UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ARBAH HOTEL CORP. d/b/a
MEADOWLANDS VIEW HOTEL

Cases: 22-CA-257539
and 22-CA-259975

NEW YORK HOTEL AND
MOTEL TRADES COUNCIL, AFL-CIO

CASE MANAGEMENT ORDER WITH INSTRUCTIONS FOR VIDEOCONFERENCE HEARING

On October 21, 2020, the Regional Director ordered that the trial in the above matters be conducted by Zoom/video conference on January 20, 2021 at 9:30 a.m.[1] This order addresses how trial participants and non-participant observers may access the unfair labor practice trial on Zoom, and also provides instructions for how the trial will proceed.

Trial Dates

The hearing will open on January 20, 2021, at 9:30 a.m., and will continue on consecutive days, or as otherwise scheduled, until completed. Please bring any scheduling issues to my attention as soon as possible.

On January 20, 2021, we will begin by addressing procedural and preliminary matters, including opening the trial record, introducing the formal papers, resolving any outstanding disputes regarding subpoenas and producing documents, addressing any other pending motions, and opening statements. Counsel for the General Counsel (General Counsel) should then be prepared to begin presenting its first witness.

Zoom Invitations

Before the trial, I will send the parties a Zoom invitation by email. The parties may share the Zoom invitation with other participants and observers as needed. If you are unable to join the meeting either online or by phone, please contact one of the other participants in the trial or call the Courtroom Deputy for assistance if one has been assigned. If you cannot reach the Courtroom Deputy, or if none has been assigned, please call Ms. Dana Brown at the Division of Judges, New York Branch Office at (212) 944-2943 for assistance.

[1] No objection has been raised to proceeding via Zoom/video and no additional request for postponement has been made since the Regional Director issued his Order.

Trial Guidelines

As preliminary resources that may assist with preparing for trial, trial participants (attorneys, representatives and witnesses) may refer to the attached guidelines: Attorney/Representative Instructions and Guidelines for Video Hearings (Exhibit A); and Witness Instructions and Guidelines for Video Hearings (Exhibit B).

Courtroom Deputy

As indicated above, a Courtroom Deputy may be assigned for the trial in this case. Courtroom Deputies are attorneys from the "Board-side" of the National Labor Relations Board (i.e., the staff of a Board Member, the Office of the Executive Secretary, or the Solicitor's Office) and will be screened from working on this case if it comes before the Board. The Courtroom Deputy will be available during the trial to assist with managing the trial, handling exhibits, and troubleshooting technical issues with Zoom, should any arise.

Identification of Participants

To facilitate managing the trial and access thereto, **by Noon (Eastern time) on January 19, 2021,** each party must email the Judge and Courtroom Deputy a list of all trial participants to which counsel has sent information about accessing the trial on Zoom. This list is for procedural use only and will not become part of the record. The list must include each participant's name, email address, telephone number and role in the proceeding in order for the Judge to allow the appropriate access to the proceedings and to correctly assign individuals to breakout rooms (when needed) or the waiting room.

As the trial proceeds, each party must supplement its list as needed to identify any new trial participants. The parties shall provide any supplemental participant names **by Noon (Eastern time) on the business day before the participant will be joining the trial.** Notwithstanding these instructions, a party will not be precluded from calling a witness who is not on the party's participant list if the witness is necessary for presenting the party's case.

To limit the number of video images on the Zoom video display during trial, the following participants generally should be the only participants with their outgoing video turned on: the Judge; one attorney per party (typically the attorney presenting argument or handling the witness);[2] and the witness. All other trial participants may observe the trial proceedings but generally should have their outgoing video off and their audio on mute (unless directed otherwise by the Judge or Courtroom Deputy). This will enable all participants to select "Hide Nonvideo Participants" in Zoom settings and focus their attention on the video images of participants who are actively involved in the trial.

Identification of Non-Participant Observers (Public Access)

The Regional Office (Region 22) will have the responsibility of advising any members of the public (non-participant observers) about how they may access the trial. Parties may also

[2] This guideline does not preclude another attorney from turning their video and/or audio on if the need arises to speak briefly during the trial.

share copies of the Zoom invite with any known non-participant observers, but also must provide the Region, **by Noon (Eastern time) on the business day before the next trial date,** the names and email addresses of any such known non- participant observers. The Region must then provide a list of all non-participant observers to the Judge and Courtroom Deputy **by 5:00 pm (Eastern time) on the business day before the next trial date.** The Judge and Courtroom Deputy will use the list to manage access to the trial.

Identified non-participant observers may observe the Zoom trial by video and/or audio but must have their outgoing audio on mute and their outgoing video turned off throughout the trial (unless directed otherwise by the Judge or Courtroom Deputy). Non-participant observers may not disrupt the trial in any way and may be subject to removal and other sanctions if they disrupt the trial or violate the Judge's instructions.

Prohibition of Videotaping or Recording the Trial

The official court reporter is the only individual permitted to record the trial. Accordingly, **do not video record, audio record, broadcast, televise, stream, screenshot, photograph, or otherwise copy the trial.** Violation of this rule may result in removal and other sanctions.

Exhibits

To facilitate the trial, it is requested that all parties email their potential exhibits to the Judge, the Courtroom Deputy, the court reporter, all other counsel, and the parties' own witnesses before the witness testifies. Jencks materials are not covered by this request, as those materials need not be provided until requested for cross examination.

As an alternative to email, in cases involving large or voluminous exhibits, e.g. audio/video files, the parties may request that the agency create a secure NLRB SharePoint webpage for this case. Exhibits can be uploaded to Sharepoint, where they can be viewed by those with authorized access (such as an individual party, which may then provide access, as needed, to the Judge, Courtroom Deputy, court reporter, and/or other parties). The agency requires at least three business days advance notice to set up a Sharepoint webpage.

All exhibits should, where possible, be pre-marked, paginated, and converted into one bookmarked PDF file per party. Please redact all personally identifiable information (PII, such as social security numbers, dates of birth, etc.) from your exhibits, and have an unredacted copy available for review if necessary.

Jencks Statements

Jencks statements, such as affidavits given to the General Counsel, will be provided (by email or another method) to opposing counsel upon request for cross examination. After cross-examination, opposing counsel **MUST** delete all Jencks statements from their computer and represent to the court and the General Counsel that it has done so.

Additional Appropriate Safeguards

Informed, but not controlled, by Board Rule 102.35(c), I will implement various appropriate safeguards to ensure that I and the parties have the ability to assess each

witness' credibility and that the parties have a meaningful opportunity to examine and cross examine each witness. See *William Beaumont Hospital*, 370 NLRB No. 9 (2020) (noting that Board Rule 102.35(c) contemplates the taking of a single witness' testimony via video transmission during an in-person hearing, but is not controlling in a hearing conducted entirely by videoconference). Appropriate safeguards will generally include, but are not limited to:[3]

1. Before taking testimony, ensuring that I, all trial participants and the hearing reporter are able to hear the testimony and observe the witness, and ensuring that the witness is able to hear all other trial participants;

2. Upon request, having the witness adjust their camera view to show whether any other individuals are present in the room where the witness is located;

3. Generally requiring the parties to provide copies of any exhibits to me, the witness, and all counsel of record before starting their examination (i.e., before starting direct, cross, or redirect);[4] and

4. Having video technology assistance available to assist with technical difficulties that may arise during the hearing (e.g., assistance from the Courtroom Deputy or agency information technology staff).

Ultimately, I will determine in my discretion whether it is feasible and appropriate to proceed with each witness' testimony by videoconference.[5]

Dated: December 17, 2020
New York, New York

/s/ Jeffrey P. Gardner

Jeffrey P. Gardner
Administrative Law Judge

[3] Board Rule 102.35(c)(2) lists, as one safeguard, providing the opportunity of party representatives to be present at the remote location where the witness will be located when testifying. I will not be employing that safeguard because it is inconsistent with the physical distancing safety procedures that we all must follow due to the ongoing Coronavirus (Covid-19) pandemic.

[4] This requirement will not preclude counsel from sharing, at a later point, additional exhibits that counsel may need to use to address issues in the witness' testimony, or certain exhibits that counsel may wish to hold in reserve as part of their litigation strategy.

[5] If I determine that it is not feasible to receive a witness' testimony by videoconference at a particular time, the remedies may include rescheduling the witness for a later trial date and/or having the relevant party take additional steps to ensure that the witness can access and participate in the Zoom hearing.

EXHIBIT A

ATTORNEY/REPRESENTATIVE INSTRUCTIONS AND GUIDELINES FOR VIDEO HEARINGS

Due to the compelling circumstances created by the COVID-19 pandemic, the Administrative Law Judge will conduct the hearing in this matter on the Zoom for Government videoconferencing platform. The following guidelines and instructions are for the attorneys and/or representatives who will be participating in the video hearing. (There are separate instructions for individuals who expect to testify as witnesses in the video hearing.)

Before the Video Hearing

Technology Requirements

To participate in the hearing, you will need access to a reliable internet connection and a device you can use to participate in the hearing by audio and video. It is recommended that you use a computer or laptop with a microphone, speaker and a web camera. In the alternative, you may use a smartphone or tablet, but those devices may be less effective if/when you need to receive and review documents. Regardless of the device you use, it is recommended that you use a headset or earphones with a microphone to help reduce feedback and background noise.

The hearing will be conducted on the Zoom videoconferencing platform. Accordingly, you should load the Zoom application on the device you will be using, and verify that you can connect to Zoom by doing a test connection at https://zoom.us/test.

It is also recommended that you set up a free Zoom account using your first and last name and your email address. By setting up a Zoom account in that manner, your first and last name will appear when you join the hearing, which will make it easier to identify you as an attorney/representative. You may set up a Zoom account at: https://zoom.us.

In addition to setting up their own account/access, counsel are responsible for ensuring that their witnesses have the equipment and internet access necessary to fully participate in the Zoom video hearing. Please bring any issues to the ALJ's attention as soon as possible.

It is highly recommended that you practice using Zoom with your witnesses before the hearing, including practice with handling and reviewing exhibits.

Agency Courtroom Deputy

In some cases, the ALJ may have a courtroom deputy present to assist with certain tasks during the video hearing. Courtroom deputies may (among other tasks): manage who is

permitted to join the video hearing; set up breakout rooms for individuals to confer privately; display exhibits if requested by one of the parties; and assist with general Zoom troubleshooting/questions. All courtroom deputies are attorneys from the "Board-side" of the agency (i.e., the staff of a Board Member, the Office of the Executive Secretary, or the Solicitor's Office) and will be screened from working on the case if it comes before the Board.

Invitation to Video Hearing (Participants and Observers)

All counsel of record and unrepresented parties will receive an email invitation to attend the video hearing. The invitation will contain a link to "Join ZoomGov Meeting" and a "Meeting ID" and "Password" for participants to join through Zoom. The General Counsel is responsible for forwarding the invitation to the court reporter and any interpreter(s).
Counsel and unrepresented parties are responsible for notifying their witnesses (or the witnesses' counsel) about the hearing and applicable instructions/guidelines.

It is permissible for individuals (non-witnesses) to observe the hearing. To ensure appropriate access to the hearing, however, counsel will need to provide the ALJ/courtroom deputy with a list of all hearing participants and observers, along with each individual's name, email address, telephone number and role in the proceeding. The ALJ/courtroom deputy will use the list to allow access to the hearing and, when needed, correctly assign individuals to breakout rooms or the waiting room. The list generally must be provided to the ALJ/courtroom one business day before the hearing, but may be amended as appropriate to accommodate new witnesses or observers. The list will not be part of the evidentiary record.

Hearing Preparation

Before the hearing, all participants should take the following steps:

1. Set up computer, laptop, tablet or smartphone in a well-lit and quiet room with no distractions, and with the strongest light source in front of you;

2. Position the web camera at or slightly above eye level;

3. Test your equipment and internet connection (www.zoom.us/test);

4. Close out and avoid running unnecessary applications besides Zoom during the hearing;

5. To the extent possible, limit the number of other devices connected to the internet/wifi service at your location during the hearing;

6. Mute sounds from other applications (e.g., email notifications, chat messaging, etc.); and

7. Plug device into a good power source.

Joining the Hearing

1. Participants must join the video hearing at least 5 minutes before the scheduled start time by clicking the "Join ZoomGov Meeting" link in the invitation or clicking "Join a Meeting" in Zoom and entering the Meeting ID and Password. If asked whether to open Zoom in your browser or in the Zoom app, open in the Zoom app. Select "Join by Computer Audio," even if connecting via smartphone or tablet.

2. Upon joining the virtual hearing, each participant will initially appear in a Waiting Room. The ALJ or courtroom deputy will admit counsel and parties into the video hearing room. Unless otherwise ordered, witnesses will remain in the Waiting Room until called to testify.

3. The video hearing is an official proceeding. Please approach the hearing with the same level of respect and civility that you would approach an in-person proceeding in a courthouse, and accordingly wear appropriate clothing and use appropriate language.

4. *Microphone and Video*: When each participant is admitted to the video hearing room, the participant's video should be on and audio should be muted until the hearing or any pre-trial discussions begin. To the extent necessary, the ALJ or courtroom deputy may mute any participant's microphone and/or turn off a participant's video during the hearing.

During the Hearing

1. The court reporter is the only person authorized to record the hearing. Participants and observers may not record, duplicate, screenshot or save any audio or video of the video hearing, including conferences or sidebars.
2. Participants must speak one at a time and pause before speaking in case there is any "lag" or delay in the audio/video feed. Before speaking, counsel should wait for the witness to finish her or his answer, and the witness should wait for counsel to finish his or her question. If there is an objection, the witness should stop speaking and wait for instruction from the ALJ.

3. While testifying, witnesses may not communicate with anyone else about their testimony (including during breaks), and may not review any documents, devices, or other items unless asked to do so by the ALJ or by an attorney as part of a question during testimony.

4. In most hearings, the Chat feature in Zoom will be turned off. Attorneys may use their cell phones to text their co-counsel and/or an individual designated as essential to assisting the attorney with presenting her case. Texting is not permitted with a designee while that person is on the stand testifying as a witness.

5. Counsel may ask the ALJ for the opportunity to confer with clients privately during the hearing. The ALJ/courtroom deputy will send counsel and the client(s) into a Zoom Breakout Room where the attorney and client may confer privately. The ALJ/courtroom deputy may send chats to counsel in a Breakout Room for status

updates, and may set a time limit for completing discussions in the Breakout Room and returning to the video hearing. When finishing a session in a Breakout Room, do not click on "Leave Meeting" because doing so will end your connection to the Zoom hearing (though you can reconnect by repeating the login process).

6. Counsel may request a sidebar with counsel and the ALJ. The ALJ/courtroom deputy will send counsel into a Breakout Room for the sidebar. At the end of the sidebar, counsel will all return to the video hearing room.

Exhibits

1. Counsel have the following options for sharing exhibits:

    a. Email a pdf copy of the exhibit to the witness and hearing participants, who would then need to open the file and review it;
    b. Use Zoom's share screen feature to show the witness (and everyone else in the video hearing) a copy of the exhibit as it appears on your own device screen;
    c. Email the exhibit to the courtroom deputy who can then use Zoom's share screen feature to display the exhibit at the attorney's request;
    d. Upload the exhibit to an agency webpage that can be accessed by the ALJ and all parties [note – if this option is desired, the agency generally needs three business days' notice to set up the webpage]; or
    e. Use Zoom's chat feature to send a pdf copy of the exhibit to the witness and other selected hearing participants. The witness and hearing participants would then need to download and open the file and review it [note – this option may not work if the intended recipient is using a smartphone or tablet].
    f. Each of these options has advantages and limitations. Counsel should consider and experiment with each option to determine which will best meet their needs.

2. Exhibits should be in pdf format and pre-marked (or saved) by Exhibit Number. You may save each exhibit as a separate pdf file, or you may create a single pdf file with bookmarks that allow the reader to select each individual exhibit. Please identify each exhibit with: initials that identify the party presenting the document and the exhibit number (e.g., "GC Exh._____," "CP Exh. __ _," or "R. Exh.___"); and a brief description of the document (e.g., (2017-2020 Collective-Bargaining Agreement), (November 21, 2019 Disciplinary Warning Issued to John Smith), or (January 2, 2020 Information Request)).

3. Any exhibit with multiple pages must be clearly paginated (e.g., "Page____of____.") or Bates Stamped.

4. Counsel must make sure all personally identifiable information (PII) other than names (e.g., social security number, date of birth, address, telephone number, etc.) is redacted from exhibits before the exhibits are proffered to a witness. This step is particularly important if you will be using Zoom's screen share function to present an exhibit to a witness during trial, because other hearing participants (including

observers) will be able to see the exhibit on their device screens.

5. Large exhibits, such as audio or video files, may require special handling since they may not be transmittable over email. Accordingly, counsel should notify the ALJ/courtroom deputy about any such exhibits at least three business days before the trial to allow time for the agency to set up a webpage where the large exhibit may be uploaded and accessed by the ALJ and other parties.
6. Counsel are responsible for making sure the court reporter receives and is able to open/access all exhibits that are admitted into the evidentiary record or are offered for inclusionin a rejected exhibit file.

EXHIBIT B

WITNESS INSTRUCTIONS AND GUIDELINES FOR VIDEO HEARINGS

You are receiving these instructions because you may be appearing as a witness in a National Labor Relations Board hearing. Due to the compelling circumstances created by the COVID-19 pandemic, the Administrative Law Judge ("ALJ") will conduct the hearing using the Zoom videoconferencing platform. The guidelines and instructions for the video hearing are as follows:

Before the Video Hearing

Technology Requirements

To participate in the hearing, you will need access to a reliable internet connection and a device you can use to participate in the hearing by audio and video. It is recommended that you use a computer or laptop with a microphone, speaker and a web camera. In the alternative, you may use a smartphone or tablet, but those devices may be less effective if/when you need to receive and review documents. Regardless of the device you use, it is recommended that you use a headset or earphones with a microphone to help reduce feedback and background noise.

The hearing will be conducted on the Zoom videoconferencing platform. Accordingly, you should load the Zoom application on the device you will be using, and verify that you can connect to Zoom by doing a test connection at https://zoom.us/test.

It is also recommended that you set up a free Zoom account using your first and last name and the email address that you will provide to your attorney or the attorney calling you as a witness. By setting up a Zoom account in that manner, your first and last name will appear when you join the hearing, which will make it easier to identify you as a witness.
You may set up a Zoom account at: https://zoom.us.

If you have any problems setting up a Zoom account or obtaining the necessary equipment and/or internet access, please contact your attorney, or the attorney calling you as a witness, as soon as possible. It is strongly recommended that you practice using Zoom before testifying at the hearing.

Invitation to Video Hearing

One of the attorneys (most likely your attorney or the attorney calling you to testify as a witness) will provide you with an email copy of the invitation to attend the video hearing. The invitation will contain a link to "Join ZoomGov Meeting" and a "Meeting ID" and "Password" that you can use to participate in the video hearing through Zoom. You (or your attorney) should communicate with the attorney calling you to estimate when you will be needed to

testify. Do not share the contents of the invitation with others as participation in the hearing may be limited. If you know someone who would like to listen to the hearing, please discuss it with your attorney or the attorney who sent you the Zoom invitation and be prepared to provide the individual's name, email address and telephone number.

Hearing Preparation

Before the hearing, please take the following steps:

1. Set up your computer, laptop, tablet or smartphone in a well-lit and quiet room with no distractions, and with the strongest light source in front of you;

2. Position the web camera at or slightly above eye level;

3. Test your equipment and internet connection (www.zoom.us/test);

4. Turn off any virtual background on Zoom;

5. Close out and avoid running unnecessary applications besides Zoom during the hearing;

6. To the extent possible, limit the number of other devices connected to the internet/wifi service at your location during the hearing;

7. Mute sounds from other applications (e.g., email notifications, chat messaging, etc.); and

8. Plug your device into a good power source.

If you have any issues, please contact your attorney or the attorney calling you as a witness.

Joining the Hearing

1. The attorney who has called you as a witness will notify you (or your attorney) about when to log into Zoom and be available to testify. Because the exact time for your testimony may change, please provide the attorney with multiple ways to contact you (e.g., telephone, cell phone, email), and be on standby to log on to Zoom and testify on short notice.

2. Please join the video hearing at least 5 minutes before the time you are asked to testify. You can join the hearing by clicking the "Join ZoomGov Meeting" link in the invitation or clicking "Join a Meeting" in Zoom and entering the "Meeting ID" and "Password." If you receive a message asking whether to open Zoom in the browser or in the Zoom app, select the Zoom app. Select "Join by Computer Audio," even if you are connecting via smartphone or tablet.

3. When you join the Zoom hearing, you will first see that you are in a Zoom "Waiting Room." Please do not disconnect from the Waiting Room. The ALJ will receive a

message that you are in the Waiting room, and will bring you into the video hearing when it is your turn to testify.

4. The video hearing is an official court proceeding. Please approach the hearing with the same level of respect that you would approach an in-person proceeding in a courthouse, and accordingly wear appropriate clothing and use appropriate language.

5. Your video should be on when you join the video hearing. If your audio is on "Mute," as indicated by a microphone symbol with a slash mark at the bottom of your device screen, then no one will be able to hear you when you speak during the video conference. You may "Unmute" yourself by clicking on the microphone symbol one time, which will remove the slash mark on the microphone symbol and allow everyone to hear you when you testify.

During the Hearing

1. The court reporter is the only person authorized to record the hearing. Participants, witnesses and observers may not record, duplicate, save or photograph any video or audio portions of the proceeding, including conferences or sidebars.

2. Please do not talk over another person. Due to the potential for the audio and/or video connection to "lag" or delay, pause before speaking to avoid having more than one person speaking at the same time. Consistent with that guideline, please wait for the attorney to finish her or his question before starting your answer. If one of the attorneys makes an objection, please stop speaking and wait for instruction from the ALJ.

3. While testifying, you may not communicate with anyone else about your testimony (including during breaks), and you may not review any documents, devices, or other items unless the attorney or ALJ asks you to do so as part of a question they pose during your testimony. You may be asked to use your camera to show your surroundings before or while testifying.

4. During the trial, the attorneys may ask you to look at an exhibit. They may show you the document on your device screen, or if allowed, they may electronically send you the document. Please make sure you have provided an email address that you can access during the hearing. You should answer any questions about the exhibit, and then put the exhibit aside once the attorney moves on to another line of questions.

5. At the end of your testimony, the ALJ will give you some final instructions, including the instruction to not tell any other possible witness about your testimony. The ALJ will then advise you when to disconnect from the Zoom video hearing. One of the attorneys will contact you if you need to appear again to provide additional testimony.

6. If you experience any connection or technology related issues during the hearing, please immediately notify the ALJ and/or the attorney who called you as a witness.