UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of: CLUB QUARTERS HOTEL TIMES SQUARE-MIDTOWN and BROTHERHOOD OF AMALGAMATED TRADES, LOCAL 514	Case Nos. 02-RC-232157 02-RC-237044

EMPLOYER'S REQUEST FOR REVIEW; *REQUEST FOR EXPEDITED CONSIDERATION AND TO STAY PROCESSING OF PETITION*

Pursuant to Section 102.67(c), and Sections 102.67(d)(1), (2), (3), and (4) of the Board's Rules and Regulations, the Club Quarters Times Square - Midtown Hotel ("Hotel" or "Employer") requests review of the Regional Director's decision granting the withdrawal of the petition for election filed by Brotherhood of Amalgamated Trades, Local 514 ("Petitioner" or "Union") and his decision to process a newly filed petition by the Union. Following the Board's remand to the Regional Director of Region 2 (the "Regional Director") on February 12, 2019 in Case 02-RC-232157, the Union – on the evening before the hearing on remanded issues – indicated its intent to amend the petition in that case to include only employees in the Hotel's Housekeeping department. Ultimately, the Regional Director permitted the Union to withdraw that petition and to re-file a new petition seeking to represent only Housekeeping employees. That case was docketed as Case 02-RC-237044. Region 2 (the "Region") has agreed to process that petition, as evidenced by its acceptance of it and assignment of a case number, 02-RC-237044. The Region's doing so was in error because an election was held on January 2, 2019

among Hotel employees (including the now-petitioned-for Housekeeping employees), and the Regional Director ignored the Board's mandate to determine whether the group that voted on that date was an appropriate bargaining unit, and in doing so has allowed the Union to circumvent the Board's one-year election bar and to refile a petition with no prejudice.

Pursuant to Sections 102.67(j)(i) and (ii) of the Board's Rules and Regulations, the Hotel also respectfully requests that the Board consider its Request for Review on an expedited basis and that it stay the processing of the petition in Case 02-RC- 237044. The Board's immediate intervention is warranted, in the form of an order that the petition in Case 02-RC-237044 be stayed pending the resolution of issues raised in Case 02-RC-232157. The Regional Director disregarded the Board's February 12 mandate to hold a hearing on the issues of the inclusion of the Hotel's Restaurant employees and its Front Desk employees in the petitioned-for unit. Instead, the Union, having evidently predicted it would lose an election in a wall-to-wall unit, has been given the opportunity to have a second bite at the apple to pursue a subset of the group of employees who voted in the election in case 02-RC-232157 on January 2, 2019.

A second election after balloting occurred in the first election but before issues raised in that case have been resolved would contravene Section 9(c)(3) of the Act, which does not permit two elections among the same employees within a twelve-month period. If the Region is permitted to process the petition and hold a second election, the purposes of the Act – designed to foster industrial stability and to avoid a proliferation of Board elections – will be injured. Moreover, employees' free choice to select or not to select a labor organization will be disturbed, as the petitioned-for employees voted in an election just two months before the petition in Case 02-RC-237044 was filed. Additionally, the Employer will be seriously prejudiced by having to go through the expense of a hearing on issues that should not be litigated, as well as a second

campaign and election in a span of just two to three months. Lastly, the processing of the new petition also will result in an inappropriate and unnecessary expenditure of agency resources. Immediate intervention by the Board is not only appropriate but necessary.

I. Factual Background

A. The First Petition.

On December 6, 2018, the Union filed a petition to represent a bargaining unit consisting of the Hotel's Housekeeping Department and Restaurant, but excluding the Front Desk. The Employer filed a Statement of Position with the Region taking the position that the Front Desk should be included with Housekeeping in a unit consisting of "rooms" employees, but excluding the Restaurant. On December 18, 2018, The Regional Director opened a hearing.

In addition to claiming that the Front Desk lacked a community of interest, the Union claimed at the hearing that the employees working at the Front Desk were supervisors within the meaning of Section 2(11) of the Act. The Regional Director stated that those issues could be resolved in a post-election proceeding, if necessary. The Hotel made an offer of proof at the hearing to show that the Restaurant lacked a community of interest with the rest of the Hotel employees. The Regional Director rejected the offer of proof and declined to take evidence on the issue. Two days after the hearing, on December 20, 2018, the Regional Director issued a Decision and Direction of Election ("DDE") finding that a "wall to wall" unit was presumptively relevant and purporting to order an election in such a unit, but at the same time stating that the Front Desk employees were to vote subject to challenge, and ordering an election on January 2. On December 24, 2018, the Employer filed a Request for Review with the Board challenging the Regional Director's refusal to take evidence at the December 18 hearing.

Shortly before the election, the Union filed a series of unfair labor practice charges and asked the Regional Director to block the election. That request was denied; instead, the ballots were impounded after the election went forward on January 2. The ballots remain impounded, as the Region has not yet made a determination regarding the charges.

B. The Board's February 12, 2019 Remand.

On February 12, 2019, in a unanimous panel decision, the Board remanded the DDE and ordered the Regional Director to "conduct a hearing regarding the appropriateness ***of the petitioned-for unit***, including, as necessary ***the supervisory status of the Employer's Front Desk Attendants*** and whether ***the petitioned for unit is appropriate with the inclusion of the restaurant employees and the exclusion of the Front Desk Attendants***." (emphasis added) (Decision of Review and Order Remanding at 6 (NLRB Feb. 12, 2019) (the "Decision"). The Decision was specific in its directive to the Regional Director. In particular, the Decision instructed him to conduct a hearing regarding the appropriateness of the union *that had been petitioned for by the Union and which has already voted*, not another potential unit in which the Union now believes it can win an election. What the Regional Director should have done, at the very least, before permitting the Union to withdraw and re-file its petition, was follow the Board's directive and take evidence in order to determine whether the wall-to-wall unit he ordered, and which has already voted, was appropriate.

Shortly after receiving the Decision and notice that the Regional Director was setting a hearing for the issues remanded to him, and upon further reflection and analysis of Board law, the Employer contacted the Board agent and counsel for the Petitioner via email on February 14, 2019 to put them on notice that the Employer did not intend to contest the inclusion of the Restaurant employees. That left the sole issue to be litigated before the Regional Director of

whether the inclusion of the Front Desk employees was appropriate, with the determination hinging on (1) community of interest (or lack thereof) and (2) the status of those employees, *vel non*, as Section 2(11) supervisors.

C. The Regional Director Disregards the Board's Directive and Permits the Union to Withdraw the Petition Without Prejudice and Refile It.

The Regional Director ultimately did not comply with the Board's directive. A hearing was scheduled for February 28, 2019. At 6:51 pm on February 27, the night before the hearing, the Union's counsel sent an email to counsel for the Employer and the Board agent assigned to the processing of the petition stating the Union's intent to amend the petition the morning of the hearing to include only Housekeeping employees. When the parties were present on the morning of the hearing, the Hearing Officer, off the record, requested the Employer's position regarding the Union's attempt to amend the petition to alter the unit scope. The undersigned advised the Hearing Officer that the Employer was opposed to the Union's attempt to do so. The undersigned gave two reasons to the Hearing Officer for the Employer's opposition.

First, Section 9(c)(3) of the Act prohibits an election among a group, or subdivision thereof, that has voted in a valid Board election during the prior twelve months. The only way that a second election could potentially be held[1] would be if the first was not valid. In the Employer's view, this depended on (1) consideration of the two (2) issues noted in the Board's February 12, 2019 remand and (2) the pending unfair labor practice charges (which ultimately may or may not result in an order by an ALJ that a second election be held). Second, the

[1] A second election in this case based on the issues raised in the Employer's initial Request for Review is a virtual impossibility. The Employer's withdrawal of its opposition to the inclusion of Restaurant employees meant that there were no employees whose eligibility was contested whose ballots were comingled with other employees' ballots. Even if the Union did prevail on its argument regarding the Front Desk employees, their ballots are all contained in challenge envelopes and could be segregated and not counted.

Employer took the position that the purpose of the February 28 hearing was to take evidence regarding the ***petitioned-for unit***, as clearly stated in the Board's February 12, 2019, decision and remand. Permitting the Union to amend the petition to include only Housekeeping employees would automatically result in a second election (because Restaurant employees voted without challenge, and their ballots were commingled with Housekeeping employees' ballots), which was not contemplated by the Board's remand to the Regional Director. As noted above, the Regional Director's instruction was to consider whether the bargaining unit that he ordered and which voted on January 2, 2019 was an appropriate unit. If so, then the ballots should be counted. If not, then a second election would have to be held. However, permitting the Union to alter the unit scope and automatically obtain a second election was not appropriate under the circumstances.

The parties were advised that the Regional Director was of the opinion that, although under Section 9(c)(3) of the Act the one-year election bar dated back to the casting of ballots, there could not be a "valid" election in this matter because there was not yet a certification; in support of this proposition, the Hearing Officer incorrectly relied upon an inapposite case, *Retail Store Employees' Union, Local 692*, 134 NLRB 686 (1961). The Regional Director then went a step further and suggested, through the Hearing Officer, that the Petitioner also had the option of withdrawing the petition and filing a new petition to represent Housekeeping employees. The Hearing Officer assured the Union that its new petition would be processed. With this assurance in hand, the Union orally requested withdrawal of the petition. Later that same day, February 28, 2019, the Region issued a brief, two-sentence order directing "that the Petitioner's request to withdraw the petition is approved" and that the "Notice of Representation Hearing previously issued in this matter is withdrawn." (Order Approving Withdrawal Request and Withdrawing

Notice of Representation Hearing (Regional Director Order Feb. 28, 2019) (the "RD Order"). The record was never opened on February 28, 2019 and the hearing did not go forward. The Employer filed a request for reconsideration with the Regional Director on February 29, 2019. The Employer expects that its request will be denied by the close of business today, because as noted below the Region has accepted a new petition and is processing it.

The Union filed a new petition on March 5, 2019, in a case docketed as 02-RC-237044. The Employer has been advised that a hearing will be set for March 13, 2019.

II. Argument and Authorities

The failure to hold a hearing to determine whether a valid election occurred here (and, if so, to proceed with the counting of the votes) not only is contrary to the Board's Decision, it also violates the core purposes of the National Labor Relations Act and contravenes Board law.

A. The Regional Director's Acceptance of a New Petition Violates Employees' Section 7 rights as well as Section 9(c)(3) of the Act.

Employees have a right under Section 7 of the Act to join or form a union, or to refrain from doing so. The Regional Director held an election on January 2, 2019. Hotel employees, including Housekeeping employees now petitioned-for by the Union, voted in that election. The fitful approach employed by the Region would utterly discount the expression of employee free choice under Section 7 of the Act as expressed by the ballots cast on January 2, 2019.

The RD Order and the Region's subsequent processing of a new petition also violate Section 9(c)(3) of the Act, which directs that "[n]o election shall be directed in any bargaining unit of subdivision within which in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3). The Board has long held that the twelve-month "election bar" imposed by Section 9(c)(3) of the Act begins to run from the date of *balloting*. *Mallinckrodt Chemical Works*, 84 NLRB 291, 292 (1949). In *Mallinckrodt*, the Board rejected

the employer's and an intervening union's contention that the one-year election bar began to run from "the date on which the Board finally determines the results of the balloting." 84 NLRB at 292. Rather, the Board concluded, "the more reasonable construction of [Section 9(c)(3)] is that a second ballot shall not be conducted within 12 months from the date of the earlier ballot…" *Id.*

Board law is clear that Section 9(c)(3) applies after an election even if the result of the vote is not yet known. In *In re E Center*, 337 NLRB 983 (2002), an election was conducted in which there were determinative challenged ballots. Before the challenges were resolved – which, of course, meant that no certification had issued – the union requested to withdraw the petition with prejudice. The request was granted. The employer filed a request for review from the decision to grant the withdrawal request. The Board rejected the employer's challenge, but noted the following:

> The Act… does not permit circumvention of the election bar rule contained in Section 9(c)(3). Regardless of when the Petitioner, or any other labor organization, may file a subsequent election petition, Section 9(c)(3) mandates that "no election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

337 NLRB at 983.

In another case, *Baltimore Gas & Electric Company*, 330 NLRB 3 (1999), an election was held in October 1998, after which there were both pending objections and determinative challenges. The election result remained unknown one year later in October 1999, at which time the union requested withdrawal of the initial petition and re-filed new petitions covering the same employees. 330 NLRB at 3. The Board held that the regional director had not erred in permitting the withdrawal, "*since a new election would not be held within 12 months* of the previous, October 1998 election." *Id.* (emphasis added). The Board went on to note that the "obvious purpose of the 12-month requirement is to ensure that the policies behind Section

9(c)(3) of the Act are honored," and that those policies were not injured in the case before it because the twelve-month period already had elapsed at the time of the withdrawal request and filing of new petitions. *Id*. Unquestionably, the Board would have reached a different result if faced with a union attempting to gain a new election within twelve months of the original balloting, even though the results of the initial vote remained in question.

In re E Center and *Baltimore Gas & Electric* establish that the *balloting* is the important event that bars a new election for one year. This is, of course, not immutable; in the event of meritorious challenges, a finding that an election was ordered in an inappropriate unit, or meritorious unfair labor practices, a second election may well be conducted. However, the Regional Director erred in concluding that a second election could be held here, where the outcome of the first election is unknown and no determination has been made as to the validity of the first election. That finding is a necessary predicate to there being a re-run election.

The Regional Director mistakenly concluded that the election bar only is triggered if, at some point, there is a certification of an election. Here, he mistakenly read *Retail Store Employees, Local No. 692*, 134 NLRB 686 (1961) to stand for the proposition that the election bar never applies unless there is first a certification. First, that case involved picketing found to violate Section 8(b)(7) of the Act, *not* a petition for a new election within a year following certification. The Board was very specific in that case:

> …***In 8(b)(7)(B) cases***, the decisive date for purposes of ascertaining when there has been a valid election conducted under Section 9(c) of the Act is the date on which a certification of bargaining representative, or a certification of results, is issued in a Board-conducted election.

134 NLRB 689 (emphasis added). The Board went on: "[a]ccordingly, the Board has decided that ***no violation of Section 8(b)(7)(B)*** should be deemed to lie until all challenges and objections have been" disposed of and it has been determined that another election need not be

held. *Id*. at 690 (emphasis added). Importantly, the Board held that because the challenges in that case were disposed of on August 26, 1960, the date the certification of the election issued. *Id*. at 692. Thus, picketing "on and after August 26, 1960" violated the Act. *Id*. Therefore, the picketing only became unlawful as of the certification of the election, not the date of balloting, and the prohibition ran for twelve months from that date. This is clearly a different situation from a petition for a new election.

The only way to harmonize *Retail Store Employees* with *In re E Center*, *Baltimore Gas & Electric* and *Mallinckrodt* is that the Board considers alleged Section 8(b)(7) picketing to be a separate matter apart from a petition for a new election after balloting has occurred. If that is not the case, then *Retail Store Employees* simply is no longer good law because it is inconsistent with numerous Board precedents coming both before and after it. Because this is not a picketing case, *Retail Store Employees* is inapposite and should not have been relied upon to discount the balloting that already had occurred on January 2, 2019.

Indeed, to permit the processing of a second petition as the Region has decided to do here allows a labor organization to game the system by raising determinative challenges or objections to an election and then, following the balloting but before challenges or objections are resolved, predicting that it might lose the election and withdrawing the petition and filing a new one among some subset of the voting unit in which it believes it can win. This result simply cannot be countenanced. Such a result not only violates Section 9(c)(3) of the Act, but would be fundamentally unfair because it allows a union to engage in gamesmanship in a way that an employer cannot. If an employer proceeds to an election, it cannot amend the petition to include a smaller group of employees than those who actually voted, nor does it have any other means by which to play games with Board rules and processes and avoid the ballots being counted, so that

it can take a shot at doing a better job in a second election. It has to live with the result. The same must be true of a petitioning union. At the very least, before processing a new petition covering the same employees the Regional Director must, as the Board's Decision instructed, hear evidence regarding the group of employees that voted and determine whether that was an appropriate unit. If it was, the ballots should be counted and the result certified.

B. The Request to Withdraw the Petition Should Have Been Denied, or Should Have Been With Prejudice.

1. Withdrawal Should Not Have Been Permitted.

After an election has been held, "[a] withdrawal request should not be approved if it appears that the intent of the withdrawal is to circumvent the intent of Section 9(c)(3)" of the Act. Case Handling Manual, R Cases ("CHM") § 11116.1; *Transportation Maintenance Services,* LLC, 328 NLRB 691 (1999) (permitting withdrawal of decertification petition after vote but before ballots counted specifically on the ground that no intent existed to circumvent Section 9(c)(3)). Section 9(c)(3) of the Act, discussed in more detail in above, prohibits two elections in a twelve-month period among the same employees, of a subset thereof. Writing in dissent in *Transportation Maintenance Services*,[2] Members Brame and Hurtgen opined as follows:

> The ballots cast in the privacy of the voting booth most accurately reflect the views of unit employees regarding representation. Those views have been expressed through a

[2] Because *Transportation Maintenance Services* was a decertification case, the Board need not overrule it to agree with the Employer's position here. The result of the withdrawal in that case was that the union remained incumbent. Here, if a withdrawal is permitted, the cases cited and discussed in this Request for Review are clear that there should be a twelve-month bar to a new election. In any event, the dissent in *Transportation Maintenance Services* is sound – votes were cast by Hotel employees, and they should be counted.

> secret ballot election, conducted under the supervision of a Board agent, and they should not be negated by the subsequent withdrawal [of the petition]…

The Board should adopt the reasoning of the dissent in *Transportation Maintenance Services* and require that the ballots cast on January 2, 2019 be counted, provided the voting unit is deemed to be appropriate. The Union's attempt to withdraw the petition and file a new petition to represent Housekeeping employees is an obvious attempt to circumvent the twelve-month election bar imposed by Section 9(c)(3) of the Act. The Union is under no misapprehension but that the Front Desk employees share a community of interest in a wall-to-wall unit and that there is no evidence whatsoever that any of the Front Desk employees possess a single indicia of Section 2(11) supervisory authority. The Union has predicted that it will lose the election when the votes cast on January 2, 2019 are counted. There is no other explanation for why the Union would now seek a smaller bargaining unit. It is simply unrealistic to think that the Union would want to represent – and collect dues from – a smaller group of employees than it originally sought to represent. The only reason it now seeks a Housekeeping unit is that it is the only way that it can win an election. Even if the withdrawal is permitted here, it should nevertheless follow the majority opinion in *Transportation Maintenance Services* and find that any new election is barred for twelve months.

2. Even if Withdrawal is Permitted, it Should Be with Six Months' Prejudice.

Even if it were determined that the election was a nullity by virtue of the Decision remanding (which the Employer vigorously contests), the withdrawal request should have been approved, but "with 6 months prejudice." CHM § 11116.2. Moreover, even if it were somehow construed that a valid election has not occurred, which it should not, although the request, if made by the sole union involved, "should be approved [but] ***with 6 months prejudice***." CHM § 11112.1(a) (emphasis added).

Indeed, the withdrawal request occurred well after the original DDE issued (not to mention after a Board election was conducted). In any other circumstance, any withdrawal of a petition would occur in a six-month window within which the Union could not seek a new election. Even if it is somehow concluded that the Decision contemplated the direction of a new election, this same result must hold. That the Regional Director's refusal to take evidence on December 18, 2018 was in error and necessitated a Request for Review was the fault of the Regional Director, not the Employer. The Board should not treat the DDE as a nullity and pretend as though it were never issued. Indeed, the Hotel should not now suffer because of the Regional Director's mistake by being forced to go through a second election. The Hotel's employees should not be put through this process a second time in violation of the principles underpinning the Act.

III. Request for Expedited Consideration and to Stay Processing of Petition.

Pursuant to Sections 102.67(j)(i) and (ii) of the Board's Rules and Regulations, the Employer respectfully requests that the Board consider the Employer's Request for Review on an expedited basis and that it stay the further processing of the petition in Case 02-RC-237044 pending ruling on the instant Request for Review. This extraordinary relief is warranted because of the certainty that Section 9(c)(3) of the Act, as well as employees' Section 7 rights, will be disturbed if the newly filed petition is processed and a second election ordered. The processing of the new petition also imposes serious prejudice on the Hotel: It is going to be put to the expense of both money and time to go through another hearing and a second campaign in the event the petition is allowed to be processed. Moreover, the processing of the petition and holding of a hearing on new legal issues is an unnecessary expenditure of agency resources.

IV. Conclusion.

For the reasons stated above, the Board should grant review, reverse the RD Order, and order that its Decision of February 12, 2019 be followed and evidence finally taken on pertinent issues regarding the proposed bargaining unit. In any event, no petition should be processed for at least twelve months among the employees, or any subset thereof, who voted on January 2, 2019. Further, the processing of the newly filed petition should be immediately stayed.

March 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Louis J. Cannon, hereby certify that on March 5, 2019, I sent a copy of the foregoing Request for Review to counsel for the Petitioner as follows:

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I further certify that a copy of the foregoing Request for Review was filed with the Regional Director using the Board's electronic filing system.

/s/ Louis J. Cannon
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