UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

REMINGTON HOTEL CORPORATION, d/b/a THE SHERATON ANCHORAGE	
	Cases 19-CA-32148
	19-CA-32188
	19-CA-32222
	19-CA-32238
and	19-CA-32301
	19-CA-32334
	19-CA-32337
	19-CA-32349
	19-CA-32367
UNITE HERE!, LOCAL 878, AFL-CIO	19-CA-32414
	19-CA-32420
	19-CA-32438
	19-CA-32487

RESPONDENT'S ANSWERING BRIEF TO CROSS-EXCEPTIONS
BY COUNSEL FOR THE ACTING GENERAL COUNSEL

The counsel for the Acting General Counsel (CGC) has filed 29 exceptions asserting objections to three decisions by ALJ Meyerson. In this Answering Brief, Respondent shall demonstrate, with respect to all three, that the Administrative Law Judge was correct in his ruling, and that no exceptions should be granted.

1. **The Evidence Supports the ALJ's Finding That the Subcontracting of Van Driver Duties Did Not Violate the Collective Bargaining Agreement, and the Counsel for the General Counsel Failed to Prove to the Contrary**

The counsel for the General Counsel at page 4 of her Cross-Exceptions Brief asserts the following: Respondent "offered the testimony of a sole bellman (which the ALJ found 'confusing') who attempted to recall (with refreshing from Respondent's business records) how, in fact, the subcontracting had affected the bellman's employment status." This

characterization by the CGC, however, is misleading, in that the ALJ – immediately after noting *only* that the bellman's testimony was "*somewhat* confusing" – went on to nonetheless find and conclude the following: "It does appear that there was no diminution in the number of bellmen employed by the Hotel from August [2009], when the subcontracting to [Valentino Limousine Service] went into effect, through November of 2009." [ALJD, pp. 25 - 26].

The significance of "no diminution" goes straight to the unmistakably clear language in the collective bargaining agreement at Article IX, Section 8. [GC Ex. 5, p. 10]. That section in its entirety reads as follows:

> **Section 8**. If analysis of its operation by the Employer indicates contracting out is reasonably expected to result in a reduction in cost, increase efficiency in the delivery of services to the public, or otherwise benefit the Employer, *and* it is reasonably expected to result in the displacement of any regular employee, the Employer shall first notify the Union in writing of the proposed action. The Employer shall provide the Union with copies of cost analyses, comparisons of employee versus contract costs, or other documents on which the proposed action is based. The Union will be invited and encouraged to meet and confer with the Employer at reasonable times regarding the proposed action, and no final action shall be taken by the Employer within thirty (30) days of its notice. If after consultation with the Union, the Employer adopts the plan to contract out the work, all affected Employees shall be given thirty (30) days advance notice or full pay and benefits in lieu of thirty (30) days notice. The Employer will make reasonable efforts to assist displaced employees in being considered for employment with the contractor, or to transfer them to other available positions with the Employer for which they are qualified. The Employer agrees that if there is an effort by the Union to organize any contractor, that it will adopt a position of neutrality.

As the first sentence in this provision makes clear, a duty to notify the Union of a subcontracting decision arises only in the event such decision results in *both* an impact on cost or efficiency (or "otherwise benefit[s] the Employer"), *and* is "reasonably expected to result in the displacement of any regular employee." The obligations set forth in the remainder of this provision – primarily, to "provide" the relevant "cost analyses," and bargain the effects – are

triggered therefore only if *both* of these conditions in the first sentence are met. And thus, if no "displacement of any regular employee" is "reasonably expected," there is no duty of "notice" and no duty to provide the relevant "cost analyses" and bargain effects. The ALJ's conclusion on this point is perfectly sound:

> The language in the expired contract [quoted above] is clear and unambiguous. The Respondent is not required to notify the Union, and implicitly bargain with the Union, unless the subcontracting would reasonably result in the displacement of bellmen. It did not.

[ALJD, p. 79, ll. 48-50]. There is, further, no language in this provision supporting the CGC's apparent contention that Respondent had a duty to provide the Union with justification or support for its conclusion – in advance of executing the decision – that it "reasonably expected" the decision not to result in the "displacement of any regular employee."

The testimony of the bellman in question, Troy Prichacharn, at pages 672-680 of the transcript, plainly supports the ALJ's conclusion that the subcontracting of the van driving duties "did not" result in the "displacement of bellmen." Briefly, Mr. Prichacharn's testimony developed as follows. He first identified that there were two "seasonal summer" bellmen who worked during the 2009 summer season: Bill Harbour and Mitchell Martineau. [Tr., p. 672, ll. 11 – 25]. Before being shown a document to refresh recollection, Mr. Prichacharn then identified the seven other bellmen in the department, all of whom were year-round employees: Romeo [Cadiogan], Joel Encabo, Philip Herman, Joseph Nicolaides, Robert Sassou, Billy Toien, and himself. [Tr., pp. 673-675]. Mr. Prichacharn was then shown a seven-page document, introduced into evidence as Respondent's Exhibit 12, extracted from the Hotel's business records, showing the bellmen employed month-by-month from May of 2009 to November of 2009. The first page – May 2009 – included summer/seasonal bellman William Harbour, as

well as the seven year-round employees (for a total of eight bellmen). The next page, listing the bellmen employed during the month of June, reflects the hiring of Mitchell Martineau, for a total of nine bellmen. The same nine bellmen were employed in July, as shown by the next page of Respondent's Exhibit 12. In the month of August, Mr. Martineau's seasonal employment ended, and the unit dropped to eight. This was the same month in which the van driving work was shifted to Valentino Limousine Service. The last three pages of Respondent's Exhibit 12 show the bellmen employed during the months of September, October and November. It will be noted that following Mr. Harbour's departure, he was replaced in September by Mr. McCallion, and the number of bellmen, thus, remained at eight. This same line-up of eight bellmen (the seven year-round bellmen, with McCallion also replacing Harbour) remained intact through October and November. Mr. Prichacharn confirmed that the foregoing monthly business-record rosters of bellmen were accurate. [Tr., pp. 673-680].

This undisputed evidence that no displacement occurred – or, as the ALJ expressed it, "no diminution" – of regular bellmen was sufficient proof of the absence of a notice obligation. As noted above, nothing in the above-quoted language can be read to have imposed an obligation on the Respondent to justify or support its conclusion – in advance of executing the decision – that it "reasonably expected" the decision would result in no displacement. Accordingly, there was no obligation on the Respondent in the hearing to prove that it reached such a conclusion at that point. As the ALJ obviously determined, the fact that "no diminution" in fact occurred was sufficient to establish the "reasonably expected" element, and hence establish the absence of a duty to notify.

2. **The Evidence Supports the ALJ's Findings That the Housekeeping Department Incentive Plan was Never Implemented, and That the Impact of**

its Mere Introduction was "*de minimis*"

The counsel for the General Counsel presented no evidence in support of her position that the incentive plan was implemented. It is true that hotel-level management for a brief time created an incentive program, as embodied in the one-page document in the record as GC Exhibit 96. It is also true that this program was communicated in some fashion to some of the housekeepers. [Tr. p. 5151: Elda Buezo testified to a single "morning" when the head housekeeper Eduardo Canas introduced the document to "around six or seven" housekeeping employees]. However, this program was never implemented, as the following review of the undisputed record evidence shows.

The incentive plan, GC Exhibit 96, was clear in stating that the incentive-reward that was offered – a reduction of the room quota from 17 to 16 – would be given to "ALL Housekeepers **for the following month**," in the event that "we as a hotel, receive a 9.0 or better on Cleanliness of Hotel AND Cleanliness of Room and Bath **for the month**..." [emphasis in bold-face added; all other emphases in original].

The counsel for General Counsel called only two witnesses in an attempt to prove that an unlawful incentive was implemented: Elda Buezo and Ana Rodriguez. Neither witness testified to this program as having been in place for any length of time. To the contrary, both testified only that the program was announced at a single point in time, and gave no further testimony describing any further execution or implementation of the program. [Tr. pp. 5150-51: Buezo testified about "the morning" when Canas spoke about the plan; and Tr. p. 5164: Rodriguez described that "Mr. Eduardo [Canas] came out of his office at 8:00 in the morning and started to

speak about this document [1]].

Both witnesses were questioned whether the above-described program was ever implemented. As shown above, to answer this question affirmatively would require a showing that there had been a reduction in the room quota for "ALL Housekeepers" for an entire "following month" as a result of "we, as a hotel, receiv[ing] a 9.0 or better . . . for the month." Both testified to an isolated – and obviously unrelated – incident of individual employees receiving a room reduction one time only. Neither testified to any month-long reductions, nor were they able to tie this isolated one-time only reduction in any other way to the program described in GC Exhibit 96. Buezo testified: "I remember one day that one room was taken away," [Tr., p. 5152; and stated further at p. 5153: "On one day, yes, they took one room away"]. Rodriguez, who was a bargaining-unit supervisor (whose duties involved handing out schedules), was asked:

> Q: And they [housekeepers as a group] didn't have their rooms reduced to 16 for an entire month, did they?
>
> A: No, they told me to take one room away for their schedule for one day.

[Tr. pp. 5179-80].

The testimony of Mary Villarreal, to which the CGC points, confirms what the testimony of Buezo and Rodriguez confirms: The program was never implemented.

In support of her contention that the ALJ erred in finding that the impact of the Hotel's incentive plan was "*de minimis,*" the CGC cites several distinguishable Board cases. The CGC looks to Waste Automation, 314 NLRB 376 (1994), which held that an employer's repeated and

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[1] As noted by the counsel for General Counsel, at p. 6 of her brief, Ms. Rodriguez stated several times in her testimony, at Tr., p. 5164, that Mr. Canas commented that there "were going to be people who would not be in agreement with this document." Nowhere in Ms. Rodriguez's testimony, or anywhere else in the record, is there any description or explanation as to what this vague comment meant. The counsel for General Counsel apparently drops this testimony in her brief merely to suggest some sinister motive. This ambiguous comment, however, having never been explained, should be ignored as immaterial and irrelevant.

widespread statements to factory employees that the factory would shut down if the Union ever gained majority status was not "*de minimis*." Obviously, such flagrantly inappropriate statements would not be considered "*de minimis*," but the case at hand does not involve anything so volatile.

The CGC also cites Metz Metallurgical Corp., 270 NLRB 889 (1984), which holds that the effect of two separate conversations between two members of management with the same employee about the Union was "*de minimis*," and Caron Intl., 246 NLRB 1120 (1979), which holds that the effect of threatening a single known Union supporter out of 850 employees was "*de minimis*." While Metz and Caron are distinguishable, they at least deal with examples of similarly minor actions, the effects of which are "*de minimis*."

Despite the factual distingtions, the CGC attempts to make the above cited cases fit the current controversy by further referring to Cartridge Actuated Devices, 282 NLRB 426, 428 (1986) (holding that a ULP committed by a high ranking company official against a large number of the proposed bargaining unit is of particular significance). The CGC fails to mention that the ULP committed in Cartridge was the frequent and wide spread threat of factory closure if the union achieved majority status. A proposed (but never implemented) incentive program presented to a mere handful of employees is a far cry from the severity embodied in frequent threats of job loss and business closure to the majority of a proposed bargaining unit.

The counsel for General Counsel also attempts to make a mountain out of a mole hill by arguing that the alleged unilateral incentive plan implementation should be viewed in context of the Respondent's other alleged ULPs. In order to support her argument, the CGC cites Microimage Display Division of Xidex Corp., 297 NLRB 110, 111 (1989) (holding that an employer's reasons for a single day, unilateral transfer of a Union supporter were pre-

textual and constituted a ULP when viewed in context with the employer's illegal withdrawal of recognition of the involved Union). Once again, while the CGC's representation of Microimage is technically correct, a deeper analysis proves that the CGC misconstrues the Board's holding. The Board stated that:

> The judge found that the alleged violation with respect to Sadowski's single-day transfer was de minimis and therefore warranted no Board action. We disagree. Initially, we find, as the judge implicitly found, that the Respondent's alleged motivation for the transfer was a pretext for its real, discriminatory motivation to limit a vocal union proponent's access to her fellow unit employees. This conduct ***must be viewed in the context*** of the Respondent's other unfair labor practices, specifically including a simultaneous withdrawal of recognition from the Union and an antecedent threat to transfer unit employees' work to a nonunionized facility in order to undermine the Union. ***Viewed in this context***, we find that even the single day's discriminatory transfer of Sadowski was a substantial violation of Section 8(a)(3) requiring a traditional Board remedy. [Emphasis added]

[Microimage, 297 NLRB at p. **8]

The Board makes it abundantly clear that context is absolutely vital when deciding whether a small unilateral implementation has a "*de minimis*" effect. Here, the CGC provides very little context and a great deal of rhetoric. Furthermore, the incentive plan the CGC claims was unilaterally implemented was never actually implemented.

In one last attempt to prove that the Respondent's unimplemented incentive plan had more than a "*de minimis*" effect, the CGC turns to EIS Brake Parts, 331 NLRB No. 195, *60 (2000). The CGC stated, accurately, that in EIS the ALJ held giving something as small as bonus meals to reward productivity achievements at the time the parties are negotiating over the Respondent's productivity proposals is destructive to the bargaining process. Unfortunately for the CGC, the Board did not agree with the ALJ's decision with regard to the bonus meals. In fact, the Board stated:

> We similarly find lawful the Respondent's decision to provide pizza to employees

> in the hose assembly area, in recognition of achievement of 100 percent productivity. It appears that the pizza lunch was a spontaneous offering after the fact, and not a "carrot" held out to employees to induce higher productivity. The record shows that the Respondent had a history of occasionally, and apparently randomly, giving small food items to employees in situations such as the completion of inventory and the achieving of departmental objectives.

[EIS, 331 NLRB at **19]

Neither the facts of EIS nor the CGC's erroneous interpretation is applicable to the case at hand. Moreover, the unimplemented incentive plan was only known to a handful of the bargaining unit and was never actually in place. Therefore, the CGC's contention that the Respondent's inconsequential incentive plan was a small part of a large plot to persuade Union employees of the Union's ineffectiveness is without merit.

3. **The Evidence Supports the ALJ's Credibility Findings Favoring Mr. Artiles' Testimony Over the Testimony of Eight (8) Contradictory General Counsel Witnesses with Regard to the Jade Restaurant Meetings as well as the General Counsel's Failure to Satisfy their Burden of Proof in Proving Mr. Artiles Denigrated the Union.**

The counsel for General Counsel at page 15 of her Cross-Exceptions Brief posits that the ALJ's reasons for crediting Mr. Artiles' testimony over that of eight (8) General Counsel witnesses was completely without merit. In fact, the CGC states that the ALJ was "confused," used nothing more than boilerplate rationales in crediting Mr. Artiles, was overwhelmed by the "hard to evaluate" testimonies of so many witnesses, and ignored several witnesses' testimony. Incredibly, the CGC even falsely claims the ALJ stated that evaluating witness testimonies from the Jade Restaurant meetings "was too difficult."

Such portrayal of the ALJ's alleged inability to reason is a gross mischaracterization of what actually happened. In truth, the ALJ explained his credibility decision involving Mr.

Artiles' testimony thoroughly as well as delineating the fact that the CGC did not meet her burden of proof in attempting to contradict Mr. Artilles' testimony. For example, with regard to Mr. Artiles the ALJ states:

> I found Artiles, who testified on four or five separate occasions, to be a straight, no nonsense kind of manager. He clearly took great pride in his ability to operate a large hotel with many employees. It was suggested by a number of witnesses that he had a reputation as a "cleaner," one who cleans up problems. This may in fact be so, as he seems very competent, and based on his testimony, very hard working. Further, I found him to be circumspect and careful with his words, and somewhat gruff in voice and manner.

[ALJD, p. 49]

The ALJ's conclusions concerning Mr. Artiles make perfect sense when viewed in the universe of events surrounding the Jade Restaurant meetings. For example, by the time the Jade Restaurant meetings occurred, Mr. Artiles had been the General Manager of the Respondent's hotel for nearly nine months. As General Manager, Mr. Artiles was aware that he was constantly being watched by a Union eager to spot any mistakes, and he was also under the guidance of attorneys for nearly nine months advising him what actions he should and should not take. Mr. Artiles was well aware of his responsibilities, and he was clearly not the kind of person to meet with most of the Union's bargaining unit and then denigrate the Union en masse. Therefore, it is easy to conclude, as the ALJ did, that Artiles did not denigrate the Union.

Furthermore, the ALJ stated that with only eight (8) witnesses contradicting and twenty-two (22) witnesses confirming Mr. Artiles testimony:

> . . . The weight of the evidence, in terms of numbers of witnesses, favors the Respondent. Also, and most obvious, the burden of proof to establish the alleged violations rests with the General Counsel. Based on the evidence presented, I must conclude that the General Counsel has failed to meet her burden of proof. The evidence is insufficient to establish that Artiles made the threatening and disparaging statements on about March 22, 2010, that are attributed to him, specifically as alleged in paragraph 15(b) through (e) of the first complaint. I will credit his denials.

[ALJD, p. 84]

It should be noted that ALJ Meyerson does not base his credibility decisions solely on the consensus of testimony by a majority of witnesses. The consensus of testimony was overwhelmingly against Dexter Wray, but the ALJ still decided to believe Mr. Wray over several others.

Likewise, the CGC states that the ALJ punted on the issue of deciding when the Jade Restaurant meetings occurred. However, the ALJ did not punt the issue, but presented instead a well-reasoned analysis why he thought there was no actual July meeting in the Jade Restaurant. Specifically, the ALJ reiterated how there were only a handful of employees who testified to a July meeting and they seemed confused as to the date. Combined with the credibility assessment in favor of Mr. Artiles, the ALJ held there was a dearth of evidence showing that such a meeting in July in the Jade Restaurant actually took place. The ALJ correctly found that the lack of evidence lies squarely with the case put on by the CGC.

Contrary to the CGC's assertion, the ALJ made a true and specific credibility determination with reference to Mr. Artiles and his testimony. The CGC is required by the Board standard stated in Standard Dry Wall Products, Inc., 91 NLRB 544 (1950) to show by a preponderance of all the relevant evidence that the ALJ was incorrect in order for the Board to overturn an ALJ's credibility decision. The CGC has not met this burden. The ALJ's credibility holding in favor of Mr. Artiles should stand.

DATED: December 13, 2011

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