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June 1, 2012

Executive Secretary
National Labor Relations Board
Washington, D.C.
By electronic mail only

Re: Stamford Hotel 34-RC-080390
Request for Review¹

May it Please the Board:

Please be advised that the undersigned represents the employer in the above referenced matter. It is respectfully submitted that the election petition in this case either must be held in abeyance or dismissed and the Regional Director's ("RD") decision and Direction of Election ("DDE") reversed.

The employer had raised several issues for consideration by the RD. As noted at the hearing, since the RD deciding this case was a named litigant, and, when looking at petitioner's exhibit "1", a "**lead attorney**", in the 10(J) proceeding, the decisions in this matter should have been sent to another Region to make. The RD analogizes the current issue where a regional director is directed to conduct a representation case hearing where

¹ In filing this request, the employer does not waive, and specifically asserts, that President Obama unconstitutionally appointed 3 board members by recess appointment on January 4th since the Senate was then actually in session.

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he is also *considering* charges filed that he is investigating. It is respectfully submitted that in the cited case the RD had not *litigated as an advocate* a position as a “lead attorney”, and then is asked to impartially decide the same case as a neutral arbiter. Yet, as an advocate, the RD has a stake in the case’s outcome.²

Substantively, the employer has argued that the ULP charges in this case represents a “Type II” charge in that they “condition or preclude a Question Concerning Representation”. (Casehandling Manual at Section 11730.3(b). In such cases a “request to proceed” may not be honored. Put simply, if the ULP charges are dismissed, the requested election unit would not be appropriate and a QCR would be “precluded”. (see *infra*). If they are sustained, the unit could be appropriate. Hence, the representation case totally depends (and is “conditioned”) on the outcome of the, already tried, ULP case. If there had been no 10(J) proceeding, there is little question that the election petition would be blocked for the reasons above noted.

The DDE studiously avoids any mention of this section of the Case Handling Manual and instead cites only to section 11730.3's reference to charges “inherently inconsistent” with the petition. Yet the title of even that cited section of the Manual speaks to charges that “condition or preclude a Question Concerning Representation”. This case is precisely such a case where the charges, as noted, “condition or preclude” a QCR.

The fact that the employees are temporarily on the employer’s payroll because of the 10(J) proceeding results, does not alter the analysis. As is reflected in the order in the 10(J) proceeding, its life continues only “until a final decision has been reached regarding the NLRB’s Complaint against Stamford Plaza”.³ The resultant final decision, not the

²Even former Member Becker would not consider cases where he actually represented a party as an advocate.

³In fact the 10(J) decision notes “...how little the NLRB’s requested 10(J) injunction will burden Stamford Plaza...”. Processing this petition, however, imposes substantial burdens on the employer that the 10(J) court was utterly unaware of. It denies the employer substantial rights under Board and statutory law to not be pushed into a multi-employer bargaining unit without its consent. In fact, the 10(J) court notes in its decision that the (2011) union election petition was withdrawn. The DDE is therefore clearly wrong in assuming that the 10(J) court was giving a “green light” to an election since it had no idea that an election was in the offing. The earlier petition was *withdrawn* as far as the 10(J) court knew. It was not extant, held in abeyance, and

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temporary status imposed by the injunction, is what counts. And that awaited decision will determine whether there is a Question concerning Representation (“QCR”) in this case or not. After all, if this case goes to election, and the petitioner is certified, the employer would be required to bargain with the union when it could soon turn out that it was not the employer, or that the unit was not appropriate or where the petition should have been dismissed without an election.

Contrary to the union’s argument at the hearing, and the RD’s rationale in the DDE, if a union accused of an 8(a)2 contract with an employer had that contract temporarily set aside by a 10(J) court, there is no doubt that an election petition thereafter filed would be *blocked*. The Board would not accept a *Carlson* waiver in such a case until after a final *Board* order issued. Thus, even though *at that moment* there was no contract in place with the 8(a)2 union, an election petition by a rival would *not* be processed. It is, therefore, not the state of facts in place because of a 10(J) injunction that counts. Rather it is the pendency of the ULP charges that determines whether the charges “condition or preclude a Question Concerning Representation” and therefore determine whether the petition must be blocked.⁴

The DDE shows an alarming lack of appreciation of a 10(J) proceeding. It is, after all, *only* interim relief pending the *Board’s* disposition of the case. The probable cause standard needed to be proven is very, very low. In reading the DDE, one wonders what is even the necessity of the proceedings continuing before the Board. The DDE has “found” the final relief that might issue from the Board in the future as applying now.

therefore, “pending”. The RD, moreover, does not assert, and the 10(J) decision does not reflect, that the 10(J) court was *ever* advised that after the grant of an interim injunction, an new election petition could be filed and now would be processed, as the DDE does. Had that been done, the 10(J) case would likely have been litigated differently and the DDE would not be putting words into the 10(J) court’s mouth. Rather the 10(J) court was enjoining threats and other 8(a)1 and (3) conduct. (*see petitioner’s exhibit “1” and attached at decretal paragraphs*)

⁴ See generally *New York Center for Rehabilitation 29-RC-9785* where the Board reversed a Regional Director who had revoked an incumbent union’s certification and then sent the rival petition to election. The Board required that there first be a disposition of the ULP 8(a)2 charges before the election petition could proceed. Of course, if the charges were withdrawn, the representation case could thereafter proceed.

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The parties stipulated at hearing, that before the entry of the 10(J) order, the housekeeping and maintenance employees were jointly employed by the employer and the respective contractors that were in place. Since the employer also has single employed employees in the sought for “service and maintenance” petition (employees who were not housekeepers), the petition would have to be dismissed since it potentially forces multi-employer bargaining.⁵ The Board noted in *H.S. Care LLC* 343 NLRB 659 (2004) such a unit cannot exist without the consent of the various employers to bargain together. In fact, the Board noted that the statute’s requirement that it approve only “employer units”, is violated by approving such *multi-employer* units.

Accordingly, the Regional Director should have transferred the decision making in this case to another region, the petition should have been blocked and held in abeyance pending disposition by the Board of the extant blocking charges and/or dismissed (since the instant “new” petition was filed *after the existence of the subcontracts* and it therefore seeks the forced formation of a multi-employer unit without consent). The Request for Review should be granted

Very truly yours,



MORRIS TUCHMAN

MT:pf

cc: Thomas W. Meiklejohn, Esq. (By electronic mail only)
Regional Director, Region 34 (By electronic mail only)

⁵ The ULP record, before the 10(J) court and ALJ Fish, amply reflects that there were these two categories of employees. Moreover, the petition seeks a “service and maintenance” unit and only some of those employees were contracted out.

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JONATHAN B. KREISBERG,
Regional Director of Region 34 of the
National Labor Relations Board,
for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

STAMFORD PLAZA HOTEL &
CONFERENCE CENTER, L.P.,

Respondent.

No. 3:12cv104 (MRK)

RULING AND ORDER

Petitioner Jonathan B. Kreisberg, on behalf of the National Labor Relations Board ("NLRB"), seeks a temporary injunction under § 10(j) of the National Labor Relations Act, 20 U.S.C. § 160(j), against Respondent Stamford Plaza Hotel and Conference Center, L.P. ("Stamford Plaza"). The requested injunction would reinstate housekeeping and maintenance employees onto the hotel's payroll pending the resolution of an unfair labor practice proceeding currently in progress. For reasons offered below, the Court grants the NLRB's requested injunction.

I.

This Petition arises out of an unfair labor practice complaint brought by the NLRB against Stamford Plaza, where the United Food & Commercial Workers Union, Local 371, began an organizing campaign in June 2011. Targeting the approximately 50 housekeeping, maintenance, front desk, and kitchen employees at Stamford Plaza, the Union was able to collect

38 signed union authorization cards by June 16. Of these, 20 were from members of the housekeeping department (out of approximately 22 total housekeepers), and 4 were from members of the maintenance department (out of 5 total employees).

In meetings beginning on June 24, Stamford Plaza informed its employees that the hotel was subcontracting its housekeeping operations to a firm called Labor for Hire, Inc ("LFH") and its maintenance operations to a firm called New York Major Construction ("NYM"). Housekeeping and maintenance employees were given employment applications for these companies. All who applied were hired by the subcontractors; thus employed, they continued doing the same work as before, for roughly the same compensation. Housekeeping and maintenance were the only two departments that were reorganized in this way.

On July 5, the Union filed a certification petition with the NLRB's Hartford office along with 38 signed authorization cards, including 21 from housekeeping and 4 from maintenance. The union withdrew this petition on July 12. In charges filed on July 1 and July 28, the Union alleged that Stamford Plaza had terminated its housekeeping and maintenance employees and begun using subcontractors in response to its discovery of their organizing activities. On November 30, the NLRB issued a complaint repeating these allegations.

Administrative Law Judge Steven Fish heard testimony regarding the NLRB's complaint during hearings held on February 7-9, 2012. The NLRB has requested that this Court use the administrative record produced during these hearings to decide the injunction petition. With no objection from Stamford Plaza, the Court GRANTS the NLRB's Motion [doc. # 2] and relies on the administrative record throughout the present opinion. In addition to the facts just canvassed, the Court will provide other facts from the administrative record as needed in its discussion below.

II.

Section 10(j) of the National Labor Relations Act ("the NLRA") gives the NLRB the power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred . . . for appropriate temporary relief or restraining order.

29 U.S.C. § 160(j). The NLRB filed such a petition with this Court on January 20, 2012. It seeks an injunction, which would last until the administrative proceedings are complete, requiring Stamford Plaza to reinstate its terminated housekeeping and maintenance employees and to refrain from interfering with any employee activities protected under the NLRA.

The Second Circuit has long held that "in order to issue a § 10(j) injunction, the district court must apply a two-prong test. First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper." *Hoffman ex rel. N.L.R.B. v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364-65 (2d Cir. 2001). The Court will address each prong of this test in turn.

A.

When considering a petition for a § 10(j) injunction, "[t]he district court does not need to make a final determination whether the conduct in question constitutes an unfair labor practice; reasonable cause to support such a conclusion is sufficient." *Id.* at 365. Courts in this Circuit are to give "considerable deference to the NLRB Regional Director" when determining whether reasonable cause exists. *Id.* "[T]he Regional Director's version of the facts should be sustained if within the range of rationality, . . . inferences from the facts should be drawn in favor of the charging party, and . . . even on issues of law, the district court should be hospitable to the views of the General Counsel, however novel." *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980).

Here, the NLRB alleges that Stamford Plaza interrogated its employees about their organizing activities and then discriminatorily subcontracted out the work of its two most pro-union departments, thereby immobilizing the Union's organizing campaign. In support of these allegations, the NLRB points to evidence in the administrative record that Stamford Plaza's Food and Banquet Manager, its Housekeeping Director, its Engineering/Maintenance Director, and a Food and Banquet Supervisor all asked employees questions about employees' organizing activities. Within weeks after those activities began, the hotel subcontracted out its housekeeping and maintenance operations. It made its arrangements with the subcontractors, LFH and NYM, in apparent haste, despite having turned down previous proposals from LFH because of concerns about their service. Stamford Plaza's subsequently proffered reasons for subcontracting have shifted—which the NLRB says suggests pretext. Finally, in August 2011, Stamford Plaza terminated its contract with LFH and then partnered with the other subcontractor to form a new entity, MySpace Management, and placed its housekeepers there. Testimony in the administrative record suggests that Stamford Plaza wanted to keep its former employees in separate companies at least in part so that they would find it more difficult to unionize as a group. *See* Tr. [doc. # 26] at 585.

Stamford Plaza responds by arguing that the supervisors who discussed unionizing with their employees do not count as supervisors or agents of the hotel under §§ 2(11) and 2(13) of the NLRA and, thus, do not establish that Stamford Plaza knew about its employees' union activities prior to its decision to subcontract. Further, the hotel argues that subcontracting was a legitimate business decision. The Court does not need to settle these questions, however; the Administrative Law Judge will do so. For present purposes, it is enough to find that the NLRB's interpretation of the facts is well within the "range of rationality," *Mego Corp.*, 633 F.2d at 1031.

Given the timing of Stamford Plaza's decision to subcontract, its shifting explanations for that decision, and the testimony that the hotel continues to structure its subcontracting arrangements with the goal of frustrating union activity, the Court easily finds reasonable cause to believe that unfair labor practices have occurred.

B.

"[I]njunctive relief under § 10(j) is just and proper when it is necessary to prevent irreparable harm or to preserve the status quo." *Inn Credible Caterers*, 247 F.3d at 368. In the words of the Second Circuit:

[T]he status quo which deserves protection under § 10(j) is not the illegal status quo which has come into being as a result of the unfair labor practices being litigated. Instead, section 10(j) was intended as a means of preserving or restoring the status quo as it existed before the onset of unfair labor practices.

Seeler v. Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975) (citations omitted).

Here, the NLRB is requesting that the *status quo ante*—the situation at Stamford Plaza as of early June 2011—be restored so that the hotel's employees, as a group, can make whatever choices they may wish regarding unionization. According to NLRB, the employees' current division among three separate employers and the fear that that similar retaliatory action might again be taken has brought the Union's previously vibrant organizing activities at Stamford Plaza to a halt.

Stamford Plaza, not unreasonably, responds that the NLRB's delay in filing this Petition itself suggests that immediate injunctive relief is unnecessary. The hotel argues further that its employees have not lost work or wages—they are simply employed by a different company. At oral argument, Stamford Plaza pointed repeatedly to testimony in the administrative record in which one hotel employee claimed, in regard to current working conditions at the hotel, that "[e]verything's fine." Tr. [doc. # 25] at 300.

The Court acknowledges that the "just and proper" test presents a closer question than the "reasonable cause" test in this case. Unlike cases in which former employees are now unemployed and new workers have taken their place, here the day-to-day life of Stamford Plaza's employees is not dramatically different than it was before. Stamford Plaza argues that if it loses before the ALJ, the employees could easily be made whole by reinstatement to the hotel's payroll. Of course, the ease with which this could be accomplished might be said to cut the other way as well: it demonstrates how little the NLRB's requested § 10(j) injunction will burden Stamford Plaza, since the hotel is simply being asked to add to its payroll workers who are already cleaning and maintaining its facility and were on its payroll as recently as last year.

More importantly, however, Stamford Plaza's argument ignores the fact that adverse treatment of individual employees is not the touchstone for the "just and proper" inquiry. As the Second Circuit observed in *Inn Credible Caterers*, the proper plaintiff here is the NLRB, not the employees, and the irreparable harm which must be considered is "whether the employees' collective bargaining rights may be undermined . . . and whether any further delay may impair or undermine such bargaining in the future." 247 F.3d at 369.

The NLRB has offered evidence that the hotel's subcontracting scheme has already had "a serious adverse impact on employee interest in unionization." *Kaynard v. Pably Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980). Despite their subsequent re-hiring by the subcontractors, the termination of so many pro-union housekeeping and maintenance employees seems to have frozen, not just chilled, organization efforts at Stamford Plaza. See *Hoffman v. Pennant Foods Co.*, No. 3:08-CV-008 (JCH), 2008 WL 1777382, at *9 (D. Conn. Apr. 15, 2008) ("There is no reason to think that a chilling effect can only take place after a union has already been certified."). As the First Circuit has said, "the disappearance of the 'spark to unionize' may be an

irreparable injury for the purposes of § 10(j)." *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001). Here, especially given the testimony in the administrative record suggesting that Stamford Plaza has structured its present subcontracting arrangements so as to continue thwarting unionization efforts, *see* Tr. [doc. # 26] at 585, the Court finds that an injunction to restore the *status quo ante* is both just and proper.

III.

Accordingly, the Petition for Preliminary Injunction [doc. # 1] is granted. Until a final decision has been reached regarding the NLRB's Complaint against Stamford Plaza, Stamford Plaza shall:

1. Refrain from interrogating its employees about their union sympathies, union activities, or protected concerted activities;
2. Refrain from laying off employees or subcontracting their jobs because they engaged in union or protected concerted activities or in order to discourage employees from engaging in those activities;
3. Refrain from restraining, coercing, or interfering in any other way with its employees' exercise of rights protected under Section 7 of the NLRA, 29 U.S.C. § 157;
4. Offer, within 30 days of the issuance of this Order, the following 28 employees who were laid off in June 2011 immediate reinstatement to their former positions, without prejudice to their seniority or other rights and privileges previously enjoyed:

- Charles Islande
- Anne Auguste
- Miriam Castillo
- Carnot Cayo
- Wesner Eduard
- Norien Erick
- Edith Francois

- Esther Garcia
- Rubenia Garcia
- Estimila Jarries
- Elmase Jerome
- Ladislao Monzon
- Zoila Monzon
- Josephine Morris
- Antony Nazaire
- Jean Pierre
- Marie Rejouis
- Ana Rodriguez
- Evangelina Rodriguez
- Mireille St. Victor
- Germithe Telemarque
- Lyudmila Tovshiteyn
- Yaolian Ye
- Jaime Diaz
- Edward Maillard
- Carmelo Marquez
- Jose Rivera
- Stanislaw Rysz;

5. Post, within 5 days of the issuance of this Order, copies of Part III of this Ruling and Order, in English and Spanish, at any location at Stamford Plaza where employee notices are customarily placed; and
6. File with this Court and with the Regional Director, within 45 days of the issuance of this Order, a sworn affidavit setting forth with specificity the manner in which Stamford Plaza is complying with the terms of this injunction.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: March 22, 2012.