

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH)	CASES	37-CA-7311
CORPORATION, and KOA)		37-CA-7334
MANAGEMENT, LLC, a SINGLE)		37-CA-7422
EMPLOYER, d/b/a PACIFIC BEACH)		37-CA-7448
HOTEL)		37-CA-7458
)		37-CA-7476
and)		37-CA-7478
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)		37-CA-7537
)		37-CA-7550
)		37-CA-7587
HTH CORPORATION d/b/a PACIFIC)		
BEACH HOTEL,)		
)		
and)	CASE	37-CA-7470
)		
KOA MANAGEMENT, LLC d/b/a)		
PACIFIC BEACH HOTEL)		
)		
and)	CASE	37-CA-7472
)		
PACIFIC BEACH CORPORATION d/b/a)		
PACIFIC BEACH HOTEL)		
)		
and)	CASE	37-CA-7473
)		
INTERNATIONAL LONGSHORE AND)		
WAREHOUSE UNION, LOCAL 142)		
(2011-022).)		
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**INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142'S
BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S SUPPLEMENTAL DECISION ON REMAND**

**I.
INTRODUCTION**

This matter was remanded to the Chief Administrative Law Judge to determine whether a make-whole remedy is appropriate for the finding that the Employer violated Section 8

(a) (5) and (1) of the Act when it unilaterally laid off the restaurant employees at the Hotel's Shogun Restaurant. See 356 NLRB No. 182 (2011) (referred to as "Slip op.") at 4 to 5. "Ordinarily, the Respondents' unilateral closure of the Shogun Restaurant and the layoff of the employees would warrant a remedy." Id. After a conference call with all interested parties present a briefing order issued to brief whether the record should be opened given the issue on remand and whether Respondents did not fully litigate the allegation that it unilaterally closed the Shogun Restaurant given the General Counsel's waiver of a remedy of these employees. (App. 1 at 1 and 2). Administrative Law Judge (ALJ) Mary Miller Cracraft¹ issued the supplemental decision on remand holding that Holder Construction Co., 327 NLRB 326 (1998) and its footnote 1 was controlling and found a make-whole remedy was inappropriate under the particular circumstances here. (App. 5-5).

The Charging Party International Longshore and Warehouse Union Local 142 ("ILWU" or "Union") submits there is no merit to the ALJ's conclusions for the following reasons and grounds:

- (1) Allegations in the complaint that Respondents unlawfully withdrew recognition and refused to bargain with the Union provided adequate notice to Respondents to allow remedy on unilateral layoff of employees of Shogun Restaurant
- (2) The position of the General Counsel does not decide the scope of the remedy which is within the prerogative of the Board and therefore Union's cross-exceptions filed from the ALJ's Decision distinguishes Holder Construction Co., supra;
- (3) The testimony elicited at the hearing covered the unilateral closing of the Shogun Restaurant sufficiently given Respondents general claim it had no duty to even recognize the Union let alone bargain;
- (4) Reopening the record is necessary where the extent of injury to the employees was not clearly established on the record.

¹ The reference to the ALJ on the initial decision will be referred to as Judge Kennedy. ALJ Cracraft will be referenced as ALJ Cracraft or Judge Cracraft.

II.
STATEMENT OF THE CASE

A. The Respondents' Underlying Conduct Towards ILWU

On August 15, 2005, the International Longshore and Warehouse Union, Local 142, AFL-CIO (hereinafter "Charging Party," "ILWU" or "Union") was certified as the exclusive collective bargaining representative for the following employees of Respondent HTH Corporation d/b/a Pacific Beach Hotel in a Unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and regular on-call concierge, concierge II, night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bus help, host help, wait help, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet food runner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marketing (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor

manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(See GC Exh. 1 (ssss); Consol. Comp., ¶ 6a, ¶6b).

From August 15, 2005 until December 2006, Respondents bargained with the Union and bargained in bad faith. See HTH Corp., 356 NLRB No. 182 (2011) (“Slip op.”) at 2. The Respondents went through the motions of bargaining but not with the purpose of reaching an agreement. Id. at 3. From January 1 to November 30, 2007, Respondents contractually delegated management of the Hotel to the Outrigger Group doing business a PBHM. During this time period, however, Respondents maintained control of the Hotel and PBHM acted as the agent of the Respondents. Id. at 3.

On August 3, 2007 when PBHM was making progress in its negotiations with the ILWU, Respondents gave notice to PBHM it was canceling the management agreement effective November 30, 2007. Respondents then resumed operation of the Hotel, effective December 1, 2007, discharged all employees, rehired some but not all, withdrew recognition from the Union and made several unilateral changes in the terms and conditions of employment. Id. The Board agreed with the ALJ that Respondents’ refusal to rehire unit employees on December 1, 2007 was akin to a permanent layoff, a mandatory subject of bargaining. Id. at 4.

B. The Respondents Conduct Specific to The Shogun Restaurant

The Hotel had three restaurants at the Hotel, one of which was the Shogun Restaurant. HTH Corp., 356 NLRB slip op. at 5. Food and Beverage employees of the Hotel would apparently work at different outlets. See id. at 29. For example, one employee at times served as the bartender/cashier at the Shogun buffet. Id. At one point, the Shogun Restaurant was

reported to have 55 employees, including a manager. (Tr. 2138). The ALJ noted that when the Shogun shutdown it necessarily meant that the kitchen and wait staff within the food and beverage department would be reduced by the number of individuals employed at the Shogun. Id. at 24.

Around October 2007 Respondents' regional vice president of operations and chief spokesperson in negotiations, Robert "Mick" Minicola, made the decision to close the Hotel's Shogun Restaurant. Once having made the decision to shutdown the Shogun, Minicola also decided to resume a free breakfast program for guests, apparently hoping some of the employees who had worked for the Shogun would be assigned to the other restaurant outlet that would operate the breakfast plan. Id. at 24.

On December 1, 2007 the Respondents unilaterally closed the Shogun Restaurant and laid off the restaurant employees in violation of Sections 8(a) (5) and (1) of the Act.² Id. at 4. Minicola testified that the decision to close the Shogun Restaurant was based on various factors including the performance of the restaurant, the closing of other Japanese restaurants n Waikiki, and competition with the Hotel's other two restaurants, but mostly its inability to make money, reduced hotel occupancy forecasts and forecasted reduction in customer traffic within the hotel. (Tr. 2134-35, 2138-42, 2160-62). The Hotel General Manager at the time John Lopianetzky testified that Shogun was very busy but was losing money. (Tr. 1098, 1311). Minicola never testified that in making the decision to close the Shogun Restaurant that he met or offered to bargain with the Union. See Slip Op. 14, 16-32.

² Although reference is made in the record to 11 employees for which the General Counsel was not seeking a remedy specific to Shogun Restaurant, Judge Kennedy found the number of employees who worked in that restaurant was an undetermined number. (Tr. 2323-24;

Lopianaetzky testified that with respect to the Respondents review of which employees to rehire December 1, 2007, the files of Shogun employees were put aside because the Shogun was closing. (Tr. 1125, 2173-74). The employees applications would be held in the event of future openings of food and beverage positions after the breakfast menu was added to the Neptune Garden restaurant at the Hotel. (Tr. 2167-68).

During the hearing before the ALJ, Respondents offered into the record a list of thirty-four (34) bargaining unit employees working at the Hotel through November 30, 2007, who were not offered employment on December 1, 2007. (Respondents Exh. 18).³ Found on that list were eleven (11) bargaining unit employees working in the Shogun restaurant.

With respect to any duty to bargain about the decision to shutdown Shogun Restaurant or the effects thereof, Respondents argued that they had no obligation to bargain with the Union generally between January 1 and November 30, 2007 since they were not the employer of the bargaining unit employees at that time, an argument the ALJ and Board both rejected. (See Respondents' Brief in Support of Exceptions to Administrative Law Judge's Decision at 28). On December 4, 2007, after resuming direct operations of the Hotel again, Respondents took the position ILWU lacked a majority status and that they were not recognizing the Union and had no duty to bargain. (GC Exh. 47; Tr. 124, 580-81).

C. Judge Kennedy's Decision Finding Violations By Respondents

The ILWU pursued over sixteen (16) unfair labor practice (ULP) charges alleging that Respondents HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC, a

Slip Op. at 37 ¶ 15).

³ Appendix 2 is a copy of Respondents' Exhibit 18.

single employer, d/b/a, Pacific Beach Hotel had violated inter alia Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the “Act”). (See GC Exhs. 1.ffff and 1.rrrr). The General Counsel then pursued the various charges as unfair labor practice complaints and given the large number of amendments, the General Counsel, for the convenience of the parties, issued a “Complaint Conformed to Reflect All Amendments as of January 13, 2009.” GC Exh. 1.rrrr (“Complaint”).⁴ ALJ Kennedy in his decision found that document was convenient to use as the operative complaint. Slip op. at 71 n.2.

Relevant sections of the Complaint state as follows (as numbered in the Complaint):

10. (a) At various times during the months of January 2007 through November 2007, PBHM and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) On or about August 2, 2007, PBHM requested the consent of Respondents HTH to propose a collective bargaining agreement to the Union.

(c) On or about August 3, 2007 Respondents HTH notified PBHM that Respondents HTH terminated the Management Agreement.

(d) By its conduct in subparagraph 10(c), Respondents HTH has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

11. (a) On or about September 2007, Respondents HTH implemented an application process and required its employees submit applications in order to keep and maintain their employment with Respondents HTH, effective December 1, 2007.

....

(c) On or about November 30, 2007, Respondents HTH permanently terminated certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to Respondents HTH.

....

⁴ Appendix 3 is a copy of the “Complaint Conformed to Reflect All Amendments as of January 13, 2009.” GC Exh. 1.rrrr.

(f) Respondents HTH engaged in the conduct described above in subparagraphs 11(a), 11(b), 11(c), and 11(d) and below in subparagraph 11(g) without affording the Union an opportunity to bargain with Respondents HTH with respect to this conduct.

....
21. By the conduct described above in subparagraphs 7(c), 8(d), 9(c), 10(d), 11(c), 11(f), 11(g), 14(b), 15(d), 16(c), and 17(g), Respondents HTH has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and 8(a)(5) of the Act.

....
WHEREFORE, as part of the remedy for the Unfair labor practices alleged above in paragraphs 11(c), 11(f), 11(g), 13, and 31, the General Counsel seeks a remedial order requiring that Respondents HTH pay quarterly compound interest of any monetary award.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 7 through 23, the General Counsel seeks an Order requiring Respondents HTH to (1) make whole employee negotiators for earning lost, if any, while attending bargaining sessions; (2) pay to the Union the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations during the period of January 1, 2006 through November 30, 2007, such costs and expenses to be determined at the compliance state of this proceeding; (3) bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, as the recognized bargaining representative in the Unit; (4) promptly have an upper management representative read the Notice to Employees to assembled employees on work time; and (5) mail any Notice to Employees that may issue in this proceeding to those employees who were terminated by PBH Management on November 30, 2007, and who were not hired by Respondents HTH on December 1, 2007. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged. (Emphasis added).

App. 3-12 to 3-13, 3-19, 3-31.

A total of thirteen days of evidentiary hearing was conducted before Judge Kennedy. Twenty-three witnesses were called to testify. On the final day of hearing, after the Respondents rested their case and aside from housekeeping matters the General Counsel offered no rebuttal. See Tr. 2319-31.

One of the two final matters on the record on the final day of hearing was the General Counsel's statement that Respondents' Exhibit 18 represented the individuals who were

entitled to some form of remedy because they were not re-hired with the exception of eleven names on the list of employees at the Shogun Restaurant. (Tr. 2323-24).⁵ General Counsel explained “that is because we did not allege that the Shogun employees were entitled to remedy.” (Tr. 2324). Within minutes the record was closed and briefing followed. (See Tr. 2324 to 2331). The ALJ decision issued on September 30, 2009. See Slip Op. at 1. Although Judge Kennedy awarded backpay to several employees, none were among the employees terminated due to the shutdown of The Shogun Restaurant. Compare id. at 38 with Respondents’ Exhibit 18 (App. 2) (listing employees assigned to Shogun as of November 25, 2007).

On September 30, 2009, Judge Kennedy issued his Decision,⁵ and found for the General Counsel on nearly every allegation contained in the complaint.⁶ After reviewing the findings of fact, Judge Kennedy stated:

I have no difficulty in concluding that the reason Respondents canceled the PBHM agreement was to avoid having a union representing the Hotel's employees. Indeed, in reviewing the management agreement and Respondents' general behavior toward the Union, it seems clear that the entire concept of inserting an “independent” manager such as PBHM was nothing more than a long-term scheme to wash the Union from the Hotel. It was designed to make it appear that Respondents were a bona fide successor to PBHM where it could also claim that the Union's one-vote majority of 2 years before had become dissipated. If so, it reasoned, it could simply treat all of the employees as if they were new hires and set the new terms and conditions. Even if it could not rid itself of the Union entirely, at the very least it could ignore all of the collective bargaining that had gone before and set initial terms and conditions of employment under cover of the holding in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). There, the Court recognized that in a normal successorship an employer is free to set the initial terms and conditions upon which it will hire the employees. In other words, it is not obligated to accept an existing collective-bargaining agreement. The

⁵ Appendix 4 is a copy of excerpts from the transcript of the hearing before Judge Kennedy, pages 2323 to 2331.

⁶ For a thorough discussion on the judge's findings of fact and conclusions of law, see ILWU’s Answering Brief to Respondent's Exceptions To the Administrative Law Judge's Decision

Court went on to say that there would be circumstances where it would be perfectly obvious that the successor intended to retain all of the employees in the bargaining unit that it would be appropriate to have him initially consult with the employees' bargaining representative before fixing those initial terms and conditions.

Respondents' scheme here anticipated that it might be obligated to both recognize and/or consult with the employees' bargaining agent, the Union. To avoid that, and to guarantee that the Union's one-vote majority could be seen as lost, it chose to discharge seven known union activists. After all, if the Union only had a one-vote majority, that majority would be extinguished if known union adherents no longer worked for the Hotel. And, as I have shown above, Minicola did exactly that when he discharged the seven bargaining committee members. Indeed, those discharges have above been found to be illegal and in violation of Section 8(a)(3) and (1).

Once it had accomplished destroying the Union's majority, it deemed itself free to behave as if it were a new employer, and not a successor under the NLRA. This ruse, however, is as transparent as it is simple. Its principal problem is not that it is difficult to discern but that it has created an intricate web of violations. Because nothing it did when it resumed operations upon PBHM's departure was with the Union's consent, nearly everything it imposed on the employees violated the Act.

....

Any objective analysis of this wide-ranging state of affairs must recognize that all of these things are of a piece. They are all designed with one purpose in mind: evasion of the Act. Respondents have chosen to defy not only the will of their employees, but the statute which provides for those employees' mutual aid and protection—Section 7 of the Act. It has rejected the validity of the certification under Section 9, its general duty to bargain in good faith as required by Section 8(d), its concomitant duty under Section 8(a)(5) to provide relevant information to the Union and its unlawful discharge of seven employees under Section 8(a)(3). And this summary does not even reflect the wide variety of unlawful unilateral changes it undertook beginning in December 2007.

356 NLRB slip op. at 34-35.

Judge Kenney's conclusions of law included the following (numbered as appearing in the decision):

9. Respondents utilized PBHM as a middleman as part of a scheme to disguise its decision to deprive the employees of union representation and to escape its obligation to collectively bargain in good faith and when PBHM was about to reach a contract with the Union, Respondents canceled its operating agreement with PBHM to defeat any collective-bargaining contract which PBHM might have achieved.

10. Respondents' conduct as described in paragraphs 7 and 9 above violated Section 8(a)(5) and (1) of the Act and constituted a general refusal to bargain in good faith.

....

15. On December 1, 2007, Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of Section 8(a)(5) and (1) of the Act. (Emphasis added).

356 NLRB slip op. at 36-37. Judge Kennedy, however, failed to include in his Order for remedies, an order of back pay and reinstatement to substantially equivalent positions, and other make-whole provisions for those Shogun workers unlawfully laid off by Respondents. See 356 NLRB slip op. at

The ALJ found the shutdown of The Shogun Restaurant violated the Act but as to the number impacted was unable to provide a count certain.

15. On December 1, 2007, Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of Section 8(a)(5) and (1) of the Act. (Emphasis added).

Id. at 37.

D. The ILWU Files Exceptions Over the Absence of Any Remedy for Shogun Employees at the Hotel

The ILWU filed exceptions to the lack of any make-whole remedy for the Shogun Restaurant employees. In filing its exceptions to ALJ Kennedy's decision, ILWU argued that under these circumstances, Respondents had a duty to bargain with the Union over an economically motivated decision to close the Shogun restaurant and/or the effects of the termination of Shogun restaurant employees, citing among other cases, First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). (See Mem. Supp. Exceptions at 8-9). The

ILWU also argued that the Respondents had a duty to bargain on the order of layoffs of the Shogun Restaurant employees. (See Mem. Supp. Exceptions at 8).

Based on Respondents' failure to bargain, the ILWU sought a remedy on behalf of the Shogun Restaurant employees of reinstatement to a substantially equivalent position at the Hotel and backpay. (Mem. Supp. Exceptions at 11-12). The Respondents opposed ILWU's exceptions (App. 6), noting that the General Counsel stated on the final day of the hearing that he was not seeking a remedy for the Shogun employee. (Slip Op. at 4). In opposing ILWU's exceptions for the Shogun employees, the Respondents HTH argued that: (1) the General Counsel waived any claims or remedies for the former Shogun employees; (2) the layoff of the Shogun employees was not closely connected to any of the other matters that were litigated in the proceedings before Judge Kennedy; and (3) the issue regarding the Shogun employees were not "fully litigated." (App. 6-3).

Respondents filed their own exceptions to ALJ Kennedy's decision. (App. 9). Although they raised several exceptions to the decision, none challenged conclusion of law number 15 of the ALJ. (See App. 9; See also Supplemental Decision on Remand (App. 5-3)). Respondents HTH argued that Judge Kennedy erred in not allowing Respondents to admit evidence of the Union's loss of majority support (App. 9-2). Respondents argued that ILWU's certification year expired in August 2006 and the ILWU's majority support came into great dispute. (App. 9-13). Respondents' excepted to the finding that ILWU had a majority support of employees since August 15, 2005. (App. 9-20). Respondents argued the unfair labor practices were in error since the judge did not find Respondents were in a joint-employer, agency, or successor employer relationship with PBHM. (App. 9-21). Respondents HTH also excepted to

Judge Kennedy's finding that it had a duty to bargain with the ILWU while PBHM was the employer at the hotel. (App. 9-35).

E. The Board Issued Its Decision and Remands on Any Make-Whole Remedy for The Shogun Employees at the Hotel

On June 14, 2011 the Board issued its Decision. See 356 NLRB No. 182 (2011).

The Board adopted Judge Kennedy's findings *inter alia* that the Respondents HTH violated Sections 8 (a) (5) and (1) by bargaining in bad faith for an initial contract with the Union and withdrawing recognition from the Union. Slip op. at 9. With respect to ILWU's exception, the Board noted that the ILWU filed exceptions, "arguing that the judge erred in failing to find that employees of the Shogun Restaurant, which the Respondents unilaterally closed, are entitled to reinstatement or other appropriate relief." Slip op. at 3. With respect to the Shogun restaurant the Board's amended conclusions of law stated:

(g) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and discharged an undetermined number of employees who worked in that restaurant.

Slip. Op. at 8.

As to remedy for the Shogun employees, the Board decided to remand back to an administrative law judge to prepare a supplemental decision. "Once a violation of the Act has been established, the Board has full authority to fashion an appropriate remedy." (Slip Op. at 4).

Ordinarily, the Respondents' unilateral closure of the Shogun Restaurant and the layoff of the employees would warrant a remedy. However, in light of the limited record on this issue, and the lack of explanation for the General Counsel's disclaimer of a remedy, we shall remand this matter to the judge to determine whether a make-whole remedy is appropriate.

(Slip Op. at 4-5). Specific to the Shogun employees, the Board severed the issue and remanded to an ALJ.

IT IS FURTHER ORDERED that the issue of the appropriate remedy for the Respondents' unilateral closing of the Shogun Restaurant and layoff of the restaurant employees is severed and remanded to the Chief Administrative Law Judge, who may designate another judge in accordance with Section 102.36 of the Board's Rules and Regulations to take further appropriate action consistent with this decision for further appropriate action consistent with this decision.

Id. at 10.

F. On Remand the ALJ Seeks Briefing on Whether to Reopen the Record and Then Denies Any Remedy for Shogun Employees

The remanded case was assigned to Judge Cracraft. On August 3, 2011 Judge Cracraft issued a briefing order. The briefs, due September 7, 2011 were to address "the issue of whether it is necessary to reopen the record pursuant to the Board's remand in *HTH Corp.*, 356 NLRB No. 182 (June 14, 2011), as corrected July 11, 2011." (App. 1-1). Based on concerns raised by counsel for Respondents, the parties were allowed to also brief whether Respondents, "due to the General Counsel's waiver of remedy for employees affected by the December 1, 2007, closure, . . . did not fully litigate the allegation that it unilaterally closed the Shogun Restaurant." (App. 1-2).

The ILWU filed a brief on remand. In its brief the ILWU argued the record should be reopened to create a clear record of the impact on the affected Shogun Restaurant employees and to fashion a meaningful make whole remedy including bargaining on the effects of the decision and making the employees whole pending that bargaining. With respect to the Respondents' issue, the ILWU argued that reopening of the record for Respondents to argue their decision was not unilateral should be denied. Any additional reason by the General Counsel for not pursuing a remedy, beyond that stated on the record (Tr. 2324) did not, ILWU argued, warrant reopening of the record.

The Respondents argued (App. 7), the ALJ should not reopen the record because (1) the Complaint did not allege an unfair labor practice for the Shogun employees and (2) the General Counsel had already disclaimed and waived any right to seek remedies for the employees in question, citing Sumo Container Station, Inc., 317 NLRB 383 (1995) and Holder Construction Co., 327 NLRB 326 (1998). (App. 7-3). Alternatively, Respondents argued if the record were reopened its due process rights required it an opportunity to litigate the issue of whether any unfair labor practices were committed with regards to the former Shogun employees in the first place.

Counsel for the General Counsel, apparently in response to the Board's comment of the "lack of explanation for the General Counsel's disclaimer of a remedy," Slip op. at 5, argued that the Acting General Counsel did not intend to litigate a violation concerning the closure of the Shogun restaurant and consequently the decision to close the restaurant was not alleged in the Amended Consolidated Complaint as a mandatory subject of bargaining. (App. 8-3). The Acting General Counsel argued a charge alleging Respondents failed to bargain on the decision to close the Shogun Restaurant but was withdrawn. (App. 8-4). In the supplemental decision Judge Cracraft found these assertions consistent with her review of the pleadings and transcript. (App. 5-3).

On October 14, 2011 Judge Cracraft issued the Supplemental Decision on Remand. (App. 5). Initially the decision noted that the Complaint did not allege unilateral closure of Shogun Restaurant or allege unlawful lay off of the Shogun Restaurant employees. (App. 5-2). The decision noted the counsel for the Acting General Counsel stated on the final day of the hearing that the Complaint did not allege the Shogun employees were entitled to remedy. (App.

5-2). The decision stated that the ILWU’s counsel was present on the final day of hearing and made no statement in agreement or disagreement regarding acting General Counsel’s statement. (App. 5-2). With respect to Conclusion of Law No. 15 that found Respondents violated Sections 8(a) (1) and (5) of the Act by unilaterally and without bargaining closed the Shogun Restaurant, the decision found that because “no remedy was provided in Judge Kennedy’s decision, it was unnecessary for Respondents to except to the Conclusion of Law.” (App. 5-3).

Without discussing whether opening the record was warranted, which was the central purpose of the briefing, the supplemental decision found that Holder Construction Co., 327 NLRB 326 (1998) in footnote 1 was controlling on whether the Shogun employees were entitled to a remedy.

“[I]t is clear that the parties knowingly proceeded throughout a lengthy trial without any allegation regarding the Shogun Restaurant closure. There was no viable unfair labor practice charge regarding the closure and at no time during the hearing did the Union urge a remedy for the closure. It was purposefully not litigated. The Board’s broad remedial authority should not, in my view, extend in these circumstances. Thus, based upon *Holder*, I find that the circumstances do not warrant the exercise of the Board’s broad remedial authority.

(App. 5-4).

III. **RELEVANT BOARD RULES AND REGULATIONS**

The Board’s Rules and Regulations related to Procedures before the Board state in relevant part:

Sec. 102.48 Action of the Board upon expiration of time to file exceptions to administrative law judge’s decision; decisions by the Board; extraordinary postdecisional motions:

....

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding

of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(Emphasis added).

IV. **STANDARD OF REVIEW**

“[T]he Board *may* identify a violation of the Act that was not specifically alleged in the complaint or advanced by the General Counsel *if* the parties had sufficient notice to satisfy due process—i.e., ‘if the issue [wa]s closely connected to the subject matter of the complaint and has been fully litigated.’”⁷ Service Employees Int’l Union, Local 32BJ v. N.L.R.B., 647 F.3d 435, 447 (2nd Cir. 2011) (emphasis in original) (quoting Pergament United Sales, Inc., 296 N.L.R.B. 333, 334 (1989), enf’d, 920 F.2d 130 (2nd Cir. 1990); N.L.R.B. v. Klaue, 523 F.2d 410, 414-15 (9th Cir. 1975) (“While this specific charge was not made in the original complaint, the Board is not precluded from finding an unfair labor practice if the parties have fully litigated the issue.”) (footnote omitted). In analyzing whether the respondent had adequate notice the Board should have determined, based on the facts in the record, whether the issue in question “had been

⁷ Respondents cited to J.P. Sturuss Corp., 288 NLRB 668 (1988) in their brief to ALJ Cracraft on the reopening of the record. (App. 7-7). In that case the issue covered by the complaint was the employer’s duty to bargain in its status of successor employer. The Board found the issue of the “perfectly clear” successor that precluded changes to initial terms and conditions of employment by the successor employer was not litigated. 288 NLRB at 668-69. For the reasons argued herein, the duty to bargain generally and Respondents’ defense that the Union lacked majority support releasing it from any duty to bargain over any matter, were fully litigated.

fully litigated and was sufficiently related to the underlying complaint such that finding a violation on that ground would comport with due process.” Service Employees Int’l Union, Local 32BJ, 647 F.3d at 448.

Notice does not mean a complaint necessarily must state the legal theory upon which the General Counsel intends to proceed. Instead notice must inform the respondent of the acts forming the basis of the complaint. For example, the Board's rules require the complaint to contain “[a] clear and concise description of the *acts which are claimed to constitute unfair labor practices*, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.” (Emphasis in original).

Pergament United Sales, Inc. v. N.L.R.B., 920 F.2d 130, 135 (2nd Cir. 1990); See also N.L.R.B. v. Ironworkers Local Union No. 505, 794 F.2d 1474, 1477 (9th Cir. 1986) (finding charges in tandem were sufficient to put the Union on notice that the NLRB might proceed under both legal theories).

An agency’s decision whether to reopen the record is discretionary. See, e.g., Fry v. D.E.A., 353 F.3d 1041 (9th Cir. 2003) (finding no abuse in discretion in denying request to reopen the record); Minwalla v. INS, 706 F.2d 831, 834 (8th Cir. 1983) (affirming Board's denial of motion to reopen deportation proceedings under abuse of discretion standard); State of Ohio v. Nuclear Regulatory Comm’n, 814 F.2d 258, 263-64 (6th Cir. 1987) (applying abuse of discretion on issue of any error on requests to reopen the record); American Mining Congress v. Marshall, 671 F.2d 1251, 1254-55 (10th Cir. 1982) (finding Secretary was not arbitrary and capricious in refusing to reopen record); Brennan v. Occupational Safety and Health Review Comm’n, 492 F.2d 1027, 1032 n.7 (2nd Cir. 1974) (recognizing discretion of the agency). If, in the agency’s judgment new evidence was necessary to discharge its duty, then reopening the record would be within its discretion. See McBride v. Smith, 405 F.2d 1057, 1060 (2nd Cir. 1968). Where the

movant fails to show the evidence proffered is not “new evidence,” the agency will not abuse its discretion in denying a request to reopen. Fry v. D.E.A., 353 F.3d. at 1044.

V.
ARGUMENT

A. THE SCOPE OF AND ALLEGATIONS IN THE COMPLAINT ARE SUFFICIENT TO COVER VIOLATIONS RELATED TO SHOGUN

In this case where Respondents HTH as of November 2009 was refusing to recognize, let alone bargain with the Union on any subject, it was on adequate notice that any violations arising from that conduct were subject to Section 8 (a) (1) and (5) violations. The complaint therefore “can fairly be construed as alleging an independent violation” of the employer’s duty to bargain. See Ironworkers Local Union No. 505, 794 F.2d at 1477. In Ironworkers Local 505, the union argued the complaint alleged only a breach of the duty of fair representation and not an independent violation of interference with employee section 7 rights. Id. at 1476-77. The Ninth Circuit found adequate notice.

Contrary to the Union's view, the complaint can fairly be construed as alleging an independent violation of 29 U.S.C. § 158(b)(1)(A). Although paragraph 8 of the complaint specifically charges the Union with “fail[ing] to fairly represent Thomas Sturdevant and Amadeo Nappi for reasons which are unfair, arbitrary, invidious and a breach of the fiduciary duty owed to the employees,” 1 T.R. item 2, at 3, paragraph 9 more generally alleges the commission of “unfair labor practices affecting commerce within the meaning of . . . the Act.” Id. These charges in tandem were sufficient to put the Union on notice that the NLRB might proceed under both legal theories. Cf. NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 433, 600 F.2d 770, 775 (9th Cir. 1979) (holding that “[t]he Board may properly find an unfair labor practice when the issue has been fully litigated even though not specifically pleaded in the complaint”), cert. denied, 445 U.S. 915 (1980). (Emphasis added).

794 F.2d at 1476-77.

In The Baytown Sun, 255 NLRB 154 (1981), the principal issues before the ALJ was the union's contention that respondent unilaterally changed term and conditions of employment in the absence of an impasse in negotiations. Id. at 156. The second issue was the composition of the appropriate unit and the union's status as exclusive bargaining representative of those employees. The third issue was a 10(b) challenge. Id. The Board upheld the ALJ's decision the employer also bargained in bad faith, reasoning as follows:

Despite Respondent's exceptions, we find that the post-December 11, 1979, refusal-to-bargain violation, although not specifically alleged, was fully litigated at the hearing. Although Respondent asserts that it had no notice of the specific basis for the violation found, its arguments before us are limited to the law, the sufficiency of the facts, and the interpretation of facts now in the record. Respondent does not allege that it was precluded from adducing any exculpatory facts; nor does it argue that it would have altered its conduct of its case at the hearing in any particular, had it but received what it would deem notice.

The refusal-to-bargain violation found by the Administrative Law Judge, though not the exact one alleged, is related to allegations in the complaint which do assert that Respondent committed that category of unfair labor practice. The issue was fully and fairly litigated and Respondent has not been prejudiced. Due process requires no more. See, e.g., *Alexander Dawson, Inc., d/b/a Alexander's Restaurant and Lounge v. N.L.R.B.*, 586 F.2d 1300, 1304 (9th Cir. 1978); *Crown Zellerbach Corporation*, 225 NLRB 911 (1976), and cases cited therein at 912. (Emphasis added).

255 NLRB at 154 n.1. The “category” of a duty to bargain was well litigated in this case.

In MJ Mueller, LLC (Benjamin Franklin Plumbing), 352 NLRB 525 (2008), the judge found the respondents violated Section 8 (a) (5) of the Act even though a failure to bargain was not alleged as an independent violation of the Act. Id. at 536.

I do find, however, that the Respondent violated Section 8(a)(5) of the Act by refusing, as of October 4, to bargain until the unfair labor practice charges pending against it were resolved, and by failing and refusing to provide requested and relevant information to the Union. I recognize that neither of these “per se” violations was alleged in the complaint as an independent violation of the Act. However, the Board may find an unalleged violation “if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130

(2d Cir. 1990). In this case both prongs of this test are met with regard to the refusal to bargain and the failure to provide requested relevant information.

The facts of the refusal to bargain were alleged as an indicia of surface bargaining in an amendment to the complaint offered at the outset of trial, [footnote omitted] and thus, the allegation is “closely connected” to the pled 8(a)(5) case. The “determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.” *Pergament*, supra at 335. The refusal to bargain allegation was fully litigated because the sum of the evidence is the admissions contained in the Respondent counsel's letters to the Region. See *Pergament*, supra (stating that closely connected/fully litigated rule “has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses). There is no reasonable evidence that the Respondent could rely upon to counter its own written admissions.

The refusal to provide information is closely connected to the subject matter of the complaint. Indeed, the issue of the information request was discussed at the parties' October 2 bargaining session, a session which was explicitly alleged in the complaint (par. 16(g)) as part of the surface bargaining allegations. The issue was “fully litigated” as well. The failure to provide the information was not only undisputed, but the Respondent counsel's letter (GC Exh. 21 at 2) makes clear that the Respondent (and counsel) were aware of the request and believed it inconsistent with the Union's filing of an unfair labor practice charge. (Emphasis added).

352 NLRB at 536.

Here, Respondents HTH alleged generally no duty to bargain with the Union for lack of majority support. See Respondents' Exceptions to Administrative Law Judge's Decision (App. 9). Respondents HTH argued that Judge Kennedy erred in not allowing Respondents to admit evidence of the Union's loss of majority support (App. 9-2,). Respondents argued that ILWU's certification year expired in August 2006 and the ILWU's majority support came into great dispute. (App. 9-13). Respondents' excepted to the finding that ILWU had a majority support of employees since August 15, 2005. (App. 9-20). In light of Respondents' position it is disingenuous now to argue it had no opportunity to defend against failing to bargaining with the ILWU under either a theory of duty to bargain on decision (or alternatively on the effects) since

its entire case was that it had no duty period to bargain with the Union. The decision to close the restaurant was made in October 2007 and Respondents excepted to Judge Kennedy's finding that it had any duty to bargain with the ILWU while PBHM was the employer at the hotel during that time period. (App. 9-35).

The Supplemental Decision on Remand found controlling Holder Construction Co., 327 NLRB 326 (1998), where the Board refused to award a remedy otherwise disclaimed by the General Counsel before the ALJ. Here, unlike Holder Construction, ILWU did file exceptions to the ALJ's decision not to award a remedy. See 327 NLRB at 326 n.1. Judge Cracraft found no distinction in this point to the holding in the footnote of the Board. Judge Cracraft's conclusion is in error for a few reasons.

First, the law is settled that "[o]nce a violation of the Act has been established, the Board has full authority to fashion an appropriate remedy." HTH Corp., Slip op. at 4 (citing Schnadig Corp., 265 NLRB 147 (1982)). As this Board noted in the first decision, ordinarily the unilateral closure of the Shogun Restaurant with the layoff of the employees would warrant a remedy. Id.

Second, a Board (and ALJ) may find violations not alleged in the complaint in cases other than where the counsel for General Counsel seeks the addition. Such action is allowed where evidence is received into evidence without objection. See White Coffee Corp., 261 NLRB at 1026, 1026 n.2 (citing GTE Automatic Electric, Inc., 196 NLRB 902 (1972)); Alexander Dawson Inc. v. N.L.R.B., 586 NLRB 1300, 1303 (9th Cir. 1978) (finding employer, by failing to take exception to certain ALJ findings was precluded thereby from raising the issue before the Board, since it was not put before the Board as required by section 10(e) of the Act).

Prior to the statement by counsel for the General Counsel, the Respondents had rested and the counsel for the General Counsel had no rebuttal.⁸ See App. 4-1 (pages 2319 to 2323).

In Niagara Falls Memorial Med. Ctr., 236 NLRB 342, (1978), counsel for the General Counsel indicated at the hearing that she was “not contending that these conversations are 8(a)(1), but merely background, because they are 10(b)[.]” The complaint did not allege incidents the judge found were interrogating and threatening and the respondents excepted to the ALJ decision that found violations based on this conduct. Id. at 344 n.2. The Board found that the respondent had been able to question witnesses related to the conduct. In rejecting the exceptions, the Board discussed when a matter not alleged in the complaint was still fully litigated before the ALJ:

Respondent has excepted to the Administrative Law Judge's conclusion that it violated Sec. 8(a)(1) of the Act by interrogating and threatening Stephen Ward in July 1976. Respondent argues that neither the charge dated November 5, 1976, nor the complaint, dated February 17, 1977, alleged that these incidents were unlawful and, therefore, any finding based thereon is barred under Sec. 10(b) of the Act. Respondent further argues that these incidents were not fully litigated. The original charge in this proceeding alleged, inter alia, that by “the above and other acts,” Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Sec. 7 of the Act. We have held that it is not necessary to allege each unfair labor practice to be litigated. See Benner Glass Co., 209 NLRB 686, 687 (1974); FTS Corp. (Division of Hitco), 184 NLRB 787, 789 (1970). We further note that the interrogation of, and the threat to, Ward in July 1976 were related to similar unlawful threats made to employees herein, including Ward. Furthermore, although counsel for the General Counsel indicated at the hearing that she was “not contending that these conversations are 8(a)(1), but merely background, because they are 10(b),” Respondent obviously did not rely on the disclaimer by the counsel for the General Counsel, as it cross-examined Ward about the incidents and the matter was fully litigated. (Emphasis added).

⁸ Where the parties have rested before the counsel for the General Counsel makes a statement regarding a remedy for a group of employees no waiver can be read into ILWU not objecting at that time and waiting until the ALJ decision to file exceptions if the findings of the ALJ so warrant.

236 NLRB at 344 n.2; See also Murcel Mfg. Corp., 231 NLRB 623, 634 n.5 (1977) (finding 8(a)(1) violation based on promise of benefits no alleged in complaint was still fully litigated and a proper basis no which to find a violation of the Act).

Here, at various points in the record, testimony about the Respondents decision to close of the Shogun restaurant was received into evidence without objection and with an opportunity to cross. See Tr. 1098, 1125, 1311, 2134-35, 2138, 2160-62, 2167-68, 2173-74; See generally 356 NLRB slip op. at 24. The General Counsel never qualified that the line of questions related to the Shogun were informational or background only. See Tr. 1098, 1125, 1311, 2134-35, 2138, 2160-62, 2167-68, 2173-74. The Complaint sought “all other relief as may be just and proper to remedy the unfair labor practices alleged.” See App. 3-31.

Third, the Board has already rejected the notion that General Counsel’s waiver of the remedy is a per se bar to the Board awarding a remedy. In footnote 16 the Board in ordering the remand noted that Board member Hayes would dismiss the allegation on the General Counsel’s disclaimer alone. See Slip op. at 5 n.16. As law of the case, Judge Cracraft could not reject the remedy on the basis alone of the statements by counsel for the General Counsel made at the conclusion of the final hearing day.

In their brief to ALJ Cracraft, Respondents’ relied in part on Sumo Container Station, Inc., 317 NLRB 383 (1995). See App. 7-3. Such reliance failed to recognize the differences between the Sumo Container case and Respondents own case and the distinguishing cases cited in Sumo Container. In Sumo Container, the violation alleged by the General Counsel and found by the judge involved statements determined to be interrogation of employees. Id. at 383. The Board agreed the judge improperly also found violations for surveillance and soliciting

of grievances, not alleged in the complaint. Id. Here again one pillar of the complaint against Respondents HTH was Respondents' failure to bargain with the ILWU and its insistence the ILWU had lost majority to support, thus releasing it from any duty to bargain. The duty to bargain over the Shogun closing is subsumed by that issue and distinguishes Sumo Container. In Graham-Windham Srvc., 312 NLRB 1199 (1993) (also cited in Sumo Container, 317 NLRB at 384), the Board rejected a lack of notice defense in part by finding that respondents never alleged that it was precluded from adducing any exculpatory facts. Id. at 1199-1200.

In Azalea Gardens Nursing Ctr., 292 NLRB No. 73 (1989) (cited in Sumo Container, 317 NLRB at 384), the Board found the issue decided by the judge over exceptions by the respondent was fully and fairly litigated where the same remark relied on in the complaint was the basis for the additional violation of the Act. Id. at 683 n.2. While the closing of the Shogun is not among the allegations in the Complaint, the failure to bargain in part over the permanent termination of "certain of the Unit employees whose names are not known with certainty," App. 3-13 ¶¶ 11 (c), (f), is part of the Complaint and the Employer's conduct as to the closing of the Shogun would be covered by this allegation.

In Sumo Container, supra, the Board found merit with the exception in part because the general counsel amended the complaint with regard to another allegation but failed to make a comparable motion to amend the complaint with regard to the statements at issue in the exceptions. 317 NLRB at 384. In this case, ILWU brought the exceptions to oppose ALJ Kennedy's decision excluding any remedy to the Shogun employees. The failure to raise it at the final hearing when this first came up in the context of discussing a Respondents exhibit, did not

waive ILWU's right to bring it up later on the exceptions when the Respondents had the opportunity to file opposition to the exception. See App. 6.

1. RESPONDENTS' DUE PROCESS RIGHTS ARE NOT VIOLATED IF THE BOARD AWARD'S A REMEDY TO SHOGUN EMPLOYEES

Respondents argued that the General Counsel's "waiver" of a remedy caused them not to fully litigate that allegation that it unilaterally closed the Shogun Restaurant suggesting to now award a remedy to the Shogun employees would violate Respondents HTH due process rights. See Briefing Order (Aug. 3, 2011). An award of remedy to Shogun employees does not violate any due process right of the employer in the total circumstances of this case. In the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice, and when the conduct indicated in the alleged violation has been fully and fairly litigated. See, NLRB v. Coca-Cola Bottling Co., 811 F.2d 82, 87 (2nd Cir. 1987); NLRB v. Chelsea Laboratories, Inc., 825 F.2d 680, 682 (2nd Cir. 1987), cert. denied, 484 U. S. 1026 (1988). See also Trim Corp. of America Inc., 349 NLRB 608 (2007). "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." Pergament United Sales, Inc., 296 NLRB 333, 334 (1989), enf'd. 920 F.2d 130 (2nd Cir. 1990); See also Cardinal Home Products, Inc., 33 NLRB No. 154 (2003)(finding judge properly found §8(a)(1) violation even though not alleged where violation of §8(a)(3) which was litigated or §8(a)(1) that was not alleged both focused on the same set of facts and raised the same ultimate issue of respondents motivation).

In Trim Corp., supra, the Board rejected a due process argument to an issue first raised in the NLRB General Counsel's post-hearing brief. 349 NLRB 608. The allegations were

that the employer violated Section 8(a)(1) by threatening employees with loss of employment if they did not renounce union representation. The Board found the issue was sufficiently related to timely filed Section 8(a)(5) allegation - that employer unlawfully withdrew recognition from union - and was fully and fairly litigated, even though the 8(a)(1) allegation was first asserted in NLRB general counsel's post-hearing brief. The Board noted that both 8(a)(1) and 8(a)(5) allegations turn on whether the supervisor made coercive statement and involved the same legal theory and arose out of same facts. 349 NLRB at 608-09; See also NLRB v. Klaue, 523 F.2d 410, 414-15 (9th Cir. 1975) ("While this specific charge was not made in the original complaint, the Board is not precluded from finding an unfair labor practice if the parties have fully litigated the issue.").

In this case, the Complaint alleged in part as follows:

11. (a) On or about September 2007, Respondents HTH implemented an application process and required its employees submit applications in order to keep and maintain their employment with Respondents HTH, effective December 1, 2007.

....

(c) On or about November 30, 2007, Respondents HTH permanently terminated certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to Respondents HTH.

....

(f) Respondents HTH engaged in the conduct described above in subparagraphs 11(a), 11(b), 11(c), and 11(d) and below in subparagraph 11(g) without affording the Union an opportunity to bargain with Respondents HTH with respect to this conduct.

....

21. By the conduct described above in subparagraphs 7(c), 8(d), 9(c), 10(d), 11(c), 11(f), 11(g), 14(b), 15(d), 16(c), and 17(g), Respondents HTH has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and 8(a)(5) of the Act.

....

WHEREFORE, . . . The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged. (Emphasis added).

App. 3-12 to 3-13, 3-19, 3-31. This Complaint contains sufficient allegations to cover the violations for unilaterally closing and laying off employees at the Shogun Restaurant without bargaining with the ILWU over the decision.

In McClatchy Newspapers, Inc. v. N.L.R.B., 131 F.3d 1026 (D.C. Cir. 1997), the complaint alleged only an “affirmative duty to explain” the nonbinding nature of a no-strike clause rather than on whether the posting “threatened” the employees. Id. at 1031. The Employer appealed arguing the decision that found the employer threatened employees violated its due process. The Court concluded the employer was “splitting hairs” and even where a complaint does not contain the specific allegation, an award finding a violation nonetheless can still satisfy due process. See id. “Granted, the General Counsel slightly shifted his legal theory after the hearing, but McClatchy has not argued that it would have litigated the issue differently at the hearing had it faced the ‘threatening’ theory. To the contrary, petitioner has used the same arguments to counter both theories.” Id. at 1036.

Here, Respondents argued in its exceptions, that the findings of unfair labor practice conduct were in error since the judge did not find Respondents were in a joint-employer, agency, or successor employer relationship with PBHM. (App. 9-21). Again, Respondents took the position it had no duty to bargain and even if the Union had alleged failure to bargain on the closing of the Shogun, the Employer would have defended that it was not the employer and therefore had no duty to bargain. Under these facts, Respondents HTH cannot argue “it would have litigated the issue differently at the hearing” McClatchy Newspapers, Inc., 131 F.3d at

1036. had it been faced with allegations of a failure to bargain under the theory of the duty to bargain on the closing of the Shogun.

In this case where the Complaint alleged failure to bargain in good faith and testimony was adduced about the closing of the Shogun restaurant, evidence was received on which Respondents HTH could have argued that the decision to close the Shogun was premised on non-labor factors. Respondents due process rights were not violated where Minicola and Lopianetzky were questioned at length about the decision to close the restaurant in a case deciding whether the employer refused to bargain with the Union. The record was fully developed and no new facts can be proffered to counter the fact that on December 3, 2007 Minicola informed Union President Fred Galdones that Respondents was not recognizing the Union and there would be no bargaining. (Tr. 576-577; GC Exh. 47). In the months prior to the actual closing, Respondents argued that they had no obligation to bargain with the Union since they were not the employer of the bargaining unit employees on January 1 through November 30, 2007. See Respondents' Brief in Support of Exceptions to Administrative Law Judge's Decision (App. 9-28). Then, on December 4, 2007, after resuming direct operations of the Hotel again, Respondents took the position ILWU lacked a majority status and so they had no duty to bargain. (GC Exh. 47; Tr. 124 580-81). Furthermore, despite the General Counsel position not to pursue a remedy for the Shogun employees (Tr. 2324), see Part V.B, infra, the issue of whether on December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun restaurant and released an undetermined number of employees who worked in the restaurant, thereby violating §§ 8(a)(5) and (1) of the Act (Decision, 44:15-17), was fully

litigated and is closely connected to the ALJ's finding that Respondents unlawfully withdrew recognition on December 1, 2007.

Interestingly, in opposing ILWU's exceptions to the lack of any remedy for the Shogun employees, Respondents did not argue the decision was an entrepreneurial decision, not of the nature to require a duty to bargain. See App. 6-3 to 6-5. Instead it argued that it failed to introduce evidence on this issue because the counsel for General Counsel acknowledged the Shogun employees were not entitled to a remedy. App. 6-3 to 6-4. Counsel for the General Counsel did not make this statement until the final hearing day and after receipt of evidence and came up only in the context of discussing a Respondents exhibit 18.⁹ See App. 4-3. Nothing precluded Respondents from presenting evidence during the trial or in its argument in opposing ILWU's exceptions and therefore awarding a remedy for Shogun employees here is not inconsistent with due process concerns. See Graham-Windham Srvcs., 312 NLRB at 1199-1200; see also White Coffee Corp., 261 NLRB 1025, 1026 (in part finding judge could not add new allegation where at the outset of the hearing counsel for the general Counsel clearly described the limited scope of remedy sought by the complaint, exclusive of the new issue in question).

Accordingly, the matter of whether on December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun restaurant and released an undetermined number of employees who worked in the restaurant, thereby violating §§ 8(a)(5) and (1) of the Act (Decision, 44:15-17) is closely connected to the ALJ's finding that Respondents unlawfully withdrew recognition on December 1, 2007. Respondents had a strong

⁹ ALJ Cracraft misstated that it was "clear that the parties knowingly proceeded throughout a lengthy trial without any allegation regarding the Shogun Restaurant closure." See App. 5-4. Since counsel for the General Counsel did not make the disclosure until the end of the

interest in defending against any violation in the rehiring process, whether Shogun employees or other employees at the Hotel and therefore no due process would be denied to Respondents if a remedy were awarded to the Shogun employees.

Respondents were not prejudiced by the Board's ruling. The chronology of when the General Counsel put on the record its intent not to seek a remedy related to Shogun employees, at the end of the final day of the evidentiary hearings, precludes Respondents from being able to show prejudice. For the dozen or so days of evidentiary hearing, Respondents would have believed they had to put on the record evidence that terminating Shogun employees was lawful, where the duty to bargain in good faith is based on a totality of circumstances. See Seattle First Nat'l Bank v. N.L.R.B., 106 LRRM 2621 (9th Cir. Feb. 5, 1981). Thus, Respondents had ample opportunity to offer evidence of a lawful decision. "We agree with the Board's finding that the company had ample opportunity to offer, and did offer, evidence on this point, and hold that the company was not denied due process by the finding of a violation based on the unlawful surveillance." Alexander Dawson, Inc. v. N.L.R.B., 586 F.2d 1300, 1304 (9th Cir. 1978). Furthermore, in opposing ILWU's exceptions, the Respondents argued against a remedy and at no time argued they would be prejudiced if ILWU's exception was given favorable consideration. Furthermore, having filed opposition to ILWU's exceptions, the Respondents had full and fair opportunity to put before the Board its arguments on why a ruling with no remedy was appropriate.

Finally, Respondents have waived any argument they lacked the opportunity to pursue evidence where they did not file exceptions to ALJ Kennedy's finding of a violation by

case it is not "clear" of any knowing conduct by the parties other than the General Counsel.

Respondents' unilaterally closing down the Shogun Restaurant. See Alexander Dawson Inc. v. N.L.R.B., 586 NLRB at 1303 (finding that by failing to take exception to ALJ findings company was precluded thereby from raising the issue since it was not put before the Board as required by section 10(e) of the Act). Furthermore, they sought to reopen the record to offer evidence to support their withdrawal of recognition which the ALJ denied. Slip Op. at 2 n.9.

It is disingenuous for Respondents under these facts to argue they were deprived the right to present evidence on any allegations tied to the closing of the Shogun Restaurant where the findings of the Board and ALJ Kennedy make clear Respondents HTH had no intent at any time to bargain with the ILWU.

I have no difficulty in concluding that the reason Respondents canceled the PBHM agreement was to avoid having a union representing the Hotel's employees. Indeed, in reviewing the management agreement and Respondents' general behavior toward the Union, it seems clear that the entire concept of inserting an "independent" manager such as PBHM was nothing more than a long-term scheme to wash the Union from the Hotel.

....

Once it had accomplished destroying the Union's majority, it deemed itself free to behave as if it were a new employer, and not a successor under the NLRA. This ruse, however, is as transparent as it is simple. Its principal problem is not that it is difficult to discern but that it has created an intricate web of violations. Because nothing it did when it resumed operations upon PBHM's departure was with the Union's consent, nearly everything it imposed on the employees violated the Act.

....

It has rejected the validity of the certification under Section 9, its general duty to bargain in good faith as required by Section 8(d), its concomitant duty under Section 8(a)(5) to provide relevant information to the Union and its unlawful discharge of seven employees under Section 8(a)(3). And this summary does not even reflect the wide variety of unlawful unilateral changes it undertook beginning in December 2007. (Emphasis added).

356 NLRB slip op. at 34-35. Judge Kenney's conclusions of law also noted that "Respondents utilized PBHM as a middleman as part of a scheme to disguise its decision to deprive the

employees of union representation and to escape its obligation to collectively bargain in good faith.” 356 NLRB slip op. at 36-37.

It also would be disingenuous for Respondents to argue now it must be afforded the opportunity to introduce evidence that it offered to bargain with the Union (and thus did not act unilaterally) at the very time they were outright refusing to bargain or even recognize the Union. Given their earlier refusal to recognize or bargain with ILWU, Respondents cannot show that a remedy now would prejudice Respondents after the General Counsel stated an intent not to pursue a remedy on the shutdown of the Shogun restaurant. Even if evidence not offered might have been relevant related to reason for the decision to close the restaurant, no such evidence is needed where the duty to bargain is clearly required at a time Respondents HTH refused even to recognize the ILWU, let alone bargain. See Slip op. at 34 (finding that once Respondents “had accomplished destroying the Union’s majority, it deemed itself free to behave as if it were a new employer, and not a successor under the NLRA” and that Respondents had “rejected the validity of the certification under Section 9, its general duty to bargain in good faith as required by Section 8(d,)”); Slip op. at 36 (noting scheme of Respondents HTH was “to deprive the employees of union representation and to escape its obligation to collectively bargain in good faith[.]”).

Where warranted, the Board has the authority to amend the charges to include violations not alleged in the General Counsel’s complaint without violating a party’s due process rights. See Free-Flow Packaging Corp. v. N.L.R.B., 566 F.2d 1124, 1131 (9th Cir. 1978) (“We conclude that the Board did not act improperly or in violation of the due process rights of the company in amending the charges and taking cognizance of the violations established by the

record.”). To award a remedy under the circumstances of this case to the Shogun employees would not violate any due process rights of the Respondents HTH.

B. THE BOARD HAS THE AUTHORITY TO AWARD A REMEDY EVEN WHERE THE GENERAL COUNSEL DISCLAIMS SUCH A REMEDY

Judge Cracraft in part supported the denial of any remedy to Shogun employees based on statements by the counsel for General Counsel that the General Counsel had no intent to seek a remedy on the unilateral lay off of Shogun employees. The record is void of any communication of the General Counsel’s intent prior to the final hearing offered at the end of receipt of evidence. App. 5-3. The intent of the General Counsel may be of weight in some circumstances but where the Board finds a violation and finds the facts underlying to the violation were litigated, it can still award a remedy in cases such as this one. See The Frito Co. v. N.L.R.B., 330 F.2d 458 (9th Cir. 1964).

Once having elected to prosecute a complaint before the Board, the General Counsel is cast in the role of prosecutor in a judicial proceeding. His authority as a prosecutor is not reviewable by the Board, but this authority does not extend to control of the proceeding itself. He cannot limit the scope of the decision which may be rendered upon the evidence adduced. It is a judicial function to permit an amendment of the complaint to conform to proof admitted without objection. The matter of allowance of such an amendment is addressed to the discretion of the court.

Id. at 465. As argued herein, having refused to acknowledge or bargain with the Union on any matter, a remedy is warranted for Shogun employees.

In Schnadig Corp., 265 NLRB 147 (1982), the ALJ found that the employer had violated Section 8 (a) (5) and (1) when it laid off a total of 47 employees. In deciding not to award back pay for these 47 employees the ALJ reasoned that counsel for the General Counsel was not seeking a backpay remedy for the laid-off employees. Id. at 147. In rejecting the ALJ’s decision, the Board noted:

We will modify this aspect of the Administrative Law Judge's recommended remedy so that employees who were unlawfully laid off are eligible for backpay. Initially, we emphasize that whether counsel for the General Counsel seeks a backpay remedy is immaterial since we have full authority over the remedial aspects of our decisions. See, e.g., *Loray Corporation*, 184 NLRB 577 (1970); *N.L.R.B. v. Duncan Foundry & Machine Workers, Inc.*, 435 F.2d 612 (7th Cir. 1979); *N.L.R.B. v. WTVJ, Inc.*, 268 F.2d 346 (5th Cir. 1959). (Emphasis added).

Id. at 147.

The Board upon finding a violation may on its own award the remedy and therefore Respondents HTH in light of the challenge to its failure to bargain with the ILWU was obligated to present evidence and argument from the outset of the hearings to defend their claim they lawfully closed the Shogun without bargaining with ILWU. Although neither Respondent nor any other party raised this issue in exceptions to the Administrative Law Judge's Decision, “matters of remedy are traditionally within the Board's province, and may be addressed by the Board *sua sponte*.” R.J.E. Leasing Corp., 262 NLRB 373, 374 n.1 (1982) (“Although neither Respondent nor any other party raised this issue in exceptions to the Administrative Law Judge's Decision, matters of remedy are traditionally within the Board's province, and may be addressed by the Board *sua sponte*.”).

In Schnadig Corp., 265 NLRB 147 (1982), the Board went on to modify the remedy ordered by the ALJ to include backpay.

We can discern no reason why we should not afford a remedy to any employees victimized by Respondent's unlawful conduct. Accordingly, Respondent's obligation to reinstate laid-off employees and its backpay liability should be determined at a compliance proceeding.

Id. at 147-48.¹⁰

¹⁰ The Board cited Holder Construction Co., 327 NLRB 326, Slip Op. at 5 where the Board refused to award a remedy otherwise disclaimed by the General Counsel before the ALJ.

While this matter is on remand, the Board's finding that the Respondents unilaterally shutdown the Shogun Restaurant and unlawfully failed to negotiate with the ILWU is law of the case. See Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1404 (9th Cir. 1993) ("The law of the case controls unless evidence on remand is substantially different from that presented in previous proceedings."). To the extent ILWU did not pursue a specific remedy for Shogun employees in its post-hearing brief,¹¹ upon ALJ Kennedy finding the Respondents violated the act by unilaterally closing Shogun Restaurant and laying off employees without bargaining with the ILWU, the Union filed its exceptions to the decision.

C. THE SUPPLEMENTAL DECISION ARBITRARILY DENIED REOPENING THE RECORD TO DETERMINE EXTENT OF REMEDY FOR THE EMPLOYEES

Clearly under the Board's reasoning and long-standing Board law, and as argued herein, some form of remedy is necessary if the Board adopts the ILWU's exceptions to the Supplemental Decision on Remand. At least 11 employees are known to have been terminated upon the unilateral closing of the Shogun Restaurant and the Respondents' blatant exclusion of the ILWU in that process warrants make whole remedy for the adverse impact on the employees. See Schnading Corp., 265 NLRB 147, 147-48 (1982) ("We can discern no reason why we should not afford a remedy to any employees victimized by Respondent's unlawful conduct."); See also Pan American Grain Co., Inc. v. N.L.R.B., 558 F.3d 22 (1st Cir. 2009) (finding customary remedy for an employer's failure to provide employees with adequate notice and a reasonable

Here, unlike Holder Construction, ILWU did file exceptions to the ALJ's decision not to award a remedy. See 327 NLRB at 326 n.1.

¹¹ "15. On December 1, 2007, Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of Section 8(a)(5) and (1) of the Act."

opportunity to bargain before imposing layoffs is reinstatement and full backpay, which is presumptively valid; it aims to return the employee to the economic status quo before the employer's unilateral action).

What the Board severed and remanded was the issue of whether a make-whole remedy is appropriate. Slip Op. at 5. The need for a remand was based on 1) the limited record on this issue, and 2) the lack of explanation for the General Counsel's disclaimer of a remedy. Id. While the Board did not specifically state that reopening was necessary to decide the issue of make-whole remedy, the Board found the record on this issue was limited and ALJ Kennedy found the amount of employees impacted as an "undetermined number." Slip Op. at 4-5, 37.

The Board's first concern, a limited record on this issue, suggests that the Board was not certain of the impact on the employees. We do not even know how many employees were adversely impacted. We do not know who was retained and worked in other departments. The Union believes those who were assigned other outlets or positions received less hours of work and in some cases perhaps lower rates of pay for less wages. How much less is not in the record. The Union knows that some of the employees permanently laid off by the shutdown were able to find other jobs with new employers while some are still without a permanent job. Opening the record to ascertain this information will provide an understanding of the scope of the effect of the violation. Absent a finding that employees suffered any economic loss as result of employer's conduct the record as now composed does not identify the specific remedy that would be appropriate given the clear finding of a violation. The record does not clarify if the subsequent opening of a breakfast plan at another restaurant in the Hotel created more positions

Slip. Op. at 37.

where the Shogun employees could have been placed. Slip Op. at 24. As ILWU argued in its exceptions to the ALJ decision, arguably some Shogun employees could have been placed in other outlets but were never considered. In the past the Board has remanded to the ALJ to receive evidence on limited remedial issues that required further evidence for the record. See Cola Electric Co., 345 NLRB 1057 (2005) (remanding to the ALJ on the limited issue of the number of openings that were available to the discriminates); Jet Electric Co., 338 NLRB 650 (2002) (same); Triple H Fire Protection, 326 NLRB 463 (1998) (remanding where evidence was not clear on size of unit, majority status union, or the extent of dissemination, if any, of the violations among the employees). Furthermore, if the Board finds some remedy is warranted based on the failure to bargain the effects of the closing (the Board having already found a failure to give notice and opportunity to bargain), further evidence is necessary to determine the extent of the impact of the decision on the employees. Some make whole remedy is the means by which to allow meaningful effects bargaining.

To remedy Respondent Shane's unlawful failure to bargain with the Union about the effects of its decision to close its facility, we shall order Respondent Shane to bargain with the Union, on request, about the effects of that decision. As a result of Respondent Shane's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed to make whole the unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for Respondent Shane. We shall do so by ordering Respondent Shane to pay backpay to the terminated unit employees in a manner similar to that required in Transmarine Navigation Corp., 170 NLRB 389 (1968), as clarified by Melody Toyota, 325 NLRB 846 (1998). (Emphasis added).

Shane Steel Processing Inc., 352 NLRB No. 28 at 3-4 (2008); See also Adair Standish Corp. v. N.L.R.B., 912 F.2d 854, 865 (6th Cir. 1990). To order such meaningful remedy, again information about the status of the various employees is necessary through reopening the record.

To the extent this Board finds such questions relevant to deciding the form of the make whole remedy, a reopening still remains appropriate. Where the record is not fully developed, reopening is the appropriate step as found in non-labor cases. See, e.g., Maharaj v. Gonzales, 450 F.3d 961, 964 (9th Cir. 2006) (remanding to develop record where record undeveloped on important points); Sunshine Min. Co. v. United Steelworkers of America, AFL-CIO, CLC, 823 F.2d 1289, 1296 (9th Cir. 1987) (finding arbitrator properly exercised authority to reopen award to supplement record and on remand, the arbitrator should reopen the award to obtain evidence necessary to the final resolution of the issue submitted).

The Board's second concern, lack of explanation for the General's Counsel's disclaimer, neither requires the opening of the record, nor denial of remedy as was decided in the supplemental decision. The only explanation given was that the General Counsel did not intend to litigate a violation concerning the closure of the Shogun Restaurant and a charge filed by ILWU on the failure to bargain the effects of the decision was withdrawn. See App. 8-3 to 8-4. These reasons, however, do not preclude a remedy where at the conclusion of the case and the briefing, the Board finds a clear violation from the failure to give notice and opportunity to bargain the unilateral closing and layoff. See Part V.A supra. In another case with different facts, perhaps where the employer was refusing to bargain subject by subject the outcome might be different. But here, where Respondents HTH claimed no duty to bargain on any subject because the Union lacked majority support and claimed it was not the employer at the time the decision

was made, these reasons by the General Counsel are inadequate to withhold a remedy to the Shogun employees.

VI.
CONCLUSIONS

For all of the aforementioned reasons, the ILWU respectfully requests that the Board find for the Union and except to the ALJ's Supplemental Decision on Remand. The record should be opened for the reasons argued herein and the ALJ decide the extent of the make-whole remedy.

DATED: Honolulu, Hawaii, November 14, 2011.

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