

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

**CL FRANK MANAGEMENT, LLC, CL  
METROPOLIS MANAGEMENT, LLC,  
AND CL VERTIGO MANAGEMENT, LLC,  
A SINGLE EMPLOYER D/B/A  
EMPLOYER PROJECT GROUP D/B/A  
EMPLOYER FRANK,**

**and**

**CL FRANK MANAGEMENT, LLC, CL  
METROPOLIS MANAGEMENT, LLC,  
AND CL VERTIGO MANAGEMENT, LLC,  
A SINGLE EMPLOYER D/B/A  
EMPLOYER PROJECT GROUP D/B/A  
EMPLOYER METROPOLIS**

**and**

**UNITE HERE! Local 2**

Case Nos. 20-CA-35123  
20-CA-25223  
20-CA-35238  
20-CA-35253  
(Consolidated)

**EMPLOYER'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S**  
**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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**Dated: September 23, 2011**

## I. INTRODUCTION

CL Frank Management, LLC d/b/a Employer Frank, LLC and CL Metropolis Management LLC d/b/a Employer Metropolis, LLC (collectively “Respondent” or “Employer”) hereby submit this Reply Brief to Acting General Counsel’s Answering Brief to Respondent’s Exceptions (“Reply”). On August 26, 2011, Respondent filed Exceptions and a Brief in Support of its Exceptions (“Brief”). On September 9, General Counsel filed an Answering Brief to Respondent’s Exceptions (“Answering Brief”). She also filed a separate Motion to Strike Respondent’s Brief in Support of its Exceptions (“Motion”).<sup>1</sup> For the reasons stated herein, the National Labor Relations Board (“NLRB” or “Board”) should reject the arguments in General Counsel’s Answering Brief.

## II. ARGUMENTS IN SUPPORT OF RESPONDENT’S REPLY

### A. Respondent’s Brief in Support of Exceptions Substantially Complies with Section 102.46(c)

In her introduction, General Counsel argues that Respondent’s Brief does not satisfy the requirements of Sections 102.46(c)(1)<sup>2</sup>, (2), and (3) of the Board’s Rules and Regulations because it did not include “a concise statement of the case containing all that is material; a specification of the questions involved and to be argued, along with a reference to the specific exception; and clear references to fact and law in support of [Respondent’s] position on each question.” However, her only argument in support of these contentions is that Respondent’s Brief does not cite to the numbered exceptions.

General Counsel’s allegation that Respondent failed to comply with Section 102.46(c)(2) for failing to list the specific objections in its brief is without merit. The Board has long recognized that a

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<sup>1</sup> Respondent filed a separate Opposition to General Counsel’s Motion.

<sup>2</sup> In her Motion, General Counsel did not argue that Respondent failed to meet the requirements of Section 102.46(c)(1) and improperly raises this objection in an Answering Brief. Therefore, the NLRB should ignore her contention.

party's brief in support of its exceptions need only "substantially" comply with Section 102.46(c). See, e.g., Solutia, Inc., 357 NLRB 1, 1 FN 1 (2011) (Board denied motion to strike brief for failing to cite to exceptions because it substantially complied with Section 102.46(c).); see also La Gloria Oil, 3373 NLRB 1120, 1120 FN 1 (2002) (Same.) General Counsel has presented no case law in support of her contention that the Board should not accept the Employer's Brief for the mere fact that it does not specifically list the exceptions in each argument. Indeed, the NLRB has repeatedly rejected this contention. See, e.g., Solutia, Inc., supra; see also La Gloria Oil, supra.

General Counsel's contention that it was difficult for her to respond to Respondent's numerous exceptions because it failed to cite them in its Brief is disingenuous. Her Answering Brief specifically addresses each exception, albeit insufficiently. The Employer's Exceptions and Brief follow a logical order that correspond to the ALJ's Decision.

Although Respondent substantially complied with 102.46(c)(2), it hereby lists for the Board its exceptions that correspond to the arguments in its Brief: exception nos. 72-79, 88-117, 149, and 151-155, relate to section II.B.2.a. of the Brief; exception nos. 72-74, 80-84, 112-126, 149, and 151-155, relate to section II.B.2.b. of the Brief; exception nos. 2-4, 72-74, 85-87, 112-118, 127-146, 149, and 151-155, relate to section II.B.2.c. of the Brief; exception nos. 7-29, 147-148, and 151-155, relate to section II.C.2 of the Brief; exception nos. 1, 30-47, and 150-155, relate to section II.D.2. of the Brief; exception nos. 62-71, 147, and 151-155, relate to section II.E.2. of the Brief; and, exception nos. 5-6, 48-61, 147, and 151-155, relate to II.F.2. of the Brief.

Respondent also substantially complied with the requirements of 102.46(c)(3). It made clear references to fact and law in support of its position on each exception. Indeed, the Employer in its Brief presented a number of new arguments to the NLRB for its consideration, and explained both what it was excepting to and the factual and legal reasons in support of them.

Finally, it is unclear in what respect General Counsel contends Respondent failed to comply with Section 102.46(c)(1). Nevertheless, the Employer in its Brief provided a clear and concise statement of the case to the Board by explaining the issues to which it was excepting in both its introduction and the arguments presented. Respondent also cited to the original transcript, Decision of the Administrative Law Judge, and all relevant exhibits. It further cited relevant case law and specifically noted the parts of the ALJ's Decision to which it did not agree.

Accordingly, General Counsel's argument is without merit as the Employer substantially complied with Section 102.46(c).

B. Respondent Properly Excepted to the ALJ's Failure to Find that Respondent Implemented Several Initial Terms and Conditions of Employment after Purchasing the Employer Frank and Employer Metropolis.

General Counsel argues in her Answering Brief that the Employer's exceptions to the findings of the Administrative Law Judge ("ALJ") regarding Respondent's initial terms and conditions of employment are irrelevant.<sup>3</sup> General Counsel, however, is incorrect. Respondent's exception to the ALJ's failure to find that the Employer issued employees an at-will policy (exception nos. 1 and 47) on May 12 relates to its argument that its extension of the probationary period was *de minimis*. Respondent's exception to the ALJ's failure to find that it issued employees job requirements, including those for bellman (exception no. 2), relates to its argument that Charging Party Marc Norton was discharged for failing to meet these standards. Respondent's exceptions nos. 3 and 72 are relevant to the Employer's argument that all employees, including Norton, received and were aware of these policies. Finally, exceptions nos. 37 and 38 are relevant to the Employer's contention that the ALJ incorrectly concluded that Respondent went beyond the discretion provided for in its policy on

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<sup>3</sup> She specifically references exception nos. 1, 2, 3, 32, 37, 38, 47, and 72.

extending probationary periods.<sup>4</sup>

C. Marc Norton's Disciplinary Actions and Terminations

1. General Counsel Failed to Address Respondent's Arguments that the Employer Did Not Orally Warn Norton on June 23, But Rather, Simply Reminded Him About Its Job Performance Standards.

In her Answering Brief, General Counsel argues—as she did in her original brief to the ALJ—that Norton's outburst during the training session on June 19 constituted protected, concerted activity. She then contends that Respondent orally disciplined Norton because of his outburst.

However, General Counsel completely failed to address the Employer's new argument that, even assuming the NLRB upholds Maribel Olmeda's alleged statement to Norton that Respondent only intended to hire those employees who were on the "same page" as the Employer, this constituted nothing more than a reminder of the Employer's job requirements. This is a critical point that General Counsel failed to address in her Answering Brief, as the ALJ relied heavily on Olmeda's alleged statement in support of his conclusion that Respondent targeted Norton because of his union activity. (D: 21:48-55, 28:9-14, 28:39-40, 29:33-35, 29:41-43)<sup>5</sup> Indeed, General Counsel went to great lengths in her Answering Brief and Motion to accuse Respondent of regurgitating its post-hearing brief to the Board. Yet, she completely ignored in her own Answering Brief to address these new issues.

2. General Counsel Also Fails to Acknowledge in Her Answering Brief that Even if the NLRB Upholds the ALJ's Discrediting of Dana Zeitlin's Testimony the Undisputed Evidence Demonstrates Norton's Failure to Assist a Co-Worker, Which is Unacceptable in the Hospitality Industry.

General Counsel—albeit incorrectly—contends in her Answering Brief that Respondent

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<sup>4</sup> General Counsel mischaracterized Respondent's exception no. 32 as relating to the Employer's setting of initial terms and conditions of employment. She is incorrect. This exception relates to the ALJ's general failure to find that the Employer's alleged unilateral change was *de minimis*.

<sup>5</sup> "(D. \_\_\_)" references the ALJ's Decision, "(Tr. \_\_\_)" references cites to the official hearing transcript, and "(GC Exh. \_\_\_)" references the General Counsel's exhibits.

solely relies on Zeitlin's discredited testimony to support its contention that it disciplined Norton on August 31 because he failed to assist a co-worker. However, she again failed to address the Employer's alternative argument that even if the NLRB upholds the ALJ's credibility finding, the undisputed evidence established Norton engaged in misconduct.

General Counsel states in her Answering Brief, in agreement with the ALJ, that the Employer was motivated by anti-union animus when it issued Norton a written notice. (D: 29:17-26) However, the undisputed evidence established that once Norton saw Zeitlin enter the building with bags in her arms he did nothing to help her. (D. 22:41-46) Respondent argued in its Brief that this clearly establishes that Norton failed to meet the Employer's minimum standards for its bellman. Nevertheless, General Counsel completely ignored this very critical point in her Answering Brief. Indeed, her failure to address this issue implies that she believes that a bellman can pick and choose when they want to provide quality customer service.

**3. General Counsel's Arguments in Her Answering Brief Re-Enforces the Employer's Contention that Norton Was Discharged Because of His Poor, Inconsistent Work Performance.**

General Counsel also goes to great lengths in her Answering Brief to point out that certain mystery guest reports noted that Norton performed some of his job duties well, while admitting others did not. In essence, she is essentially conceding the very argument Respondent has been making all along: Norton was inconsistent in his performance as a bellman. The hospitality business is a service industry and its very survival depends on its employees providing consistent, quality, customer service, which Norton did not provide.

General Counsel also incorrectly states in her Answering Brief that "Respondent never issued Norton discipline for failing to meet performance standards," including not citing him for failing to use guests' names. She is incorrect. Respondent specifically pointed out to Norton in its August 31

write-up to him that he continued to fail to meet the Employer's minimum job standards. (D 23:14-19; GC Exh. 9) Moreover, Front Desk Supervisor Michael Infusino orally warned Norton regarding his failure to do his bellman duties. (D. 25:37-40)

In short, General Counsel confirms in her Answering Brief what the Employer has argued from the beginning: Norton's performance was inconsistent and did not meet Respondent's job requirements.

D. General Counsel Overlooks in Her Answering Brief Respondent's New Argument that it Disciplined the Employer Housekeepers Because They Claimed They Did Not Have Enough Time to Clean Their Rooms

In her Answering Brief, General Counsel tries to rephrase Respondent's position in its Brief that it solely disciplined certain housekeepers because they were engaged in a slowdown. Although the Employer maintains the employees were engaged in an unprotected strike, it also argues in its Brief that the employees were disciplined because they failed to clean their required rooms in a timely manner. This is not an issue of Section 7 activity, but rather, an individual decision by each housekeeper to refuse to meet Respondent's room cleaning standards.

E. The General Counsel Incorrectly Contends that Respondent Must Ask Uninvited Members of the Public to Leave its Property in Order to Document a Trespass or, Otherwise, Risk a Violation of Section 8(a)(1).

In her Answering Brief, General Counsel repeatedly writes that Respondent violated Section 8(a)(1) of the National Labor Relations Act when it took pictures of alleged union representatives who trespassed onto its premises and failed to ask them to leave. She presents absolute no case law in support of her argument. If the NLRB were to accept the General Counsel's contention, it would be creating new case law requiring that all employers either formally request that a union trespasser leave its premises immediately or lose the right to document such unlawful action for fear of violating the Act. The Board simply cannot accept the General Counsel's rationale.

F. General Counsel Fails to Provide Any Legal Justification As to Why The Employees' At-Will Status is Not Relevant to Establish that the Employer's Alleged Unilateral Extension of Employees' Probationary Period Was *De Minimis*

General Counsel fails to properly address in her Answering Brief Respondent's argument that because the Employer set initial terms and conditions of employment that its employees were at-will, and, thus, its extension of the probationary period was *de minimis*. Instead, General Counsel hurls insults at Respondent stating that it "misse[d] the mark" and "fail[ed] to grasp the legal framework applicable to a unilateral change in working conditions." She provides absolutely no case cites in support of her claim. Indeed, Respondent is unaware of any Board law that represented employees lose their employment-at-will status simply because they become represented unless the employer and union agree otherwise.

G. General Counsel Incorrectly Characterizes Respondent's Argument Regarding the Union Button Issue as a *Passavant* Matter

The General Counsel also argues in her Answering Brief that Respondent failed to meet the standards set forth in Passavant Memorial Hospital, 237 NLRB 138 (1978), to cure the alleged unfair labor practice that Respondent prohibited employees from wearing union buttons in violation of the NLRA. The Employer, however, did not make a Passavant argument in its Brief. Instead, it argued that it did not need to cure any unfair labor practice because its conduct was not coercive in the first place. General Counsel's analysis under Passavant is simply irrelevant.

**III. CONCLUSION**

Based upon the foregoing, Respondent requests that the Board disregard the General Counsel's arguments in her Answering Brief and uphold the Respondent's Exceptions to the ALJ's Decision.

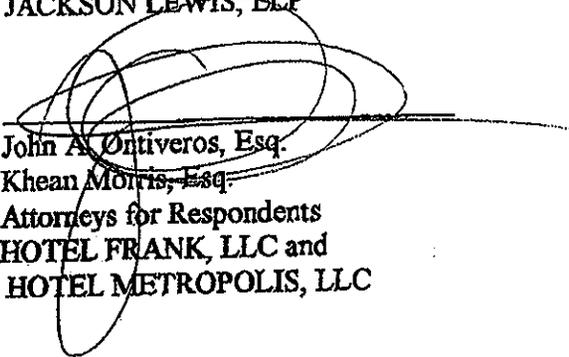
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Respectfully submitted this 23<sup>rd</sup> day of September, 2011.

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4827-5586-4842, v. 1

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20**

**CL FRANK MANAGEMENT, LLC  
d/b/a HOTEL FRANK, and  
CL METROPOLIS MANAGEMENT, LLC,  
d/b/a HOTEL METROPOLIS**

**and**

**UNITE HERE! Local 2**

Case Nos. 20-CA-35123  
20-CA-35223  
20-CA-35238  
20-CA-35253  
(Consolidated)

**PROOF OF SERVICE**

Case Names: Providence/Hotel Project Group d/b/a Frank Hotel  
Provenance d/b/a Hotel Frank  
Provenance d/b/a Hotel Frank  
Provenance d/b/a Hotel Metropolis

Case Nos.: 20-CA-35123  
20-CA-35238  
20-CA-35253  
20-CA-35223

I, Jamie Fensterstock, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 1655 West Broadway, 9<sup>th</sup> Floor, San Diego, California 92101; I am over the age of eighteen (18) years and am not a party to this action.

On September 23, 2011, I served the attached *Employer's Reply Brief To Acting General Counsel's Answering Brief to Respondent's Exceptions* in this action as follows:

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**[X] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, [fensterj@jacksonlewis.com](mailto:fensterj@jacksonlewis.com), to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 23, 2011 at San Diego, California.

  
Jamie Fensterstock

4842-8715-6746, v. 1