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Unite Here Local 1 and Ritz-Carlton Water Tower Partnership. Case 13-CB-019622

March 23, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS FLYNN
AND BLOCK

On November 29, 2011, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Charging Party Employer filed a brief in opposition to the Respondent’s exceptions. Thereafter, the Respondent filed a reply brief in support of exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

¹ In September 2009, the Respondent and the Employer entered into a “me-too” agreement generally binding them to the terms of a collective-bargaining agreement to be negotiated between the Respondent and the Sheraton Chicago Hotel, but carving out, in par. III of the agreement, certain issues to be bargained directly. The judge found that the agreed-upon carve-out encompassed nine issues, and that the Respondent subsequently refused to bargain about six of them. The judge found that the Respondent thereby violated Sec. 8(b)(3), and then rejected the Respondent’s contention that the parties’ dispute should be deferred to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Respondent excepts, inter alia, to the judge’s failure to consider whether deferral was appropriate before he decided the merits of the 8(b)(3) allegation. We find that any error in this regard was harmless. Considering the deferral issue first, we find that deferral is not appropriate for the reasons that the judge stated as to why the issue is not eminently well suited to resolution by arbitration. Second, we find that the Respondent violated the Act for the reasons that the judge set out in his discussion of the substantive 8(b)(3) issue.

² Relying on *Doubletree Guest Suites Santa Monica*, 347 NLRB 782 (2006), the Respondent contends that if the Board decides that deferral is not appropriate, it should remand the case to the judge to afford the Respondent an opportunity to present evidence regarding the meaning of the “me-too” agreement. We find this argument without merit. *Doubletree* is readily distinguishable. In that case, the fact that the respondent entered into a settlement agreement with the General Counsel obviated the need to litigate certain complaint allegations. When the Board set aside that settlement agreement, the respondent’s pre-settlement conduct became relevant, and the Board remanded the proceeding to the judge to permit the parties to litigate the reinstated allegations. In the present case, by contrast, the Respondent was not precluded from litigating the substantive 8(b)(3) issue, but chose not to do so, opting instead to rely solely on its deferral defense. In these circumstances, we find that a remand is not appropriate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, UNITE HERE Local 1, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

“(c) In any like or related manner restraining or coercing members and employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Substitute the following for paragraph 2(c).

“(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 13 signed copies of the notice in sufficient number for posting by the Employer at its Chicago, Illinois, facility, if it wishes, in all places where notices to employees are customarily posted.”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 23, 2012

Mark Gaston Pearce, Chairman

Terence F. Flynn, Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf
with your employer

We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate our Memorandum of Agreement with the Ritz-Carlton Water Tower Partnership.

WE WILL NOT fail and refuse to bargain with the Ritz-Carlton Water Tower Partnership regarding the topics that are subject to collective bargaining under the terms of our Memorandum of Agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Ritz-Carlton Water Tower Partnership regarding the topics that are subject to collective bargaining under the terms of our Memorandum of Agreement, and if an understanding is reached WE WILL embody the understanding in a signed agreement.

UNITE HERE LOCAL 1

Kevin McCormick, Esq., for the General Counsel.

Kristin L. Martin, Esq., of San Francisco, California, for the Respondent.

Thomas J. Posey, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Chicago, Illinois, on August 1, 2011. The charge was filed January 7, 2011, and the complaint was issued on March 25.

The complaint alleges that the Union, Unite Here Local 1, violated the Act by failing and refusing to bargain over certain terms and conditions of its members' employment that it had previously agreed were subject to such bargaining. This conduct is alleged to violate Section 8(b)(3) of the Act. The Union filed an answer to the complaint denying the material allegations of wrongdoing and asserting as a procedural defense that the Board's policies required that the matter be deferred to arbitration.

For the reasons that I will describe in detail in this decision, I find that the Union did violate the bargaining obligation imposed on it by the Act. I further conclude that the Board's policies regarding deferral to arbitration are not intended to be applicable to the circumstances presented in this case.

On the entire record¹, including my observation of the demeanor of the witnesses, and after considering the briefs filed

¹ The transcript of the proceedings is quite accurate. The only material correction is the erroneous use of the word "form" in three locations where the intended term was "forum." (See transcript at p. 74, l. 20; p. 75, l. 18; and p. 79, l. 11.) Any other errors of transcription are not significant.

by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party, a corporation, operates a hotel at its facility in Chicago, Illinois, where it annually derives gross revenues in excess of \$500,000 and purchases and receives at its Chicago facility goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois. The Respondent admits,² and I find, that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Before setting out my findings of fact, it is appropriate to discuss the state of the evidentiary record. The General Counsel and the Employer produced the testimony of two witnesses, Kyle Johansen and Thomas Posey, both of whom are attorneys. Johansen represented the Ritz-Carlton in labor relations from 2004 through 2010. Posey took over those matters from Johansen during the summer of 2010. While the Respondent presented certain documentary evidence in its case, it chose not to call any witnesses. As a consequence, the testimony of Johansen and Posey is uncontroverted.

In evaluating the probative value of the witnesses' testimony, its uncontroverted status is obviously significant. Nevertheless, I recognize that both logic and Board precedent teach that additional analysis is required. See *Jupiter Medical Center Pavilion*, 346 NLRB 650, 652 (2006) (Board upholds trial judge's rejection of uncontroverted testimony which the judge deemed to be incredible). In this case, I found the manner of presentation of the two witnesses to be clear and persuasive. I was also impressed by the fact that there were no significant internal or external contradictions in their accounts. Most compellingly, I found their description of the key events to be powerfully corroborated by documentary evidence that was created contemporaneously with the unfolding events at the heart of the controversy. The Board has acknowledged that this is a weighty consideration in evaluating evidence. See *Domsey Trading Corp.*, 351 NLRB 824, 836 (2007) (a finding that contemporaneously created documentary evidence is "entitled to greater weight than contradictory testimonial evidence is consistent with Board law"). For all of these reasons, I have concluded that the testimony of Johansen and Posey was reliable.

I will now describe the sequence of events that led to this litigation. Unite Here Local 1 has represented employees of the Ritz-Carlton Water Tower Hotel for decades.³ Prior to 2006,

² See Respondent's answer to the complaint, pars. II and III. (GC Exh. 1(e), p. 1.)

³ Counsel for the Respondent reported that the bargaining representative for those employees is technically the Chicago Joint Executive Board whose members consist of Unite Here Local 1 and Unite Here Local 450. No party deemed it necessary to amend the complaint in this regard.

the parties engaged in collective bargaining through the mechanism of a multiemployer bargaining group involving many hotels in the Chicago area. However, in 2006, the Union advised that it would no longer bargain with the group if it included hotels owned by Hilton. After that, certain major hotel chains withdrew from the multiemployer group. Still other hotels, including the Ritz-Carlton, chose a different approach. This was described by Johansen, who testified that the Ritz-Carlton and a number of other hotels, “adopted a ‘me too’ approach, meaning that they would adopt the collective bargaining agreement between the Sheraton Chicago and Unite Here.” (Tr. 65.)

Following this procedure, the Union and the Ritz-Carlton agreed to adopt the collective-bargaining agreement negotiated by the Sheraton and the Union. This procedure was implemented, leading to a collective-bargaining agreement between the parties that commenced on September 1, 2006 and was scheduled to expire on August 31, 2009. (Jt. Exh. 1.)

During the summer of 2009, the Union and the various hotel employers began the process of negotiating new agreements. In July, the Union suggested to various hotels, including the Ritz-Carlton, that they enter into written “me too” agreements that would bind them to the terms of the collective-bargaining agreement that it would eventually negotiate with the Sheraton. The template for such “me too” agreements was drafted by the Hotel Employers Labor Relations Association (HELRA) and its subordinate arm, the Chicago Area Hotel Group (CAHG).

Johansen explained that the Ritz-Carlton clearly intended to subscribe to the “me too” method of proceeding for the upcoming round of collective bargaining. Nevertheless, the hotel had some unique concerns that it wished to address with the Union. Management of the hotel raised this matter with Johansen and presented him with a chart listing the topics of concern and describing both the current established practice and the desired modifications. (GC Exh. 2.)

Management’s list of established practices for which it wished to negotiate changes with the Union contained nine such topics. These topics were:

1. Reduce the fee paid to employees assigned to carving or other specialty stations and change the applicable scheduling procedures.
Reduce the fee paid in lieu of a gratuity to bell attendants for delivery of luggage to vacant rooms.
 2. Reassign the two staff cafeteria cooks to the main kitchen.
Increase the number of private in-room bars that are to be serviced per shift.
 3. Increase the work schedule for housekeepers from 7.5 to 8 hours per shift, including elimination of the paid 15 minute break.
 4. Reduce the payments for making up roll-away and sofa beds and limit those payments to room attendants only.
 5. Lower the room credit reduction for housekeepers based on the number of “check-out” rooms per shift.
 6. Pay all new employees at the union contract rate instead of the “Ritz Rate.”
 7. Eliminate the bargaining unit’s beverage manager position.
- (GC Exh. 2.)

As requested by his client, in late July 2009, Johansen approached Henry Tamarin, the president of the Union. His purpose was to “discuss the possibility of having discussions over items that the hotel wanted to negotiate over that were not necessarily part of the collective- bargaining agreement that would have to be negotiated between Local 1 and the Sheraton.” (Tr. 69.) Johansen testified that, as outlined in the chart he was given by management, there were 9 such items that the hotel wished to discuss. Each of them concerned a situation where the Ritz was providing greater pay or improved working conditions compared to those established in the “me too” collective-bargaining agreement.

Johansen explained the legal background supporting this approach to the Union. He noted that the hotel was “looking for relief on, not to change the [parties’ eventual “me too”] contract but to change the practice essentially.” (Tr. 70.) This concern arose from the fact that the current collective-bargaining agreement contained a “Maintenance of Existing Privileges” section that provided:

No employee shall, as a result of the signing of this Agreement, suffer a reduction in his wages nor be deprived of any established and recognized benefits or privileges in excess of, or more advantageous than, the contract provisions.

(Jt. Exh. 1, Sec. 11, p. 7.) Johansen reported that he anticipated that the new “me too” agreement would contain the same language.

Beyond potential liability for breach of contract, I note that the Employer’s concern regarding this issue reflects an accurate appreciation of the principles of labor law applicable to unilateral changes in terms and conditions of employment. Thus, the Board holds that an established practice becomes an implied term and condition of employment even if it is not included in the parties’ collective-bargaining agreement. When this occurs, a unilateral change to such a practice would generally constitute an unfair labor practice within the meaning of Section 8(a)(5) of the Act. *Lafayette Grinding Corp.*, 337 NLRB 832, 832 (2002).⁴ Thus, the hotel recognized that, in order to alter its established practices in the 9 areas of concern, it would be required to afford the Union an opportunity to engage in bargaining.

Johansen reported that, before he had a chance to raise the matter with the Union, he was approached by Tamarin regarding the Ritz’s failure to sign the HELRA “me too” agreement. Tamarin asked if there was going to be a problem with the Ritz joining in the “me too” arrangement for the current round of contract negotiations. Johansen explained that there was not a problem, but that the Ritz was not “necessarily” prepared to sign the HELRA “me too” agreement that had been provided to the various hotels. (Tr. 74.) He told Tamarin that, “there were a number of items that we all knew that the Ritz was paying beyond the contract, and that we wanted a forum to sit down

⁴ For an example of this principle applied to a hotel employer, see *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 203 (2007) (in successorship case, new owner could not unilaterally modify established seniority accrual practice even though the modification “tracked the literal terms” of the predecessor’s collective-bargaining agreement).

and try and work through these issues.” (Tr. 74.)

Tamarin responded that the Union was “more than willing to sit down and talk . . . but that he wanted my assurance that, ultimately, that the Ritz would be going along with a Me Too agreement in some form.” (Tr. 76.) He also raised an additional concern about the Ritz’s request, noting that he “wanted to avoid any appearance that the Ritz may be getting a better deal than the other hotels.” (Tr. 76.) Thus, he wished to avoid giving other hotels “an incentive or a roadmap on how to try and extract more from the union.” (Tr. 76.) Having aired these considerations, the two men agreed to meet on September 1, the day after the expiration date of the current collective-bargaining agreement between the parties.

On September 1, the parties held their scheduled meeting at the Ritz. The Employer was represented by Johansen and Michele Grosso, who was at that time the hotel’s general manager. Present for the Union were Tamarin and Karen Kent, the Union’s vice president. Johansen testified that he brought the chart describing the items the Hotel wished to discuss that had been previously provided to him by management. He did not, however, disclose the chart to the union officials.⁵ The parties’ meeting lasted a bit more than an hour.

Johansen testified that he began the meeting by pointing out the long history of positive labor relations between the parties and their prior ability to “work together to resolve a number of disputes in the recent past.” (Tr. 78.) He expressed the hope that they would maintain a “positive relationship . . . going forward.” (Tr. 78.) In reply, Tamarin agreed that the parties “had a good relationship and that they were able to work through some challenging issues in the past.” (Tr. 89.)

As the meeting progressed, Johansen explained that the hotel’s goal was not to reach any agreements about the specific issues at this initial meeting, but rather “to come to an understanding, to essentially agree to a forum to negotiate in the future, and to not be precluded by the current version of the Me Too agreement.” (Tr. 79.) Specifically, he told Tamarin and Kent that “what we needed was an agreement to carve out and to have the ability of, after the Sheraton contract settled, that the Ritz would still have the ability to negotiate these issues.” (Tr. 79.)

In order to provide context regarding the Hotel’s perceived need to obtain concessions as to the 9 established practices, Johansen next provided the Union with “detailed information about the financial condition of the Ritz-Carlton at that point.” (Tr. 80.) After presenting this background, Johansen read through the list of issues that he had brought with him to the meeting and “walked through all of the issues.” (Tr. 80.) He informed Tamarin and Kent that “[o]ur general comment on all of these items is we’d like to go back to the contract rate or what the contract required.” (Tr. 86.) In making this assertion of the hotel’s position, Johansen was referring to the terms of the anticipated future contract between the Union and the

⁵ This has some significance because Posey later mistakenly asserted that Johansen had provided a copy of the chart to the Union’s representatives. See GC Exh. 7. To clarify, I asked Johansen to confirm his testimony on this point and he responded, “They never saw the document. I did not hand it to them.” (Tr. 142.)

Sheraton.

During their discussion, Tamarin questioned whether the hotel was “saying all or nothing, you’re asking for all or nothing?” (Tr. 82.) Johansen testified that he reassured Tamarin that they were not presenting a *fait accompli*, but that “these are issues we need help with, we want to work and reach an agreement and negotiate over these issues so we can close some of the competitive gaps.” (Tr. 88.) Tamarin stated that the Union was “willing to bargain over those issues.”⁶ (Tr. 90.)

Once the Union had expressed its consent to the procedure proposed by the hotel to permit separate negotiations over the 9 established practices, the discussion turned to the mechanics of implementing their agreement to negotiate. They discussed, “the challenge of how to reduce to writing what we were agreeing to.” (Tr. 90.) In that connection, Tamarin made two requests. First, he asked the hotel to draft the proposed agreement, “since we were the ones that had asked for it.” (Tr. 90.) Second, he told Johansen that “he did not want a specific list of the things in there.” (Tr. 90.) His rationale was the same that he had expressed to Johansen during their initial discussion of the problem. He did not want to provide any “roadmap” for other hotels to make similar demands for concessions. (Tr. 90.) They then engaged in some discussion about how to draft language that would express their intent without providing such a roadmap. In that conversation, Johansen and Grosso used the term “unique” to describe the issues that were to be addressed by the parties outside the confines of the Sheraton agreement. (Tr. 103.)

The parties left the meeting with the understanding that Johansen would prepare a draft agreement that would memorialize and preserve the hotel’s right to negotiate changes to the established practices that had been discussed. Johansen testified that, overall, it had been a “very cordial, friendly meeting.” (Tr. 91.)

After the meeting, Johansen prepared a draft of a memorandum of agreement that would reduce the parties’ understanding to written form. On September 16, 2009, he sent this draft and a cover letter to Tamarin. In that cover letter, he explained that, “[a]ttached is the ‘me too’ agreement for the Ritz. It incorporates the parties’ agreement reached during our September 1 meeting to continue our discussions regarding the issues we raised with you.”⁷ (GC Exh. 3, p. 1.) The draft memorandum began by confirming the parties’ intention to enter into a new collective-bargaining agreement by “adopting in its entirety” the agreement negotiated between the Union and the Sheraton. (GC Exh. 3, p. 2.)

Paragraph III of the draft contained the heart of the matter raised by the hotel at the September 1 meeting. It provided:

Specifically, the parties agree to continue their negotiations in

⁶ To underscore the point, counsel for the General Counsel, referring to the existence of 9 separate topics, asked Johansen whether Tamarin made this statement about “[a]ll of them?” Johansen responded, “Yes.” (Tr. 90.)

⁷ Johansen then proceeded to list seven issues. He testified that he did not include the in-room bar stocking issue or the bell attendant luggage delivery fee reduction in his list because those matters were “pretty insignificant.” (Tr. 93.)

good faith regarding the specific side letters and operations issues unique or pertaining to the Employer that were raised during the parties' September 1, 2009 meeting notwithstanding the execution of this Memorandum of Agreement. The parties further agree to keep open those provisions of the Successor Collective Bargaining Agreement that pertain to the specific unique operational issues raised at the September 1, 2009 meeting until those issues are fully resolved.

(GC Exh. 3, p. 2.)

Additional paragraphs of the draft included the parties' promises to each other that they would not engage in any work stoppage or lockout. The draft also contained an arbitration clause and a final paragraph noting that "this Agreement may not be rescinded or modified by either the Employer or the Union, at any time or for any reason, except by mutual agreement of the Employer and the Union." (GC Exh. 3, p. 3.)

Johansen testified that he had a discussion with Tamarin, who informed him that he had only one objection to the draft language. He took strong exception to the sentence that explicitly stated that the parties would "keep open" the provisions of the successor collective-bargaining agreement that related to the topics that were to be subject to negotiation. (GC Exh. 3, p. 2.) He told Johansen that he opposed this language because it would prevent the parties from concluding a "final collective bargaining agreement." (Tr. 100.) He expressed the strength of his opposition by asking Johansen a rhetorical question—"are you [expletive] kidding me with that language?" (Tr. 99.)

Johansen reported that he and his client decided to accommodate Tamarin's rejection of the offending sentence and, with this deletion, Tamarin told him that, "we're good to go." (Tr. 104.) They also agreed that they would begin the process of negotiations after the Sheraton negotiations "count[ed] down." (Tr. 104.)

The final revised version of the Memorandum of Agreement (MOA) was signed on behalf of the hotel by Grosso on September 16, 2009. Tamarin signed it for the Union on the next day. The signed version is contained in the record as Jt. Exh. 2.⁸ With the signing of the MOA, the parties put matters in abeyance until the Sheraton negotiations were completed. Those negotiations took far longer than the parties had expected.

In the meantime, as of July 2010, Johansen accepted a new job and Posey took over his duties as labor relations counsel for the Ritz, including matters related to the MOA. During this period, Grosso transferred to a new position for the Employer that is located outside the United States. He was replaced as general manager by Patrick Ghielmetti.

Posey testified that, although the Sheraton negotiations had still not been concluded, he decided that it was time to contact the Union regarding the MOA negotiations. Thus, on the anniversary of the signing of the MOA in the preceding year, Posey sent an email to Kent on the subject of, "Ritz-Carlton Negotiations—Hotel Proposals." (GC Exh. 4, p. 1.) In the body of this cover letter, he informed Kent that he was attaching proposals

from the Employer that "all relate to matters that have already been discussed." (GC Exh. 4, p. 1.) He noted that the parties were scheduled to meet on September 24, 2010 and requested that the Union provide a "written response" to the attached proposals at that meeting. (GC Exh. 4, p. 1.) The attached proposals contained detailed language implementing changes to the established practices regarding each of the 9 specific topics that had been listed on management's original chart prepared for Johansen's use.

Posey testified that he received a telephone call from Kent to confirm the September 24 negotiating session. Significantly, he reported that Kent did not indicate any disagreement with the list of issues that had been sent to her in preparation for the meeting.

As planned, the parties met at the Ritz on September 24. The Employer's representatives were Posey, Ghielmetti, and Cecilia Moore, the Hotel's human resource director. Kent served as the Union's principal spokesperson and was accompanied by a bargaining committee including various Hotel employees. Posey testified that he began the meeting by referring to the Hotel's written proposals that had previously been emailed to Kent. He reported that he "discussed each of the proposals and referred back to this list of nine items." (Tr. 165.) He noted that, during the course of his presentation, Kent "asked a number of questions and made information requests regarding each of those proposals." (Tr. 165.) He also testified that Kent never offered any indication that the Union objected to negotiations over any of the 9 topics. The parties did not resolve any substantive issues at the meeting but did agree to a second meeting on October 21, 2010.

Posey next communicated with Kent by email on October 7, 2010. He began by confirming the date and place of the parties' next negotiating session. He then made the following request to Kent:

As we discussed at the last session, please forward us the union's initial proposals prior to that date so that we can make the most productive use of our time on the 21st.

(GC Exh. 5, p. 1.)

Kent replied to Posey's email on October 11, 2010. Her response contained an attachment that she explained was "a written request for information that we outlined in our last session."⁹ (GC Exh. 5, p. 1.) She requested that the information be provided to her in advance of the October 21 meeting date.

In my view, Kent's attachment is compelling evidence directly related to the key substantive issue in this case. As will be discussed later in this decision, the Union's position as to the substance is that the parties never reached an agreement to negotiate regarding all 9 topics that were of interest to the Employer. Instead, the Union contends that the agreement only extended to a duty to negotiate over a certain subset of those 9 topics. This argument is gravely undermined by the detailed content of Kent's email attachment. She begins this letter by noting that, during the parties' September 24 meeting, "I out-

⁸ The copy reproduced in the record contains a pencil-marked bracket that was not part of the original document. This has been ignored.

⁹ On the first page of the copy of this attachment reproduced in the record there is a hand-written notation reading, "\$125." This was added later and should be ignored.

lined a number of questions that the Union had related to the Company's proposal. The following is an outline of the information that we requested." (GC Exh. 5, p. 2.) The remainder of the attachment consists of the list of detailed questions. It is divided into 9 paragraphs. Each of those paragraphs addresses topics regarding which the hotel intended to negotiate with the Union.¹⁰

Examining the contents of this detailed information request reveals that the Union posed 13 questions, divided into 2 sections, regarding the carving station topic. It posed 4 questions about the proposed transfer of the cafeteria cooks. Six questions were asked about the plan to eliminate the beverage manager position. Ten questions were addressed regarding the roll-away bed topic. Five questions were listed regarding the room credit proposal. Seven questions were posed concerning the hotel's desire to eliminate the paid 15-minute break. Kent asked another 4 questions about the luggage delivery gratuity. Six more interrogatories were directed toward the in-room bar service requirement. Finally, 8 questions were raised regarding the hotel's negotiating proposal concerning compensation for newly hired employees.

The Union has never presented any explanation as to why Kent felt it necessary to make these detailed information requests as to each and every topic that the hotel asserts was subject to negotiation under the parties' MOA. I readily infer that the reason for the requests was the Union's belief that it was required by the MOA to address each of those topics in good faith bargaining with the Employer.

The parties next met on October 21 as planned. Posey noted that the Employer had already provided certain information that had been requested and then proceeded to provide, "a little bit more of that information at the start of the meeting." (Tr. 172.) In addition, he observed that, "we had not received any written responses to our September 24th proposals yet." (Tr. 172.) At this juncture, the Union requested a break which lasted approximately 40 minutes.

When the session resumed, Kent informed Posey that, "it was the Union's position that there were not nine items on the table to be bargained over and it was, in fact, less than that." (Tr. 172.) Posey testified that, "[a]t that time, [Kent] said five items but, as she got into more detail and explained which items the Union would and would not bargain over, I actually only counted three." (Tr. 172.)

In his testimony, Posey reported that Kent provided the Union's rationale for its refusal to continue negotiations over all 9 topics. Kent explained that paragraph III of the MOA provided that, "it was only issues that were unique or pertaining to the Ritz and, that a number of the proposals did not fall under that category." (Tr. 173.) She did offer to continue to negotiate over the beverage manager position, the cafeteria cook transfer, and the quota for in-room bar servicing. Finally, she stated that, "although she didn't believe they were obligated to, that

they may consider also discussing one part of the carving station issue, specifically the carving station scheduling." (Tr. 174.) Lastly, Kent raised a tenth topic, cross-training for the hotel's cooks. The Union also presented written proposals to the hotel regarding the cafeteria cook reassignment and its own newly raised cross-training proposal. On hearing the Union's position, Posey stated that, "we strongly disagreed," asserting that "you've already agreed that we [are] going to negotiate" over all of the 9 topics. (Tr. 175.)

On November 3, 2010, Posey sent a letter to Kent containing a formal statement of the Hotel's position regarding the Union's refusal to negotiate over all 9 topics. He asserted that, "there is no basis for the Union's argument that only some, but not all, of the issues that were raised during the parties' September 1, 2009 meeting are subject to the Memorandum." (GC Exh. 7, p. 2.)

The parties next met on November 11, 2010. Shortly before the time set for the meeting, Kent sent an email response to Posey.¹¹ She reported that the Union was working on its proposals and would provide them to the hotel by the start of the meeting. She added, "[r]egarding our 'Me Too' agreement, it is clear that we have a disagreement. Hopefully that will not stand in way of us amicably resolving our differences." (GC Exh. 8.)

At their meeting later on this day, Posey told the union negotiators that, based on Kent's email, the hotel "looked forward to receiving the Union's proposals regarding each of the nine items." (Tr. 194.) Kent explained that Posey had misunderstood the meaning of Kent's email and that the Union would not be making proposals as to all 9 topics. The majority of the subsequent discussions related solely to the in-room bar stocking issue.

On November 23, 2010, Kent sent a letter to Posey that she characterized as the Union's "formal" response to the hotel's contention that the MOA required the parties to engage in negotiations regarding all 9 topics that were of interest to the Employer. (GC Exh. 9, p. 1.) She explained that the Union's view was that only a subset of the 9 topics was subject to a bargaining requirement under the language of the MOA. Referring to the MOA's reference to the parties' commitment to bargain over "specific side letters and operations issues unique or pertaining to the Employer that were raised during the parties' September 1, 2009 meeting," she asserted that this phraseology was intended as an agreement to limit bargaining to only a subset of management's 9 topics of interest.

According to Kent's proposed interpretation, the term "unique" meant "things that are only true at Ritz-Carlton and not elsewhere," while the term "pertaining" signified "a matter that is not a standard item throughout the industry but is something that specifically, although not uniquely, pertains to Ritz-Carlton." (GC Exh. 9, p. 2.) Thus, she concluded that this language from the MOA constituted "a limiting qualification: that this promise [to bargain] extended only to those of the nine issues that are 'unique or pertaining to the Employer.'" (GC

¹⁰ To be clear, while the hotel had 9 topics and the Union divided its questions into 9 topics, the parties adopted different groupings. The bottom line, however, is that the Union posed detailed questions about each and every topic that the hotel was raising in the negotiations under the parties' MOA.

¹¹ Kent's email makes reference to Posey's letter of October 3, 2010. The parties all agree that this was an error and that Kent was referring to Posey's letter sent on November 3, 2010.

Exh. 9, p. 2.)

On December 8, 2010, the parties held their next meeting. The discussion was largely confined to an exploration of the in-room bar issue. Similarly, at the following meeting on December 22, the topics were limited to the same in-room bar issue and the Union's proposal regarding cross-training of cooks. The Union took the occasion to present a written proposal regarding its cross-training plan.

Posey testified that, during 2011, the parties have held 4 or 5 additional bargaining sessions. These involved negotiations over the three topics that the Union asserted as the entirety of the topics it was required to discuss under the MOA. In addition, the parties continued to discuss the Union's cross-training issue.¹² Posey summarized the course of these discussions as follows:

[I]n general, at those sessions, I've reiterated the hotel's position that the other six items or six-and-a-half, depending on how you count them, should also be on the table and the Union has responded that they're not.

(Tr. 206.) He added that Kent, "maintained the consistent position that those items are off the table." (Tr. 208.) The parties reached a tentative agreement as to the transfer of the cafeteria cooks but have not been able to agree on any other item.

On January 7, 2011, the hotel filed its initial charge in this matter, alleging that the Union had violated the MOA by refusing to bargain over issues that were subject to bargaining under the terms of that agreement. (GC Exh. 1(a).) On April 12, 2011, the Union and the Sheraton successfully concluded their lengthy negotiations for a new collective-bargaining agreement. As of the time of trial, Posey outlined the status of the contractual relationship between the Ritz-Carlton and the Union in his testimony:

[T]he full or formal agreement [between the Union and the Sheraton] has yet to be prepared At the moment, there's a summary of the terms of the new agreement that's been drafted and signed by the Sheraton's attorney, which is myself, and the Union's representative, Henry Tamarin. I don't believe that summary has been formally presented to the Ritz yet. So, until the time that's presented, the Ritz is not bound by those new terms. Although, as a practical matter, I believe they may be following those right now, anyway.

(Tr. 149.) Later in his testimony, Posey reported that he had spoken with the Ritz's human resources director and her assistant and they confirmed that the Ritz had not yet received the new collective-bargaining agreement.

The Regional Director issued his complaint and notice of hearing on March 25, 2011. The parties confirm that throughout this matter the Union has continued its refusal to bargain over all of the 9 topics that the Employer contends are mandated for such bargaining by the parties' MOA.

B. Legal Analysis

I have already indicated that resolution of this case requires assessment of both a substantive legal dispute and a procedural

¹² Posey reported that, ultimately, the hotel rejected the cross-training plan.

defense raised by the Union. Ordinarily, one would expect that the procedural matter should be resolved first. However, on the particular circumstances presented in this case, I have concluded that the proper methodology requires a dissection of the substantive issue before the procedural defense can be fully addressed. In order to explain this conclusion, it is necessary to outline some of the history of this litigation.

It will be recalled that the complaint issued on March 25, 2011. The Union filed its answer on April 4. In that answer, it contended that, "[t]he unfair labor practice alleged in the Complaint should be deferred to arbitration pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971)." (GC Exh. 1(e), p. 3.) Quite properly, the Union followed up this assertion by filing a motion for summary judgment on the deferral issue. (GC Exh. 11.) Both the General Counsel and the hotel filed oppositions to the motion. (GC Exhs. 1(i) and 1(l).) On July 29, 2011, the Board issued an order denying the Union's motion for summary judgment in the following terms:

The Respondent has failed to establish that there are no genuine issues of material fact regarding its argument that the complaint allegations should be deferred to the parties' grievance and arbitration procedure pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). This denial is without prejudice to the Respondent renewing its deferral argument before the administrative law judge.

(GC Exh. 1(q).)

At trial, the Union did continue to assert its deferral defense. As its counsel explained, "our position is this is a *Collyer*, really should be *Collyerized* and we feel very strongly about that." (Tr. 236.)

I have given particular attention to the wording of the Board's Order denying the summary judgment motion without prejudice. I conclude that the Board's language, cited above, mandates that the ultimate resolution of the deferral issue must proceed from a comprehensive assessment of the "material fact[s]" as developed through the trial process. (GC Exh. 1(q).) Otherwise, there would be no point in the Board's specific authorization for the Union to renew the argument before me. In light of the Board's position, I will therefore begin by assessing the facts underlying the parties' dispute and the legal conclusions that flow from those facts. Having performed this analysis, I will next turn to the procedural argument and determine whether the Board's deferral policies are properly applied to this dispute.

1. The alleged bargaining violation by the Union

In Section 8(b)(3) of the Act, Congress made it an unfair labor practice for a union representing employees in a bargaining unit to "refuse to bargain collectively" with their employer. The General Counsel alleges that, by failing to bargain over all of the 9 issues that the hotel viewed as encompassed in the parties' MOA, the Union has violated this statutory requirement.

In response, the Union has stated as its "formal" position that the parties' MOA merely required it to bargain over a "subset" of the 9 issues of concern to the Employer, namely those issues "unique or pertaining to the Employer." (GC Exh. 9, pp. 1-2.)

It has chosen to define those issues as being limited to the hotel's proposed reassignment of the two cafeteria cooks, the work quota for the servicing of in-room bars, and the elimination of the beverage manager position.¹³ As a result, it has refused to engage in bargaining over the fee for work on specialty stations, reduction of the gratuity paid to bell attendants for delivering luggage to vacant rooms, elimination of the paid 15-minute break for housekeepers, reduction of the payment for making up roll-away and sofa beds, lowering of the room credit reduction for check-out rooms, and payment of the contract rate for all new employees.

In determining whether the Union's conduct violates the Act as alleged, I will first outline the evidence regarding the parties' decision to enter into the MOA. It will be recalled that the hotel's management presented its lawyer with a chart detailing the 9 topics that it wished to reserve for bargaining with the Union. The lawyer was instructed to seek an understanding with the Union that the hotel would sign a "me too" commitment binding it to the eventual terms of the Sheraton collective-bargaining agreement in exchange for the Union's promise to bargain over this list of 9 issues.

Following his client's instructions, Johansen met with union officials on September 1, 2009. He presented uncontroverted and credible testimony that, during this meeting, he "walked through all of the issues" listed by his client on the chart. (Tr. 80.) Union President Tamarin expressed the Union's agreement to bargain over these items in return for the hotel's commitment to follow the "me too" process. Under examination by counsel, Johansen clearly affirmed that the agreement to bargain covered, "[a]ll of them." (Tr. 90.) [Counsel's choice of wording.] The parties also agreed that counsel for the hotel would draft the MOA and that, at the request of the Union, it would not include a "specific list of the things in there." (Tr. 90.)

After this meeting, Johansen proceeded to prepare a draft MOA. Tamarin limited his comments to one sentence which he found unacceptable. When the hotel withdrew this sentence, Tamarin advised Johansen that they were "good to go." (Tr. 104.) The parties then proceeded to execute the MOA. After this, matters remained in limbo for approximately a year while the Sheraton negotiations dragged on. In September 2010, Posey replaced Johansen as the hotel's counsel. On September 16, he sent an email to Kent containing the hotel's specific proposals regarding the 9 issues of concern to the Employer. (GC Exh. 4.) Posey provided credible and undisputed testimony that Kent responded by telephone. During their conversation, she confirmed the date for upcoming negotiations and did not express any reservations regarding the topics to be discussed.

The parties held their first bargaining session under the MOA on September 24, 2010. Posey testified, without contradiction, that he "discussed each of the proposals and referred

¹³ Kent also told the hotel's negotiators that, although not obligated to bargain about the topic under the MOA, the Union "may consider also discussing . . . the carving station scheduling." (Tr. 174.) However, she specifically rejected any bargaining about the carving station fees.

back to this list of nine items." (Tr. 165.) He reported that, "Ms. Kent asked a number of questions and made information requests regarding each of those proposals." (Tr. 165.) On October 11, Kent followed up her information requests with a detailed and highly specific list of questions regarding each of the hotel's 9 items. (GC Exh. 5.) Not until the parties were assembled for the next bargaining session on October 21 did the Union express any limitation on the topics that it was prepared to discuss. At that session, Kent took the position that the Union's agreement in the MOA only required bargaining over 3 of the 9 topics. Since that time, the Union has maintained its insistence that the parties' MOA requires bargaining only as to those topics.

I conclude that the clear and undisputed evidence demonstrates that both parties entered into the MOA for valuable consideration. The hotel sought and obtained a mechanism for seeking concessions about 9 issues involving established past practices that were more favorable to its employees than the terms of the Sheraton collective-bargaining agreement. The Union sought and obtained the hotel's agreement to follow the "me too" format for the parties' successor collective-bargaining agreement, something that Tamarin had raised as an important objective during his first conversation about the issue with Johansen in July 2009.¹⁴

The private parties both agree that the MOA is a valid and enforceable contract between them. At trial, I confirmed this point by asking the lawyers for the Employer and Union whether, "everyone agrees there's a contract here." (Tr. 13.) Both expressed assent to this proposition.¹⁵ They have a dispute regarding the scope of their contract and the resolution of that dispute is vital to the adjudication of the unfair labor practice alleged in this case. The Board has noted that its authority to engage in interpretation of contractual agreements in the course of adjudicating unfair labor practices is "well settled." *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 425 (1984), enf. 772 F.2d 571 (9th Cir. 1985).

I will now turn to the task of interpreting the parties' MOA. The Board requires that this process be "fact specific." *Shaw's Supermarkets*, 343 NLRB 963, 963 (2004). The key analytical principles have been outlined by the Board as follows:

¹⁴ The MOA also contained another important set of mutual promises representing valuable consideration for each side. Par. V of the MOA provides for "mutual promises between the Union and the Employer" that they will refrain from engaging in any strike or lockout against each other following the expiration of their current collective-bargaining agreement.

¹⁵ Counsel for the General Counsel did voice some concern that there may have been an issue of "contract formation." (Tr. 26.) In my view, this was a shortsighted tactical argument that represented an effort to counter the Union's insistence that the matter be deferred to arbitration. As I stated to Counsel for the General Counsel, "what you're saying . . . is you can't defer this to arbitration because there wasn't a contract, therefore, we're going to have a trial. At that trial, you're going to insist that there was a contract and that [the Union] broke it." (Tr. 30.) Having now had the opportunity to review the entire record, I readily conclude that the private parties are correct in agreeing that they did enter into a valid and binding contract. The only matter in dispute is the extent of the bargaining obligation they undertook in that contract.

In contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.

Mining Specialists, 314 NLRB 268, 268–269 (1994).

Turning first to the language of the MOA, the parties agree that the critical provision in dispute is par. III, which contains the following key sentence:

Specifically, the parties agree to continue their negotiations in good faith regarding the specific side letters and operations issues unique or pertaining to the Employer that were raised during the parties' September 1, 2009 meeting notwithstanding the execution of this Memorandum of Agreement.

(Jt. Exh. 2, p. 1.) It is obvious to the parties and to me that this language is ambiguous on its face, particularly since it references "issues . . . that were raised during the parties' September 1, 2009 meeting" without providing a list of such issues.

While the Board does not permit the introduction of extrinsic evidence to contradict a contract's unambiguous terms, it does allow consideration of such parole evidence to facilitate analysis in circumstances where "an ambiguity arises, or the intent or object of the instrument cannot be ascertained from the language employed therein."¹⁶ *Sansla, Inc.*, 323 NLRB 107 109 (1997), citing 30 *Am. Jr.* 2d, Section 1069 (1967). See also *Don Lee Distributor, Inc.*, 322 NLRB 470, 484–485 (1996), enf. 145 F.3d 834 (6th Cir. 1998), cert. denied 525 U.S. 1102 (1999).

The parole evidence in this case, consisting of the credible and uncontroverted testimony and the documentary evidence including the Union's detailed information request regarding all 9 of the hotel's topics, clearly demonstrates that the issues raised during the parties September 1, 2009 meeting and intended for inclusion in the MOA were the 9 matters that I have previously listed at page 3 of this decision. The MOA commits the parties to negotiate about each of those items.

In reaching this conclusion, I have considered the Union's argument to the contrary. That argument centers on the parties' use of certain descriptive language regarding the issues that were raised at the September 1, 2009 meeting. Thus, the MOA provides that those issues consist of "specific side letters and operations issues unique or pertaining to the Employer." (Jt. Exh. 2, p. 1.) The Union argues that these descriptive words represent a limitation on the scope of its agreement to negotiate

¹⁶ In this case, it is particularly appropriate to consider parole evidence. It will be recalled that the MOA's ambiguity was created at the specific demand of the Union. Tamarin had insisted that the agreement omit a precise list of the topics to be negotiated because he did not want to provide a "roadmap" for other hotel managers to use in an effort to seek concessions from the Union. (Tr. 90.) Having demanded the use of elliptical language in the MOA, the Union cannot (and does not) complain about the use of extrinsic evidence to shed light on the parties' intent.

about the issues raised at the September 1 meeting.¹⁷

In the first place, the Union contends that, in context, the word "unique" means that the issues to be negotiated must represent "things that are only true at Ritz-Carlton and not elsewhere." (GC Exh. 9, p. 2.) Second, the Union asserts that the word "pertaining" means "a matter that is not a standard item throughout the industry but is something that specifically, although not uniquely, pertains to the Ritz-Carlton." (GC Exh. 9, p. 2.) In some undefined process of alchemy, it concludes that application of these definitions to the 9 items of concern to the hotel results in a requirement that the parties' negotiate about 3, but need not discuss the remaining 6. Thus, for example, they must discuss the number of in-room bars that employees are required to service per shift but need not address the number of rooms the housekeepers must make up during a shift. I cannot discern any substantive difference between these topics and the Union has not provided any explanation for the proposed distinction.

It is evident from the totality of circumstances that the use of the terms "unique" and "pertaining" was simply to express the concept that these matters have been subject to an established practice that differs from the requirements of the parties' collective-bargaining agreement. The Union's strained effort to interpret them as something else founders on the rock represented by the parties use of a tiny but important additional disjunctive term, "or." The use of this term vitiates any limitation that may conceivably derive from the word "unique." In order to be covered by the MOA, a practice that was discussed at the September 1 meeting need not be unique. It need only be a matter that pertains to the Ritz-Carlton, so long as it was discussed at the key September 1 meeting.

Lastly, in presenting the Union's rationale for its refusal to bargain about the majority of the 9 topics, Kent argued that the Employer's position that all 9 of the items raised at the September 1, 2009 meeting were subject to a bargaining obligation, "deprives much of Paragraph III of any meaning, in violation of one of the most important rules of contract construction." (GC Exh. 9, p. 2.) This is inaccurate because it fails to acknowledge Johansen's actual reason for using the words "unique or pertaining to the Employer." (Jt. Exh. 2, p. 1.)

In reality, Johansen chose those words to express the concept that the 9 items that would be subject to the parties' negotiations under their MOA all involved matters on which the past practice of the Employer and the Union had been different from (and more favorable to the Union than) the terms of the "me too" collective-bargaining agreement then in effect and any anticipated successor "me too" agreement. Thus, the nature of the topics was hardly unique. These were topics common in the hospitality industry such as the quantity of work performed by housekeepers and the amount of gratuities owed to bell attendants. What was unique and pertained only to the Ritz were the particular established practices that were in effect regarding

¹⁷ It is interesting to note that Kent's formal statement of the Union's position concedes one key matter of fact. In her statement she acknowledges that the parties did discuss "all nine of the items" during the September 1, 2009 meeting. (GC Exh. 9, p. 2.)

each of the topics.¹⁸ For this reason, I reject the Union's strained effort to suggest that Johansen's contract language was a limitation on the number of items subject to negotiation, as opposed to an attempt to explain why each of those items was appropriately subject to such negotiation despite the parties' adherence to the "me too" arrangement for their successor collective-bargaining agreement.¹⁹

It is beyond question that each of the 9 topics of concern to management does "pertain" to the Ritz-Carlton. Furthermore, each of those topics was specifically raised during the parties' September 1, 2009 meeting. In consequence, the MOA commits the parties to negotiate about each of those 9 items.

The Union's attempt to pick and choose among the 9 items and negotiate about only those that it arbitrarily selects represents a fundamental repudiation of the MOA. This is further illustrated by examination of the Union's overall behavior in its negotiations with the Employer. It has taken four positions regarding the subject matter of those negotiations. First, the Union has agreed that it is required by the MOA to bargain over reassignment of the cafeteria cooks, servicing of in-room bars, and elimination of the beverage manager position. Second, it has flatly refused to bargain over the carving station fees, gratuity for bell attendants, elimination of the housekeepers' paid break, fees for making up roll-away or sofa beds, room credits for check-out rooms, and compensation of new employees. Third, it has agreed to bargain over scheduling procedures for carving station work, but has specified that this is a voluntary decision that is not compelled by the parties' MOA. Fourth, it has raised an entirely new issue to be subject to bargaining outside the confines of the "me too" agreement. That issue is its proposal for cross training of cooks.²⁰ Viewed in the entirety, this course of conduct leads to the conclusion that the Union has placed no reliance on any obligation to bargain created under the MOA. Instead, it has chosen to proceed as if that MOA did not impose any obligations on it. Essentially, in the Union's view, the MOA has ceased to exist. In its eyes, bargaining between the parties is entirely an ad hoc matter, free of any contractual limitations or obligations.

The Union's acts and statements go beyond the confines of a

¹⁸ Thus, as Johansen testified, his choice of language meant, "different, paying above scale and a level above scale, any number of things that were beyond the [Sheraton] contract. And we were only talking about the Ritz." (Tr. 103.)

¹⁹ Indeed, it is a bit ironic that the evidence leads me to the strong inference that Johansen actually included the "unique or pertaining" language to reassure the hotel's employees and the Union that the hotel was precluded under the MOA from seeking concessions that were less favorable than the working conditions specified in the parties' collective-bargaining agreement or its eventual successor.

²⁰ In his brief, counsel for the hotel correctly notes that during the trial I wondered aloud about the rationale for the Union's cross training proposal. (CP Br., at fn. 2.) At that time, I speculated that it may have borne some relationship to the cafeteria cooks' transfer issue. Posey responded with uncontroverted testimony that established that the Union stated that the purpose was to give all 25 to 30 of the hotel's cooks "maximum opportunities for advancement and increase of their earnings." (Tr. 210.) There was no evidence presented to indicate that the Union saw this proposal as related to any of the 9 topics covered by the MOA.

contract dispute or minor breach of the contract. They constitute a repudiation of the MOA. As Comment 2(b) to the *Restatement of Contracts 2d*, § 250 notes, "language that under a fair reading amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation."²¹ [Internal punctuation omitted.] Such conduct violates Section 8(b)(3) of the Act. See *Local Union No. 3, IBEW (Burroughs Corp.)*, 281 NLRB 1099 (1986), fn. 2 (union's repudiation of existing contract violates Sec. 8(b)(3)).

2. The Union's deferral argument

As part of their MOA, the parties in this case provided that, "[t]he provisions of this Agreement shall be enforceable in accordance with the procedures set forth in Section 46 of the Current Collective Bargaining Agreement between the Employer and the Union." (MOA, par. VI, Jt. Exh. 2, p. 2.) Citing this language, the Union has throughout this litigation rested the bulk of its defense on the argument that the Board's policies require that the controversy be deferred to the arbitral process. As I have already indicated, in its pretrial order denying summary judgment, the Board rejected this argument but authorized the Union to raise it again before me.²²

The Board's leading case on deferral of unfair labor practice charges and complaints to arbitration is, of course, *Collyer Insulated Wire*, 192 NLRB 837 (1971). As the Board explained:

[E]ach such case compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board

²¹ The *Restatement* cites § 2-610 of the Uniform Commercial Code and its official comments. Those comments note that repudiation consists of statements or actions that constitute "a demonstration of a clear determination not to perform." Comment 5. The evidence as to the Union's behavior in this case certainly falls within that description.

²² In denying the summary judgment motion, the Board held that the Union "has failed to establish that there are no genuine issues of material fact" related to the deferral argument. (GC Exh. 1(q).) As a result, I have waited until the development of the full trial record before finally addressing the deferral defense. However, I do recognize that this methodology, while consistent with the Board's Order in this case, is in tension with the Board's directive in *Servomation Corp.*, 271 NLRB 1112, fn. 7 (1984), where it held that, "[t]he maintenance of a meaningful and effective deferral policy . . . requires that the initial deferral decision under *Collyer* be made on the basis of the complaint, the Respondent's defense, and the applicable contract provisions. Thus, it serves few, if any, of *Collyer's* stated objectives to make a decision regarding deferral that is based on evidence and legal theories that are outside the specifically pleaded complaint allegations. In short, the Board and its judges ought not to first decide the case and then determine whether deferral is appropriate." I can only concur with the observations of a colleague who noted that application of *Collyer* "is often a challenging task, however, because of the variety of pronouncements by the Board on the subject and the uniqueness of each new case in which deferral contentions are raised." *Live Oak Skilled Care & Manor Hosp.*, 300 NLRB 1040, 1044 (1990). On balance, I believe that the procedure I have adopted in the circumstances of this case has permitted a full and fair examination of the deferral issue consistent with the Board's intentions as expressed in its pretrial Order and without the imposition of an undue burden on the parties.

of exclusive jurisdiction to prevent unfair labor practices. 192 NLRB at 841.

Very recently, the Board reiterated the following list of its criteria used to assess the competing policy interests and arrive at a decision:

The Board considers six factors in deciding whether to defer a dispute to arbitration: (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration. [Citations and internal punctuation omitted.]

San Juan Bautista Medical Center, 356 NLRB No. 102 (2011), slip op. at p. 2. In that case, the respondent was an employer. Here, the Respondent is a labor organization. As a result, the criteria must be adapted to address the Union's behavior and willingness to arbitrate.

Applying this test, I note first that there is ample evidence in the record to establish that these parties have enjoyed a lengthy and, usually, productive collective-bargaining relationship. In their discussions with each other, they have often made reference to this history. While I certainly suspect that the events involved in this case have placed a strain on their relationship, I still conclude that the first criterion for deferral is met.

It is not entirely clear to me how the Board would apply the second criterion in these circumstances involving a union as the respondent seeking deferral to arbitration. Clearly there is nothing about this case that suggests that the Union is hostile to "employees' exercise of protected rights." *Supra*, slip op at p. 2. On the other hand, if one takes a broader view of what is intended by this criterion, there is evidence to suggest that the Union is hostile to the principles of collective bargaining that are an equally important component of the policies underlying the Act. I do not view this as decisive because there is no evidence in the record to indicate that the Union's conduct in this case is part of a pattern of recidivist violations of the Act. Thus, application of the second criterion to this case does not preclude deferral.

I will examine the next two criteria together as they are closely related in the circumstances of this case. The parties' arbitration clause appears on its face to provide broad coverage for any dispute involving, "[t]he provisions of this Agreement." (Jt. Exh. 2, p. 2.) The more difficult question is whether the clause encompasses the dispute at issue. Both the General Counsel and the hotel argue that the clause does not encompass the dispute at issue since they contend that the Employer "does not have access to the contractual grievance procedure." (CP Br., at p. 18. See also GC Br., at p. 13 ("the grievance procedure is not available" to the Employer).)

The basis for the contention that the hotel cannot avail itself of the MOA's arbitration clause is the fact that the clause incorporates a reference to Section 46 of the parties' collective-bargaining agreement. That lengthy provision sets forth a de-

tailed procedure for "Adjustment of Grievances." The procedure culminates in arbitration as a last step. Naturally, this procedure anticipates that such grievances would only be filed by employees or their union representative. Therefore, the Employer and General Counsel argue that the arbitration process is only available to the Union or an employee who has proceeded through the prior steps of the grievance process. Because the Employer cannot file a grievance, it is asserted that it cannot avail itself of arbitration of disputes arising under either the collective-bargaining agreement or the MOA.

I conclude that this line of reasoning is mistaken, both because of the specific language in the MOA and the existence of other language in the collective-bargaining agreement that has not been cited by the parties. Turning first to the collective-bargaining agreement, in addition to their grievance procedures, the parties have established an arbitration process for another class of potential disputes. Section 6 of their contract covers issues related to subcontracting. It requires negotiations before any subcontracting of work by the hotel. It goes on to direct that:

In the event such negotiations fail to produce an agreement, *either party* may invoke the arbitration provisions set forth in Sections 45 and 46 of this Agreement. [Italics supplied.]

(CBA, Sec. 6, Jt. Exh. 1, p. 5.) Obviously, this language disposes of the claim that the Employer lacks any right of access to arbitration under the terms of the parties' collective-bargaining agreement. Beyond that, it demonstrates that the placement of the arbitration provisions in the contract section governing grievances is merely a matter of convenience and does not carry any substantive implications.

These conclusions are only reinforced when the language of the MOA's arbitration clause is examined closely. That clause does not say that arbitration of disputes under the MOA shall be performed under the terms of Section 46 of the collective-bargaining agreement. Instead, it clearly provides that such arbitration shall be performed "in accordance with the *procedures* set forth in Section 46." (Jt. Exh. 2, p. 2.) [Italics supplied.] Thus, as with arbitration of subcontracting disputes, the intent of the MOA's arbitration clause was to utilize the procedural mechanisms of Section 46. These mechanisms describe the list of potential arbitrators, allocate the costs of arbitration, provide time frames for the process, and delineate other important procedural details. The MOA's reference to Section 46 simply creates a shorthand method of fleshing out the details of the arbitration process for disputes arising under the MOA. I readily conclude that there is no impediment to the Employer's use of arbitration that would preclude deferral in this case.

The next issue is whether the Union has asserted a willingness to subject the dispute to arbitration. Through its counsel, it has repeatedly expressed its desire to do so. Indeed, counsel added that, "we would very much respect that process because our whole collective bargaining relationship depends on it." (Tr. 21.) There is nothing in the record to cast doubt on these representations. I do not find that this factor precludes deferral.

Having determined that none of the first 5 criteria support a refusal to defer this case to an arbitrator, I must assess the final evaluative standard: whether the parties' dispute is eminently

well suited to resolution by arbitration. In articulating the proper considerations regarding suitability, the Board has outlined two particular factors that persuade me that deferral is inappropriate in this case.

First, in *Collyer*, the Board placed great reliance on an articulation of policy from a prior case, *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142 (1969), where the Board outlined the proper use of deferral follows:

[W]here, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action is not designed to undermine the union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.

Among the key analytical tests outlined in this language is the requirement that the respondent's position on the merits is "not patently erroneous but rather is based on a substantial claim of contractual privilege." *Supra.*, at p. 142.

Webster defines "patency" as the "state of being obvious." *Webster's II New Riverside University Dictionary*, 1994 edition, at p. 861. I have previously discussed my conclusions regarding the erroneous nature of the Union's position in this litigation based on my review of the entire record of these proceedings. However, in order to demonstrate the obvious nature of the Union's error, I will simply refer to 3 documents that convincingly demonstrate that the Union's position is patently wrong.

First, the parties' MOA itself does not give any support to the notion that the parties agreed to bargain over only a subset of the issues that they discussed in their September 1, 2009 meeting. It would be ludicrous to suggest that they would enter into such a bizarrely indeterminate undertaking. Second, lest there be any doubt that the topics for bargaining were the 9 topics of interest to the hotel, Kent's formal statement of position concedes the issue. In that document she affirms that there were, indeed, 9 items raised at the September 1 meeting. (See, GC Exh. 9, p. 2, par. 2.) Finally, any lingering concern that the Union may have in some manner misunderstood that it had agreed to bargain over 9 items is eliminated by reference to the extensive written list of information requests that demanded answers to detailed questions about each and every one of those 9 topics. (GC Exh. 9, pp. 2-5.) This contemporaneous documentary evidence convincingly demonstrates that the parties agreed to bargain over 9 issues and the Union recognized its obligation to engage in such bargaining as to those 9 issues by taking steps to become fully informed about each of them. The Union's belated claim that the parties actually only agreed to negotiate about some undefined portion of the 9 issues is simply a makeweight argument designed to deflect its liability for refusing to meet its contractual and statutory obligations.

In *Borden, Inc.*, 196 NLRB 1170 (1972), the Board expressly adopted the judge's refusal to defer the case to arbitration where the employer's position on the merits was patently erroneous. In reaching this conclusion, the judge contrasted the

situation with the issue presented in *Collyer*. He noted that the dispute in *Collyer* involved "an intricate, technical kind of issue involving an interpretation of contract language covering problems peculiar to the employer involved." 196 NLRB at 1175. In contrast, in *Borden*, the issue was whether the parties "have fallen short in their obligations to bargain collectively." 196 NLRB at 1175. As the judge explained, this type of issue was poorly suited to arbitration and one that was "of a kind that the Board is especially well equipped to handle." 196 NLRB at 1175.

In my view, the same factors are at work here. An experienced arbitrator selected from the parties' established panel may well be ideally suited to resolve such disputes as when to apply a room check-out credit or what circumstances should give rise to an obligation to provide a fee to a bell attendant in lieu of a gratuity. By contrast, an arbitrator's experience and expertise in the hospitality industry adds nothing to the task of addressing the consequences of the Union's utter refusal to negotiate about the majority of the issues covered by the parties' MOA.²³ As another judge has noted in a deferral decision involving "a complete breakdown in contract renewal negotiations, rather than a routine contract violation," the Board's "statutory remedies available to treat with such issues are far more comprehensive than those available in arbitration." *AMF, Inc.*, 219 NLRB 903, 912 (1975). That judge's analysis was also adopted by the Board. I believe that these considerations apply with equal force to the conduct of the Union in the case before me. As a result, the issue presented is not well-suited to arbitration.

In what is perhaps, under the facts of this case, another way of saying the same thing, I conclude that the Board's precedents regarding deferral in the context of contract repudiation also demonstrate that the matter is not suitable for arbitration. Thus, the Board holds that where a party's course of conduct "constitutes a rejection of the principles of collective bargaining," deferral is not proper. *Rappazzo Elec. Co.*, 281 NLRB 471, fn. 1 (1986). As the Board has explained, "the Board is not trespassing on forbidden territory when it inquires whether negotiations have produced a bargain which [a respondent] refuses to honor. The proper business of the Board is to remedy conduct . . . that amounts to the repudiation of an obligation under the collective-bargaining relationship." *New Mexico Symphony Orchestra*, 335 NLRB 896, fn. 8 (2001).

In the present case, I have already explained my conclusion that the Union's conduct constitutes a repudiation of the MOA. This conclusion is well-summarized by counsel for the hotel, who accurately characterizes the Union's behavior as follows:

The Union has taken actions and adopted positions demon-

²³ Counsel for the Union's own concise summary of the nature of the issue presented in this case serves to demonstrate the inappropriateness of arbitration as the means to resolve that dispute. Thus, she correctly notes that, "[t]he only issue for the arbitrator is whether the parties agreed to adopt the Sheraton contract or bargain directly about the six issues about which Local 1 is refusing to bargain." (R. Br., at p. 23.) Resolution of this dispute calls into play the unique legal and policy-making expertise of the Board, not the practical experience of an arbitrator.

strating in no uncertain terms that it does not consider itself bound by the parties' Memorandum. In doing so, it has renounced its collective bargaining obligations, thereby rendering deferral wholly inappropriate in this matter.

(CP Opposition to summary judgment motion, p. 8, GC Exh. 1(1).) As the Board has noted, where a respondent's actions:

amount to a repudiation of the contract or strike at the very heart of the collective-bargaining relationship, deferral is not appropriate. Thus, the Board has stated that it will not defer in instances where the respondent's conduct constitutes a rejection of the principles of collective bargaining. In those instances, it is unlikely that an arbitrator, whose function is limited to problems of contractual interpretation, would resolve or remedy, if necessary, allegations of statutory wrongs [Internal punctuation and citations omitted.]

United Cerebral Palsy of New York City, 347 NLRB 603, 606 (2006).

Because the Union's position in this case is patently erroneous and its conduct represented a repudiation of both the MOA and its statutory obligations to bargain in good faith, I find that deferral of this matter to arbitration is inappropriate because the issue is not eminently well suited to that process.

CONCLUSIONS OF LAW

1. The dispute underlying this litigation is not suitable for deferral to the parties' arbitration process.

2. By repudiating its memorandum of agreement with the Employer and failing and refusing to bargain over required topics specified by that memorandum of agreement, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I will also order the Respondent to post the Board's customary notice and to provide copies of the notice for posting by the Employer if it so chooses.

At the beginning of this trial, I asked counsel for the General Counsel if, "the only relief you're seeking is an order for them to bargain?" (Tr. 16-17.) He responded affirmatively.²⁴ In their posttrial briefs, neither the General Counsel nor the Employer has sought any additional relief. Nevertheless, I recognize that the Board and its judges, "may grant such a remedy as will effectuate the purposes of the Act, whether the remedy is specifically requested or not." *Willamette Industries*, 341 NLRB 560, 564 (2004). [Citations omitted.]

I have given the issue of remedy considerable thought as befits the extent of the Union's breach of its bargaining obligations under the Act. I am well aware that additional remedies for bargaining violations exist, including an order mandating a specific bargaining schedule or requiring the submission of

reports as to the course of such bargaining. On balance, out of respect for the adversary process, I have decided to defer to the moving parties' position. They are best situated to gauge their own needs. I will, however, urge that on final resolution of the case, the Region's staff maintain close communication with the parties in order to promptly and effectively secure the Respondent's compliance with the Act's bargaining requirements.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, Unite Here Local 1, Chicago, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Repudiating its Memorandum of Agreement with the Ritz-Carlton Water Tower Partnership (Jt. Exh. 2).

(b) Failing and refusing to bargain with the Ritz-Carlton Water Tower Partnership regarding the following topics that are subject to collective-bargaining under the terms of the parties' memorandum of agreement: reducing the fee paid to employees assigned to carving or other specialty stations and changing the scheduling procedures for such employees; reducing the gratuity paid to bell attendants for delivery of luggage to vacant rooms; increasing the work schedule of housekeepers and eliminating their paid 15-minute break; reducing the payment for making up roll-away beds or sofa beds and limiting those payments to room attendants only; lowering the room credit reduction for housekeepers based on the number of check-out rooms per shift; and paying all new employees at the union contract rate instead of the "Ritz rate."

(c) In any like or related manner violating federal labor law.

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

(a) On request, bargain with the Ritz-Carlton Water Tower Partnership about the topics listed in paragraph 1(b) above, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its union office in Chicago, Illinois, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet, or an internet site, and/or other electronic means, if the Respondent customarily communicates

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

²⁴ Somewhat paradoxically, however, counsel for the General Counsel has characterized the Union's misconduct as "egregious." (Tr. 56.)

with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Ritz-Carlton Water Tower Partnership, if willing, at all places where notices to employees are customarily posted.

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

Dated, Washington, D.C. November 29, 2011

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate our Memorandum of Agreement with the Ritz-Carlton Water Tower Partnership.

WE WILL NOT fail and refuse to bargain with the Ritz-Carlton Water Tower Partnership regarding the topics that are subject to collective-bargaining under the terms of our Memorandum of Agreement.

WE WILL NOT in any like or related manner violate federal labor law.

WE WILL, on request, bargain with the Ritz-Carlton Water Tower Partnership regarding the topics that are subject to collective-bargaining under the terms of our Memorandum of Agreement, and if an understanding is reached, WE WILL embody the understanding in a signed agreement.

UNITED HERE LOCAL 1