

Quinn Restaurant Corp d/b/a Water's Edge and Hotel Employees and Restaurant Employees Union, Local 100 of New York, New York and Vicinity, AFL-CIO Cases 29-CA-12214, 29-CA-12304, and 29-CA-12978

March 28, 1989

DECISION AND ORDER

BY MEMBERS JOHANSEN, CRACRAFT, AND HIGGINS

On June 17, 1988, Administrative Law Judge James F. Morton issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified herein and to adopt the recommended Order as modified.

1 The judge found that the Respondent did not violate Section 8(a)(5), (3), or (1) by adopting new procedures on how employees could change their work schedules. Specifically, he found that before the election a unit employee, Carol Welker, prepared the weekly schedule and when an employee needed to switch a shift he merely found a replacement and told Welker. Either the employee or Welker wrote in the change on the schedule. After the election, the general manager wrote in the scheduling changes. The judge concluded that there was no "substantial change" because "essentially the same scheduling procedures" were employed as before the election. The General Counsel excepts arguing that the elimination of the employees' unfettered right to change their work schedules constituted a loss of a substantial benefit and violated Section 8(a)(3) and (1) because it was imposed to retaliate against the employees for choosing the Union as their collective-bargaining representative and violated Section 8(a)(5) and (1) because it was implemented without bargaining with the Union. We find merit in the General Counsel's exceptions.

We agree with the judge's analysis of how the schedule was made and what the employees had to do in order to obtain a change in their schedule.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

both before and after the election. However, the record contains one critical fact that the judge failed to mention in his decision. Before the election, employees were never denied the right to make a change in their schedule as long as they found a replacement. Dennis O'Reilly, the Respondent's former general manager, testified² that after he began preparing the schedule, he had, on occasion, rejected some of the employees' offers of replacements. Thus, after the Respondent instituted the new procedure the employees lost a significant benefit of their employment: the ability to freely change their schedules. In the context of the Respondent's other unlawful conduct, we find that the Respondent instituted this change because its employees chose the Union as their collective-bargaining representative in violation of Section 8(a)(3) and (1). We also find that this change violated Section 8(a)(5) and (1) because it was instituted without bargaining with the Union.

2 The General Counsel also excepts to the judge's failure to order the Respondent to post the notice to employees in Spanish, Mandarin, and Cantonese, as well as English. We shall order the Respondent to do so in view of the ethnic diversity of the Respondent's work force.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Quinn Restaurant Corp d/b/a Water's Edge, Long Island City, New York, shall take the action set forth in the Order as modified.

1 Insert the following as paragraph 1(d) and re-letter the subsequent paragraphs:

"(d) Refusing to allow employees to change their work schedules as long as they find a replacement because they selected the Union to represent them."

2 Insert the following as paragraph 2(e) and re-letter the subsequent paragraphs:

"(e) Rescind the work rules that deny employees the right to change their schedules as long as they find a replacement and that require employees to punch timecards after eating."

² We agree with the judge that O'Reilly's testimony was technically not proper rebuttal because it was not introduced to refute evidence provided by the Respondent's witness. We note however that the admissibility of evidence on rebuttal is committed to the discretion of the judge. See 6 Wigmore *Evidence* § 1867 at 656 and § 1873 at 672 (Chadbourn rev. 1976). Thus, although the General Counsel should have elicited O'Reilly's testimony during her case in chief, we find the judge did not err in admitting it. We reject the Respondent's contention that O'Reilly's testimony should be stricken.

3 Substitute the attached notice in English, Spanish, Mandarin, and Cantonese for that of the administrative law judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT inform our employees, in effect, that more stringent work rules will be adopted and enforced because they selected Hotel Employees and Restaurant Employees Union, Local 100 of New York, New York and Vicinity, AFL-CIO to represent them

WE WILL NOT threaten to defer payment to our employees of their charge card tips in order to discourage support of the Union

WE WILL NOT fail and refuse to continue paying employees for mealtimes or prohibit them from punching in their timecards before eating in order to discourage them from supporting the Union

WE WILL NOT implement work rules without first bargaining collectively thereon with the above-named Union

WE WILL NOT refuse to allow employees to change their schedule provided they find a replacement worker because they selected the Union to represent them

WE WILL NOT refuse to recognize the Union as the exclusive collective-bargaining representative of our banquet employees

WE WILL NOT renege on or refuse to sign, when requested, a contract we reached with the above-named Union

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL, on request by the Union, execute a collective bargaining agreement embodying the terms and conditions to which we agreed with the Union in December 1986

WE WILL apply that agreement retroactively and make our employees whole for any loss suffered, with interest, as a result of our failure to execute and abide by that contract

WE WILL make our employees whole, with interest, for losses suffered as a result of our failure to pay for mealtimes

WE WILL notify the Union in writing that we recognize the Union as the exclusive collective bar-

gaining representative of our banquet employees and

WE WILL apply the agreement, referred to above, to them and make them whole for any loss of earnings they may have suffered

WE WILL rescind the work rule requiring employees to punch timecards after eating and instead allow them to punch in before eating

WE WILL rescind the work rule that denies employees the right to change their schedules as long as they find a replacement worker

QUINN RESTAURANT CORP D/B/A
WATER'S EDGE

Kathleen M Troy Esq for the General Counsel
Richard G Kass Esq (Rains & Pogrebin PC), of Mineola, New York, for the Respondent
Barry J Peek Esq (Snozzi English & Klein PC) of Mineola, New York, for the Charging Party

DECISION

STATEMENT OF THE CASE

JAMES F MORTON, Administrative Law Judge The complaint in Cases 29-CA-12214 and 29-CA-12304 was consolidated for hearing with the complaint that issued in Case 29-CA-12978 The underlying unfair labor practice charges were filed by Hotel Employees and Restaurant Employees Union Local 100 of New York New York and Vicinity, AFL-CIO (the Union) against Quinn Restaurant Corp d/b/a Water's Edge (Respondent) The complaints alleged that Respondent committed unfair labor practices within the meaning of Section 8(a)(1) (3), and (5) of the National Labor Relations Act (the Act)

The pleading set out the following issues

1 Whether Respondent, because its employees had selected the Union as their representative, warned them that it would now play by the book

2 Whether Respondent implemented new work rules without bargaining with the Union and because the employees had voted for the Union

3 Whether Respondent had agreed on the terms of a collective bargaining agreement with the Union and then unlawfully refused the Union's request that it sign a contract which incorporated these terms

The hearing was held before me in New York City on November 17 and December 8 and 15 1987 On the entire record including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I JURISDICTION

The pleadings establish, and I find, that Respondent operates a restaurant and catering business and that in its operations annually it meets the Board's retail standard for the assertion of jurisdiction I further find, based on

the pleadings, that the Union is a labor organization as defined in Section 2(5) of the Act

II THE ALLEGED UNFAIR LABOR PRACTICES

A Background

In September 1987, Stuart Somerstein and his wife Maricka, purchased Water's Edge, a restaurant in Long Island City, a section of New York City. The employees of Water's Edge were then unrepresented. Soon afterwards, the Union filed a petition in Case 29-RC-6468 for an election to represent these employees. The hearing in that case, held on November 4 and 6, 1985, was adjourned, pending approval of the Stipulation upon Consent Election executed by the parties. The election was held on December 19, 1985.

Prior to the election, Maricka and Stuart Somerstein sent a Notice to Employees to each employee informing them of the election agreement and setting forth their views, which were couched in the first person, presumably a reference to Stuart. The notice stated, 'I do not want a union here in my restaurant. I do not think a union will help our business, and I do not think a union will help you or your family. I am opposed to a union, and I will do my best to keep the union out of here.'

The Union won the election.

The General Counsel contends that, immediately after the results of the election were announced and also shortly thereafter, Respondent made coercive statements, unlawfully changed certain work practices, and that it later engaged in extensive contract negotiations only to renege on the agreement ultimately reached. Respondent asserts that various changes in working conditions alleged as unlawful actually took place before the advent of the Union, it also contends that it reached no agreement with the Union and that, in any event as the unit of employees claimed by the Union was broader than the certified unit and was inappropriate. Respondent lawfully refused to sign the preferred contract.

B Alleged Coercion, Discrimination and Unilateral Changes

1 Implied threat

Jane O'Donovan, a witness in Respondent's employ from May 1985 until her discharge in late December 1985, testified that Stuart Somerstein was very angry on leaving the election area at the end of the election on December 19, 1985, and was yelling at everyone. She testified further that later that day when she went into the kitchen, Somerstein yelled, 'wanted to know what all these employees were doing in the kitchen and told the employees there that because they voted the Union in, [n]ow we were going to play by the rules.'

Somerstein testified that he was upset that the Union won the election. He was asked by Respondent's counsel if he remembered ever saying to any of the employees that he was to play by the book and he answered that he did not.

I credit Donovan's account. It was vivid. Somerstein did not deny that he talked to the employees about the fact that the Union won the election, he merely an-

swered in the negative when asked a clearly leading question and at best that answer only established that he did not remember saying what O'Donovan clearly did recall.

Somerstein's angry statement to employees made right after the Union won the election on December 19, 1985, that Respondent would now play by the rules is violative of Section 8(a)(1) of the Act as it is a threat of unspecified reprisals. See *K & M Electronics*, 283 NLRB 279 fn 2 (1987).

2 Change in mealtime practice

The General Counsel's second witness, John Brancale, testified that several days after the election Respondent's general manager at that time, Dennis O'Reilly, held a meeting with the employees at which he informed them that they were no longer to punch in at the clock *before* they ate but that they were to eat *before* they punched in. As a result, Brancale testified the employees lost a half hour's wages each workday.

Somerstein testified that, when he purchased Water's Edge in September 1985, it was terribly mismanaged and that he instituted a number of changes at that time. He alluded to a problem with 'lateness' and stated that a previous practice permitted employees to eat first if they came in at 5 o'clock; they didn't have to be on the floor. To correct that practice, according to Somerstein, he informed employees in September 1985 that they had to be on the floor at 5 o'clock.

I do not see that Somerstein's testimony materially controverts Brancale's, particularly that aspect of Brancale's account which relates that all the employees suffered a loss of a half hour's wages each workday. In any event, I credit Brancale's testimony. I note too that it is consistent with the import of O'Donovan's testimony credited above, that Somerstein intended to retaliate against the employees because they selected the Union to represent them.

The change in mealtime practice as announced by General Manager O'Reilly shortly after the election was obviously one of those reprisals. Thus that change violated Section 8(a)(1) and (3) of the Act. See *Superior Forwarding Co*, 282 NLRB 806 (1987). The change also was effected without notice to the Union in contravention of Respondent's duty to bargain collectively in violation of Section 8(a)(1) and (5) of the Act. See *Storall Mfg Co*, 275 NLRB 220-237 (1985). The Union was not certified as the representative of Respondent's employees until late January 1986. Nonetheless Respondent's having effected a unilateral change between the date of the election and the date of the certification was an act in derogation of its responsibility to bargain collectively with the Union. See *O'Connor Chevrolet Buick GMC Co*, 209 NLRB 701-704 (1974).

3 Alleged unlawful change in method of scheduling work

The General Counsel contends that Respondent required its dining room employees to obtain its approval before they could change their shifts; that Respondent adopted this procedure because the employees selected

the Union and that it did so without bargaining thereon with the Union

In support thereof, the General Counsel's witnesses testified that prior to the election, a unit employee (Carol Welker) prepared the weekly schedule and that when the dining room employees needed to switch shifts or change [they] took it up with her and if [anyone] needed to get off [he or she] would find someone to cover and had Carol change it [i.e. the schedule]. The General Counsel's witness could not remember if she herself was allowed to write in the name of her replacement on the schedule or if Carol did that. After the election, the general manager then O'Reilly, had to physically change it.

The General Counsel asserts in her brief that Respondent implemented the most serious work rule change from the employees' perspective when O'Reilly took over the scheduling of employees' work hours from employee Carol Welker. There was no substantial change as O'Reilly essentially employed the same scheduling procedures Welker used. I thus find that Respondent did not unlawfully change the terms and conditions of employment for the unit employees by O'Reilly's assumption of scheduling duties. See *Murphy Oil USA*, 286 NLRB 1039 (1987), in which the Board approved the administrative law judge's analysis as to the application of the holding in *Peerless Food Products*, 236 NLRB 161 (1978), to various insubstantial changes. See also *San Antonio Portland Cement Co.*, 277 NLRB 309, 314 (1985).

4 Alleged unlawful warning

The General Counsel contends that Respondent's general manager, O'Reilly, unlawfully warned employees in December 1985 that Respondent might begin to include their charge card tips in their regular paychecks. Brancale testified without contradiction that O'Reilly mentioned (at the same time he informed the employees that they had to punch their timecards in after, not before, they ate) that Respondent was toying with the idea of not paying them each evening as was normally done, the tips given them via customer charge cards and instead including those tips in their weekly paychecks. Although the change was never made, Brancale testified that O'Reilly's announcement scared the waiters. Respondent put the change into effect and deferred payments of those tips; the waiters still would have to pay each night to the hosts, the bartenders, and the busboys their respective shares of those tips and also the waiters would be saddled with an enormous amount of paper work.

The timing of the announcement by O'Reilly and its context show that Respondent was actively considering taking specific retaliatory measures against its employees because they selected the Union to represent them, an act which clearly interfered with their right under Section 7 of the Act.¹

¹ O'Reilly made other announcements at this time. Only one of those other announcements was also alleged as violative of the Act. The consolidated complaint in Cases 29-CA-12214 and 29-CA-12304 alleges that Respondent, by announcing and implementing a work rule that restricted employees from using the telephone while working on the floor, discriminated against its employees because they selected the Union as their bar

C Alleged Unlawful Refusal to Sign the Contract

1 The negotiations

On January 27, 1986, the Union was certified as the exclusive collective bargaining representative for the following unit:

All full and regular part time dining room employees, bar kitchen and coat check employees employed by Respondent, excluding all valet parking employees, professional employees, office clerical employees, guards, the executive manager, general manager, banquet manager, the chef, the maitre d' and all supervisors as defined in the Act.

On March 3, 1986, the Union submitted its contract proposals to Respondent and several months later the first negotiation session was held. There were about 10 such sessions altogether. The Union's president, Anthony Amodeo, negotiated for the Union, Somerstein and John Russell, a partner in a consulting firm retained by Respondent, handled the negotiations for Respondent.

Somerstein testified that at each negotiating session he stated as ground rules that any agreement reached had to be approved by his attorneys. Amodeo testified that the only time Somerstein made reference to an attorney was at one of the earlier sessions when Somerstein somehow indicated that he wanted to have an attorney present. Amodeo testified that he told Somerstein that he would not negotiate separately with Russell and an attorney but would not object to having an attorney present so they can all sit down and work together. According to Amodeo, Somerstein and Russell then left the bargaining table to meet privately and, on returning, Somerstein agreed to continue negotiating using only Russell. Amodeo's account was corroborated by detailed testimony given by Russell. It is unlikely that Somerstein would at each of the 10 sessions repeat the ground rules. It is even more unlikely that the Union would participate in one negotiating session with Respondent's principal all subject to approval by an attorney. Respondent would designate I credit Amodeo's corroborated testimony.

At the last session in December 1986, according to Amodeo, the parties reviewed a draft agreement paragraph by paragraph and reached accord on all. His account was corroborated by Russell. Somerstein was asked by Respondent's counsel if he had ever reached an

gaining representative. The General Counsel offered no evidence in support of that allegation during the presentation of her case in chief. O'Reilly, who had left Respondent's employ after a dispute with Somerstein, testified for the General Counsel as a rebuttal witness and, over Respondent's objection, he testified that he made this announcement at this time because the waiters were lackadaisical in their duties and were leaving their stations unattended to take care of personal matters. O'Reilly's account is clearly not proper rebuttal and constituted a reopening of the General Counsel's case in chief. However, the Board's practice is to allow considerable leeway in developing a record. Cf. *Cedar Rapids Building Trades Council (Siebke Hoyt)*, 283 NLRB 1155 (1987). As to the merits of the allegation, I find that while the timing of the announcement makes out a prima facie case of discriminatory motivation, O'Reilly's account itself effectively negates a finding of an unfair labor practice as the evidence is uncontroverted that the rule was adopted to ensure proper service to Respondent's customers.

agreement about a contract with the Union and answered in the negative. I credit Amodeo's account over the conclusional testimony offered by Somerstein.

At the last session, Amodeo agreed to have the contract typed in final and that Russell would pick it up to be signed by Respondent. Russell came by Amodeo's office several days later and informed Amodeo that Somerstein wanted to have his lawyer look it over. When a week or so went by without any further development, Amodeo asked the Union's attorney, Harold Ickes, to look into the matter.

Ickes testified that he met with an attorney, Fred Braid, who was then handling the matter for Respondent and that Braid proposed some changes. Ickes consulted with Amodeo who agreed to the changes reluctantly so as not to hold up the execution of the contract. Ickes sent Braid the revised contract. Braid then requested an additional change. Ickes accepted it. Braid responded by proposing changes in the wage rate schedule covering Respondent's catering employees. Ickes endeavored to accommodate him. Ickes' testimony which is uncontroverted, is that Braid, in several subsequent conversations with him, advised that he, Braid, either had not been able to meet with Somerstein or that Somerstein had failed to keep appointments with him. On March 27, 1987, Ickes sent Braid the final contract to be signed by Respondent and advised that, if it was not signed by March 30, the Union would file an unfair labor practice charge based on Respondent's refusal to sign. When Ickes heard nothing further, the Union filed the charge in Case 29-CA-12978.

It is obvious from the foregoing, and I thus find, that the parties had reached full agreement in December 1986, and that Respondent thereafter used evasive tactics to renege on the agreement.

At the hearing before me, Respondent raised a new contention which has to do with the appropriateness of the contractual unit discussed next.

2 The scope of the unit

Respondent contends that in July 1986, it established a separate unit of catering employees larger in size than the unit certified 6 months previously. Respondent further contends that the agreement, which the Union would have it sign, improperly accretes the catering unit to the certified unit without the consent of the catering employees. The General Counsel and the Union contend that the certified unit had always encompassed the employees of Respondent who did its catering work.

When Somerstein purchased Respondent in September 1985, there was a small area on the second floor of Respondent's two-story building. That area was used for catering purposes. This area was used for the purpose of conducting the election in Case 29-RC-6468 and was referred to in the election agreement in that case as the

Second Floor Banquet Room. The public dining room occupied the first floor. Whenever a large catering affair was held, the dining room was closed to the public so that the affair could be held on the first floor. The dining room employees, also called the restaurant employees or the a la carte employees, in Respondent's employ then also handled the catering duties. In the latter capacity

they performed the duties of what are termed banquet employees or servers. Banquet employees are required to wear white gloves, to provide French service, and to perform other duties which vary from those of a la carte servers. When working then on catered affairs, the dining room employees were supervised by a banquet manager. When they worked in the public dining room, they were supervised by a general manager. There were other differences. For example, as dining room employees, the servers shared their tips with the busboys, bartenders and others, in their catering duties, they received a defined percentage as their tips.

In November 1985, about a month before the election referred to above, Respondent began a major renovation program. At the representation hearing held in Case 29-RC-6468 in early November 1985, Respondent took the position that no election could be held then as the unit was expanding. It withdrew that contention when it agreed to the holding of an election. As the unit description set out above reveals, there was no express reference made to banquet employees. Only a passing reference was made to the fact that the dining room employees also did the banquet work in that the unit description did expressly exclude the banquet manager and, as noted above, the election was to be held in the banquet room.

The renovations begun in November, took over 6 months to be completed. In that interval no banquets were held on the second floor as it was undergoing major changes. The banquets were held on the first floor which was closed to the public whenever there was a large catered affair.

The renovation was finished in July 1986. The second floor then had its own separate kitchen and storeroom. Somerstein hired a banquet manager who then used two lists of servers for the banquets. On the first list were the servers who received regular banquet assignments, the second was for those who were called in as needed. The employees who worked on the first floor—kitchen employees, servers—were from that point on used infrequently as banquet employees.

In the last half of 1986, Respondent had on its weekly payroll as few as 35 to as many as 52 employees who worked in its dining room, in that same period it had on a weekly payroll as few as 14 to as many as 38 banquet employees, including kitchen employees who worked on the second floor. It was not until October 26, 1986 that Respondent placed its banquet kitchen employees on a separate payroll.

Respondent and the Union negotiated respecting the rates of pay and other terms of employment of the banquet employees beginning with the session held on August 13, 1986. The Union proposed the adoption of the wage schedule that it has in a contract covering employees of another firm owned by Somerstein which provides only catering services. That schedule ultimately developed into Schedule B which was in December 1986, incorporated into the contract then agreed to by Respondent and the Union as discussed earlier.

3 Analysis

The facts stated above are not in material dispute. They demonstrate that the banquet work was a significant function performed by employees in the unit before and at the time the election was held in December 1985 and that banquet duties are closely akin to those performed for the dining public. In substance, banquet work was unit work when the Union was certified. That Respondent restructured its operations in July 1986, by setting up two divisions, one for the dining room and another for its banquet facilities, hardly removes banquet functions from those to be performed by unit employees. The parties themselves obviously contemplated through their negotiations that banquet work would continue to be unit work as they discussed and agreed on the terms set out in Schedule B to the contract. Nor do I find that the number of employees in the banquet operation is so large in relation to the number of employees on the first floor as to necessitate a finding that the former could only be in the unit if they now vote for inclusion.

In *Meyer's Cafe & Konditorei*, 282 NLRB 1 (1986), the employer there put in a take out delicatessen next to a self service cafeteria and refused to apply the contract covering the cafeteria employees to the employees hired for the delicatessen. The Board there rejected the employer's contention that because the number of newly hired delicatessen employees exceeded the number of employees in the cafeteria it was not obligated to extend that contract to the delicatessen employees. Rather, the Board held that the delicatessen operation was nothing more than an enlargement of the existing restaurant operation which required the hiring of new employees to staff the facility. In the light of overwhelmingly strong community of interest factors shared by the delicatessen and cafeteria employees in that case, the Board held that the new hires fell within the existing contractual unit and in those circumstances it was irrelevant that there was a larger number of new hires. In the case before me, the community of interest factors are stronger than those in *Meyer's Cafe* because the dining room employees did the very banquet work involved, as the parties negotiated about the wage rates and other terms of employment for the banquet employees and because even the number of banquet employees is markedly fewer than the number of employees on the first floor. The banquet employees at all times were part of the certified unit. I thus find that Respondent has failed and refused to honor the Union's request that it execute the contract agreed on at the last negotiating session in December 1986. Respondent's efforts subsequently to obtain modifications should not be countenanced as, in retrospect, they were not made in good faith but were in furtherance of an attempt to evade its obligation to bargain collectively with the Union. Of course that determination would not preclude the parties from later agreeing to modifications otherwise appropriate.

CONCLUSIONS OF LAW

1 Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2 The Union is a labor organization as defined in Section 2(5) of the Act.

3 At all times material, the Union has been the exclusive collective bargaining representative of the employees in the following appropriate unit²

All full and regular part time dining room and banquet employees, bartenders, kitchen employees and coat check employees employed by Respondent excluding all valet parking employees, professional employees, office clerical employees, guards, the executive manager, general manager, banquet manager, the chef, the maitre d and all other supervisors as defined in the Act.

4 Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having impliedly threatened its employees that it would adopt and put into effect stricter work rules, by having warned them that it intended to defer payment of their charge card tips until payday and by having engaged in those acts because the employees had selected the Union as their collective bargaining representative. Respondent also violated Section 8(a)(1) by the acts described in the next two paragraphs.

5 Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) of the Act by having required its employees, because they selected the Union to represent them to punch timecards in for work after they have eaten and by no longer paying them for the time spent while eating and by implementing this policy because the employees supported the Union.

6 Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act by having unilaterally and without bargaining with the Union implemented the change described above in paragraph 6, by refusing to execute the collective bargaining agreement given its representative in December 1986 for that purpose and by refusing to recognize the Union as the exclusive collective bargaining representative of its banquet employees.

7 Respondent has not engaged in any unfair labor practices alleged in the complaints in this case which are not found.

8 The unfair labor practices set out above in paragraphs 4, 5, and 6 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

² The description of the certified unit is modified to make clear that it encompasses the banquet employees.

Having found that Respondent has unlawfully discontinued paying its employees for mealtimes, it shall make them whole for such losses, to be computed in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest in accordance with the principles enacted in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also be ordered to execute, on request by the Union, the agreed on contract and to apply its terms retroactively, with employees to be made whole in a manner consistent with the policy set out in *Ogle Protection*, supra, with interest thereon under *New Horizons*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Quinn Restaurant Corp d/b/a Water s Edge, Long Island City, New York its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Impliedly threatening its employees that it will adopt and enforce more stringent work rules or threatening to defer payment of charge card tips in retaliation for their having selected Hotel Employees and Restaurant Employees Union Local 100, AFL-CIO as their collective bargaining representative

(b) Failing and refusing to continue paying them for mealtimes or to prohibit them from punching in their timecards before they eat because they selected the Union to represent them

(c) Implementing work rules without first bargaining collectively thereon with the Union

(d) Refusing to recognize the Union as the exclusive collective bargaining representative of its banquet employees

(e) Refusing to execute a contract negotiated and agreed on with the Union

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) Execute, on request, a collective bargaining agreement embodying the terms and conditions to which it and the Union agreed in December 1986

(b) Apply retroactively the terms and conditions of that agreement and make employees whole for any loss of earnings suffered as a result of its failure to execute and abide by that agreement in the manner described in the remedy section of this decision

(c) Make whole employees for losses incurred, with interest to be computed thereon in the manner described in the remedy section of this decision, as a result of the discriminatory discontinuance of payment for mealtimes

(d) Notify the Union in writing that it recognizes the Union as the exclusive collective bargaining representative of its banquet employees and apply the agreement, referred to above, to them and make them whole for any loss of earnings they may have suffered, in the manner described above

(e) Preserve and, on request make available to the Board or its agents for examination and copying, all payroll records social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order

(f) Post at its facility in Long Island City, New York, copies of the attached notice marked Appendix ⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

³ If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations the findings conclusions and recommended Order shall as provided in Sec 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes

⁴ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"