UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Richfield Hospitality as Managing Agent for Kahler Hotels, LLC Respondent and UNITE HERE Local 21 Charging Party	Cases 18-CA-176369

ANSWERING BRIEF TO THE BOARD ON BEHALF OF THE GENERAL COUNSEL

Submitted by:

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INTRODUCTION

In response to Respondent's Exceptions to Decision of Administrative Law Judge (Exceptions), Counsel for the General Counsel (Counsel) submits the following Answering Brief for consideration by the Board.[1] Respondent's Exceptions are limited in scope, as they only address ALJ Locke's finding of overall surface bargaining and a Section 8(a)(1) threat made by Respondent's lead negotiator, Bill Dwyer. The arguments in support of these two Exceptions are incoherent, contradictory, and largely unsupported by the factual findings of ALJ Locke or record evidence.

With regard to ALJ Locke's surface bargaining finding, Respondent spends little, if any, time attempting to defend its *own* conduct during the bargaining at issue in this case. Instead, Respondent improperly attempts revisit the factual findings in a *prior* case currently on review before the Board, and thereafter attempts to prove an (unpled) case of bad-faith bargaining by the *Union*. Respondent's (attempted) misdirection is perhaps its only remaining gambit, as the record evidence and factual findings of ALJ Locke clearly reveal that Respondent's conduct at the bargaining table in 2016 amounted to surface bargaining. This record evidence (and even Respondent's own briefing before the Board) demonstrate, among other things, that Respondent has continued to bargain in bad faith regarding wages, that it has failed to pay wage increases called for under the expired contract, and that it has refused to provide crucial information regarding health insurance. As such, there is ample evidence to support ALJ Locke's finding of overall surface bargaining.

[1] This Answering Brief is limited solely to addressing the arguments raised by Respondent and is intended to be read in conjunction with Counsel's Cross-Exceptions and Brief in Support Thereof, which is being filed contemporaneously.

With regard to the unlawful threat excepted to by Respondent, Respondent does not except to whether the underlying statement was made, only to whether it actually violates Section 8(a)(1) of the Act. Under well-established Board case law, statements that a union cannot benefit employees are patently unlawful. *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011); *Cherry Hill Convalescent Center*, 309 NLRB 518, 521 (1992).

Respondent's Exception to ALJ Locke's Finding of Surface Bargaining Should Be Rejected By the Board

Respondent's Exception, as it relates to surface bargaining, appears to be focused on three points: 1) ALJ Locke's supposed mischaracterization of the parties' bargaining over wages (R. Br. at 2–12)[2]; 2) the Union's alleged bad faith during bargaining (R. Br. at 14–17); and 3) ALJ Locke's bias against Respondent, as demonstrated by his allegedly one-sided credibility determinations (R. Br. at 18–19).[3] As an initial matter, this Exception ignores Respondent's other, unremedied unfair labor practices—including its failure to pay substantial wage increases called for under the expired contract and its refusal to provide essential health insurance information. (ALJD at 49:39–41, 50:16–

[2] "R. Br." references are to Respondent's Exceptions.

[3] These Exceptions open with an extended (and largely uncited) discussion of Respondent's version of the parties' bargaining history, dating back to 2013. (R. Br. At 2–3; 7–8.) This foray into the parties' bargaining history is based on record evidence that is not before the Board in this case, and is the subject of factual findings made by ALJ Steckler in Case 18-CA-151245. These findings are already before the Board through a different set of Exceptions filed by Respondent in that matter. Respondent's *new* factual assertions represent a second, or perhaps even third, bite at the apple for Respondent regarding the parties' bargaining in Case 18-CA-151245, and should be disregarded by the Board. The proper avenue for addressing the factual findings of ALJ Steckler is the path that Respondent has *already* taken—through filing exceptions in that case.

19.)[4] It also ignores all of the additional conduct relied on by ALJ Locke in finding that Respondent engaged in surface bargaining—including Respondent's refusal to discuss wages unless the *Union* presents a new wage proposal. (*E.g.*, ALJD at 38:19–22, 39:20–24.) Rather than attempting to address the entirety of ALJ Locke's findings, Respondent hones in on his discussion regarding its wage proposal. Contrary to Respondent's assertions, however, its bargaining over wages provides ample evidence of bad faith.

In essence, the parties' bargaining over wages in this case boils down to a question whether Respondent has *remedied* the conduct found unlawful by ALJ Steckler in Case 18-CA-151245, or whether it has instead chosen to continue its unlawful course of action. ALJ Steckler, in Case 18-CA-151245, found that Respondent had bargained in bad faith over wages as of the December 2015 hearing in that matter by offering obscure and contradictory proposals. (Steckler ALJD at 21:4–10, 21–22.) The evidence in this case reveals that Respondent did nothing to remedy or clarify its unlawful bargaining over wages from the prior case. (*E.g.*, GCX 18 ("We start from the fact that the company has not budged on any of its wage proposals since making its last best and final offer, on March 24, 2015.").)[5] Indeed, Respondent confirms this fact in its Exceptions, stating that "the [wage] proposal was made on March 24, ***2015,*** and never altered except to update the spreadsheet, in 2016, to reflect the then-current roster of hotel employees." (R. Br. at 6.) What Respondent does not note, however, and what the record evidence makes clear, is that these updates occurred *only after Respondent had already unilaterally*

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[4] "ALJD" references are to the underlying decision of ALJ Locke in Case 18-CA-176369. References to the ALJD in Case 18-CA-151245 will be referenced as "Steckler ALJD."

[5] "Tr." references are to the transcript of the unfair labor practice hearing; "GCX" refers to exhibits entered at the hearing by the General Counsel; and "RX" refers to exhibits entered by Respondent.

implemented its wages proposal on May 16, 2016. (ALJD at 27:6–11; GCX 12; GCX 13; GCX 14.)

The clarity and details of a proposal matter, particularly on a subject as integral as wages. As the Board noted in *Anderson Enterprises,* "Negotiating the details on such important subjects as wages is at the heart of collective bargaining." 329 NLRB 760, 770 (1999). By refusing to clarify its wage proposal, Respondent prevented good-faith bargaining from occurring. Respondent's failure to even attempt to clarify its wage proposal *until* after it implemented is clear bad-faith bargaining. *Billion Motors,* 260 NLRB 745, 756 (1982), *enforced,* 700 F.2d 454 (8th Cir. 1983).

Rather than attempting to address its own unlawful conduct, Respondent points the finger at the Union, by repeatedly claiming that the Union was at fault for failing to discuss or address its wage proposal. (*E.g.*, R. Br. at 4.) This argument fails. The evidence in this case reveals that the Union has repeatedly attempted to discuss wages during bargaining. As addressed by ALJ Steckler's findings in Case 18-CA-151245 (which are *not* reviewable in the instant matter), the Union made repeated inquires during the parties' bargaining in that case regarding Respondent's wage proposal. (Steckler ALJD at 20:33–21:10.) This evidence further reveals that it was Respondent in *this case* who refused to allow discussion regarding wages. As ALJ Locke found, Respondent repeatedly told the Union, in violation of the Act, that it was unwilling to discuss *its* wage proposal unless the Union presented a new (and acceptable) proposal. (ALJD at 40:17–19.) Further, it is not the Union's job to remedy Respondent's unlawful bargaining on wages—it is Respondent's job to *fix* that position. The Union can do nothing to remedy Respondent's unlawful conduct; only Respondent can do this.

Respondent attempts to confuse the bargaining surrounding its wage proposal by claiming that, contrary to the evidence in this case, its wage proposal was clarified through a spreadsheet that was offered during the course of the parties' bargaining in 2015. The position, however, is contradicted by ALJ Steckler's findings in Case 18-CA-151245, the evidence in this case, and even Respondent's Exceptions Brief to the Board. First, ALJ Steckler fully considered this spreadsheet in her decision, and found that it did not otherwise clarify or make lawful Respondent's bargaining over wages in 2015. ALJ Steckler's finding on this point rests on the fact that, along with this spreadsheet, Respondent also offered *thousands* of pages of pie charts as part of its wage offer, which were inconsistent and inaccurate. This confusing milieu is the reason that ALJ Steckler found that Respondent bargained in bad faith over this topic. (Steckler ALJD at 20:33–21:10.) Second, the evidence in this case reveals that these pie charts remained on the table, as part of Respondent's wage proposal, and that Respondent did nothing to rebut this confusion.[6] (*E.g.*, Tr. 229–230, 281–83.) Third, Respondent's briefing in this case makes clear that the pie charts remain part of its wage proposal. As Respondent writes:

> Respondent's wage proposal was presented employee by employee. ***Two*** formats were utilized: (i) a spreadsheet setting forth clearly the wage rate for each employee, for each of the five years of the proposed contract; and (ii) individual pie charts reflecting the wage rates *plus* all benefits for each employee for the proposed five-year term. (R. Br. at 2–3.)

[6] ALJ Locke's finding, that the Respondent's wage proposal was represented by this 2015 spreadsheet in "crisp clarity," is unsupported by the record evidence in this case and is the subject of Cross-Exceptions filed by Counsel. As even Respondent's own Exceptions make clear, the confusing pie charts remain a part of its current wage proposal. (R. Br. at 3–4.)

In reality, only two things are clear about Respondent's wage proposal—that it remained confusing during the parties bargaining in 2016, and that Respondent did nothing to clarify this confusion.

Moreover, the record evidence in this case fully supports ALJ Locke's conclusion that *Respondent's* actions precluded meaningful discussions regarding its wage proposal. At the parties first bargaining session in this case in February 2016, Respondent's then-lead negotiator, Michael Henry, told the Union representatives that he did not have authority to negotiate. (Tr. 59; GCX 3 at 3 (Henry: "The ppl I need to talk to are not available today").) At the parties' second bargaining session in June 2016, Respondent's new lead negotiator, attorney Karl Terrell, told the Union representatives that the parties were not there to discuss wages. (Tr. 72, 186; GCX 3 at 5; GCX 26 at 1.) As such, there was no opportunity to engage in meaningful bargaining regarding this topic because of Respondent's actions. Indeed, ALJ Locke found that Respondent's undisputed bargaining posture on wages—specifically that it was unwilling to discuss *its* wage proposal until the *Union* presented a new proposal—was strong evidence of bad faith. (ALJD at 38:19–22; GCX 6; GCX 7; GCX 8.)[7] As such, ALJ Locke's conclusion—that Respondent did not allow for sufficient discussion regarding its wage proposal—is fully supported by the record evidence in this case.

Respondent next attempts to claim that the Union's bad faith, specifically its alleged refusal to meet in the spring of 2016, excuses any and all surface bargaining by

[7] Throughout these emails, there is also no evidence that Respondent ever clarified that the spreadsheet, not the pie charts, represented its wage proposal. Despite having ample opportunity to do so, Respondent has simply refused to clarify the ambiguity regarding its wage proposal. Maintaining this confusion precluded any meaningful bargaining on this critically important issue, and is strong evidence of Respondent's bad faith bargaining regarding wages.

Respondent. In support of this claim, Respondent relies primarily on a number of irrelevant outside cases. (R. Br. at 16.) Respondent also relies on the Board's decision in *Paramount Liquor Co.*, 307 NLRB 676 (1992), which it claims "is almost directly on point here." (R. Br. at 15.) The facts of that case, however, are clearly distinguishable from the instant matter. In *Paramount Liquor*, there was no dispute that the employer had bargained in good faith and reached a lawful *initial* impasse. The case rather focused on whether the Employer could lawfully implement subsequent unilateral changes, *after the union failed to respond to numerous requests to bargain over a three month period of time.* Here, by contrast, Respondent has committed *numerous* unfair labor practices, including a failure to pay wage increases and a refusal to provide essential health insurance information that it is not even disputing before the Board. Moreover, even assuming that Respondent *was* bargaining in good faith, the Union's delay in responding to its request to bargain amounted to, at most, a little over a month. Finally, the Board in *Paramount Liquor* was dealing with the issue of whether the employer had a lawful right to implement, not whether the employer had engaged in overall surface bargaining. *Id.* at 676, n.1.

The Board recognizes that, in certain circumstances, a union's bad faith can excuse an employer's obligation to bargain. The Board, however, has recognized that this exception to the duty to bargain in good faith is narrow. *See, e.g., Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); *EIS Brake Parts*, 331 NLRB No. 195, slip op. at 47 (2000) In cases where the Board has allowed an employer to implement due to union misconduct, the delay has been exceptional, generally rising to the level of a failure to even meet. *Compare Southwestern Portland Cement Co.*, 289 NLRB 1264, 1272–77

(1988) (employer privileged to implement after union delayed bargaining for over one year); *M & M Contractors*, 262 NLRB 1472, 1476–78 (1982) (union refused to bargain for seven months), *AAA Motor Lines, Inc.*, 215 NLRB 793, 793–94 (1974) (union intentionally delayed bargaining for over 2.5 months), *with, e.g., Oak Hill*, 360 NLRB No. 55, slip op. at 81 (Feb. 27, 2014), *Kingsbridge Heights Rehabilitation & Care Center*, 353 NLRB 631, 640–41 (2008) (two member decision), *enforced*, 358 F. App'x 267 (2d Cir. 2009); *Pratt Industries, Inc.*, 358 NLRB 414, 420–21 (2012) (all finding that Union's delay did not rise to the level of allowing employer to implement). These cases, read as a whole, do not support Respondent's position in this case.

As clearly demonstrated by the parties' communications in this case, the Union's delay, at most, extended over one month. At no point did the Union actually *refuse* to bargain—it simply delayed in responding to Respondent's communications. This delay, moreover, occurred at time when Respondent was bargaining in bad faith, and had already committed numerous, unremedied unfair labor practices away from the bargaining table. The Union's delay in responding to these communications also must take into account *Respondent's* posture in bargaining—including the fact that Respondent had not brought someone with authority to negotiate to the parties' February 2016 bargaining session. These factors all explain the Union's delay in responding to Respondent's offer to negotiate, which in any event did not rise to the level required to affect *Respondent's* duty to bargain in good faith.

Respondent's final attack on the ALJ's surface bargaining finding is also its most feeble. Respondent claims that the ALJ's findings should be disregarded because of the bias he showed towards witnesses who testified on behalf of the General Counsel.

According to Respondent, this bias is demonstrated by the fact that ALJ Locke "uniformly credited" Counsel's witnesses over Respondent's witnesses. (R. Br. at 18–19.) The underlying basis for this claimed bias, however, is simply untrue. In fact, ALJ Locke made several adverse credibility determinations against witnesses who testified on behalf of Counsel. Respondent even *cites to these findings earlier in its brief to the Board.* (R. Br. at 5.) Accordingly, the Board should summarily dismiss Respondent's claim of bias.

Respondent's Exception Regarding Bill Dwyer's Threat Ignores Established Board Case Law

Respondent does *not* except to ALJ Locke's finding of fact regarding this statement. ALJ Locke found that Respondent's negotiator Bill Dwyer told bargaining unit employees, during negotiations on June 7, that he couldn't believe that the employees had selected these union negotiators, and that these negotiators "can't get you anything and you should just leave the room." (ALJD 13:5–7.) ALJ Locke then engaged in a thoughtful analysis of the objective circumstances surrounding this threat. He took into account not only Respondent's history of unfair labor practices, but also that Dwyer was a high level manager for Respondent designated to represent its position at the bargaining table. (ALJD at 14:5–15:22.) In considering these circumstances, along with Dwyer's actual statements, ALJ Locke correctly found that these statements "signify a present and continuing intention to disregard [Respondent's] duty to bargain in good faith." (ALJD at 15:9–10.)

ALJ Locke's legal conclusion follows Board precedent. The Board has long held that statements to employees that the Union was unable to benefit employees, and that employees would be better off without a union, violate the Act. *Regency House of*

Wallingford, Inc., 356 NLRB at 567 (statements that union was harming employees and that the employees would be better off without the union); *Cherry Hill Convalescent Center*, 309 NLRB 518, 521 (1992) (supervisor's statement that union was attempting to cut benefits, that facility was better off before union came in, and that employees would be better off without a union violated the Act). Dwyer's statements clearly fall within this line of precedent.

CONCLUSION

For the reasons discussed above, the Board should reject Respondent's Exceptions and find that Respondent engaged in surface bargaining and unlawfully threatened bargaining unit employees.

Dated: August 8, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Answering Brief on behalf of the General Counsel was filed via e-filing and served on August 8, 2017 by email on the parties whose names and addresses appear below.

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