed by Attractions Hosts. Rather, it is new work performed at a newly built facility. For the foregoing reasons, I conclude that the Guides are not part of the bargaining unit. Furthermore, for the reasons stated above, Article 4, Section 2 of parties' collective-bargaining agreements prohibits employees in new classifications, such as the NBA Experience Guides, from being accreted to the units. Accordingly, the petition must be dismissed.

II. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce with the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction therein.

3. The Petitioner is a labor organization with the meaning of Section 2(5) of the Act.
4. The Petitioner is the exclusive collective-bargaining representative of the employees included in Addendum A of the parties' regular full-time collective-bargaining agreement that is effective by its terms from September 24, 2017 through October 1, 2022.
5. The Petitioner is the exclusive collective-bargaining representative of the employees included in Addendum A of the parties' regular part-time collective-bargaining agreement that is effective by its terms from September 24, 2017 through October 1, 2022.
6. The Petitioner proposes to clarify the aforementioned bargaining units to include NBA Experience Guides.
7. The bargaining units represented by the Petitioner shall not be clarified, as indicated below.

III. ORDER

Based on the foregoing, IT IS ORDERED that the petition for unit clarification is denied, and the existing bargaining units of regular full-time and regular part-time employees do not include NBA Experience Guides. IT IS FURTHER ORDERED that the petition is dismissed.

IV. RIGHT TO REQUEST REVIEW

You may obtain a review of this action by filing a request for review with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations, and must be filed no later than March 3, 2020.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the

request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: February 18, 2020.

A handwritten signature in cursive script that reads "David Cohen".

David Cohen, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824