UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

SUBREGION 37

OAKTREE CAPITAL MANAGEMENT, LLC, and TBR PROPERTY, LLC, a SINGLE EMPLOYER, d/b/a TURTLE BAY RESORTS, and BENCHMARK HOSPITALITY, INC.	Cases	37-CA-6601-1
		37-CA-6642-1
		37-CA-6669-1
and		37-CA-6691-1
		37-CA-6730-1
		37-CA-6753-1
		37-CA-6756-1
UNITE HERE! LOCAL 5		37-CA-6768-1
		37-CA-6816-1
		37-CA-6826-1
		37-CA-6827-1
		37-CA-6835-1
		37-CA-6840-1
		37-CA-6875-1
		37-CA-6877-1
		37-CA-6878-1

OPPOSITION TO RESPONDENTS' MOTION FOR RECONSIDERATION OF ORDER DATED JUNE 19, 2007

Counsel for the General Counsel hereby opposes Respondents' Motion for Reconsideration of the Board's Order dated June 19, 2007, for the reasons set forth below.

I. Background

On about August 22, 2006, Respondents filed with the Board a Motion for Permission to Exceed Increased Page Limit for Brief in Support of Exceptions to Decision of Administrative Law Judge. Respondents requested a 250 page limit for its Brief in Support of Exceptions. On August 29, 2006, Associate Executive Secretary Richard Hardick granted in part Respondents' request, stating that Respondents' "[b]rief is not to exceed **175 pages**."

On about September 10, 2006, Respondents filed their Initial Brief in Support of Exceptions ("Initial Brief") to ALJ Decision. On about December 8, 2006, Counsel for General Counsel filed a Motion to Strike Respondents' Exceptions and Brief in Support of Exceptions to the ALJ Decision. Associate Executive Secretary Hardick issued an Order on March 30, 2007, stating *inter alia* that "the arguments in the exceptions and the single-spacing in Respondents' brief, each or combined, far exceed the 175 pages of permitted argument." The Order afforded Respondents a second opportunity to submit their "noncompliant documents" in a form that comports with the Board's rules. The Order explained the nonconformity with the Board's rules and cited the relevant rules for guidance. The Order also cited the Board's decision in *Geske & Sons,* 317 NLRB 28, 29 (1995), and explained that there "the Board stressed the importance of 'close attention to the requirements of Section 102.46(b)(1) and Section 102.46(j)' and emphasized that 'a person should not expect in the future, or consider as now the norm, that the party filing exceptions will be afforded several opportunities to put its exceptions in proper form in conformity with the filing requirements of the Board's rules.'"

On about April 9, 2007, Respondents filed their Amended Exceptions, which include two hundred and ninety-nine (299) exceptions, and an Amended Brief in Support of Exceptions ("Amended Brief"). Counsel for General Counsel filed a Motion to Strike Respondents' Amended Brief on April 12, 2007 ("Motion to Strike"), arguing that Respondents had once again far exceeded the 175 pages of argument permitted by the Board. Respondents filed an Opposition to the Motion to Strike Respondents' Amended Brief and Counsel for General Counsel filed a Reply to Respondents' Opposition on April 24, 2007 (the "Reply").

On June 19, 2007, the Board granted the Motion to Strike Respondents' Amended Brief, but accepted Respondents' amended exceptions. Respondents on about June 27, 2007, filed a

Motion for Reconsideration of the Board's Order (the "Instant Motion") pursuant to Section 102.48 of the Board's Rules and Regulations. Respondents claim in the Instant Motion that their amended brief complies with Section 102.114(d) and should not have been stricken.

II. Argument

Section 102.48(d)(1) of the Board's Rules and Regulations states that:

> A party to a proceeding before the Board may, because of **extraordinary circumstances**, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the **material error** claimed and with respect to any finding of material fact shall specify the page of the record relied on.

(Emphasis added).

Respondents claim in the Instant Motion that the Board's Order was based on a material error because their amended brief "fully complies with the requirements of Section 102.114(d)...." (Motion at 2). This is incorrect. For the reasons set forth in the Motion to Strike and the Reply, the Board correctly found that Respondents have exceeded the permitted 175 page limit.

In support of their argument, the Respondents include a self-serving and misleading "chart" in which they describe improper single-spaced text as "quotation[s] from ALJ opinion (with slight paraphrasing)."[1] (Motion at 3). Respondents explain in a footnote that such "paraphrasing was used for the sake of clarity and brevity." (*Id.*) As set forth in the Motion to Strike and Reply, what Respondents characterize as mere "paraphrasing" is actually something entirely different. Thus, Respondents cobbled together concepts and quotations from different parts of the ALJ's decision and attempted to pass them off as block quotations from the same in their Amended Brief. Respondents did so in an apparent attempt to meet the very generous 175

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[1] Respondents also neglect to point out that the block quotation on page 118 of their Amended Brief is not from the ALJ's decision.

page limit granted by the Board. Nevertheless, after admitting that they included a number of block quotations of "paraphrased" text, Respondents go on to claim that "only one section of a single-spaced text arguably does not consist entirely of a quotation," and thus highlight yet another section of their Amended Brief where they used improper line spacing. (Instant Motion at 4). For the reasons set forth above, as well as in the Motion to Strike and Reply, Respondents' arguments that the Board made a "material error" in striking its Amended Brief should be disregarded.

Respondents argue that they will be "unfairly prejudiced" if the Board does not consider their Amended Brief. (Instant Motion at 6). Respondents, citing *Special Touch Home Care Services,* 349 NLRB No. 75 (April 18, 2007), claim that the Board's "failure to consider their amended brief would completely deprive the Respondents of their ability to present their legal argument to the Board...." (Motion at 7). In *Special Touch,* the Board explained:

> Striking the defective exceptions, however, may impair the Respondent's right under Section 10(e) of the Act to appeal. Under the present circumstances, we believe it strikes a fairer balance to deny the motion to strike the exceptions and instead strike the brief. Thus, our ruling on the motion serves to uphold the Board's rules without unduly penalizing the Respondent. Moreover, we do not think that the Respondent will be unfairly prejudiced by our rejection of the brief that was filed on its behalf, given the substantial amount of factual and legal argument contained in the exceptions, which will be considered in our review.

Id. slip op. at 2 (footnotes omitted). In this case, given that Respondents have urged two hundred and ninety-nine (299) exceptions, all of which are before the Board, no one can claim that Respondents' right under Section 10(e) of the Act has been impaired. As in *Special Touch*, the Board's "ruling on the motion serves to uphold the Board's rules without unduly penalizing the Respondent." In addition, as in *Special Touch*, Respondents are not prejudiced by the Board's rejection of their brief because their arguments are readily apparent from their exhaustive exceptions, many of which are written in an argumentative fashion. One need look no further

than Respondents' Exception number 1 to see that this is the case. There, Respondents except "[t]o the ALJ's conclusion that TBR's attempts to abide by and enforce adherence to the CBA were instead illegal restrictions on the access of the Union business agents at TBR."[2] Respondents also include a number of exceptions that take issue with the ALJ's "failure to find" one of their arguments to be valid.[3] In setting forth these alleged "failures," Respondents particularize the alleged omitted facts and make their arguments.[4] *See Special Touch*, slip op. at 2 (explaining the difference between "grounds" and "argument"). Therefore, given the extensive nature of Respondents' exceptions, which themselves contain argument in support of the exceptions, Respondents in fact have not been prejudiced by the Board's rejection of their second noncompliant brief.

In the end, despite having been afforded a second opportunity to comply with the Board's Rules and Regulations, which were clearly identified in the Board's Order dated March 30, 2007, Respondents submitted another brief that violates those Rules and Regulations. As in *Special Touch* "[s]ome sanction is therefore warranted." The Board struck a balance in this case by striking Respondents' brief while accepting its exceptions. This is a fair decision and there is no reason to alter it.

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[2] Additional examples of Respondents' exceptions that contain argument include, among numerous others, exceptions 88, 111, 138, 140, 169, 177, 287, and 289. For instance, in Exception 287, Respondents except "[t]o the ALJ's finding that Respondents disciplined Martinson for uttering 'scab' as a protected activity and not for harassing another employee...."

[3] These include Exceptions 5, 6, 52, 54, 55, 64, 65, 91, 94, 95, 99, 102, 105, 120, 127, 128, 136, 141, 162, 185, 188, 201, 209, 211, 213, 215, 217, 220, 230, 232, 242, 254, 265, 266, 267, 276, and 277.

[4] For example, in Exception 5, Respondents except "[t]o the ALJ's failure to find that Marsh was involved in individual acts of disruption and in disruptive rallies and other Union actions."

III. Conclusion

WHEREFORE, in consideration of the above, Counsel for General Counsel respectfully requests that the Board deny Respondents' Motion for Reconsideration of Order Dated June 19, 2007.

Dated at Honolulu, Hawaii, this 12th day of September 2007.

Respectfully submitted,

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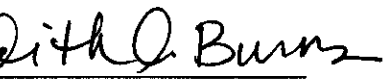
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Opposition to Respondents' Motion for Reconsideration of Order Dated June 19, 2007, has this day been served as described below upon the following persons at their last-known address:

1 copy	Daniel T. Berkley, Esq. Dan Ko Obuhanych, Esq. Gordon & Rees LLP 275 Battery Street, Suite 2000 Embarcadero Center West San Francisco, CA 94111	Via Federal Express
1 copy	Sarah O. Wang, Esq. Marr Hipp Jones & Wang, LLLP Pauahi Tower 1003 Bishop St., Ste. 1550 Honolulu, HI 96813	Via U.S. Mail
1 copy	Jennifer Cynn In-House Counsel UNITE HERE! Local 5 1050 Queen Street, Suite 100 Honolulu, Hawaii 96814	Via U.S. Mail
1 copy	Kristin L. Martin, Esq. Davis, Cowell & Bowe LLP 595 Market Street, Suite 1400 San Francisco, CA 94105	Via Federal Express

DATED at Honolulu, Hawaii, this 12th day of September 2007.



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