

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

SERVICE TRADES COUNCIL UNION,

Petitioner,

and

Case No. 12-UC-248568

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

Employer.

**EMPLOYER WALT DISNEY WORLD, U.S. D/B/A WALT DISNEY WORLD'S
STATEMENT IN OPPOSITION
TO PETITIONER'S REQUEST FOR REVIEW**

The Employer, Walt Disney World Parks U.S. d/b/a Walt Disney World, pursuant to Section 102.67(f) of the Board's Rules and Regulations, submits its Statement in Opposition ("Statement") to the Petitioner Service Trades Council Union's ("Petitioner") Request for Review ("Request") and states as follows:

I. INTRODUCTION

This case involves a Unit Clarification Petition ("Petition") filed by the Petitioner seeking a determination that the newly-created position of NBA Experience Guide ("Guide") should be added to a group of Cast Members¹ represented by the Petitioner without an election. The Region conducted a three-day evidentiary hearing wherein the Parties presented witnesses and offered documents into evidence. Thereafter, the Parties submitted post-hearing briefs.

¹ The Employer refers to its employees as "Cast Members." (Tr. 27:11-13.)

On February 18, 2020, the Regional Director issued his Decision and Order Dismissing Petition (“Decision”), which dismissed the Petition. In a thorough and thoughtful decision, the Regional Director applied the express disclaimer of interest contained in the Parties’ Collective Bargaining Agreement (“Contract”), which he found precluded an analysis of whether accretion was appropriate. This is the only issue challenged by the Petitioner in its Request. Accordingly, the Regional Director’s determination that the bargaining unit should not be clarified to include the Guides is not subject to review and should not be disturbed.

In its Request, the Petitioner contends that the Board should review the Decision because it takes umbrage with a single sentence: “The parties agree that the Petitioner is contractually bound not to pursue representation of employees who do not perform the job duties of employees set forth in Addendum A [of the Parties’ Contract].” Despite claiming that this statement is “clearly erroneous,” the Union does not offer **any** evidence to support this specious assertion. Indeed, the Request is entirely devoid of any citations to facts adduced at the hearing and does not contain a single citation to the hearing transcript. For this reason alone, the Board should deny the Request as it wholly fails to comport with Section 102.67(e) of the Board’s Rules and Regulations (the “Rule”).

Even if the Board considers the fatally-flawed Request on its merits, the record evidence demonstrates that statement with which the Union takes issue is, in fact, correct and based on undisputed evidence. Significantly, this includes **direct testimony** from an individual authorized by the Petitioner to provide the Petitioner’s position on the application of the Contract’s disclaimer of interest. When evaluated with the testimony of the Employer’s witness, as well as the Contract itself, the accuracy of the Regional Director’s statement is made evident. As the Regional’s

Director's Decision is supported by competent and substantial evidence, the Board should deny the Request.

II. THE REQUEST FAILS TO COMPLY WITH THE RULE

The Rule provides the requirements for a request for review. 29 C.F.R. 102.67(e). In relevant part, the Rule states as follows:

Contents of request. A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request **must** contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument.

Id. (emphasis supplied.) The Rule's requirements are not permissive; they are mandatory. While it does not appear that there are any reported decisions wherein the Board has denied a request for review solely on the basis of a party's failure to comply with the Rule, several recent decisions highlight the Board's aversion to such conduct. In that regard, *Starbest Construction, LLC*, 2017 NLRB LEXIS 604 (2017) is instructive. In *Starbest*, the Board denied a request for review and included the following footnote:

In denying review, we note that the Employer's Request for Review, which has been prepared by its counsel, **does not contain any citations at all to the hearing transcript** in support of its assertion that the cessation of the Employer's business is imminent and definite. As such, the Request for Review **completely fails to comply** with the requirement that such a request be a self-contained document enabling the Board to rule on the issues on the basis of its contents without the necessity of recourse to the record. See 29 C.F.R. § 102.67(e). Member Kaplan would deny review solely on this basis.

Id. at fn. 1. (emphasis supplied.); *see also Audio Visual Servs. Grp., LLC*, 2020 NLRB LEXIS 79, fn. 1 (2020) (denying review and noting that requesting party "did not provide any meaningful supporting explanation of its position" and thereby failed to comply with Section 102.67(e)); *Manor Care of Yeadon Pa, LLC*, 2019 NLRB LEXIS 421, fn. 4. (2019) (denying review and noting

that a request is “deficient” where “it does not comply with the requirements that such a request must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record”). Accordingly, it is evident that the Board disfavors requests for review that fail to comply with the Rule and have highlighted such deficiencies when denying those requests.

In the instant matter, Petitioner wholly failed to comply with the Rule. Indeed, the Request does not contain any citations to the hearing transcript or exhibits introduced by the Parties. That is, the Request does not offer a shred of evidence to support its allegation that the Regional Director somehow erred. Instead of complying with the Rule, the Petitioner directs the Board to seek out argument made by Petitioner’s counsel “in its Response to Order to Show Cause, at hearing, and in its Post-Hearing Brief.”² (Request at 4.) Indeed, Petitioner makes several references to positions that “the Union argued” without providing any underlying evidentiary support for those arguments. Argument of counsel is not evidence and certainly not sufficient to meet Petitioner’s obligations under the Rule. Simply, regardless of the relative merit of Petitioner’s argument (of which there is none), the Petitioner has not directed the Board to any record evidence in support of its position, which is a necessary requirement under the Rule. Accordingly, based on the Petitioner’s failure to comply with the Rule, the Board should deny the Request.

III. THE REGIONAL DIRECTOR DID NOT ERR

Assuming that the Board is willing to entertain the Request, the record evidence demonstrates that the Regional Director did not err when he stated that the Parties agreed upon the application of Article 4, Section 2 of the Contract. Indeed, this agreement was confirmed by one

² The Petitioner’s apparent lack of conviction in its position is demonstrated by the fact that the Petitioner failed to provide citations as to what argument it is referring to, and also fails to provide document references and page numbers.

of Petitioner's witnesses who had the authority to testify about the Petitioner's position regarding the application of Article 4, Section 2.

A. RELEVANT FACTUAL BACKGROUND³

In 1972, the Employer voluntarily recognized the Petitioner, which contains six-member affiliates that includes UniteHere! Local 362. (Tr. 26:4-16; C. Ex. 1.)⁴ In exchange for voluntary recognition, the Petitioner (and its affiliates and respective internationals) promised that it would not seek to represent the Employer's Cast Members, now or in the future, except for those specifically identified on a list. (Tr. 29:23-25, 30:1-10; C. Ex. 1.) The Contract is bargained with the Petitioner, and then each affiliate negotiates addenda with regard to the positions that the affiliate represents. (Tr. 26:4-25, 27:1.) The Petitioner represents approximately 42,000 Cast Members – 29,000 full-time and 13,000 part-time. (Tr. 27:20-22.)

Addendum A of the Contract contains a list of all of the positions the Petitioner represents. Indeed, the Contract's Recognition article, which defines the scope of the bargaining unit, states that:

The [Employer] recognizes the Service Trades Council Union as the sole and exclusive collective bargaining representative of all of the [Employer's] Regular Full Time employees who are in the classification of work listed in Addendum A at Walt Disney World Resort in Bay Lake, Florida, but excluded are all other employees, Security and Supervisors as defined in the Labor Management Relations Act of 1947, as amended.

(C. Ex. 3a.) The part-time agreement contains nearly identical language. (C. Ex. 3b.)

The Contract also contains a disclaimer of interest that states that the Petitioner and its affiliates will not seek to represent employees if they are not listed on a specified addendum. (Tr.

³ As the Petitioner did not include any underlying facts in its Request, the Employer believes that a brief recitation of the Parties' collective bargaining history will assist the Board in denying the Petition.

⁴ References to the hearing transcript are cited to as "Tr." followed by the page number and then the line numbers.

34:4-24; C. Ex. 3a.) There is identical language in the part-time agreement. (C. Ex. 3b.) This language was included within each of the Parties' contracts over nearly 50 years. (Tr. 32:20-25; C. Ex. 2.) The disclaimer, located in Article 4, Section 2, states:

The Service 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 [Employer] 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.

(C. Ex. 3a.) Other than the addition of the case citation, this language has never been modified. (Tr. 33:1-5; C. Exs. 1-2.) Thus, in exchange for voluntary recognition, not an election, the Petitioner decided to disclaim interest and would not pursue any positions at the Employer other than those included in the Contract. (Tr. 34:25, 35:1-8.)

B. THE PARTIES AGREE ON THE APPLICATION OF ARTICLE 4, SECTION 2

The Petitioner contends the Regional Director engaged in clear error when he stated that the Parties agree on the application of Article 4, Section 2.⁵ As discussed above, the Petitioner does not offer **any** evidence to support its claim. This alone is fatal to the Request. Moreover, the record demonstrates the Regional Director's finding of agreement is well-supported by credible, competent, and undisputed evidence. Thus, it is evident that the Regional Director did not commit clear error; instead, the Regional Director simply stated that which the Parties had agreed.

⁵ The Employer notes while the Petitioner discusses (albeit incorrectly) the standard used in the *Briggs Indiana* doctrine, the Petitioner does not assert or allege that the Regional Director misapplied the *Briggs Indiana* doctrine in his Decision. (Request at 4-5.) Moreover, while the Petitioner discusses its contention that the Board's decision in *MV Transportation, Inc.* 2019 NLRB LEXIS 509 (2019) is inapplicable to the instant matter, the Petitioner does not allege that Regional Director inappropriately applied that decision's "contract coverage" standard. (Request at 4-5.) Indeed, the Decision does not discuss, apply, or let alone reference *MV Transportation*. Accordingly, neither of these decisions are issues upon which the Request can rely. The Request is limited simply to the Petitioner's contention that the Parties do not agree on the application of Article 4, Section 2.

On direct examination, Christie Sutherland, the Employer's Director of Labor Relations, testified the Employer's position on Article 4, Section 2 was "that the disclaimer language precludes [the Petitioner] from filing petitions to represent anyone other than those positions that are listed in Addendum A." (Tr. 44:15-22.) On cross-examination, Ms. Sutherland confirmed that Article 4, Section 2 applies when a newly-created position does not perform essentially the same work as a bargaining unit position. (Tr. 117:22-25, 118:1-25, 119:1-25, 120:1-17.)

On direct examination, Victor Faggella, an organizer and grievance handler for one of the Petitioner's affiliates, testified about the Petitioner's position on Article 4, Section 2. (Tr. 223:8-23, 341:19-24.) Before he provided the Petitioner's position, however, Mr. Faggella confirmed under oath that he had the authority to speak on behalf of the Petitioner. (Tr. 341:15-17.) Thus, Mr. Faggella's testimony is the Petitioner's position on Article 4, Section 2. When asked directly, Mr. Faggella unequivocally testified that it was the Petitioner's position that Article 4, Section 2 "applies when the work that's being done is not traditionally done by the bargaining unit." (Tr. 341:19-24.) No other witness having the authority to testify on behalf of Petitioner provided any qualification to Mr. Faggella's testimony or the Petitioner's position regarding Article 4, Section 2.

It is undisputed that the work traditionally performed by the bargaining unit is located within the job duties contained in Addendum A. (C. Ex. 3a.) Indeed, pursuant to Article 3 of the Contract, the Employer has recognized the Petitioner "as the sole and exclusive bargaining representative of all of the [Employer's] Regular Full Time employees **who are in the classification in Addendum A.**" *Id.* (emphasis supplied.) Thus, based on the testimony and evidence provided by the Parties, it is clear that the Petitioner's position on Article 4, Section 2 mirrors that of the Employer – the disclaimer of interest applies to all job classifications, whether

new or not, that are not contained in Addendum A, which are positions that perform duties historically performed by the bargaining unit.

This agreement is reflected in the Decision. Accordingly, the Regional Director did not err by stating that “[t]he 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.” This statement is a true and accurate reflection of the Parties’ position on the application of Article 4, Section 2. As discussed above, the Union does not direct the Board to **any** testimony or evidence that erodes Mr. Faggella’s testimony on the application of Article 4, Section 2. Thus, the Board should reject the Union’s specious argument that the Regional Director committed clear error and deny the Request.

III. CONCLUSION

The Petitioner’s Request for Review fails to comply with Section 102.67(e) of the Board’s Rules and Regulations. For this reason alone, the Board should deny the Petitioner’s Request for Review. Moreover, the Regional Director’s Decision and Order Dismissing Petition is fully supported by the record and does not contain errors (clear or otherwise) on a substantial factual issue that prejudicially affects the rights of a party. Accordingly, the Petitioner’s Request for Review must be denied.

Dated: March 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 10, 2020, the foregoing was efiled via nlr.gov portal with the Region and served on the Employer's counsel via electronic mail: David Cohen, Regional Director (David.Cohen@nlrb.gov) and Richard Siwica, Nicholas Wolfmeyer, Egan, Lev, Lindstrom & Siwica, P.A., 231 East Colonial Drive, Orlando, FL 32801 (rsiwica@eganlev.com; nwolfmeyer@eganlev.com; laguirre@eganlev.com)

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