UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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IN THE MATTER OF: Case No.: 22-CA-29242

CENTURY BUFFET AND RESTAURANT,

Respondent,

And

318 RESTAURANT WORKER'S UNION,

Charging Party.

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RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Dated: New York, New York
July 26, 2011

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I. STATEMENT OF THE CASE

Based upon a charge and a first amended charge filed by 318 Restaurant Workers' Union (hereinafter referred to as the "Union"), on December 11, 2009, and January 7, 2010, respectively, the Regional Director issued a Complaint and Notice of Hearing, which alleged that Century Buffet and Restaurant, Inc. (hereinafter, "Respondent" or "Restaurant") engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the Act. On August 3rd, 4th, November 18th, and December 9th of the year 2010, a hearing was held before Administrative Law Judge Steven Davis (hereinafter, the "ALJ").

The ALJ allowed the Acting General Counsel (hereinafter, "General Counsel") to amend the complaint, after General Counsel had rested his case, to change the name of the Respondent to Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc., and Century Buffet Grill, LLC.

On February 17, 2011, parties filed their respective post-trial briefs. Thereafter, on or about March 10, 2011, General Counsel filed a Motion to Strike. In response, Respondent filed its Opposition to General Counsel's Motion to Strike and Respondent's Cross-Motion to Reopen Record on April 8, 2011. On April 11, 2011, ALJ issued an order denying Respondent's motion to reopen the record. Respondent filed its letter motion for reconsideration on April 13, 2011.

On May 2, 2011, ALJ filed his decision with the Board in Washington, D.C., and the case was transferred to and continued before the Board. On May 13, 2011, the Board granted an extension for Respondent to file its exception to ALJ's decision to June 30, 2011. On June 2, 2011, the parties entered into the Board's Alternative Dispute Resolution ("ADR") program, and the deadline for filing exceptions was thereby stayed. When the parties entered into ADR, there were still 29 days left before the deadline for filing exceptions. On June 28, 2011, the case was

removed from ADR. As such, Respondent's deadline for filing exceptions and supporting briefs is July 27, 2011.

There is no dispute between the parties as to jurisdiction. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. This case is properly before the Board for adjudication.

II. STATEMENT OF FACTS

A. Background

The Respondent is a New Jersey company, having its place of business in Clifton, New Jersey, engaged in the operation of a restaurant.

The current business entity, Century Buffet and Grill, LLC, was formed by Ko Fung "Peter" Yeung (hereinafter, "Peter") in January 2010. Prior to January 2010, Peter's father operated the restaurant under the business name, Best Century Buffet, Inc., from 2007 until he dissolved the business in December 2009.

In or about late 2008 to early 2009, three of the Respondent's wait staff, namely Rong Chen, Li Xiam Jiang (hereinafter "Jessica"), and Jin Ming Lin (hereafter "Ivan"), allegedly visited the Union's office. They allegedly spoke to Union's vice president Fong Chun "Tony" Tsai (hereinafter "Tony") about a number of grievances they had regarding their working conditions. Trial transcript ("Tr."). P128, 146, 176. Tony allegedly said he could refer the employees to an attorney who could help them. Administrative Law Judge Decision ("JD") P3 L33. On April 9, 2009, Rong Chen, Jessica, and Ivan, among others, filed a federal lawsuit against the Respondent, Peter, and Steven Lam, for minimum wage and overtime violations of the Fair labor Standards Act and the New Jersey Wage and Hour Law. JD P3 L39-41. On or

about May 29, 2009, Rong Chen, Jessica and Ivan presented the Respondent with a complaint from the federal lawsuit. Tr. 119, 177-78.

On June 1, 2009, the Union filed a representation petition with the Regional office seeking to represent Respondent's wait staff. Tr. P21. Just days after the federal action was filed, Steven Wong, an alleged activist in Chinatown, arranged a meeting between the Union and the Restaurant. JD P4 L6-7. Peter testified that he asked Steven Wong for help resolving the federal lawsuit and this case. JD P4 L15. Tony was aware that Steven Wong is not an attorney. Tr. P334 –338. The Respondent was represented by the law firm of Wong, Wong and Associates at the time of the meeting. JD P3 L45.

B. <u>The June 10, 2009 Meeting</u>

The parties met in Steven Wong's office on or about June 10, 2009. Present for the Union were Tony, another Union representative, and Ivan and Rong Chen. Present for the Respondent were Peter, his ex-wife, and his ex-father-in-law. JD P4 L20. At the time of the meeting, the restaurant was still owned by Peter's father. Peter's father executed a power of attorney on June 10, 2009, giving Peter authority to negotiate with the Union. Tr. 55-6. During the meeting, Peter testified that Tony and Steven Wong told him that the federal action and the NLRB action could be "canceled" if he followed their advice and do what they told him to do. JD P6 L20. Indeed, they spoke about settling the federal court case and even negotiated about the amount it would take to settle the case. JD P6 L24. In his federal court deposition, when asked about this meeting, Tony stated that "we were negotiating regarding the lawsuits suing the employer". JD P6 L26.

Tony brought a recognition agreement with him to the meeting and asked Peter to sign the agreement to recognize the Union. Tr. 22. The recognition agreement was written in English,

and was not translated in Peter's native language—Chinese. JD P6 L34. Tony testified that Steven Wong explained to Peter that "[the Union is] the bargaining unit that is able to bargain with the employers about the worker's condition." JD P4 L46-47. Peter testified that Tony and Steven Wong did not explain to him the essential terms of the agreement or the responsibilities that comes with signing the agreement. Notably, no one testified that they explained to Peter that he is required to provide Union with advance notice before implementing any changes to the employment condition, and no one advised Peter to discuss with an attorney before signing the agreement.

Peter testified that Tony instructed him to put down the title "CEO" next to his signature. Tr. 334-38. He did not know what the term meant, but wrote it because Tony told him "this is a position. It doesn't matter." JD P7 L1.

Following the execution of the recognition agreement, the parties discussed the working conditions at the restaurant. Tony asked Peter to stop assigning wait staff side work, which request Peter agreed. JD P5 L33. Peter testified that the Respondent agreed to stop assigning side work "as long as you can cancel this case, the federal and here." JD P5 L36. Rong Chen and Ivan testified that, in late July, the wait staff stopped doing any side work. JD P5 L34.

Tony also asked the Respondent to stop charging the workers for transportation, or to reimburse them the amount that they paid, even though the Respondent never charged its workers any fees for transportation since it did not provide the transportation. Peter replied that if Tony canceled the lawsuits he would pay the workers $6.00 per day for transportation. Tony rejected that and countered with $10 per day. No agreement was reached by the parties regarding the issue of transportation reimbursement.

Tony then asked Peter to pay the workers their alleged proper hourly wages. Tony conceded that in order to properly compute the sums owed, the employer must have a record of the total number of hours that employees worked each day. Tony further agreed that such a record might be made by having the workers sign in and out each day.

Peter testified that Tony also complained that the workers' hours were too long. Peter promised to try to change the work hours, and indeed delivered on his promise when he changed the employees' work schedule to 40 hours a week pursuant to Tony's request. Peter's testimony here is corroborated by a document bearing Tony Tsai's handwriting, in which Tony wrote down the hours that the Union was requesting on behalf of the employees. The original and translated versions of this document are annexed hereto as **Exhibit A**.[1]

C. <u>The July 22 Meeting</u>

Peter testified that he requested that Steven Wong arrange another meeting with Tony because he fulfilled many of the Union's requests but the federal court case had not yet been cancelled.

At a meeting on July 22, the same persons were present. They discussed the employee's monetary demands in the federal court case. Peter was taken by surprise when Tony said the employees' demanded an unreasonably high amount of money. Tony said that the employees would consider lowering the sum if the Respondent improved their working conditions first as a demonstration of "sincerity"

Tony demanded that Peter order Lam to stop taking a share of employees' tip. Peter replied that Lam was a head waiter, and therefore, he was entitled to share in the tips. JD P7 L32-34.

[1] Respondent intends to move the Board to reopen the record to adduce this new evidence.

Tony asked that Peter reimburse the workers for their transportation costs. Respondent offered to reimburse the workers up to $6.00 per day, even though the Respondent had never reimbursed employees for transportation previously. The employees did not agree to that amount.

D. Events in August

Peter testified that he started to manage the operations of the restaurant in August of 2009. Even though Peter was granted power of attorney a few months back in June, Peter did not think he had the "right" or "authority" to manage the wait staff or their work schedule. JD P8 L17.

1. Employer Charged All Employees for Meals Regardless of Union Affiliation.

Peter gave notice to all wait staff when he assumed the managerial role in August 2009 that he was going to charge the wait staff for meals consumed at the restaurant. Tr. P315. Respondent deducted from their net wages the money they owed for consuming the buffet food. Peter testified that Respondent charged all the wait staff, including Steven Lam, regardless of their Union membership, the same amount for meals. Id. In September, 2009, the workers stopped eating the buffet food and began brining their own meals to work, and so Respondent stopped deducting money from their pay for food. In January, 2010, when Peter became the owner of the new restaurant, the new restaurant stopped charging employees for meals altogether. JD P8 L26.

2. Steven Lam's Decision to Stop Driving Workers to Work.

Steven Lam started providing his fellow employees transportation to and from work in 2006. Tr. P183-184. In consideration for this service, the employees paid Lam $5 per day for the round trip that would have otherwise cost them $16. JD P8 L38; JD P9 L11. Lam used his own

personal vehicle, not a company car, and the employer never paid for his expenses such as gas, tolls, or repairs. JD P9 L22.

Rong Chen, Ivan and Jessica testified that on August 7, 2009, Lam told them that they should lie in federal court by testifying that they paid him the transportation fee voluntarily, and if they did not testify in that manner, he would not take them to and from work. JD P9 L5. They refused to do so and thereafter were not driven to and from work. Id. However, Tony offered inconsistent testimony regarding when Steven Lam stopped driving the employees. Tony "credibly" testified that at the July 22 meeting, the employees were no longer being driven to and from work by Steven Lam. JD P9 L50.

Peter testified that employees were not provided transportation by the Employer, transportation expenses were not reimbursed by the employer, and it had not agree to reimburse such costs. Tr. P155. Peter further testified that he was never directed Lam to drive employees to and from work, and he has never paid Lam for doing so. Tr. P361-62. Lam has never shared the money employees paid him with the employer. Lam charged employees for transportation regardless of their union affiliation. JD P9 L19.

3. Employer Required Employees to Sign in and Out of Work and Reduced Work Hours for All Wait Staff Regardless of Union Affiliation.

The wait staff claimed that, before the federal lawsuit was filed in April, they allegedly worked five to six days per week, from 12 to 13 hours per day, which claim the Respondent vehemently disputes. In August, 2009, Peter changed the wait staffs' hours to about 8 hours per day. Peter testified that the decision to change employee's hours was prompted upon request by Tony during the meeting in June of 2009. Tr. P339-340. Tony told Peter that Peter needed to first make the working conditions at the restaurant better before the Union would consider discontinuing the federal lawsuit. Thus, Peter changed the work hours all of the wait staff,

whether or not they were union members. Tr. P337. Ivan himself conceded during his testimony that the wait staff's income remained the same after August of 2009, when their hours were reduced. Tr. P159 L1-3 ("Q: So your payment remain the same after reduction of hours right? A: Yes.)

Peter further testified that an additional reason for changing workers' hours was the restaurant's business was not going well. Tr. P392-93. Instead of laying off workers, Peter chose to change workers' hours so that he may keep everyone employed. Id.

Also in August, 2009, Peter instituted a policy of requiring all wait staff to sign in and out of work. Tr. P376 L4-5. All of the wait staff was required to record their hours, regardless of their union affiliation. Tr. P376 L6-8. Peter stated that the purpose of this policy was to keep accurate records of wait staff's work time in accordance with the Fair Labor Standards Act and the New Jersey Wage and Hour Law. Tr. P377. Peter testified that, unlike the kitchen staff, wait staff does not work regular hours, and therefore, asking wait staff to sign in and out of work is the only way to keep accurate time records for purposes of wage and overtime payments. JD P10 L19.

4. The Alleged Discharge of Jessica

The facts and circumstances surrounding Jessica's employment are highly contested. Jessica allegedly began working for Respondent in May of 2006. JD P10 L24. Jessica left her position and then resumed working for Respondent in May of 2008. Id. During this same period, Jessica's tax return for the years 2008 and 2009 show that she was also working at another Chinese restaurant, Baby Budda NYC Inc./ New Baby Budda Inc., in New York City. Jessica testified that she joined the Union in or around early 2009. JD P10 L26. On or about September 1, 2009, Jessica allegedly had a miscarriage. JD P10 L42. On or about September 3, 2009,

Jessica called Peter and requested a two week leave of absence to deal with her pregnancy-related issues.

During Jessica's leave of absence, the Restaurant hired a substitute worker to fill her position. JD P11 L37. On or about September 17, 2009, Jessica called Peter and advised him that she was ready to return to work. JD P11 L41. Peter advised Jessica that since the restaurant had filled her position there was not currently room for her at the restaurant and he told Jessica she should contact the Union to resolve the matter. JD P11 L46.

In or about late September 2009, Peter called Tony Tsai to discuss some Union issues. JD P12 L14. Peter offered to reinstate Jessica and said "what about if I give her 40 hours per week?" JD P12 L16. Tony asked for additional hours for Jessica but Peter maintained that he could only give Jessica 40 hours per week. JD P12 L17.

On or about September 22, 2009, Legal Services of New Jersey sent the undersigned a letter stating that Jessica was available for work and that she wished to return to work as soon as possible. JD P12 L1. On or about September 28, 2009, the undersigned replied that Respondent had actually offered Jessica a position and that the Union had apparently refused the good faith offer and demanded additional overtime hours that the business did not call for. JD P12 L3.

Tony testified that he never told Jessica that Respondent was wiling to have her return to work. JD P12 L11. Instead of relaying Respondent's offer to Jessica, Tony lied and told Jessica that Peter had no position for her at that time. JD P12 L22. Jessica testified that she was never told about Respondent's offer to reinstate her. JD P12 L23.

Peter testified that he later spoke to Tony and again told him that Jessica could return to work. JD P12 L33. Tony told Peter that Jessica was already working elsewhere and would not be returning to work. JD P12 L34.

Jessica filed a federal lawsuit claiming that she was discharged by Respondent due to her pregnancy. However, she denied that she was discharged because of her pregnancy when she testified in this matter. JD P12 L43. Later, Jessica claimed that she was discharged because she filed the federal lawsuit and because of her pregnancy. JD P12 L44.

III. ARGUMENT

A. The ALJ Erred in Determining that Respondent Discharged Li Xian "Jessica" Jiang in Violation of Section (8)(a)(3) and (1) of the Act. (Exceptions No. 1)

ALJ erred in determining that Respondent discharged Jessica in violation of Section 8(a)(3) and (1) of the Act. The evidence introduced at the hearing clearly showed that Respondent offered Jessica her job back, however, she did not accept such an offer. Jessica's refusal to accept Respondent's offer of employment is not activity for which Respondent can be held liable under the Act.

It is undisputed that Jessica requested a two week leave of absence in or about September 2009. It is also undisputed that Peter Yeung granted Jessica's request for such leave of absence. The ALJ, however, made an error of fact in determining that Respondent never offered Jessica an offer of unconditional employment following her leave of absence. In fact, Peter offered Jessica a position working 40 hours per week, but testimony shows that the offer was never communicated to her by her union representative, Tony Tsai. Moreover, the offer was not conditional and did not have strings attached as the ALJ incorrectly determined. The evidence clearly shows the charging party's and the union's bad faith in refusing Respondent's offer, which, upon information and belief, was an attempt to prejudice Respondent in both this proceeding and in the federal court action.

The ALJ's finding that Jessica was discharged and not offered re-employment goes against the weight of evidence adduced at the hearing. The ALJ found that following Jessica's pregnancy-related two week leave of absence, Tony Tsai spoke with Peter Yeung regarding union issues. Tony testified that Peter Yeung offered to employ Jessica if she would work 40 hours per week. When Tony Tsai testified as to this offer by Peter, he did not state that there were any conditions attached. It was simply an offer to employ Jessica without any other consequences to other employees. Although this was fewer hours than Jessica had previously worked, all wait staff's hours had been changed since August 2009 and Peter Yeung had to further account for additional help he had hired due to Jessica's absence. Despite the fact that Respondent's business did not require additional employees, he nonetheless extended the offer to employ Jessica.

This is not a case of constructive discharge. In *Munford, Inc., World Bazaar Div.* 266 NLRB 1156 (1983), the Board held that it was not a constructive discharge where an employer, motivated by legitimate business interests, requested employees work a more flexible schedule and discharged those who refused. As in *Munford*, Respondent's offer of a 40 hour work week to Jessica was clearly a business decision and did not stem from any discriminatory animus. In fact, General Counsel produced no evidence that the offer of 40 hours was intended to cause Jessica to resign. The record indicates that Jessica's resignation was due to Tony Tsai's failure to communicate Respondent's 40 hour per week offer to her. JD P12 L22.

Although Peter told Tony Tsai that Respondent was willing to employee Jessica, Tony Tsai testified that he never once notified Jessica that Peter had made such an offer. JD P12 L11; P12 L22. Jessica stated that she was never told about Peter's offer to employ her. JD P12 L23. The fact that Peter's offer was never communicated to Jessica by the Union shows an extreme

amount of bad faith and which also undermines Jessica's discharge claim. Essentially, Tony Tsai lied to Jessica when he told her that Respondent did not have a position for her. JD P12 L22. The ALJ, despite recognizing these facts, found that no unconditional offer was made to Jessica. That finding is clearly contradicted by the testimony of Peter Yeung and Tony Tsai.

The ALJ erred in finding that "Jessica credibly denied being offered reinstatement at 40 hours per week." JD P22 L48. It is clearly erroneous that the ALJ could make this finding after previously stating in his decision that Jessica "denied being told that Peter wanted her to return for only 40 hours per week." JD P12 L23. Tony Tsai also confirmed that he told Jessica that Respondent had no position for her. JD P12 L22. These two conclusions by the ALJ are not logical and are mutually exclusive. Jessica could not have "credibly denied being offered reinstatement at 40 hours per week" if she testified that she never was told about such an offer. This is surely reversible error, since it shows Respondent actually offered Jessica a position.

It is clear that Respondent offered Jessica reinstatement through her union representative, however, she was never advised of such an offer by Tony. In light of that fact, the ALJ's finding that Jessica reasonably refused employment is completely baseless. How can one credibly refuse an offer that she never knew existed? This is a question that only the ALJ's flawed logic can answer. What is clear, is that Tony Tsai's conduct is what led to Jessica not being reinstated. Tony's failure to communicate Peter's offer to her cannot be the basis for Respondent's liability.

Moreover, the ALJ erroneously found that Peter's offer of 40 hours per week was conditioned upon the other wait staff agreeing to a reduction of their own hours to 40 per week in order to compensate for the additional hours Jessica would work. In fact, when Tony Tsai testified to refusing the 40 hour offer during a phone call with Peter, he did not state anything about a requirement that the other wait staff's hours be changed. JD P12 L14-20. Tony simply

opined that 40 hours instead of 48 hours for Jessica would be retaliation. Id. Since the union was acting as Jessica's bargaining agent, it was completely proper for Peter to make the offer to Tony and not directly to Jessica. Tony, as an agent for Jessica, was required to inform her of Respondent's unconditional offer. Thus, it is clear that Jessica, via Tony, rejected an unconditional offer to work 40 hours per week for Respondent. This is contrary to the ALJ's findings.

The record clearly reflects Respondent's good faith in making an offer to employ Jessica following her leave of absence. The offer by Respondent was for 40 hours since Respondent's business did not require additional work hours. In light of the fact that all wait staff's hours were changed to 48 and that a substitute worker had been hired to replace Jessica when she took her leave, Respondent could not feasibly offer Jessica the number of hours that Tony Tsai requested. The cost of overtime is higher than a regular hourly rate for a 40 hour work week. Moreover, despite the reduction in hours, Ivan testified that the wait staff was still earning the same amount of money as when they previously worked longer hours before August 2009. Tr. P159 L1-3. Thus, although Jessica was offered only 40 hours per week, she would have received substantially similar pay as she had earned previously. Thus, the ALJ erred in finding that a reduction in hours along with an increased pay rate is a violation of the Act. Accordingly, there were significant changes in Respondent's business which necessitated the offer to Jessica of only 40 hours per week. In light of the above-mentioned changes, 40 hours was a reasonable offer which was not conditional as the ALJ erroneously determined.

Finally, General Counsel has not shown that anti-union animus was the reason for Respondent's offer of employment. Jessica was one of several union members working for Respondent and she was the only one allegedly discharged by Respondent. The facts

surrounding Jessica's alleged discharge show that, if anything, the alleged discharge was related to her pregnancy, not any concerted activity or union involvement.

In the present matter, the Union rushed to judgment that Jessica was terminated due to her Union membership and protected union activities when there is not a single factual support except Tony's own irresponsible conjecture. See Tr. P87 L17 to P.90 L12, in particular:

> Q So were you aware Jessica filed a discrimination action in the district court, based on gender and pregnancy?
> A I knew about it, yes.
> Q Did you ask her whether the discrimination is based on union membership or it's based on pregnancy?
> A That was between her and her attorney, I was not involved.
> Q So you did not bother to check with her, right?
> A I have a lot of stuff to do, not just this case.
> Q I understand that, I know you are busy. But my question to you is, did you check with Jessica to find out whether she was discriminated upon because she's a union member or because she was pregnant?
> MR. DICE-GOLDBERG: Objection.
> The two things aren't mutually exclusive.
> JUDGE DAVIS: Overruled. The question is, did you ask whether or not it was her belief that she was discriminated against because of her union activities or because of her sex and/or pregnancy, did you ask her, answer the question.
> THE WITNESS: I didn't ask her.
> JUDGE DAVIS: Okay.

Tony further admitted that no other union membership was terminated except Jessica. Tr. P89 L24 to P90 L12.

Jessica was examined at the wage and hour action and she admitted that she was not terminated due to her union membership or protected activities. See Tr. P248 L24 to P249 L8.

> Q Ms. Jiang, you also sued – let me rephrase. What do you believe it the reason of your termination?
> A Do you mean being laid off by the boss?
> JUDGE DAVIS: Why do you believe that you were laid off in September of 2009?

> THE WITNESS: I believe there are two reasons. The first one is because he took revenge on me taking part in the law suit, suing them in the Federal Court. And the second one is thing is because I was pregnant. He did not like any pregnant ladies. They fire any pregnant ladies.

Jessica also testified that she was terminated due to pregnancy in the wage and hour action. See GC10 P136 L20 to P137 L13 Tr. Tony even admitted that he was present when he heard Jessica testified that she was terminated due to her pregnancy. Tr. P91 L8-11.

Accordingly, the ALJ made factual and legal errors in determining that Respondent's employment offer was conditional.

B. The ALJ Erred in Its Credibility Determinations (Exceptions No. 2)

The ALJ consistently credited General Counsel's witnesses, Jessica, Ivan, Rong Chen, and Tony Tsai while discrediting Peter Yeung's testimony. This was improper by the ALJ since there are many instances of the discriminatees', particularly Jessica's, lack of credibility which the ALJ admittedly chose to ignore. See *United Packinghouse Workers v. NLRB* (1954, CA8) 210 F.2d 325, 33 BNA LRRM 2530, 25 CCH LC P 68153, cert den (1954) 348 U.S. 822, 99 L. Ed. 648, 75 S. Ct. 36, 34 BNA LRRM 2898 ("Uniformity with which trial examiner credited negative testimony offered on behalf of strikers and discredited positive testimony offered on behalf of employer regardless of fact that evidence of employer was corroborated in most instances by surrounding facts and circumstances, strongly indicated that trial examiner was biased and hostile towards employer."); See *NLRB v. A. Sartorius & Co.* (1944, CA2) 140 F.2d 203, 13 BNA LRRM 769, 8 CCH LC P 61983 ("If NLRB ignores all evidence given by one side in controversy and with studied design gives credence to testimony of other side, findings would be arbitrary and not in accord with legal requirement.").

The ALJ's conduct was tantamount to bias of the trial examiner. Such bias would require

the setting aside of the ALJ's and NLRB's orders. See *Donnelly Garment Co. v. NLRB* (1941, CA8) 123 F.2d 215, 9 BNA LRRM 590, 5 CCH LC P 60754 ("Bias was not shown merely because trial examiner and NLRB ruled erroneously with respect to issues to be tried or in exclusion of evidence, and drew unwarranted inferences from evidence adduced."); See *NLRB v. Washington Dehydrated Food Co.* (1941, CA9) 118 F.2d 980, 8 BNA LRRM 865, 4 CCH LC P 60419 ("Bias of trial examiner necessitated setting aside of NLRB order, where his unfair conduct was reflected in findings and opinions of NLRB, in that NLRB was misled into erroneous findings by adopting as facts answers to assumed, hypothetical questions that had no foundation in evidence and were at variance with actual admitted facts.").

Here, the ALJ admitted that Jessica's testimony was not credible at times and that her testimony was inconsistent with other evidence and testimony. JD 14:31-40. Jessica's testimony clearly was contradictory to her previous testimony in a related federal court action, a fact that the ALJ acknowledged, but nonetheless still found her to be a credible witness. Id.

The ALJ committed significant material error in finding that "on the major points concerning areas that concern her, the one-day suspension, her discharge, the conversations with Lam and Peter, Jessica's testimony was corroborated by other employee witnesses or a tape recording." JD P14 L38. Not only is this statement completely false, but Jessica's testimony was contradicted by her testimony in the federal court case regarding material issues to this NLRB matter as well as an affidavit which the ALJ refused to admit.

When questioned about her husband's business before the ALJ, Jessica claimed that her husband's business is a "buy and sell business". Tr. P476 L4-16. Jessica also denied outright that her husband owned an auto shop. GC10 P209 L11 to L21. Jessica further denied working for her husband when in fact she cleans her husband' shop, buys food, goes to the bank for her

husband, greets customers, accepts money from customers, and even helps with the tinting of automobile windows. GC10 P209 L22 to P223 L23. Jessica also claimed that she had no job after her September 2009 alleged discharge from Century Buffet, JD 14:21, when in fact she worked for another Chinese restaurant for at least part of 2009 and also at 88 Auto Alarm and Sound.

Furthermore, Jessica's statements are contradicted by an affidavit which Respondent sought to admit in which Jessica stated that she may own or have some interest in 88 Auto Alarm and Sound[2]. In another clear showing of bias by the ALJ, he denied Respondent's motion to reopen the record and granted General Counsel's motion to strike Jessica's federal court affidavit despite the fact it directly contradicted her previous testimony in this matter, and thus, was relevant to the issues of this case. Contrary to Jessica's testimony cited above, in her December 16, 2010 affidavit, Jessica admitted that her husband indeed owned a car repair shop, that she did help out at the shop from time to time, and that the business may be under her name and she may have some ownership interest in the same. *See* **Exhibit B** Jessica's Affidavit. These sworn statements directly contradict Jessica's testimony before the ALJ and her deposition testimony in the federal action.

Such testimony by Jessica is very material and relevant to this proceeding, though the ALJ failed to find as such. The contradictions in Jessica's testimony clearly show she was trying to avoid admitting ownership and employment of and by 88 Auto Alarm and Sound. Not only that, but such facts have far reaching significance. If Jessica did own 88 Auto Alarm and Sound,

[2] Since the ALJ's decision came down, Respondent has subpoenaed the New York Department of State and has received additional tax documents from Jessica regarding ownership of 88 Auto Alarm and Sound. Respondent will move to reopen the record based upon this evidence. In sum, these documents are clear proof that despite Jessica's claims otherwise, she owned 88 Auto Alarm and Sound, not her husband. She is listed as the President of the company on some documents and was obviously an officer of the company at all relevant times. These documents show that Jessica is a non-credible witness on material issues in this matter. Furthermore, such documents are indisputable evidence that Jessica has committed fraud upon the government and they destroy all credibility the ALJ claimed she had.

as she swore to in the affidavit Respondent sought to introduce, then Jessica's lack of credibility is clear. Moreover, Jessica would be guilty of defrauding the government since she has testified to receiving Medicaid, unemployment, and other governmental benefits, which would not be available to someone who owns a business. Fraud is serious misconduct and surely would result in the tribunal having to discredit much of Jessica's testimony, especially when it relates to material issues.

In the federal court action Jessica testified that she received unemployment benefits from November 2009 until the present. Fed. Ct. Tr. 199:16. Jessica's ownership of a business during this time period precluded her from receiving any unemployment assistance. Its clear that if she did receive such unemployment benefits as Jessica claims she has, she must have defrauded the government by lying about her ownership of 88 Auto Alarm and Sound. The ALJ committed great error in determining that inconsistencies regarding such testimony by Jessica were not material. Jessica's testimony and conduct clearly shows her tendency for lying and failing to tell the truth. Such material misrepresentations by Jessica bring all of her testimony into question. It was clearly erroneous to find that Jessica was a credible witness.

The ALJ's course of action in this proceeding has clearly been designed to bolster the credibility of the General Counsel's witnesses while detracting as much as possible from Peter Yeung's testimony. The ALJ was disingenuous in claiming that Peter Yeung's inconsistencies went to substantial matters while Jessica's inconsistencies were on collateral matters that did not affect her credibility. JD P14 L38. Even if this were true, which it obviously is not, any inconsistencies or contradictions made by an individual testifying clearly go to their credibility to tell the truth regarding all matters. The ALJ takes the position that a person can lie all they want in an NLRB proceeding, but if they allegedly tell the truth about some things it does not matter

how much they lied on other material matters. The ALJ's rationale for crediting some testimony and not others is not only errouneous but it is extremely troubling that he would not discredit a witness' testimony even though he acknowledged Jessica had not been truthful in all matters.

Regarding transportation issue, Jessica testified in the Federal court action that she rode in Steven Lam's car to work for two and a half years and that Lam told her it was his car. However, in this proceeding, she testified that she did not know the car belonged to Lam. Tr. P239 L22 to P240 L9. In a clear showing of bias toward the discriminatees, the ALJ attempted to explain how Jessica could make these contradictory statements yet still be credible. JD P14 L35. Although no evidence or testimony was presented by the General Counsel, the ALJ speculated that Jessica, though she rode in Steven Lam's car for approximately 6 days per week for 2 years, could credibly claim she did not know that the car was Lam's.

Accordingly, the ALJ's credibility determination was biased and is grounds for reversal.

C. ALJ Erred in Denying Respondent's Motion to Reopen Record to Receive Additional Evidence. (Exceptions No. 3)

The ALJ erroneously found that the new evidence sought adduced would not have required a difference result, while in fact the evidence were new, could not have been introduced at the hearing, and are material and highly probative as it severely impairs the credibility of a key witness. Section 102.35(8) of Board Rules and Regulations provides that the administrative law judge shall have the authority "to order hearings reopened" between the time he is designated to the transfer of the case to the Board. However, the same Rules does not set forth the standard for doing so. Due to this absence of applicable rules, administrative law judges have tuned to Section 102.48(d) of the Rules for guidance. *Brooklawn Nursing Home, Inc. d/b/a Sassaquin Convalescent Center,* 223 NLRB 267, fn7 (1976). Section 102.48(d) of the Board Rules and Regulations provides that "a motion to reopen the record shall state briefly the additional

evidence to be adduced, why it was not presented previously, and that, if addressed and credited, it would require a different result."

The Board has repeatedly granted motions to reopen where new evidence surfaces after the hearing that significantly affects the credibility assessment of witnesses. See *Sunshine Piping, Inc. v. United Assoc. of Journeymen & Apprentices*, 351 N.L.R.B. 1371, 1409 (N.L.R.B. 2007) (Case reopened because the general counsel presented credible evidence that respondent knowingly altered its records in anticipation of litigation and in response to charges filed under the National Labor Relations Act); *Anderson v. VA*, 2010 MSPB LEXIS 5007 (M.S.P.B. Aug. 25, 2010) (appellant's motion to reopen and supplement the record granted in order to adjudicate the appellant's retaliation claim with the requisite credibility assessment.)

Here, Respondent moved to adduce: 1) an affidavit, and the undersigned's objection thereto, from Acting General Counsel's key witness, Li Xian Jiang ("Jessica"), dated December 16, 2010, in which Jessica directly contradicts her testimony at the hearing (annexed hereto as **Exhibit B**); 2) evidence that Jessica's husband has refused to avail himself to be questioned about matters relating to Jessica's employment despite a subpoena ordering him to comply (subpoena and letter requesting compliance therewith annexed hereto as **Exhibit C**).

The evidence therein sought adduced was new evidence that only became available after the close of the hearing. The ALJ closed the hearing on December 9, 2010. Tr. P478. Thereafter, on or after December 17, 2010, Respondent received Jessica's affidavit that contradicted not only her deposition testimony in the federal wage and hour action but also her testimony before the ALJ. After receiving Jessica's affidavit, on January 10, 2011, Respondent's counsel drafted a letter to object to Jessica claiming her affidavit to be "clarifications" to her previously sworn testimony. As evidence already in the record shows, Jessica first denied that

her husband owned a business. GC10 P205 L13 to P206 L20. Then, when questioned about her husband's business before the ALJ, Jessica claimed that her husband's business is a "buy and sell business". Tr. P476 L4-16. Jessica also denied outright that her husband owned an auto shop. GC10 P209 L11 to L21. Jessica further denied working for her husband when in fact she cleans her husband's shop, buys food, goes to the bank for her husband, greets customers, accepts money from customers, and even helps with the tinting of automobile windows. GC10 P209 L22 to P223 L23.

Contrary to Jessica's testimonies cited above, in her December 16, 2010 affidavit, Jessica admitted that her husband indeed owned a car repair shop, that she did work at the shop from time to time, and that the business may be under her name and she may have some ownership interest in the same. *See* **Exhibit B** Jessica's Affidavit. These sworn statements directly contradict Jessica's testimony before the ALJ and her deposition testimony in the federal action.

Respondent has served Jessica's husband with a subpoena in order to discover evidence relating to Jessica's work history and employment at her husband's business. See **Exhibit C** Respondent's Subpoena to Jessica's Husband. However, Jessica's husband refused to comply with the subpoena despite Respondent's repeated requests. *See* the last paragraph of the letter dated March 11, 2011 in **Exhibit C**. His stubborn refusal to avail himself to be questioned regarding the truth of Jessica's affidavit raises further suspicion as to the credibility of Jessica's testimony.

Like the evidence sought adduced in *Sunshine Piping, Inc.*, the evidence here seriously impairs the credibility of a key witness. Jessica's affidavit is new evidence produced after the close of the hearing, and it is a critical piece of evidence without which the ALJ's credibility assessment regarding Jessica's testimony would be incomplete. The contradiction and

inconsistency between Jessica's affidavit and her testimony before the ALJ would require a finding that Jessica's testimony is not credible at all. The contradiction shows that she has repeatedly made false statements under oath and in open court. Specifically, the Affidavit dated December 16, 2010 provides documentary evidence of the contradictions and inconsistencies between Jessica's testimonies.

The ALJ erroneously summarized Jessica's affidavit as stating "essentially that her husband owns a car accessory shop, that her husband owns and runs the business, and that she, by virtue of her marriage to her husband, believes that she has an ownership interest in that business." However, Jessica's affidavit says much more. Most notably, Jessica stated in her affidavit that "[w]hen my husband initially opened the business, I believe that certain documents were filed in my name." This, coupled with additional evidence that has come to light since, shows that the business is actually owned under Jessica's name, and she does not, contrary to ALJ's finding, only has an ownership interest by virtue of her marriage. This finding is pure speculation on the part of the ALJ and is not supported by any evidence. Indeed, Jessica was, and may still be, the president of the car accessory shop as shown by New York Department of State Records annexed hereto as **Exhibit D**.

Jessica's statement that her husband's business might be filed under her name is a direct contradiction to her testimony in the federal court litigation, where Jessica at one point denied outright that her husband operated an auto shop business. GC10 P209 L11 to L21. Jessica changed her story again later when, in her testimony before the ALJ, she claimed that her husband's business is a "buy and sell business". Tr. P476 L4-16. Jessica's Affidavit documents such glaring inconsistencies between Jessica's sworn statements and her testimony. As Jessica's affidavit goes directly to the heart of a key witness' credibility finding, the ALJ should have

received this new evidence as it undoubtedly affects the credibility assessment regarding Jessica, and thereby requiring a different result on the issue.

Given that Respondent seeks to adduce evidence that is new, could not have been introduced at the hearing, and would have required a different result because it seriously impairs the credibility of a key witness, the ALJ erred in denying Respondent's motion to reopen the record to receive additional evidence.

D. The ALJ Erred in Finding Steven Lam to be a Supervisor and Agent of the Respondent in August of 2009. (Exceptions No. 4)

The evidence in record does not support the ALJ's finding that Steven Lam continued to be employed as a supervisor of the Respondent in August 2009, because the General Counsel failed to satisfy its burden of proving that Lam was an agent of the Respondent in August of 2009. In *Albertson's, Inc.*, 344 NLRB 1172 (2005), the Board explained that the test for determining agency status is "whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that 'employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Albertson's, Inc.*, supra, slip. op. at 1 (quoting *Pan-Oston Co.*, 336 NLRB 305, 306 (2001)). The party asserting that an individual is an agent bears the burden of establishing the agency relationship. *Pan-Oston*, supra at 306. Further, "the party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful." Id.

In his decision, the ALJ found that Steven Lam had apparent authority to act for the Respondent based on the alleged fact that Ivan and Jessica were told by Lam in July 2009 to not report to work the following day and they complied accordingly. JD P17 L27-32. Even assuming that Lam did ask Jessica and Ivan not to report to work one day in July, 2009, it does

not establish that the employees reasonably believed that Lam was still an supervisor in August of 2009. Peter testified that, beginning on or about August 2, 2009, he assumed all managerial decision making and responsibilities of the restaurant, and Steven Lam no longer had any such authority. Tr. P362 L10-12. Peter further testified that he announced the fact that he was taking over managerial control of the restaurant to the employees in August 2009. Tr. P315. Given that Peter specifically told the employees that he was now managing the restaurant, no employees would reasonably believe that Lam was still acting for management. *Waterbed World*, 86 NLRB 425 (1987). As such, the evidence does not support the finding that Lam was still a supervisor of the Respondent in August 2009, and the ALJ erred in making a determination contrary to the evidence on record.

E. The ALJ Erred in Finding the Union Recognition Agreement Enforceable. (Exception No. 5 and 6).

The ALJ erred in finding the Union Recognition Agreement enforceable, because it was signed under duress, false pretenses, and without the advise of counsel. In *Residential Electric, Inc.* (1981) NLRB Advice Mem Case No. 18-CA-7373, the employer was free to repudiate collective bargaining agreement and did not violate 29 USCS § 158(a)(5) where signing of letters of assent to master collective bargaining agreement between union and multi-employer association did not demonstrate employee's intent to be bound by joint bargaining.

In this case, Peter testified truthfully that he was instructed by the Union representative Tony to sign the Union Recognition Agreement (GC-5) without the benefit of counsel, under the false pretense that both pending federal court wage and hour action and the union election petition would be discontinued, and under duress because the Union would organize demonstration against the restaurant. Tr. P334-338. During direct testimony, Tony claimed Steve Wong was the counsel for Respondent and explained the agreement to Peter when in fact

Mr. Wong was not an attorney. Peter was represented by counsel at that time but was not offered an opportunity to consult his counsel before signing the agreement. Tony admitted at cross examination that he knew Mr. Wong is not an attorney. Tony further admitted that he brought GC5 with him and did not make any change to GC5. Tr. 55 L7-9. Tony falsely instructed Peter to put down "CEO" as his title knowing that Peter was not the CEO the employer. Tr. P55 L14 to P57 L 17. Tony further admitted that the Union did carry a coffin to a demonstration against restaurant and admitted that this kind of action is very disruptive to the business. Tr. P58 L13 to P59 L2.

Therefore, the Union Recognition Agreement should be deemed null and void. 318 Restaurant Workers' Union should not be deemed as a legitimate collective bargaining representative for three of the wait staff.

F. Respondent Did Not Violate Section 8(a)(1) and (3) of the Act as It Did Not Act to Discriminate Employees With Antiunion Animus.

1. Legal principles

Section 8 (a)(1) of the National Labor Relations Act, 29 U.S.C.S. § 158(a)(1), provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights under § 7 of the Act, 29 U.S.C.S. § 157. However, not every business decision by employer that interferes with concerted activities by employees constitutes a violation. *Textile Workers Union v. Darlington Mfg. Co*., 380 U.S. 263 (U.S. 1965). Only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8 (a)(1) of the Act, 29 U.S.C.S. § 158(a)(1), is violated. *Id*.

The Supreme Court has consistently and unambiguously stated that employer's intent to discourage or encourage union membership is a necessary element of a violation of Section 8(a)(3). *Radio Officers' Union v. NLRB*, 347 U.S. 17, 43 (1954). Therefore, in any case alleging

a violation of Section 8(a)(3), the General Counsel must prove by preponderance of evidence that: (1) that the employee engaged in (or refrained from engaging in) protected concerted activity; (2) that the employer had knowledge of such conduct on the part of the employee; (3) that the employer engaged in conduct that affected a term or condition of employment with regard to the employee because of the employee's activity; and (4) that the employer's conduct was intended to discourage or encourage employees to engage in, or refrain from engaging in, protected concerted activity. *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958). Likewise, the Board in *Wright Line*, 251 NLRB 1083 (1980), held that the General Counsel must meet its burden by proving by preponderance of evidence that the employer had animus toward protected and concerted activity.

2. ALJ erred in finding that Respondent was motivated by antiunion animus in requiring employees to pay for meals, because the ALJ erroneously placed the burden of proof on the Respondent rather than the General Counsel. (Exception No. 7).

Respondent's conduct with respect to employees' meal benefits did not violate Section 8(a)(1) and (3) because it was applied equally to both union and non-union wait staff. The ALJ erred in finding antiunion animus by requiring Respondents to provide additional evidence to prove that all wait staff were charged for meals. In *Wright Line*, 251 NLRB 1083 (1980), the Board placed upon the General Counsel the burden of proving, by a preponderance of the evidence, that the employer had animus toward protected activity. The General Counsel must first prove animus before the burden then shifts to the employer. With respect to antiunion animus, Courts have unambiguously established that where an employer can show that union employees did not receive disparate treatment, and that the employment condition is imposed upon all employees similarly-situated, no intent to discriminate will be found. *Trailways, Inc. v. NLRB*, 608 F.2d 523 (5th Cir. 1979); *Freuhauf Corp. v. NLRB*, 601 F.2d 180 (5th Cir. 1979).

Therefore, whether or not Respondent treated all wait staff equally is an essential part of the inquiry into whether the Respondent was motivated by antiunion animus in charging meals. As part of the "animus" analysis, General Counsel bears the burden of proving that Respondent did not treat all wait staff equally as part of its prima facie case.

Here, however, the ALJ found that Respondent acted with antiunion animus because "no credible evidence was produced to support" Peter's testimony that he charged all wait staff meals regardless of union affiliation. In requiring Peter to submit evidence in addition to his sworn testimony, the ALJ improperly placed the burden of showing by preponderance of evidence on the Respondent rather than the General Counsel. Under *Wright Line*, the ALJ should have required the General Counsel to provide credible evidence to prove its claim that Respondents only applied the meal charge to union employees, and not the other way around. As such, the ALJ erred in placing the burden of proof upon the Respondent rather than the General Counsel, and therefore, its decision should be reversed and vacated.

To be sure, Respondent testified that all wait staff was similarly charged for meals consumed during work hours, and they were all charged the same, regardless of their union status. Tr. 386. When asked by General Counsel regarding the meal policy, Respondent testified as follows:

> Q Did you only charge Union Members for meals?
> A Every Waiter same thing.
> […]
> Q Did you charge Union Members more than the non-Union Members for the meals?
> A Everyone stays the same. (Tr. P386)

As such, every employee similarly situated as a waiter/waitress, was subjected to the same implementation of changed meal benefits. Accordingly, the evidence shows that

Respondent did not act with intent to discriminate union employees, and therefore, Respondent's conduct did not violate Section 8(a)(5).

3. ALJ erred in finding Steven Lam's decision to eliminate transportation for employees to be motivated by antiunion animus and to be attributable to Respondent, because transportation was never provided by Respondent, and every worker was treated the same. (Exceptions No. 8)

Respondent's conduct regarding wait staff's transportation is not in violation of Section 8(a)(1) and (3), because Respondent's conduct was consistent before and after Union involvement as the worker's transportation cost had never been reimbursed, and Steven Lam's decision to stop driving the workers is not attributable to the Respondent. The Board has repeatedly held that evidence that employer followed customary pattern and procedure in implementing rules regarding work condition is factor supporting a finding that employer acted with proper motive. *Cary Lumber Co.*, 102 NLRB 406 (1953); *True Temper Corp.*, 127 NLRB 839 (1960); *Dairylee, Inc.*, 149 NLRB 829 (1964); *Amerace Corp.*, 162 NLRB 338 (1966). Here, Respondent's conduct in implementing work conditions was consistent before and after the worker's protected activity. To wit, as the Respondent never provided employees with transportation benefits to the workers, there could be no "elimination" of such benefits. In fact, the federal lawsuit filed by Rong Chen, Jessica, and Ivan included a breach of contract claim alleging that the employer failed to provide transportation benefits. JD P8 L50. Indeed, the wait staff at Century Buffet has always had to pay for their own transportation costs. Steven Lam started driving his co-workers in 2006, Tr. P183-84, and he continued to do so after June 10, 2009. Lam provided the staff with transportation to and from work with his own vehicle and on his own accord, and the Respondent has never requested that he do so. Tr. 361-362. The staff paid him five dollars per day for the round trip, which is an arrangement made entirely between Lam and the workers. Respondent has never received any part of the money workers paid to Mr.

Lam for transportation. Id. Peter further testified that Respondent has never paid nor reimbursed Mr. Lam for the transportation; Respondent did not pay Mr. Lam for the gas, toll, nor any of the repair costs for the vehicle. Tr. P361 L14-15.

In *Pan-Oston Co.*, 336 NLRB 305, 306 (2001), the Board stated that the party asserting that an individual is an agent bears the burden of establishing the agency relationship, *Pan-Oston*, supra at 306, and "the party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful." *Id*. The General Cousel never proved that Lam was an agent of Respondent with respect to the transportation that Lam provided. Additionally, the General Counsel has failed to establish that Lam was Respondent's agent in August 2009. In August 2009, Peter assumed all managerial responsibilities at the restaurant. Tr. P315. Peter testified that, by August of 2009, Lam was no longer a supervisor of the Respondent. Tr. P362 L10-12. When Lam decided to stop driving workers to work for his own personal reasons in August 2009, it was not at the Respondent's request or direction.

Steven Lam's decision to drive the workers was not a part of his employment relationship with the Respondent, and neither was his decision to stop. There is no evidence on record to suggest that Respondent requested Lam to stop driving the employees at any point in time. However, evidence in the testimony amply shows that Mr. Lam has always acted on his individual accord and not as an agent or supervisor of the Respondent. Tr. P361-362. As such, the ALJ erred in finding that Respondent violated the Act in eliminating employee transportation benefits when such benefit was never provided by, and cannot be attributed to, the Respondent. The foregoing facts have been conceded in the testimony by Ivan:

> Q Now, Steven Lam did not charge you because you are a union member, right?

A All along he charged us.
Q Even before you become a union member, right?
A Yes.
Q And continued to charge you after you become a union member, right?
A Yes.
Q Did restaurant ever pay your transportation fee before you become a union member?
A No.
Q After June 2009, did restaurant ever reimburse you for transportation fee?
A No.
Q Has Steven Lam charged non-union member for transportation fee too, right?
A Yes. (Tr. P154-155)

The representative from the Union, Tony, provided further corroboration in his testimony:

Q …. Before the Union get involved on June 10, 2009, the wait staff was not provided with free transportation in Century Buffet, isn't that correct?
A Yes.
JUDGE DAVIS: That is correct?
A Yes. They have to pay. (Tr. P63, L18-23)

Even if the Respondent were to be found responsible for Steven Lam's decision to stop driving employees to work, the act was not motivated by antiunion animus. Like the employers in *Trailways, Inc*. and *Freuhauf Corp.*, not only was Respondent's conduct consistent before and after Union activity, it was also consistent with regard to both union and non-union staff. Tr. P155. All wait staff was treated the same with respect to transportation. No employee has ever received reimbursement for transportation costs from Respondent, regardless of his or her union affiliation. Id. ("Q: Did restaurant ever pay your transportation fee before you become a union member? Ivan: No. Q: After June 2009, did restaurant ever reimburse you for transportation fee? Ivan: No. Q: Has Steven Lam charged non-union member for transportation fee too, right? Ivan: Yes.).

As such, the evidence supports a finding that Respondent did not act with improper motives to discriminate and discourage protected activity. According, ALJ erred in finding Respondent's conduct regarding worker's transportation violative of Section 8(a)(1) and (3).

4. ALJ erred in finding that Respondent acted with antiunion animus in reducing employee's work hours, because the policy was applied equally to all wait staff regardless of union affiliation and was supported by business justification. (Exception No. 9)

Respondent did not violate Section 8(a)(1) and (3) in changing employee's hours, because the policy was equally applied to both union and non-union employees, and it was justified by legitimate business considerations rather than antiunion animus. In *Textile Workers Union v Darlington Mfg. Co.* 380 US 263 (1965), the Supreme Court found that employer's act of closing a plant following the election of a union is not, on its own, unfair labor practice, whatever the impact of such action on concerted activities, because the decision to close is motivated by reasons other than discriminatory reasons. *Id*. at 269. Like the employer's decision in *Textile Workers Union*, Respondent's decision to reduce employee's work hours was motivated by legitimate business considerations, to wit, the business could not afford to pay exuberant overtime wages, and it was not done with discriminatory intent as the hours for all wait staff were changed regardless of union affiliation.

Respondent testified that the decision to change employee's hours to 48 hours a week was prompted upon request by Tony during a meeting in June of 2009. Tr. P340. Peter's testimony is corroborated by a document bearing Tony Tsai's handwriting, in which Tony wrote down the hours that the Union was requesting on behalf of the employees. *See* **Exhibit A**. The document shows that Tony requested that the worker's hours be change to about 8 hours per day, from 11 AM to 8:30 PM, with 1 ½ hours of break time in between. **Exhibit A**. In making this and other requests, Tony promised Peter that, if Respondent complied with all of their requests

regarding the working conditions of the restaurant, the Union would instruct the employees to discontinue the wage and hour federal court action against Respondent. Tr. 340. Indeed, Respondent testified that he complied with Union's request because he wanted to improve the working conditions for the employees, so that employees would drop the wage and hour action. Tr. P337.

ALJ found that "it is very doubtful that Tony would ask that the employees work fewer hours, thereby making less money." JD P20 L50-51. This finding was not based on evidence in the record or legal analysis, but purely upon personal conjecture and speculation. In fact, even though the wait staff's hours were changed to 8hours per day, they actually earned the same amount of money as before their hours were changed. Tr. 382 P6-8. In his testimony, Ivan himself conceded that the wait staff's salary remained the same after August of 2009, when their hours were reduced. Tr. P159 L1-3 ("Q: So your payment remain the same after reduction of hours right? A: Yes.) Given that the workers wages have increased, it is not at all "doubtful", as the ALJ believed, for Tony to ask Peter to chang the worker's hours to a more manageable 8 hours per day. Therefore, the ALJ erred in speculating that Peter acted with antiunion animus in changing the worker's despite the fact that the Restaurant paid them higher wages, which resulted in wait staff receiving the same pay as they did previously.

In addition to acquiescing to Tony's request, there are also business justifications for the change in hours. In August of 2009, the country was experiencing one of the worst economic recessions it has ever faced. The financial downturn impacted Respondent as much as it did countless other businesses around the country. Despite the financial hardship, Peter wanted to keep as many people employed as possible. Tr. P392, 393. One way to achieve keeping everyone on the payroll while paying proper wages and managing operating expenses was to change

employee's hours so as to reduce overtime wage payments. When asked why he decided to reduce everyone's work hours rather than layoff some workers, Peter testified that

> "I do not know how to fire" … "I do not know how to open my mouth because the economy was bad at that time. I don't know where to begin", "if you suddenly tell this person, oh you don't have a job no more. I just can't feel that good saying it." (Tr. 392 L19-24)

Peter's testimony corresponds to the fact that, during the relevant period, no worker was denied a job opportunity at the restaurant, including Jessica, who was offered to work 40 hours per week but refused to accept. Therefore, Peter reduced the hours of all wait staff. As demonstrated by *Textile Worker's Union*, such managerial decision based purely on business considerations does not support a finding of antiunion animus. *Textile Worker's Union*, 380 U.S. at 269.

Respondent's lack of antiunion animus is further evidenced by the fact that the implementation of the working conditions was applied to all employees similarly-situated. Courts have unambiguously held that where an employer can show that all employees similarly-situated were treated the same as the charging party, no intent to discriminate will be found. *Trailways, Inc. v. NLRB*, 608 F.2d 523 (5th Cir. 1979) (discharge for absenteeism lawful where other employees were treated similarly); *Freuhauf Corp. v. NLRB*, 601 F.2d 180 (5th Cir. 1979) (suspension for violation of plant rules lawful when all employees were treated evenly); *Sunbeam Corp.*, 287 NLRB 996 (1988); *Animal Humane Society, Inc.*, 287 NLRB 50 (1987). Here, Peter testified credibly that all the work hours of all full time wait staff were changed. Tr. P.383 L3-4. Not only were the union employees' hours changed, non-union employees were subjected to the same exact reduction in their work hours. Id. As such, ALJ erred in finding antiunion animus, as the evidence supports the finding that Respondent's change of wait staff's

work hours was not intended to discourage union activity, but was due to Union representative's request and the financial constraints of the business.

5. ALJ erred in finding that Respondent acted with antiunion animus in requiring employees to sign in and out for work, because the policy was applied equally to all wait staff regardless of union affiliation and was implemented to comply with Federal and State regulations. (Exceptions No. 10)

ALJ erred in finding that by requiring all wait staff to sign in and out of work, Respondent acted with antiunion animus. ALJ's finding of antiunion animus here is solely based on the unsustainable logic that, since all the changes in employment conditions were made at the same time, that they must have been made "for the same reason—retaliation…" JD 21 L39. With scant legal analysis, the ALJ reasoned that, since he found the other changes to be motivated by animus, this change must also be motivated by the same. Id. This finding is not supported by the evidence on record and must be reversed.

Respondent testified that he adopted the policy of requiring employees to sign in and out of work in order to comply with the Fair Labor Standards Act and the New Jersey Wage and Hour Law. Tr. P377. It is undisputed that federal and New Jersey laws require the Respondent to maintain and keep records of its employees' hours of work. JD P21 L31. Because the wait staff does not keep fixed work schedules, Tr. P379, asking them to sign in and out is the only way Respondent may keep an accurate record of their work hours. Another motivation for keeping accurate time is for to calculate employee's overtime wages. Since the Fair Labor Standards Act requires Respondent to pay employees overtime wages for hours worked per week above 40, Respondent must keep track of how many hours each employee worked during the week in order to make proper wage payments. Tr. P375-379. See also GC12 and GC13.

Again, Respondent's lack of discriminatory intent is evidenced by the fact that the implementation of the working conditions was applied to all employees similarly-situated. As

set forth above, courts have unambiguously held that where an employer can show that all employees similarly-situated were treated the same as the charging party, no intent to discriminate will be found. *Trailways, Inc. v. NLRB*, 608 F.2d 523 (5th Cir. 1979) (discharge for absenteeism lawful where other employees were treated similarly); *Freuhauf Corp. v. NLRB*, 601 F.2d 180 (5th Cir. 1979) (suspension for violation of plant rules lawful when all employees were treated evenly); *Sunbeam Corp*., 287 NLRB 996(1988); *Animal Humane Society, Inc.*, 287 NLRB 50 (1987). Here, it is significant that Respondent asked both union and non-union wait staff to keep accurate records of their work hours by signing in and out of work. Tr. P376 L6-8. In fact, there is no evidence on the record indicating anyone who is a wait staff but was not required to keep records of his or her hours.

Still, the ALJ drew an adverse inference against the Respondent because the kitchen staff was not required to record their hours. Contrary to ALJ's finding, the distinction between kitchen staff and wait staff is not one of union versus non-union. Rather, the distinction is between workers who maintain regular work hours (the kitchen staff) and those who do not (the wait staff). It is worth emphasizing again that every single wait staff, regardless of their union affiliation, was required to sign in and out of work, and this fact is not controverted by any testimony from any witness on the record. As such, evidence strongly supports the fact that Respondent's conduct was not motivated by discriminatory intent to discourage union activity, and therefore, it was not in violation of §8(a)(1) and (3).

G. The ALJ Erred in Finding that Respondent Violated Sections 8(a)(1) and (5) of the Act as Respondent Did Not "Refuse to Bargain" Within the Meaning of the Act.

Under Section 8(a)(5) an employer's "refusal to bargain collectively with the representatives of his employees" is an unfair labor practice. 29 U.S.C.A. § 158(a)(5). In

addition, Courts have established "the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964). However, Supreme Court has held that "…there can be no breach of the statutory duty by the employer -- when he has not refused to receive communications from his employees -- without some indication given to him by them or their representatives of their desire or willingness to bargain" *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939). Therefore, whether or not there had been notice to the Union is essential in analyzing Section 8(a)(5) violations respecting unilateral amendments in conditions of employment. *See NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1036-37 (10th Cir. 1996).

1. Respondent did not violate Section 8(a)(5) in changing employees' hours (Exceptions No. 9)

Respondent's changing of employees' hours does not violated Section 8(a)(5), because Union had actual notice of this impending change but failed to meet its obligation to request bargaining. If the union has actual notice of the employer's unilateral amendments, but fails to request bargaining, then the union waives its right to bargain. *See YHA, Inc. v. NLRB*, 2 F.3d 168, 173-74 (6th Cir. 1993); *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 51 (2d Cir. 1983). Both the Board and the Supreme Court have recognized that a union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain. *Columbian Enameling & Stamping Co.*, 306 U.S. at 297; *International Offset Corp.*, 210 N.L.R.B. 854,855 (1974). To avoid waiving its bargaining rights, the bargaining representative must do more than merely protest the change; it must meet its obligation to request bargaining; any less diligence amounts to a waiver by the bargaining

representative. *Jim Walter Resources, Inc.* 289 N.L.R.B. 1441, 1442 (1988). Notice of four to eight days has been found sufficient to provide a meaningful opportunity to bargain. *Id*.

In *YHA, Inc.*, the court held that union waived its right to bargain regarding a no-smoking policy because it failed to make a timely bargaining demand. *YHA, Inc.* at 174. The court found that union received actual notice when its representative attended meetings where the employer discussed the no-smoking policy and received a draft of the same. *Id* at 173. Similarly, in *Island Typographers, Inc.*, the court held that the union received sufficient formal notice where the employer posted documents in its premises to regarding the management's plan. *Island Typographers, Inc.* at 50-51. These two cases, together with established case law, suggest that actual notice of the proposed change is sufficient for the purpose of Section 8(a)(5); the statute does not require "formal and full" notice, neither does it require that the proposal be agreed to by Union. *YHA, Inc.* at 173. In addition, in *International Offse Corp.*, the Board declined a finding of Section 8(a)(5) violation because the union failed to seek bargaining even though it knew or should have known that a change was imminent. *International Offset Corp.*, 210 N.L.R.B. 855 (1974).

Here, as in *YHA, Inc.*, the Union received actual notice of Respondent's intention to change working conditions when Respondent discussed issues of employee's wage and hour in at lease two meetings with Tony, the representative for the Union. Through these meetings, as in *International Offse Corp.*, the Union knew or should have known that Respondent intended to implement changes in wage and hour policies so as to improve the working conditions at the restaurant. Respondent changed the hours of work in August 2009 after he took control of the operations of the Restaurant. Two months prior, in a meeting on June 10, 2009, Peter and Tony

had already discussed changing worker's hours in connection with the employees' federal action against Respondent. With respect to the June meeting, Peter testified that:

> Q Do you remember what exactly Tony told you about the hours at the meeting?
> A He said something about work hours too long.
> Q And did you promise him that you would try to reduce the work hours?
> THE WITNESS: Yes, after they let me manage it, after August, I changed the schedule.
> BY MR. XUE:
> Q So did you notify Tony about that you tried to reduce the hours worked?
> A Well, that's according to what he tell me. He wants me to do that. But at that time he didn't let me manage them. (Tr. P339 to 340)

It is undisputed that Tony was aware of the employees' federal action against the Restaurant in June 2009. Peter's testimony shows that Tony was at least aware of Peter's intention to change the worker's hours. Indeed, Tony testified that, in the July 22 meeting, he and Peter discussed changing working conditions at the Restaurant: Tr. P110.

> We said that in order, you know, that's possible if we could, you know, if you could improve the working condition and with the workers are willing to go down and negotiate with you about the fair price. But first you need to show some sincerity by changing the working condition for the workers. (Tr. P110-11)

Following this July 22 meeting, Respondent started implementing work policies designed to improve the working conditions, namely changing work hours to 48 per week including break time, and paying hourly wages including overtime compensation. As such, although no formal notice was given to the Union, the Union was sufficiently appraised of Respondent's intentions of implementing said changes throughout Tony's meetings with Peter as shown by their testimony regarding the same supra. Accordingly, Respondent did not violate of Section 8(a)(5),

as the Union failed to make its request to bargain after receiving notice, thereby waiving its right to bargaining.

2. Respondent did not violate Section 8(a)(5) in requiring employees to sign in and out of work. (Exceptions No. 10)

Respondent did not violate Section 8(a)(5) requiring employees to sign in and out of work, because the Union failed to make a bargaining request despite having actual notice of Respondent's intention to implement such policy in compliance with wage and hour law. As discussed supra, Tony had actual knowledge of employees' federal wage and hour action against the Respondent, and he also was aware of Respondent's intention to improve working conditions and to comply with relevant regulations. In order to comply with the FLSA and the NJAC, Respondent is required to keep accurate records of workers' hours. To this end, it is entirely reasonable and undoubtedly foreseeable that Respondent would ask that the employees sign in and out of work. As such, the Union representative was sufficiently notified of this pending change when he told Respondent that the employees are "entitled to minimum wage and overtime wages", Tr. P110, as one cannot receive proper hourly wages and overtime without keeping accurate records of their hours work. As such, the Union failed to make a bargaining request to bargain even after the employees allegedly complained about the practice. Therefore, Union waived its right to bargain, and Respondent's conduct was not in violation of Section 8(a)(5).

3. Respondent's policy with respect to employee transportation benefits did not violate Section 8(a)(5). (Exceptions No. 8)

Respondent's policy with respect to employee transportation benefits did not violate Section 8(a)(5), because Respondent has never provided said benefits for employees, and in any event, Respondent did in fact bargain with Union representative on the issue of reimbursement

for transportation costs on July 22, 2009. First, as discussed above, Respondent has never provided reimbursement for employees' transportation costs. Steven Lam drove some workers to and from work with his own vehicle, without the Respondent reimbursing him for gas, toll, or the repairs thereof. Tr. P361 L14-15. Respondent never asked Lam to provide such transportation, and neither did it request Lam to stop. Tr. 361-362. As such, Respondent's policy regarding transportation benefits has remained constant and has not been changed, unilaterally or otherwise. Second, on July 22, 2009, Respondent and the Union did in fact bargain about transportation benefits, and Tony has testified to this fact. In fact, the General Counsel characterized this meeting as a "bargaining session." Tr. P34 L23. Tony stated:

> A […] because the wait staff has been taking public transportation on their own to -- from Chinatown to Clifton, New Jersey and the transportation cost has cost the workers about $10 to $11 per day. And so we were talking to the employers about --
> A -- -how much money they will reimburse and they -- we were just going back and forth on the amount and at the end, I believe that we didn't reach a agreement because the employer only willing to reimburse up to $6 and I think we stop at that point.

Inasmuch as Respondent never changed its policy regarding transportation benefits, and parties indeed bargained regarding the same, Respondent's conduct did not violate Section 8(a)(5).

4. Respondent's policy regarding employee meal benefits did not violate Section 8(a)(5). (Exceptions No.7)

Respondent did not violate Section 8(a)(5) in changing employees' meal benefits, because Respondent provided notice to all wait staff prior to implementing the change, and the Union failed its obligation to request bargaining. Here, Peter gave notice to all wait staff in August 2009 that he was going to charge employees for meals consumed at the restaurant during work hours. Tr. P315. Peter testified:

> Q And when you started managing at the restaurant you notified Employees that you were going to charge meals. Right?
> A Yes.
> Q And when you notified them, what did they say?
> A They said, No problem, whatever way that you run the Company is fine. (Tr. P315 L20-21)

Jessica, in her testimony, corroborated Peter's statement:

> THE WITNESS: […] The boss came and informed us in August of 2009 that any Wait Staff wanted to have meal in the Restaurant they need to pay normal price that the Customer pay for the meal. (Tr. P228 L3-6)

Such actual notice should have been sufficient to apprise the Union representatives of the proposed change in conditions of employment so as to trigger the Union's obligation to request bargaining. See *YHA, Inc. v. NLRB*, 2 F.3d 173-74 (6th Cir. 1993). In fact, Tony has admitted that the Union was notified by the employees regarding this change. Tony testified that, in August, 2009, the employees came to him and informed him that the "employer has starting to charge them meal money". Tr. P38. Thus, the Union had surely been unambiguously notified by this point. Yet, Union never contacted Respondent to initiate bargaining as to this change. In fact, Respondent initiated contact with the Union on at least two occasions thereafter, but Tony, according to his own testimony, did not attempt to bargain with Respondent during either of those occasions. Tr. P40-42. Significantly, Tony testified that, on one of the encounters in March or April of 2010, Respondent approached Tony on the street, "practically begging" Tony to help him resolve the conflicts with his employees. Tr. P42. As such, after the Union received notice of Respondent's change in work policy, it stubbornly failed to meet its obligation to request bargaining despite giving multiple opportunities to do so. Accordingly, Union waived its right to bargain, and Respondent's conduct was not in violation of Section 8(a)(5).

H. Respondent's Questioning of its Employees Regarding their Union and Protected Activities was Lawful and Not a Violation of the Act. (Exceptions No. 11)

1. Test for violation of 29 USCS § 158 relating to interrogation

Courts have held that a totality of circumstances test is applied to determine whether an interrogation of employees by an employer is a violation of the National Labor Relations Act ("NLRA"). *Vincent Indus. Plastics, Inc. v. NLRB*, (2000, App DC) 341 US App DC 99, 203 F3d 727, 164 BNA LRRM 2039, 141 CCH LC P 10761; *Retired Persons Pharmacy v. NLRB*, (1975, CA2) 519 F.2d 486, 89 BNA LRRM 2879, 77 CCH LC P 10970 ("Employer interrogation is unlawful if it is coercive in light of all surrounding circumstances."). To constitute a violation of the NLRA, the "questioning must either contain express or implied threat or promise of benefit or form part of overall pattern or course of conduct hostile to union, considered in context with time, place and manner, and surrounding circumstances in which questions are asked." *NLRB v. Cousins Associates, Inc.*, (1960 CA2) 283 F.2d 242, 46 BNA LRRM 3045, 41 CCH LC P 16560. In determining whether interrogation of employees as to their membership violates 29 USCS §158, the following may be considered: the "background of such inquiries, time and manner of their being made, and all surrounding circumstances to conclude whether or not such interrogation had coercive characteristics proscribed" by Section 158. *NRLB v. Flemingsburg Mfg. Co.*, (1962, CA6) 300 F.2d 182, 49 BNA LRRM 2888, 44 CCH LC P 17505.

2. No violation of the NLRA where interrogation relates to subject matter of the wage and hour lawsuit

Where the interrogation of an employee regarding their union and union activities has taken place in a deposition and directly relates to wage and hour litigation, it has been held that

there is no violation of the NLRA. "Any legally proper evidential interrogation, such as competent affidavits, depositions or witness-chair testimony, within issues of [the] case and wholly for purposes thereof, does not constitute unfair labor practice." *NLRB v. Katz Drug Co.*, (1953, CA8) 207 F.2d 168, 32 BNA LRRM 2680, 24 CCH LC P 67838. Indeed, an "employer did not violate 29 USCS § 158(a)(1) when it sought discovery of union organizing activities and pending NLRB charges in its defense of employee's state law wage and hour lawsuit, since employer's discovery requests were relevant to subject matter of lawsuit. *Anderson Seafoods, Inc.*, (1998) NLRB Advice Memo Case No. 21-CA-3267. Therefore, the "mere act of questioning employees concerning union membership is not unlawful in itself, [the] test is whether what is done by interrogation interferes with employee's protected rights; it is [the] method used, circumstances existing at time; and what [the] employer thereafter does that is material to proof of illegal action." *Salinas Valley Broadcasting Corp. v. NLRB*, (1964, CA9) 334 F.2d 604, 56 BNA LRRM 2765, 50 CCH LC P 19114.

In the present matter, the interrogation of Jin Ming Lin ("Lin"), Rong Chen ("Chen"), and Li Xian Jiang ("Jiang"), by Century Buffet's attorneys did not constitute an unfair labor practice nor was it a violation of any provision of the NLRA. Lin, Chen, and Jiang are among five Plaintiffs in a wage and hour lawsuit against Century Buffet in United States District Court of New Jersey (Civil Action No.: 09-1687). Century Buffet, by and through its attorneys, were entitled to depose and interrogate the Plaintiffs regarding the subject matter of that lawsuit. See *NLRB v. Katz Drug Co.*, (1953, CA8).

The questions regarding the employees' Union activities in the wage and hour action are relevant as they relate to the employees' knowledge of the minimum wage and overtime laws. The FLSA requires an action to be filed within two or three years depending on whether the

violation was willful. Therefore, it was important to determine the timing of when the charging parties learned of the pertinent labor laws since the statute of limitations is contingent upon their knowledge. Additionally, the plaintiffs set forth in their federal complaint a claim for equitable tolling based on their lack of knowledge of the labor laws. Therefore, questions regarding plaintiff's Union activities were essential to Respondent's defense of the claim in order to show that plaintiffs learned of such laws from the Union representatives at a certain time.

Moreover, these questions did not only relate to the plaintiff's knowledge of the labor law, but also went to the issue of whether there was an illegal financial arrangement between the plaintiffs and the Union. The timing of when the plaintiffs became Union members would dictate whether such an arrangement was possible. Since the questions were relevant towards both of these issues, it is clear that they were not motivated by legitimate and not illegal objectives.

During the Deposition of Jin Min Lin, he was asked "when did you become a union member?" Lin Dep. at 105:14. This question was not improper since it was not accompanied by any coercion or threats and there was no intimidation by the employer restaurant. Mr. Lin had both his attorney and union representative present at the time the question was asked and neither objected to Mr. Lin answering such question. Furthermore, the question sough relevant wage and hour information, as it related to whether the plaintiffs may have entered into any illegal financial agreements with any entities, including unions, in bringing their wage and hour case.

During the deposition of Rong Chen, she was asked several questions regarding her union membership, including "are you a member of any union?", "have you made any agreements with the union relating to your work at Century Buffet which relates to this lawsuit?", and "did you ever talk to any union employees about this lawsuit?" Chen Dep. at 66:19 to 67:24. As

discussed above, Respondent sought information regarding how plaintiffs brought the wage and hour lawsuit against the employer restaurant. These questions are not only relevant to how plaintiffs brought the suit, but also go to whether there was any improper agreement between plaintiffs and their union. In fact, when Ms. Chen was questioned as to any agreements she may have made with her union, she was questioned only as to agreements "which relates to this lawsuit." Chen Dep. at 66:5.

Ms. Chen was also asked during the deposition about the union memberships of Jin Ming Lin, Zheng Song, and Jessica, who are other plaintiffs in the wage and hour case. Those deposition questions relate to whether there are any agreements and communication between the plaintiffs and the union related to the wage and hour action.

Finally, Ms. Chen was asked, "do you attend protests on a weekly basis?" This question was asked in a line of questioning that sought information regarding whether the plaintiffs have communicated with one another about the wage and hour case and the substance of such conversations.

Jessica was asked several questions during her deposition regarding when she joined a union. Jessica Dep. at 127:7 to 127:21. These questions were asked in a line of questioning that related to Jessica's discrimination claim brought against the Respondent in the wage and hour case. Specifically, the questioning was in regard to the facts surrounding Jessica's alleged termination. Whether there was union involvement in Jessica's alleged attempt to get reinstated is relevant to her discrimination claim that she was wrongfully terminated. Based on Jessica's answers, it is in fact obvious that the union had some involvement once Jessica was allegedly terminated. Tony admitted he was involved in negotiation with Mr. Yeung.

It is also alleged that Century Buffet unlawfully asked Jessica if "before this action [was] commenced, did you sit down with other plaintiffs, talk about this case?" and "did you compare notes with other plaintiffs?" Jiang Dep. at 139:24 to 140:2. These questions have absolutely nothing to do with plaintiffs' union membership or activities. Further, the questions are plainly relevant to the wage and hour case in that they seek information regarding communications about the lawsuit between plaintiffs.

3. Absence of coercion, threats or promises

An employer's interrogation of an employee regarding union activities does not violate the NLRA where there is not any threat or intimidation by the employer. *NLRB v. Montgomery Ward & Co.* (1951, CA2) 192 F2d 160, 29 BNA LRRM 2041, 20 CCH LC P 66583 ("Mere interrogation of employees as to union activities in store was not unfair labor practice where not accompanied with threat or intimidation."). Where an inquiry into union membership is not accompanied by "threats of reprisal, express or implied, and without relation to coercion or restraint of employees in their right to self-organization," there is no violation of the NLRA. *NLRB v. Superior Co.* (1952, CA6) 199 F2d 39, 30 BNA LRRM 2632, 22 CCH LC P 67159; *NLRB v. Katz Drug Co.* (1953, CA8) 207 F2d 168, 32 BNA LRRM 2680, 24 CCH LC P 67838 ("Inquiry by employer of employee as to his union membership is not unlawful per se."); *NLRB v. Southern California Associated Newspapers* (1962, CA9) 299 F2d 677, 49 BNA LRRM 2453, 44 CCH LC P 17939 ("Mere interrogation of employee with regard to union membership is insufficient to constitute unfair labor practice.").

In the present case, it is evident that there was no coercion or threats relating to the interrogation of the employees during their depositions. Each employee had an attorney present. There were no threats or coercive conduct on the part of Century Buffet. The questions posed by

Respondent related only to facts regarding their claims in their wage and hour case against Century Buffet.

I. The ALJ Erred in Allowing General Counsel to Amend the Complaint as to the Name of the Respondent. (Exceptions No. 12)

Respondent opposes any amendment to the Complaint to name Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc., and Century Buffet Grill, LLC.

First, the only entity that has recognized the union is Best Century Buffet, Inc. General Counsel submitted an alleged union recognition agreement entered into by Best Century Buffet, Inc. in or around June 2009. Although General Counsel has known since that time that the wrong party was named in this proceeding, no amendment to the complaint has been made until now. After having rested its case, it would be highly prejudicial to name additional parties. This is especially prejudicial because General Counsel has waited until such a late stage in the proceeding to amend despite knowing for over one year that the incorrect party was named.

Secondly, Century Buffet and Restaurant Inc. has different officers and owners than the two entities you seek to add to the complaint. Century Buffet and Restaurant, Inc. was solely owned by Chi Ying Lee. Following Ms. Lee's passing, Century Buffet and Restaurant, Inc. was dissolved in 2007. Century Restaurant and Buffet, Inc. has never done business under the trade name Best Century Buffet, Inc. Additionally, Century Buffet and Restaurant Inc. has never recognized any union.

Best Century Buffet Inc. was formed in or about September 2007 and was owned by Peter Yeung's father. In or around late 2009 Best Century Buffet Inc. stopped doing business since Peter Yeung's father had completely retired from the restaurant business.

Peter Yeung started operating a restaurant under the name Century Buffet Grill LLC in or about January 2010. According to Mr. Yeung, Century Buffet Grill LLC has never recognized any union in the restaurant.

Thirdly, General Counsel has already rested its case against Century Buffet and Restaurant, Inc. No case has been proven against the entities that General Counsel sought to add. As previously noted, each of these entities has or had different officers and owners. It would clearly be prejudicial to add these entities at this late stage.

Finally, on the last day of trial, after General Counsel rested its case, it moved to add an agency allegation against Peter Yeung and Steven Lam, alleging that they acted as agents for their employer. This amendment should be denied because General Counsel moved to amend after it rested its case. It would be highly prejudicial to amend the Complaint to add agency allegations at this late stage. Not only did Mr. Yeung and Mr. Lam never have an opportunity to defend these charges, Mr. Lam has never even appeared in this proceeding. Furthermore, such agency allegations are unfounded and based solely on conclusory statements of a witness.

Based on the forgoing, the ALJ erred in allowing General Counsel's amendment to the Complaint.

IV. CONCLUSION

General Counsel failed to meet its burden of establishing violations of the Act. Credible evidence supports that Respondent did not act in contravention of Section 8(a)(1), (3) or (5) of the Act. Wherefore, it is respectfully requested that, the Board, based on the foregoing reasons, vacate and reverse the Administrative Law Judge's decision and dismiss the above charges of unlawful conduct against Respondent in its entirety.

Dated: July 26, 2011
New York, New York

Respectfully submitted,

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