

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

DROCK GAMING, LLC d/b/a THE D CASINO

Case No. 28-CA-219756

Respondent,

-and-

XSTAL CAMPBELL, an Individual,

Charging Party.

**RESPONDENT DROCK GAMING, LLC d/b/a THE D CASINO'S
MOTION TO ADJOURN HEARING DATE**

NOW COMES Respondent, DROCK GAMING, LLC d/b/a THE D CASINO ("Drock Gaming"), by and through its counsel, Dickinson Wright PLLC, and for its Motion to Adjourn Hearing Date pursuant to 29 CFR § 102.16(a)(5) states as follows:

1. On May 14, 2018, Drock Gaming ended its employment relationship with Charging Party, Xstal Campbell ("Campbell"), for failure to attend work and failure to phone in advance of that absence ("no-call no-show").

2. Campbell's Union, Unite Here Bartenders' and Beverage Dispensers' Union Local 165 (the "Labor Organization"), amended a previously-filed grievance and thus challenges Campbell's discharge. That grievance remains pending.

3. Campbell filed an Unfair Labor Practice Charge and an Amended Charge, challenging her discharge and related matters.

4. The Region issued a Complaint and Notice of Hearing, setting that proceeding for October 10, 2018.

5. The factual dispute in this matter focuses upon Campbell's interactions with Respondent's Employee Relations Manager, Brian Swartwood. *See specifically*, Complaint ¶ 5(e).

6. Further, Mr. Swartwood is the senior human resources professional employed by Respondent.

7. Mr. Swartwood's testimony is, therefore, pivotal to Drock Gaming's case, and his testimony will ultimately be critical to the fair adjudication of this matter.

8. Mr. Swartwood is the designated representative for the Respondent in an expedited grievance that is scheduled for the same date as the Hearing Date set by the Region for this Unfair Practice Hearing, specifically, October 10, 2018. *See*, June 18, 2018 letter from McCracken *et al* law firm to Arbitrator Jay C. Fogelberg, confirming Mr. Swartwood as the designated arbitral representative of Respondent The D (copy attached as **Exhibit A**), and email from Brian Swartwood to Jay C. Fogelberg and other individuals, dated June 28, 2018, stating, "[t]he union and company have agreed to October 10, 2018," as an arbitration date (copy attached as **Exhibit B**).

9. The relevant grievance procedure involving the Labor Organization and Respondent which is the source of the scheduling conflict, ends in a summary, expedited, arbitration procedure ("Expedited Arbitration"). *See*, Excerpt from collective bargaining agreement between Respondent and the Labor organization, Article 21, copy attached as **Exhibit C**.

10. Attorneys representing either party are *not* allowed to participate in Expedited Arbitration. *See*, **Exh C** at Sec 21.03(4). Accordingly, Mr. Swartwood's attendance at said Expedited Arbitration proceeding is essential. Moreover, and as part

of the process of expediting their dispute resolution process, the parties have agreed that Expedited Arbitration hearings, once scheduled, will only be rescheduled for reasons that constitute an unavoidable conflict or unavoidable inability of a representative to appear.

11. The difficulty in obtaining arbitration dates, which is one reason the parties make all possible attempts to avoid rescheduling of such proceedings, is shown in the specific conflicting arbitration matter, which involves a discharge that occurred more than *two years* prior to the date of the instant Motion, on August 18, 2016 (*sic*, 2016). The Labor Organization submitted its Demand for Arbitration in that conflicting arbitration matter by letter dated December 6, 2016 (*sic*, 2016), copy attached as **Exhibit D**. The first assigned date for the arbitration is, as noted, October 10, 2018. **See, Exhibit B.**

12. Mr. Swartwood also is a critical witness in the conflicting Expedited Arbitration, due to his status as the Employer's Employee Relations Manager.

13. Due to the foregoing conflict in the schedule of Mr. Swartwood, an essential witness, Respondent requests an adjournment of the scheduled hearing in the instant matter.

14. As Campbell no longer is an employee of Respondent, counsel have not inquired if she objects to the relief requested.

15. 29 CFR § 102.16(a)(5) provides that "[u]pon his own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may extend the date of such hearing ... [w]here more than 21 days remain before the scheduled hearing date."

16. If Respondent's Motion is "granted, the Regional Director ... retains the authority to order a new hearing date and the responsibility to make the necessary arrangements for conducting the hearing." 29 CFR § 102.16(b).

17. Mr. Swartwood also is unavailable on October 11 and 18, and October 22-26, 2018. Trial counsel is available all other dates between October 12 and October 31, 2018.

18. In this instance, due to the unavailability of Mr. Swartwood, who is an individual critical to the preparation and presentation of the defense of Respondent Drock Gaming, and whose testimony is vital to the ultimate fair resolution of this matter, Drock Gaming respectfully requests a brief adjournment of this hearing to a date on or after October 12, 2018, but not October 18, or October 22-26, 2018.

WHEREFORE, Respondent requests that the hearing in this matter be adjourned to a date on or after October 12, but not October 18 or October 22-26, 2018.

Respectfully submitted,

/s/ David J. Houston

William M. Thacker and
David J. Houston,
Counsel for Respondent Drock Gaming
Dickinson Wright PLLC
215 S. Washington Sq, Suite 200
Lansing, MI 48933
Ph: 517.487.4777

Dated at Lansing, Michigan, this 27th day of August, 2018.

EXHIBIT A

McCRACKEN, STEMERMAN & HOLSBERRY, LLP

Counselors and Attorneys at Law

June 18, 2018

Via E-mail, Only.

San Francisco

595 Market Street, Suite 800
San Francisco, California 94105
415.597.7200
Fax 415.597.7201

Arbitrator Jay C. Fogelberg
10970 Spoon Ridge
Eden Prairie, MN 55347

*Re: Culinary Workers Union Local 226 and The D Las Vegas
Involving Michael Yonter*

Dear Mr. Fogelberg:

The parties with reference to the above-referenced matter have agreed to request your services as arbitrator under the expedited arbitration provision in the parties Collective Bargaining Agreement. If you are willing to serve as arbitrator, we would appreciate it if you would furnish the Union and the Company with your available dates. Please also include your cancellation policy.

The D Las Vegas will be represented by:

Brian Swartwood
Human Resources Director
301 E. Fremont Street
Las Vegas, NV 89101
Email: brian.swartwood@thed.com

The Union will be represented by:

Raymond Saldana
Culinary Workers Union Local 226
1630 S. Commerce Street
Las Vegas, NV 89102
Email: RSaldana@culinaryunion226.org

Please note that the expedited arbitration provision requires that:

- No legal counsel shall be used.
- No court reporter will be used.
- No briefs may be submitted but the case may be argued orally after evidence is taken.

Las Vegas

1630 S. Commerce Street, Suite A-1
Las Vegas, Nevada 89102
702.386.5107
Fax 702.386.9848

McCRACKEN, STEMERMAN & HOLSBERRY, LLP

Jay C. Fogelberg
June 18, 2018
Page 2

- The arbitration proceedings must be continuous to a conclusion. A day of hearing shall begin at 9:00 a.m. and end no earlier than 5:00 p.m. unless the hearing is finished sooner.
- The arbitrator must render a bench decision immediately following the close of the hearing followed by a concise written decision within seven (7) calendar days of the close of the hearing.
- Each party will bear its own costs and will share equally the fees and expenses of the arbitrator.

Thank you for your courtesies with this matter.

Very truly yours,


Marcie Boyle, Legal Assistant

cc: Brian Swartwood
William Thacker
Jim Bonaventure
Norbert Kubiak
Raymond Saldana

EXHIBIT B

-----Original Message-----

From: Brian Swartwood <brian.swartwood@thed.com>

To: Jay C. Fogelberg <jcfogelberg@aol.com>; RSaldana <RSaldana@culinaryunion226.org>; com <com@aol.com>

Cc: mboyle <mboyle@msh.law>; William M. Thacker <WThacker@dickinson-wright.com>

Sent: Thu, Jun 28, 2018 10:37 am

Subject: RE: Culinary Workers Union Local 226 & The D Las Vegas; Michael Yonter

Arbitrator Fogelberg:

Thank you for the quick response. The union and company have agreed to October 10, 2018. A follow up email with the meeting room will be sent to all parties prior to our meeting, but we will meet at the D Casino, 301 Fremont St. Las Vegas, NV. 89101.

My telephone number is: 702 388 2448

Raymond Saldana's telephone number is: 702 387 7043

In addition to the matter of Mr. Yonter's termination, the union filing for this arbitration are way out of contractual time lines, there was no waiving of time by the company. Would you like to discuss this point prior to meeting or the day of our meeting?

Thank you again.



Brian Swartwood

Employee Relations Manager/Risk Manager

ph: 702-388-2448

702-388-2485

[facebook.com/theDlasvegas](https://www.facebook.com/theDlasvegas)

301 Fremont St | Las Vegas, NV 89101 | www.theD.com

From: Jay C. Fogelberg <jcfogelberg@aol.com>

Sent: Wednesday, June 27, 2018 9:46 AM

To: RSaldana@culinaryunion226.org; Brian Swartwood <brian.swartwood@thed.com>; com@aol.com

Cc: mboyle@msh.law

Subject: Culinary Workers Union Local 226 & The D Las Vegas; Michael Yonter

Dear Representatives,

Thank you for selecting me to serve as the arbitrator in connection with this matter. Please be advised that currently, I am available for a hearing on one of the following dates:

August 29, September 11, or October 10, 2018

After the parties have **mutually agreed** to the date, kindly notify me at your earliest convenience. **Please note that these days are being offered on a first come/first served basis**, and further that my standard billing policy calls for one day's

fee to be charged to the parties for *each* day reserved for the hearing if canceled or postponed within sixty (60) calendar days of the confirmed date.

Jay C. Fogelberg, Arbitrator

Ph:952.926.5505 Fax: 952.922.4404

Confidentiality Notice: This e-mail may contain confidential and privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive from the recipient), please contact the sender by reply e-mail and delete all copies of the message.

EXHIBIT C

ARTICLE 21: GRIEVANCES AND ARBITRATION

21.01. Definition.

For purposes of this Agreement, a grievance is a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of this Agreement. Any violation or alleged violation of Section 22.01 or 22.03 shall not be subject to the Grievance and Arbitration Procedure.

21.02. Time Limit for Filing Grievances.

(a) Before a grievance is filed by an employee the employer must follow the procedures for Step One in Section 21.03. No grievance shall be entertained or processed unless it is received in writing by either party within fifteen (15) work days after occurrence of the event giving rise to the grievance or after the aggrieved party hereto acquires knowledge of the occurrence of such event, whichever is later; provided that grievances involving discharge cases shall be filed in writing fifteen (15) work days after the day of discharge. The written grievance shall set forth the provision(s) of this Agreement alleged to have been violated, and every effort will be made to set forth all of the known facts allegedly constituting the violation. At the time it submits a grievance to the Employer, the Union shall furnish the Employer with copies of any written statements,

reports or documents relied on by the Union or the grievant to support the grievance (but not including the employee's written grievance submitted to the Union). Anything herein to the contrary notwithstanding, it is understood and agreed that the Union shall have the right to grieve live warning notices at the time of subsequent discharge or suspension unless the case involves witnesses. At the time the warning notice is issued, the Employer shall indicate on the notices whether witnesses are involved.

(b) As used in this Article, the term "workdays" means the days Monday through Friday, inclusive, but excluding any holiday set forth in Section 12.01.

21.03. Procedure for Adjusting Grievances.

All grievances covered by this Article shall be handled exclusively in the following manner:

(1) **STEP ONE.**

It is mutually agreed between the parties that the speedy resolution of grievances is in the best interests of the employees and the Employer. For that reason, the parties have created the following grievance procedure which requires the employee to first talk to their supervisor when questions, problems, complaints or disputes arise, and encourages the resolution of grievances at the lowest possible levels and provides for a quick and fair resolution of problems and disputes.

The employee shall, within three (3) working days of the accident or circumstance giving rise to the dispute, take the matter up with his/her immediate supervisor. The employee has the full right and involvement of the Shop Steward in this step. The supervisor involved in the Step 1 meeting shall respond within three (3) days of the Step 1 meeting. Settlements reached at this level shall be considered non-precedent, unless the Employer and the Union Representative agree that the settlement shall be reduced to writing and may be used as a precedent in the future.

(2) **BOARD OF ADJUSTMENT.**

Any grievances not resolved at the Step One process shall be reduced to writing and scheduled for hearing by a Board of Adjustment to be held within 30 calendar days of the filing of the grievance. Absent a written agreement to extend this deadline, any grievance not heard within 30 days of filing shall be deemed waived. The Board of Adjustment shall be comprised of not more than three (3) representatives of the Employer and three (3) representatives of the Union. For the purpose of attempting to resolve grievances prior to arbitration, the parties, at any meeting prior to the Board of Adjustment hearing and at that hearing, shall make full disclosure to each other of all facts and evidence then known to them which bear on the grievance.

(3) **ARBITRATION.**

Any grievance not settled by the Board of Adjustment may be referred to arbitration by written notice from the party who filed the grievance within ten (10) working days of the Board of Adjustment. Representatives of the Employer and Union shall attempt to select an arbitrator, but if they are unable to do so, the arbitrator shall be chosen by lot from the following panel except that either party may strike two (2) arbitrators from the panel for a particular arbitration before drawing by lot:

Gary L. Axon

Matthew Goldberg

Joe Henderson
Michael Rappaport
Frank Silver
Mei Bickner
Wilma Rader

Eric Lindauer
Geraldine Randall
Jay Fogelberg
William Riker

In non-expedited arbitration, each party will bear its own costs and will share equally the fees and expenses of the arbitration.

(4) EXPEDITED ARBITRATION.

All grievances involving the written warning, suspension and discharge of any employee covered by this Agreement referred to arbitration, except for those involving Sexual Harassment discharge, shall be referred to Expedited Arbitration in accordance with the paragraph below. All other (non-discharge, non-suspension or non-written warning) unresolved grievances may be referred to Expedited Arbitration within the same time period upon mutual agreement of the parties. Otherwise, such other (non-discharge, non-suspension or non-written warning) grievances may be referred to non-expedited arbitration within the same time period in Section 21.03 (3).

In expedited arbitrations under this subsection, no legal counsel shall be used. No court reporter will be used. No briefs may be submitted but the case may be argued orally after evidence is taken. The arbitration proceedings must be continuous to a conclusion. A day of hearing shall begin at 9:00 a.m. and end no earlier than 5:00 p.m. unless the hearing is finished sooner. The arbitrator must render a bench decision immediately following the close of the hearing followed by a concise written decision within seven (7) calendar days of the close of the hearing. Each party will bear its own costs and will share equally the fees and expenses of the arbitrator.

21.04. Extension of Time Limits.

The time limits and other provisions set forth in this Article 21 may be extended or waived by mutual agreement of the parties.

EXHIBIT D

CULINARY WORKERS

UNION, LOCAL 226



Affiliated with UNITE HERE INTERNATIONAL UNION

December 6, 2016

BY FAX

Mr. Brian Swartwood
Employee Relations/Risk Management
The D Las Vegas
301 E. Fremont St.
Las Vegas, NV 89101-5600

Re: Melih Yonter, Bell Person
Suspension Pending Investigation August 16, 2016
Resulting in a Termination on August 18, 2016

Dear Mr. Swartwood:

Inasmuch as the grievance concerning the above has not been resolved, you are hereby notified the Union desires to submit the issue to expedited arbitration in accordance with the provisions of Article 21, Section 21.03(3) of our Collective Bargaining Agreement.

We are hereby instructing our attorney, Richard G. McCracken of McCracken, Stemerman & Holsberry, 1630 South Commerce Street, Las Vegas, Nevada 89102, to select an arbitrator from the panel in the Collective Bargaining Agreement. Please have your representative contact our attorney for the purpose of selecting an arbitrator from the list.

Sincerely yours,

Jim Bonaventure
Administrative Director
Legal Affairs

JB/mg

Copies to: Norbert Kubiak
Raymond Saldana
Files