UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:
CHICAGO HOTEL MASTER LESSEE, LLC,
AND SAGE HOSPITALITY RESOURCES, LLC,
D/B/A THE BLACKSTONE, A RENAISSANCE
HOTEL, A SINGLE INTEGRATED ENTERPRISE
AND SINGLE EMPLOYER,

Respondent

and

UNITE HERE, LOCAL 1,

Charging Party

and

ERIN KOLODZIEJ,

Party-in-Interest

Consolidated Cases 13-CA-45089
13-CA-45159
13-CA-45313
13-CA-45361
13-CA-45401

RESPONDENT'S REPLY TO COUNSEL FOR GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO SUPPLEMENT

On June 8, 2011, Respondent filed a Motion to Supplement its Exceptions and Brief based on the Board's March 31, 2011, decision in *Embarq Corp.*, 356 NLRB No. 125 (2011). On June 10, 2011, the General Counsel filed an Opposition, which was served upon Respondent by U.S. mail and which the undersigned did not receive until the afternoon of June 13, 2011. On the morning of June 13, 2011, before Respondent received General Counsel's Opposition, the Associate Executive Secretary faxed to the parties a letter notifying Respondent of receipt of its Motion to Supplement and stating that that document would be "...treated as a letter and

transmitted to the Board for consideration." *See* Letter, attached as ***Exhibit 1***. Respondent, through its undersigned labor counsel, hereby files the following Reply to General Counsel's Opposition, and for support, states as follows:

A. General Counsel's Opposition is Moot.

General Counsel opens his Opposition by arguing that Respondent's Motion to Supplement should be rejected as untimely.[1] GC Opp. at ¶¶ 1-5. General Counsel cites the time limitations on filing exceptions and a supporting brief contained in the the Board's Rules and Regulations at Sections 102.45 and 102.46 but ignores the Board's decision, cited by the Associate Executive Secretary, *Reliant Energy aka Etiwanda, LLC*, 339 NLRB 66 (2003), which provides that a party may bring to the Board's attention "pertinent and significant authorities that come to a party's attention after the party's brief has been filed." More importantly, however, General Counsel's argument on this point is moot. The Associate Executive Secretary has already advised the parties that Respondent's Motion will be treated as a letter and transmitted to the Board. ***Exh. 1*** at 2.

B. General Counsel's Opposition is Without Merit.

General Counsel is also wrong on the substance. First, General Counsel argues that Respondent has suggested in its Motion that based on the Board's recent decision in *Embarq Corp.*, *supra*, "the ALJ's decision is flawed." GC Opp. at ¶ 6. That is not accurate and not what we have argued; we think the ALJ's decision was flawed in numerous respects, not just as to his conclusion that the Hotel's closure of Room Service as a free-standing department was subject to the Hotel's duty to bargain and not only because of his failure to adopt the reasoning of the ALJ

[1] One wonders how it would have been possible for the Hotel to invite the Board's attention to a decision issued on March 31, 2011, when its Exceptions and Brief were submitted months earlier.

in *Embarq Corp.*[2] We think the ALJ's decision was incorrect for many reasons apart from the way he dealt with the ALJ's decision below in *Embarq Corp.* but think a broader discussion of our position is inappropriate at this juncture. General Counsel also takes the position that *Embarq Corp.* is factually distinguishable from our case, which, as explained more fully *infra*, is not only incorrect but immaterial. General Counsel also rehashes cases on which the ALJ relied in making his decision and which were already discussed in our Exceptions and Brief and in the other parties' responses thereto, which we think is inappropriate for him to raise in a document purportedly responsive to our "letter."

1. *Embarq Corp.* is not distinguishable in any meaningful way from these proceedings.

The ALJ in *Embarq Corp.* applied the test promulgated by *Dubuque Packing Co.*, 303 NLRB 386 (1991), to facts which were more akin the situation at The Blackstone than to more traditional "relocations" like that in *Dubuque Packing* itself. In fact, General Counsel misreads *Embarq* by describing it as involving the closure of a call center in Las Vegas, Nevada, which was "relocated . . . to Altamonte Springs, Florida." GC Opp. ¶ 8. It was not the *call center* that was relocated in *Embarq*, but rather a call center was closed and its *work* was relocated to an *existing* call center. General Counsel parses the facts in an effort to give the impression that *Embarq* is distinguishable from our facts because of insignificant factual differences. The important fact is that *Embarq* involved a consolidation of work among existing facilities after one facility was closed, just as the elimination of the Room Service Department as a free-

[2] *See* Respondent's Brief at pp. 43, 45-46. We think the ALJ here erred in the way he dealt with—or refused to deal with—the ALJ's decision in *Embarq Corp.*, stating only, "Board law is clear that an administrative law judge's decision pending before the Board is not binding authority." JD at 63. Judges in state and federal courts commonly look to published decisions in other jurisdictions—or to opinions issued by other judges in their own jurisdictions—for guidance in cases involving similar principles and facts, even though those other judges' opinions are not binding authority. What the ALJ in our case did by brushing off the ALJ's decision in *Embarq* was, we think, an inappropriate excuse for him not to consider the reasoning in that decision.

standing department at The Blackstone resulted in the absorption of the room service work by Mercat Restaurant staff.

General Counsel appears to take the position that because our facts are not on all fours with every facet of *Embarq Corp.*, that decision is inapposite to our case and should be ignored. That approach fails to appreciate one of the Board's principal functions: issuing opinions which not only resolve disputes between discrete parties but which give guidance to the labor and management community as to the Board's thinking. Why else would the Board issue reasoned decisions rather than summary orders? Why would the Board cite to its own precedents when issuing new opinions? There are principles in each Board decision which are applicable to future cases with distinct and different facts. The principles in *Embarq Corp.* are applicable here and illustrate why the Board should find that The Blackstone's decision to close Room Service as a free-standing department and absorb its functions within Mercat was exempt from the Hotel's duty to bargain with the Union.

Further, we do not think it matters as a material consideration that the work was not physically moved to a different street address (that is, outside the Hotel building). We agree with the Fourth Circuit's position that cases cannot "be resolved by placing decisions within rigid categories such as 'partial closing,' 'relocation,' or 'consolidation.' . . . [M]anagement decisions involve different dimensions, which may be categorized in several ways, and determining whether bargaining is required is not a matter of finding a proper 'label' for the decision." *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223, 229-30 (4th Cir. 1988). We urge the Board to adopt that pragmatic approach. In short, whether work has been moved from one physical location to another is a distinction without a difference if the employer is still

performing the work with its own personnel as it did here—and here with personnel in the bargaining unit for which the Union has been recognized.

We also agree with the Fourth Circuit's view that there is no practical reason for the Board to distinguish between "labor costs" and "economic reasons," for a decision under *First National Maintenance*. As the Fourth Circuit has noted, such a distinction "posits a false dichotomy between economic and labor costs," because "labor costs are 'inescapably' a part of the economic calculus that a company must consider in deciding whether to relocate." *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831 (4th Cir. 2000); *Arrow Automotive*, 853 F.2d at 228.

Therefore, because there was a consolidation in Food and Beverage at The Blackstone—the work performed by Room Service was shifted to Mercat and the management structure was changed—and because the Union could not have offered, and did not offer, meaningful concessions—as described more fully in Respondent's Exceptions and Brief (at pp. 35-38, 42, 44-45)—the Hotel was entitled to close Room Service without bargaining with the Union over the decision to do so.

2. The cases cited in support of the ALJ's decision are inapposite here.

In lieu of addressing the issues raised by Respondent's Motion, General Counsel string-cites many of the cases relied upon by the Administrative Law Judge ("ALJ") below. GC Opp. ¶ 7. General Counsel spends only four (4) lines of his Opposition discussing *Embarq Corp.*, a decision which was the very basis of Respondent's Motion. General Counsel attempts to file further argument which he should have developed in his principal filings months ago. We think the Board should strike that part of General Counsel's Opposition which deals with cases cited and relied upon by the ALJ and which have nothing to do with *Embarq Corp.* Because we think

it was inappropriate for General Counsel to have submitted additional argument and cited cases in support of the ALJ's decision, we decline to respond to that portion of his Opposition.

C. Conclusions

For the foregoing reasons, in addition to the reasons raised in Respondent's Motion, Respondent respectfully requests that the Board apply its reasoning from *Embarq Corp.* to this dispute and analyze the closure of the Room Service Department under the *Dubuque Packing* framework and apply the Fourth Circuit's pragmatic reasoning that labor costs are an important part of an economic analysis and that a dichotomy between "closures" and "relocations of work" is false and impractical given the Supreme Court's holding in *First National Maintenance*. *See Arrow* and *Dorsey Trailers, supra*. Under that analysis, we think the Board will and should conclude that Respondent was under no obligation to bargain over the decision to close Room Service and transfer that work to the Mercat.

Respectfully submitted,

/s/
Norman R. Buchsbaum

/s/
Louis J. Cannon, Jr.

/s/
Wendell S. Phillips III

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Dated this 15th day of June, 2011,
at Baltimore, Maryland

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Reply was served on the following persons, by electronic mail, on this 15th day of June, 2011:

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/s/
Louis J. Cannon, Jr.

NATIONAL LABOR RELATIONS BOARD

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June 13, 2011

Re: The Blackstone, A Renaissance Hotel
Case 13-CA-45089, et al.

Norman R. Buchsbaum
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Dear Mr. Buchsbaum,

This will acknowledge receipt of your June 8, 2011 Motion to Supplement Exceptions and Brief, in which you request the Board to apply the relevant portions of its holding in *Embarq Corp.*, 356 NLRB No. 125 (2011) to the present case. The Board's decision in *Reliant Energy aka Etiwanda, LLC*, 339 NLRB 66 (2003) permits parties in a case to call to the Board's attention "pertinent and significant authorities that come to a party's attention after the party's brief has been filed." In such circumstances, a party may "promptly advise the Executive Secretary by letter, with a copy to all other parties." Accordingly, your motion, which will be treated as a letter, has now been transmitted to the Board for consideration.

Farah Z. Qureshi
Associate Executive Secretary

cc: Parties