UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

MARRIOTT INTERNATIONAL, INC., D/B/A
J.W. MARRIOTT LOS ANGELES AT
L.A. LIVE

and Case No. 21-CA-39556

UNITE HERE! LOCAL 11

GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION FOR RECONSIDERATION

Comes now Jean C. Libby, Counsel for the Acting General Counsel, herein General Counsel, and submits this Opposition to the Motion of Reconsideration filed by Respondent Marriott International, Inc., d/b/a J. W. Marriott Los Angeles at L.A. Live, of the Board's September 28, 2012, Decision and Order in this matter, which is reported at 359 NLRB No. 8.

I.

FACTS

On July 22, 2011, Administrative Law Judge Clifford H. Anderson issued a decision finding that the Respondent violated Section 8(a)(1) of the Act by maintaining two versions of two work rules, one restricting off-duty employee access and another restricting employee use of its facilities. Respondent filed exceptions to the decision.

On September 28, 2012, the Board issued a Decision and Order adopting the Administrative Law Judge's findings and recommended decision as modified. In

light of Member Hayes' dissent and relevant precedent that issued after the judge's decision, the Board explained its reasoning.

On October 26, 2012, Respondent filed a motion for extension of time to file a Motion for Reconsideration of the Board's Decision and Order and on October 30, 2012, filed a Motion for Reconsideration. In its Motion for Reconsideration, Respondent makes three principal arguments: (1) employees would not reasonably construe the rules as restricting Section 7 activity because Respondent has a constructive relationship with the Charging Party Union, UNITE! HERE Local 11; (2) the Board's decision provides insufficient guidance for compliance; and (3) the Board lacked a quorum when issuing its Decision and Order because the "recess" appointments were improper.

II.

ARGUMENT

Respondent's Motion for Reconsideration should be denied because it raises no issue not previously considered by the Board or not appropriate for the Board to resolve. Section 102.48(d)(1) of the Board's Rules and Regulations provides that motions for reconsideration are granted only "in extraordinary circumstances." Thus, the Board grants such motions only when the Board's original decision is not supported by the record or where an intervening Board or court decision rendered the Board's original Decision and Order inappropriate. E.g. Proper Steel Erectors, Inc., 352 NLRB 892 (2008); R & H Masonry Supply, Inc., 258 NLRB 1220 (1981). Likewise, the Board recently granted a motion for reconsideration correcting the terms of its previous Order to better express its remedial intent. Fresh & Easy Neighborhood, Inc., 356 NLRB No.

145 (April 28, 2011). However, a motion for reconsideration will be denied when it raises "no substantial issues that were not considered by the Board in its original Decision and Order." Kahn's and Company, 256 NLRB 930 (1981). Because two of the three bases for Respondent's Motion for Reconsideration involve issues that were previously considered, those grounds for the motion should be rejected. The third, which challenges the legality of the Board's recess appointments, should be denied because it raises an issue that is not appropriate for the Board to decide.

A. RESPONDENT'S RELATIONSHIP WITH THE UNION IS IRRELEVANT.

Respondent argues that no reasonable employee would read either version of the two work rules at issue to prohibit Section 7 activity because neither rule expressly or implicitly implicates Section 7 activity. Not only is Section 7 activity not mentioned in the rules but, according to Respondent, employees would not interpret the rules as restricting their right to unionize or engage in union activity because Respondent has such a constructive relationship with the Union. Respondent raised essentially the same argument in its exceptions to the Administrative Law Judge's decision and the Board has already rejected it. In the brief submitted in support of its exceptions, Respondent argued that the Administrative Law Judge failed to consider that Respondent never applied its rules in any way related to Section 7 activity, did not promulgate the rules in response to union activity, there is no evidence that a single employee believed the rules implicate Section 7 activity and employees were not disciplined for conducting Section 7 activity on or off Respondent's property.[1]

[1] See Respondent's Brief in Support of Exceptions at page 17.

The Board has already addressed, and rejected Respondent's arguments. In its Decision, the Board noted that whether Respondent has union animus or enforced its rules to restrict Section 7 activity is "simply irrelevant."[2]

Respondent's argument fails to address the crux of the Board's reasoning which is that while the rules do not expressly mention Section 7 activity, reasonable employees would believe that they would have to disclose Section 7 activity to their managers in order to either use Respondent's facilities or remain on the premises while off-duty. The rules, as the Board noted, allow off-duty employees access for *any* purpose and allow off-duty employees to use *any* of Respondent's facilities as long as a manager approves the purpose or the use in advance.[3] As the Board noted, the rules do not "define, describe, or limit in any way the "circumstances' under which access would or would not be granted."[4] Because off-duty access and use of any facility is completely prohibited without a manager's approval, employees would reasonably conclude that they have to disclose the nature of the activity for which they seek access or use of a facility. That compelled disclosure, according to the Board, would chill the exercise of Section 7 rights.

B. THE BOARD'S DECISION AND ORDER PROVIDES SUFFICIENT GUIDANCE FOR COMPLIANCE.

In addition to arguing that the Board should reconsider and reverse its decision because employees would not reasonably construe the rules as restricting their Section 7 rights, Respondent argues that the decision should be modified because it provides

[2] 359 NLRB No. 8 at p. 2 (September 28, 2012).
[3] 359 NLRB No. 8 at p. 2 (September 28, 2012).
[4] 359 NLRB No. 8 at p. 2 (September 28, 2012).

insufficient guidance for compliance. In its decision, the Board invalidated Respondent's access rules under Tri-County Medical Center, 222 NLRB 1089 (1976), because they provided for *unspecified* exceptions. In distinguishing Lafayette Park Hotel, 326 NLRB 824 (1998), the Board expressly noted that the rule in that case provided for exceptions in "narrow, extremely specific" circumstances whereas Respondent's rule gives Respondent "broad, standard-less discretion."[5] Thus, contrary to Respondent's claim, the Board provided sufficient guidance for Respondent to fashion a lawful access rule.

The Board also provided sufficient guidance for Respondent to address the problems with its use of facilities rules. Both versions of Respondent's rule allow for essentially unlimited access to all parts of Respondent's "property and its facilities" and "property outlet" as long as a manager's approval is obtained. In adopting the ALJ's reasoning, the Board noted that employees would reasonably interpret the rule as restricting off-duty employees from access to exterior nonwork areas without prior managerial approval. Thus, the Board made the infirmities in Respondent's rules more than sufficiently clear to enable Respondent to fashion new rules.

C. THE LEGALITY OF THE BOARD'S RECESS APPOINTMENTS IS NOT AN APPROPRIATE ISSUE FOR THE BOARD TO DECIDE.

In addition to its arguments disputing the merits of the Board's Decision and Order, Respondent argues that the Board lacked a quorum when issuing its Decision and Order because the "recess" appointments of Members Block, Flynn and Griffin were improper. Of the three "recess" appointments, only Member Block participated in

[5] 359 NLRB No. 8 at p. 2, n. 3 (September 28, 2012).

the Decision in this matter. In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." Lutheran Home at Moorestown, 334 NLRB NLRB 340, 341 (2001), citing U.S. Chemical Foundation, 272 U.S. 1, 14, 15 (1926); Center for Social Change, 358 NLRB No. 24 (2012). Accordingly, the legality of the "recess" appointments is not a valid basis for granting the Motion for Reconsideration.

III.

CONCLUSION

For all the foregoing reasons, Counsel for the General Counsel requests that the Board deny Respondent's Motion for Reconsideration.

Dated at Los Angeles, California, this 8th day of November, 2012.

Respectfully submitted,

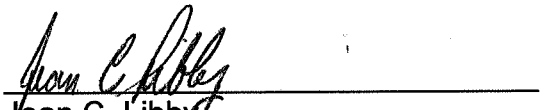
Jean C. Libby
Counsel for the General Counsel
National Labor Relations Board, Region 21

STATEMENT OF SERVICE

I hereby certify that a copy of General Counsel's Opposition to Respondent's Motion for Recosideration in Case 21-CA-39556 was submitted by E-filing to the National Labor Relations Board, Washington, D.C., on November 8, 2012. The following parties were served with a copy of the same Brief by electronic mail:

William J. Dritsas, Attorney at Law
Kamran Mirrafati, Attorney at Law
Seyfarth Shaw LLP
wdritsas@seyfarth.com
kmirrafati@seyfarth.com

Kiril Penteshin, Staff Attorney
UNITE HERE, Local 11
kpenteshin@unitehere11.org



Jean C. Libby
Counsel for the General Counsel
National Labor Relations Board, Ninth Floor
888 S. Figueroa St., Ninth Floor
Los Angeles, CA 90017-5449
Jean.libby@nlrb.gov

DATED at Los Angeles, California, this 8th day of November, 2012.