

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

**LA TOURRAINE LLC d/b/a
SOFITEL CHICAGO MAGNIFICENT
MILE**

CHARGING PARTY

AND

UNITE HERE Local 1

RESPONDENT

Case: 13-CA-236423

**OPPOSITION TO RESPONDENT'S
"UNOPPOSED" MOTION TO ALLOW
LATE FILING OF EXCEPTIONS BRIEF**

Charging Party UNITE HERE Local 1 opposes Respondent La Tourraine LLC d/b/a Sofitel Chicago Magnificent Mile's "unopposed" motion to allow late filing of exceptions brief. Local 1 opposes the motion on three bases.

- 1. The motion, which appears to assert "excusable neglect" for late filing, does not comply with the Board's rule that requires an affidavit affirming the specific facts upon which the motion relies.**

The NLRB rules provide for acceptance of late-filed exceptions "upon good cause shown based on excusable neglect when no undue prejudice would result." NLRB Rules and Regulations § 102.2(d)(1)(ii). The specific facts in support of the motion "must be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts." NLRB Rules and Regulations § 102.2(d)(2). The affidavit requirement is strictly applied: "[I]n all matters raising excusable neglect issues [the Board] will strictly adhere to [its] rule that the specific facts relied on to support the motion to accept a late filing shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. Failure to submit the facts in an

affidavit will result in rejection of the Motion.” *In Re Int’l Union of Elevator Constructors*, 337 NLRB 426, 428 (2002).

Here, Respondent’s motion to allow late filing must be rejected because it is not supported by an affidavit or declaration. The motion is presented only as a motion, with the typed signature of counsel. It lacks any oath or verification; it lacks the language of 28 U.S.C. § 1746 which would make it acceptable as an unsworn declaration.

Since the Board strictly applies the affidavit requirement of § 102.2(d)(2), and since Respondent failed to submit any affidavit or declaration at all, Respondent’s motion to permit late filing must be rejected.

2. Respondent’s late filing does not meet the standard for excusable neglect. Even if Respondent’s claim of excusable neglect is considered (contrary to clear Board law), it has not shown excusable neglect.

As Respondent itself states in its motion for late filing, it previously requested and obtained a 10-day extension of time, to December 23, 2019. Motion ¶¶ 4-5. Respondent knew that this extension would require filing the day before Christmas Eve, during a holiday season that all attorneys know to be full of additional social commitments, staff requests for time off, and other foreseeable impediments to the usual operation of a legal practice.

Despite this, Respondent’s counsel was not finished with the exceptions brief on the afternoon it was due. Motion at ¶ 6. According to Respondent’s counsel, there was a period of about one hour and 15 minutes during which he was unable to work on the brief. Motion ¶ 7. This was resolved before 4:32 p.m., when Respondent’s counsel apparently emailed counsel for the General Counsel (but not for Charging Party). *Id.* Although the exceptions were not due until midnight Eastern time by electronic filing, Respondent’s counsel claims that due to his and his staff’s unbreakable social commitments, he was unable to file the exceptions at any time from 4:32 p.m. on December 23 until December 26, three days after the deadline.

Having requested an extension to December 23, Respondent and its counsel should have known that the filing would be due during the busy holiday season. That knowledge should have influenced the drafting schedule as well as the scheduling of staff availability for e-filing. Under the circumstances, it is not excusable that the one-hour-and-fifteen-minute delay in mid-afternoon at counsel's apartment building should have triggered a chain of events that led to the exceptions being filed three days late.

3. Contrary to the implication in the motion, Respondent's counsel knew Charging Party's counsel and contact information, yet made no attempt to obtain Charging Party's consent to late filing.

Respondent's motion suggests but does not outright claim that its counsel was unaware of the identity and contact information of Charging Party's counsel in this matter. Motion ¶ 8. The implication appears to be that Respondent was excused from contacting Charging Party's counsel and asking permission to file late exceptions. The further implication is that Respondent's motion is "unopposed," as Respondent styles it. These implications are false.

The NLRB's website, on the public "Case Search" listing for this case, lists the correct counsel for the Charging Party as well as his contact information. Declaration of David L. Barber, Exhibit A. Respondent's counsel has demonstrated that he knows Charging Party's counsel and contact information. This can be seen from the Certificate of Service filed with Respondent's motion to allow late filing. It can also be seen from previous emails from Respondent's counsel to Charging Party's counsel about this case: for example, an email notifying Charging Party's counsel of Respondent's request for extension of time to file an exceptions brief. Barber Dec., Exhibit B.

Thus, any implication in Respondent's motion that its counsel did not know how to contact Charging Party's counsel is simply false. By extension, Respondent's claim that its motion is unopposed is also false.

For the reasons stated above, Respondent's motion to allow late filing of its exceptions should be denied.

Date: December 30, 2019

Respectfully submitted,

MCCRACKEN, STEMERMAN & HOLSBERRY

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UNITE-HERE LOCAL 1

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing documents titled:

1. OPPOSITION TO RESPONDENT'S "UNOPPOSED" MOTION TO ALLOW LATE FILING OF EXCEPTIONS BRIEF

2. DECLARATION OF DAVID L. BARBER IN SUPPORT OF OPPOSITION TO RESPONDENT'S "UNOPPOSED" MOTION TO ALLOW LATE FILING OF EXCEPTIONS BRIEF

Were filed with the Division of Judges by using the NLRB's electronic filing system on its website at <http://www.nlr.gov> and E-mailed to counsel below:

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