

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNITE HERE LOCAL 1

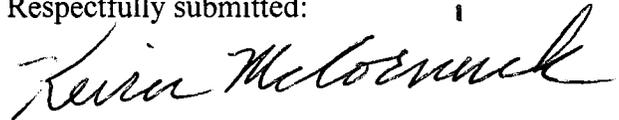
and

Case: 13-CB-19622

RITZ-CARLTON WATER TOWER
PARTNERSHIP

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted:



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Now comes Kevin McCormick, Counsel for General Counsel, who, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, files this Answering Brief in response to Respondent's Exceptions to the Decision of Administrative Law Paul Buxbaum, dated November 29, 2011.¹

I. INTRODUCTION

Respondent and the Ritz-Carlton have a long-standing collective-bargaining relationship. The hotel has long been a "me-too" signatory to a multi-employer contract with the Union. Over the course of time, however, Ritz-Carlton adopted terms and conditions of employment that exceeded the terms in the multi-employer agreement and wished to gain relief from those terms. Accordingly, when it came time to negotiate the most recent agreement, the Ritz-Carlton sought relief from Respondent on those areas where it exceeded the industry standards. As a result, the Ritz-Carlton and Respondent entered into a Memorandum of Agreement providing that after the multi-employer agreement had been negotiated, the Ritz-Carlton and Respondent would engage in separate bargaining over nine separate terms, specifically enumerated in a side letter.

After the multi-employer agreement was concluded, and it was time to negotiate the separate terms, Respondent claimed that it was not obligated to negotiate over all nine terms, but only a few of them. As will be shown below, Respondent relies on an indefensible and twisted reading of the MOA language to support its position. Respondent also asserts that the case

¹ Hereinafter the Administrative Law Judge will be referred to as the "Judge"; the National Labor Relations Board hereinafter is the "Board"; the National Labor Relations Act hereinafter is the "Act"; UNITE HERE Local 1, hereinafter is "Respondent"; Ritz-Carlton Water Tower Partnership hereinafter is the "Ritz"; citations to the Judge's decision will be referred to as "ALJD__"; citations to the transcript are designated as "Tr. __" the General Counsel's Exhibits are hereinafter referred to as "GC__"; Respondent's Exhibits are hereinafter referred to as "R__". Joint Exhibits are hereinafter referred to as "JT__."

should have been deferred, but as will be shown, the utter frivolity of its position regarding the MOA's interpretation precludes this result.

II. GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S FACTUAL ASSERTIONS

Respondent excepts to the some factual findings of the ALJ on disputed issues, and has filed a lengthy brief in support of those exceptions. The ALJ's decision, on the other hand, explains in exacting detail the facts and reasoning supporting his decision that the Respondent violated the Act. Nothing contained within the Respondent's exceptions or brief in support thereof detracts from his factual findings, conclusions or legal analysis. As shown below, the ALJ's findings of fact, credibility resolutions and conclusions of law appropriately rely upon the evidence contained in the record and are amply supported by legal precedent.

At the outset, the General Counsel notes that Respondent's nineteen (19) exceptions to the Administrative Law Judge's decision in the instant manner are numerous, repetitive and argue many of the same topics. Because of the nature and the sheer volume of exceptions which contain identical arguments, the General Counsel will address the exceptions in thematic groupings.

A. The ALJ's Decision to Examine the Merits of the Case before the Deferral Argument was Justified in this Particular Case.

Most of Respondent's Exceptions rest on the argument that the ALJ should have deferred the case to the parties' grievance/arbitration procedure. Respondent relied so much on this argument that it didn't even present any witnesses to address the merits. As the analysis below proves, deferral is not appropriate in this case. By failing to introduce any evidence, the Respondent has waived its right to present a defense on the merits, and as the evidence shows, Respondent would have lost on the merits as well.

In Respondent's Exceptions 1, 2, 3, 4, 8, 10, 11, 16, 17, and 19, Respondent argues essentially the same thing; that the ALJ erred in not allowing the Respondent to submit the case to arbitration. Respondent presents a number of arguments why this is so and each one will be dealt with below.

In Respondent's Exception 1, it argues that the ALJ should have decided the deferral issue before reaching the merits of the case. Respondent cites several cases in support of this argument including *Servomation Corp.*, 271 NLRB 1112 (1984)² which explains the policy concerns of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies*, 268 NLRB 557 (1984). Respondent also argues in Exception 2 that the ALJ should not have relied on the Board's July 29, 2011, decision denying the Respondent's motion for summary judgment in deciding the merits of the case before deciding whether deferral was appropriate. Respondent argues that the denial of its motion for summary judgment only said there were genuine issues of material fact regarding its argument that the complaint allegations should be deferred. GC 1(g).

In his decision, the ALJ acknowledges that the case involves both a procedural and substantive legal dispute. He also acknowledged that normally the procedural matter would be resolved first. For this case however, and the particular circumstances presented by it, he concluded that he had to dissect the substantive issue first so that the procedural matters (i.e. deferral) could be fully addressed. ALJD 11; 19-24. The ALJ based his decision to examine largely on the history of the case. In its answer, Respondent contended that, "[t]he unfair labor practice alleged in the Complaint should be deferred to arbitration pursuant to *Collyer Insulated*

² Respondent's lengthy quotation from *Servomation* (Br. P. 14), while accurate, is inapposite. While it is true that normally a deferral decision will be made on the basis of the complaint, Respondent's defense, and relevant contract provisions, such is not the case, here, where the Board made a ruling expressly finding that there were issues of material fact and remanded the case to the ALJ. Such order became the law of the case and clearly takes precedence over any contrary instructions in the case law.

Wire, 192 NLRB 837 (1971).” GC 1(e). Respondent followed this up with a motion for summary judgment on the deferral issue to which the Counsel for the General Counsel and the Ritz both filed oppositions. On July 29, 2011, the Board issued an order with the following language:

The Respondent has failed to establish that there are no genuine issues of material fact regarding its argument that the complaint allegations should be deferred to the parties’ grievance and arbitration procedure pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). This denial is without prejudice to the Respondent renewing its deferral argument before the administrative law judge. GC 1(q)

At trial, the Respondent did present its deferral defense. Tr. 236.

The ALJ paid particular attention to the wording of the Board’s Order denying the summary judgment motion without prejudice. According to the ALJ’s reasoning, the Board’s language mandates that the ultimate resolution of the deferral issue must proceed from a comprehensive assessment of the material facts as developed through the trial process. ALJD 11; 48-51. In other words, if the Respondent had established there were no issues of material fact regarding its argument that the complaint allegations should be deferred, the Board would have granted the motion. The content and order of the language in the Board’s Order is significant. The content of the Board’s Order essentially instructs the ALJ to proceed with the litigation. He had no choice but to comply with the Order. Otherwise, the Board would have decided the deferral issue. ALJD 11; 51-52. It is clear that the Order mandates a hearing on the merits but does not preclude the Respondent from presenting its deferral argument during the trial. The order of the language used in the Order is significant as well. In order to make conclusions on the issues of material fact regarding the argument that the complaint allegations should be deferred, the ALJ must examine the complaint allegations first, and then decide if they should be deferred. Without a thorough and full examination of the complaint allegations, there

would be no way to decide if the allegations should be deferred. However, see Footnote 22 in the ALJ's decision in which he does admit the tension with the Board's decision in *Servomation Corp.*, 271 NLRB 1112, fn. 7 (1984). ALJD 17; 33-51. The ALJ points out though that it serves few, if any, of *Collyer's* stated objectives to make a decision regarding deferral that is based on evidence and legal theories that are outside the specifically pleaded complaint allegations. ALJD 17; 36-43.

Exception 3 is simply untrue. Respondent claims that the ALJ concluded that the Board rejected the Respondent's *Collyer* defense. As he clearly stated in his decision, the ALJ points to the Board's pretrial order denying summary judgment. In the sentence before the one cited by Respondent, the ALJ states, "Citing this language, the [Respondent] has throughout this litigation rested the bulk of its defense on the argument that the Board's policies require that the controversy be deferred to the arbitral process." ALJD 17;7-9. As the ALJ's decision correctly reflects, the Board's pretrial order found that Respondent failed to establish that there were no genuine material issues of fact regarding the case being deferred to the arbitral process. ALJD 17; 9-10. Nowhere in this language does the ALJ mention a *Collyer* defense although he examines it as the leading case on deferral later.

In Exception 4 and 8, Respondent makes similar arguments in that it disputes the ALJ's conclusion that the dispute underlying the litigation is not suitable for deferral to the arbitration process. The Respondent also disputes the ALJ's conclusion that an arbitrator's experience "adds nothing to the task of addressing the consequences of the [Respondent's] utter refusal to negotiate about the majority of the issues covered by the parties' MOA." Respondent claims basically that this is a question of contract interpretation and an arbitrator has all the necessary

tools at his or her disposal to remedy any dispute arising under the MOA. The Respondent claims that this case is one of clear contract interpretation.

In *Borden, Inc.*, 196 NLRB 1170 (1972), the Board expressly adopted the judge's refusal to defer a case to arbitration where the employer's position on the merits was patently erroneous. The judge in that case contrasted his with the issue in *Collyer*, supra. *Collyer* involved "an intricate, technical kind of issue involving an interpretation of contract language covering problems peculiar to the employer involved." 196 NLRB at 1175. As the ALJ noted, in contrast, in *Borden*, the issue was whether the parties "have fallen short in their obligations to bargain collectively." *Id.* The judge noted in that case that this type of case was poorly suited to arbitration and one that was "of a kind that the Board is especially well equipped to handle." *Id.*

In *Stevens Graphics, Inc.*, 339 NLRB 457, 460-461 (2003), the Board approved an administrative law judge's finding that deferral was inappropriate. In that case, the employer had been restricting the employees' postings in violation of their Section 7 rights. *Id.* Like the Respondent in this case, the employer offered to submit the case to the grievance/arbitration procedure pursuant to *Collyer Insulated Wire*, supra. The judge found deferral inappropriate because there was no assurance that the employees' Section 7 rights were even covered by the contract. The judge noted that under *United States Steel Corp.*, 223 NLRB 1246, 1247 (1976), deferral is dependent on express language and there was no language regarding the distribution of Section 7 literature. *Id.* at 461. Accordingly, the judge in *Stevens*, rejected the employer's deferral defense.

The same can be said of this case. Nowhere in the MOA or Sheraton Contract is there language specifically addressing the legal dispute here. Submission to an arbitrator with only his practical experience would be fruitless. In *Collyer*, the Board noted that the presence of a "fully

effective remedy” must be available for a case to be deferred. 192 NLRB 840. An arbitrator would not be able to handle a Section 8(b)(3) claim as the Board is especially equipped to handle it.

Respondent’s Exceptions 10, 11, 16, 17 and 19 all argue variations of the same thing. All these exceptions state that for one reason or another, the ALJ should not have reached a particular conclusion he did because he should have deferred the case instead. In Exception 10, Respondent claims the ALJ should not have found that Respondent violated Section 8(b)(3) because he should have deferred the case first. Similarly, Respondent claims in Exception 11, the ALJ’s conclusion that Respondent agreed in the MOA to bargain about nine issues but failed to should not have been reached because deferral is appropriate. Exception 16 states that the ALJ’s finding that “the use of the terms ‘unique’ and ‘pertaining to’ was simply to express the concept that these matters have been subject to an established practice that differs from the requirements of the parties’ collective bargaining agreement” that should not have been reached and deferred instead. Exception 17 contests the ALJ’s finding that the MOA “does not itself give any support to the notion that the parties agreed to bargain over only a subset of issues that they discussed in their September 1, 2009 meeting” should not have been made because deferral is appropriate here as well. Exception 19 claims that the ALJ should not have found Respondent’s interpretation of the MOA was patently erroneous. As will be shown below, and for the reasons already cited, deferral was not appropriate in this case.

Respondent first relies on the six factors of *Textron, Inc.*, 310 NLRB 1209 (1993) for its claim that none of the judges conclusions should have been reached in Exceptions 10, 11, 16 and

17 because deferral is appropriate.³ The ALJ concluded that the first five criteria were met. ALJD 19; 29-31. The ALJ then went on to evaluate the last standard; whether the dispute is eminently well suited to such resolution. ALJD 19; 30-31.

In deciding whether the dispute was eminently well suited for deferral, the ALJ noted that the Board has articulated two factors in analyzing such claims that persuaded him that the case was not eminently well suited for deferral. One requirement is that the Respondent's position on the merits is not "patently erroneous but rather is based on a substantial claim of contractual privilege." ALJD 19; 35-50(citing *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142 (1969)). From a review of Board law, it becomes clear that "patently erroneous" means that an employer's or union's position during litigation is clearly or obviously wrong. See *Antioch Bldg. Materials Co.*, 316 NLRB 647, 653 (1955)(finding respondent's claims that all issues under contract had been resolved as patently erroneous); *J & B Smith Co.*, 280 NLRB 539, 544 (1986)(finding testimony of respondent's witness patently erroneous because of conflicting testimony of respondent's other witness); *Jackson Engineering Co.*, 265 NLRB 1688, 1691 (1982)(finding obvious errors in transcription of testimony and arguments of counsel to be patently erroneous).

The ALJ found in this case that the Respondent's position regarding deferral was patently erroneous. First, the MOA itself didn't give any support to Respondent's position that the parties agreed to bargain over a subset of issues that were discussed at their September 1, 2009 meeting. As will be shown more fully below, Respondent's argument that the MOA only applied to items that were unique to Respondent defies established rules of construction and border on frivolous.

³ The *Textron* factors for deferral are, "(1) the dispute arose within the confine of a long and productive collective bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to such resolution. *Id.* at 1210.

Additionally, Karen Kent's own statement concedes that there were 9 topics the hotel raised at the September 1, 2009. GC 9; page 2, second paragraph. Finally, as the ALJ notes in his decision, the Respondent would not have made information requests on all 9 subjects if it really believed it was not obligated to bargain over all of them. GC 5 with attachments. Thus, the ALJ was correct in finding the Respondent's position to be patently erroneous. See *Borden, supra*.

The second factor the ALJ examined regarding whether a dispute is eminently well suited for deferral involves the suitability of an arbitrator. If an issue is a type that is poorly suited for an arbitrator, then a judge should not defer the case. *Borden, supra* at 1175. An arbitrator's experience may be enough to provide expertise in the immediate case, but cannot address the consequences of the Respondent's utter refusal to negotiate about the majority of the issues covered by the MOA. When there is a complete breakdown in contract negotiations, rather than a routine contract violation, the Board's remedies are far more comprehensive than those available to an arbitrator. See *AMF, Inc.*, 219 NLRB 903, 912 (1975). The Respondent in this case has only agreed to negotiate a small percentage of the issues agreed to at the September 1, 2009, meeting. This is clearly more than just a minor contract violation.

Additionally, whether a dispute is well suited to resolution through arbitration, the Board will defer where the dispute "aris[es] over the application or interpretation of an existing collective-bargaining agreement." *Commercial Cartage Co.*, 273 NLRB 637, 640 (1984), quoting *Collyer*, 192 NLRB at 840. Where, however, an employer's actions amount to a repudiation of the contract or strike at the very heart of the collective-bargaining relationship, deferral is not appropriate. *Id.* at 641. Thus, the Board has stated that it will not defer in instances where the respondent's "conduct constitutes a rejection of the principles of collective bargaining." *Kenosha Auto Transport Corp.*, 302 NLRB 888 fn. 2 (1991). In those instances,

“[i]t is unlikely that an arbitrator, whose function is limited to problems of contractual interpretation, would resolve or remedy, if necessary, allegations of statutory wrongs, or address such issues as the Union's status as a labor organization and authorized collective-bargaining representative in accordance with the Act or Board precedent.” *Postal Service*, 302 NLRB 767, 774 (1991); *Rappazzo Electric Co.*, 281 NLRB 471 fn. 1 (1986); *AMF Inc.*, 219 NLRB 903, 912 (1975). Here, the Respondent’s conduct amounts to a repudiation of the contract and strikes at the heart of collective bargaining.

Respondent also makes the argument in its 19th Exception that if the Board decides deferral is inappropriate, then it should remand the case so that Respondent can put on evidence regarding the merits. Respondent made a litigation strategy decision to not present any witnesses for the merits of the case. It chose to rest on its deferral argument. Respondent has therefore waived any defense on the merits. See *Tortilleria La Poblanita*, 357 NLRB No. 22, FN 7 (2011). It cannot present witnesses after it has waived its right to do so. Thus, Exceptions 10, 11, 16, 17, and 19 should be denied.

B. The Record is Replete with Evidence that Supports the ALJ’s Factual Findings.

Respondent’s Exceptions numbered 9, 12, 13, 14, 15 and 18 contend that there is no basis on the record for the ALJ’s factual assertions and determinations. However, Respondent’s Exceptions are either of no significance to the case or clearly wrong. The General Counsel contends that these erroneous assertions should be rejected by the Board for the reasons set forth below.

Respondent’s Exception 9 alleges that the ALJ failed to find that Respondent’s representative Karen Kent offered to arbitrate the MOA, also known as the Memorandum of Agreement or MOA, that requires Respondent to bargain over all nine issues. First, and most

importantly, the ALJ in this case never made an issue or questioned the fact that the Respondent was willing to arbitrate the dispute. In fact, the ALJ discussed the Respondent's deferral defense at length. ALJD 17-21. At no time in his decision did the ALJ ever dispute that the Respondent desired arbitration rather than a Board hearing. Thus, Respondent's argument about Karen Kent's request to arbitrate is irrelevant. Even if relevant, Respondent's argument fails factually. In support of its theory, Respondent points to testimony given by Thomas Posey in support of its assertion. Tr. 233. However, Mr. Posey only testified that Kent said, "let's go to arbitration or, something to that effect," Tr. 233, and thus never stated whether Kent was offering to arbitrate over all nine issues or only the ones Respondent claimed were unique. Respondent decided to not put on any witnesses to testify, including Karen Kent, to fill in the gap in Posey's testimony. Thus, Respondent's argument about Karen Kent's request to arbitrate fails.

In Respondent's Exceptions 12, 13, 14, and 15, Respondent argues that the ALJ should have found that some of the nine issues in the MOA are unique, and he should not have concluded that Respondent has not provided any explanation for the distinction between unique items and non-unique items. Respondent claims because the issues that Respondent admittedly refused to bargain over are in the Sheraton CBA, those issues are not unique, and this was explained to the Ritz. The Respondent argues that the Sheraton CBA does not contain a beverage manager position, impose a minibar quota, provide for cooks in the employee cafeteria or regulate schedules for carving stations. As a result, these issues are unique to the Ritz. The remaining issues about which the Ritz seeks to negotiate are addressed in the Sheraton agreement. Respondent claims this is significant because it interprets the phrase "unique or pertain to" in the MOA as anything that is only true at the Ritz-Carlton and it should only have to bargain over those positions.

Respondent's arguments concerning the language of the MOA are spurious. Respondent bases its argument on a tortured interpretation of the phrase "unique or pertaining to:"

"Unique" of course means things that are only true at Ritz-Carlton and not elsewhere. "Pertaining" means a matter that is not a standard item throughout the industry but is something that specifically, although not uniquely, pertains to Ritz-Carlton. Since the Sheraton contract is the industry standard, the phrase "unique or pertaining" can be implemented by a relatively simple test. If the subject is dealt with in the Sheraton agreement, then it is not unique or pertaining to the Ritz-Carlton and need not be negotiated. If the matter is one that does not appear in the Sheraton agreement, then the union is obligated to continue negotiating about it.

Brief p. 22, GC 9. The trouble with this interpretation is that it completely negates any meaning of the "pertaining to" portion of the phrase, and thereby violates a fundamental principle of interpretation. The parties used the disjunctive "or" to specify that either items unique to the Ritz-Carlton *or* items pertaining to the Ritz-Carlton would be negotiated; Respondent's interpretation pretends that the phrase was conjunctive and that an item had to be both unique and pertain to the Ritz-Carlton to be negotiable.

Moreover, the parties went further and *specified* the nine topics that were to be negotiated. Respondent does not attempt to explain, most likely because it is inexplicable, why the parties would enumerate nine topics of negotiation if they did not intend to negotiate about all of them. Taken together, Respondent's negation of the phrase "pertaining to" and disregard of the enumerated topics of negotiation violate several established precepts of contractual interpretation. See Restatement 2d of Contracts, Section 203(a) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"); Restatement 2d of Contracts Section 203(c) ("specific terms and exact terms are given greater weight than general language). See

also *Electrical Workers Local 48 (Oregon –Columbia Chapter of NECA)*, 342 NLRB 101, 107 (2004).

The ALJ rejected Respondent's Exceptions 12, 13, 14 and 15 for completely logical reasons. Kyle Johansen testified that he spoke to Henry Tamarin, who wanted Mr. Johansen to sign a MOA, and expressed to him that he needed an agreement to discuss some issues at a later time. Tr. 76. Tamarin agreed to have a meeting on September 1, 2009, to discuss the agreement. Tr. 76-77. Tamarin was present along with Ms. Kent. Tr. 77. Johansen discussed all nine issues with them and requested an agreement to not necessarily agree on his proposals in the future, but instead to negotiate over those issues. Tr. 80. Johansen went over all nine issues with the Respondent. Tr. 89. Tamarin asked Johansen to draft the language himself but expressed that he had concerns about calling out what the specifics of what they had discussed in an agreement. Tr. 90-91. In other words, Tamarin was the one who asked Johansen to not specifically mention each individual issue in the MOA. Tr. 90.

The ALJ in his decision also recognized that the Respondent's arguments regarding the meaning of "unique or pertaining to" were merely a smokescreen for refusing to bargain over all nine issues. ALJD 15; 3-51. 16; 1-6. As the ALJ points out, Respondent is attempting to cherry-pick which items it will bargain over when it has an obligation to bargain over all nine. ALJD 16; 8-9.

Respondent makes further specious arguments in Exceptions 12, 13, 14 and 15. As explained by Kyle Johansen's uncontroverted testimony during the trial, the issues that were referred to in the MOA, because of past practice, the Ritz had gone well beyond what was required by the Ritz' CBA. Tr. 69. Johansen explained that the positions he talked to Respondent about were positions, including, but not limited to the beverage manager, minibar,

cooks in the employee cafeteria, and carving stations. Tr. 69-70. Respondent put on no witnesses to rebut this testimony.

In Respondent's Exception 18, it claims that the ALJ should have found that the Ritz did not want to become the focal point of Chicago hotel negotiations or to deter Respondent from entering into a "me too" agreement with the Ritz, which its representative feared might happen if he demanded too much from Respondent. Respondent does not explain why this is significant other than Johansen had an incentive to limit the MOA's scope. This argument is also of no consequence to this case. It is clear from Johansen that he received his instructions from his employer and spoke to the Respondent's representatives about reaching an agreement to negotiate over nine items. (Tr. 69-70) The fact that he wished to limit the agreement's scope only shows that he wanted to negotiate nine (9) issues, not more, not less.

C. Respondent has Clearly Refused to Bargain.

In its Exceptions 5, 6, and 7 Respondent essentially argues that there is no evidence supporting the ALJ's finding that it is refusing to bargain and that it "is hostile to the principles of collective bargaining." (citing ALJD 18;19-20) First, the Respondent claims that it is not refusing to bargain because the General Counsel did not allege that Respondent repudiated the MOA and, as a result, the question whether Respondent repudiated the MOA was not fully and fairly litigated. Respondent claims that the ALJ decided the repudiation issue *sua sponte* in his decision.

Respondent in making its repudiation argument simply ignores the ALJ's decision and what it stated. In his decision, the ALJ stated that the Respondent's attempt to pick and choose among the 9 items and only negotiate over those it arbitrarily selects represents a fundamental repudiation of the MOA. ALJD 16; 8-9. This is further demonstrated by the Respondent's

behavior in its negotiations with Ritz. The Respondent took four different positions regarding the subject matter of the negotiations. ALJD 16; 9-11. First, Respondent agreed it was required to bargain over the reassignment of the cafeteria cooks, servicing of in-room bars, and elimination of beverage manager position. Second, it refused to bargain over the carving station fees, gratuity for bell attendants, elimination of the housekeepers' paid break, fees for making up roll-away or sofa beds, room credits for check-out rooms, and compensation of new employees. Third, Respondent agreed to bargain over scheduling procedures for carvings station work, but has specified that it this is a voluntary decision and Respondent is not obligated by the agreement to do so. Fourth, Respondent raised an entirely new issue to be subject to bargaining outside the confines of the MOA. That issue is its proposal for cross training of cooks. ALJD 16; 11-24. The ALJ explained that viewed in its entirety, Respondent's course of conduct leads to the conclusion that Respondent has placed no reliance on any obligation to bargain created under the MOA. In this way, Respondent has chosen to proceed as if the Agreement doesn't even exist. The ALJ explains that Respondent's acts and statements go beyond a mere contract dispute or minor breach of a contract. He cites Comment 2(b) of the Restatement of Contracts 2d. § 250, "language that under a fair reading amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation." See *Contek, Int., Inc.*, 344 NLRB 879, 879 (2005)(where Board references Restatement of Contracts 2d.); *First National Supermarkets*, 302 NLRB 727, 728 (FN 4) (1991)(Board relies on Restatement of Contracts 2d. § 202(3)(a)).

In Exception 7, Respondent claims that there is no evidence to support the ALJ's conclusion that Respondent "is hostile to the principles of collective bargaining." ALJD 18; 19-20. Respondent cites as evidence for its argument the fact that it continues to have a collective

bargaining relationship with the Ritz and it bargains over the issues it believes fall within the MOA. Respondent and the Ritz had, at the time of the hearing, reached agreement on one issue. Tr. 181-88. Respondent presents no other evidence to support its claim.

Like several of its other Exceptions, Exception 7 is irrelevant. Respondent claims that the ALJ erred in calling the Respondent's behavior hostile to the principles of collective bargaining. In the ALJ's view, there is nothing in this case that suggests that the Respondent is hostile to employees' exercise of protected rights. ALJD 18; 16-18. On the other hand, the ALJ suggests that if one takes a broader view of what is intended by this criterion, there is evidence to suggest the Respondent is hostile to the principles of collective bargaining underlying the Act. However, the ALJ states in his decision, "I do not view [the broader view] as decisive because there is no evidence in the record to indicate that the [Respondent's] conduct in this case is part of recidivist violations of the Act. Thus, application of the second criterion to this case does not preclude deferral." ALJD 18; 21-23. In other words, the ALJ did not place any weight on this conclusion or rely on it in his decision.

III. CONCLUSION

Based on the foregoing, Respondent's Exceptions to the Decision of the Administrative Law Judge are all without merit and should be rejected by the Board. Therefore, Counsel for General Counsel respectfully requests that Respondent's Exceptions be overruled in their entirety.

DATED at Chicago, Illinois, this 24th day of January, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge have been served this 24th day of January, 2012, in the manner indicated, upon the following parties of record.

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A handwritten signature in cursive script that reads "Kevin McCormick". The signature is written in black ink and is positioned above the printed name and contact information.

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