

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

REMINGTON HOTEL CORPORATION,  
d/b/a THE SHERATON ANCHORAGE

and

UNITE HERE!, LOCAL 878, AFL-CIO

Cases: 19-CA-32148  
19-CA-32188  
19-CA-32222  
19-CA-32238  
19-CA-32301  
19-CA-32334  
19-CA-32337  
19-CA-32349  
19-CA-32367  
19-CA-32414  
19-CA-32420  
19-CA-32438  
19-CA-32487

**EMPLOYER'S REPLY BRIEF TO THE COUNSEL FOR THE ACTING GENERAL  
COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE'S DECISION**

In accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Respondent Remington Lodging & Hospitality, LLC (Respondent) submits this Reply to the Answering Brief (“Response”) filed by the Counsel for the Acting General Counsel (CGC) regarding Respondent’s Exceptions to the Decision of Administrative Law Judge Gregory Meyerson (the ALJ), issued on August 25, 2011 (“Exceptions” and “Decision” respectively). In her Response, the CGC invites the Board to ignore the testimony of more than sixty (60) witnesses – indeed most of the testimony taken in this case – and instead chooses to build her answering brief on a few tiny corners of the record to support the Union’s case. In sum, the Decision was premised on inaccurate factual findings and incorrectly applied Board law. Accordingly, the Board should overturn the Decision in-line with Respondent’s Exceptions.

The Response appears to be a rehash of the CGC’s post-hearing brief and treated as an opportunity to lob pointless generalities at Respondent rather than offer any true analysis of the Exceptions. The CGC departs from her role as zealous prosecutor and stumbles into the realm of unfounded pedagogy by choosing to ignore huge swaths of testimony, and gratuitously misrepresenting others. There is no basis anywhere in the record that supports images of “decimation” and “any means necessary” tactics [Response, p. 4] found in the first sentence of the Response’s so-called “Analysis” section - the ALJ specifically held that Respondent bargained in good faith, and truly intended to reach a deal. [Decision, p. 58]. This same sort of storytelling is found throughout the Response with large portions of the record evidence, apparently inconvenient for the CGC’s storyline are ignored in the Response. A complete reading of the record and a fair application of the law lead an unbiased fact finder to conclusions much different than those found in the Decision.

**I. The Decertification Petition was initiated, circulated and submitted by a majority of the bargaining unit employees.**

- a. Sixty five (65) witnesses testified that the decertification petition was initiated, circulated and submitted without management knowledge or influence.

The Response inexplicably ignores weeks of employee testimony that clearly and credibly show that a majority of the unit employees signed the decertification petition without management influence and for individual reasons that had nothing to do with management activity. The Response does the Board a disservice by pretending that these sixty-five (65) employees and their handwritten declarations do not even exist. The Petition was initiated by workers without management's knowledge, and there is no evidence to say otherwise. The record is also clear that the Petition was circulated almost entirely by five Hotel employees – Janet Emmsley, Jannice Emmsley, Margarita Lucero, Cindy Mathers, and Lupita Mejia. This fact is left untouched by the CGC, because it points to a conclusion she hopes the Board will fail to see – *i.e.*, that most of the unit employees testified they signed the petition because they did not like the organizational tactics and failed benefits programs of the Union. The Response avoids any direct discussion of the evidence, and instead makes four statements about witness testimony and without record citation. What's more, the CGC's summarized statements (the Union has done nothing for them, they were worried about their Pension benefits, frustration with the Boycott [Response, n. 7]) support Respondent's case; the disaffection with the Union was a result of the Union's activity and failing benefits program, not the ULP allegations identified by the ALJ.

The law remains on the Respondent's side. Even in the cases cited by the CGC, employee-initiated, led and circulated decertification petitions, despite significant managerial involvement, are still considered objective evidence of employee disaffection. *See Narricot Indus., L.P.*, 2008 N.L.R.B. LEXIS 140 (May 6, 2008); *Eastern States Optical Co., Inc.*, 275 N.L.R.B. 371 (1985); *Poly Ultra Plastics*, 231 N.L.R.B. 787 (1977); and *KONO-TV-Mission Telecasting*, 163 N.L.R.B. 1005

(1967). The CGC steers clear of this analysis. The Response insists instead on rehashing the same arguments about only three (3) of the 167 unit employees (Wray, Bristol, and Lantigua), even though there is no showing anywhere in the record that these three communicated their thoughts or opinions to any of the other 107 petition signatories.

- b. The Decision and the Response invite the Board to ignore eight (8) witnesses who show Dexter Wray to be a liar – Dexter Wray’s testimony cannot be credited.

The Response invites the Board to dwell on the unique (and dubious) testimony of Dexter Wray as proof of management influence over the decertification petition. In reaching this conclusion, the CGC describes Mr. Wray’s testimony as if he and Mr. Emmsley were the only people who testified at the forty-day Hearing. Mr. Wray’s credibility vanishes once the testimony of other witnesses is examined.

Mr. Wray’s testimony is contradicted by eight (8) witnesses. The Response does little to explain why the ALJ should be permitted to ignore the testimony of Mssrs. Encabo, Reyes, Cain, Carino, Llego, and every member of the Emmsley family who all directly contradict Mr. Wray’s stories about Ed Emmsley, Sr. To believe Dexter Wray is to disbelieve the stories of his worker colleagues who, unlike the union-cast Wray, have no motivation to speak anything less than the truth. Thus, it is noteworthy that the CGC, like the ALJ, ignores the testimony of Mr. Encabo, and every other engineer, bellman, and security officer. Indeed, there is little that the CGC can say when faced with the ALJ’s error regarding Mr. Wray’s credibility. Mr. Wray did not tell the truth.

First, Mr. Wray did not tell the truth about his story of a fanatical Ed Emmsley who would spend hours on end, over a period of many days, to persuade Mr. Wray to sign the decertification petition. In the busy, day-to-day operations of a Hotel, two and three hours of time to discuss a subject, any subject, on several separate occasions is a fantasy. Furthermore, the Response offers no explanation for why Mr. Emmsley would hound Mr. Wray, a known Union-supporter, for his

signature on the Petition, but never once raises the issue with any other employee in the Hotel. Mr. Encabo, a supposed participant in these discussions, denied that these discussions every occurred.

Second, Mr. Wray did not tell the truth about the temporary use of engineers as back-up security officers. Of the five engineers and two security personnel, Mr. Wray is the only individual to offer this outlandish testimony. Every other witness contradicts Mr. Wray's version of events. The ALJ's error in this regard cannot stand.

- c. There was no causal connection between the alleged ULPs and the employees' decertification efforts.

Respondent agrees that *Master Slack Corp.*, 271 N.L.R.B. 78 (1984) is a key case for guidance regarding an employer's withdrawal of recognition based upon a decertification petition gathered in the midst of other ULP allegations. After citing to *Master Slack*, the CGC claims that Respondent should not benefit from a "parade of employee witnesses before the ALJ to explain their various rationales for signing the petition." [Response, p. 14]. In fact, though, just such a 'parade' of employee testimony is *exactly* what was relied upon in *Master Slack*. *Id.* at 84-85. The *Master Slack* Board looked almost exclusively at the subjective testimony of employees to examine the bases for the employer's withdrawal of recognition. *Id.*; *see also Eastern States Optical Co. Inc.*, 275 N.L.R.B. 371, 372 (1985). The CGC ignores this Board precedent, and instead responds to Exception 9 by misrepresenting the record<sup>1</sup> and retreating to a mechanistic position statement devoid of true analysis.

---

<sup>1</sup> The CGC grossly misrepresents the testimony of employees in her footnote 7 that noticeably excludes direct quotations or citations to the record. The mandatory length limitations of this document prevent an unabridged catalogue of witness testimony. However, even a cursory review of the record will show the CGC's representations to be false. Furthermore, the CGC's claim that "almost every" witness required prompting and refreshing [Response p. 14] is a gross mis-reading of the record. Every single employee answered the open ended question: "Why did you sign the petition?" with a specific answer under oath.

What is revealed by an objective analysis of the record is that there is no substantial connection between the ULPs and the decertification petition. None of the alleged misconduct was referred to by any of the Petition signers in their testimony or in the dozens of handwritten declarations in evidence. The CGC is only able to reach the conclusions she claims in the Response by prematurely presuming Respondent's liability in all of the allegations, and then going on to manufacture a causal link not found in the employee testimony. As described more fully in the Exceptions, should the ULP allegations be found true – which Respondent respectfully believes would be error – the alleged events that occurred in September, October, November 2009 and February 2010, and were all far too distant in time to be relevant to the decertification petition. None of the allegations that the ALJ believes are a bar to decertification would have had a lasting effect on the employees, nor would they tend to cause employee disaffection, nor have an adverse impact on employee morale, organizational activities, and membership in the Union. The Response does nothing less than discount more than sixty (60) employee witnesses, and then point to unproven allegations in its Union-scripted Complaint as reason enough to undermine the employee-led decertification petition.

## **II. Respondent bargained in good faith.**

### **a. There is record evidence that FMCS was notified of the dispute; the Response is wrong.**

Respondent did not violate 8(a)5 or 8(d)3 of the Act for failing to notify the Federal Mediation and Conciliation Services (FMCS) prior to the implementation of its October 2009 impasse offer because the FMCS had already been notified of such an impasse by the Union. In support of this position, Respondent's Exceptions lay out an analysis of the Board adopted *Mar-Len Cabinets, Inc.* 659 F.2d 995 (9<sup>th</sup> Cir. 1981) (adopted by the Board at 262 N.L.R.B. 1398 (1982)) and legislative history of Section 8(d)3. In response, the CGC represents that "Respondent...failed to provide record evidence to support this theory." [Response, p. 23]. How could the CGC so

conveniently over look Respondent's citation to the record in its Exception 2 and 3? Exceptions 2 and 3 quoted language from Respondent's Exhibit 19, a submission from the FMCS, which states that the Union filed an "F-7 Notice to Mediation Agencies, advising FMCS of the contract termination." [Resp. Ex. 19; Tr., p. 1177]. The ALJ received this exhibit into evidence and accepted this document and its contents as true. [Tr., p. 1175, Ins. 20-22]. The FMCS had notice of the impasse. The Response is wrong.

Precise dates of the notice, however, were improperly withheld by the ALJ because of a ruling revoking Respondent's subpoena. The CGC glosses over the significant legal and factual problems identified in the Exceptions regarding this subpoena decision without adding anything more than a sentence in support of the ALJ's mis-guided conclusion.

- b. The record evidence does indeed establish that impasse was not broken in March 2010; the assertion that record evidence was "recreated" is false.

In section F.1 of her Response, Counsel for the General Counsel asserts that Respondent engaged in an "effort to *recreate* the record evidence of the parties' bargaining." A careful review of Respondent's argument in support of Exception 1 will, however, belie this assertion. Every item of evidence relied upon in this argument by Respondent is supported by either citations to the record or by citations to the ALJ's Decision (in those instances where Respondent takes no issue with the ALJ's finding). While the CGC, of course, disagrees with the conclusions Respondent seeks, these conclusions aren't pulled from thin air; these conclusion are based on the record itself, and nothing but the record. Respondent did not 'recreate' record evidence. Respondent corrected the ALJ's *misapprehension* of this evidence.

A clear example illustrating this is as follows. The CGC asserts at page 22 of her Response: "Respondent claims there was really nothing new about its health care proposal, because its 'true proposal' – that it be permitted virtually unilateral discretion to select health care plans each year –

had not changed.” This is in fact an accurate statement, and is supported by the record (albeit, the CGC overstates the characterization of “virtually unilateral discretion,” as discussed below). In its Exceptions brief at pages 4 - 5, Respondent pointed carefully to the health care proposal it made in July of 2009, [GC Ex. 38, Article 31, p. 29], and to its final health care proposal made in August of 2009. [Resp. Ex. 69, sections 173-176]. This proposal, in its final form, called for a complete exit from the Taft-Hartley plan then in place – in which the control of providing health coverage was entrusted to the Taft-Hartley trustees – and placed it in the hands of the party that would in fact be paying for the coverage, the employer, empowering it to select coverage annually. As shown in its brief, Respondent had carefully supported its argument at the bargaining table for this right based on the volatility and runaway costs it had experienced under the Taft-Hartley plan. Did this proposal cede a large measure of control to Respondent? Yes.<sup>2</sup> Was Respondent within its rights to make such a proposal, and stand firm? Absolutely, as shown in the Exceptions brief, and the ALJ agreed. The ALJ agreed Respondent was within its legal rights to declare impasse and implement its final August 2009 proposal.

The ALJ ran off the rails, however, in his assessment of Respondent’s presentation of the Aetna plan in the March 2010 bargaining sessions. As explained in the Exceptions brief at page 16, the Cigna plan – which had been attached to the August 2009 proposal – was never implemented. “More important,” as also explained, “[t]he substance” of Respondent’s health care proposal in August, as well as in March, “was for the right sought by Respondent to annually select the Hotel’s ‘plan providers, plan benefits and employee contributions,’” subject to the limitations noted in the footnote above.

---

<sup>2</sup> This measure of control, however, was not “virtually unilateral,” as the CGC asserts. The August 2009 proposal called for advance notice to the Union, and provided that Respondent would “meet and confer” with the Union over the annual selections, and set forth a governing standard: “Any such changes shall be for sound business reasons.” Resp. Ex. 69, sections 173 -176.

The parties were deadlocked in October and remained so in March. The Union's March proposal – analyzed at pages 10-14 in the Exceptions brief – consisted of three parts: (i) a rooms-quota proposal that in fact retained the status quo, and was designed not to be accepted thanks to the All-or-Nothing Caveat, (ii) a Taft-Hartley health proposal the Union knew wouldn't be accepted, that was regressively worse than the December "Non-proposal", and (iii) a proposal on wages, which was not an issue of contention. In short, these three proposals were, respectively, *non-significant*, a *non-starter*, and a *non-issue*. It was designed to fail, in keeping with the Union's efforts throughout "to avoid making any more concessions than it had to . . . [given the] tough economic times." [ALJ Decision, p. 11, l. 44-46]. Impasse was not broken in March.

### **III. The Respondent properly disciplined employees who violated the Hotel's lawful work rules.**

All of the employee discharges and disciplinary notices were deemed to be violations of the Act for only one reason – the discipline was based upon invalid work rules.<sup>3</sup> [Decision, p. 70, lns. 18-24] The six (6) work rules in question were the same negotiated rules that had been in place for generations of unionized workers at the Hotel. There is no evidence that the disciplinary actions were taken for any reason other than the blatant violation of these known rules. Thus, upholding the validity of the rules eliminates the bases for the ALJ's findings regarding the discipline of the eight (8) boycott petition presenters, and the four (4) leafletters at the front-drive of the Hotel.

---

<sup>3</sup> CGC's claim that Respondent failed to accept the ALJ's ruling regarding the discipline of the eight (8) employees is misleading. The only basis for the ALJ's ruling against the Respondent is that the discharges relied solely on work rules that were, themselves illegal. Thus, a separate exception for the eight discharged employees is unnecessary.

- a. None of the Hotel's work rules explicitly restrict Section 7 activity nor could they be reasonably construed to do so.

Exception 4 provided a detailed proof of how the Hotel's work rules do not tend to chill employees in the exercise of their rights as described in *Martin Luther Mem'l Home*, 343 N.L.R.B. No. 75 at \*1-2 (May 19, 2004). The Response, however, argues that the Hotel's rules violate the Act simply because the rules could be enforced to restrict Section 7 activity. But this simplistic, circular reasoning is not true. Not all rules that limit Section 7 activity are violative of the Act. If it were so, for example, leafletters would be permitted to hand out flyers to patrons standing in line at McDonald's restaurants (they are not). *McDonald's Corporation*, 205 N.L.R.B. 404 (1973). The union leadership had ways that they could have delivered the exact same petition without breaking Hotel rules: asked for a meeting with the General Manager utilizing the Hotel's Open Door policy, and presented the petition to him with their sentiments. Instead, they violated Hotels rules that had been in place (and negotiated with the Union) for decades.

- b. *Santa Fe Hotel* should not be applied to this case.

The CGC asks the Board to somehow believe that the *porte cochere* of a large full-service hotel is not a "work area." This is silly. Unlike the coal mine and retail grocery store cases cited in the Response, a Hotel's revenue is exceptionally dependent on how guests are treated from the moment they arrive. There is a reason why the industry is known as the "hospitality" industry. A hotel's business operations begin in earnest when guests are received, cars unloaded, luggage transported, taxi called, car parked, busses packed, etc. In fact, the entrance to the Hotel is one of the busiest areas of the entire business operation. Thus, distributing literature and limiting ingress/egress specifically interferes with a Hotel's mode of production. *Santa Fe Hotel* case was wrongly decided because, though a hotel's parking lots or its landscaped front drive may not be considered "work areas," its front door areas certainly are. In the face of clear precedent showing the folly of the *Santa*

*Fe* holding in this situation, the CGC is left only to complain about the date of the well-established Board cases, and side-steps the well thought-out reasoning behind them.

Finally, far from an afterthought, the 2.5 pages of factual analysis point out the distinct differences between the location and geography of the Sheraton Anchorage Hotel and Spa in downtown Anchorage, and a casino hotel fifteen miles away from downtown Las Vegas. There were several other places that union supporters could have chosen to distribute their materials to Hotel guests without interfering with the main entryway through which all of its guests arrive.

This 1st day of December, 2011.

STOKES, ROBERTS & WAGNER, ALC



---

Arch Y. Stokes  
Karl M. Terrell  
Peter G. Fischer

3593 Hemphill Street  
Atlanta, GA 30337  
(404) 766-0076  
(404) 766-8823 (FAX)

ATTORNEYS FOR RESPONDENTS

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

REMINGTON HOTEL CORPORATION,  
d/b/a THE SHERATON ANCHORAGE

and

UNITE HERE!, LOCAL 878, AFL-CIO

Cases 19-CA-32148  
19-CA-32188  
19-CA-32222  
19-CA-32238  
19-CA-32301  
19-CA-32334  
19-CA-32337  
19-CA-32349  
19-CA-32367  
19-CA-32414  
19-CA-32420  
19-CA-32438  
19-CA-32487

**PROOF OF SERVICE**

I am employed in the County of Fulton, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is 3593 Hemphill Street, Atlanta, Georgia 30337.

On December 1, 2011, I caused the following document(s) to be served:

**Employer's Reply Brief to the Counsel for the Acting General Counsel's Answer to Respondent's Exceptions to the Administrative Law Judge's Decision**

— BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Atlanta, Georgia, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.

BY THE NLRB'S ELECTRONIC FILING SYSTEM on its website: <http://www.nlr.gov>. It was e-filed with Region 19 and The Office of Executive Secretary

BY ELECTRONIC MAIL to:  
Mara-Louis Anzalone, Counsel for the General Counsel of Region 19,  
[Mara-Louis.anzalone@nlrb.gov](mailto:Mara-Louis.anzalone@nlrb.gov)

Dmitri Iglitzin, Attorney  
[iglitzin@workerlaw.com](mailto:iglitzin@workerlaw.com)

Executed on December 1, 2011, at Atlanta, Georgia.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.



---

Peter Fischer, Attorney

Attorneys for the Respondent:

Stokes Roberts & Wagner  
3593 Hemphill Street  
Atlanta, GA 30337  
404.766.0076 Telephone  
404.766.8823 Facsimile