

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CP SACRAMENTO, LLC, d/b/a
HILTON SACRAMENTO ARDEN WEST
HOTEL

and

UNITE HERE, LOCAL 49

Cases 20-CA-34751
20-CA-34867
20-CA-34909
20-CA-34941
20-CA-34987
20-CA-34988

Matthew C. Peterson, Esq.,
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of Kansas City, Missouri, for the Respondent.

Aamir Deen, Organizer, of Sacramento, California,
for the Charging Party.

DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Sacramento, California, on September 14–17 and November 8–10, 2010, upon the third amended consolidated complaint (complaint), as amended¹ and notice of hearing issued on September 2, 2010, by the Regional Director for Region 20.

The complaint alleges that CP Sacramento, LLC d/b/a Hilton Sacramento Arden West Hotel (Respondent) violated Section 8(a)(1) of the Act by denying the request of its employee to be represented by the Union, by interrogating employees about their union activities, by prohibiting employees from distributing union literature in nonwork areas, and by promulgating an overly broad rule prohibiting off duty employees from being on its property in non-working areas more than 15 minutes before or after a shift.

The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by issuing written discipline to employee Joan Finnsson (Finnsson), and by terminating Finnsson for engaging in union and other protected concerted activities.

¹ At the hearing, counsel for the General Counsel withdrew complaint allegations 7(c), 9(a), (b), and (c), as they related to 8(a)(3) allegations concerning employee Joan Finnsson, amended complaint paras. 7(b)(iv), 13(c), and 21 as set forth in G C Exh.2.

The complaint finally alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by changing work rules dealing with rest periods, employees' presence at work, switching work schedules, cart use, notice for requesting time off, bypassing the Union, by dealing directly with bargaining unit employees concerning notice for time off, by issuing Finnsson discipline for violating work rules dealing with cart use and scraping plates, by issuing Finnsson, Boucher, and Corral discipline for violating a work rule dealing with being on Respondents' property while off duty, and by terminating Finnsson.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

Findings of Fact

Upon the entire record herein, including the briefs² from the counsel for the Acting General Counsel, Charging Party, and Respondent, I make the following findings of fact.

I. Jurisdiction

Respondent admitted it is a limited liability corporation with an office and place of business located in Sacramento, California, where it is engaged in the operation of a hotel providing food and lodging. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$500,000 and purchased and received at its Sacramento, California facility goods or services valued in excess of \$5000 directly from suppliers located outside the State of California.

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

II. Labor Organization

Respondent admitted and I find that UNITE HERE! Local 49 (Charging Party or Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

Respondent owns and operates the Hilton Sacramento Arden West Hotel located at 2200 Harvard Street, Sacramento, California. Howard Harris (Harris) is Respondent's general manager, Melissa Bass (Bass) is Respondent's director of human resources, Douglas Remedios (Remedios) is Respondent's director of food and beverage, and Shelly Mendez (Mendez) was Respondent's banquet manager from about September 2009 to about September 2010. David Salyer was Mendez' predecessor. Respondent has admitted that the above named individuals are supervisors and/or agents of Respondent within the meaning of Sections 2(11) and (13) of the Act. Respondent denied that two or three unidentified Shield Protective Services security guards were its agents within the meaning of Section 2(13) of the Act.

² On January 28, 2011, counsel for the Acting General Counsel filed a motion to correct transcript. Charging Party joined in the motion and Respondent has failed to object to the motion. Good cause having been shown for the motion it is hereby granted.

Chris Rak (Rak) is the Charging Party Union’s president and Aamir Deen (Deen) is the Charging Party Union’s organizer.

5 Since about June 2006 Charging Party has been the exclusive collective-bargaining representative of employees in the following appropriate collective-bargaining unit (Unit):

All employees employed at the Hilton Sacramento Arden West and described in the Wage Scales Section of the collective bargaining agreement between Respondent and the Union, effective June 1, 2006 to May 31, 2009.

10 Respondent purchased the hotel in 2007 and adopted the 2006–2009 collective-bargaining agreement with the Union.³ The collective-bargaining agreement expired on May 31, 2009. Respondent informed the Union by letter that it would terminate the collective-bargaining agreement as of July 1, 2009.⁴ The parties met approximately eight times to
15 negotiate a successor collective-bargaining agreement but, ultimately, they were unsuccessful in reaching a contract. Impasse was declared and, on December 1, 2009, Respondent informed the Union by letter that it would implement its last, best, and final offer on January 1, 2010. The Union has held rallies near and around the Hotel property on several occasions since early December 2009. At the March 3, 2010 rally, the Union publicly announced a boycott of
20 Respondent’s Hotel.

At the hearing the parties stipulated that Respondent implemented the terms of its last, best, and final offer⁵ to the Charging Party on January 1, 2010, only as to economic and productivity terms.⁶

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1. The Independent 8(a)(1) Allegations

a. The request for union representation and interrogation.

30 On February 5, 2010, Charging Party organized a rally outside Respondent’s hotel where Respondent’s banquet servers Carmencita Sparks (Sparks) and Joan Finnsson (Finnsson) passed out union literature⁷ dealing with health care cuts by Respondent about 15 feet from the hotel front door in the parking lot.

35 On February 6, 2010, Sparks and Finnsson were called into Banquet Manager Mendez’ office. When Sparks asked for Finnsson to be present during the interview, Mendez told Sparks she wanted to speak with her alone. When Sparks asked for a union representative, Mendez told her she only needed a union representative if something had to be documented. According to Finnsson, she and Sparks were called to Mendez’ office. Mendez said she wanted to talk to
40 them about soliciting yesterday. Sparks asked for a union representative and Mendez said you don’t need a union representative because I’m not going to write you up.⁸

During the meeting, Mendez asked Sparks what she was doing in the parking lot on February 5, 2010.⁹ Sparks said she was there to support the Union and to hand out flyers to

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³ GC Exh. 3.

⁴ GC Exh. 4.

⁵ GC Exh. 6.

⁶ GC Exh. 5.

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⁷ GC Exh. 9(c).

⁸ Mendez was not called as a witness in this trial.

⁹ It is undisputed that a union rally took place at Respondent’s hotel on February 5, 2010.

hotel guests. Mendez asked Sparks two or three times how far Sparks was from the hotel front door and what she was doing there. Mendez told Sparks it was wrong to hand out the flyers in the parking lot. Sparks said she was about 15 feet from the door handing out flyers. When Sparks said Mendez kept asking her same question, Mendez told Sparks not to get smart with her and that she could ask Sparks any question she wanted. At this point Sparks terminated the meeting and spoke with Union Organizer Deen who said he would not be available until the following Monday. Sparks then returned to Mendez' office, said she had spoken with Deen and said she could continue the meeting with Mendez on Monday. Mendez told Sparks to take the matter up with Director of Human Resources Bass on Monday. Sparks asked if she was going to be written up for this and Mendez replied no.

While Sparks claims that Mendez did not tell her until the end of the interview that she would not be written up, Finnsson places Mendez' statement that they were not going to be written up when both she and Sparks were together at the outset before they were individually called into meetings with Mendez. Since Sparks and Finnsson were interviewed by Mendez separately, it is likely that the statement they would not be written up occurred not only at the end of Sparks' interview but also at the outset of the meetings.

b. Prohibiting employees from distributing union literature in nonwork areas

On March 3, Respondent's employees Sparks, Finnsson, and Maria Munoz (Munoz) were attempting to distribute union literature¹⁰ in the parking lot about 20 to 20 feet from the hotel entrance. They were about 15 or 20 feet from the door of the hotel, they were stopped by uniformed guards who, after checking with a management official, told the employees that they had to leave the property.

c. Promulgating an overly broad rule prohibiting off duty employees from being on its property in nonworking areas more than 15 minutes before or after a shift.

Since at least 2003 Respondent has maintained the following rule in its employee handbook dealing with employee presence at Respondent' facility before and after work:

Associate Entrance/Exit
All associates of the hotel should only enter and exit the building through the designated associates' entrances. Do not enter the property earlier than 15 minutes prior to your scheduled shift and always leave the property within 15 minutes after the end of your shift. While waiting for transportation, associates must be in the designated area.¹¹

In addition Respondent's Meristar Hotels & Resorts Inc. Employee Orientation Form provides:

B. Commission of any one of the following acts may be considered just cause for remedial action that could range from oral or written reprimand, to suspension from work without pay, to dismissal.

15. Being on company premises or in working areas while off duty without the approval of management. Loitering and/or contributing to the inefficiency of employees who are working.¹²

¹⁰ GC Exh. 9(e).

¹¹ R. Exh.1, p. 14.

¹² R. Exh. 2.

The above rules are repeated in a document signed by employee Carmen Sparks in January 18, 2010:

5 Associates are only allowed in the building 15 minutes before and after their scheduled shift. You can not [sic] stay in your work area unless you are scheduled to work.¹³

10 Despite this rule, employee witnesses Sparks, Mendoza, Calderon, and Mercado testified credibly and without contradiction that, before Mendez became banquet manager, they were regularly present on Respondent's property, typically in the employee break room, for more than 15 minutes, both before and after their shifts and in split shift situations, and that they were not required to seek permission from supervision. Employee Sparks might be as much as hour early for work, as when she was just returning from visiting her son out of town. On those occasions, she would sit in the break room until it was time for her shift to begin. Employees Hugo Calderon and Arturo Mercado would stay in the break room more than 15 minutes before or after their shifts in between a split shift and they testified, without contradiction, that prior to Mendez' employment by Respondent they often were at Respondent's facility, without managers' permission, for nonwork related purposes, most often in the break room/cafeteria more than 15 minutes before or after their shift in the presence of Respondent's managers. In a January 18, 2010 meeting of banquet department employees, Banquet Manager Mendez informed the banquet staff that they could no longer be on the property more than 15 minutes before or after their shifts and distributed a written version of this rule. Employee Jaclyn Mendoza uncontroverted testimony was that sometime after the January announcement, she heard Mendez specifically address split shift situations. Mendez said that, even then, an employee could only be on Respondent's property within 15 minutes of his or her shift. 25 However, after January 2010 Mendez began enforcing this rule and told employees that they could not remain on Respondent's facility for more than 15 minutes before or after a shift. Employees Mercado, Calderon, Finnsson, Corral, and Boucher all testified credibly to having the rule enforced against them or learning about the enforcement of the rule for the first time when they ran afoul of it during the course of their activities at the Hotel. Employee Arturo Mercado's credited testimony reflects that in January 2010 he was in the Hotel's kitchen getting a meal in between split shifts. At the time, he had clocked out from one shift and was more than 15 minutes ahead of his next shift when Mendez saw him and asked him why he was there. He explained his circumstances, but Mendez told him that he was not to be on the property more than 15 minutes before his shift.

35 Employee Hugo Calderon's credited testimony establishes that on March 19, 2010, he was in the break room after clocking out because he and some other employees had stayed behind to talk to Human Resources Manager Bass about not receiving their breaks. When Banquet Manager Mendez saw Calderon and the other employees, she asked Calderon why they were still on the property more than 15 minutes after having clocked out. Mendez' question about Calderon's presence on the property is documented in a discipline¹⁴ he received as a result of that exchange.

45 On August 6, 2010, Employees Sharon Boucher and Erica Corral received identical written final warnings¹⁵ pursuant to the newly enforced rule on the day after they participated in a union rally which marched through the Hotel lobby. Their warnings stated: "The employees are not allowed to be lingering on the premises when not on duty without a supervisor's permission."

50 ¹³ R. Exh. 9.

¹⁴ GC Exh. 25(G).

¹⁵ GC Exhs. 21 and 22.

Two additional instances of enforcement of the off-duty employee access rule occurred during a union rally on March 3, 2010. On that occasion, Respondent, through its hired security guards, denied an off-duty employee access to the Hotel parking lot and prohibited other off-duty employees from distributing union literature in the Hotel parking lot. In the first instance, off-duty employee Maria Gomez, accompanied by Union Representative Aamir Deen, was in the Hotel parking lot for the purpose of telling other off-duty employees to join the rally. Gomez and Deen both credibly testified that the security guard repeatedly told them that they were not permitted to be on the property.

In the second instance, employees Sparks, Finnsson, and Munoz were attempting to distribute union literature in the parking lot near the Hotel entrance. When they were about 15 or 20 feet from the door of the Hotel, they were stopped by uniformed guards who, after checking with a management authority by walkie-talkie, told the employees that they had to leave the property.

2. The 8(a)(3) Allegations

a. Written discipline to employee Joan Finnsson¹⁶

Respondent had employed banquet server Finnsson for over 15 years. Finnsson usually worked eight hours a day. Finnsson's immediate supervisor from about September 2009 to September 2010 was banquet manager Shelly Mendez. Prior to Mendez, Finnsson's supervisor was banquet manager David Salyer for 18 to 24 months. Douglas Remedios, Respondent's Food and Beverage Manager was Mendez' boss. Banquet servers worked under the direction of banquet captains, a bargaining unit position. Finnsson was a member of Charging Party Local 49, and according to Union Organizer Deen's credited testimony she was a member of the bargaining committee and she sat in on most of the bargaining sessions with Respondent in 2009. Finnsson also attended a union rally in San Diego and spoke to San Diego media in March 2010. There is no evidence Respondent had knowledge of Finnsson's San Diego union activity. Finnsson participated in many of the Charging Party rallies held just outside Respondent's hotel in 2010. As noted above, on February 6, 2010, Finnsson was called to Mendez office about soliciting on behalf of the Union at the hotel on February 5, 2010.

Between May 27, 2009, and April 10, 2010, Respondent issued Finnsson at least 10 written warnings.¹⁷ On June 10, 2010, Respondent terminated Finnsson.

On May 27, 2009, Finnsson received her first written warning from former Banquet Manger David Salyer for using a plastic pitcher.¹⁸ In her testimony, Finnsson explained that she was using the plastic pitcher to refill the more formal silver pitchers, which the servers were meant to use at the tables. When Salyer saw her with the plastic pitcher, he assumed she was using it to refill glasses at the table and disciplined her.

¹⁶ In its brief counsel for the Acting General Counsel requested reconsideration of my decision to reject GC Exh. 28. Since I have found there is ample evidence in the record of Respondent's knowledge of Finnsson's union activity, there is no need to rely on Exhibit. 28 and the request is denied.

¹⁷ On January 15, 2010, Finnsson received an additional warning for speaking to Mendez in a rude and loud manner. However, Respondent did not consider this warning in terminating Finnsson. GC Exh. 25(g).

¹⁸ GC Exh. 130.

On October 21, 2009, Finnsson received a second warning for using a cart.¹⁹ Food and Beverage Manager Remedios testified that the warning and the meeting with Finnsson was mostly out of concern for her medical restrictions and the issue of food safety. A note²⁰ attached to Finnsson’s warning discusses Finnsson’s medical limits on carrying food items of more than 15 pounds.

On January 14, 2010, Finnsson received an additional warning for speaking to Mendez in a rude and loud manner. On January 15, 2010, Finnsson received disciplinary actions three and four. One was a written warning because she allegedly did not complete all of her assigned tasks.²¹ Finnsson explained that during the course of a service, banquet captain Kelly Patton, unsolicited, and began to help Finnsson with service. On January 15, 2010, Mendez also issued Finnsson a written warning for being, “. . . on the hotel premises 3.5 hours after her shift ended. Joan is not to be on property after her shift ends unless she has prior permission from management.”²² In this case Finnsson had returned to the hotel to speak with Mendez about the upcoming schedule, including whether she was scheduled to work the next day.

On January 28, 2010, Food and Beverage Manager Remedios placed a note²³ in Finnsson’s personnel file reflecting warning number five for working before she had punched in for work. Finnsson testified that just as she was coming into work she noticed a clean cart which she wheeled to the side for use during her shift.

On February 26, 2010, Finnsson received warning six for tardy service at a luncheon.²⁴ Finnsson received a final written warning on February 26, 2010. Finnsson testified that she was on time with the other servers at that function. In the meeting with Mendez during which she received the final written warning, Finnsson testified that she had received help from her coworker Carmen Sparks but that the assistance was not needed and she could have completed the service.

Also, on February 26, 2010, Finnsson received warning number seven for staying in the cafeteria for 40 minutes after she had punched out on February 25, 2010. Finnsson had stayed after work along with various other employees in order to speak with Human Resources Manager Bass about a payroll issue. They waited outside Bass’ office for about a half hour before Bass came out and said that she could not talk to them at that time. While other employees left, Finnsson stayed behind in the break room a few more minutes to speak with Union Representative Aamir Deen. It was then that Mendez saw Finnsson and asked her what she was doing there. Initially, Finnsson said that she was waiting to give coupons to another employee but then she also told Mendez that she had stayed after to speak with Bass. Mendez told her that she could not stay at the Hotel that long after her shift.

On April 7, 2010, Mendez memorialized an eighth warning to Finnsson for using a plastic pitcher to refill guests’ glasses with water and iced tea at the tables.²⁵ Finnsson testified that, as with the other incident involving a plastic pitcher, she did not take it to the guests’ tables and that she did it to be more efficient.

¹⁹ Ibid. at 13M.

²⁰ Ibid at 13N.

²¹ Ibid at 13K.

²² Ibid at 13J.

²³ Ibid at 13I.

²⁴ Ibid at 13F, G, and H.

²⁵ Ibid at 13D.

On April 10, 2010, Mendez added a ninth warning²⁶ to Finnsson's personnel file for scraping a plate in front of a guest. Finnsson testified that on April 10, 2010, the action she engaged in to clear food from the plates was silent and not visible to the guests. In the discipline logs admitted into evidence as General Counsel exhibit 25, there are no other disciplinary actions for the scraping of plates. Respondent presented no witness to rebut Finnsson's version of the event.

b. The termination of Joan Finnsson

Respondent terminated Finnsson on June 11, 2010. The counseling/disciplinary record²⁷ reflects that Finnsson was fired for her, ". . . consistent pattern of violating the hotels/department's policies (sic) this violation will result in Joan's separation from employment with the Hilton Arden West." The termination notice reflects that on June 10, 2010, Finnsson received her final discipline when she took leftover food from a buffet line. The termination document also reflects previous discipline Finnsson had received on October 21, 2009, January 15, 2010, and two disciplinary actions on February 26, 2010. Notes attached to the termination notice reflect that Remedios observed Finnsson making a plate of food from guest buffet line as it was being broken down. Finnsson admitted she had not gotten permission from the executive chef to take the food.

Respondent's rule regarding leftover food in the banquet department is that the banquet staff must take it to the chef so that they can make if it is still safe to consume and whether the kitchen has any use for it. On June 10, 2010, Finnsson and a coworker, Yahya El Hadid, were in the process of cleaning off a buffet table at the conclusion of a function. At that time, Finnsson and El Hadid were both due to have their lunch. Finnsson noted that the entire buffet had been consumed by the guests but for a few pancakes. Finnsson testified without contradiction that she and El Hadid each took three of the leftover pancakes. A short time later Remedios appeared and asked Finnsson if she had checked with the chef about the leftover pancakes. Finnsson admitted she had not. Finnsson was written up for this violation the same day and terminated the next day.

3. The 8(a)(5) allegations -Unilateral work rules changes

a. Rest/break periods

Section 8(g) of the parties' 2006-2009 collective-bargaining agreement defines rest periods as follows:

(g) All employees shall be entitled to a ten (10) minute rest period for every four (4) hours worked, or major portion thereof.²⁸

Respondent's final offer during collective-bargaining negotiations for a successor agreement to the 2006-2009 agreement was implemented on January 1, 2010.²⁹ The language in Respondent's final offer is unchanged from Section 8(g) of the parties' 2006-2009 collective-bargaining agreement.³⁰

²⁶ Ibid at 13C.

²⁷ Ibid at 13P, Q, and R.

²⁸ GC Exh. 3, p. 5.

²⁹ GC Exh. 5.

³⁰ GC Exh. 6, p. 6.

According to the weight of the evidence, including the consistent, un rebutted, and credited testimony of employees Mendoza, Bera, Boucher, Olivares, Chen, Mercado, Sparks, and Calderon in early 2010 Mendez announced a change in Respondent's break policy. Mendez told employees that they would have to complete 4 hours work before they were entitled to a 10 minute break. In the past banquet captains had often allowed a 10 minute break after servers had set up the banquet room at about two hours into employees' shifts. While the timing of breaks was always dependent upon the needs of the banquet schedule, employees always received breaks even though they did not work four full hours. Captain Chen is only one who ignored Mendez' policy and continued to give servers a break if time allowed after they had set up the banquet about 2 hours into their shift.

b. Employees' presence at work.

The facts concerning Respondent's employee access rules have been discussed above in section 1c and need not be repeated here.

c. Switching work schedules

Based upon the un rebutted and credible testimony of banquet servers Mendoza, Bera, Mercado, Calderon, Sparks, and banquet captain Chen the evidence reflects that banquet servers are notified of their banquet assignments by a weekly schedule that is posted. Before January 2010, banquet servers were allowed to switch shifts with other servers with the agreement of the other server, after following seniority³¹ and getting permission of the banquet captain, the banquet manager or the food and beverage manager.³² The switching of shifts was routinely granted before January 2010. However after January 2010 Mendez prohibited servers from switching shifts with each other.³³ While houseman Martin Olivares testified that since January 2010 Mendez had allowed the switching of shifts on occasion, his testimony was clearly opposed by all of the servers who testified to the contrary and by banquet captain Chen who said that Mendez told him he could no longer grant shift switches. I credit the weight of the evidence against Olivares.

d. Scraping plates

When food service has been completed, banquet servers remove plates from guest tables, remove food from the plates at the back of the room outside the view of guests, and remove the collected plates from the room. Before October 2009 banquet servers were allowed to use any item to scrape the remaining food from a collected plate. However after October 2009 Mendez instructed banquet servers to use only bread and butter plates to remove food from collected plates. Mendez enforced this rule in an April 10, 2010 written warning to Finnsson.³⁴ Before this warning to Finnsson, Respondent had not disciplined an employee for using utensils to scrape a plate.

³¹ Banquet servers were listed in seniority order on the banquet schedule.

³² See R. Exh.6, a grievance settlement from March 11, 2008.

³³ Since I have found ample evidence in the record that Mendez changed the policy of switching shifts, I need not consider counsel for the Acting General's request to reconsider striking portions of Mercado's testimony as nonresponsive.

³⁴ GC Exh. 13(C).

e. Use of carts to transport food

Banquet servers deliver food to Respondent's guests in various banquet rooms from the kitchen which is located distant from the banquet rooms.³⁵ Prior to late 2009 or early 2010, banquet servers carried food on carts from the kitchen to the hallways just outside the banquet rooms and from these carts carried food to guests' tables. The general consensus among the serving staff who testified at the hearing and whose testimony has been credited, such as employees Mendoza, Boucher, and Finnsson, and Captain Kenny Chen is that, for many year to just prior to Mendez's announcement prohibiting cart use, servers used carts to transport plates of food from the kitchen to an area just outside of where a function was being held and would then serve by hand from the cart to the guests. After Mendez became the banquet manager, in late 2009, she instituted a new policy prohibiting the use of carts by banquet servers to transport food from the kitchen to the halls outside the banquet room other than to transport very heavy items such as coffee urns. Chen testified that the use of carts was changed by Mendez and that he had personally heard Mendez state the new rule prohibiting carts. Banquet Manager Mendez announced the new rule prohibiting cart use in a meeting of banquet department employees held on October 2, 2009. In that meeting, Mendez told servers that they would now be required to transport food on trays from the kitchen directly to the guests for service. Employees Jaclyn Mendoza and Sharon Boucher also recalled Mendez saying that prohibiting the use of carts was necessary because, as multiple entrees sat on a cart, the food would get cold waiting to be served. Under the new rule, banquet servers were required to transport plates of food on trays from hotboxes in the kitchen to the banquet rooms. On occasion, the hotboxes were rolled into the hall near a banquet room and food was taken from the hotbox, placed on a tray and carried to guests in the banquet room.

Prior to October 2009, Respondent did not discipline any employee for using a cart to transport food to the banquet rooms. However after October 2009 employees Joan Finnsson,³⁶ Hugo Calderon, Donna Ryan, and Antonio Henriquez³⁷ were disciplined for using carts to transport food.

f. Bypassing the Union concerning notice for time off

It appears that former Banquet Manager David Salyer used the posting of the schedule as the benchmark for employee requests for time off. Salyer allowed employees to request days off that would fall within the upcoming schedule within a day or so before the schedule was to be posted. The parties' March 11, 2008 grievance settlement reflects, inter alia, that:

The deadline to submit requests for days off that will be considered in drafting the schedule will be 5pm on the Monday before the schedule is posted.³⁸

While there was some confusion in the record concerning the amount of advance notice required for time off, the banquet servers agreed they had a few days before the posting of the schedule to request time off prior to January 2010. This is consistent with the grievance in Respondent's exhibit 6.

³⁵ GC Exh. 12 provides a floor plan of the hotel's banquet rooms. The kitchen, where food is prepared for guests, is located in the blank space above the restrooms in the upper center portion of GC Exh. 12.

³⁶ GC Exh. 13(M).

³⁷ GC Exh. 25(G), items dated 2/22/2010, and notes to file from Mendez and Remedios regarding the discipline of these employees for using carts for transporting food.

³⁸ R. Exh. 6.

However, the un rebutted and credited testimony of employees Mendoza, Mercado, Sparks, and Calderon was that in early 2010, Mendez announced to employees that they would have to give two weeks notice to request time off. Several employees protested that two weeks
 5 notice was unfair. In the course of the meeting, Mendez responded to the employees' complaints and said that she would compromise and only require one week's notice. However, some time after the meeting, employees eventually learned that Mendez had again increased the amount of advance notice required to request time off to two weeks.

- 10 g. Issuing Finnsson, Boucher, and Corral discipline for violating a work rule dealing with being on Respondents' property while off duty

As noted above in section A, 2, a, Finnsson was issued warnings by Mendez on January 15, 2010, and February 26, 2010, for being on hotel property more than 15 minutes
 15 after her shift had ended.

Respondent's banquet server Erica Corral (Corral) testified that on August 5, 2009, she was at a union rally outside the hotel. While off duty, during the rally she and about 70–80 people entered the hotel through the front door and remained in the hotel about 5 minutes.
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On August 6, 2009, Mendez issued Corral a written warning for being inside the hotel lobby while not scheduled to work. The warning stated that, ". . . are not to be lingering on the premises when no on duty without a supervisor's permission."³⁹

25 Respondent's off-duty banquet server Sharon Boucher also attended the August 5, 2009 union rally at Respondent's hotel and like Corral she joined the union supporters who entered the hotel for about 5 minutes. On August 6, 2009, Mendez issued Boucher a written warning identical to that received by Corral.⁴⁰ Mendez told Boucher she was not supposed to be on the property off the clock if they were not working and that they were not supposed to rally at the
 30 hotel.

h. By terminating Finnsson

As discussed above in section A, 2, b, Finnsson was terminated for a multitude of
 35 Respondent's rules violations on June 10, 2010.

B. The Analysis

40 For the sake of clarity I will discuss the violations of the Act alleged in the complaint by section of the Act.

1. The 8(a)(1) allegations

45 a. The February 6, 2010 denial of union representation to employee Carmen Sparks

Complaint paragraph 15(a) alleges that on about February 6, 2010, Mendez denied the request of employee Carmen Sparks to be represented by the union during an interview.

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³⁹ GC Exh. 21.

⁴⁰ GC Exh. 22.

In the brief General Counsel contends that Mendez conducted an investigatory interview in which Sparks reasonably believed would lead to discipline and that even if Mendez made representations that the interview would not lead to discipline, by questioning Sparks she turned the interview into an investigation.

5

Respondent argues Sparks did not request union representation.

Employees have a Section 7 right to union representation at interviews where there is a reasonable belief that the employee will be disciplined. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). However this right does not apply where the adverse action has been decided and the employee is only being informed. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). But the Board has held that where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies. *Titanium Metals Corp.*, 340 NLRB 766 (2003).

Contrary to Respondent's assertion, Sparks did assert her right to request union representation at her meeting with Mendez. When Mendez denied Sparks request to have Finnsson present during the interview, Sparks said, "I prefer to have my union representative to be there with me." Further while I have found that Mendez told Sparks and Finnsson at the outset of the interview that you don't need a union representative because I'm not going to write you up, it is clear that Mendez intended to question them about soliciting and in fact repeatedly interrogated Sparks about what she was doing in the parking lot on February 5, 2010. Mendez asked Sparks two or three times how far Sparks was from the hotel front door and what she was doing there. Mendez not only told Sparks it was wrong to hand out the flyers in the parking lot but that she could ask Sparks any question she wanted. It was not until after Mendez had interrogated Sparks that Sparks ended the interview and was told again by Mendez that there would be no discipline.

Plainly Mendez turned this meeting into an investigative interview which despite her disclaimer that there would be no discipline, would have led a reasonable person to believe that discipline could result, particularly when coupled with Mendez warning that Sparks solicitation in the parking lot was wrong and that she could ask Sparks any questions she wanted. *Roadway Express, Inc.*, 246 NLRB 1127, 1128, and 1130 fn. 3 and 4 (1979), citing *Chrysler Corporation, Hamtramck Assembly Plant*, 241 NLRB 1050 (1979); see also *Amoco Oil Co.*, 278 NLRB 1, 8 (1986). *Manor Care of Easton*, 356 NLRB No. 39, (2010).

I conclude that despite her disclaimer to the contrary, Mendez turned this meeting into an investigative interview Sparks could have reasonably concluded would lead to discipline and by conducting the interview without Spark's union representative, Respondent violated Section 8(a)(1) of the Act as alleged.

b. The February 6, 2010 interrogation of Sparks

Complaint paragraph 16 alleges that on or about February 6, 2010, Mendez interrogated employees about their union activities.

General Counsel takes the position that Mendez questioning of Sparks regarding her solicitation in the Respondent's parking lot on February 5, 2010, violated the Act.

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Respondent, to the contrary, argues that since Sparks was a well known union activist who engaged in public activity in support of the union, the interrogation by Mendez is not inherently coercive.

5 Recently, in *Manor Care of Easton*, 356 NLRB No. 39, (2010), the Board had an opportunity to examine its test of when interrogating an employee is coercive and violates Section 8(a)(1) of the Act. In *Manor Care*, the Board reaffirmed the totality of the circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985). The Board stated in *Manor Care*:

10 While the Board has identified a number of factors that are ‘useful indicia’ in making this determination, there are no particular set of factors that are to be ‘to be mechanically applied in each case.’ *Rossmore House*, *supra* fn. 20; *Westwood Health Care Center*, 330 NLRB at 939. Rather, the Board has explained that ‘[i]n the final analysis, our task is to determine whether
15 under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.’ *Westwood*, *supra* at 940; *Sunnyvale Medical Clinic*, *supra*. This is an objective standard, and it does not turn on whether the ‘employee in question was actually intimidated.’ *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), *enfd.* 255 F.3d 363 (7th
20 Cir. 2001). Generally, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboard Casinos of Missouri*, 329 NLRB 77 (1999). *Id.* at 26.

Respondent cites *Starbucks Corp.*, 354 NLRB No. 99 (2009) and *Tribune Co.*, 279 NLRB 977, 977 fn. 2 (1978), for the proposition that there is no unlawful interrogation where
25 employees had publicly supported the union. *Starbucks* does not support this contention and *Tribune Co.* is inapposite as the Board found there was a legitimate reason for the interrogation and thus was not coercive.

Here Mendez had no valid basis to question Sparks about her lawful activity particularly
30 in view of the finding below that Respondent’s application of its access policy was illegal. The questioning took place in Mendez’ office where Mendez repeatedly asked Sparks what activity she had engaged in. When Sparks objected to the same questions, Mendez told Sparks not to get smart and that she could ask her any question she wanted. Mendez then told Sparks that it was wrong to hand out the flyers in the parking lot. The interrogation was clearly coercive and
35 violated Section 8(a)(1) of the Act.

c. The January 2010 rule prohibiting off-duty employee access in non-work areas of the hotel

40 Complaint paragraph 18(a) alleges that since January 2010 Respondent promulgated an overly broad rule prohibiting its off-duty employees from being on Respondent’s property in on work areas more than 15 minutes before or after their shifts.

45 General Counsel contends that in telling employees they could not be present on Respondent’s property more than 15 minutes before or after their shift, Respondent promulgated an unlawfully overly broad employee access rule.

Charging Party argues that a no access rule is valid only if it limits access to interior or
50 other working areas, is clearly disseminated to employees, and applies to off-duty employee access for all purposes not just union activity.

With respect to off-duty access, Respondent argues that the evidence does not support the allegation that there was any change in the Hotel’s policy regarding off-duty access rules.

In *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976), the Board established a test for determining if an employer rule limiting off duty employee access to its property is lawful. The Board held:

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[A rule] is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

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In *Ohio Masonic Home*, 290 NLRB 1011, 1012 (1988), the Board applied the *Tri County* test to an existing collective-bargaining relationship between the parties.

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The Board has found rules limiting access to parking lots and other outside nonwork areas unlawful. *Tri-County Medical Center*, 222 NLRB 1089 (1976); *Automotive Plastics Technologies Inc., d/b/a Nashville Plastic Prodeucts*, 313 NLRB 462, 462–464 (1993); *TeleTech Holdings, Inc.*, 333 NLRB 401, 404 (2001); *Martin Luther Memorial Home, Inc., d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646, 655–656 (2004). In *Ark Las Vegas Restaurant Corporation*, 343 NLRB 1281 (2004), the Board found a rule similar to the access rule in the instant case unlawful. The rule in Ark Las Vegas stated:

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Rule 30.

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Reporting to property more than 30 minutes before a shift is to start or staying on property more than 30 minutes after a shift ends unless authorized by a supervisor.

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Under a *Tri County* analysis, the Board found that the term “property” was ambiguous and created an ambiguous message for employees as to the meaning of those terms.

Respondent’s various written and oral iterations of its employee access rule creates an ambiguity among its employees as to the meaning of what property Respondent refers to when limiting employee access.

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Respondent’s employee handbook directs employees not to, “. . . enter the **property** (emphasis added) earlier than 15 minutes prior to your scheduled shift and always leave the property within 15 minutes after the end of your shift.

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Respondent’s Meristar Hotels & Resorts Inc. employee orientation form lists employee action that may cause discipline including, “. . . Being on company premises or in working areas while off duty without the approval of management.”

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While a document signed by employee Carmen Sparks in January 18, 2010, clarifies that, “Associates are only allowed in the building 15 minutes before and after their scheduled shift,” there is no evidence this document was widely disseminated and in view of Respondent’s other handbook provisions, merely adds to the confusion.

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In addition to the written documents listed above Respondent’s supervisor Mendez told employees both in written discipline and in oral statements, that they were not permitted on the premises 15 minutes before or after their shifts, without defining what premises meant.

Respondent's employee access rules as written in employee handbooks and as orally promulgated by Mendez fail to meet the *Tri County* and *Ohio Masonic Home* test. The rules are ambiguous and fail to limit access solely with respect to the interior of the plant and other working areas. Clearly the rules as published and promulgated could apply to nonwork areas such as parking lots. Moreover, Respondent has failed to justify by business reasons why the rule should apply to nonwork areas such as parking lots and entrances. I find that the rules as published and promulgated violate Section 8(a)(1) of the Act as alleged.

d. The March 3, 2010 rule prohibiting employees from distributing union literature in nonwork areas.

Paragraph 17 of the complaint alleges that on about March 3, 2010, by prohibiting its employees from distributing union literature at its hotel entrance, Respondent promulgated a rule prohibiting employees from distributing union literature in nonwork areas.

General Counsel argues that by its security guards prohibiting employees from distributing union literature on March 3, 2010, near the hotel entrance, Respondent promulgated and maintained a rule prohibiting employees from distributing union literature in nonwork areas.

Charging Party contends that employees have the right to handbill in nonwork areas during nonwork time and to request the public to assist its cause by boycotting the employer.

Respondent takes the position that an employer is within its rights to prohibit employees from using its property to promote a boycott of the employer's product or services or to otherwise engage in activities that disrupt its business.

An employer may not prohibit its employees from distributing union literature in nonworking areas of its property during nonworking time absent a showing that such a ban is required to maintain the operation of the business. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

In cases where employees are engaged in distribution of union literature on company property, rules prohibiting distribution of literature on employees' own time and in nonworking areas are presumptively invalid. *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000); *New York New York Hotel*, 334 NLRB 762, 763 (2001); *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg.*, 138 MLRB 615 (1962). A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful. *MTD Products, Inc.*, 310 NLRB 733 (1993).

The Board has found that the porte-cochere or entrance to a hotel is a nonwork area, despite the fact that some of the Respondent's employees work there. *New York New York Hotel*, supra; *Santa Fe Hotel & Casino*, supra.

Agency

In the instant case, it was guards who prohibited the distribution of union literature in the parking lot near the hotel entrance. A discussion of agency principles is appropriate as Respondent has denied the guards in question are its agents. Only if the guards are Respondent's agents can the prohibition be made attributable to Respondent.

In *Greg Murrieta*, 323 NLRB 125, 125 (1997), the Board, quoting *Southern Bag Corp.*, 315 NLRB 725 (1994), reiterated the common law standard for determining whether an individual is serving as an agent of an employer:

5 The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Great American Products*, 312 NLRB 962, 963 (1993); *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees “would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426-427 (1987). As stated in Section 2(13) of the Act, when making the agency determination, “the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

20 In *Cooking Good Div. of Perdue Farms, Inc.*, 323 NLRB 345, 351 (1997), the Board affirmed ALJ Al Metz who found that an unnamed guard was an agent of the employer finding that, “by placing the guard in a position to stop persons entering the plant premises and to confiscate materials the Respondent had cloaked the guard with at least apparent authority as the Respondent's agent.”

25 Here the record reflects that Respondent had hired security guards to be present during union rallies. In addition to that admission, the testimony revealed that the guards wore uniforms, used walkie-talkies, and told the employees distributing union literature that they were directing questions to management and gave the employees a reasonable basis to believe that the guards were acting on behalf of Respondent in directing them to leave the property.

30 I find that the guards were Respondent's agents cloaked by Respondent with apparent authority to enforce the rule prohibiting employees from distributing literature near the hotel front entrance.

35 The area in which the off-duty employees were attempting to distribute union literature was the parking near the covered hotel entrance. Identical areas have been found to be nonwork areas. *New York New York Hotel*, supra; *Santa Fe Hotel & Casino*, supra. The rule as promulgated by the guards on March 3, 2010, was an overly broad no distribution rule since it applied to nonwork areas during the off-duty employees' nonwork time.

40 Respondent's arguments to the contrary are of no avail. This is neither a *Lechmere v. NLRB*, 502 U.S. 527(1992), nor a *Loehmann's Plaza*, 316 NLRB 109 (1995), situation. Here, unlike *Lechmere* and *Loehmann's*, the individuals engaged in distributing union literature in Respondent's parking lot were off-duty employees not nonemployee union representatives. Indeed Respondent's contention that it can prohibit distribution of union literature that calls for guests to boycott Respondent is without legal foundation. To the contrary, the Board has found nothing impermissible about employees making appeals to hotel guests. *Santa Fe Hotel & Casino*, supra.

45 I find that the rule promulgated by the guards on March 3, 2010, violated Section 8(a)(1) of the Act as alleged.

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2. The 8(a)(3) allegations

The warnings and termination of Joan Finnsson

5 Complaint paragraphs 9(d) through (g), 10, and 20 allege that Respondent disciplined and terminated Finnsson because she engaged in union or other concerted activities.

Counsel for the General Counsel contends that Respondent disciplined and terminated Finnsson due to her increasingly public union activity.

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Respondent counters that Finnsson received discipline because she violated hotel policy on numerous occasions and that her discipline and final termination were consistent with its past practice.

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Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."⁴¹ In 8(a)(3) cases the employer's motivation is frequently in issue, therefore the Board applies a causation test to resolve such questions. *Wright Line*, 251 NLRB 1083, 1088 (1980). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. "The critical elements of discrimination cases are protected activity known to the employer and hostility toward the protected activity." *Western Plant*, 322 NLRB 183, 194 (1996). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. *Id.* at 194. In dual motivation cases, once General Counsel has established a prima facie case the burden shifts to Respondent to show that it would have disciplined the employee even in the absence of protected activity.

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The Board and courts have found employer animus based on such factors as the suspicious timing of the discharge,⁴² the presence of other unfair labor practices,⁴³ statements and actions showing the employer's general and specific antiunion sentiment,⁴⁴ and evidence of pretext in the proffered explanation for the discipline.⁴⁵

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The disparate nature of employee discipline is additional evidence of unlawful motivation. *Rogers Electric*, 346 NLRB 508, 520 (2006). In *Grant Prideco, LP d/b/a Tubular Corporation of America*, 337 NLRB 99, 99 (2001), the Board held:

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It is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988); *U.S. Soil Conditioning Co.*, 235 NLRB 762, 764, and *fn.10* (1978), *enfd.* 606 F.2d 940, 948 (10th Cir. 1979). See also *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1003 (1994). Here, the judge found no direct evidence of union animus, but inferred an unlawful motive based on a variety of

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⁴¹ 29 U.S.C. Sec. 158(a)(3).

⁴² *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

⁴³ *Richardson Bros. South*, 312 NLRB 534, 534 (1993).

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⁴⁴ *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-75 (6th Cir. 1993).

⁴⁵ *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 663 (2007); *Wright Line*, *supra* at *fn.12*.

circumstances. These circumstances included the suspicious timing and disparate nature of Knott's discipline.

5 There is no dispute that Finnsson engaged in union activity including her membership in the union, membership on the bargaining committee, attendance at most of the negotiations with Respondent in 2009, participation in union rallies, and handbilling at the hotel.

10 It is likewise clear that Respondent was aware of Finnsson's union activity. As a member of the union negotiating committee, having participated in most of the bargaining sessions with Respondent in 2009, Respondent would have been well aware of Finnsson's support of the Union. Mendez told Finnsson that the February 6, 2010 meeting was about her February 5 handbilling. Further Respondent's guards on March 3, 2010, prevented Finnsson from handing out union literature at the hotel.

15 There is no direct evidence of antiunion animus by Respondent for Finnsson's union activity. If there is such animus it must be inferred from the timing of her discipline and from any pretext in disparate treatment Finnsson may have received when compared with discipline other employees received for similar conduct.

20 All of Finnsson's discipline coincides with her active union participation known to Respondent. Thus, on May 27, 2009, Finnsson received her first written warning from former Banquet Manger David Salyer for using a plastic pitcher. On October 21, 2009, Respondent disciplined Finnsson for improper cart use. On January 15, 2010, Finnsson received disciplinary actions three and four. One was a written warning because she allegedly did not
25 complete all of her assigned tasks. The other warning was for being on hotel premises more than 15 minutes after her shift had ended. On January 28, 2010, Food and Beverage Manager Remedios placed a note⁴⁶ in Finnsson's personnel file reflecting warning number five for working before she had punched in for work. On February 26, 2010, Finnsson received warning
30 number six for tardy service at a luncheon. Also, on February 26, 2010, Finnsson received warning number seven for staying in the cafeteria for 40 minutes after she had punched out on February 25, 2010. On April 7, 2010, Mendez memorialized an eighth warning to Finnsson for using a plastic pitcher to refill guests' glasses with water and iced tea at the tables. On April 10, 2010, Mendez added a ninth warning to Finnsson's personnel file for scraping a plate in front of a guest.

35 Moreover, Respondent's record⁴⁷ of employee discipline during the period March 2006 to August 2010 reflects disparate treatment of Finnsson when compared with other banquet employees. Finnssons' June 11, 2010 warning⁴⁸ states, "Due to Joan's continuing pattern of violating the hotel's/department's policies this violation will result in Joan's separation from
40 employment with the Hilton Arden West." The violation referred to in the June 11 warning was making a plate of food from a buffet line she had finished working. Yet other banquet employees with prior discipline committed similar food violations and received only notes to file or written warnings.

45 Banquet Captain Donna Ryan had ten warnings and an April 22, 2010 note to file⁴⁹ for eating on line. The note to file reflects that Ryan took food that was to be served to guests from

50 ⁴⁶ Ibid at 13l.

⁴⁷ GC Exh. 25(B)-25(F).

⁴⁸ GC Exh. 13(P).

⁴⁹ Ibid.

a pan in the kitchen and ate it. Ryan also received a July 15, 2010 written warning⁵⁰ that reflects she was eating food in a banquet room.

Banquet Server Sharon Boucher received eight warnings and three warnings involving food violations. Boucher received a note to file⁵¹ on April 13, 2010, for eating food off a buffet line, a May 19, 2010 verbal warning⁵² for eating on line that reflects she removed breakfast items from the hotel's buffet line, and a July 15, 2010 written warning⁵³ for removing food from the hotel that reflects Boucher removed a container full of desserts left over from a lunch function.

Banquet employee Hugo Calderon had a total of seven warnings and an April 13, 2010 written warning⁵⁴ for unauthorized eating of banquet food. The warning states that Calderon was witnessed by a manager eating a plated meal that was left over from the lunch he had just served.

In addition banquet employee Antonio Henriquez, who received a total of six warnings was given a note to file⁵⁵ on July 28, 2010, for drinking lemonade that was meant for a break.

Banquet employee Erica Corral who had a total of four warnings had not one but two warnings for taking food home without authorization on February 17, 2010, and for improper consumption of food on April 17, 2010.⁵⁶

Banquet server Jaclyn Mendoza, who was disciplined four times, received a written warning⁵⁷ on February 17, 2010, for taking food home without authority and a note to file on April 17, 2010, for improper consumption of food and beverage. The note to file⁵⁸ reflects Mendoza drank Respondent's soda and water without authority.

Finally, banquet server Maria Bera who had two warnings received an April 17, 2010, note to file⁵⁹ for improper consumption of food.

The above record of employee discipline establishes that when seven other banquet employees with multiple prior warnings violated Respondent's policy concerning eating food, they received no more than written warnings. Contrary to Respondent's argument in its brief, I conclude that the record is replete with evidence of disparate treatment.⁶⁰ Other than its assertion, Respondent failed to address this evidence of disparate treatment. Contrary to the assertion in its brief, there is no evidence⁶¹ any employee from 2006 to 2010 was terminated for violation of eating or taking food. Indeed the record establishes that Respondent treated

⁵⁰ Ibid.

⁵¹ GC Exh. 25(F).

⁵² GC Exh. 25(G).

⁵³ Ibid.

⁵⁴ GC Exh. 25(G).

⁵⁵ Ibid.

⁵⁶ GC Exh. 25(F).

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ GC Exh. 25(F).

⁶⁰ Respondent misstates the holding in *Kmart Corp.*, 320 NLRB 1179 (1996). Nowhere does ALJ Metz hold that evidence of disparate treatment is fundamental to finding a violation of Sec. 8(a)(3) of the Act.

⁶¹ GC Exhs. 25(B)–25(F).

5 unauthorized employee use of food as a minor infraction since many employees who violated this rule, including Corral, Mendoza, Boucher, Ryan, Bera, and Henriquez received no more than a note to file or verbal warning. Moreover, contrary to Respondent’s assertion, it was not normal practice to terminate employees after four disciplines. It is clear that Respondent tolerated multiple violations by employees without terminating them, including Calderon, Mendoza, Ryan, Boucher, Corral, and Henriquez. I conclude that Respondent treated Finnsson differently than other employees when she was terminated for violating its food policy. I infer from this disparate treatment unlawful motivation in Respondent’s termination of Finnsson and that the reasons proffered for her termination were pretext.

10 I find that the timing of Finnsson’s discipline together with her disparate treatment when compared with other employees establishes the requisite antiunion animus toward Finnsson.

15 Accordingly, I find that counsel for the Acting General Counsel has satisfied its burden of establishing Finnsson’s protected conduct motivated the Respondent’s termination.

Ordinarily the burden of proof would shift to Respondent to establish it would have disciplined the employee even in the absence of protected activity.

20 However, as the Board stated in *Rood Trucking Co., Inc.*, 342 NLRB 895, 898 (2004):

25 A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities. This is because where “the evidence establishes that the reasons given for the Respondent’s action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981)). See also *Sanderson Farms, Inc.*, 340 NLRB 402 (2003).

30 Because Respondent has proffered pretextual reasons for disciplining and terminating Finnsson by treating her differently than other employees who received lesser discipline for engaging in similar conduct, Respondent has, by definition, failed to meet its burden of proof that it would have taken the same actions, even absent Finnsson’s union activities.

35 I find that in terminating Finnsson, Respondent violated Section 8(a)(1) and (3) of the Act as alleged.

40 3. The 8(a)(5) allegations

a. The unilateral changes

45 General Counsel has alleged that Respondent made several unilateral changes to terms and conditions of employment that violated section 8(a)(5) of the Act.

50 Respondent contends that there have been no new rules implemented, the rules do not deal with a subject of bargaining that is material, substantial, and significant, the rules are not amenable to notice and bargaining since they are not an actual change in working conditions, rather they are an instruction to achieve compliance with established job requirements and the union waived its right to bargain over any changes by not requesting bargaining or filing a grievance.

It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications. *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001), citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, a unilateral change in a mandatory subject of bargaining is unlawful only if it is material, substantial, and significant. *Flambeau Airmold Corp.*, supra at 166. Recently in *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618 (2007), the Board has held that where a unilateral change is accompanied by the threat or imposition of discipline, the Board will find a violation without regard to whether the change is otherwise material, substantial, or significant. *King Soopers, Inc.*, 340 NLRB 628 (2003); *United States Postal Service*, 341 NLRB 684, 687 (2004); *Flambeau Airmold Corp.*, supra at 166.

As noted by the *Ferguson* Board:

The Board has held that a threat of discipline for a breach of a unilaterally implemented policy is sufficient to establish that the policy constitutes a material change in working conditions. See *Postal Service*, 341 NLRB 684, 687 (2004) (employer's contention that unilaterally implemented policy was not material was "belied by the threat of discipline" for violating that policy); *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (threat to impose discipline on employees who failed to follow new sick leave policy was sufficient to show that employer considered the policy to be significant).

...
[U]nder extant law, the Respondent's institution of the truck key policy constituted a material and substantial change in the employees' working conditions because it was enforced with discipline. 349 NLRB at 618 and 619 fn.6 (2007).

Thus, under the *Ferguson Industries* test it must first be determined if a respondent unilaterally implemented a policy, began enforcing a previously unenforced policy or more strictly enforced extant rules. Next it must be found if there is a threat of discipline for violation of that policy. If both elements are established the policy is a material change in working conditions.

Respondent relies on another line of cases in which the Board has held that changes in service standards and other "day to day operating" decisions are not subject to mandatory bargaining prior to implementation of the change. *The Little Rock Downtowner, Inc.*, 148 NLRB 717, 719 (1964); *Irvington Motors Inc.*, 147 NLRB 565 (1964); and *Litton Systems*, 300 NLRB 324 (1990). In *Little Rock*, the Board held that a rule contained in the maid's manual requiring the daily washing of windows by its maids did not unilaterally change the working conditions of the maids in violation of Section 8(a)(5) of the Act since the rule did not exceed the compass of the job duties the affected employees were hired to perform and falls within the normal area of detailed day-to-day operating decisions relating to the manner in which work is to be performed. The Board found no actual change in working conditions, rather than an instruction to achieve compliance with established job requirements. However, in *Little Rock*, *Irvington Motors Inc.*, and *Litton Systems*, the employer imposed no discipline.

The Board has regularly found that enforcing a previously unenforced policy can support a unilateral change finding. *Beverly Health And Rehabilitation Services, Inc.*, 346 NLRB 1319, 1327 (2006); *Flambeau Airmold Corp.*, 334 NLRB at 166; *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1190–1191 (1986). Moreover a new policy of stricter enforcement of extant work rules is subject to notice and bargaining. *St. John's Community Services-New Jersey*, 355 NLRB No. 70 (2010).

i. The cart use policy

Complaint paragraph 7(a) alleges that on about October 2, 2009, Respondent changed its policy on cart use in the banquet department.

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Prior to late 2009 or early 2010, banquet servers carried food on carts from the kitchen to the hallways just outside the banquet rooms and from these carts carried food to guests' tables. The general consensus among the serving staff who testified at the hearing, such as employees Mendoza, Boucher, and Finnsson, and Captain Kenny Chen is that, for many years prior to October 2009, servers used carts to transport plates of food from the kitchen to an area just outside the banquet room where a function was being held and would then serve by hand from the cart to the guests. After Mendez became the Banquet Manager, in late 2009, she instituted a new policy prohibiting the use of carts by banquet servers to transport food from the kitchen to the halls outside the banquet room other than to transport very heavy items such as coffee urns.

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Contrary to Respondent's contention, Mendez made a change to the rule permitting use of carts to bring food to the area outside the banquet room. I find that this change was material, substantial, and significant. *Mitchellace, Inc.*, 321 NLRB 191 (1996). Unlike the situation in *Irvington Motors*, 147 NLRB 565 (1964); and *Little Rock Downtowner, Inc.*, 148 NLRB 717 (1964), the rule change here involved working conditions rather than mere changes in service standards and other "day to day operating" decisions. Here, under Mendez' new rule, employees were required to carry heavy trays full of food from the kitchen. While portable hot boxes were sometimes used close to the banquet room, it was not unusual for employees to have to carry food from the kitchen to a distant banquet room. Moreover, Respondent issued a disciplinary action to Finnsson for using a cart during service on October 21, 2009,⁶² bringing this case under the *Ferguson* rule.

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Here Respondent presented the Union with a fait accompli regarding the new cart use rule without affording the Union an opportunity to bargain obviating any requirement that the Union seek bargaining.

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I find that in unilaterally issuing the new cart rule in October 2009, Respondent violated section 8(a)(5) of the Act as alleged.

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ii. Rest periods

Complaint paragraph 7(b)(i) alleges that on about January 1, 2010, Respondent changed its practice regarding employee rest periods in the banquet department.

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It has long been acknowledged that lunch and break periods are terms and conditions of employment. *Garrison Valley Center, Inc.*, 246 NLRB 700, 709 (1979); *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 895 (1994) (changing lunch periods violated Section 8(a)(5)); *Genesee Family Restaurant*, 322 NLRB 219, 225 (1996); *Pepsi-Cola Bottling Co.*, 330 NLRB 900, 903 (2001);

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General Counsel contends that Respondent changed its rules concerning rest periods by requiring employees to work a full four hours before receiving a break.

Respondent counters that the General Counsel has not established any change regarding the policies or practices relating to rest periods and assuming arguendo that the

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⁶² GC Exh. (13)(m).

denial of breaks in these instances may have violated the terms of the expired collective bargaining, such isolated breaches do not amount to a violation of Section 8(a)(5).

5 Contrary to Respondent’s contention, the record establishes that in early 2010, Mendez told employees that they would have to complete four hours work before they were entitled to a 10 minute break. In the past banquet captains had often allowed a 10 minute break after servers had set up the banquet room at about two hours into employees’ shifts. While the timing of breaks was always dependent upon the needs of the banquet schedule, employees always received breaks even though they did not work four full hours. Chen is the only captain
10 who ignored Mendez’ policy and continued to give servers a break if time allowed after they had set up the banquet about two hours into their shift.

Respondent’s reliance on the line of cases cited in ALJ Michael Rosas’ decision is misplaced. *Howell Insulation Co.*, 311 NLRB 1355 (1993), is an information request case. In
15 *Chatham Manufacturing Co.*, 221 NLRB 760, 767 (1975), the Board found the respondent gave adequate notice of changes to the union and thus there was no unilateral change. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), is also inapposite as it deals with the midterm modification of a collective-bargaining agreement.

20 I conclude that in early 2010 Respondent unilaterally implemented a rule change requiring employees to work 4full hours before receiving a rest break. By implementing this rule, which was a substantial change to a mandatory subject of bargaining, without notice to the Union, Respondent violated Section 8(a)(5) of the Act as alleged.

25 iii. Employee presence at work

Complaint paragraph 7(b)(ii) alleges that on or about January 1, 2010, Respondent changed its practice regarding employee presence at Respondent’s facility when not scheduled to work.

30 General Counsel contends that Respondent, through Mendez and the security guards enforced a previously unenforced policy, thus creating a unilateral change.

35 Respondent argues that the evidence does not support the allegation that there was any change in the Hotel’s policy regarding off-duty access.

40 The record establishes that since at least 2003 Respondent has maintained a rule that prohibits employee entrance onto its property earlier than 15 minutes prior to or after a scheduled shift or being on company premises or in working areas while off duty without the approval of management.

45 While Respondent contends that here was no change in its access policy, the record shows that from 2003 until January 2010 this rule was observed only in its breach. Off-duty employees regularly entered Respondent’s premises more than 15 minutes before a shift and remained well over 15 minutes after a shift for a variety of reasons, including waiting for a split shift, visiting, or waiting for a ride. Respondent’s access policy was not enforced until January 2010 when Mendez told employees in a meeting that they could not be on Respondent’s premises more than 15 minutes before or after a shift. After the January 2010 employee meeting Mendez enforced the announced access rule. Thus, Finnsson’s January 15, 2010,
50 discipline⁶³ refers to her being “on property” after her shift ended. Finnsson’s February 26,

⁶³ GC Exh. 13(j).

2010 written warning⁶⁴ refers to her being on property after her shift. On August 6, 2010, employees Sharon Boucher and Erica Corral received identical written warnings⁶⁵ which stated, “The employees are not allowed to be lingering on the premises when not on duty without a supervisor’s permission.”

5

Enforcing a previously unenforced rule concerning a mandatory subject of bargaining without notice to the union is an invalid unilateral change. *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319, 1327 (2006); *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001). Also a new policy of stricter enforcement of extant work rules is subject to notice and bargaining. *St. John’s Community Services-New Jersey*, 350 NLRB No. 70 slip op. at page 25 (2010).

10

I find that in enforcing a previously unenforced employee access rule without notice to or bargaining with the Union, Respondent made an unlawful unilateral change that violated section 8(a)(5) of the Act as alleged.

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iv. Switching shifts

Complaint paragraph 7(b)(iii) alleges that on about January 1, 2010, Respondent changed its practice allowing banquet department employees to switch their shifts with other unit employees and give their shifts to other employees.

20

General Counsel argues that Mendez’ January 2010 edict that there would be no more shift changes granted was an unlawful unilateral change to terms and conditions of employment.

25

Respondent again contends that there is insufficient evidence to support any actual change in the hotel’s policy or practice concerning switching or giving away shifts.

The uncontroverted evidence reflects that before January 2010, banquet servers were allowed to switch shifts with other servers with the agreement of the other server, after following seniority and getting permission of the banquet captain, the banquet manager, or the food and beverage manager. The switching of shifts was routinely granted before January 2010. However, after January 2010 Mendez prohibited servers from switching shifts with each other.

30

35

Respondent’s position that banquet servers simply failed to request shift changes, is belied by the banquet servers’ testimony that they stopped asking for shift changes because of Mendez’ new rule prohibiting such changes.

40

In *JLM, Inc.*, 312 NLRB 304, 307 (1993), the Board held that restaurant shift coverage rules, i.e., how employees must go about securing a day off or switching days off, are plainly terms and conditions of employment.

I find that in January 2010 Respondent issued a new policy denying banquet employees shift changes without notice to or bargaining with the Union and in so doing violated section 8(a)(5) of the Act as alleged.

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50

⁶⁴ GC Exh. 13(g).

⁶⁵ GC Exh. 21 and 22.

v. Scraping plates

5 Complaint paragraph 7(b)(iv) alleges that on about January 1, 2010, Respondent changed its practice regarding the method for scraping dishes and enforced its new policy on or about April 10, 2010.

10 General Counsel and Charging Party contend that under either the *Ferguson Enterprises* standard or under the *Mitchellace, Inc.*, material, substantial, and significant test, Respondent’s new practice for scraping plates was an unlawful unilateral change.

15 On the other hand, Respondent counters that changes in service standards and other “day to day operating” decisions are not subject to mandatory bargaining prior to implementation of the change. The *Little Rock Downtowner, Inc.*, 148 NLRB 717 (1964); *Irvington Motors*, 147 NLRB 565 (1964); *Litton Systems*, 300 NLRB 324, 414 (1990).

20 There is no dispute that part of the banquet servers’ duties has always required them to remove uneaten food from guests’ plates at the end of a meal. In the past, before October 2009, banquet servers were allowed to use any item, including silverware, to scrape the uneaten food from a collected plate. However, after October 2009 Mendez instructed banquet servers to use only bread and butter plates to remove food from collected plates. Mendez enforced this rule in an April 10, 2010 written warning to Finnsson.⁶⁶ Before this warning to Finnsson, Respondent had not disciplined an employee for using utensils to scrape a plate.

25 At first blush it would appear that the change from using silverware to using a plate to scrape food is not a material or substantial change but rather a change in service standards and other “day to day operating” decisions like those cited in *The Little Rock Downtowner, Inc.*, 148 NLRB 717 (1964); *Irvington Motors*, 147 NLRB 565 (1964); and *Litton System*, 300 NLRB 324, 414 (1990). However, unlike in *Ferguson Industries*, these cases did not involve imposition of discipline.

30 Respondent contends that the tension between these two lines of precedent is readily reconciled. Respondent posits that prior notice and an opportunity to bargain has been required in those cases involving traditional subjects of bargaining such as usage of sick leave and vacation and has not been required in those cases involving the basic direction of the business for example, the determination of standards of service, the supervision, and direction of employees. Also, the fact that discipline may result from a failure to follow management supervision and direction as to a matter that is within the basic direction of the business does not transform an issue into one that requires prior notice and bargaining.

35 However, there is no legal support for Respondent’s argument. Indeed *Ferguson Industries* at 618 at makes it clear that, “. . . a threat of discipline for a breach of a unilaterally implemented policy is sufficient to establish that the policy constitutes a material change in working conditions.”

40 Here, Respondent enforced the change in the manner plates were scraped with discipline. The Respondent’s discipline for a breach of a unilaterally implemented policy is sufficient to establish that the policy constitutes a material change in working conditions. By implementing this change without prior notice to or bargaining with the Union constitutes and
50 unlawful unilateral change in violation of Section 8(a)(5) of the Act as alleged.

⁶⁶ GC Exh. 13c.

vi. Advance notice to request time off/direct dealing

5 Paragraphs 7(d) and 8 allege that Respondent bypassed the Union and dealt directly with bargaining unit employees about whether two weeks advance notice would be required in order to request time off.

10 General Counsel, in its brief, argues that Respondent not only dealt directly with employees concerning the requisite advance notice for time off but also made a unilateral change in the amount of advance notice required.

Respondent takes the position that nothing was in fact changed regarding notice for time off and the facts fail to support any direct dealing finding.

15 Former Banquet Manager David Salyer used the posting of the schedule as the benchmark for employee requests for time off. Salyer allowed employees to request days off that would fall within the upcoming schedule within a day or so before the schedule was to be posted. The parties' March 11, 2008 grievance settlement reflects a similar policy:

20 The deadline to submit requests for days off that will be considered in drafting the schedule will be 5 pm on the Monday before the schedule is posted.⁶⁷

25 However, in early 2010, in a meeting Mendez announced to employees that they would have to give two weeks notice to request time off. Several employees protested that two weeks notice was unfair. In the course of the meeting, Mendez responded to the employees' complaints and said that she would compromise and only require 1 week's notice. However, some time after the meeting, Mendez had again increased the amount of advance notice required to request time off to two weeks.

30 In its brief Respondent suggests that Human Resources Manager Melissa Bass was made aware of these discussions regarding notice for time off and she advised that nothing could change without going through the Union. Contrary to its assertion, Dean was not testifying about advance notice for time off but rather bidding for schedules.⁶⁸ The email⁶⁹ she sent to Union Organizer Aamir Dean, referred to in Respondent's brief, had nothing to do with advance notice for time off but was to advise that if the Union wished to change any aspect of the scheduling/bidding process, he should bring them to the Hotel's attention.

40 As to the issue of unilateral change, in *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001), the Board found a change in the advance notice requirement for vacation leave from 1 day to 3 days to be material, substantial, and significant, requiring notice and bargaining over the change. As in this case, the policy in *Flambeau* had been in writing for some time, but contrary to the stated policy, the employer's practice was to approve employee vacation requests made as late as the day before the vacation day.

45 In this case, the record is clear that in January 2010, Mendez changed the advance notice required to request time off from as little as a few days to two weeks. This was a material and substantial change in a term and condition of employment that required notice to and

50 ⁶⁷ R. Exh. 6.

⁶⁸ Tr. p.1249, lines 11–15.

⁶⁹ The email, R. Exh. 5, was rejected as irrelevant to the allegations of the complaint since bidding schedules was not alleged as a violation of the Act.

bargaining with the Union. The fact that there may have been members of the Union bargaining committee present does not constitute notice to the Union nor waive the Union's right to bargain over this change. I find that in changing the notice requirement for time off without notice to or bargaining with the Union, Respondent violated Section 8(a)(5) of the Act as alleged.

5

With respect to bypassing the union and direct dealing, the Board has long held that the obligation to bargain collectively requires, "recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly with the employees." *General Electric Co.*, 150 NLRB 192, 194 (1964), enf'd. 418 F.2d 736 (2nd Cir. 1969), cert. denied 397 U.S. 965 (1970).

10

However, the Board does not apply this doctrine blindly in every case where an employer announces wage and benefit changes to represented employees. As the Board pointed out in *United Technologies Corp.*, 274 NLRB 609, 610 (1985):

15

[T]here may be some risk that direct communication between an employer and its employees which bears on the bargaining process may be perceived by some as an attempt to undermine the statutory collective-bargaining representative. However, we are convinced that the benefits to be derived from free, noncoercive expression far outweigh such speculative concerns.

20

So, to find that direct dealing has occurred, there must be factors present other than a simple communication from employer to employee. Accordingly, the issue to be determined is whether a respondent's announcement was made, was intended, or naturally tended, to undermine the union's status as the exclusive representative of the bargaining unit. *KEZI, Inc.*, 300 NLRB 594, 600 (1990).

25

In *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000), the Board held that the criteria to determine whether a respondent has engaged in direct dealing are:

30

[T]hat the Respondent was communicating directly with union-represented employees; the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and such communication was made to the exclusion of the Union.

35

Here, it is clear that each element set forth in *Permanente Medical Group* is present. Mendez communicated her willingness to negotiate the notice requirement for time off to bargaining unit employees. The purpose of the communication between Mendez and the bargaining unit employees was to change a term or condition of employment, i.e., the notice requirement of two weeks, thereby undercutting the Union's exclusive role as bargaining agent over terms and conditions of employment. Finally, Mendez' communication was made to the exclusion of the Union. The fact that there may have been members of the union bargaining committee present does not constitute notice to the Union.

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I find that in directly negotiating with the banquet employees over the amount of time required to request time off, Respondent dealt directly with members of the bargaining unit and bypassed the Union in violation of Section 8(a)(5) of the Act, as alleged.

50

General Counsel has also alleged Respondent has committed additional violations of section 8(a)(5) of the Act in:

b. Issuing written warnings to Finnsson, Boucher, and Corral

5 In complaint paragraphs 7(b)(iv), 9(a), 9(b)(iii), 9(d)(ii), 11, 12, and 21 General Counsel alleges that Respondent's warnings to Finnsson, Boucher, and Corral were the product of unilaterally implemented work rules changes.

10 On October 21, 2009, Respondent issued Finnsson a warning for improper cart use. On January 15, 2010, and February 26, 2010, Respondent issued Finnsson warnings for being on Respondent's property when not scheduled to work. On April 10, 2010, Respondent issued Finnsson a warning for using a utensil to scrape a plate. On August 6, 2010, Respondent issued Boucher and Corral warnings for being on Respondent's property when not scheduled to work.

15 The Board has held that if an employee is disciplined or discharged due to an unlawfully implemented work rule or policy that was a factor in the discipline or discharge likewise violates Section 8(a)(5) of the Act. *Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001).

20 Likewise discipline based upon an invalid no access rules that discipline in unlawful regardless of whether the conduct could have been prohibited under a lawful rule. *Double Eagle Hotel and Casino*, 341 NLRB 112 fn. 3 (2004).

25 Having found the Respondent's cart rule, access rule, and plate scraping rule invalid under Section 8(a)(5) of the Act, any discipline issued due to those rules likewise violate section 8(a)(5). Since Finnsson, Boucher, and Corral received discipline for violating the above rules, their discipline violates Section 8(a)(5) of the Act, as alleged.

c. Terminating Finnsson

30 In complaint paragraphs 10 and 21 General Counsel alleges that Respondent terminated Finnsson due to unlawfully implemented rules changes.

35 I have previously found that Respondent unlawfully implemented rules changes dealing with employee access, cart use, and scraping food off plates. As noted above, Finnsson received four warnings for violating unilaterally implemented work rules. Since, Respondent considered, at least in part, Finnsson's four unlawfully issued warnings, I must conclude that her discharge was due to an unlawfully implemented work rule or policy that was a factor in the her discipline or discharge and thus both the discipline and discharge likewise violates Section 8(a)(5) of the Act. *Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001), as alleged.

40 Conclusions of Law

45 1. The Respondent, CP Sacramento, LLC d/b/a/ Hilton Sacramento Arden West Hotel, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Unite Here! Local 49 is a labor organization within the meaning of Section 2(5) of the Act.

50 3. Respondent has violated Section 8(a)(1) of the Act by interrogating its employees about their union activities, by denying its employees the right to union representation in an investigative interview, by promulgating an overly broad rule prohibiting its off-duty employees

access in nonwork areas of the hotel, and by promulgating a rule prohibiting employees from distributing union literature in nonwork areas.

5 4. Respondent has violated Section 8(a)(1) and (3) of the Act by issuing written warnings to and terminating employee Joan Finnsson.

10 5. Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally implementing rules concerning cart use, rest periods, employee access, switching shifts, scraping plates, and notice for time off. Respondent has also violated Section 8(a)(1) and (5) of the Act in bypassing the Union and directly dealing with employees, in issuing written warnings to Finnsson, Boucher, and Corral and in terminating Finnsson.

15 The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

25 The Respondent will be ordered to offer reinstatement to Joan Finnsson who it unlawfully terminated and make her whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against her in accordance with the formula set forth in *F. W. Woolworth Co*, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

30 Having unilaterally implemented its rules dealing with cart use, rest periods, employee access, switching shifts, scraping plates, and notice for time off Respondent should be ordered to cease giving effect to these rules and bargain in good faith with the Unions over such rules.

35 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁷⁰

ORDER

40 The Respondent, CP Sacramento, LLC d/b/a/ Hilton Sacramento Arden West Hotel, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

45 (a) Refusing to bargain in good faith with the Union as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

50 ⁷⁰ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

All employees employed at the Hilton Sacramento Arden West and described in the Wage Scales Section of the collective bargaining agreement between Respondent and the Union, effective June 1, 2006 to May 31, 2009.

- 5 (b) Unilaterally implementing terms and conditions of employment without giving the Union notice and an opportunity to bargain.
- (c) Interrogating employees about their union activities.
- 10 (d) Refusing to allow employees to have union representation during an investigative interview.
- (e) Promulgating and enforcing rules prohibiting employees from distributing union literature in on work areas during non-work times.
- 15 (f) Promulgating and enforcing rules prohibiting off-duty employees from being on its property in outside, non-work areas more than 15 minutes before or after their shifts.
- (g) Bypassing the Union and dealing directly with its employees concerning terms and conditions of employment.
- 20 (h) Issuing warnings to and terminating its employees for engaging in union or other protected concerted activity.
- (i) Issuing warnings to and terminating its employees pursuant to unilaterally implemented work rules.
- 25 (j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.
- 30 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Offer immediate and full reinstatement to Joan Finnsson to her former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and make her whole with interest as provided in the remedy section of this decision.
- 35 (b) Remove from its files any reference to the unlawful warnings of Joan Finnsson, Sharon Boucher, and Erica Corral and the unlawful suspension and termination of Joan Finnsson and notify them in writing that this has been done and that the warnings suspension and termination will not be used against them in any way.
- 40 (c) Cease giving effect to the unilaterally imposed rules dealing with cart use, rest periods, employee access, switching shifts, scraping plates, and notice for time off and give notice to and, if requested, bargain in good faith with the Unions over such rules.
- 45 (d) Preserve and, within 14 days of a 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 back pay due under the terms of this Order.
- 50

(e) Within 14 days after service by the Region, post at its facility Sacramento, California, copies of the attached notice marked “Appendix.”⁷¹ Copies of the notice, on forms provided by the Regional Director for Region 19, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., May 12, 2011.

John J. McCarrick
Administrative Law Judge

⁷¹ If this Order is enforced by a Judgment of the 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.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Chose not to engage in any of these protected activities

After a trial at which we appeared, argued, and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain in good faith with Unite Here! Local 49 as the exclusive collective-bargaining representative of the employees in the bargaining unit:

All employees employed at the Hilton Sacramento Arden West and described in the Wage Scales Section of the collective bargaining agreement between Respondent and the Union, effective June 1, 2006 to May 31, 2009.

WE WILL NOT bypass the Union and deal directly with our employees concerning terms and conditions of employment.

WE WILL NOT unilaterally implement terms and conditions of employment without first giving notice to and bargaining with the Union and WE WILL NOT issue warnings to or terminate our employees as a result of unilaterally implemented terms and conditions of employment.

WE WILL NOT warn, suspend, or terminate for engaging in activities protected by Section 7 of the Act.

WE WILL NOT interrogate employees about their union or other protected concerted activities.

WE WILL NOT refuse to allow employees to have union representation during investigative interviews.

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

WE WILL cease giving effect to unilaterally imposed rules and WE WILL give the Union notice of such rules, and if requested, bargain with the Union in good faith with the Union about those rules.

WE WILL offer Joan Finnsson reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position of employment without any loss of rights and benefits, and WE WILL make her whole for any loss of wages or other benefits she may have suffered as the result of the discrimination against her.

WE WILL notify Joan Finnsson, Sharon Boucher, and Erica Corral that we have removed from our files any reference to their warnings, suspension, and termination and that the warnings, suspension and termination will not be used against them in any way.

CP SACRAMENTO, LLC d/b/a/ HILTON
SACRAMENTO ARDEN WEST HOTEL

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's San Francisco, California Regional office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market St., Suite 400, San Francisco, California 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5183.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above. The final decision and this notice are available in either English or Spanish.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CP SACRAMENTO, LLC, d/b/a
HILTON SACRAMENTO ARDEN WEST
HOTEL

and

UNITE HERE, LOCAL 49

Cases 20-CA-34751
20-CA-34867
20-CA-34909
20-CA-34941
20-CA-34987
20-CA-34988

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