

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

REMINGTON LODGING & HOSPITALITY, LLC,  
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  
19-CA-32598  
19-CA-32600  
19-CA-32609

**ACTING GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD**

Counsel for the Acting General Counsel, respectfully submits this Opposition to Respondent's Motion for Leave to Supplement the Record ("Respondent's Motion") in the above captioned cases. Respondent's Motion requests leave to reopen the record in order to include voluminous portions of the record before the United States District Court for the District of Alaska in the § 10(j) injunctive proceedings related to this matter, as well as another outstanding Consolidated Complaint not yet litigated before the Board. Counsel for the Acting General Counsel objects to Respondent's Motion for a variety of reasons.

## **I. BACKGROUND**

On February 2, 2012, the United States District Court in Alaska granted the petitioned-for § 10(j) injunctive relief encompassing Respondent's multiple unfair labor practices found by Judge Meyerson in his 52-page August 25, 2011 Decision and Order ("ALJD") ("Remington I"). Exceptions and Cross Exceptions to the Remington I ALJD (which were based on 40 days of hearing and over 8,000 pages of record transcript) were filed in November and December 2011, respectively, and are currently pending consideration by the Board. In addition to the Remington I allegations, the District Court Order granted injunctive relief with regard to a series of more recent unilateral changes set forth in an outstanding Consolidated Complaint, not yet litigated before the Board ("Remington II"). After initially taking an appeal on February 3, 2012, Respondent voluntarily withdrew its appeal of the District Court's Order on April 9, 2012. Respondent now seeks to supplement the record in the Remington I case pending before the Board on exception in order to include over 2,000 pages of District Court filings, exhibits, hearing transcript pages, and orders issued by the District Court.

## **II. REOPENING OR SUPPLEMENTING THE ADMINISTRATIVE RECORD AT THIS JUNCTURE IS INAPPROPRIATE AND UNWARRANTED**

Section 102.48 (d) of the Board's Rules and Regulations sets forth the following with regard to parties filing a motion to reopen the record:

(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. . . . A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

First, as a procedural matter, Respondent's Motion must be denied as untimely. The Board's Rules require that any motion for leave to "adduce additional evidence shall be filed promptly on discovery of such evidence." Board's Rules and Regulations § 102.48(d)(2). Respondent's Motion is clearly untimely as it was filed more than four months after the record was created and the District Court's Order issued.

Even if Respondent's Motion were not untimely, the documents Respondent seeks to introduce are not newly discovered. Respondent was well aware that Counsel for the Acting General Counsel was contemplating a request for § 10(j) injunctive relief at the time of briefing and could have asked that any such potential filings and orders be included in the administrative record at that time. See *A.J.R. Coating Division Corp.*, 292 NLRB 148, n.1 (1988) (employer precluded from reopening the record in order to introduce transcript from § 10(j) hearing when employer failed to request a stay of the proceedings until the transcript became available). Respondent failed to preserve this opportunity and it is now too late to do so.

Further, if Respondent had been unaware that a Petition for Injunctive Relief was going to be filed, the documents Respondent now seeks to include add nothing to the underlying case currently pending before the Board. Neither Petitioner nor Respondent introduced witnesses or new evidence with regard to Remington I during the § 10(j) proceedings, but rather relied on the facts as laid out in the hearing transcript and exhibits and as found by Judge Meyerson in his ALJD. In fact, the only new evidence

produced to the District Court in the § 10(j) proceedings were evidentiary documents (witness affidavits and exhibits) pertaining to Remington II, a case that has not yet been litigated before an Administrative Law Judge. As such, it is completely inappropriate for these evidentiary documents to be made part of the record before the Board when they have not yet been brought before an Administrative Law Judge.

The Board's Rules require that the moving party show that "if adduced and credited, [the evidence submitted] would require a different result" in the underlying proceeding; in this case, Remington I. Board's Rules and Regulations § 102.48(d)(1). As set forth above, the various § 10(j) filings submitted by Respondent add nothing new to the factual record in this case. Rather, any further information presented in these documents with regard to Remington I would merely go to Respondent's legal arguments. Even if that were contemplated by Board Rule § 102.48(d)'s protection encompassing new evidence, given the amount of time that passed during the ongoing litigation, as well as the fact that the parties were granted an extension of time in which to write and submit their respective briefs, the parties had more than an adequate amount of time to invoke the rule to present evidence supporting any new legal theories desired to be presented.

Moreover, Respondent gives no rationale for the need to reopen the record in order to include the §10(j) documents other than the vague statement that the documents are necessary to provide the Board with "a full factual record" for its decision. Respondent's Motion at p.2. As such, Respondent fails to demonstrate that "extraordinary circumstances" warrant reopening the record here. See, e.g., *Lockheed Martin Astronautics*, 332 NLRB 416, 417 n.2 (2000) (finding no extraordinary

circumstances when moving party failed to specify relevance of evidence proffered or claim that evidence would require a different result). *USF Red Star, Inc.*, 339 NLRB 389, 391 n.3 (2003) (finding no extraordinary circumstances warranting reopening the record when respondent fails to explain how proffered evidence, if introduced, would require a different result than that reached by the judge).

The cases cited by Respondent in support of its Motion are easily distinguishable as they involve unopposed motions to supplement the record. *Dean Transp. Inc.*, 350 NLRB 48 (2007), involves an unopposed motion to include a copy of motions that had inadvertently been omitted from the formal papers received at hearing. Likewise, *Aero Ambulance Serv., Inc.*, 349 NLRB 1314 (2007), involves an unopposed Motion to include records upon which the Region's compliance officer made backpay calculations, and *Edw. C. Levy Co.*, 351 NLRB 1237 (2007), involves the introduction of a grievance award in a representation case. None of the cases cited by Respondent involve the introduction of over 2,000 pages of a tangential injunctive proceeding, which also include a case not yet litigated before the Board.

Given the dearth of reasons provided by Respondent for its Motion, Counsel for the Acting General Counsel can only speculate as to Respondent's potential motivation for this unprecedented request; it appears that Respondent is seeking a second chance to place the District Court's Order before a Circuit Court in light of Respondent's having withdrawn its appeal. Alternatively, by moving to have the 2,000-page District Court record added to the already 8,000-page record and 52-page decision in this case, Respondent attempts to hinder the Board's decision making process by overburdening

the record and inappropriately putting before the Board a record encompassing a Consolidated Complaint not yet adjudicated before an Administrative Law Judge.

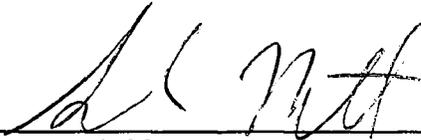
Respondent's thinly veiled attempt to have a second bite at the apple by having a Circuit Court review the § 10(j) proceedings as part of the Board's record as well as its attempted inappropriate tampering with the Board's proper processes regarding the extant complaint and the breadth of the underlying record, warrant denial of Respondent's Motion in its entirety.

### III. CONCLUSION

As Respondent's Motion does not meet the standards of § 102.48 of the Board's Rules, it is inappropriate and without merit. Accordingly, the Board should deny it in its entirety.

Dated at Seattle, Washington, this 26<sup>th</sup> day of June 2012.

Respectfully submitted,



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Susannah Merritt  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
Seattle, Washington 98174-1078  
Telephone: 206.220.6328 (p)  
Facsimile: 206.220.6305 (f)  
susannah.merritt2@nlrb.gov

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**AFFIDAVIT OF SERVICE OF *ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD.***

I, the undersigned employee of the National Labor Relations Board, state under oath that on June 25, 2012, I served the above-entitled document(s) by **E-File, E-mail and post-paid regular mail** upon the following persons, addressed to them at the following addresses:

**E-FILE**

LESTER A. HELTZER, EXECUTIVE SECRETARY  
NATIONAL LABOR RELATIONS BOARD  
1099 14<sup>TH</sup> STREET, N.W., ROOM 11602  
WASHINGTON, D. C. 20570-0001  
PHONE: (202) 273-1067

PETER G. FISHER, ATTORNEY  
STOKES ROBERTS & WAGNER  
3593 HEMPHILL ST  
ATLANTA, GA 30337-2626  
Phone: (404)766-9627  
Mobile Phone: (303)552-7609  
Fax: (404)766-8823  
Email: [pfischer@stokesroberts.com](mailto:pfischer@stokesroberts.com)

DMITRI IGLITZIN, ATTORNEY  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W MERCER ST STE 400  
SEATTLE, WA 98119-3971  
Phone: (206)257-6003  
Mobile Phone: (206)300-1258  
Fax: (206)257-6038  
Email: [iglitzin@workerlaw.com](mailto:iglitzin@workerlaw.com)

MARVIN JONES, PRESIDENT  
UNITE HERE! LOCAL 878  
530 E 4TH AVE  
ANCHORAGE, AK 99501-2624  
Email: [marvinj@union878.com](mailto:marvinj@union878.com)

ARCH Y. STOKES, ATTORNEY  
STOKES ROBERTS & WAGNER  
3593 HEMPHILL ST  
ATLANTA, GA 30337-2626  
Phone: (404) 766-0076  
FAX: (404) 766-8823  
Email: [astokes@stokesroberts.com](mailto:astokes@stokesroberts.com)

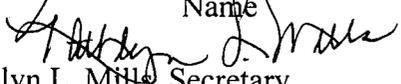
Rick Sawyer, NW Reg. Director, VP  
UNITE HERE!  
2800 First Avenue, Ste. 326  
Seattle, WA 98121  
Phone: (206)728-2326  
Fax: (206)728-9772  
[sawyerrf@aol.com](mailto:sawyerrf@aol.com)

KARL M. TERRELL, ATTORNEY  
STOKES ROBERTS & WAGNER  
3593 HEMPHILL ST  
ATLANTA, GA 30337-2626  
Phone: (404) 766-0076  
FAX: (404) 766-8823  
Email: [kterrell@stokes@stokesroberts.com](mailto:kterrell@stokes@stokesroberts.com)

TODD STOLLER  
REMINGTON HOSPITALITY & LODGING  
14185 DALLAS PKWY STE 1150  
DALLAS, TX 75254-4309

June 26, 2012.

Date

/s/ DENNIS SNOOK  
Dennis Snook, Designated Agent of NLRB  
Name  
  
Kathlyn L. Mills, Secretary  
Signature