

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKTREE CAPITAL MANAGEMENT, LLC,  
and TBR PROPERTY, LLC, a SINGLE EMPLOYER,  
d/b/a TURTLE BAY RESORT  
and BENCHMARK HOSPITALITY, INC.

and

Cases 37-CA-6601-1  
37-CA-6642-1  
37-CA-6669-1  
37-CA-6691-1  
37-CA-6730-1  
37-CA-6753-1  
37-CA-6756-1  
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

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**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENTS' EXCEPTIONS**

Submitted by  
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I. BACKGROUND<sup>1</sup>

On March 31, 2009, the Board issued its decision and order in *Oaktree Capital Management, LLC*, 353 NLRB No. 127 (2009), affirming Administrative Law Judge Joseph Gontram's findings that Respondents engaged in numerous violations of Sections 8(a)(1), (3), and (5) of the Act. These violations included the unlawful termination of employee Mark Feltman, the unlawful suspension of employee Tim Barron, and the unlawful discipline of employee Jeannie Martinson. In addition, the Board found that Respondents violated the Act by restricting the Union's access to Turtle Bay Resort, engaging in surveillance of employees engaged in protected activity, illegally threatening to close Turtle Bay Resort, failing to provide relevant information to the Union, and maintaining unlawful work rules, among other things.

In its decision, the Board severed and remanded for further appropriate action consistent with its decision the allegation that Respondents violated Section 8(a)(5) and (1) of the Act when they ceased to validate parking for union representatives who visited Turtle Bay Resort for representational purposes. *Id.*, slip op. at 2-3 (2009). Judge Gontram found that Respondents had a longstanding practice of providing free parking to Union representatives when they came to Turtle Bay Resort pursuant to the contractual access provision, Respondents knew of and approved of the practice, and the parking fee burdened the Union's access to Turtle Bay. *Id.*, slip op. at 39. However, Judge Gontram concluded the evidence failed to show the change was significant. *Id.*, slip op. at 40. In

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<sup>1</sup> References to the transcript are noted by "Tr." followed by the volume and page number(s). References to the General Counsel's exhibits are noted as "GC" followed by the exhibit number. References to Respondents' Exhibits are noted as "R" followed by the exhibit number. References to the Supplemental Decision on Remand issued by Judge Mary Miller Cracraft is referred to as "SDR." Respondents Brief in Support of Exceptions filed on October 14, 2009, is referred to as "RBS."

this regard, Judge Gontram explained “[t]here was no evidence of the amount the Respondents require union representatives to pay for parking.” *Id.*, slip op. at 40. The Board found, contrary to the judge, that “there is evidence of the monetary amounts at issue for the parking privileges unilaterally revoked by the Respondents.” *Id.*, slip op. at 3. In particular, the Board referred to record evidence of three LM-10 forms filed with the U.S. Department of Labor and explanatory testimony by Human Resources Director Nancy Ramos. *Id.*, slip op. at 3. The Board remanded the issue of whether the change in parking privileges was a significant change and directed the administrative law judge “to consider this evidence and to issue a supplemental decision analyzing whether the Respondents violated Section 8(a)(5) as alleged.” *Id.*, slip op. at 3.

On remand, Administrative Law Judge Mary Cracraft correctly found “that rescission of the parking validation practice was a material, substantial, and significant change.” SDR 2. Respondents’ unilateral change of discontinuing parking validation for Union representatives who are at Turtle Bay Resort for collective bargaining duties without proper notice and an opportunity to bargain was a significant change and violates Section 8(a)(5) and (1) of the Act. Respondents’ exceptions are without merit for the reasons set forth below.

## II. FACTS

The expired collective bargaining agreement between the parties provides for Union access to Turtle Bay Resort. (Slip op. at 39; GC 2, Section 13). As determined by Judge Gontram, Respondents had a longstanding practice of validating Union representatives’ parking tickets. (Slip. op. at 39; Tr. 4:706-707, Marsh; Tr. 6:1133-34, Marsh; Tr. 8: 1696-97, Harman; Tr. 18:3787, Ramos). This practice was known by and

approved of by Respondents, which is shown by the fact that the Union representatives' parking tickets were stamped in the Human Resources office or at the security dispatch window, at times by the security guards themselves. (Slip. op. at 39; Tr. 4: 706-707, Marsh; Tr. 6: 1133-34, Marsh; Tr. 8: 1696-97, Harman; Tr. 13: 2869-70, Fortin).

Respondents raised no objection to Union representatives validating their parking tickets when they were at the hotel for official Union business. (Slip. op. at 39; Tr. 13: 2869-70, Fortin). Union Business Agent Marion Marsh went to Turtle Bay Resort approximately twice a week from 2002 until 2005. (Slip op. at 9; Tr. 4: 700-701, Marsh). When Marsh went to Turtle Bay Resort, which is located more than 40 miles from downtown Honolulu, she stayed there the entire day. (Tr. 4: 701, Marsh).

Starting on January 28, 2005, without providing the Union with notice and an opportunity to bargain, Respondents refused to continue validating Union representatives' parking tickets when they were on the Turtle Bay Resort property for official union business. (Slip op. at 21; Tr. 1:180-81, Ramos; Tr. IV: 813-14, Marsh). On January 28, 2005, Robert Murphy, the Respondents' attorney, sent a letter to the Union stating that Union representatives who park at the Resort will thereafter be required to pay for parking. (Slip op. at 21; GC Ex. 5). There is no evidence that Respondents objected to the practice of validating the Union representatives' parking tickets prior to January 28, 2005.

On June 29, 2005, Respondents completed United States Department of Labor, Form LM-10 for fiscal years 2003, 2004, and through March 31 of fiscal year 2005. (Tr. 1:180-181, Ramos; GC Ex. 4a, 4b, 4c). The LM-10 Forms were filed with the Department of Labor on or about June 29, 2005. (Tr. 1:179, Ramos). Respondents hired

an independent investigator to determine the dollar value of the free validated parking. (Tr. 2:284-286, Ramos). Nancy Ramos, Respondents' Director of Human Resources, signed the LM-10 Forms and declared "under penalty of perjury" that all of the information submitted in the LM-10 Forms is true, correct and complete. (GC Ex. 4a, 4b, 4c).

According to the LM-10 Forms, which were based on the independent investigator's conclusions, the Union representatives who were at the Resort on official business were not assessed for parking in the amount of \$480.00, \$2,080.00, and \$2,080.00 for fiscal years 2005, 2004, and 2003, respectively. (GC Exh. 4a, 4b, 4c). The LM-10 Forms state that it costs \$20.00 per day to park at the Resort. (GC Exh. 4a, 4b, 4c).

There is a distance of about one half to three-quarters of a mile from the entrance of Turtle Bay Resort on Kamehameha Highway to the hotel itself. (Slip op. at 7; Tr. 5: 973; GC 8).

### III. ARGUMENT

Administrative Law Judge Mary Cracraft correctly found in her Supplemental Decision on Remand ("SDR") that Respondents' rescission of the parking validation practice was a material, substantial and significant change and that Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating parking validation for Union agents who visited Turtle Bay Resort to perform representational duties. For the reasons in the SDR and as set forth below, Respondents' Exceptions 1, 2, 3, and 10, which concern this issue, are without merit.

The undisputed evidence established that Union representatives travel to Turtle Bay Resort twice a week for Union business. On those visits to the Resort, the Union representatives park their cars in the Resort parking lot. Due to the distance between Turtle Bay Resort and Honolulu, where the Union's office is located, Union representatives remain at Turtle Bay Resort for the entire day. The record evidence established that it costs \$20.00 per day to park at the Resort, which at the rate of two days per week amounts to over \$2,000.00 per year. Judge Cracraft appropriately found that this is a substantial amount of money and requiring the Union to pay such parking fees, where no fees were previously assessed, is a significant change. (SDR, slip op. at 6).

Respondents argue that the LM-10 Forms only show an approximation of the amount of free parking the Union representatives received prior to Respondents' unilateral discontinuation of its parking validation practice. (RBS 14, Exception 9). Respondents make the disingenuous argument that "the Board should infer that Union business agents were never charged, and never paid, \$20/day to park or any other amount." (RBS 15). In essence, Respondents are claiming that after taking the extreme measure of turning themselves in to the Department of Labor for purportedly committing the crime of providing the Union with a "thing of value," Respondent knowingly continued to violate the law as they understood it by persisting in providing the Union with free parking. In the end, the evidence shows that Respondents unilaterally ended a practice that Respondents knew, as they declared under penalty of perjury to the Department of Labor, was worth more than \$2000.00 per year – a substantial amount of money and a material change. Respondents' Exception 9 is therefore without merit.

Respondents argue in their Exceptions 6 and 7 that it was improper for Judge Cracraft to consider their unilateral rescission of the practice of validating parking for Union agents in the context of Respondents' numerous unfair labor practice violations found by the Board.<sup>2</sup> The Board in its Order severed and remanded the issue of whether Respondents "violated Section 8(a)(5) on and after January 28, 2005, when they required union agents to pay for parking, which the Respondents had previously validated, when visiting the resort for representational purposes." Slip op. at 2-3. The Board directed the administrative law judge to consider the evidence "of the monetary amounts at issue for the parking privileges unilaterally revoked by the Respondents" "and to issue a supplemental decision analyzing whether the Respondents violated Section 8(a)(5) as alleged." Slip op. at 3. However, the Board did not state that the judge must limit her analysis to the evidence in the LM-10 forms. In the end, the issue is whether the change in parking privileges was "a significant change." Slip. op. at 2. As Judge Cracraft explained, the Board will consider the natural context of the other actions between the Respondents and the Union in determining whether a unilateral change is material, substantial and significant. SDR 3, 5 (citing *Microimage Display Division of Xidex Corp.*, 297 NLRB 110, 111 (1989), *enf'd* 924 F.2d 245 (D.C. Cir. 1991)).<sup>3</sup> It was

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<sup>2</sup> In Exception 8, Respondents apparently except to Judge Cracraft's recitation of the chronology of events as set forth in Judge Gontram's decision and affirmed by the Board. Respondents' exception is of no consequence because it is beyond dispute that the Board found Respondents engaged in numerous violations of the Act in the course of the Union's campaign to secure a new collective bargaining agreement.

<sup>3</sup> Respondents attempt to distinguish *Microimage* is unpersuasive. Respondents concede that the case stands for the proposition that it is appropriate to look at the context in which a unilateral change occurred in order to determine whether the unilateral change is material and substantial. (RBS 12). The points Respondents claim to be distinguishable (such as whether there was a unilateral change) are not at issue in the remand.

appropriate for Judge Cracraft to do so and Respondents exceptions 6 and 7 are accordingly without merit.<sup>4</sup>

In much of their Brief in Support, Respondents raise matters that have already been decided and that they admit are outside of the scope of the remand. For example, in Exceptions 4, 5, and 11, Respondents object to Judge Cracraft's summary of Judge Gontram's decision. Respondents could have, but did not, raise the issues set forth in Exceptions 4, 5, and 11 in their exceptions to Judge Gontram's decision. These exceptions, having not been raised when appropriate, should be deemed to have been waived by Respondents. *NLRB Rules and Regulations* Section 102.46(b)(2). Similarly, Respondents' entire argument in Section III.A. of its Brief, in which Respondent claims that there was no unilateral change in the parking validation policy, involves an issue that has already been decided. This entire section of the brief is appropriately disregarded. In addition, Respondents argue that the unilateral change at issue does not involve a mandatory subject of bargaining. (RBS 16-17). Once again, Respondents raise an issue outside of the scope of the remand that should have been raised in their exceptions to Judge Gontram's decision.<sup>5</sup> Not surprisingly, Respondents' entire factual recitation

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<sup>4</sup> In footnote one of their Brief in Support, Respondents request that the Board take judicial notice of their briefs to the Fifth Circuit Court of Appeals and state their intention to submit their Fifth Circuit Brief to the Board. The General Counsel respectfully requests that the Board not consider any additional documents submitted by Respondents outside the scope of those permitted by the Board's rules. The Board has already ruled on the issues that Respondents contest in their circuit court brief. Respondents should not be permitted to submit any additional argument on the merits of issues already decided, especially in this case where Respondents brief in support in the underlying matter was struck for noncompliance with the Board's rules. *See Oaktree Capital Management, LLC*, 353 NLRB No. 127 n.1 (2009).

<sup>5</sup> It is apparent that Respondents are retreading old ground here since they point to an argument made in General Counsel's "brief in support of exceptions in the underlying case. . . ." (RBS 17).

appears to be directed to support their arguments concerning issues which have already been decided and which are outside the scope of the remand. It would be inappropriate to allow Respondents a second attempt to argue these issues on remand, especially in a case such as this where the Board struck Respondents brief in the underlying matter for repeated noncompliance with the Board's rules.

IV. Conclusion

It is respectfully submitted that Administrative Law Judge Cracraft appropriately concluded that Respondents have violated Sections 8(a)(5) and (1) of the Act by unilaterally discontinuing the validating of the parking tickets of Union representatives who are at Turtle Bay Resort for collective bargaining purposes without proper notice and an opportunity to bargain. Accordingly, it is respectfully urged that the Board adopt the Supplemental Decision on Remand and Recommended Order.

DATED AT Honolulu, Hawaii, this 28th day of October 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the General Counsel's Answering Brief to Respondents' Exceptions has this day been served as described below upon the following persons at their last-known address:

1 copy	Daniel T. Berkley, Esq. Gordon & Rees LLP 275 Battery Street, Suite 2000 Embarcadero Center West San Francisco, CA 94111	Via e-mail and U.S. Mail
1 copy	Terrence B. Robinson Gordon & Rees LLP 3D/International Tower 900 West Loop South, Suite 1000 Houston, TX 77027	Via e-mail and U.S. Mail
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DATED at Honolulu, Hawaii, this 28<sup>th</sup> day of October 2009



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