UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HACIENDA HOTEL, INC. GAMING CORPORATION D/B/A HACIENDA RESORT HOTEL AND CASINO, Respondent, AND SAHARA NEVADA CORPORATION SAHARA HOTEL AND CASINO Respondent, AND LOCAL JOINT EXECUTIVE BOARD LOCAL 226, AND BARTENDERS UNION, LOCAL 165, AFFILIATED WITH HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, AFL-CIO Union.	)	No. 28-CA-13274 & -13275 REPLY TO CHARGING PARTY'S OPPOSITION TO MOTION FOR RECONSIDERATION BY ARCHON CORPORATION, D/B/A INTERVENOR ON BEHALF OF RESPONDENTS

REPLY TO CHARGING PARTY'S OPPOSITION TO RESPONDENTS'

MOTION FOR RECONSIDERATION

I. INTRODUCTION

In its opposition, Charging Party, Local Joint Executive Board Local 226, and Bartenders Union Local 165, Affiliated With Hotel Employees and Restaurant Employees, AFL-CIO ("Charging Party"), has provided no valid basis supporting its contention that the Board should deny the motion for reconsideration filed by Respondents Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino (the "Hacienda") and Sahara Nevada

Corporation d/b/a Sahara Hotel and Casino (the "Sahara") (hereinafter collectively referred to as "Hotels" or "Respondents"). Rather than addressing the merits of the motion, Charging Party submitted a less than two-page opposition focused entirely on procedural arguments, and which is nearly barren of citation to any legal authority. In sum, Charging Party suggests that the Board does not have the power to entertain Respondents' motion for various procedural reasons. Moreover, without citing any authority, and despite the fact that this Action has yet to conclude, Charging Party contends this matter is not "pending" as a purported basis to avoid the clear applicability of the Board's recent decision in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019) ("*Valley Hospital*"). However, as explained below, ample authority supports Respondents' contention that this Action is indeed pending, and that the Board has the discretion and ability to reverse its March 19, 2019 decision in this Action.

Tellingly, Charging Party does not bother to address Respondents' motion on the merits. The likely reason is because the Board's decision in *Valley Hospital* — finding that an employer's obligation to check off union dues terminates upon expiration of a collective-bargaining agreement — has irrefutable impact on this case. Moreover, because the Board applied its decision in *Valley Hospital* retroactively to ***all pending cases***, the decision necessarily compels the fair and equitable reversal of the Board's March 19, 2019 decision in this Action.

Accordingly, for the reasons explained in Respondents' moving papers and herein, Respondents respectfully request that the Board reconsider its March 19, 2019 decision finding that Respondents violated Sections 8(a)(5) and (1) of the Act and, pursuant to the rationale set forth in *Valley Hospital*, hold that the Hotels were permitted to cease deducting and remitting to the Union employees' dues upon the expiration of the contract.

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II. ARGUMENT

A. The Board Has Discretion to Hear and Decide a Motion for Reconsideration Filed Within "Such Further Period as the Board May Allow."

Charging Party suggests the Board is bound by an inflexible rule mandating denial of Respondents' motion on grounds of untimeliness. *See* Charging Party's Opposition, at p. 2. However, the plain language of the regulation cited by Charging Party in support of its argument specifies that a motion for reconsideration "must be filed within 28 days, ***or such further period as the Board may allow***, after the service of the Board's decision or order. . ." 29 C.F.R. §102.48(c)(2) (emphasis added). Thus, the Board may utilize its discretion to hear a motion for reconsideration filed beyond the 28-day period. *See Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 509 (5th Cir. 2002) (explaining that there is "no merit" to contention that NLRB erred in granting a motion filed beyond the 28-day deadline because "the NLRB can, at its discretion, disregard the 28 day deadline"); *NLRB v. Usa Polymer Corp*., 272 F.3d 289, 296 (5th Cir. 2001) ("[W]e agree with the Sixth Circuit that section 102.48 grants the NLRB discretion to entertain motions . . . after the twenty-eight day period has expired."). The Board's exercise of its discretion is particularly appropriate under circumstances where, as here, the basis for reconsideration is predicated on a later-issued Board decision with express retroactive effect on pending cases.

As explained in Respondents' moving papers, Respondents seek reconsideration of the Board's March 5, 2019 decision in this Action as result of the Board's December 2019 decision in *Valley Hospital, supra*, 368 NLRB No. 139. In *Valley Hospital*, the Board explicitly discusses this Action at length, including the prior decisions made by the Board and the Court of Appeals, explicitly noting that this pending Action is the "single case" where a court has taken issue with the Board's longstanding standard set forth in *Bethlehem Steel*, 133 NLRB 1347 (1961)

("*Bethlehem Steel*"). *See Valley Hospital, supra,* 368 NLRB No. 139 at *9-*13. As explained in Respondents' moving papers, the Board has now established a new rule with retroactive application to ***all pending cases***.

Against this backdrop, Respondents' motion for reconsideration is appropriate, despite having been filed beyond 28-day period set forth in 29 C.F.R. §102.48(c)(2). In fact, absent the Board's exercise of its discretion to hear Respondents' motion, the Board's intention that *Valley Hospital* be retroactively applied to all pending cases will be frustrated; and this Action will be the *sole* pending case subject to a legal standard that differs from the longstanding Board precedent set forth in *Bethlehem Steel*. Respondents therefore respectfully urge the Board to exercise its discretion to hear and decide Respondents' motion for reconsideration, based on the unique circumstances presented in this Action.

B. *Valley Hospital* Applies Retroactively to All Pending Cases, Including the Instant Action.

The Board's decision in *Valley Hospital* explicitly states that it applies retroactively to all pending cases. *See Valley Hospital, supra,* 368 NLRB No. 139 at *3. A simple review of the Board's docket in the instant action reveals that it is described as an "open" (i.e., "pending") case. Yet, Charging Party attempts to avoid the unmistakable impact of *Valley Hospital* by arguing that the "merits decision" in this case is no longer "pending," and *Valley Hospital* therefore is inapplicable. *See* Charging Party's Opposition, at p. 2.

Nothing in *Valley Hospital* limits the definition of "pending" in the manner suggested by Charging Party, nor is Charging Party's position consistent with Board precedent. Indeed, "[t]he Board's usual practice is to apply new policies and standards retroactively "to all pending cases ***in whatever stage***." *SNE Enterprises,* 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture*

Co., 121 NLRB 995, 1006-1007 (1958) [emphasis added]); *see also King Soopers, Inc.*, 364 NLRB No. 93 (2016); 2016 NLRB LEXIS 625 at *37; *Pressroom Cleaners*, 361 NLRB 643, 648 (2014); *Aramark School Services*, 337 NLRB 1063, fn. 1 (2002). Furthermore, while no compliance proceeding has yet occurred in this Action to date, the Board has previously applied new policy decisions retroactively, including those in the compliance phase. *See, e.g., Tortillas Don Chavas*, 361 NLRB 101, 104 and fn. 22 (2014) ("We shall apply this policy to all pending cases in whatever stage, including compliance."). For these reasons, the Board's decision in *Valley Hospital* undeniably applies to this pending case, and Charging Party's contention otherwise must be rejected.

C. Failure to Apply the Holding in *Valley Hospital* to this Pending Action Would Result in Manifest Injustice to Respondents.

As explained in *Valley Hospital*, the Board typically applies a new rule "to the parties in the case in which the new rule is announced and in other cases pending at the time so long as [retroactivity] does not work a 'manifest injustice.'" *Valley Hospital*, *supra*, 368 NLRB No. 139, at *38 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). Moreover, [i]n determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *Id*. In *Valley Hospital*, the Board explicitly found that "any ill effects resulting from retroactive application of the legal standard we reinstate today do not outweigh the important policy considerations we rely on in reinstating the *Bethlehem Steel* standard that has defined statutory obligations and shaped collective-bargaining practices for all but a few recent years since 1962." *Id.* Accordingly, the Board found that the application of the new standard "in this ***and all pending cases*** will not work

a 'manifest injustice.'" *Id.* (emphasis added).

Indeed, Respondents submit that "manifest injustice" would result if imposition of the Ninth Circuit's ruling in *Local Joint Exec. Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9th Cir. 2011) (*"LJEB III"*) is applied to this pending Action, as opposed to the Board's retroactive holding in *Valley Hospital*, returning to the *Bethlehem Steel* standard. As the Board noted in *Valley Hospital*, the Ninth Circuit has been the only court to take issue with the *Bethlehem Steel* precedent, and it has done so "in the protracted litigation of [this] single case," finding that "the Board had failed to provide a reasoned explanation for holding that an employer's post-expiration dues-checkoff obligation in right-to-work states was not subject to that doctrine." *Valley Hospital*, *supra*, 368 NLRB No. 139, at *9-10. However, the Board has now provided that explanation, and has adopted a different and retroactive rule that "…is rational and consistent with the NLRA," in full accord with the Ninth's Circuit's decision in *LJEB III*. *Id.* at *14-*39; fn. 9 ("We acknowledge, as did former Members Schaumber and Hayes in their concurring opinion in *Hacienda III*, 355 NLRB at 745, that the Board may have failed to adequately explain the rationale for the holding in *Bethlehem Steel*, particularly as to its application in cases where there is no companion union-security provision. We disagree, however, with our dissenting colleague's implication that a prior failure by the Board to adequately explain the rationale could somehow preclude us from providing an explanation now. The Ninth Circuit clearly did not think so when it declared in *LJEB III* that the law of the circuit doctrine would not apply to its holding there and that "the Board may adopt a different rule in the future provided, of course, that such a rule is rational and consistent with the NLRA. 657 F.3d at 876.").

Here, the Board should apply the *Bethlehem Steel* principle that was reestablished in *Valley Hospital* and find that the Hotels did not violate Sections 8(a)(5) and (1) of the Act, particularly

given the decades-old alleged violations as well as the similar passage of time following sale of the Hotels.

D. <u>The Law of the Case Doctrine Does Not Bar the Board From Reconsidering its March 5, 2019 Decision</u>.

Charging Party further contends that the "law of the case" doctrine somehow bars the Board from granting Respondents' motion. *See* Charging Party's Opposition, at p. 2. Specifically, Charging Party argues that if the Board changes the decision in this matter based on *Valley Hospital*, such a ruling "would conflict with the law of the case that the Board accepted on remand from the Ninth Circuit." *Id.* Charging Party, however, confuses the "law of the case" doctrine with principles of *res judicata*.

The United States Supreme Court has explained the distinction: "[A] prior ruling may have been followed as the law of the case but there is a difference between such adherence and res judicata; one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission." *Southern R. Co. v. Clift*, 260 U.S. 316, 319-320 (1922) (citing *Remington v. Central Pacific R.R. Co.*, 198 U.S. 95, 99 (1905); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)).

Likewise, the Board has recognized its own power and discretion to reconsider its decisions, despite having adopted a prior ruling as "law of the case":

> [A]s stated in *Arizona v. California*, 460 U.S. 605, 618 (1983), "[u]nlike the more precise requirements of res judicata, law of the case is an amorphous concept"—it "directs a court's discretion, it does not limit the tribunal's power." Thus, as we recently stated in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 82 (2007): "***Although the law of the case doctrine does not absolutely preclude reconsideration or reversal of a prior decision***, such action should not be taken absent extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice" (internal quotations omitted).

D.L. Baker, Inc., 351 NLRB 515, 528 (2007) (emphasis added). Indeed, the Board has a longstanding practice of applying a "nonacquiescence policy" to appellate decisions contrary to Board law, and "instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court." *Id*. at 529 fn. 42 (citations omitted); *Valley Hospital, supra,* 368 NLRB No. 139 at fn. 16.

Additionally, as noted in Respondents' moving papers, to the extent the Board accepted the Ninth Circuit's decision in *LJEB III* as the law of the case, the Board need not follow that decision now that "controlling authority has since made a contrary decision of law applicable to the issue." *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 24 F. App'x 104, 111 (4th Cir. 2011); *see also EEOC v. International Longshoremen's Assoc.*, 622 F.2d 1054, 1058 (5th Cir. 1980); *Toussaint v. McCarthy*, 801 F.2d 1080, 1092 n. 11 (9th Cir. 1986). Thus, contrary to Charging Party's contention, the Board has the right and the power to reconsider its prior decisions, even if it adopted a prior ruling as "law of the case."

Valley Hospital is subsequent controlling authority that is directly on point to the precise issue raised in this Action. *See Valley Hospital, supra,* 368 NLRB No. 139 at *38. In *Valley Hospital*, the Board explained its rationale for reestablishing the *Bethlehem Steel* standard and stated that its decision should be applied retroactively to all pending cases. *Id.* at *14-*38. Thus, the Board should reconsider its March 5, 2019 decision in the instant Action and apply the longstanding precedent that was reestablished in *Valley Hospital*.

III. CONCLUSION

For the reasons set forth above, and in Respondents' moving papers, the Board should reconsider its Order entered March 5, 2019 and find that Respondents did not violate Sections 8(a)(5) and (1) Act when they ceased dues checkoffs after the expiration of collective-bargaining

agreements, or in the alternative, issue an Order to Show Cause as to why this Motion should not be granted.

Dated: March 25, 2020

Respectfully submitted,

FORD & HARRISON LLP

By:/s/Stephen R. Lueke____
Stephen R. Lueke
Stefan H. Black
Courtney E. Majors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Reply to Charging Party's Opposition to Motion for Reconsideration by Archon Corp, D/B/A Intervenor on behalf of Respondents was served on the following persons:

via electronic filing:

The Hon. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

via overnight mail and telephonically notified of electronic filing :

Richard G. McCracken, Esq. Kimberly C. Weber McCracken, Stemerman & Holsberry, LLP 595 Market Street, Suite 800 San Francisco, CA 94105 Tel: (415) 597-7200 Fax: (415) 597-7201	Cornele A. Overstreet Regional Director National Labor Relations Board Region 28 2600 North Central Avenue, Suite 1400 Phoenix, AZ Tel: (602) 640-2160 Fax: (602) 640-2178

Dated: March 25, 2020

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