UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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Marriott Hotel Services, Inc.,
Employer,

and

Law Enforcement Officers Security Unions LEOSU-DC & Police Benevolent Association LEOS-PBA,
Petitioner,

Case No. 05-RC-206350

and

Service Employees International Union, Local 32BJ,
Intervenor.

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SEIU LOCAL 32BJ'S
MOTION TO INTERVENE IN RC PETITION

Service Employees International Union, Local 32BJ, hereby moves to intervene in this matter.

Local 32BJ represents over 20,000 security guards on the eastern seaboard, including approximately 100 who work at the Gaylord National Resort & Convention Center ("Gaylord"). Gaylord and Local 32BJ are parties to a collective bargaining agreement pursuant to which Gaylord has recognized Local 32BJ as the bargaining representative of its security guard employees at its facility.

Local 32BJ seeks to intervene in this proceeding pursuant to Sections 102.65 and 11023.5 of the National Labor Relations Board Rules and Regulations to participate in the proceedings related to the forthcoming election. Local 32BJ is the recognized collective bargaining representative of Gaylord's guard employees that petitioner seeks to represent. Local 32BJ

obtained that status through majority support of the employees, as well as Gaylord's voluntary recognition. Although Local 32BJ is a union that represents both guards and non-guards, even under the regime set forth in the *University of Chicago*, 272 NLRB 873 (1984), there is nothing within the applicable case law that prohibits Local 32BJ's participation in the proceedings surrounding the election, even if the Region prohibits the Union from appearing on the ballot itself.

Moreover, in light of the Board's recent decision in *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016), which calls into question the continuing validity of *University of Chicago*, 272 NLRB 873 (1984), it is appropriate for the Region to accede to the Union's request. The Board determined in *University of Chicago* that unions that represent guards and non-guards, such as Local 32BJ, cannot appear on a ballot as an Intervenor in elections under Section 9(b)(3) of the Act. However, in *Loomis,* the Board again recognized that the Act only prohibits the *certification* of the mixed unions. It does not impose additional restrictions on mixed units and does not prohibit a guard-nonguard union from participating in the proceedings surrounding an election.

ARGUMENT

Employees Who Have Selected Local 32BJ as Their Collective Bargaining Representative Should be Permitted to Have Their Interests Represented in the proceedings Surrounding this Election

Local 32BJ should be allowed to intervene in this proceeding. The employees – guards – are empowered under § 9(b)(3) of the Act to join Local 32BJ, even though Local 32BJ is a mixed guard/non-guard union. In light of their selection of Local 32BJ as their bargaining representative and the existence of a collective bargaining agreement negotiated by Local 32BJ

which has yet to expire, Local 32BJ should be permitted to intervene and participate in the proceedings surrounding this election.

Section 7 gives all employees, including guards, the right to bargain collectively through representatives of their own choosing. Section 9(b)(3) does not prevent guard employees from joining a labor organization that also represents non-guard employees. *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016) (employers violate 8(a)(5) if they withdraw recognition without actual loss of majority status, workers at issue were members of Teamsters locals); *White Superior Division*, 162 NLRB 1496 (1967), *enf'd* 404 F.2d 1100, 1103 (6th Cir. 1968) (employer violated § 8(a)(1) and (3) by abolishing the positions of security guards who organized with International Association of Machinists); *Bel-Air Mart Inc.*, 203 NLRB 339 (1973), *enf'd* 497 F.2d 322 (4th Cir. 1974) (following *White Superior Division*); *Burns International Security Services*, 216 NLRB 11 (1975) (employer violated § 8(a)(1) and (3) when it unlawfully discharged, surveilled and interrogated officers during an organizing campaign with Laborers' union); *Guardsmark, LLC*, 344 NLRB 809 (2005), *enf'd in part* 475 F.3d 369 (D.C. Cir. 2007) (employer violated § 8(a)(1) by maintaining unlawful handbook provisions; officers were organizing with SEIU local).

Furthermore, nothing in § 9(b)(3) prohibits an employer from recognizing and bargaining with a mixed guard/non-guard union for a unit of guards. *See Stay Security*, 311 NLRB 252 (1993). Indeed, in *Loomis Armored US, Inc.*, the NLRB overturned *Wells Fargo, Corp.*, 270 NLRB 787 (1984), and its holding that it was permissible for an employer to withdraw recognition from a guard/non-guard union, even without actual loss of majority support. 364 NLRB at pg. 2. The Board found that "this interpretation unnecessarily sacrifices one of the Act's primary objectives—the promotion of stability of established collective bargaining

relationships." *Id.* Moreover, the Board reiterated that "guards still retain their rights as employees under the [Act], notwithstanding the terms of Section 9(b)(3)." *Id.*, citing 93 Cong.Rec. 6601 (1947). Accordingly, the Board found that an employer's withdrawal of recognition, absent an actual loss of majority status, was unlawful. *Id.* at 7.

Loomis Armored US, Inc., was merely the latest in a series of affirmations of security guards' rights under the Act. In *The Wackenhut Corp.*, 348 NLRB 1290 (2006), the Board reaffirmed guards' § 7 right to organize with a mixed union and that guards possess the same rights as non-guard employees, affirming the ALJ's conclusion that

> "[a]lthough Section 9(b)(3) prohibits Board certification of a mixed-guard union, it does not operate to prevent guard employees from joining a labor organization, and this principle extends to labor organizations which also represent non-guard employees ... . Guards are employees within the meaning of Section 2(3) and possess the same rights as nonguard employees under Section 7."

Id. at n. 2 and 1297 (internal quotation marks omitted). *See also University of Chicago*, 272 NLRB at 876, n. 26 (guards are free under the Act to choose a guard/non-guard union); *Brink's*, 272 NLRB 868, 870 (1984) (the Act's prohibition on certification of a mixed union does *not* prohibit an employer from voluntarily recognizing a mixed union as the representative of a guard unit); *Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933 (1st Cir. 1992) (mixed guard/non-guard unions have the right under § 7 to organize guards and an employer of such guards may voluntarily recognize a mixed union as their collective bargaining representative); *NLRB v. White Superior Division*, 404 F.2d. at 1103 ("[i]f guard employees do join a union which also represents non-guards, their membership is not unlawful, and in fact an employer may, if it wishes, recognize such a union for purposes of collective bargaining").

When Congress intended to do more than deny a union certification under the Act, it has explicitly provided so. In the Section 9(f), (g) and (h) Taft-Hartley amendments to the Act,

added concurrently with § 9(b)(3), Congress barred non-complying unions from participating in the Board's processes to a far greater degree than in § 9(b)(3). Subsection (f) explicitly prohibited the Board from investigating any questions concerning representation and from issuing complaints on unfair labor practice charges filed by any unions that did not file their constitution, bylaws, and certain reports with the Secretary of Labor. Similarly, subsection (h) explicitly prohibited the Board from investigating representation questions or pursuing unfair labor practices charges for any union that had not filed an anti-communist affidavit. Had Congress intended to dramatically restrict the access of guard/non-guard unions to its processes, it clearly knew how to draft § 9(b)(3) to prohibit more than certification. It did not do so.

Despite these principles, in *University of Chicago,* the Board held that unions representing both § 9(b)(3) guards and non-guards may not appear on an election ballot for Board-conducted elections for guard units, even for arithmetical purposes. However, even *University of Chicago* did not prohibit the participation of a guard-non guard union in the proceedings surrounding an election. Rather, the *University of Chicago* prohibited a guard-non guard union from appearing as an Intervenor on the election ballot, finding that it was contrary to the Act to allow a Union to appear as an Intervenor on the ballot, when it was barred from appearing on the ballot as a Petitioner. 272 NLRB at 875-876. As the Board found, "we construe Section 9(b)(3) not only to bar the formality of certification, but also to preclude a disqualified labor organization from taking advantage of the Board's election processes, including the privilege of being placed on the ballot as an intervenor with an accompanying certification of the arithmetical results." *Id.* at 876.

Indeed as the Board recently found, "the *only* limitation" under § 9(b)(3) for a guard-only bargaining unit "is that the labor organization representing such employees cannot be 'certified,'

if, in other aspects of its operation it admits non-guard employees..." *Loomis Armored US, Inc.*, 364 NLRB at n.27 (emphasis supplied). Accordingly, as there is no statutory bar to permitting the Union to intervene, finding that a guard-non-guard union is barred from participating in any manner in the election proceedings is a much too expansive interpretation of the holding set forth in *University of Chicago*. Moreover, it is not the result intended either by Congress or the Board. Essentially, Local 32BJ should be allowed to intervene, even if it is not considered an Intervenor on the ballot.

Furthermore, as set forth in Section 11023.5 of the Rules and Regulations, the Board's election rules contemplate participation in election processes, even if such parties are unable to appear on the ballot, for "the purpose of protecting [] interests in the unit it represents." Local 32BJ is in an equivalent position here. As the incumbent representative of the bargaining unit, Local 32BJ has unique insights as to how the bargaining unit functions, and our knowledge and perspective as to what is the best time, place and manner of the election is different than either the employer or the petitioning union.

As the current representative, Local 32BJ is the only entity poised to represent the interests of all the bargaining unit members and ensure that the Region has sufficient information to enable all employees to exercise their right to vote. The petitioner has no such interest. To the contrary, RC petitions can be filed with as little as 30% support, and there is nothing to indicate that the petitioner is interested in ensuring that any officers vote, other than those that supported its petition. Similarly, Local 32BJ presumes that the employer's interest is for the election to have only a minimum impact on its operations; ensuring that all officers have the opportunity to vote, regardless of any hardship on operations, is not a principle it is charged with advancing. Accordingly, to prohibit Local 32BJ from participating in any manner whatsoever, impairs the

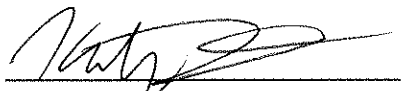
ability of employees to freely choose their advocate in election proceedings concerning their workplace and hampers the Region's ability to conduct a free and fair election. *See General Shoe Corporation,* 77 NLRB 124, 127 (1948) ("it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the *uninhibited* desires of the employees.") (emphasis added).

CONCLUSION

For the foregoing reasons, Local 32BJ respectfully requests it be allowed to intervene in these proceedings.

Dated: September 20, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **SEIU LOCAL 32BJ's MOTION TO INTERVENE IN RC PETITION** was served on this 20th day of September, by email and regular U.S. mail on the following parties:

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