UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RICHFIELD HOSPITALITY, INC. AS MANAGING AGENT FOR KAHLER HOTELS, LLC and UNITE HERE INTERNATIONAL UNION LOCAL 21	Cases 18-CA-151254 and 18-CA-176369

COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO STRIKE AND OPPOSITION TO RESPONDENT'S REQUEST TO CONSOLIDATE CASES

Counsel for the General Counsel (Counsel) respectfully requests that the National Labor Relations Board (Board) strike certain portions of Richfield Hospitality, Inc. as managing agent for Kahler Hotels, LLC's (Respondent's) Motion to Consolidate Cases and further deny this Motion. Specifically, in support of this request, Counsel avers:

Statement of Facts

1. On May 27, 2016, Administrative Law Judge Sharon Steckler issued her decision in Case 18-CA-151245. In her decision, Judge Steckler found that Respondent committed numerous violations of the Act, through its conduct at and away from the bargaining table. Notably, Judge Steckler found that Respondent's misconduct included retaliating against a union steward and the union's employee vice president in violation of Section 8(a)(3); denying union representatives access to its facilities in violation of Section 8(a)(5); failing to pay wage increases called for in the expired contract in violation of Section 8(a)(5); and failing to provide information to the Union in violation of Section 8(a)(5). *Richfield Hospitality, Inc., as Managing Agent for Kahler Hotels, LLC,* JD-45-16, Case 18-CA-151245, slip op. at 60–61 (May 27, 2016). As

Respondent notes, Judge Steckler also made significant, critical findings regarding the lawfulness of Respondent's bargaining tactics, and in particular found that Respondent had acted unlawfully with regard to its pay proposals. *Id.*, slip op. at 17–21. This finding was based on extensive evidence presented by both parties as to what occurred at the bargaining table *in 2015*. This case is pending at the Board and has been fully briefed by the parties.

2. On May 5, 2017, Administrative Law Judge Keltner Locke issued his decision in Case 18-CA-176369. *Richfield Hospitality, Inc., as Managing Agent for Kahler Hotels, LLC,* JD-28-17, Case 18-CA-176369, (May 5, 2017). As Respondent notes, Judge Locke's decision primarily addresses a separate issue, namely, whether Respondent engaged in overall surface bargaining *in 2016*. *Id.* at 55–56, 58–59. Consistent with the scope of the case, the parties limited their presentation of evidence to what occurred at and away from the bargaining table *in 2016*. In contrast to the numerous issues in Case 18-CA-151245, Judge Locke's decision focused almost exclusively on the parties' bargaining. The case is pending before the Board. Respondent filed its exceptions on July 10, 2017. General Counsel has yet to file an answering brief, cross-exceptions and/or briefs in support thereof.

<u>Respondent's Factual Assertions Improperly Usurp the Factual Findings of Judge Steckler and Judge Locke</u>

3. In its Motion to Consolidate, Respondent engages in an extensive factual foray into what, allegedly, occurred at the bargaining table in 2015 and 2016. *Respondent's Motion to Consolidate Cases,* dated July 3, 2017, at 1–4. Respondent does not cite any record evidence or passages from either Judge's decision until page four of its factual representations.

4. The parties spent three days on the record presenting testimony and documentary evidence regarding what occurred at and away from the bargaining table before Judge Steckler in Case 18-CA-151245. Judge Steckler made factual findings based on this evidence and her credibility assessments in her May 27, 2015 decision. The parties spent an additional two days presenting testimony and documentary evidence before Judge Locke in Case 18-CA-176369. Judge Locke made additional factual findings in his May 5, 2017 decision. These decisions, and the accompanying transcripts and exhibits, represent the respective records before the Board.

5. Respondent's factual assertions go well beyond the record evidence that is already before the Board. They contain few, if any, citations, are not based on evidence, and indeed represent a slanted, at best, view of the factual record in this case. The assessments of the facts in these cases are properly limited to the respective decisions and the underlying factual records. Indeed, the proper avenue for presenting additional factual assertions is through a Motion to Reopen the Record, an option that Respondent has chosen not to take in this matter. As such, Respondent's factual representations should be stricken from consideration by the Board.

<u>The Board Should Deny Respondent's Motion to Consolidate</u>

6. Contrary to Respondent's assertions, the Board regularly denies requests to consolidate, even when cases involve the same parties and related issues. *See, e.g., A.W. Farrell & Son, Inc.*, 361 NLRB No. 162, slip op. at 1, n.1 (Dec. 16, 2014); *Plasterers Local 200 (Standard Drywall, Inc.*), 357 NLRB 2212, 2212 n.1 (2011); *ITT Automotive*, 321 NLRB No. 156, slip op. at 1, n.1 (1996). Although the Board has not articulated detailed standards regarding when cases on appeal should be consolidated,

a review of the cases cited by Counsel and Respondent[1] reveal that the primary focus in making this determination is the timely and efficient disposition of disputes between the parties.

7. Although the parties in Cases 18-CA-151245 and 18-CA-176369 are undisputedly the same, the cases present very different issues. Case 18-CA-151245 involves, *inter alia*, numerous 8(a)(3) disciplinary issues, denials of access, and refusals to provide information. The conduct at issue in this case occurred from about March 2015 to December 2015—the date of the first unfair labor practice hearing. By contrast, Case 18-CA-176369 focuses on the conduct that occurred in 2016, *after* the unfair labor practice hearing in 18-CA-151245. Further, while Case 18-CA-151245 involves a variety of misconduct at and away from the bargaining table, Case 18-CA-176369 focuses almost exclusively on whether Respondent engaged in surface bargaining *after* the December 2015 unfair labor practice hearing. Thus, the issues presented in the two cases are largely independent.

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[1] That being said, almost all of the cases cited by Respondent are representation cases, and often involved far different facts than those presented here. Thus, they are of relatively little precedential value to the issue presented in these unfair labor practice proceedings. *55 Liberty Owners Corp.*, 318 NLRB 308, 308 (1995) (unit clarification cases consolidated where all cases dealt with same legal issue—the status of door persons); *Connecticut Light & Power Co.*, 222 NLRB 1243, 1243 n.1 (1976) (representation cases where parties stipulated to combined record in two cases); *Malcolm X Center for Mental Health, Inc.*, 222 NLRB 944, 944 & n.2 (1976) (representation cases consolidated before Board where cases had already been consolidated by Regional Director for single hearing); *Woodstock Manufacturing Co.*, 116 NLRB 389, 389 n.1 (1956) (representation matters consolidated by Board where sole issue was whether two employers constituted a single employer). And while *Central Distributors, Inc.*, 266 NLRB 1021 (1983), admittedly involved a combined representation and unfair labor practice matter, the Board chose to consolidate these cases only after *sua sponte* ordering the reopening of the record in one of the cases.

8. The consolidation of these cases does not promote timely resolution of these unfair labor practices, nor does it aid in administrative efficiency. Case 18-CA-151245 is fully briefed and has already been before the Board on appeal for over a year. During this time, the Board has presumably begun working on a decision dealing with the issues in this case. By contrast, Case 18-CA-176369 was transferred to the Board only recently, and Respondent just filed its exceptions on July 10, 2017. General Counsel has not yet filed any answering brief or cross-exceptions. As such, combining Case 18-CA-176369 with 18-CA-151245 at this late stage would delay the timely resolution of the unfair labor practices in the initial matter. Further, due to the disparate issues presented by the cases, there is little, if any, efficiency to be gain by combining the matters.

9. Additionally, keeping the cases separated does not open the door to contrary results. Case 18-CA-151245 involves discrete unfair labor practices committed by Respondent in 2015. Case 18-CA-176369 involves discrete unfair labor practices committed by Respondent in 2016. The unfair labor practices that Respondent committed in 2015 can be fairly judged without having to look into the future to what happened in 2016—as ALJ Steckler ably demonstrated in her decision in 18-CA-151245. The unfair labor practices committed by Respondent in Case 18-CA-176369 similarly stand on their own merits.

Respondent spends much of its brief addressing an alleged inconsistency between the two decisions with regard to the content of Respondent's wage proposal during the parties' bargaining in 2015. This issue was fully litigated in Case 18-CA-151245, with much of the testimony and documentary evidence centered on the

communications Respondent made regarding its wage proposal during the parties' 2015 bargaining.[2] This evidence, standing alone, is all that is necessary to determine Respondent's bargaining over wages up to the date of the unfair labor practice hearing in the first case. Respondent's bargaining regarding wages, and all other topics, *after* December 2015 is the subject of the second case, and can be properly judged by the evidence contained in the record in the second case.[3]

10. Finally, consolidation of these cases does not "resolve at the same time all issues surrounding the parties' negotiations." Indeed, since the hearing in Case 18-CA-176369, the Region has issued an additional complaint against Respondent in Case 18-CA-187974, alleging a unilateral change to an employee meal benefit. The Region is also investigating an additional unfair labor practice charge in Case 18-CA-198527, which alleges further unilateral changes, direct dealing, and an overall refusal to bargain. As such, the issues related to Respondent's conduct at the bargaining table will be in no way fully resolved through the consolidation of these two cases.

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[2] Indeed, as noted in the record in case 18-CA-176369, Judge Locke ultimately did not allow Counsel to elicit extensive testimony regarding the parties' bargaining over wages in 2015, nor did he allow for the introduction of much of the documentary evidence regarding Respondent's wage proposal from 2015. (*See, e.g.,* Tr. 248–49 (rejecting Counsel's proffer of pie charts from the first case).)

[3] To the extent that the Board is concerned with contrary results in these cases, consolidating the cases at this point in the proceedings risks confusing the various credibility resolutions made by the ALJs in separate hearings. As these cases were heard months apart from one another, it is important that the evidence in each case be viewed independently.

For the foregoing reasons, Counsel respectfully requests that the Board strike certain portions of Respondent's Motion, and deny Respondent's Motion in full.

Dated: July 11, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition was served on the parties via electronic mail at the email addresses listed below, and was filed using the Board's e-filing system:

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