

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

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

and

Cases: 19-CA-32734
19-CA-32739
19-CA-32740
19-CA-32915

UNITE-HERE! LOCAL 878, AFL-CIO

**REQUEST FOR SPECIAL PERMISSION TO APPEAL ORDER DENYING MOTION TO POSTPONE AND
APPEAL OF ORDER DENYING MOTION TO POSTPONE**

Pursuant to Board Rule 102.26, Employer Remington Hotel Corporation [“Respondent” or “Hotel”] requests special permission to appeal the January 27, 2012 Order by Associate Chief Administrative Law Judge Cracraft, which denied Respondent’s motion to postpone the above referenced case, currently scheduled to begin on February 21, 2012, in Anchorage, Alaska, until this Board issues a decision in a related, earlier case, *Remington Lodging & Hospitality d/b/a The Sheraton Anchorage*, case # 19-CA-32148, et al. (“*Sheraton 1*”).¹ By disregarding Board rules, Board case law, and the Administrative Procedures Act, Judge Cracraft’s Order sets up a procedural train wreck.

OVERVIEW

On July 2, 2010, Respondent withdrew recognition of the charging-party union based on objective evidence of a loss of majority support, including a decertification petition signed by a clear majority of the bargaining unit employees. The hearing in this present case – which follows a hearing and decision by ALJ Gregory Z. Meyerson in *Sheraton-1*, who ruled that the withdrawal of recognition was unlawful – involves alleged Section 8(a)(5) violations that occurred *after* July 2, 2010, for failing or refusing to bargain with the Union. Here, as in any 8(a)(5) case, the Counsel for the General Counsel

¹ A copy of Judge Cracraft’s Order is attached as **Exhibit 1** (the “Order”).

must prove that the Union was the lawfully recognized or certified collective bargaining agent of the employees. The question of the Union's status in this regard, after July 2, 2010, is one of many now pending before the Board in *Sheraton 1*.

The hearing in *Sheraton 1* took 40 days, from August 2010 to January 2011.² Most of the 125 witnesses were Hotel employees, who testified as to their personal reasons for wishing to decertify the Union, and testified further to various actions of the Union which led to disaffection within the bargaining unit. ALJ Meyerson issued findings and recommendations on August 25, 2011, but erred egregiously by ignoring this testimony as "largely irrelevant." Respondent filed twelve (12) exceptions with this Board. The parties are awaiting a final decision.

The present case is scheduled for hearing on February 21, 2012. More than likely, this hearing will take place *prior* to this Board ruling in *Sheraton 1* on the issue of whether the Union was the lawful bargaining representative after July 2, 2010. The Hotel submitted a request to the Regional Director (Region 19) to postpone the hearing, and subsequently filed a motion to postpone with the Division of Judges. Both submissions requested postponement until this Board issues its decision in *Sheraton 1*. The Regional Director ignored Respondent's request (no written response to the request was ever received). Judge Cracraft's January 27 Order, in denying the motion to postpone, side-stepped the real issues at hand. She merely dropped the decision in the lap of the Administrative Law Judge assigned to hear the case: "The matters raised [in Respondent's motion] are particularly within the discretion of the administrative law judge assigned to hear this case beginning on February 21, 2012 . . . *The judge may decide to rely on Judge Meyerson's findings or not.*" (emphasis added).

To allow the February 21 hearing to proceed prior to this Board deciding the issue, in *Sheraton 1*, as to whether the Respondent lawfully withdrew recognition on July 2, 2010, would violate broadly

² The transcript exceeds 7000 pages, and over 200 exhibits were admitted in evidence. A complete copy of the transcript can be provided upon request.

honored principles of judicial and administrative efficiency. In addition, Respondent will suffer undue hardship, significant prejudice, and a violation of its due process rights. The Respondent's Motion to Postpone should be granted, and the February 21 hearing should be postponed until the Board issues its decision in *Sheraton 1*.

STATEMENT OF FACTS, PROCEEDINGS IN *SHEARTON 1*, AND APPLICABLE AUTHORITY

A. The Administrative Law Judge in the Present Case May Not Receive into Evidence the Findings Decided by the Prior Administrative Law Judge in the Earlier Related Case.

"It is axiomatic that the decisions of administrative law judges do not serve as binding precedent," where exceptions are pending, in a subsequent case before another administrative law judge. Waste Management of Arizona, 2005 NLRB LEXIS 196, at *8, n. 5 (Case 28-CA-19526; April 25, 2005; ALJD – Meyerson) (deciding further that administrative notice of the earlier ALJ decision in that case was limited only to "certain undisputed facts set forth in that decision, such as the dates the [first] case was heard at trial"). Here, Judge Cracraft's Order ignores this "axiomatic" principal and, without explanation, permits an ALJ to rely on factual findings and legal conclusions that are not his/her own. This violates the Administrative Procedures Act, the National Labor Relations Act, Board procedures, and clear Board precedent.

Four of the six ULP allegations in this case assert 8(a)(5) violations tied to the collective bargaining agreement that was previously in place between the parties.³ All four allegations assert acts that are alleged to have occurred after the Respondent, on July 2, 2010, withdrew recognition of the charging-party Union. Specifically, the Complaint alleges that Respondent, on or after July 2, 2010: (1) banned Union representatives from the hotel's non-public areas; (2) ceased to apply contract-based

³ Respondent anticipates the CGC will amend and add other 8(a)(5) charges that occurred after July 2, 2010.

seniority rules; (3) ceased contributions to the Taft-Hartley pension fund; and (4) refused to provide information requested by the Union. [Amended Complaint par. 13(a), (b) and (c), and 14(e) and (f)].⁴

Each of these four allegations requires proof by the counsel for the General Counsel, as alleged in the Complaint, that “[a]t all material times,” including since July 2, 2010, the charging-party Union “has been the designated exclusive collective-bargaining representative of the Unit and has been recognized as such representative by Respondent.” [Complaint par. 6(e)]. This statement is patently false on its face in view of the July 2, 2010 withdrawal of recognition by Respondent.⁵

Establishing the above-quoted allegation at paragraph 6(e) of the Complaint will require findings and a legal conclusion that Respondent’s July 2, 2010 withdrawal of recognition was unlawful. That issue was litigated extensively, however, *Sheraton 1*. Although the ALJ in *Sheraton 1* issued findings and recommendations adverse to Respondent on this issue, Exceptions to his decision have been filed and are now pending before the Board.

The issue of the lawfulness of Respondent’s withdrawal of recognition is highly disputed. At issue is the following primary Exception:

⁴ The fourth allegation, set forth at paragraphs 14(e) and (f), asserts that the request was made prior to July 2, 2010. However, the evidence will show that the obligation, if any, to provide the requested information did not arise until after July 2, 2010.

⁵ **The allegation noted above with respect to the pension fund is false for a separate reason.** Respondent has never disputed its obligation to continue making contributions to this multi-employer pension fund. Respondent has contended, however, in separate negotiations with the fund, that it was only obligated to make “withdrawal liability” contributions, pursuant to 42 U.S.C. sec. 1381, *et. seq.*, following the July 2, 2010 withdrawal of recognition. Respondent ultimately entered an agreement with the fund to continue the contributions on a going-forward basis, and retroactive to July 2, 2010. **All past due payments, along with interest and penalties associated with the delay, have been paid in full, and payments are continuing. The interests of employees and beneficiaries in this pension fund have in no manner been harmed.** Respondent and the pension fund agreed further that, In the event either the Board or an appellate court rules that the July 2, 2010 withdrawal of recognition was lawful, the contributions will be credited to Respondent’s withdrawal liability, calculated as of July 2, 2010.

- Exception 8: The ALJ erred in ruling that the decertification petition and related evidence (in particular, see the attached July 3, 2010 letter ⁶) did not constitute an objective showing of the Union’s loss of majority support, by ignoring the Master Slack analysis that requires the General Counsel to establish a specific causal connection between alleged ULPs and the loss of majority support, and to show how employer’s conduct had a “meaningful impact” in bringing about the employees’ disaffection for the Union. ⁷

Also at issue, related to the Master Slack analysis, are the following Exceptions raising highly fact-intensive issues:

- Exception 1: The ALJ erred in ruling impasse was broken in the March 10 – 11, 2010 bargaining sessions, and erred in ruling that Respondent’s subsequent implementation violated Section 8(a)(5) of the Act.
- Exception 5: The ALJ erred in his reliance on Santa Fe Hotel, 331 N.L.R.B. 723 (2000), by ruling that the two entrances to the Sheraton Anchorage are “non-work” areas and that the discharge of four off-duty employees for distributing flyers to hotel guests at the two entrances was an unfair labor practice.
- Exception 6: The ALJ erred in discrediting chief engineer Ed Emmsley Sr.’s testimony by relying solely on engineer Dexter Wray’s clearly biased testimony relating to, among other issues, management influence over the decertification petition, and by ignoring the testimony of unbiased third-party Joel Encabo, in addition to other witnesses, whose testimony contradicted that of Mr. Wray.

⁶ See **Exhibit 2**, hereto. This letter was introduced in evidence in *Sheraton 1*, as Resp. Ex. 112.

⁷ Master Slack, 271 N.L.R.B. 78, 84 (1984)

- Exception 7: The ALJ erred in granting credibility to Dexter Wray’s testimony regarding the use of hotel engineers as security personnel, which resulted in the ALJ erroneously holding that the Respondent committed a ULP.
- Exception 10: The ALJ erred in finding three instances of alleged managerial influence in the circulation of the decertification petition, and erred further in finding that these mere three instances (if ultimately proven) constituted unlawful assistance to the circulation of a petition that was signed by 109 employees in a 161-employee bargaining unit.

With this complicated set of factual and legal circumstances in mind, the Order’s conclusion that the ALJ in the present case “may decide to rely on Judge Meyerson’s findings or not” is particularly out of bounds. Procedural requirements found in the Administrative Procedures Act (5 U.S.C. § 551, et seq.), the National Labor Relations Act, and in the Board’s Rules and Procedures (29 C.F.R. 101, et seq.) all give binding effect to decisions of the Board, not to the recommendations of an administrative law judge.

The Administrative Procedures Act (5 U.S.C. § 551, et seq., hereinafter “APA”) was established, in part, to standardize the administrative quasi-judicial process among the federal agencies, including the National Labor Relations Board. NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 442-444 (1965); See also Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951). The administrative law judge is charged with taking evidence, hearing witnesses, and contributing to the record of the case. 5 U.S.C. § 556(c).⁸ Section 7 of the APA (5 U.S.C. § 557) describes the relationship between the so-called initial

⁸ (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may - (1) administer oaths and affirmations; (2) issue subpoenas authorized by law; (3) rule on offers of proof and receive relevant evidence; (4) take depositions or have depositions taken when the ends of justice would be served; (5) regulate the course of the hearing; (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter; (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods; (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy; (9) dispose of

agency decision from an administrative law judge and the final decision by the agency (here the National Labor Relations Board) in the following way:

When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings *unless there is an appeal to, or review on motion of, the agency within time provided by rule.* On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .

Id. (emphasis added). Thus, findings and recommendations from an administrative law judge, if appealed, function only act as recommendations, while the final decision on the merits of a case are left to the Board:

In case the evidence is presented before . . . an administrative law judge or judges thereof, such . . . judges . . . shall issue and cause to be served on the parties to the proceeding a *proposed report*, together with a *recommended order*, which shall be filed with the Board, and if no exceptions are filed . . . such recommended order shall become the order of the Board and become affective as therein prescribed.

29 U.S.C. 160(c). *See also*, 29 C.F.R. § 101.11(b):

The parties may accept and comply with the administrative law judge's recommended order, which, *in the absence of exceptions*, shall become the order of the Board. *Or, the parties or counsel for the Board may file exceptions to the administrative law judge's decision with the Board.* (emphasis added).

And see, 29 C.F.R. § 101.12(a):

If any party files exceptions to the administrative law judge's decision, the Board, with the assistance of the staff counsel to each Board Member who function in much the same manner as law clerks do for judges, reviews the entire record, including the

procedural requests or similar matters; (10) make or recommend decisions in accordance with section 557 of this title; and (11) take other action authorized by agency rule consistent with this subchapter.

administrative law judge's decision and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. (emphasis added)

See also, Universal Camera Corp. v. NLRB, 340 U.S. 474 (ALJ's findings and recommendations are by no means binding on the Board).

Though the factual findings of the administrative law judge carry weight, the Board is not bound by these finding, or even bound by the ALJ's credibility determinations if not otherwise supported by record evidence overall. See Humes Elec., Inc. 263 NLRB 1238 (1982); and see e.g., E.C. Waste, Inc. d/b/a Waste Management of Puerto Rico v. NLRB, 359 F.3d 36, 39 (1st Cir. 2004)(the Court of Appeals for the First Circuit treats a Board order as "final" and that "the Board is entitled to summary enforcement of those portions of its order that are based on unappealed findings" at p. 41). Without the input of the Board, the ALJ's opinion has no binding effect. See 29 C.F.R. § 101.13 (the Board's Orders are enforceable, not ALJ decisions); 29 C.F.R. § 101.14 (the Board's orders are reviewed by federal courts, not ALJ decisions).

Accordingly, the erroneous decisions reached by the ALJ in Sheraton 1, which are now subject to the above-referenced pending Exceptions – and precisely *because* they are subject to such review – “do not serve as binding precedent” in the present case. Waste Management, supra. This ‘axiom’ is beyond dispute given the Board's authority for *de novo* review of the findings of fact issued by an ALJ's decision. Standard Dry Wall, 91 NLRB 544 (1950); Permaneer Corp., 214 NLRB 367 (1974); and, R. C. Aluminum Industries, 343 NLRB 939 (2004).

Particularly when *disputed* facts are relied upon in an ALJ decision that hasn't been approved by a Board decision, the ALJ decision is wholly incompetent to serve as binding precedent. South Jersey Regional Counsel of Carpenters, 335 NLRB 586, 592, n. 10 (2001) (an administrative law judge decision is “not binding” where “[n]o exceptions were filed to the judge's [published] decision, and . . . the Board never ruled on it”); Henry F. Bude Publ., 242 NLRB 243, 246, n. 6 (1979) (where an ALJ died prior to

issuance of his decision, and the Board issued a “proposed” decision, to which exceptions could be filed, the proposed decision does not constitute binding precedent).

Hence, in the present case, while the basic *undisputed* facts found by the ALJ in *Sheraton 1* can be received in evidence through administrative notice – for example, the fact that 109 out of 161 unit employees signed a decertification petition – *none* of the essential *disputed* facts at issue, as raised by the above-stated Exceptions, can be so treated. The evidence related to these disputed facts was received through live testimony in *Sheraton 1*, with witnesses subject to cross-examination. In order for the administrative law judge in the *present* case to make the findings necessary to either accept or reject submissions of proof on the question of whether the July 2, 2010 withdrawal of recognition was lawful, he or she would have to also receive and assess live testimony, subject to cross examination, on the very same issues heard in *Sheraton 1*. Southwest Janitorial, 205 NLRB 1061, 1066 (1973) (the ALJ has an “obligation to hear and evaluate the testimony of witnesses and assess their credibility with the view to making ultimate findings of fact”); *see also*, Meyers Industries, 268 NLRB 493, 508, n. 7 (1984) (“an administrative law judge must assess the credibility of witnesses”).

The following issues of *disputed* fact, among others, bear on the question of whether the CGC will be able to prove in the *present* case, as alleged in paragraph 6(e) of the Complaint, that UNITE-HERE local 878 was entitled to recognition after July 2, 2010:

- Whether the proposals made by the Union in the March 10–11, 2010 bargaining sessions related to health insurance and the housekeepers’ room-cleaning quota, viewed in the context of the extensive testimony and documentary evidence concerning all prior proposals and negotiations over a 16-month period (during which it is undisputed that Respondent bargained in good faith, and that impasse had been reached) were “significant enough” under applicable Board law to have broken impasse, and thus prevent Respondent from making unilateral implementations.

- Whether the facts relating to the two hotel entrances were properly considered and weighed in determining whether those two areas are work or non-work areas, as it relates to the alleged ULP concerning enforcement of a rule prohibiting solicitation of guests by employees (who were off-duty, and on-property, when soliciting).
- Whether the testimony of the following witnesses presented in *Sheraton 1* by the CGC, on the issue of management influence in the signing of the decertification petition, should be believed as credible: Dexter Wray, Jose Lantigua and Eugene Bristol.
- Or, whether the testimony of the following witnesses presented in *Sheraton 1* by Respondent on this issue of management influence should be believed as credible: Ed Emmsley, Sr., Joel Encabo, Cindy Mathers, Chef Rydin, Denis Artiles, Jamie Fullenkamp, Mary Villarreal, Ed Emmsley, Jr., the two Emmsley sisters, Margarita Lucero and Guadelupe Mejia.
- Even assuming the credibility of the above three CGC witnesses on the issue of management influence, whether the mere occurrence of the three contacts with management to which they testified – viewed in the context of the overall record of evidence, including the fact there were 65 other employee-witnesses (and 106 employees in total) who had *no contact* with management at all related to the petition – warrants the finding by the ALJ in *Sheraton 1* that the petition was tainted by management influence.
- Whether the testimony of Dexter Wray should be believed, in light of the totality of evidence, on the issue of whether the Respondent committed an 8(a)(5) violation in the alleged assignment of security duties to hotel engineers without consulting the Union.

In addition, most critically, upon the resolution of the above ULP issues, whether *those ULPs which are proven, if any*, had the “meaningful impact” required under a properly applied Master Slack analysis so as to bring about the loss of the Union’s majority support?

And finally, whether the 68 witnesses who testified to their personal reasons for signing the decertification petition should be credited, and what weight to give that testimony – in light of the totality of evidence – on the issue of what in fact actually motivated the 109 employees to sign a petition asking for withdrawal of recognition. These 68 witnesses as a whole testified to their individualistic reasons, unrelated to any of the alleged management ULPs, for signing the petition. See, Appendix to Respondent’s post-hearing brief, setting forth key quotations from the 68 witnesses, attached here as **Exhibit 3**. These excerpted quotations, many of them by witnesses whose first language is not English, are in some instances fairly cryptic, as presented in the attached Appendix. Of course, hearing these witnesses live, and cross-examined, would afford a much clearer understanding of their testimony and beliefs.

B. Judge Cracraft’s Order relies on authority that does not support the denial of Respondent’s Motion to Postpone

In her Order, Judge Cracraft cites to Grand Rapids Press, 327 NLRB No. 72 (1998)⁹, in which the ALJ – according to Judge Cracraft – “properly relied on prior Judge’s finding that a strike was an unfair labor practice strike.” A closer examination of Grand Rapid Press shows, however, that the second ALJ only adopted a very narrow finding by the first ALJ. The second ALJ simply adopted the first judge’s finding of animus, and did so only because the allegations at issue were “substantially similar” (related to a restriction against the hiring of substitute workers involved in a strike at another location), and only because the “same foreman . . . [was] involved in imposing the restrictions on the use of substitutes in *both situations*.” 327 NLRB No. 72 at 373 (emphasis added). Further, the adoption of this finding was limited only to its use as “background evidence of animus.” *Id.* The second ALJ also noted that “animus need not be proven by direct evidence; it can be inferred from the record as a whole,” *citing to*, Fluor

⁹ Judge Cracraft incorrectly cites this case as “327 NLRB 298 (1998).”

Daniel, 304 NLRB 970 (1991). *Id.* Finally, the ALJ found there was already “sufficient evidence in *this record* to support an inference of animus.” *Id.* (Emphasis added).

Accordingly, Grand Rapids Press hardly stands for the proposition that an ALJ – in a case such as the one now presently before this Board – can freely adopt findings of another ALJ based simply on the identity of a respondent being the same in both cases. As shown above, the issue as to whether the July 2, 2010 withdrawal of recognition was lawful or not is highly fact intensive, and is central to the decision to be made in four out of six ULP charges in the present case.

Instead, this present case is governed by Sunland Construction, 307 NLRB 1036 (1992), which the ALJ in Grand Rapids Press considered and distinguished. In that case, this Board approved an ALJ’s *refusal* to adopt findings of animus in an earlier case, because the evidence of animus in the earlier case involved different managers of the employer.

Judge Cracraft also cited Fluor Daniel, Inc. v. NLRB, 332 F.3d 961, 972 (6th Cir., 2003). That case, however, *supports* Respondent’s argument in this present motion: “The ALJ was under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness.” 332 F.3d at 972.

C. The Division of Judges and the Assigned Administrative Law Judge were Required to Postpone the Hearing Set for February 21, 2012, Pursuant to Applicable Rules and Regulations of the Board and the Case Handling Manual

As stated and shown above, in order for the administrative law judge in this case to make the findings necessary to either accept or reject submissions of proof on the ultimate question of whether the July 2, 2010 withdrawal of recognition was lawful, he or she will have to receive and assess live testimony, subject to cross examination, on the very same issues that have already been heard in *Sheraton 1*. As the above outline of issues shows, such an undertaking would require the calling of dozens upon dozens of witnesses, including the 68 who have already testified to their personal reasons

for signing the petition. Such an undertaking would constitute a monumental waste of time and expense, both to the taxpayer and to Respondent, and would fly in the face of common considerations of administrative and judicial efficiency. In addition, there would be a clear possibility of findings and conclusions in sharp conflict with those of the ALJ in *Sheraton 1*. *The result would be an even greater delay in the ultimate resolution of the issues in these two cases*, inasmuch as the Board would be unable to issue a full and final decision until considering the findings reached in *both cases*. It is not hard to imagine, further, that the conflicting findings would be so far apart and so contradictory as to render the duties of the Board – as the *de novo* trier of fact – close to impossible. And finally, there is a great danger of prejudice to the Respondent. How many of the 68 petition-signing employees, for example, are still around to testify concerning their reasons for signing? How will the passage of time, for those who are still around, affect their ability to testify with meaningful recall and conviction concerning their reasons?

Given these intractable problems, the obvious wiser course is to postpone the February 21 hearing. The hearing should be postponed until such time as these issues have been decided by the Board, and appellate review exhausted. Failure to postpone will only result in *greater delay* in the final resolution of the conflicts between the charging party and Respondent, for the reason stated above: If there are conflicting findings from the two cases, the Board will first have to resolve those conflicts; if the ALJ simply relies on the findings of the first ALJ in *Sheraton 1* before those findings are confirmed by the Board, it is clear error that very well may cause the entire case to be overturned.

The Board's Case Handling Manual (CHM) at section 10118.4 provides that the Regional Director "may postpone determination of a ULP charge" based on the pendency of "closely related matters in other proceedings." The term "closely related" applies to other pending ULP cases as well as a number of other proceedings, including claims in arbitration under the "Collyer Wire" doctrine. CHM section 10118.4 further provides that the "disposition of the related matter" is "normally" to be considered

when the Region is making its “eventual determination” of the ULP charge. This provision in the CHM then states that the “Regional Office is *not generally required to defer* to the result in the related matter except for controlling General Counsel determinations or *Board decisions.*” Id. (*emphasis added*).

Given the ‘exception’ in the provision quoted just above, the Regional Office in the present case was, therefore, “required” to defer to the “Board decision” which is yet to come in the “related matter” now pending before this Board – *i.e.*, the decision in *Sheraton 1*, on the issue of whether Remington lawfully withdrew recognition on July 2, 2010. The next paragraph in the CHM, at 10118.4(a), provides:

The Regional Office may postpone determination where the outcome of a closely related ULP charge may affect the disposition of the charge to be deferred. Common circumstances include cases pending administrative appeal and where complaint has issued.” (*emphasis added*).

While the use of the permissive “may postpone” in the first sentence above might suggest the Regional Office is not ‘required’ to postpone, the remainder of this sentence renders clear that no such discretion is available in the present matter. That is, we are *not* faced with a question of whether the ruling in *Sheraton 1* – on the issue of the lawfulness of Respondent’s July 2, 2010 withdrawal of recognition – is an “outcome” that “may affect the disposition of the charge” in the present case, we are faced instead with the *fact* that the “outcome” in *Sheraton 1* will be *determinative* of the “disposition of the charge[s]” in the present case. In short, the outcome in *Sheraton 1* will *affect* – not “may affect” – the disposition of the allegations in this case set forth at paragraphs 13(a), (b) and (c), and 14(e) and (f) of the Complaint. Accordingly, the Division of Judges should have granted the Motion to Postpone

D. Additional Ground for Postponement

As shown above, the Board’s own Case Handling Manual mandates postponement of this present case, at least with respect to the allegations at paragraphs 13(a), (b) and (c), and 14(e) and (f) of the Complaint (as well as the additional claims Respondent anticipates will be filed, as noted in footnote 3, above). In addition, as also shown above, considerations of administrative efficiency, as well as the

avoidance of unduly burdensome litigation expense and avoidance of prejudice, further mandate the postponement of this present case. A denial of this present Motion, it is respectfully submitted, will constitute a denial of administrative due process.

More fundamentally, this Respondent seeks relief from the arbitrary and selective enforcement and investigation by the agency of a barrage of frivolous ULPs filed by the charging-party union, most of which assert 8(a)(5) violations of the Act occurring after the July 2, 2010 withdrawal of recognition. For the reasons stated above in this Motion, the Region should have deferred ruling on these ULPs, and the Division of Judges should have granted the motion for postponement. The Region, instead, utterly ignored the motion, and now, with the permission of the Division of Judges, continues to plow ahead with the hearing now set for February 21.¹⁰

Adding to the harassing nature of the agency's actions, in recent months the Region has resurrected for investigation numerous one-year-plus old, stale ULPs – including the three ULPs currently asserted in paragraph 8 of the Complaint in this case – which were filed *before* the commencement of the six-month long trial in the First Case (August 2010 to January 2011). The counsel for the General Counsel in the First Case amended her Complaint several times prior to and during the pendency of the six-month hearing, and could therefore have amended to add the charges which are only now being resurrected. But, she failed to do so. It was not until the autumn of 2011 that the Region suddenly begun investigating and pursuing these stale ULPs. The Respondent was in a far better

¹⁰ **Region 19 and the Office of the General Counsel have previously demonstrated bias and lack of impartiality**, by, *inter alia*, having selectively refused to prosecute “bad faith bargaining” ULP charges filed by Respondent prior to the First Case, as documented in the record in Remington v. Ahearn, (U.S.D.C. – AK, case no. 3:10-cv-214). Respondent was forced, in consequence, to allege the bad-faith bargaining of the charging-party Union as an affirmative defense in the First Case. **The legitimacy of the Respondent’s original assertions to the Region of this bad faith found its vindication in portions of ALJ Meyerson’s decision in *Sheraton 1*, determining, among other findings:** that the Union “stonewalled” the Respondent’s requests for bargaining sessions and information during the first three-plus months of bargaining, that it was rarely the driver thereafter in scheduling sessions, that it made no new proposals over an 11-month period despite the occurrence of eight sessions, and that it consciously avoided reaching agreement.

position to defend these ULPs during the pendency of the hearing in *Sheraton 1*, and will now be prejudiced by having to defend, at this far-removed point in time, these selectively resurrected charges. Among other prejudicial factors, numerous key witnesses who could have been called to testify in defense of these now-stale ULPs during *Sheraton 1* have left Respondent's employment and do not reside in Alaska – including, the former hotel general manager, former director of the hotel's housekeeping department, and the corporate head of human resources, as well as numerous hourly employees.

For the reasons stated above, Respondent respectfully requests the postponement of the commencement of the February 21 hearing until *Sheraton 1* has run its course.

CONCLUSION

For the reasons set forth above, and based upon the authority described above, the Board should **GRANT** Respondent's Motion for Special Appeal, and **GRANT** Respondent's Appeal by reversing the Associate Chief Administrative Law Judge's Order and postponing the February 21, 2012, hearing until thirty (30) days after the Board should issue its ORDER in case 19-CA-32148, *et seq.*

Respectfully submitted, this 7th day of February, 2012.

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AMENDED CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Request for Special Permission to Appeal Order Denying Motion to Postpone and Appeal of Order Denying Motion to Postpone which was electronically filed with the Office of Executive Secretary and Region 19 using the NLRB's filing system at www.nlr.gov, on February 7, 2012, was sent to the following via email and regular mail as follows:

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This 7th day of February, 2012.



Peter G. Fischer