

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ALSTATE MAINTENANCE, LLC

and

VERNON HARRIS, an individual

Case No. 29-CA-252004

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ

and

VERNON HARRIS, an individual

Case No. 29-CB-252635

**MOTION TO STRIKE PORTIONS OF GENERAL COUNSEL'S
POST-HEARING BRIEF**

Pursuant to NLRB Rules and Regulations, Sec. 102.24(a), Respondent SEIU Local 32BJ hereby respectfully requests that the Administrative Law Judge strike the portions of Counsel for General Counsel's (CGC) brief that argue that Harris had supervisory authority because he had the same authority as other leads. This argument is not within the scope of the Complaint and was expressly disavowed by CGC at the hearing and in his brief. The Board grants motions to strike when a party seeks to introduce material that is not properly before it. U.S. Postal Serv., 309 N.L.R.B. 13, n. 1. (1992).

The Complaint alleges that Harris is a supervisor (Para. 7(a)). It does not allege that any other lead is a supervisor or possesses any indicia of supervisory authority. Moreover, CGC expressly disavowed any contention that other leads were supervisors. He stated at the hearing that "this case is about Vernon Harris specifically and not about any other leads" (Transcript, 19:22-23). His Post-Hearing Brief states:

The General Counsel does not allege in this case, and takes no position regarding, whether any other individuals employed by Respondent Employer as Lead Agents are statutory supervisors. CGC Brief, p. 2, n. 2.

As CGC concedes, workers are presumed statutory employees until and unless evidence is introduced establishing their supervisory status.

The party asserting supervisory status bears the burden of establishing it by preponderance of the evidence, and "the sole question the Board must answer

when making a supervisory determination is whether the party asserting supervisory status has proved that the person issuing commands possesses one or more of the indicia set forth in Section 2(11).” G4S Government. Solutions, Inc., 363 NLRB No. 113 (1996); Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003) (supervisory status must be proven by preponderance of evidence). CGC Brief, p. 37

Hence, the leads other than Harris are statutory employees based on the record of this case. The similarity of Harris’ authority to those of other leads militates against supervisory status for Harris, not for it. Nonetheless, CGC’s Brief repeatedly argues that Harris has supervisory status because he has the same authority as other leads.

Claims That Other Leads’ Authority Support Harris’ Supervisory Status

On page 6, CGC argues that “leads, and in particular Charging Party Vernon Harris, were responsible for assigning baggage handlers to various posts . . .” “Leads agents were generally responsible for overseeing the work of the baggage handlers . . .” CGC claims that the Employer’s handbook “codified the role of Leads in assigning employees . . .” CGC points to the difference in clothing for leads and baggage handlers, CGC Brief, page 6-7.

On page 11, CGC cites Harris’ thought that leads had the “authority over the baggage handlers to ensure that they performed their work successfully.” CGC twice cites testimony that lead agents made daily work assignments on pages 13-14. Similarly, CGC claims “Leads, including Harris, occasionally approached baggage handlers and asked them to work overtime.”

Leads in the CBA

CGC discusses the CBA’s treatment of leads expressly argues that other leads were supervisors at several points and implies it at others. On p. 10-11, CGC’s Brief states:

There is no evidence that the Respondents made any other agreement to include Lead agents in the Unit, or that they notified employees in the Unit that Lead agents would be included in the Unit, even if they are considered supervisors under the Act.

On p. 47, CGC argues:

The exclusion of “foremen” from the Unit at the time when the Unit was formed under Local 660 strongly indicates that individuals charged with the duties and responsibilities entrusted to Lead agents like Harris were not supposed to be included in the Unit.

CGC returned to this improper argument:

The Respondents may argue that before Mr. Harris filed his charges in the instant case, neither party knew that Lead agents who possessed similar authority to Harris are considered supervisors under the Act, and therefore Respondents never

intended to unlawfully apply their Union Security agreement to a statutory supervisor excluded from the Unit. CGC Brief, p. 50.

Yet once more:

Thus, the Respondents cannot rely upon their mutual intent to include Harris in the Unit specifically as a supervisor because they never made any explicit agreement to that effect with knowledge of Harris's or other Lead agents' supervisory status. CGC Brief, age 51.

Conclusion

Respondent SEIU Local 32BJ respectfully requests that the above-cited portions of Counsel for General Counsel's Brief be struck as they make arguments that are outside the Complaint and which Counsel for General Counsel expressly disavowed. To allow Counsel for General Counsel to make arguments outside the scope of the Complaint would deny fundamental due process to Respondents.

Dated: October 16, 2020
New York, NY

SEIU LOCAL 32BJ



Brent Garren
Deputy General Counsel
25 West 18th Street
New York, NY 10011
bgarren@seiu32bj.org
(212) 388-3943