UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MARRIOTT HARTFORD DOWNTOWN HOTEL,
Employer/Petitioner,

UNITE HERE LOCAL 217
Union,

Case No. 34-RM-88

and

JOSEPH UCCELLO et alia,
Employees/Intervenors.

MOTION OF EMPLOYEES JOSEPH UCCELLO AND WAVERLY JAMES TO INTERVENE, WITH MEMORANDUM IN SUPPORT ATTACHED; ALTERNATIVELY, MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS IN SUPPORT OF THE REQUEST FOR REVIEW

Pursuant to R & R §102.65, Joseph Uccello and Waverly James ("Employee/Intervenors"), employees of the Marriott Hartford Downtown Hotel, hereby move to intervene in this case. Because Employee/Intervenors' interests are directly effected by the outcome of this case, see accompanying Declarations, they also invoke the Board's inherent power to allow all parties to be heard, and allow them to protect their legal interests under §7 of the NLRA, 29 U.S.C. § 157, which are at the heart of this case.

Alternatively, if the Board denies this Motion to Intervene, Employee/Intervenors hereby move for leave to file this Motion as a Brief Amicus Curiae in support of their Employer's Request for Review of the Regional Director's decision of May 2, 2006, which dismissed the "RM" petition filed in this case.

I. INTRODUCTION: This case concerns the demand by UNITE HERE Local 217 ("UNITE HERE" or "union") for a "neutrality agreement" with the Marriott Hartford Downtown Hotel ("Hotel" or "Employer"), in order for the union to represent the Hotel's employees as their exclusive bargaining representative. (See Ex.1-3 attached to the Hotel's Request for Review). Although the specifics of UNITE HERE's "neutrality agreement" presumably remain to be negotiated, the union has indicated that it wants the same type of agreement that existed in HERE Local 217 v. J.P. Morgan Hotel, 996 F2d 561 (2d Cir. 1993), to wit: union access to employees, a waiver by the Hotel of its right under Section 8(c) of the Act to speak about the union (a.k.a. a "gag" clause); a waiver by the Hotel of its right to file for an "RM" election supervised by the NLRB; and an agreement to recognize the union via "voluntary recognition" after a "card check." (See id., 996 F.2d at 563; see also Ex. 2 attached to the Hotel's Request for Review).

Along with UNITE HERE's demand for a "neutrality agreement" came the now common litany of pressure tactics that unions use against employers when seeking to organize employees from the "top-down": pressure by local and Connecticut state politicians, a "corporate campaign," threatened boycotts, and the entry of "religious" and other "activist" groups in relentless attacks on the Hotel. All of these elements were present here, as well as a City of Hartford "Living Wage Ordinance" that further pressures employers to agree to help organize their employees from the top-down. (See Exs. 4-12 attached to the Hotel's Request for Review).

However, there is one major "fly in the ointment" in this situation: no one asked the employees of the Hotel whether they wanted to be represented by this power-hungry union, or whether they wanted to be grist for a "neutrality agreement" which gags their employer, provides the union with personal information about them and access to them in the workplace, and trades away their ability under §7 to choose or reject unionization via a secret-ballot election. (See Declarations of Employee/Intervenors attached hereto). Nowhere in the union's demand for a neutrality agreement did it even hint at employee support for its top-down organizing campaign, presumably because such support is nonexistent. (See Ex.1-3 attached to the Hotel's Request for Review).

As the attached Declarations of the Employee/Intervenors show, employees of the Hotel do not want to be grist for a "neutrality and card check" agreement. These Employee/ Intervenors wish to hear all sides of the story regarding the UNITE HERE union and its background and purposes. These Employee/Intervenors feel that they and their Employer have been unfairly pressured by the UNITE HERE demands for a "neutrality and card check" agreement, which they believe is antithetical to true employee free choice. Most importantly, these Employee/Intervenors fervently desire the freedom to choose – or refrain from choosing – a union, and would like a secret-ballot election supervised by the NLRB if UNITE HERE is to become their collective bargaining representative. These Employee/Intervenors therefore support their Employer's filing of an "RM" petition, so that they can vote their consciences in private via an NLRB secret-

ballot election.

Finally, lest UNITE HERE claim that it is the true spokesman for the Hotel's employees, it must be remembered that these Employee/Intervenors, not the union, possess § 7 rights and interests. Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) (by "its plain terms ... the NLRA confers rights only on employees, not on unions or their nonemployee organizers.")

For all of these reasons, the Board should allow the Employee/Intervenors to fully participate in this case, so they can advocate for a secret-ballot election without union, political and "community" pressure on their Employer or themselves.

II. STANDARDS GOVERNING INTERVENTION: The Employee/Intervenors recognize that their request to intervene at this stage of the proceedings is unusual, but such requests are not without precedent. See, e.g., Coast Radio Broadcasting Corporation d/b/a Radio Station KPOL (AFTRA Los Angeles Local), 166 NLRB 359, 363 n. 5 and 371 n. 2 (1967). In that case, the Board overruled an ALJ and granted a special appeal to allow employees to intervene in post-election challenges to their employer's "RM" petition. The Board obviously recognized that the employees' interest in the proceedings entitled them to appear as full parties.

Here, these Employee/Intervenors are directly affected by the outcome of this important case, but they were given no notice of the filing of the "RM" petition or the

pendency of the proceedings before the Regional Director, and were not served with any of the papers related to the Request for Review. Thus, these Employee/Intervenors only recently learned of the existence of this Request for Review, whereupon they promptly filed the instant Motion.

The Employee/Intervenors' Motion to Intervene is based on the broad provisions of NLRB Rules and Regulations § 102.65(b), which states:

> *Any person* desiring to intervene in *any proceeding* shall make a motion for intervention, stating the grounds upon which such person *claims to have an interest in the proceeding*. The Regional Director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(Emphasis added). The text of § 102.65(b) indicates that a person's "interest in the proceeding" is the relevant criterion for intervention, and the Board should not elevate form over substance in applying these rules.

In Camay Drilling Co., 239 N.L.R.B. 997, 998-99 (1978), the Board held that a party can intervene in an NLRB proceeding, even after the ALJ hearing is concluded, if it is an "interested party" under § 554 of the Administrative Procedures Act, 5 U.S.C. § 554. Section 554(c)(1) states that an "agency **shall give all interested parties** opportunity for ... (1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." (Emphasis added). In addition to this standard under § 554, the Board in Camay Drilling relied upon its inherent authority and the discretion provided to it in §10(b) of the Act, 29

U.S.C. §160(b), to permit pension fund trustees to intervene where the employer was accused of unlawfully terminating contributions to the trust fund.

"The word 'interested' is not defined in [the Administrative Procedures Act], nor is there a ready and convenient definition in the case law." American Trucking Ass'n, v. U.S., 627 F.2d 1313, 1319 (D.C. Cir. 1980). Thus, "[w]hether the interest asserted by a particular petitioner to intervene will suffice to justify his participation will depend, as it should, on the facts of the particular situation." Id. at 1322, citing Alleghany Corp. v. Breswick & Co., 353 U.S. 151, 173 (1957) and City of San Antonio v. CAB, 374 F.2d 326, 332 (D.C.Cir.1967). However, persons "with a concrete interest however small in the proceeding have a right to intervene." Id. at 1320.

The Employees of the Hotel certainly have an "interest" in an "RM" petition calling for a secret-ballot election, for it is their § 7 rights that are at stake. As discussed below, the primary purpose of an NLRB election is to effectuate employee free choice as to union representation. No party has a greater interest in the conduct of a secret-ballot election than the employees themselves. If the Employee/Intervenors are not permitted to appear in this case, their interests in a secret-ballot election will not be fully protected by the current parties to the proceedings.

The Board has permitted employees to intervene in post-election proceedings in a variety of circumstances, in addition to those mentioned in Coast Radio Broadcasting Corporation d/b/a Radio Station KPOL (AFTRA Los Angeles Local), 166 NLRB 359,

363 n. 5 and 371 n. 2 (1967). See Shoreline Enter. of America, 114 N.L.R.B. 716, 717 n.1 (1955) ("we shall permit these employees to intervene for the limited purpose of entering exceptions to that part of the Regional Director's report on objections which relates to their nonparticipation in the election"); Belmont Radio Corp., 83 N.L.R.B. 45, 46 n.3 (1949) (permitting employees to intervene and file exceptions related to their challenged ballots); Western Electric Co., 98 N.L.R.B. 1018, 1018 n.1 (1952) (permitting "a group of employees affected by this proceeding" to intervene in a certification election and file motions regarding the appropriateness of the bargaining unit); see also Taylor Bros., 230 N.L.R.B. 861, 861 n.1 and 862 (1977) (individual employees permitted to intervene in unfair labor practice proceedings against their employer to protect their interest in voting on their bargaining representative); Gem City Ready Mix Co., 270 N.L.R.B. 1260, 1261 n.1 (1984), (ALJ allows "limited" intervention, which included virtually full participation, because employees' seniority rights were being challenged).

For similar reasons, the Supreme Court and the federal courts of appeals frequently apply FRAP 15(d) and FRCiv.P 24 to allow intervention at various stages of the proceedings. See, e.g., UAW Local 283 v. Scofield, 382 U.S. 205, 207-18 and n.10 (1965). Employee/Intervenors have a similar interest in participating in this "RM" case, in order to secure a secret-ballot election supervised by the NLRB.

Intervention does not require "compelling circumstances" or any other level of heightened scrutiny, and the NLRB has never announced any such standard. Instead,

persons "with a concrete interest however small in the proceeding have a right to intervene." American Trucking Ass'n, 627 F.2d at 1320. Indeed, the "interested party" standard is not a particularly high one in NLRB representational proceedings. For example, a union that enjoys the support of only **one employee** is permitted to participate in election proceedings as a "participating intervenor." See Union Carbide & Carbon Corp., 89 N.L.R.B. 460 (1950).[1] Certainly these Employee/Intervenors standing up for their own rights and the rights of others employees opposed to UNITE HERE representation via a "neutrality and card check" agreement have a sufficient interest to intervene.

Finally, it must be remembered that employee rights are the paramount interest in representational proceedings. See Dana Corp., 341 N.L.R.B. No. 150 (2004) (stressing "the importance of Section 7 rights of employees"); Rollins Transp. Sys., 296 N.L.R.B. 793, 794 (1989) (overriding interest is "employees Section 7 rights to decide whether and by whom to be represented"); MGM Grand Hotel Inc., 329 N.L.R.B. 464, 472 (1999) (Member Brame, dissenting) ("Employees' Section 7 rights comprise the core of the Act ... the Board must show special sensitivity toward employees' rights"); Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J.,

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[1] A union can also intervene in representational proceedings based on "its status as the representative of other employees of the employer . . . [and] for the purpose of protecting its interests in the unit it represents." NLRB Casehandling Manual, ¶ 11023.5; Penn-Keystone Realty Corp., 191 N.L.R.B. 800, 800 n.1 (1971) (union was permitted to intervene on the basis of its current contractual interest in the employees).

concurring) ("employee free choice . . . is a core principle of the Act") (citations omitted). The very purpose of an election is to "determine the uninhibited desires of the employees." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

Thus, permitting UNITE HERE and the Hotel to participate in these proceedings, but freezing out individual employees of the Hotel, turns the Act on its head. As the Board stated in Levitz Furniture, "[i]t is well to bear in mind, after all, that it is employees' Section 7 rights to choose their bargaining representatives that is at issue here." 333 N.L.R.B. at 728. Employee/Intervenors must be permitted to participate in these proceedings to protect their §7 rights.

III. MEMORANDUM ON THE MERITS OF THE REQUEST FOR REVIEW:

The Employee/Intervenors support the Hotel's Request for Review, and ask the Board to overturn the Regional Director and allow a secret-ballot election. In doing so, the Board can and should re-evaluate decisions like New Otani Hotel & Garden, 331 NLRB 1078 (2000) and Brylane, L.P., 338 NLRB 538 (2002), which foster an environment in which unionization is foisted on employees from the top-down via union-coerced "gags" on employer free speech, and "card check" recognition which eliminates secret-ballot elections supervised by the Board. See Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall, 2000); Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating

the Company Unions of the Twenty-First Century, 24 Empl. Rel. L.J. 21 (Spring 1999).

It is well established that NLRB-conducted elections are the preferred method for determining whether a union has the support of employees. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 596, 602 (1969). It is also well established that the overriding policy of the NLRA is employee free choice and "voluntary unionism." Pattern Makers v. NLRB, 473 U.S. 95 (1985); Bloom v. NLRB, 153 F.3d 844, 849-50 (8th Cir. 1998) (citations omitted), vacated on other grounds sub nom. OPEIU Local 12 v. Bloom, 525 U.S. 1133 (1999) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected"). In even close cases, the Act should be tilted towards enhancing employee free choice via secret-ballot elections, rather than via "card checks" which are demonstrably coercive and lacking in the protections of a secret-ballot election.

In secret-ballot elections, the Board provides a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. See General Shoe Corp., 77 N.L.R.B. 124, 127 (1948); see also NLRB v. Sanitary Laundry, 441 F.2d 1368, 1369 (10th Cir. 1971); Gissel Packing, 395 U.S. at 601-02. In contrast, the fundamental purpose and effect of a "neutrality and card check" agreement is to **eliminate** Board-supervised "laboratory conditions" protecting employee free choice, and to substitute a system in which unions have far greater leeway to pressure

employees to accept union representation.

The contrast between the rules governing a Board supervised secret-ballot election and the "rule of the jungle" governing "card checks" could not be more stark. In an NLRB-supervised secret-ballot election, even conduct that does not rise to the level of an unfair labor practice has been found to violate employee free choice and warrant overturning an election. General Shoe, 77 N.L.R.B. at 127. Yet, a union engaging in the same conduct can lawfully attain the status of exclusive bargaining representative in a "card check" campaign under current Board policy. Worse still, some conduct that is objectionable in a secret-ballot election is inherent to any card check!

For example, in an NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters, at or near the polling place;[2] (b) speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[3] and (c) a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list).[4]

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[2] See Alliance Ware, Inc., 92 N.L.R.B. 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 N.L.R.B. 111 (1961) (same); Bio-Medical Applications, 269 N.L.R.B. 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co., 291 N.L.R.B. 578 (1988) (same).

[3] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[4] Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

Yet, this conduct occurs in almost every "card check campaign." When an employee signs (or refuses to sign) a union authorization card, he is not likely to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby "vote" for the union.[5] This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases the employee's decision is not secret, as in an election, because the union clearly has a list of who has signed a card and who has not.

Once an employee has made the decision "yea or nay" by voting in a secret-ballot election, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee.

Indeed, conduct inherent in all "card check drives" is objectionable and coercive when done during a secret-ballot election. In Fessler & Bowman, Inc., 341 N.L.R.B. No. 122 (2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret-ballot–even absent a showing of

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[5] The Board's justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employees making a determination as to union representation in a card check drive.

> The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Milchem, Inc., 170 N.L.R.B. 362, 362 (1968). Union soliciting and cajoling employees to sign authorization cards is incompatible with this rationale.