

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 19**

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In the Matter of:

**REMINGTON LODGING & HOSPITALITY,  
LLC, d/b/a THE SHERATON HOTEL,**

Charged Party,

and

**UNITE-HERE! LOCAL 878, AFL-CIO,**

Charging Party.

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Case Nos.	
	<b>19-CA-32599</b>
	<b>19-CA-32733</b>
	<b>19-CA-32734</b>
	<b>19-CA-32735</b>
	<b>19-CA-32736</b>
	<b>19-CA-32737</b>
	<b>19-CA-32738</b>
	<b>19-CA-32739</b>
	<b>19-CA-32740</b>
	<b>19-CA-32745</b>
	<b>19-CA-32760</b>
	<b>19-CA-32764</b>
	<b>19-CA-32806</b>
	<b>19-CA-32812</b>
	<b>19-CA-32915</b>
	<b>19-CA-33009</b>
	<b>19-CA-33010</b>
	<b>19-CA-33011</b>
	<b>19-CA-33047</b>
	<b>19-CA-33194</b>
	<b>19-CA-70707</b>
	<b>19-CA-70719</b>

**RESPONDENT'S POST-HEARING BRIEF**

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**I. All 8(a)(5) Charges in the Present Case Should be Dismissed Based on the ALJ's Error in Adopting Disputed, Non-Binding ALJ Findings in *Remington I*, and by Not Requiring the General Counsel to Prove the Charging Party Union Remained the Collective Bargaining Representative After July 2, 2010**

(a) Introduction and Brief Summary of Prior Proceedings

On January 27, 2012, Associate Chief Administrative Law Judge Cracraft denied Respondent's Motion to Postpone the hearing in this matter, pending the resolution of certain disputed factual issues in the closely related case of Remington Lodging & Hospitality, LLC, Case No. 19-CA-32148, et al. (hereinafter "*Remington I*"). The motion had requested postponement of the start of the hearing until the Board issues its decision in *Remington I*, and was predicated on concerns of judicial/administrative economy, the avoidance of conflicting decisions, and the denial of due process.

As noted, the Motion to Postpone was denied. [Exhibit GC-1(aaaa)]. Judge Cracraft ruled: "The matters raised [in Respondent's Motion] are particularly within the discretion of the administrative law judge assigned to hear this case . . . the judge may decide to rely on Judge Meyerson's findings [in *Remington I*] or not." Respondent thereafter filed with the Board a Request for Special Permission to Appeal Order Denying Motion to Postpone and Appeal of Order Denying Motion to Postpone (hereinafter, "Request to Appeal"). This Request to Appeal was denied on February 14, 2012 (Pearce, Hayes and Griffin).

Thereafter, administrative law judge McCarrick informed the parties in a pretrial telephone conference that he would adopt the findings of fact entered by ALJ Myerson in his August 25, 2011 decision in *Remington I*. On the first day of the hearing, ALJ McCarrick acknowledged his review of the Motion to Postpone, Judge Cracraft's denial, and the Request to Appeal, and restated his ruling announced in the pretrial conference:

I do plan to follow Judge Meyerson’s findings of fact and conclusions of law with respect to issues such as jurisdiction, labor organization status, supervisory status . . . appropriate unit, rules of conduct. . . previously found unlawful, and withdrawal of recognition of the union as well as the union’s status as exclusive collective bargaining representative.

[Vol. I, p. 14]. Counsel for Respondent then stated and preserved Respondent’s objection to proceeding with the litigation of this case subject to ALJ McCarrick’s ruling, and stated the following:

I would . . . like to note for the record Respondent’s objection to Your Honor’s ruling just stated, particularly with respect to withdrawal of recognition. We have no problem with jurisdiction, labor organization, supervisory status . . . the members of the unit, classifications in the unit . . .

[Id., pp. 14 – 15].

For the reasons set forth in the Motion to Postpone and in the Request to Appeal, and based upon the authority cited therein, the Motion to Postpone should have been granted, and it was error not to have done so. This error has now been compounded by permitting this case to proceed to trial, and to proceed without requiring the counsel for the Acting General Counsel (“CGC”) to put on evidence proving that the charging-party union – UNITE-HERE, Local 878 – remained the exclusive collective bargaining representative of the Respondent’s employees at the Sheraton Anchorage hotel after July 2, 2010 (when, as discussed herein, Respondent withdrew recognition of Local 878).

The hearing in *Remington I* took 40 days, with testimony from over 100 witnesses. The central issue was the lawfulness of Respondent’s withdrawal of recognition on July 2, 2010, following the presentation to management of a decertification petition signed by 109 employees out of a bargaining unit of 161. This issue turned on whether various alleged ULPs were committed, and whether those ULPs, if committed – or any lesser number, if found to have been committed – had a “meaningful impact” (a specific causal connection)

leading to the union's loss of majority support, applying the Board's line of cases on this issue led by Master Slack, 271 NLRB 78 (1984). Also at issue was whether the petition was tainted by any material involvement by management personnel.

ALJ Meyerson decided in Respondent's favor on a number of significant issues. His decision, dated August 25, 2011, however, was adverse to Respondent on the withdrawal-of-recognition issue. Respondent thereafter filed exceptions with Board. The exceptions were pending at the time Respondent filed its Motion to Postpone and the Request for Appeal, they remained pending while this present case proceeded to trial in October through December of 2012, and . . . they are still pending as of today.

(b) Argument and Authority

"[I]t is axiomatic that the decisions of administrative law judges do not serve as binding precedent" in a subsequent case before another administrative law judge, if exceptions are pending to the first decision. Waste Management of Arizona, 2005 NLRB LEXIS 196, at \*8, n.5 (case no. 28-CA-19526; April 25, 2005; ALJD Meyerson) (deciding further that administrative notice of the earlier ALJ decision in that case was limited only to "certain undisputed facts set forth in that decision, such as the dates the [first] case was heard at trial"). The ALJ's ruling in the present case, described above, ignores this "axiomatic" principal, as it permits this ALJ to rely on factual findings and legal conclusions that are not his own. This violates the Administrative Procedures Act, the National Labor Relations Act, Board procedures, and clear Board precedent.

The following ULP allegations in the Third Amended Complaint, [**Exhibit GC-1 (iii)**], assert 8(a)(5) violations, occurring after July 2, 2010, tied to the expired collective bargaining agreement that was previously in place between the parties:

- Par. 25(a) & (b) – changed Elda Buezo’s hours and reduced her schedule.
- Par. 26 (a) & (b) and 27 – decreased number of shifts in banquet and restaurant departments for certain employees, and correspondingly increased the number of shifts for certain others.
- Par. 28(b) – banned the Union from the hotel after July 2, 2010.
- Par. 28(c) -- eliminated scheduling preference sheets in the banquet department.
- Par. 28(d) – ceased posting schedules by noon Friday.
- Par. 28(e) – ceased scheduling by seniority hotel-wide.
- Par. 28(f) – assigned engineering work to non-bargaining employees.
- Par. 28 (g) – changed sick leave policy.
- Par. 28(h) – ceased contributions to Taft-Hartley pension fund.
- Par. 28(i) & (j) – subcontracted banquet work, and re-allocated (and reduced) banquet server compensation as a consequence of payments to the third-party provided servers.
- Par. 28(k) & (l) – changed the banquet set-up server duties, and set-up and server staffing and schedules.
- Par. 29(e) & (i) – refused [after July 2, 2010] to provide employee census data, requested prior to July 2, 2010.

[*See also*, paragraph 33 of the Third Amended Complaint, at **Exhibit GC-1(iii)**].

All of these allegations assert acts that are alleged to have occurred after the Respondent, on July 2, 2010, withdrew recognition of the charging-party Union. Each of these allegations requires proof by the CGC, as alleged in the Complaint, that “[a]t all material times,” *including since July 2, 2010*, the charging-party Union “has been the

designated exclusive collective-bargaining representative of the Unit and has been recognized as such representative by Respondent.” [Complaint par. 6(e)].

Establishing the above-quoted allegation at paragraph 6(e) of the Complaint requires findings and a legal conclusion that Respondent’s July 2, 2010 withdrawal of recognition was unlawful. This ALJ, however, by adopting ALJ Meyerson’s findings and conclusion on this issue, has permitted the CGC to proceed without having to first prove the withdrawal of recognition was unlawful. This constitutes error, based on the authority outlined below.

The issue of the lawfulness of the withdrawal was litigated extensively, however, in *Remington I*. Although the ALJ in *Remington I* issued findings and recommendations adverse to Respondent on this issue, exceptions to his decision have been filed and are now pending before the Board. At issue is the following primary Exception:

- Exception 8: The ALJ erred in ruling that the decertification petition and related evidence did not constitute an objective showing of the Union’s loss of majority support, by ignoring the analysis laid out in Master Slack, *supra*, that requires the General Counsel to establish a specific causal connection between alleged ULPs and the loss of majority support, and to show how employer’s conduct had a “meaningful impact” in bringing about the employees’ disaffection for the Union.

Also at issue, related to the Master Slack analysis, are the following Exceptions raising highly fact-intensive issues:

- Exception 1: The ALJ erred in ruling impasse was broken in the March 10 – 11, 2010 bargaining sessions (finding and concluding, though, that Respondent bargained in good faith and reached impasse prior to those dates), and erred in ruling that Respondent’s subsequent implementation violated Section 8(a)(5) of the Act.

- Exception 5: The ALJ erred in his reliance on Santa Fe Hotel, 331 N.L.R.B. 723 (2000), by finding and concluding that the two entrances to the Sheraton Anchorage are “non-work” areas and that the discharge of four off-duty employees for distributing flyers to hotel guests at the two entrances was an unfair labor practice.
- Exception 6: The ALJ erred in discrediting chief engineer Ed Emmsley Sr.’s testimony by relying solely on engineer Dexter Wray’s clearly biased and non-credible testimony relating to, among other issues, management influence over the decertification petition, and by ignoring the testimony of unbiased, credible witness Joel Encabo, in addition to other witnesses, whose testimony contradicted that of Mr. Wray.
- Exception 7: The ALJ erred in granting credibility to Dexter Wray’s testimony regarding the use of hotel engineers as security personnel, which resulted in the ALJ erroneously deciding that the Respondent committed a ULP.
- Exception 10: The ALJ erred in finding that a mere three instances of alleged managerial influence in the circulation of the decertification petition, involving only three out of 109 employees, was material, and erred further in finding that these mere three instances constituted unlawful assistance to the circulation of a petition that was signed by 109 employees in a 161-employee bargaining unit.

Judge Cracraft in her Order denying the Motion to Postpone, [**Exhibit GC-1(aaaa)**], directed the ALJ in this case that he “may decide to rely on Judge Meyerson’s findings or not.” Given the complicated and highly disputed factual and legal issues addressed by the above-listed Exceptions, the decision of the ALJ in the present case – to “rely on Judge

Meyerson’s findings” – is particularly out of bounds. Procedural requirements found in the Administrative Procedures Act (5 U.S.C. § 551, et seq.), the National Labor Relations Act, and in the Board’s Rules and Procedures (29 C.F.R. 101, et seq.) all give binding effect to decisions of the Board, *not* to the mere recommendations of an administrative law judge.

The Administrative Procedures Act (5 U.S.C. § 551, et seq., hereinafter “APA”) was established, in part, to standardize the administrative quasi-judicial process among the federal agencies, including the National Labor Relations Board. NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 442-444 (1965); *see also*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951). The administrative law judge is charged with taking evidence, hearing witnesses, and contributing to the record of the case. 5 U.S.C. § 556(c).<sup>1</sup> Section 7 of the APA (5 U.S.C. § 557) describes the relationship between the so-called initial agency decision from an administrative law judge and the final decision by the agency (here the National Labor Relations Board) in the following way:

When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings *unless there is an appeal to, or review on motion of, the agency within time provided by rule*. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .

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<sup>1</sup> (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may - (1) administer oaths and affirmations; (2) issue subpoenas authorized by law; (3) rule on offers of proof and receive relevant evidence; (4) take depositions or have depositions taken when the ends of justice would be served; (5) regulate the course of the hearing; (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter; (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods; (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy; (9) dispose of procedural requests or similar matters; (10) make or recommend decisions in accordance with section 557 of this title; and (11) take other action authorized by agency rule consistent with this subchapter.

*Id.* (emphasis added). Thus, findings and recommendations from an administrative law judge, if appealed, function only act as recommendations, while the final decision on the merits of a case are left to the Board:

In case the evidence is presented before . . . an administrative law judge or judges thereof, such . . . judges . . . shall issue and cause to be served on the parties to the proceeding a *proposed report*, together with a *recommended order*, which shall be filed with the Board, and if no exceptions are filed . . . such recommended order shall become the order of the Board and become affective as therein prescribed.

29 U.S.C. 160(c) (emphasis added);. *See also*, 29 C.F.R. § 101.11(b):

The parties may accept and comply with the administrative law judge's recommended order, which, *in the absence of exceptions*, shall become the order of the Board. *Or, the parties or counsel for the Board may file exceptions to the administrative law judge's decision with the Board.* (emphasis added).

*And see*, 29 C.F.R. § 101.12(a):

*If any party files exceptions to the administrative law judge's decision*, the Board, with the assistance of the staff counsel to each Board Member who function in much the same manner as law clerks do for judges, reviews the entire record, including the administrative law judge's decision and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. (emphasis added)

*See also*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (ALJ's findings and recommendations are by no means binding on the Board).

Though the factual findings of an administrative law judge carry weight, the Board is not bound by these finding, or even bound by the ALJ's credibility determinations if not otherwise supported by record evidence overall. *See*, Humes Elec., Inc. 263 NLRB 1238 (1982). The Board exercises authority for *de novo* review of the findings of fact issued by an

ALJ. Standard Dry Wall, 91 NLRB 544 (1950); Permaneer Corp., 214 NLRB 367 (1974); and, R. C. Aluminum Industries, 343 NLRB 939 (2004); *and see*, 29 C.F.R. § 101.13 (the Board's Orders are enforceable, not ALJ decisions); 29 C.F.R. § 101.14 (the Board's orders are reviewed by federal courts, not ALJ decisions).

Accordingly, the erroneous decisions reached by the ALJ in *Remington I*, which are now subject to the above-referenced pending exceptions – and precisely *because* they are subject to such review – “do not serve as binding precedent” in the present case. E.C. Waste Inc. d/b/a Waste Management v. NLRB, 359 F3d 36, 39 (1<sup>st</sup> Cir., 2004).

Particularly when *disputed* facts are relied upon in an ALJ decision that hasn't been approved by a Board decision, the ALJ decision is wholly incompetent to serve as binding precedent. South Jersey Regional Counsel of Carpenters, 335 NLRB 586, 592, n. 10 (2001) (an ALJ decision is “not binding” where “[n]o exceptions were filed to the judge's [published] decision, and . . . the Board never ruled on it”); Henry F. Bude Publ., 242 NLRB 243, 246, n. 6 (1979) (where an ALJ died prior to issuance of his decision, and the Board issued a “proposed” decision, to which exceptions could be filed, the proposed decision does not constitute binding precedent).<sup>2</sup>

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<sup>2</sup> The Case Handling Manual (CHM) also shows that Judge Cracraft, the Board and this ALJ erred in not postponing the hearing. At section 10118.4, the CHM provides the Regional Director “may postpone determination of a ULP charge” based on the pendency of “closely related matters in other proceedings.” This provision further states that the “Regional Office is not generally required to defer to the result in the related matter *except for controlling* General Counsel determinations or *Board decisions*.” *Id.* (*emphasis added*). In view of this ‘exception,’ the Regional Office was therefore *required* to defer to the “Board decision” which is yet to come in the “related matter” now pending in *Remington I* on the issue of the withdrawal of recognition. Judge Cracraft, the Board and this ALJ, therefore, should have deferred to the decision yet to come in *Remington I* before proceeding to a hearing. At 10118.4(a), the CHM provides:

The Regional Office may postpone determination where the outcome of a closely related ULP charge may affect the disposition of the charge to be

In the present case, while the basic *undisputed* facts found by the ALJ in *Remington I* can be received in evidence through administrative notice – for example, the fact that 109 out of 161 unit employees signed a decertification petition – *none* of the essential *disputed* facts at issue, as raised by the above-stated Exceptions, can be so treated. The evidence related to these disputed facts was received through live testimony in *Remington I*, with witnesses subject to cross-examination. In order for the administrative law judge in the *present* case to make the findings necessary to either accept or reject submissions of proof on the question of whether the July 2, 2010 withdrawal of recognition was lawful, he should have also received and assessed live testimony, subject to cross examination, on the very same issues heard in *Remington I*. Southwest Janitorial, 205 NLRB 1061, 1066 (1973) (the ALJ has an “obligation to hear and evaluate the testimony of witnesses and assess their credibility with the view to making ultimate findings of fact”); *see also*, Meyers Industries, 268 NLRB 493, 508, n. 7 (1984) (“an administrative law judge must assess the credibility of witnesses”).

The following issues of *disputed* fact, among others, bear on the question presented in the case *sub judice*, as alleged in paragraph 6(e) of the Third Amended Complaint, that UNITE-HERE local 878 was entitled to recognition after July 2, 2010:

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deferred. Common circumstances include cases pending administrative appeal and where complaint has issued.” (*emphasis added*).

While the permissive “may postpone” might suggest the Regional Office is not *required* to postpone, the remainder of this provision renders clear that no such discretion is available in the present matter. It is not a question of whether the ruling in *Remington I* is an “outcome” that “may affect the disposition of the charge,” it is instead an “outcome” that *will* be determinative.

- Whether the proposals made by the Union in the March 10–11, 2010 bargaining sessions related to health insurance and the housekeepers’ room-cleaning quota, viewed in the context of the extensive testimony and documentary evidence concerning all prior proposals and negotiations over a 16-month period (during which it is undisputed that Respondent bargained in good faith, and that impasse had been reached) were “significant enough” under applicable Board law to have broken impasse, and thus prevent Respondent from making unilateral implementations.
- Whether the facts relating to the two hotel entrances were properly considered and weighed in determining whether those two areas are work or non-work areas, as it relates to the alleged ULP concerning enforcement of a rule prohibiting solicitation of guests by employees (who were off-duty, and on-property, when soliciting).
- Whether the testimony of the following witnesses presented in *Remington I* by the CGC, on the issue of management influence in the signing of the decertification petition, should be believed as credible: Dexter Wray, Jose Lantigua and Eugene Bristol.
- Or, whether the testimony of the following witnesses presented in *Remington I* by Respondent on this issue of management influence should be believed as credible: Ed Emmsley, Sr., Joel Encabo, Cindy Mathers, Chef Rydin, Denis Artiles, Jamie Fullenkamp, Mary Villarreal, Ed Emmsley, Jr., the two Emmsley sisters, Margarita Lucero and Guadalupe Mejia.

- Even assuming the credibility of the above three CGC witnesses on the issue of management influence (Wray, Lantigua and Bristol), whether the mere occurrence of these three contacts with management in the context of the overall record of evidence – including the fact there were 65 other employees who testified, and 106 employees out of 109 decertification petition-signers in total, who had *no contact* with management at all related to the petition – warrants the finding by the ALJ in *Remington I* that the petition was tainted by management influence.
- Whether the testimony of Dexter Wray should be believed, in light of the totality of evidence, on the issue of whether the Respondent committed an 8(a)(5) violation in the alleged assignment of security duties to hotel engineers without consulting the Union.

In addition, most critically, upon the resolution of the above ULP issues, whether those ULPs *which are proven, if any*, had the “meaningful impact” required under a properly applied Master Slack analysis so as to bring about the loss of the Union’s majority support?

And finally, whether the 68 witnesses who testified in *Remington I* to their personal reasons for signing the decertification petition should be credited, and what weight to give that testimony – in light of the totality of evidence – on the issue of what in fact actually motivated the 109 employees to sign a petition asking for withdrawal of recognition. These 68 witnesses as a whole (and certainly 65 of them) testified to their individualistic reasons, unrelated to any of the alleged management ULPs, for signing the petition.

(c) The Authority Cited by Judge Cracraft and the Board Does Not Allow this ALJ to Proceed Without Making His Own Findings, and to the Contrary Bars a Decision on the 8(a)(5) Charges Pending Final Resolution of *Remington I*

In her Order, Judge Cracraft cites to Grand Rapids Press, 327 NLRB 371 (1998)<sup>3</sup>, in which the ALJ – according to Judge Cracraft – “properly relied on prior Judge’s finding that a strike was an unfair labor practice strike.” A closer examination of Grand Rapid Press shows, however, that the second ALJ adopted only a very narrow finding by the first ALJ. The second ALJ simply adopted the first judge’s finding of animus, and did so only because the allegations at issue were “substantially similar” (related to a restriction against the hiring of substitute workers involved in a strike at another location), and only because the “same foreman . . . [was] involved in imposing the restrictions on the use of substitutes in *both situations*.” 327 NLRB No. 72 at 373 (emphasis added). Further, the adoption of this finding was limited only to its use as “background evidence of animus.” Id. The second ALJ also noted that “animus need not be proven by direct evidence; it can be inferred from the record as a whole,” *citing to*, Fluor Daniel, 304 NLRB 970 (1991). Id. Finally, the ALJ found there was already “sufficient evidence in *this record* to support an inference of animus.” Id. (Emphasis added).

Accordingly, Grand Rapids Press hardly stands for the proposition that an ALJ can freely adopt the wholesale findings of another ALJ based simply on the identity of a respondent being the same in both cases. As shown above, the issue as to whether the July 2, 2010 withdrawal of recognition was lawful or not is highly fact intensive, and is central to the decision to be made in four out of six ULP charges in the present case.

Instead, this present case is governed by Sunland Construction, 307 NLRB 1036 (1992), which the ALJ in Grand Rapids Press considered and distinguished. In that case, the

Board approved an ALJ's *refusal* to adopt findings of animus in an earlier case, because the evidence of animus in the earlier case involved different managers of the employer.

Judge Cracraft also cited Fluor Daniel, Inc. v. NLRB, 332 F.3d 961, 972 (6<sup>th</sup> Cir., 2003). That case, however, *supports* Respondent's argument in this present motion: "The ALJ was under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness." 332 F.3d at 972.

The Board, in denying Respondent's Request to Appeal, cited to one additional case, stating: ". . . we also rely on Detroit Newspapers, 326 NLRB 782, fn. 3 [sic – actually, fn. 4] (1998), enf. denied, 216 F3d 109 (D.C. Cir. 2000) (Board found that judge properly relied on an earlier decision by another judge in a case pending before the Board to find that a strike was an unfair labor practice strike)." However, the Board's description of this holding in footnote 4 was incomplete. The holding – which actually appears in the adopted ALJ decision – states *in addition*: "If the Board reverses that finding [by the ALJ in the first case, to the effect that the strike was not an unfair labor strike], then this case should be dismissed, and I so find. However, in the event that the Board affirms that critical finding, I shall proceed to resolve the issues in this case." 326 NLRB at 783, fn. 4 (emphasis added). Assuming *arguendo* that the Board in the present case is not ruled to have erred in refusing to postpone the hearing in this case (either upon petition for review or by its own future decision reversing, in effect, its denial of the Request to Appeal), the fact remains that *Remington I* has still not been decided. The fact remains, in other words, that a "critical finding" by an earlier ALJ, just as in *Detroit Newspapers*, has not been ruled upon by the Board (which, again, possesses *de novo* review authority). Since the ALJ in this case has failed to take evidence in support of a "critical finding" to the imposition of 8(a)(5) liability –

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<sup>3</sup> Judge Cracraft incorrectly cites this case as "327 NLRB 298 (1998)."

*i.e.*, that the withdrawal of recognition was unlawful – then, no decision can be rendered in the present case on the question of 8(a)(5) liability, until there has been a ruling by the Board in *Remington I*.

Further, in the event the Board decides *Remington I* as it should – holding that Respondent legitimately withdrew recognition – or, in the event a court of appeals reverses an affirmation of ALJ Meyerson on that issue, then, just as the ALJ in Detroit Newspaper found and ruled (in footnote 4, quoted above), this ALJ should find and rule as follows: None of the 8(a)(5) charges, listed above, are supported by critically necessary evidence that proves the charging-party union remained a recognized bargaining representative after July 2, 2010, and therefore those charges are dismissed.

## **II. The Charge That Dexter Wray was Discharged in Violation of 8(a)(1) and (3) Should Be Dismissed.**

### **(a) Mr. Wray began his testimony with a bald-faced lie.**

In support of the charge at paragraph 28(e) of the complaint (alleging seniority was unilaterally discontinued), Mr. Wray testified that he lost wages based on a unilateral discontinuation of seniority rights in the engineering/maintenance department following the July 2, 2010 withdrawal of recognition of local 878. Prior to withdrawal, he testified, the minimum number of hours he worked was “forty” per week. [*Id.*, pp. 248-49]. Mr. Wray then testified that on or about July 5, 2010, engineering manager Ed Emmsley “came down and told us, he said, you know, all the other departments done took cuts, we’re the only department that haven’t took no cuts, so he said I’m going to have to cut your hours,” and that “[e]verybody’s hours [in engineering] got cut back to 32.” [*Id.*, p. 251, and affirmed at p. 260]. *This was a bald-faced lie.* He went on to embellish: “And I

said Ed, I said why are you cutting my hours, I'm – I'm the head seniority.” [Id., p.250]. He testified this reduction in hours lasted “two to four weeks.” [Id., p. 253].

Mr. Emmsley testified he “always followed” seniority in the engineering department, and that he did not reduce hours in July 2010 or cut Mr. Wray back to 32 hours. [Vol. XVII, p. 2805]. Mr. Wray’s lie to the contrary is confirmed by the scheduling, time card and payroll records:

- Schedules – **Exhibit R-34** – The engineering/maintenance department schedules for the month of July, 2010 show that Mr. Wray’s hours remained at 40 throughout the month. [Id., pp. 2806-09; and cross examination at p. 2884 <sup>4</sup>].
- Time cards – **Exhibit R-42** – The daily time card reports show Mr. Wray steadily worked a five-day / 40 hour workweek from July 5 to August 25, 2010.
- Payroll Records – **Exhibit GC-136 (n) and (o)** – The payroll records for the two-week pay-periods ending July 16, 2010 and July 30, 2010 show the following, at pages 42 and 37 therein, respectively: Mr. Wray was paid for 79.75 hours for the period ending July 16, and was paid 80 hours for the period ending July 30.

Dexter Wray is a liar. The above-described lie is only the first of several lies by him under oath. The additional lies will be discussed below.

Mr. Wray’s testimony should be discredited on all contested factual issues related to the three disciplines he received leading to his discharge from employment. To hear Mr. Wray tell it, he was the innocent victim of 8(a)(3) discrimination, and was not guilty

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<sup>4</sup> As established on cross examination at page 2884, the schedules are maintained by Mr. Emmsley electronically as a word processing document, and when changes are made to the schedules –after initial posting – the changes are reflected by “shaded” entries to the schedule. The schedules entered in evidence as **Exhibit R-34** were

of *any* of the work-rule infractions he was disciplined for. Mr. Wray is a liar.

(b) Mr. Wray's first discipline: Dereliction of duty in allowing the lobby fountain to overflow.

Mr. Wray was the overnight engineer on duty, and among the duties handled on the overnight shift was to periodically drain, clean and re-fill the pond to the lobby water fountain, a task he had performed many times. This is a task usually performed during the overnight shift, when lobby traffic is low.

Among his duties that evening, it is undisputed that Mr. Wray was to clean the pond in the lobby, and to train a new employee on how to perform this task. [Vol. II, p. 304, line 14; p. 305, line 6-7 (admissions by Wray)]. This training was to include all of the steps necessary: draining, cleaning and refilling. [Id., p. 378, lines 1-8; p. 390, lines 6-8]. He admitted that around 3 am he drained the pool and that the trainee watched. [Id., pp. 380 and 387]. He described further that an outside service company was working on the hotel's sprinkler system that evening, and that this work required turning off the water to the entire building. In connection with this work, the building's water was turned off *prior* to draining the pool, and was off for approximately two hours. [Id., p. 381]. The service work on the sprinkler wasn't completed, however, due to a problem with cutting off the water main into the building. Wray admitted he was aware the water system to the building was restored and back on by 4 am. [Id., p. 383, line 23-25; and 387, lines 14-16]. He then admitted to all of the following:

Q. Okay. And so at 4:00 o'clock you knew the water was back on in the building.

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printed a few days prior to Mr. Emmmsley's testimony on December 13. There are no shaded entries or changes reflecting any change to Wray's schedule in July 2010..

A. Right.

Q. Now I think you said a few minutes ago that you learned at 7:00 am the water was flooding into the lobby?

A. Yes.

[Id., p. 387]. ....

Q. ... When did you last see Sam [the trainee]? You showed him how to drain the pond at 3:00 am. Right?

A. That's the last time I seen Sam because Sam went back to do what Sam's supposed to be doing and I was doing what I was doing.

Q. Okay. And you were supposed to train him that evening on how to drain, clean and fill the pond. Correct?

A. Right.

Q. That was what you were supposed to do that evening. In addition to working with EW Sprinklers that evening[,] your job was to train Sam on cleaning – draining, cleaning and filling the pond. Correct?

A. Right.

Q. All right. And then you didn't see Sam after 3:00 am.

A. No.

Q. And at 3:00 am you knew the pond was empty. Right?

A. Right.

Q. Okay. And then you didn't know anything else about what was going on with this pond until 7:00 am. Is that correct?

A. Right. Because --

Q. And then you found out at 7:00 am that it was flooding because you got a call on the radio.

A. Right.

[Id., p. 390]. .....

[ALJ McCarrick]: But the question is you didn't see Sam.

A. I didn't see Sam.

Q. Okay. So you didn't see Sam the rest of that day.

A. That morning.

Q. Or rest of that shift –

A. No.

[Id., 391].

There is no testimony or evidence that anyone else was responsible during that overnight shift for the draining, cleaning and refilling of the fountain pond. The plain and simple facts of the matter are that this job was assigned to Mr. Wray, that he was solely responsible for successfully completing this task, and that the only other engineer on duty that night hadn't yet been trained in the task (except for being shown how to conduct the draining, at 3 am). While Mr. Wray *started* this task – when he drained the pond – he failed to successfully *complete* this task, and the pond overflowed causing damage to the lobby. [Vol. XVII, pp. 2812-13 (Emmsley: who observed that morning the fountain had overflowed, and observed damage to the lobby carpet and to the ceiling tiles on the floor below)]. It is evident from the testimony above that Mr. Wray abandoned his responsibilities for this task, and in the process caused damage to hotel property. He admitted he was off doing something else after 3 am, when he last saw Sam the trainee; he admitted the water to the building had been restored at 4 am; and he admitted he “didn't know anything else about what was going on with this pond until 7:00 am.” [Id., 390, lines 18-20].

Mr. Wray asserted in the hearing that it was the trainee's fault, and suggested – without any proof other than this naked assertion – that, “Sam took it upon himself to fill

the pool.” [Id., pp. 305 and 306]. Whether this is true or not is immaterial, because (1) it was Wray’s job that evening to perform this task; (2) he started the task, and then abandoned his duty after 3 am, even though he knew the building’s water was back on at 4 am; and (3) Wray knew that trainee Sam had not been taught how to complete this task. Wray admitted: “I never show Sam how to put the water back in the pond.” [Id., p. 305].

Mr. Emmsley spoke to Mr. Wray in the lobby that morning. Wray’s only excuse was that he had had to respond to a call somewhere else in the Hotel. [Vol. XVII, pp. 2814-15]. As Mr. Emmsley testified, regardless of the nature of the call Wray was responsible for preventing the fountain from overflowing, and stated: “The fact was that he left it running.” [Id., p. 2815].

Mr. Emmsley testified further: “I did not discipline the trainee because it was the *trainer’s* responsibility.” [Id., p. 2817 (emphasis added)]. The trainee <sup>5</sup> had never performed this task; “That’s the reason Dexter was training him.” [Id., p. 2818]. <sup>6</sup>

Human Resources Director Jamie Fullenkamp personally observed the overflowed fountain, and learned from her investigation that Wray had been assigned the “routine” task of cleaning and refilling the fountain. She and Mr. Emmsley “walked around” the fountain and observed the damage. [Id., pp. 2586-87; 2591-92]. She spoke also with the trainee, who simply confirmed that he and Mr. Wray had responded to a call, and that when they returned the fountain was flooding. [Vol. XVII, p. 2588]. In her capacity as the Human Resources Director she approved the discipline prepared by Mr.

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<sup>5</sup> Mr. Emmsley was unable to recall if the trainee was an employee named Sam or Ray, however, Mr. Wray recalled it was Sam.

<sup>6</sup> Under questioning by ALJ McCarrick, Mr. Emmsley, although unable to remember which new employee was the trainee that evening, affirmed that *neither* had performed this task before. [Vol. XVII, p. 2818].

Emmsley, which was then approved by General Manager Denis Artiles, as reflected by the signatures on the disciplinary write-up. [*Id.*, p. 2588; **Exhibit GC-36**].

Mr. Wray signed the discipline. [**Exhibit GC-36**, dated May 10, 2010]. Wray did not pursue a grievance over the discipline. [Vol. II., pp. 392-93].

Mr. Wray told another lie when testifying about this discipline. In connection with his receipt of the discipline, on May 10, 2010, he testified he asked Emmsley for a union representative, and that Emmsley refused, stating “we’re no longer union.” [*Id.*, pp. 306-07]. It is well established in the record, however, that the Hotel did not withdraw recognition until approximately seven weeks later, on July 2, 2010. It would have been nonsensical for Mr. Emmsley to have made such a statement, on May 10. There is no reason to believe Wray is telling the truth here. He will say anything he thinks he can get away with to embellish the case against Respondent. *Dexter Wray is a liar.*

(c) Mr. Wray’s second discipline: Use of vulgar language on the Hotel radio, transmitted on a single frequency throughout the Hotel.

On July 7, 2010, engineering/maintenance department manager Ed Emmsley received an email – **Exhibit R-23** – from Remington’s Dallas-based corporate vice president over spa operations, Lorraine Park, advising that while in the hotel she had overheard Dexter Wray utter the vulgar statement: “I don’t need to put up with this shit.” The email indicated this incident occurred on the 15<sup>th</sup> floor near the one-floor elevator that takes guests up to the Hotel’s 16<sup>th</sup> floor spa, and was witnessed by Ms. Park as well as an individual she described as an “older, thinner gentleman engineer.” She reported also in the email that Mr. Wray had stated to her: “You didn’t hear that.”

Mr. Emmsley met that day with Ms. Park, and she showed him the location on the

15<sup>th</sup> floor where the exchange with Wray occurred, confirming that Wray’s use of the foul language had occurred in a public area of the hotel. [Vol. XVII, p. 2823]. Mr. Emmsley testified also that Ms. Park – when referring to the “older, thinner gentleman engineer” in the email – was referring to John Cain. [Id.]. Mr. Cain testified on December 13 (transcript volume XVIII). He is indeed a hotel engineer, and fits the physical description Ms. Park gave.

Mr. Cain testified the incident occurred on the 15<sup>th</sup> floor in a public area of the hotel which includes guest rooms, near the main elevator bank and the spa elevator. Like Mr. Emmsley, he referred when testifying to **Exhibit R-35**, a floor diagram of the 15<sup>th</sup> floor. His testimony, coupled with Mr. Emmsley and with Ms. Park’s email, [**Exhibit R-23**], establishes conclusively that Mr. Wray’s use of vulgar language occurred in a public area used by guests.

Mr. Wray doesn’t deny he used the word “shit,” and that it was heard by Ms. Park. Mr. Wray is aware, however, that vulgar language by a hotel employee is a far less serious matter when it occurs in a non-public area of the hotel. Accordingly – in the third lie he made while testifying – he placed the conversation in a non-public area. In the following testimony, he describes the disciplinary discussion he had with Ed Emmsley:

I said Ed, *I’m in the back of the house*, me and David <sup>7</sup> talking. And – and like when I said that [comment using the word ‘shit’] she [Lorraine Park] was from you – from where I’m sitting at to you. I mean, you know, to me it doesn’t make a difference *because we are all employees*, we’re sitting back there talking.

[Vol. II, p. 316, lines 4-8 (emphasis added)]. He testified further:

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<sup>7</sup> Mr. Wray testified he was talking at the time to a security guard named “David.” Although Mr. Cain didn’t identify “David” as present, nonetheless, this part of Wray’s testimony isn’t inconsistent with Mr. Cain’s testimony.

Q. Do you remember the – what happened that day that’s discussed with the swearing [in **Exhibit GC-37**, the disciplinary write-up], do you remember that day?

A. With the swearing, yes ma’am.  
... It took place on that Monday [July 5] and they wrote me up on a Friday [July 10].]

Q. Okay. And then on that Monday where were you when you were with David?

A. We were in the back of the house. It was like the first floor service area.  
... We was in the hallway.

Q. Okay. And was anybody else around?

A. Like I say, the only person came in our passing was Lorraine.

[Id., pp. 319-20].

Making matters worse, it was determined – and the record evidence is again conclusive – that Mr. Wray’s comments were picked on a radio on when speaking. Although Mr. Wray indicated it wasn’t picked up by his own radio – which he was carrying at the time – he admitted it could have been picked up by a radio carried by someone else who was present (he indicated “David”). [Id., p. 322, lines 4-7]. Regardless, Mr. Cain, who was standing approximately 15 feet away, was clear and precise in testifying that he heard the vulgar statement in both his right ear (facing Mr. Wray), *and* through the radio ear piece in his *left* ear. [Vol. XVIII, at pp. 2980-82; see also, Cain’s statement, **Exhibit R-22**<sup>8</sup>]. Mr. Wray’s vulgar utterance was heard, therefore, by approximately 15 to 20 hotel employees, and was likely heard also by some hotel guests, inasmuch as some radio-carrying employees do not use ear pieces. [Id., at

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<sup>8</sup> Cain testified Emmsley asked him simply to write what he observed, did not tell him what to say, and that he wrote, “[e]xactly the truth.” Emmsley didn’t ask for the additional observation Cain placed in the second paragraph. [Vol. XVIII, p. 2986].

pp. 2978-79], testimony by Cain, who, consistent with several other witnesses, testified [i] the radios are carried by this number of employees on typical days; [ii] that perhaps one-fourth do not use ear pieces; and that [iii] all transmissions are broadcast on a single frequency and heard by all required to carry radios; *see also*, Vol. XVIII, p. 2894 (Emmsley – it wasn't necessary to investigate who heard the vulgar utterance, as it was obvious it had been heard by all carrying the work-required radio)].

Testimony was offered by counsel for the General Counsel in support of the wholly unsurprising fact there have been occasions when words of a vulgar nature have been uttered within the walls of the Sheraton Anchorage Hotel. This testimony misses the point completely, inasmuch as – with respect to every example offered by General Counsel – either one of the following was true: (1) the vulgar words occurred in a non-public area of the hotel, and was thus heard only by a fellow employee (who did not complain, thus resulting in no discipline), or (2) the vulgar utterance *did* result in a discipline (based on a complaint having been brought forth).<sup>9</sup>

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<sup>9</sup> See, first, Vol. XVI, pp. 2602-05 (**Jamie Fullenkamp** testified to two disciplines of employee Lumni, based on complaints by employees; see. **Exhibits R-24 and R-25**). See, second, Vol. VII & VIII -- p. 1017 and 1232 (**Maria Hernandez**: Lumni used very bad words sometime in 2010 – didn't testify where or that there were witnesses. Eduardo Canas on 11<sup>th</sup> floor changing linen, no one else around; he was called on the radio, "and then he turned it off" and said bad word. Admitted other than Lumni, never heard any other person use bad words). See, third, Vol. VII & IX, pp. 1292-93 and 1304-08 (**Luz Maria**: houseman Carlos said bad words to her in a room both were cleaning, with no one else around. She did not complain or report this. Later, that same day in basement corridor she heard Canas make similar comment to Carlos [and only Carlos]. She alluded to other occasions where Carlos may have used colorful language, but no detail elicited, and testified she never heard this language out of Canas on any other occasions.). See, fourth, Vol. X, pp. 1556-75 and 1604-1617 (**Troy Prichacharn**: Isolated incident hearing GM Denis Artilles over radio say, "What the hell is going on ... where is security." Evidently, something quick and unusual startled Artilles, possibly an emergency, as Prichicharn described when this happened "everybody was running through here," and that a "couple of security [guards] ran up to him." Artilles didn't shout, because Prichacharn was only 15-20 feet away and only heard this on radio. He never

The use of “bad” language can occur in many workplaces. The context, time and place in the use of such language are what matter, particularly in the setting of an upscale hotel. Vulgar language in the presence of hotel guests is indeed a serious matter, as it is destructive of the atmosphere of warm, friendly hospitality which hotels must seek to maintain. This was well understood by Mr. Wray in the instant he committed his error, as reflected by his contemporaneous comment to Ms. Parks: “You didn’t hear that.”<sup>10</sup>

Human Resources Director Jamie Fullenkamp investigated and approved the disciplinary write-up over this incident by Mr. Emmsley, which was signed off by

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heard Artiles curse on any other occasion. Heard manager Jeff Brown use the F-word on one occasion only (conflicting testimony where), but no other witnesses; Brown described as a friend. Prichicharn didn’t complain. Other than these two instances, never heard any other managers curse, and no knowledge of any managers who had observed cursing. Heard Emmsley, Jr. use the F-word twice: once in back of house with no other witnesses (Prichicharn didn’t complain), and once at front desk with one other employee (Prichicharn didn’t complain and no knowledge if other employee did). Heard bellman Eric Goff curse on back loading dock (not a public area; he didn’t complain). Heard Katie in back-of-house PBX office use colorful word, but not over the PBX phones (no complaint). See, fifth, Vol. XIV, pp. 2246-60 (**Ana Rodriguez**: Heard housekeeping director Canas use a vulgar Spanish word on two occasions, both uttered while going in or out of his office on basement floor (non-public). On both occasions, the language was not directed at Rodriguez or at anyone, and Rodriguez was not aware of anyone else being around. Rodriguez did not complain. Also heard employee Lumni use vulgar language on one occasion, and received a report from a housekeeper of another occasion. Both occurred in public areas, and for this reason – “because guests could hear him” – she reported both instances to Canas, who said he would take action. As noted above in this footnote (Fullenkamp testimony), Lumni was disciplined twice).

<sup>10</sup> Interestingly, though, Mr. Wray testified he said: “You didn’t hear the part *union*.” [Vol., p. 324 (emphasis added)]. *This smacks of another embellishment by Wray; i.e.,* he seeks to imply (in accordance with his untruthful version that this happened in the back of the house, and was therefore not a big deal) that it was the “union” word he was worried would cause offense. This is not credible. Nowhere in the testimony of Emmsley and Cain is there any mention of Wray ever uttering the word “union.” In point of fact, Mr. Cain was asked in his testimony if he knew what Mr. Wray was referring to when Wray said he was “tired of this shit.” Mr. Cain said he walked back toward Wray, with the intent of asking that very question, but decided against pursuing his curiosity when he saw Ms. Park, the corporate executive. Further, Emmsley’s testimony and Park’s email reflect that their focus and concern related solely to the use of the word “shit.”

General Manager Articles. See **Exhibit GC-37**. She interviewed Ms. Park, Mr. Emmsley, Mr. Cain and Mr. Wray, and reviewed the statements in evidence as **Exhibits R-22** and **23**. [Vol. XVI, pp. 2592-2602]. She approved the discipline based on the fact she had “documented other people in the past for [this infraction] . . . and I try to treat every employee the same.” [*Id.*, at pp. 2601-02; see also, pp.2602-05 and **Exhibits R-24** and **R-25**, regarding discipline of employee Lumni].

Subsequent to Mr. Wray’s receipt of this discipline, he communicated to Ms. Fullenkamp – see, **Exhibit GC-38** – that he had observed Ms. Park utter a curse word while riding in an employee-only service elevator (referring in friendly terms to another employee in the elevator as her “favorite bullshitter”). [Vol. XVI, pp. 2608-12 and 2617-22 (Fullenkamp’s investigation and subsequent actions)]. Fullenkamp confronted the Dallas-based vice president of spas, who was at that time working in the hotel. Ms. Park noted the remark was made in jest, but recognized her error and the embarrassment this caused, stating, “I just added fuel to your fire,” to which Ms. Fullenkamp responded:

And I said, of course, Lorraine. And I said it wasn’t very professional at all out of you and she agreed. And she goes, Jamie, go ahead, and call corporate and tell them. So I did and I told my general manager . . . [I] gave it to my general manager so he could send it to the VP of HR at corporate.

[*Id.*, p. 2610-11]. The corporate vice president of human resources, Mary Villarreal, prepared a hand-written note – see **Exhibit R-27** – which was placed in Mr. Wray’s file reading, in part, that the incident in the service elevator had been “addressed w[ith] Lorraine Park & memo given to her re same.” The reference to a “memo” having been given to her was to a disciplinary memo from the company’s president, Mark Sharkey, in the record as **Exhibit R-43**. [Vol. XVIII, pp. 3037-42 (Stoller – delivery of such

memoranda is the disciplinary practice followed within the corporate office, where Mr. Stoller is employed and as counsel advises on such matters)]. Mr. Sharkey's memoranda concluded by stating that he told Ms. Park he "expected that she would conduct herself in a professional manner using appropriate language at all times going forward." Subsequently, Ms. Park apologized directly to Mr. Wray for her "unprofessional language." See, **Exhibit R-28**.

Notwithstanding Ms. Park's mistake, which was addressed separately and appropriately as described above, the discipline for Mr. Wray's use and broadcast of vulgar language throughout the hotel was a valid, legitimate and non-discriminatory discipline.

(d) Mr. Wray's third and final discipline within a five-month period for playing online poker while on the clock.

On Saturday morning, October 23, 2010, at approximately 9 am, Faren Ardis – a Dallas-based corporate executive involved in renovation work at the Sheraton Anchorage – was in the hotel's engineering/maintenance offices, and made a discovery that would lead to Mr. Wray's third and final discipline. [**Exhibit R-29**].

As shown on the diagram of the hotel's basement floor, **Exhibit R-37** – and as described in testimony by chief engineer Ed Emmsley [Vol. XVII, pp. 2853-56] – the Hotel's engineering/maintenance operation is based within three contiguously located rooms: (1) the main engineer's shop in the center (with two interior office rooms), (2) the "wood shop" room (used primarily for storage), and (3) the pump/mechanical room. Each of the three rooms is accessible by a door from the basement corridor, and each of these doors sits within the view of two stationary video cameras monitoring the hallway. All three rooms can also be accessed from the inside, through interior doors, such that

one can move through each of the rooms without passing into the hallway or being observed by the two hallway cameras. The pump/mechanical room also has a second door that enters into a short *cul-de-sac* hall off the main corridor. That door is not within view of either camera. Another door in the *cul-de-sac* hall is marked “Exit,” which passes into a stairwell landing that goes up the exterior side of the building.

Mr. Emmsley testified the maintenance staff, while not working elsewhere in the building, spend most of their time in the main shop room (he estimated 80%). [Id., pp. 2936-37]. The pump/mechanical room is typically entered only once a day, to take water gauge readings (any needed maintenance on the equipment therein is contracted out to a third party). [Id., p. 2929]. The wood shop/storage room contains stored material, including for example the “vinyl” Mr. Ardis stated he was searching for on the morning of October 23, 2010, [Exhibit R-29], as well as certain tools such as saws which are not in regular use by the engineering/maintenance crew. [Id., p. 2919]. The light in that room is normally turned off. [Id., pp. 2938, lines 13-17].

Mr. Ardis entered the wood shop/storage room at “approximately 9 am” on October 23, 2010. [Exhibit R-29]. He was in the process of “searching various storage rooms for hotel vinyl.” [Id.]. When he entered the wood shop storage room, the light was turned off – which, as noted above, is normal – but, he noticed a glow of light within the darkness. [Vol. XVI, pp. 2938, lines 6-17]. The glow was coming from Dexter Wray’s laptop, which Ardis found “hidden behind several pieces of furniture in front of a soft back chair comfortably hidden out of sight and view from anyone entering either doorway into this shop.” [Exhibit R-29]. The laptop was opened to an on-line poker site. [Id.]. Mr. Ardis took photos showing the poker site page, [Exhibits R-4 and R-5],

and gave the laptop to Mr. Emmsley. Mr. Emmsley did not recognize the laptop, and testified further he had never known Mr. Wray to have a laptop at work. [Id., p. 2910].

Mr. Emmsley spoke to Wray later that morning, and asked what he was doing with a laptop at work. He recalled stating to Wray: “There’s nothing that we do in Engineering that we use a laptop for.” Wray replied that he had been “downloading something.” [Id., p. 2868]. Emmsley then told him that Ardis had found the laptop open on a poker site, and asked if he had been playing poker, which he denied. [Id.].

Mr. Wray maintained throughout his testimony – just as he did when first confronted by Ed Emmsley – that he was not playing poker on his laptop. He testified, instead, to only the following: that early that morning, 30 minutes before his 7 am start time, on his way into work, he ran into another employee (Ed Emmsley, Jr.), and was asked by this employee to “send” him some of the “chips” that are used in the playing of the game. [Vol. II, p. 330]. He went on to testify that he waited for Emmsley, Jr. to log on, so that he could send him the chips, but that Emmsley, Jr. never did log on prior to his 7 am start time, and that he then stepped away from the laptop, went to the time clock, punched in, and began his daily duties. [Id.]. He testified he never played poker that morning, either before or after 7 am. [Id., pp. 330-33].

Dexter Wray is once again lying. This lie was established by the prior inconsistent statement given verbally to union representative Jessica Lawson on October 25, 2010, two days after the incident. The substance of his verbal statement was typed up by Ms. Lawson, and signed by Mr. Wray two days thereafter, on October 27. [Id., pp. 413-20]. He signed the statement and initialed each page, affirming thereby – as noted on the face of the document – that that the statements given therein were “accurate to the

best of [his] memory.” [Id.]. The signed and initialed statement was then attached (as “Exhibit 6”) to an under-oath *Jencks* affidavit which Mr. Wray gave to a Region 19 investigator, dated November 15, 2010. [Id., p. 412-13]. In the statement to Lawson, which she wrote in the third-person, Wray told her:

“He got to the hotel at 6:30 a.m., so since he was there early he opened up his computer and *started playing poker* on it.”

[Tr., pp. 419, line 22 to 420, line 1 (emphasis added), and received in evidence at lines 9-10].

Dexter Wray lied when he testified he was not playing poker on the morning of October 23. But moreover, apart from the lie, the circumstantial evidence that he was in fact playing poker – *and doing so while on the clock* – is persuasively convincing. Respondent’s management acted reasonably, and non-discriminatorily, in concluding this to be the case and in taking disciplinary action. The key circumstantial facts are the following:

- One, the laptop was nestled away in a dark, low-use storage room, and was “hidden behind several pieces of furniture . . . out of sight and view from anyone entering either door.” [Exhibit R-29].
- Two, the laptop was open and on, and placed “in front of a soft back chair,” [Id.], making it obvious the laptop owner wasn’t simply storing the device, or using it for quick and casual searches. It was apparent the laptop’s owner had been engaged in a full session.
- Three, the laptop was discovered at “approximately 9 am,” as stated by Mr. Ardis in his statement to Mr. Emmsley. [Id.]. This reported time of discovery is consistent

with the video camera observations reported by Mr. Emmsley, showing that Ardis entered the shop at 8:50 through the main door, and showing Wray *exiting* through the wood shop/storage room door, where the laptop was sitting, at 8:54 (as described in further detail, below, with reference to **Exhibit R-36**).

- Four, the laptop screen was lit, which is *inconsistent* with Mr. Wray’s denial – at the time, and in his testimony – that he was no longer using the laptop for any reason after 7 am. Administrative notice can be taken of the common observation that laptops and other computers, if left on and open, typically don’t stay lit if unattended for a two-hour period (i.e., from 7 am until Ardis’s discovery at “approximately 9 am”). Most computers have energy-saving features that cause the screens, when not in use, to go dark after a certain period, and certainly within a two-hour period. As noted below, Mr. Wray exited the wood shop/storage room at 8:54, where the laptop was located, just prior to Mr. Ardis’s discovery of the on-and-open laptop at “approximately 9 am.”
- Five, the laptop was open to the poker website, as shown in the photos Mr. Ardis took, **Exhibits R-4** and **R-5**, and Wray was logged into the site with his user name, DEW1961. [Id., p. admitting this was his log-in name].
- Six, additional observations from the time-notated video cameras, [**Exhibit R-36**], supported the reasonable conclusion that Wray was playing poker while on the clock:
  - Mr. Emmsley started viewing the video playback at the point where the time-notation read “6:00” am. He used the playback mechanism in the fast-forward mode (he couldn’t recall the exact speed, but testified it was more in the range of 2x or 3x, not 10x), and then slowed down to real time when he observed significant activity, such as Wray’s entries and exits, and made

note of the times shown on the screens. [Vol. XVII, pp. 2858-59 and 2913, 2933-36].

- Mr. Wray did not enter the engineering office area at any time after 6 am, until he was observed entering the main door at 6:58 am. This time of entry is consistent with Wray's scheduled shift-starting time of 7 am.
- Mr. Emmsley did not see any other movement into or out of the engineering offices until 8:02 am, when he observed Wray departing through the wood shop door, where the laptop was located.
- Mr. Wray re-entered through the pump/mechanical room at 8:17 am.
- Mr. Wray then exited 15 minutes later, at 8:32 am, once again through the storage room door where the laptop was hidden.
- At 8:38, Wray re-entered through the main door.
- At 8:50, Faren Ardis entered main door.
- At 8:54, Wray exited, once again, through the wood shop door where the laptop was hidden.

Wray's observed entries and exits establish that he did not enter the engineering area until 6:58 am, and remained inside until 8:02 am, a period of a little over one hour while he was on the clock. Based on all of the circumstantial evidence outlined above, it was readily apparent to Respondent's management that Wray had been in the wood shop/storage room during that time, playing online poker.

Counsel for the General Counsel tried to suggest, in one line of questioning on cross-examination of Mr. Emmsley, that Mr. Wray could have ended his laptop session and departed the wood shop/storage room at 7 am – consistent with Wray's testimony – by traveling through the interior doors and then exiting through the second door from the mechanical/pump room, which opens into the *cul-de-sac* hallway, without being observed by either of the main-hallway cameras. First, Mr. Wray did not testify to ever exiting

through that door. Moreover, it is highly unlikely that he did, or would, exit through that door. There are two reasons for this:

- One, as Mr. Emmsley explained, the engineering crew has no reason to enter or work in the pump/mechanical room, with the exception of entering once-a-day on the first shift to read the water gauges. [Vol. XVII, pp. 2915-16 and 2929-30]. Mr. Wray, in fact, testified that he performed this task that morning. [Vol. II, p. 333]. Consistent with that testimony, Mr. Wray was observed entering the pump/mechanical room, at 8:17 am, as noted above. However, he entered that room through the *main hallway door*, as observed by the camera, *not* through the interior door from the main shop room. Having thus performed this once-a-day task, there would be no reason for him to *re-enter* or travel through that room ... particularly in view of the next reason given here.
- Two, in addition to the minimal need to enter this room, there is little reason that anyone, after having entered, would then exit through the second door into the *cul-de-sac* hallway. That short hallway simply leads to a door opening into the landing of the building-exterior stairwell. When asked how often that stairwell is used, Mr. Emmsley testified: “I hardly see, you know, people going into that stairwell. [Vol. XVII, p. 2930].

\* \* \* \* \*

Mr. Wray’s was discharged for having three disciplinary write-ups in a six month period, and in view of the seriousness of the final write-up for playing poker on his laptop when he was supposed to be on the job. Mr. Emmsley concluded that not to discharge

would set a bad example, and also, given Mr. Ardis' knowledge and involvement, which made the hotel and his department look bad to their corporate superior. [Vol. XVII, p. 2880].

In the final disciplinary meeting, Wray said he was being set up by Emmsley, who responded: "And I said, okay, how can I set you up when ... it's your laptop." [Vol. XVII, p. 2867]. Ms. Fullenkamp approved the final discipline and termination. [p. 2623 and 2867]. Mr. Emmsely testified further: "I did not believe him. Why? "Because it was open on a poker site. If you're on a poker site" the only reason to do that "is [to] play." [Id., p. 2868].

### **III. Ed Emmsley did not Coerce Dexter Wray Regarding His Testimony in *Remington I***

Paragraph 14 of the Third Amended Complaint alleges that Ed Emmsely "coerced an employee regarding testimony at an NLRB hearing." The employee in question is Dexter Wray, and the reference to an "NLRB hearing" is to *Remington I*.

Dexter Wray is a liar, as shown in the immediately preceding section of this brief. Ed Emmsley denies that he spoke to Mr. Wray concerning his testimony. [Vol. XVII, p. 2879]. Mr. Wray's asserts that Emmsley said to him: "if – if – if I was to sign the decert form he would get rid of the [discipline regarding the fountain overflow]." [Vol. II, p.377]. This assertion is simply not credible. As Mr. Emmsley explained, he has "no control of that." [Id., p. 2880]. This explanation is corroborated by the fact that all disciplinary write ups contained in this record require the signature not only of the manager initiating the discipline (in the case of the water fountain discipline, Ed Emmsley), but also the signature and approval of the general manager and human

resources director. It is simply not credible, in light of that fact, that Mr. Emmsley would say this.

At the end of the day, only two witnesses testified to this issue – Emmsley and Wray. As Winston Churchill said, “It takes two to lie. One to lie and one to listen.” In this case, the “one to listen” is this ALJ. This ALJ should not listen to Mr. Wray’s lies.

#### **IV. The Charge that Elda Buezo Was Discharged in Violation of 8(a)(1) and (3) Should Be Dismissed Because She Voluntarily Resigned**

Elda Buezo testified she made a sudden, emergency decision on May 19, 2011 to leave for Montana to join her long-time boyfriend whose mother was in the final stages of an illness. She testified she called and left a voice mail message late that evening with the housekeeping department and human resources, advising of the emergency, and that she would be gone starting on May 20, and returning May 31. [Vol. IV, p. 585-87].

Shortly after her return to Anchorage, she spoke by telephone with Human Resources Director Jamie Fullenkamp. She claims Fullenkamp asserted she left on May 19 without advising the hotel. [*Id.*, p. 592]. Ms. Fullenkamp, however, squarely acknowledged in her testimony to having received Buezo’s May 19 voice mail. [Vol. XVI, p. 2559]. In the context of the full record of evidence on this issue, reviewed below, Ms. Buezo’s claim that Fullenkamp denied receipt of the voice mail is simply not credible.

Buezo attempted also to suggest that Fullenkamp took issue in this phone conversation regarding justification for the leave related to the fact she and her long-term boyfriend were not married. [Vol. IV., p. 593]. Fullenkamp was quite clear in her testimony, though, that this was a non-issue. [Vol. XVI, pp. 2565-67 (testifying: “It’s

common knowledge that she's been with her guy for years and years and years . . . almost like common law marriage, as long as they've been together"; and then, in response to the question of "what impact, if any" did the fact of their non-married state have on the issue of "whether to grant leave or not," she testified: "None. Zero. Absolutely nothing.")]]. Once again, in light of the totality of the testimony – including the facts, discussed below, showing that lengthy non-paid leaves are commonplace at the hotel, given the remoteness of Anchorage, and that most employees hail from outside the United States or from the Lower 48 -- there is no reason to accept Buezo's claim that Fullenkamp communicated in any way, shape or form that she deemed the May 20 to 30 leave as illegitimate, based on the fact the "boyfriend's" mother was not a legally recognized in-law.

Buezo testified she spoke again with Fullenkamp, later that same day – this time, placing the call from the Union's office, with Marvin Jones and Ana Rodriguez listening in on a speaker phone. [Id., p. 594 and 598]. There were in fact several such calls made from the Union hall with Mr. Jones and Ms. Rodriguez listened in, according to Buezo. [Id.]. Although both Jones and Rodriguez testified in this case, *neither of them offered any testimony whatsoever corroborating Ms. Buezo's versions of what was said in these calls between her and Fullenkamp.*

With regard to the second phone call (*i.e.*, the first call from the Union hall), Ms. Buezo was asked by counsel to describe what she said to Fullenkamp. She replied (in English): "I want to know why – that I had a right to know what is the meet . . . why was the reason she want to meet." [Id., p. 594]. Ms. Buezo, however, did not testify – on direct examination – to the answer Ms. Fullenkamp gave to her question. Ms.

Fullenkamp, for her part, did testify to “the reason” she gave Buezo for the meeting: “I wanted the proof of funeral leave,” and “we setup a meeting to talk about her paperwork [*i.e.*, the standard, required leave request/approval form, with which Buezo was familiar from previous leaves she had taken; discussed below].” [Vol. XVI, pp. 2560-61]. A meeting at the hotel was scheduled during this call. [Id., p. 595].

On Ms. Buezo’s cross-examination, she denied that Fullenkamp informed her she wanted to meet to fill out the leave paperwork for the May 20 - 30 leave. [Vol. V, pp. 702-04]. According to Buezo, Fullenkamp spoke only about the failure to fill out the leave paperwork before going on leave. [Vol. IV, p. 595]. Jones and Rodriguez, however, did not corroborate Buezo’s testimony, when they testified. The plain inference must be drawn that they were unable to do so consistent with the truth.

Following the second phone conference, Ms. Buezo called Fullenkamp and left a voice mail cancelling the meeting, for unidentified personal reasons. [Id., p. 597]. Ms. Fullenkamp continued to pursue a meeting with Buezo, though. [Id., p.598 (Buezo admits Fullenkamp initiated a call to her after receipt of the voice mail, asking her to “call me back so we can schedule our meeting”)]. A third phone call was then held, once again with Jones and Rodriguez listening in from the Union hall (but once again without corroborating what they heard). Ms. Fullenkamp testified that she said she wanted to meet because she needed the leave request/approval form. [Vol. XVI, pp. 2562-63]. A meeting was set during this call for “the second week of June.” [Id., pp. 598-600, and Id.].

However, Buezo once again cancelled, via voice mail. [Id., p. 601]. And, once again, Ms. Fullenkamp pursued her for a meeting. Buezo testified Fullenkamp left a

voice mail, stating “we can do it by phone. Call me.” [Id.]. This was then followed by another call from the Union hall. This time, an individual by the name of “Matt” listened in. [Id., pp. 601-02]. This individual – evidently a union employee – *failed to testify and corroborate Ms. Buezo’s version of the call*, similar to the failure of Jones and Rodriguez to corroborate the two calls they listened in on. Ms. Buezo testified she said to Fullenkamp in this call, “Jamie, this is Elda, I’m returning your call,” and then gave two slightly different versions (prompted by this ALJ’s request, for clarification) of what Fullenkamp said:

- Version 1: “And then she say – say hi, Elda. So since you – since – since you cannot come to meet me you resign yourself.” [Id., p. 602, lines 12-14 (emphasis added)].
- Version 2: “Since we cannot meet – you resign yourself.” [Id., line 23 (emphasis added)].

Ms. Buezo’s first language is Spanish, and she used an interpreter throughout most of her testimony. However, she was testifying in English at this point, as she was describing what Fullenkamp had said to her in English. Ms. Buezo’s command of her second language is, of course, not perfect. Nonetheless, the description she gave is quite close to and descriptive of what was actually said during this call, as shown by Ms. Fullenkamp’s testimony, reviewed immediately below.

First, though, Ms. Buezo’s use of the word “since” should be noted. She uses this adverb to connect the two events referred to in her statement:

- Event 1: “you cannot come to meet me” (version 1) or ”we cannot meet” (version 2).

- Event 2: "you resign yourself"

Buezo was plainly expressing the fact that she understood Fullenkamp was attributing event 2 to event 1. That is, the event "you resign yourself" was attributed to, or evident from – was "since" -- the fact that "you" (Buezo) "cannot come to meet." Or, as in version 2, the fact that "we" (Buezo and Fullenkamp) "cannot meet." There does not appear, however, to be any significance in the variant uses of "you" in version 1 and "we" in version 2. Version 1, though – the first words out of her mouth in the hearing – is the more accurate version, given the undisputed fact it was Buezo who cancelled both meetings. [Vol. V, p. 704, lines 8-11 (Buezo)]. As for the use of "we" in the second version, this would normally suggest the presence of an external circumstance or reason preventing both of them from meeting. However, there is nothing in the record that suggests anything like this (both were physically present in Anchorage at the time).

As for the imperfect-English phrase "you resign yourself," no deconstruction is necessary. It is evident she was testifying that Fullenkamp was acknowledging Buezo's volitional act of resigning ... which is exactly how Fullenkamp testified.

Ms. Fullenkamp testified, consistent with Buezo's testimony, that after the first cancellation "[w]e rescheduled another meeting. And then she cancelled that one also." [Vol. XVI, p. 2562]. Ms. Fullenkamp then testified, with respect to the final phone conversation:

Q. Why were you trying to reach her?

A. To get the paperwork.

Q. Okay. Did she ever come into the hotel?

A. No.

Q. Did you -- what did you say to her when you were able to speak with her?

A. I just said, Elda, I definitely need the paperwork. And she said well I'm not coming in. And I said, Elda, we have to get the paperwork put together. And she says I'm not coming in. And I just said then I'm taking it that you resigned.

[Id., pp. 2562-63]

At the end of the day, Ms. Buezo admitted she cancelled two meetings, she refused to meet, and admitted – consistent with Ms. Fullenkamp – that she was told, “I’m taking it that you resigned.” It is also telling that Ms. Buezo, when asked, “And what did you say” after being told “you resigned yourself,” testified that she stated to Fullenkamp: “Okay. Okay, that’s okay.” [Id., p. 602, line 16]. This is the precisely the type of remark one would expect from someone who, in fact, wanted to resign, and is not what one would expect from someone who had been involuntarily discharged in violation of their rights.

Buezo gave the following explanation for refusing to meet, and for cancelling the second meeting

[B]ecause I – I knew that they were going to – what’s that word, take my job because some of the other – there were other co-workers that have gone through that and it was very humiliating and I didn’t want to go through that humiliation. I knew that they were going to give me a write-up.

[Id., p. 600]. When asked “what other co-workers are you talking about,” she stated the “only one I remember” is Yanira Escalante. [Id., p. 601]. The termination of that individual, however, was unrelated to the hotel’s policies and practices related to leave rights. *See*, record testimony relating to Escalante discharge. Moreover, though, Ms. Buezo gave no other testimony concerning anything Ms. Fullenkamp said during any of the phone conversations that would have supported this belief, and neither did Jones,

Rodriguez or “Matt.” To the contrary, it is evident – just considering Buezo’s testimony on its own – that all Fullenkamp was seeking to do was to meet with her. She was merely speculating, without basis, that she would be either written up or fired – and, it’s not clear from her quoted testimony, above, which of these outcomes she was speculating would happen, a discharge or a write-up.

Ms. Fullenkamp testified credibly that she wanted to meet simply “to get the [leave] paperwork,” as quoted above, and she testified further to the leave procedures followed by the hotel. Ms. Fullenkamp also testified that the funeral program Ms. Buezo produced – for the first – during her direct examination, **GC-49**, would have been acceptable documentation of a death in the family warranting the leave. [Vol. XVI, p. 2568]. Ms. Buezo, however, never provided this to Fullenkamp. [Vol. V, p. 702].

The hotel has a variety of leaves – FMLA, vacation, funeral, etc. – including what Ms. Fullenkamp referred to as “just a plain leave of absence,” which she described as being available “when you use all your vacation hours and [the employee] wants to stay longer, an extended [leave] without pay.” [Vol. XVI, p. 2531]. This type of leave is common and is regularly used in the hotel, reflective of the facts that “most” employees have home countries outside the United States, and the fact that distances when flying out of Alaska (even if only to the Lower 48) are substantial. [Id., p. 2539]. On the day Ms. Fullenkamp testified, she noted, “I have six [employees] right now” out of the country on leave. [Id.].

There are standardized procedures relating to the various leaves, including the following from page 33 of the collective bargaining agreement, [**Exhibit GC-2**], relating to an extended leave without pay:

Section 1. A leave of absence is an excused absence from work for a specified period of time. A leave of absence will only be granted after consideration has been given to reason for absence, performance record, length of service, the business level of the company during the requested leave and for Employees with one (1) year continuous service. A leave of absence can be requested to a maximum of ninety (90) days, per Employer's standard procedure. The Employer reserves the right to deny a request for a leave of absence for the purpose of working elsewhere. If an Employee fails to return to work upon completion of their leave of absence, they will be deemed to have abandoned their employment with Employer.

Section 2. The Employee must request the leave of absence from their executive committee member. Upon approval of the leave, the Employee must go to Human Resources to complete a leave of absence form (as shown in Exhibit "B"). The Employee must then get their executive committee member's signature and return the form to Human Resources.

As provided in this section of the CBA, this discretionary leave requires execution of a specific, identified leave of absence form, and leave must be approved by an "executive committee member" (department head) and human resources. An example of the form referenced in this section is in the record as **Exhibit R-18**, and shows on its face that signature-approval is also required by the general manager. [*Id.*, p. 2541; *see also*, **Exhibits 13(c) and (d)**, leave of absence request/approval forms completed by Danny Rana, Vol., pp. 2417-42].<sup>11</sup> Although this form was changed following July 2010 – *see, e.g.*, **Exhibits R-16 and R-17** – Ms. Fullenkamp testified the procedure remained the same. [*Id.*, pp. 2541-43]. There is no testimony, and there are no charge allegations, to the contrary. It will be noted that all of these forms, pre- and post-July 2010, require the same sets of signatures: the employee, department head, human resources, and general manager. It will be noted also the hotel actually continued to use the CBA form, at least some of the time – **Exhibit R-18** was filled and signed by Elda Buezo on October 6,

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<sup>11</sup> The copy of collective bargaining agreement entered in evidence, **Exhibit GC-2**, was offered in by counsel for the General Counsel. That copy is missing the referenced form. Ms. Fullenkamp, at p. 2541, however, identified **Exhibit R-18** as the form that was in fact attached to and referenced in the CBA.

2010.

**Exhibits R-16, R-17, R-18 and R-19** are all leave of absence forms filled out by Elda Buezo, establishing the fact she was personally knowledgeable of the required procedure. [*Id.*, pp. 2534-52]. **Exhibit R-16** is a jury leave form, and has an attached jury-duty notice bearing her name. **Exhibit R-17** is a request made in November 2010 by Buezo for an *unpaid* (or “plain”) leave of absence she wanted to take from March 14 through 21, 2011. This leave was granted, as reflected by the signatures thereon. Ms. Fullenkamp testified that vacation time/pay must be used up before an employee can take plain/unpaid leave. [*Id.*, pp. 2537-38]. **Exhibit R-18** is another request by Buezo for unpaid leave, executed on October 6, 2010 for a one-day leave to attend some type of training on October 25, 2010.

And finally, **Exhibit R-19**, which consists of two pages of the same form, was executed by Buezo on April 29, 2011 for a paid vacation to run from May 9 to 27, 2011 (and returning May 30), as shown on the *second* page of this exhibit. [*Id.*, pp.2547-54]. These particular vacation days were in fact not taken; instead, as Ms. Fullenkamp testified from these business records <sup>12</sup>, and as reflected on the *first* page of this exhibit filled out by then-director of housekeeping Eduardo Canas, Buezo took vacation from April 25 through May 6, 2011. [*Id.*]. Of particular significance to the 8(a)(3) charge at issue here is the fact that *this leave was granted retroactively*. As Ms. Fullenkamp explained, testifying from these business records: “Elda [Buezo] was already gone,” on vacation, as of the date the vacation time shown on the first page was approved (May 6, as shown by the approval signatures). [*Id.*, pp. 2550]. She surmised from this business

record that Buezo had called in to either her or to Canas, and that Canas (whose handwriting and signature she recognized) “revised her vacation,” and testified also that the notation in the top left corner was by hotel paymaster Cheri Adams, reflecting approval of the noted 78.06 hours of vacation pay. [Id., p. 2550].<sup>13</sup> Because this vacation leave was taken starting on April 25, but approved on May 6, Ms. Fullenkamp agreed with the observation made by this ALJ that, in fact, it appears Ms. Buezo was granted a leave after the leave had begun or was completed. [Id. pp. 2553-54].

Retroactive grants of leave are not at all uncommon. Ms. Fullenkamp testified to several incidents she could recall, including several leaves granted to banquet server (and union-advocate/witness) Fay Gavin, whose husband suffered a long illness, necessitating visits by Gavin to the town of Soldatna, and that “sometimes when she was down there, she had to stay or extend her LOA.” [Id., pp. 2555-57]. In addition, she recounted an employee named David Massey, whose own illness sometimes caused him to take leave without obtaining advance approval, [Id., pp. 2554-55], and an employee named Mida Vargus, who – like Buezo – had a dying relative, and “left pretty quickly also.” [Id., pp. 2557-58]. All three of these employees received post-leave approvals. Ms. Fullenkamp testified also that she herself took a sudden leave – “My father went in the hospital and I flew out that night” – and that she subsequently filled out her own leave request/approval forms, testifying: “Everybody gets treated the same. We all have to fill out the same paperwork.” [Id., 2558].

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<sup>12</sup> See, pp.2546, identifying all four of these exhibits as business records maintained in the ordinary course of business, for purposes of the “business records” exception to the hearsay rule.

<sup>13</sup> Fullenkamp noted there was no signature by the general manager, Denis Artilles at the time, and surmised that “Denis never signed off on it, probably because he wasn’t there at the time.” [Id., pp. 2550-51].

Counsel for the General Counsel will likely argue, based on an email exchange on June 6, 2011 between Fullenkamp and a corporate human resources representative, [Exhibit GC-131], that the decision to terminate had already been made as of that date. This document, though, does not support that conclusion, and is plainly an incomplete record of the exchange between them (objection was made on this basis, but overruled [Vol. XVII, p. 2752]). In the first email, Fullenkamp asks: “I can term her on this Nancy? Correct?” However, nowhere in this document or in the record is a copy of an obviously email communication, enabling the reader of this record to understand what Ms. Fullenkamp was referring to by her use of the word “this.” What “this” likely referred to, in view of Ms. Fullenkamp’s testimony, is that she had informed the corporate representative that she was having difficulty getting Buezo to come into the hotel and fill out the usual leave request/approval paperwork, and the issue was what happens if she fails to show up and perform this obligation. The corporate representative responded: “Yes, tell her that by failing to show up – that we consider that she has voluntarily resigned her position. We are not terming her – she resigned.”

It is undisputed, as shown above, that Fullenkamp continued to pursue and speak with Buezo *after* June 6 and, as shown also, the more credible testimony and evidence is that Fullenkamp was asking her, after June 6, to simply come in and provide the usual request/approval form for leave. Ms. Fullenkamp identified **Exhibit R-21** as a manila folder from Ms. Buezo’s personnel file (the original was in the courtroom, and a copy was made for the record), upon which she maintained a hand-written log of her communications with Buezo, along with the dates of those communications. [Vol. XVI, pp. 2573-82 (testifying further that it was her habit and custom to maintain notes on

communications in this manner)] There was also a Post-it Note with Buezo's telephone number stuck on the folder side where the log was written and maintained. Consistent with her testimony, the contemporaneous dated entries on **Exhibit R-21** in fact show that Ms. Fullenkamp continued to pursue and speak with Ms. Buezo, on June 7 and 14 and 15. The first June 14 entry contains the notation that "Elda called @ 6:30 AM CXL meeting said she was busy." (Fullenkamp testified "CXL" meant "cancelled" [*Id.*, p. 2579-80]). This would have been the third cancellation. [Vol. V, p. 704 (Buezo admits she cancelled three times)]. The next entry reflects Fullenkamp "called Elda left mess. to call me & meet w/ me." Two more messages were left after that, and they finally spoke on June 15. Fullenkamp's entry reads: "Elda called. Told her since she didn't follow procedure & fill out correct paperwork I considered her as she resigned."

Ms. Fullenkamp affirmatively testified:

Q. After June 6 what were you looking for from Ms. Buezo?

A. I wanted to get the paperwork.

Q. Of you had gotten the paperwork what action would you have taken?

A. I would have recommended her not to be terminated.

[Vol. XVII, p. 2757; *see also*, Vol. XVI, p. 2581 (Fullenkamp testified Buezo would not have received any discipline if she had filled out the paperwork and provided the funeral program, **Exhibit GC-49**)].

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Based upon the evidence shown above, Ms. Buezo voluntarily resigned. The 8(a)(3) charge must be dismissed.

**V. The 8(a)(3) Charge on Behalf of Elda Buezo Related to the Alleged Reduction of Her Hours Must be Dismissed Because She had No Rights Under the Expired CBA to Her Unique Five-Hour Schedule.**

Elda Buezo's schedule in the housekeeping department was for only five hours a day, from 7 am to 12 noon, Monday to Friday. [Vol. III, p. 499 (Buezo)]. This was a unique schedule, unlike any other employee in the housekeeping department. [Vol. XVI, pp. 2526-27 (Fullenkamp); Vol. XVII, pp. 2738-39 and 2753-54 (Fullenkamp)].

The Third Amended Complaint charges, at paragraph 25 (a) & (b), that starting April 15, 2011 her schedule was "changed" from "regular part time" to "on call," and that her hours were reduced. This is not an accurate statement of what happened to Ms. Buezo's schedule. First, as shown elsewhere this brief, above, seniority was never abandoned in the housekeeping department. Second, as the evidence outlined just below shows, Respondent's management acted -- within its power under the management rights provision in the CBA -- to discontinue the maintenance of a five-hour schedule, but offered Ms. Buezo the opportunity to work an eight-hour schedule, in which event she would not have lost her seniority. She declined this opportunity, however, and consequently was scheduled only when a five-hour shift was needed.

Ms. Buezo testified to conversations around April 15, 2011 with then-housekeeping director Yolanda Hannah and with then-human resources director Jamie Fullenkamp. Both informed her of the discontinuance of the five-hour shift as a regularly operated shift, and advised they needed her to work an eight-hour shift, and offered her that opportunity. [Vol. IV, p. 570, lines 13-15, 577, lines 20-22, and 578, lines 9 and 14-15]. The housekeeping department is scheduled on a daily, not weekly, basis, as reflected and stated in the collective bargaining agreement [*see, e.g.*, Article XIX, section 1,

**Exhibit GC-2].** Ms. Fullenkamp (who has been in the hotel over 30 years, and currently manages the housekeeping department) explained the dynamics of scheduling in the housekeeping department, which is determined by the number of occupied rooms that require cleaning – a number that fluctuates significantly on a day-to-day basis; hence the daily scheduling regime – and explained in that connection the difficulty of scheduling a lone employee for a five-hour shift. [Vol XVI, pp. 2527-29 and Vol. XVII, pp. 2753-54]. It was for these reasons related to the efficiency and orderly effectiveness of housekeeping operations, with a schedule that must be juggled on a daily basis, that the decision was made to discontinue the five-hour shift.

This charge is based on an alleged violation of Ms. Buezo’s seniority rights under the expired collective bargaining agreement [**Exhibit GC-2**]. Ms. Buezo did have high seniority. The seniority provision within the expired CBA, at Article XIV, section 1, provides in material part that “*seniority shall be the controlling consideration in determining shift changes, shift assignments, days off . . . [and] hours of work.*” This provision must be read together with the managements rights provion, at Article I, section 6, which in its entirety reads:

Section 6. The Union agrees that all Employer rights and functions to manage and operate the Employer’s business, except those which are expressly limited in this Agreement, shall remain vested exclusively in the Employer, including but not limited to the rights to determine the work to be done by Employees covered by this Agreement; to establish and require standards of performance; to direct Employees; to determine job to determine the methods, process and means of performing any and all work; to control the property and composition, assignment, direction and determination of the size of operations, methods, means, services, products or facilities; assignments and schedules; to extend, limit, contract out or curtail the whole or any part of its operation; to require reasonable overtime work of Employees; to promulgate and enforce rules, regulations and personnel policies and procedures; to hire, schedule, promote, transfer, release and layoff Employees; and the right to suspend, demote, discipline

and discharge Employees for cause and otherwise to maintain an orderly, effective and efficient operation.

Taken together, the following conclusions are compelled with respect to Ms. Buezo's charge in paragraph 25 (a) & (b) of the Third Amended Complaint. First, under the management rights provision, management retains the fundamental "rights and functions to manage and operate the Employer's business, except those [rights and functions] which are expressly limited in this Agreement." In addition, the following listed rights and functions, among others, are "vested exclusively in the Employer, including but not limited to the rights . . . to determine job assignments *and schedules* . . . to hire, [and] *schedule* . . . Employees . . . and otherwise to maintain an *orderly, effective and efficient operation*." (emphasis added). Given the broadness of this language, including the expression of fundamental right to operate the business in an orderly, effective and efficient manner, the seniority provision – as it impacts scheduling -- does not limit the management from, in the first instance, of determining which schedules will be worked and how the schedules will be structured. While the seniority provision determines the right of an employee, by seniority, to work a specific shift once it has been established in the schedule, the employee does not have the right to create or maintain a unique schedule of his or her own choosing. The shifts, the number of shifts, when they will be scheduled, and by how many employees (working the available hours management determines), is a right and function plainly reserved to management. Stated differently, applying the language used in the seniority provision: While that provision grants rights of seniority to individual preferences in changing shifts ("shift changes"), and as to which shift one receives ("shift assignments"), management determines in the first instance what shifts will be scheduled, and when.

The seniority provision also grants rights of seniority relating to preferences as to “days off” and “hours of work.” Once again, the “rights and functions” of the management right to establish the schedule empowers management to determine what days off will be permitted, and what hours will be worked, except as “expressly limited” elsewhere in the CBA. With respect to limitations regarding “days off,” Article XVII, section 3 mandates rules maximizing a right to receive two consecutive days off in a workweek. Otherwise, management retains a free hand to determine scheduling, and where the days off will land. Seniority comes into play only with respect to selection of the days off management makes available. Similarly, with respect to limitations regarding “hours of work,” the expired CBA defines the “workday,” in Article XVII, section 2, as “eight (8) consecutive hours,” and similarly defines, in Article XXI, section 1, the term “full time shift” as a “shift of eight (8) consecutive hours.” Section 9 in the same Article XXI, however, provides as follows:

Section 9. Nothing in this Article or in any other Article of this Agreement constitutes a guaranty of any number of hours of work per day or per week to any Employee covered by this Agreement, unless specifically expressed in this Agreement.

While Article XXI also identifies the existence of “short shifts” in section 2 (a shift of less than eight (8) hours but no less than three (3)), and while the Definitions in Article II define a “non-full time employee” as one hired to work less than forty (40) hours in a workweek, the above-quoted section 9 in Article XXI makes it plain that no employee has any guaranty of “*any number of hours of work per day or per week.*” The determination of the hours needed, and when those hours should be scheduled resides solely with management. No employee has a contractual right or a seniority right to work

a short shift or a non-full time schedule. Employees have only the seniority right to select from the shifts made available in the schedule.

After April 15, 2011, the five-hour shift that Ms. Buezo had been working was discontinued. Management was within its right to do so under the terms of the CBA quoted and analyzed above, and had no obligation to meet and confer with Local 878 in doing so. The 8(a)(3) charge set forth in paragraph 25 (a) & ( b) must therefore be dismissed.

#### **VI. Yanira Medrano Was Discharged For a Legitimate, Non-Discriminatory Reason**

Yanira Medrano was discharged after the discovery of an extensive amount of hotel property in her locker, including a large container of a cleaning fluid which apparently had been sitting in the locker for an extensive period of time. The chemical had leaked out of the locker and damaged the base, such that the initial witness observing the leakage thought there was blood on the floor.

Counsel for the General Counsel paraded several housekeeping employees who testified it was commonplace to keep certain items and materials in their locker, based on convenience. Ms. Medrano's conduct, however, was entirely different. Jamie Fullenkamp, the current Director of Housekeeping, was the Human Resources Director for 22 years, until April 2012. During those 22 years, she performed inspections of all lockers, men and women, on an approximately quarterly basis.<sup>14</sup> The inspections were always unannounced, and all of the approximately 200 lockers were inspected each time. The combination of each locker is contained in a "combination book" Ms. Fullenkamp

maintained in her office. [Vol. XVI, pp. 2627 – 32]. Given these numbers, and assuming 3.5 inspections per year (or, 700 lockers) for 22 years, Ms. Fullenkamp has conducted an estimated 15,400 locker inspections at the Sheraton Anchorage (22 x 700 = 15,400). For purposes of this discussion, the number will be rounded down to 15,000.

The discovery of what had been contained in Ms. Medrano’s locker, however, did not occur during a routine inspection. It was discovered after an employee reported “blood coming out of the locker.” [Id., p. 2633, ll. 15-22]. Ms. Fullenkamp testified she observed the “blood” and “went back to my office and got the . . . combination book and opened the locker,” with a witness. [Id., p. 2634]. She then testified:

Q. Okay. Now you’ve opened 15,000 lockers. Was – when you opened Ms. Yanira Medrano Escalante’s locker was there anything unusual?

A. Yeah. It was crammed full of stuff like shower curtains, bath towels, sponges, a big bottle of chemical, which was causing the red stuff. It was rusting out at the bottom and it rusted the locker base. And it was just starting to drip out. So it had to be in there for a period of time.

Q. Okay.

A. There was a lot of stuff in there.

Q. With the background of having inspected 15 – or opened 15,000 lockers, had you ever seen a locker with that much stuff in it?

A. Not hotel stuff.

Q. Okay. And when you say hotel stuff what are you referring to?

A. Things that the hotel provides to clean a room or owns, such as alarm clocks or bath towels or shower curtains or shower hangers or hooks.

Q. Had you ever – I mean out of 15,000 lockers, had you ever encountered hotel property on any occasion?

A. Well, the housekeepers have a – it’s called a – you know, one of the cloth bags

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<sup>14</sup> She explained the routine need for the inspections was to search for uniforms, and explained why this was the case. [Vol. XVI, p. 2630-31].

that you might load your groceries up in. And they are allowed to carry like their rags and stuff in there. And they hang it in their locker. That is okay to do, because they take it to their work station the next day.

[*Id.*, pp. 2634 – 35]. Ms. Fullenkamp then explained that it was “okay” to store in their lockers their “personal[ly] given” items, like “orange gloves and sponges and containers to hold the sponge in.” In other words, as she described: “cleaning item[s] that you wouldn’t want anybody else to touch or use,” and also “[b]ecause they’ll be throwaways eventually and the other things [i.e., non-permitted items for locker storage] are not throwaways.” [*Id.*, pp. 2635 – 36].

She testified further that the chemical in Medrano’s locker was not contained in a smaller, portable container, such as would be carried by the housekeepers onto the guest-room floors or in their cloth bags, but was in one of the large containers used for supplying the department as a whole. [*See*, **Exhibit GC-56** (photo of the large bottle that at one point was observed in the courtroom); *Id.*, pp. 2637 – 39]. Ms. Fullenkamp testified further:

Q. . . . you have opened 15,000 lockers. Have you ever seen that much chemical in anyone’s locker?

A. No.

Q. Did the – was there actually blood in the locker?

A. No.

Q. What was it that looked like blood that prompted this?

A. I think it was the combination of the chemical spilling over and rusting out the bottom of the locker and it just started pouring out the crack at the bottom. But I think it was rust in the end.

Q. Can you think of any legitimate reason why a housekeeper would keep that much chemical in her locker?

A. No.

\* \* \* \* \*

Q. . . . what else did you see in the locker?

A. Shower curtains, towels, liners, hooks, gloves . . .

Q. How many shower curtains?

A. Probably 5 to 6, maybe. I can't recall . . .

\* \* \* \* \*

Q. Can you think of any legitimate reason why there would be so many shower curtains in a locker? Legitimate reason?

A. Only if we were running short. Each maid – each room attendant has her own floor and they want to do certain things in every – one of their guest rooms. And if they are running short, they'll try to hoard things.

Q. In your – in your experience of opening 15,000 lockers, have you ever seen 5 or 6 shower curtains in a locker?

A. No. No.

Q. Anything close to that?

A. No.

[Id., pp. 2639 - 41].

Ms. Medrano's conduct in storing so much hotel property in her locker was highly irregular, and shocking to management. The type and volume of items and materials stored there was unlike any of the locker-storage practices described by the housekeeper witnesses, who stored property simply for convenience's sake in preparing for their daily

duties. Ms. Medrano, by contrast, appeared to be staging hotel property there in relation to an ongoing theft of this property. That was, in fact, the only logical conclusion management could reach. There is simply no other explanation for the highly irregular storage of a large chemical bottle, and for the storage of multiples of items like shower curtains. In addition, the storage of the large chemical bottle resulted in damage to hotel property.

Ms. Medrano was discharged for a legitimate, non-discriminatory reason. The 8(a)(3) charge should be dismissed.

## **VII. The Charges Relating to Surveillance Should be Dismissed.**

### **(a) Rallies and Other Public Events in Front of the Hotel**

During the cross-examination of Marvin Jones, president of the charging-party union, he testified that at one of the rallies in front of the hotel there was a good turnout from the community, and acknowledged that television media had been invited and was in attendance as well. [Vol. XIV, pp. 2375-78]. In addition, videos of one or more of the rallies were posted and placed on the union's website. [Id.]. Jones was asked if he had any concern whether the alleged unlawful surveillance at these rallies would inhibit participation. The question drew an objection *sua sponte* from the ALJ: "I don't care what he thinks. That's a legal conclusion that I'll draw. . . . 8(a)(1)'s an objective standard." [Id., p. 2375].

While true the standard doesn't turn on whether individuals subjectively felt "interfere[d] with, restrain[ed] or coerce[d]" by alleged unlawful surveillance, there is more to the inquiry than mechanical application of an objective standard. It is sufficient that "the employer's conduct 'may reasonably tend to coerce or intimidate' employees in

the exercise of these rights.” U.S. Steel Corp. v. N.L.R.B., 682 F.2d 98, 101 (3d Cir. 1982) (citations omitted). However, as the Third Circuit went on to emphasize, in refusing to enforce the Board’s finding of unlawful surveillance in U.S. Steel: “The Board failed to recognize, however, that it is a reasonable tendency *under the circumstances* which governs the inquiry *in each case*.” Id. (emphasis added). It is, accordingly, most appropriate to weigh – among the circumstances – whether the participants themselves felt or believed that their concerted activities were in any manner interfered with, or that they felt or believed themselves threatened or coerced. These expressions of subjective belief, in tandem with the entire range of facts making up the “circumstances” attendant to a particular event in which unlawful surveillance is alleged to have occurred, must be taken into account. Testimony regarding subjective beliefs or feelings reflects the circumstances at hand. If testimony by participants fails to support the notion that they perceived themselves to have been coerced or restrained, it is probably because the circumstances – objectively assessed, and taken as a whole – in fact do not point to the presence of conduct that “reasonably tends to coerce or intimidate.”

In short, while “it is not essential to . . . [find] that the employer’s conduct *actually* ‘interfere with, restrain, or coerce employees’ in the exercise of protected rights,” nonetheless, that does not mean that an inquiry into *whether* there was “actual” interference, restraint and coercion is irrelevant. U.S. Steel, 682 F2d at 101 (emphasis added). Such an inquiry is essential to a complete examination of “the factual setting.” Id. (“Consequently, the Board did not examine the factual setting of this case in reaching its conclusion that petitioner’s surveillance was unlawful”). See also, NLRB v. Computed Time Corp., 587 F2d 790 (5<sup>th</sup> Cir., 1979) (rejecting a ‘per se’ rule, and holding

that surveillance by itself does not violate the Act); NLRB v. Intertherm Inc., 596 F2d 267 (8<sup>th</sup> Cir., 1979) (accord); NLRB v. Colonial Haven Nursing Home, 542 F2d691 (7<sup>th</sup> Cir., 1976) (accord); NLRB v. Associated Naval Arch., 355 F2d 788 (4<sup>th</sup> Cir., 1966); Berton Kirschner, Inc., 209 NLRB 1081 (1974) (based on the circumstances of the case, surveillance did not violate the Act); Hilton Mobile Homes, 155 NLRB 873 (1965) (same).

This ALJ's objection *sua sponte* to the question of whether Jones had a concern that surveillance would inhibit participation was therefore in error, and it would constitute further error if, in reaching a decision, this ALJ fails to consider the subjective testimony that was elicited and which tended to show – along with all other circumstantial evidence – that the alleged surveillance at the Sheraton Anchorage did not, in fact, “‘reasonably tend to coerce or intimidate’ employees in the exercise of [section 7] rights.” Id. Not a single witness, when testifying to being videotaped, expressed a feeling of concern related to intimidation or coercion; more typically, the witnesses expressed indifference. Further, given the purposefully public and promotional nature of the rallies – *i.e.*, the union's invitation to have the television media present, as well as its posting of videos on its website, and the fact that these rallies were held in front of the hotel – it is evident the union and its members were *not* concerned that it would be known that they had participated in this form of concerted activity, and would not have therefore been threatened or coerced by management representatives taking videos. This evidence, in turn, reflects that the taking of the videos was not of the type that would “‘reasonably tend to coerce or intimidate.” [See also, Vol. III, p. 504 (Buezo, when asked how long she observed the videotaping security guard at one of the rallies, testified: “I

only notice about for – for a minute because *it wasn't very important to me.*” – emphasis added); Vol. X, p. 1686 (Dudek: she wasn't worried or bothered by fact that she was observed in videos shown on television and the union's website); Vol. IX, p. 1434 (Grimes: the public events in front of the hotel were *intended* to attract attention); and Vol. XIV, p. 2201 (Ana Rodriguez: regarding her observation of security at the 'bake sale' event: "I didn't pay attention to – to them")].

Just as the subjective beliefs of the participants are relevant and material, so is the intent and purpose behind the surveillance. “Unlike other forms of violation of Section 8(a)(1), where intention to commit an offense may be irrelevant, a necessary element of illegal surveillance is a conscious intent to keep union activities under observation.” Home Comfort Products Co., 180 NLRB 597, 600 (1970) (presence of management officials in the vicinity of a union meeting did not prove unlawful surveillance where there was no evidence that their intent was to eavesdrop or spy). The rule that intent to unlawfully surveil must be proved follows from the fundamental proposition of Board law that “mere observation of open, public union activity on or near [the employer's] property does not constitute unlawful surveillance.” National Steel and Shipbuilding Co., 324 NLRD 499 (1997), citing to F.W. Woolworth Co., 310 NLRB 1197 (1993). In the present case, of course, all of the rallies occurred in front of the hotel.

While “[p]hotographing and videotaping such activity clearly constitute more than mere observation,” nonetheless, the Board and the courts must still consider the reasons for taking pictures or video, which is to be “*balanced against* the tendency of that conduct to interfere with employees' rights [under section 7].” Id. (emphasis added). Both sides of this balancing fulcrum must be weighed. Certainly, where there is at most

only a low likelihood of a “tendency to interfere,” as shown above in this case, a reasonable purpose behind the taking of pictures or video is sufficient to remove it from the category of unlawful.

“[A]n employer has the right to maintain security measures necessary to the furtherance of its legitimate business objectives,” and pictorial recordings of protected activity, therefore, are permitted if the employer “show[s] that it had a reasonable, objective basis anticipating misconduct.” Kingsbridge Heights Rehab. Care Ctr., 352 NLRB 6, 10 (2008); *see also*, Smithfield Foods, 347 NLRB 1225, 1228 (2006) (after union organizers engaged in repeated instances of trespass by handbillers, the employer’s *redirection* of its security cameras to monitor the union organizers *outside* the facility had a reasonable basis, “in light of the physical proximity of the handbilling to the Respondent’s property and the temporal proximity of the previous trespassing incident”).

Here, the hotel’s chief security office, Ed Emmsley, Sr., testified to “an increase” in 2010 of “vandalism” and other criminal acts involving hotel property, which taken together was strongly suggestive of union involvement (or, involvement of persons sympathetic or supportive of the union). [Vol. XVII, pp. 2872-79]. The ALJ can take administrative notice from the record in *Remington I*, as well as from the record in the present case, that 2010, as well as the latter part of 2009, was when tensions were at their highest with local 878, in the face of the boycott announcement in October 2009, the breakdown in negotiations in March of 2010, the impasse implementation in May of 2010, and the withdrawal of recognition in early July. During that time frame, Mr. Emmsley testified, there were two instances of vandalism to the vehicles of two managers (human resources director Jamie Fullenkamp and head chef Glenn Rydin), in addition to

a break-in to the general manager's office and the theft from that office of a laptop and files from a cabinet labeled "Union." The door to general manager Denis Artiles' office was damaged during the break-in. The police were called, and the theft of the laptop and the "union files" were reported ("that's how we reported it," Emmsley stated, at p. 2875, referring to the "union files"). A BB gun was fired into one of the windows of the street-level lobby restaurant ("Jade"), which cracked and required replacing. The police were called in connection with this incident as well. An egg was thrown on the door to the room in the hotel where Mr. Artiles was sleeping, and in a separate incident Mr. Artiles received a threat of violence, on his phone. The police were once again called. Mr. Emmsley, in his capacity as the chief of security, was involved in all of these incidents, and testified to personally hearing the threat left on Artiles' phone (which he described, at p. 2878, as stating, "you better lay low or something will happen to you").

When asked, "what, if anything, did this history [in 2010] of vandalism, threats, [and] vandalism have to do with the videotaping of the Union events," Mr. Emmsley replied that it was "a proactive thing that we did just to be cautious." [*Id.*, p. 2878]. He explained further that "if anything happens," the hotel would "at least have some sort of thing to go back to." [*Id.*]. While Emmsley acknowledged, with respect to the entire spate of criminal activity, that it was "hard for us to try and determine . . . [from] where all this is coming," suspicion was nonetheless reasonably tied to bad actors with some affiliation to the union and its cause, given the "increase" in vandalism and other bad acts which "happened within the time period" when, as noted above, tensions with the union were at their highest. [*Id.*]. This was an entirely reasonable suspicion. The Union was never accused of these bad acts, but it was certainly a fact-based reasonable suspicion

that the union or its most zealous supporters were responsible, particularly in view of the theft of files related to the union, as reported to the police. [*Id.*, p. 2923, line19 – 2924, line 2 (under aggressive cross-examination by the ALJ, Mr. Emmsley – who is not a graceful, articulate speaker – stood his ground in response to the assertion he had “no reason to believe the union was responsible for any of these acts of vandalism,” and testified: “The – the one with the office, I mean . . . for those type of documents to be missing – is just – that was my impression, that it might have something to do with . . . somebody from the Union.”)].

The fact that these suspicions were born of incidents not occurring during the course of a public union event, doesn’t lessen the reasonableness of the concern that one of the rallies could provoke an incident of violence or vandalism during the course thereof. The videos were taken, as noted from Mr. Emmsley’s testimony above, simply as a “proactive” measure, “just to be cautious.” This ALJ erred, [*Id.*, pp. 2938-39], in sustaining an objection to a question seeking to elicit the degree and nature of the concern Emmsley held that the Union or its supporters were responsible for the vandalism and therefore capable of creating a problem at the rallies, and thus justifying the “precaution of video-taping.”<sup>15</sup> The objection was sustained on the basis of calling for speculation. This was error – as Respondent’s counsel attempted to explain prior to being cut off – as the questioning related to the motivation and intent behind the surveillance, which as shown by the authority herein, is centrally relevant. *See, e.g., Home Comfort Products*

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<sup>15</sup> The question followed an acknowledgment by Emmsley that he had no *direct* proof of union involvement in the vandalism and break-in, and posed: “Did you nonetheless have a concern that the Union may have been involved or associated in some way with the spate of vandalism that occurred?”

Co., *supra*.

Given the nature of the increase in vandalism and violence described above, and the reasonableness of the suspicion and concern that one of the public events could provoke further incidents, the anticipatory video-taping was reasonable and permitted. *See*, Smithfield Foods, *supra*. (past trespassing, described above); Berton Kirschner, Inc., *supra*. (several trespasses, but no violence) ; Saia Motor Freight Line, 209 NLRB 1091 (1974) (illegal picketing); and *cf.*, Kingsbridge Heights Rehab. Care Ctr., *supra* (careful examination of past violence as justification for the need to video-tape, which, however, was not found based on the following facts, distinguishable from the present case: the two incidents of past violence took place six years prior to the video-taping at issue; and the sole witness testifying to the need for video-taping had no personal knowledge of the six-year old incidents and gave “uncorroborated ... nonspecific and conclusory testimony”).

The video-taping was not done with the intent to surveil. Indeed, as of the summer of 2010, there were no secrets in the hotel as to which individuals were the most pro-union. [*See, e.g.* Vol. XI, pp.1790-1796 (Tubman: listing the names of employees who participated on the bargaining committee, who frequented the rallies, and who were widely known within the hotel as pro-union, and whose names appear throughout the record of this case, as well as giving testimony <sup>16</sup>)]. And, therefore, there was nothing to be gained by surveillance. By the time of the rallies in the summer of 2010, the hotel had been through a long, high-profile struggle over the failed bargaining, the boycott effort,

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<sup>16</sup> Gina Tubman herself, and listing: Joanna Littau, Lucy Dudek, Troy Prichacharn, Fay Gavin, Maria Hernandez, Ana Rodriguez, Dexter Wray, Scarlett (last name not given) John Fields, Mario Cordero, Elda Buezo and Shirley Grimes. To this list, one could add also Luz Maria Espinoza and Audelia Hernandez)

and the decertification movement. The battle-lines, so to speak, had been clearly drawn with knowledge on both sides as to who was on each side. This case is therefore plainly distinguishable from surveillance in the context of an organizing campaign, in which managers might have a more understandable (albeit unlawful) reason to surveil union activities. Common sense dictates that both of the following are true: one, not only was there no ‘need’ (and therefore no intent) to surveil, and two, the video-taping was not likely to in any way interfere, restrain or coerce.

Further, there is no evidence the videos were in any way used against any of the employees, as noted above. In fact, as Mr. Emmsley testified, without any contradiction in the record, since no acts of violence or vandalism occurred in any of the public events, nothing was done with tapes:

Q. And so what was done with these videos?

A. It was just taped over it, they taped over.

Q. Anything else done with the videos before they were taped over?

A. No, sir.

[Id., pp. 2878-79].

Counsel for the General Counsel tried to suggest on cross-examination, [Id., pp. 2924-2927], that the hotel is located in a bad part of downtown Anchorage, and in that manner attempted, without success, to undermine Mr. Emmsley’s testimony that the increase in vandalism was not unusual. Mr. Emmsley first denied that the area around the hotel is unsafe, [Id., p. 2924], and proceeded to demonstrate that fact in his testimony. He was asked how often security is called during a day. He replied that it was on the order of three to four times a day. [Id., p. 2926]. The nature of these calls relate mostly,

however, to the mere, harmless presence of “street people” entering the lobby to warm up, which he indicated – based on a foundation as a long-term resident of Anchorage – is a commonplace occurrence everywhere in the city. [*Id.*, p. 2938-41]. He testified security simply moves them along, or calls community patrol to take them to a more appropriate location. [*Id.*]. Beyond this, he testified, the calls to security more routinely involve calls for keys (security has control of all hotel locks), the delivery of mail packages, and responses to complaints about noise from guest rooms. [*Id.*]. None of this testimony in any manner undermined the efficacy of his testimony that there was an increase in vandalism and property damage in 2010 that was reasonably tied to a suspicion that it was union-related.

(b) Managers in the Employee Cafeteria

As noted above, it is well established that “mere observation of open, public union activity on or near [the employer’s] property does not constitute unlawful surveillance.” National Steel and Shipbuilding Co., *supra*, (emphasis added), citing to F.W. Woolworth Co., *supra*. This rule applies to the charge related to alleged surveillance in the employee cafeteria.

Counsel for the General Counsel presented a number of witnesses who were asked to compare their observations of the frequency of the presence in the cafeteria of various managers during, roughly, the Spring of 2010<sup>17</sup>, in comparison to a vague, not well-defined or consistent earlier period.<sup>18</sup> The resulting testimony was all over the place, and highly unreliable. For example, **Audelia Hernandez** gave vague, self-

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<sup>17</sup> The questions usually referenced March and April, but there was little consistency.  
<sup>18</sup> Usually, “2009.”

contradictory answers. [Vol. VI & VII, pp. 907 - 912]. She first testified that prior to the Spring of 2010, she saw “only one” manager in the cafeteria, H. R. Director Jamie Fullenkamp. Then, however, she contradicted herself and testified she saw Housekeeping Director Eduardo Canas in the cafeteria “six, eight times” a month prior to the Spring of 2010, and also saw General Manager Denis Artiles down there during that time period. Counsel for the General Counsel dropped the questioning at this point, as her inconsistent statements and inability to recall anything meaningful became obvious. **Luz Maria Espinoza Sabala’s** testimony was exceptionally vague and uncertain. [Vol. VIII & IX, pp. 1246 -66]. The clearest she gave related to Eduardo Canas, who she claimed she saw 2 to 3 times a week in 2010, and 3 to 4 times a month in 2009. As to Denis Artiles, she testified she saw him “not very often” in 2010, and stated “I don’t remember” with regard to 2009. This ALJ correctly struck her attempted testimony regarding an unidentified kitchen manager, and should likewise strike or disregard attempted testimony concerning an un-named “manager of maintenance.” Other witnesses presented by the counsel for the General Counsel gave testimony that supported the Respondent’s case. For example, **Maria Hernandez** testified Canas was there “daily” in 2010, and “almost every day” in 2009, and that Artiles’ practice of coming to the cafeteria was the “same” during both time periods: “once or twice a week.” [Vol. VI, p. 990 -98]. As for **Shirley Grimes**, her testimony was all over the place and is hardly reliable. [Vol. IX, pp. 1346-49]. She appeared to simply hew to the ‘party line’ by giving expected pat standard answers, using the phrase “very rarely and “rarely” three times in the space of a few pages in response to separate questions regarding Emmsley, Rydin and Canas eating in the cafeteria prior to the Spring of 2010. [*Id.*, pp. 1347-49]. The time frames counsel used in questioning her

on direct was a moving target – at one point she used “in April 2010,” then “March through the summer of 2010,” and elsewhere “April through the summer of 2010,” [Id.] – and thus, consequently, very little meaning can be gleaned from Grimes’ testimony.

Counsel for the General Counsel may attempt to make much of Grimes’ testimony that she, on one occasion, heard Chef Rydin speak into the radio, “there is a visitor in the break room,” and that she immediately went down and saw that union agent Jessica Lawson was present, and that she also saw Rydin, Emmsley and Canas there. [Id., pp. 1350-55]. However, she only remained in the break room for “[j]ust a few seconds, minutes,” and testified to no other material observations as to what was, *or wasn’t*, going on other than *lunch*. [Id., p. 1354]. However, she did answer the question of what the three managers were doing; she said, of Rydin: “He usually sits down and has lunch” and that she saw him that day “fix a plate,” and that Emmsley and Canas were doing the same. [Id., pp. 1353-54]. This slim reed of cryptic testimony, thoroughly uncorroborated, proves nothing. It should also be noted, with respect to this testimony, that her statement – “[Canas] usually sits down and has lunch” – is in direct conflict with her statement, made just a few minutes prior, [Id., p. 1347], that Rydin (along with Emmsley and Artiles) were “very rarely” seen in the cafeteria, because “[t]hey’d eat upstairs in the restaurant.” This latter assertion finds no support in the record from any other witness, including the General Counsel’s witnesses, and is in direct conflict with the credible testimony of Fullencamp and Kranock, discussed below, that just the opposite is true.

Shirley Grimes is not a credible witness. In addition to the above, her testimony that one of the security guards came up close to her and took her picture while entering Fay Gavin’s car, [Vol. IX, p. 1318], should not be believed. There is no other testimony

in the record (including from Fay Gavin) describing conduct like this from the security guards (the testimony on the whole reflects instead that guards stayed in the background near the building).

Shirley Grimes had an axe to grind when testifying. She was fired by the hotel for *repeated* instances of rude and demeaning behavior directed toward fellow employees, which was witnessed and complained about by guests, and she admitted she thought the disciplines and negative reviews she received in this regard were unfair. [*Id.*, pp. 1436-50 (admission at 1349-50)]. Shirley Grimes' inconsistent, unsupported testimony should not be believed.

More fundamentally, though, the testimony regarding the appearances in the cafeteria of managers is unreliable. Different employees ate at different times of the day, and some of them worked different shifts at different periods of times (which was inadequately explored by counsel for the General Counsel), and some also worked weekends and/or afternoon/evening shifts when managers are less likely to be in the building or eating lunch (for example, Ms. Sabala testified she works both weekend days, and only Monday through Wednesday during the regular workweek, and testified further, at a different point in her testimony, that she also worked the second shift for some unidentified period of time in 2010 [Vol. VIII, p. 1259]). Given the small sampling of witnesses, and all of the time variables at play, counsel for the General Counsel to meet their burden of proving there was a greater presence of managers in the employee cafeteria during the Spring (and Summer?) of 2010 (again, the time frame in question was never clearly delineated).

By contrast, the most credible and uncontroverted testimony in the record on this

issue is that managers have always dined and taken their breaks on a frequent, regular basis in the employee cafeteria. And, there is a reason for this simple fact: Managers take most of their meals, as well as coffee and sodas, in the employee cafeteria because, as Ms. Fullenkamp explained, "it's free," and because food items consumed in the restaurant are counted as costs. [Vol. XVI, p. 2691]. Ms. Fullenkamp explained further:

Q. ... You said something a minute ago in response to the judge about food costs and not taking it out of food costs. Could you explain that?

A. Well the chef has a food cost and he has to make sure his food cost is in a certain percentage. We like it around 23 to 25 percent. And if it's taken out of the restaurant, it takes away from the food cost. So the employee cafeteria has its own food cost value.

Q. Okay. So as a practical matter, help us understand. If a manager takes a meal in the Jade Restaurant, as opposed to taking a meal in the employee cafeteria, what impact does that have on the issue you've identified?

A. If we go to the Jade Restaurant, we have to ring up a ticket.

Q. Okay.

A. A server takes our order, the ticket is rung up, and the food is accounted for just like a walk-in customer towards the food cost. Well the employee cafeteria, you don't ring up any of the food cost. It's food that the chef has prepared in - in advance for the employees.

Q. Okay.

A. And then it's just cut in certain dollar amount for each employee that eats there.

Q. Okay.

A. And that includes your drinks and whatever.  
[*Id.*, pp. 2693-94; *see also*, testimony by current General Manager Jon Kranock to the same effect, at Vol. XVIII, pp. 3009-10].

Ms. Fullenkamp testified she has eaten in the employee cafeteria four or five times a week, and that this has been her practice over all the years she has worked in the

hotel since 1980. [Id., p. 1387]. She also volunteered: “We have the best cafeteria in town.” [Id.]. She testified further:

Q. Now during the several month period in 2010, leading up to the withdrawal of recognition on July 2, 2010, we’ll focus on that timeframe. So we’re talking February or March through the month of June in 2010. Did you spend more time in the employee cafeteria than before?

A. No. I’m in there three, four, five times a day.

Q. Oh[,] in addition to eating?

A. Yes.

Q. What causes you to be in there three, four, five times a day?

A. I get coffee quite a bit. I’m a coffaholic (sic).

Q. Okay. Where is your -- excuse me, where is your office in relation to the employee cafeteria?

A. Right down the hall.

Q. On the same floor?

A. Same floor, both the HR and housekeeping.

Q. ... And where is Mr. Emmsley’s office in relation to the cafeteria?

A. Around the corner. He’s closer than I am.

Q. ... [D]o you know if Mr. Emmsley is in the employee cafeteria, and I’m referring now to the seven year timeframe of Mr. Emmsley’s employment there, do you know if -- if he is -- if he frequents the cafeteria on occasions other than lunch?

A. Sure.

[Id., pp. 2689-90]. She also stated: “Most managers -- we all have to get our coffee down there.” [Id., p. 2691 (this ALJ asked why this was the case, which led to Ms. Fullenkamp’s initial explanation that it was because “it’s free,” and the further explanation relating to food costs)].

Ms. Fullenkamp testified that Mr. Emmsley similarly eats in the restaurant four to

five times a week (as well as other breaks), and that they often eat together, and that this has been the case for the entire six or seven years they have worked together. [Id., p. 2688-89]. With respect to Mr. Artiles, she testified his habit was to eat lunch there two or three times a week, and that this remained his habit at all times while he worked there. [Id., p. 2690]. She was also asked:

Q. And during the period, say, February or March 2010 through the month of June 2010 did Mr. Artiles increase his frequency -- based on your observation, did he increase his frequency of being in the cafeteria?

A. I could not answer that. I wouldn't know that answer. I would say no -- of what I would be in -- when I'm in the employee cafeteria.

Q. Yeah. I mean you can't answer to his presence when you're not there.

A. Right.

Q. So the premise of my question is only -- I'm only asking you based on your observation, based on the times that you were in the cafeteria.....

A. Yes.

Q. ....and you've testified that you ate lunch there four or five times a week, plus you were in the cafeteria three or four times during the day. Based on your observation, and based on your being in the cafeteria that amount of time, did you see Mr. Artiles in the cafeteria more or less or about the same or.....

A. About the same.

Q. ....do you have an opinion?

A. The same.

[Id., pp. 2692-93].

With respect to Chef Rydin, she testified he usually ate earlier than her, but that she saw him in the employee cafeteria three or four times a week, and that his habits never changed, including, based on her observations, during the Spring 2010 time frame.

[Id., pp. 2694-97]. She testified also that Rydin, as the executive chef, had responsibility

to oversee the employee cafeteria, and stated further: “He’s in charge of all the food. So he has to make sure it’s cooked right . . . And then he has to make sure the trash is taken out and it’s cleaned up and the dishes are done.” [Id., pp. 2695-96]. Similarly, she testified Mr. Canas ate three or four times a week in the cafeteria, and that his habits never changed, including during the Spring 2010 time period. [Id., pp. 2697-2701]. His office, as the Director of Housekeeping, was on the same basement floor, and he ate frequently with the housekeepers during their usual break at 11:00 to 11:30. [Id., p. 2700].

In addition to this testimony by Ms. Fullenkamp, three bargaining unit employees were called by Respondent – Margareta Lucero, Juanita Bourgeois and Harka Gurung. All three testified consistently that the managers in question ate in and visited the employee cafeteria regularly at all times, and that they did not observe an increase in the frequency of their visits during the Spring of 2010. [Vol. XVII, pp. 2759-70, pp. 2770-84, and pp. 2784-2800, respectively].

At the bottom line, all the General Counsel has is unreliable, non-credible evidence of an increased frequency of manager presence in the cafeteria, and mere suspicion they were there to surveil. The Board has cautioned, though, that “mere suspicion cannot substitute for proof of an unfair labor practice.” Lasell Junior College, 230 NLRB 1076 (1970).

Numerous Board cases have not found unlawful surveillance where the management employees in question showed a legitimate reason to be in a particular place at a particular time, especially when the location chosen by the union was one often

frequented by or visible to management. *See, e.g.,* W. Point Mfg. Co., 142 NLRB 1161, 1163 (1963) (the fact that a manager was “driving by” homes and motels in which union meetings were taking place did not prove unlawful surveillance); Murray Ohio Mfg. Co., 155 NLRB 239, 251 (1965) (manager had legitimate reason to be in public square on the night of the union meeting, and no unlawful surveillance was proved); Golub Corp., 159 NLRB 355, 363 (1966) (managers’ presence at the bar while union meeting was going on in the back room did not prove unlawful surveillance when the managers remained there even after being informed that the union meeting was taking place, because they were not shown to be present with intent to “surveil”); Roxanna of Texas, Inc., 98 NLRB 1151, 1162 (1952) (fact that union was observed distributing circulars to employees on a public sidewalk did not establish unlawful surveillance where the location of the distribution was directly visible from the windows of the plant); Swan Fastener Corp., 95 NLRB 503, 509 (1951) (“Even accepting the fact that William Cravatts and Gilman looked at the group while they were in that section of the plant where the group was having lunch and observed what was going on, such evidence, in the Trial Examiner’s opinion, is insufficient to warrant a finding of intentional surveillance. This is particularly so since the said employees chose to meet in a place clearly visible to both Gilman and William Cravatts as they went about their duties in the plant.”); N. Berkshire Cmty. Services, Inc., 2006 WL 80566, at p. 15 (NLRB Div. of Judges) (Buxbaum, March 9, 2010) (“[T]he Board’s jurisprudence in this area recognizes that open union activity may well be observed by supervisors. ... Applying this test, there is simply insufficient evidence to conclude that Moresi engaged in unlawful surveillance in the facility’s parking lot. ... Standing in the lot and engaging in conversation with colleagues is not out of the

ordinary. Isolated instances of sitting inside her vehicle before entering the building are likewise not probative of unlawful conduct.”).

\* \* \* \* \*

For the reasons stated above, and based on the above evidence and authority, all charges relating to alleged unlawful surveillance must be dismissed.

**VIII. General Counsel Failed to Prove Seniority Was Dishonored In Any Department, With the Exception of Isolated Instances in the Banquet Department and in the Restaurant.**

The Third Amended Complaint charges at paragraph 28(e) that “Respondent ceased assigning work and ceased scheduling employees according to seniority.” With the exception of isolated instances, referenced below, Counsel for the General Counsel failed to prove this Charge.

There was no testimony or evidence presented of any discontinuance of seniority rights in the kitchen department, and no evidence or testimony that any kitchen worker (cooks, chefs, stewards, storeroom clerks, etc.) lost any wages or benefits as a result of any change to scheduling. Similarly, there was no evidence or testimony of any changes in seniority in the front office area, including front desk agents and PBX operators, and no testimony or evidence of discontinuance of seniority among the bell person staff (in fact, one of the bell persons, Troy Prichacharn, testified on November 15, but did not testify to any changes to seniority).

In addition, there were no changes in seniority in the engineering department. As shown in Section II (a), of this Brief, Dexter Wray lied when he testified that the department’s hours were cut back and his seniority dishonored in July of 2010. Apart

from this lie by Wray, there is no evidence at all in the record of any discontinuance of seniority in the engineering department. Mr. Emmsley testified affirmatively that he “always” followed seniority. [Vol. XVII, pp. 2808-09].

With respect to the housekeeping department, there was no probative evidence or testimony that seniority was discontinued. Witness Maria Hernandez parroted the assertion that seniority was changed <sup>19</sup>, but when asked, “what if anything happened to your schedule,” she replied: “With mine, nothing.” [Vol. VII, p. 1035-36]. She was then asked a question concerning knowledge of changes to the schedules of others, which drew an objection by Respondent’s counsel, “to the extent the question [elicits] hearsay.” Without waiting for a ruling from this ALJ, counsel for the General Counsel withdrew the question and moved on to another topic. [*Id.*, p. 1036-37]. Subsequently, on cross-examination, Maria Hernandez fully admitted, consistent with her *Jencks* affidavit, that she “does not know anyone else that had their schedule changed,” related to any dishonoring of seniority. [Vol. VIII, p. 1231-32].

Counsel for the General Counsel attempted to elicit testimony from housekeeper Luz Maria Espinoza Sabala regarding seniority. [Vol. IX, pp. 1280-83]. The witness indicated something happened on one occasion involving an employee named “Netecia.”

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<sup>19</sup> When asked whether she heard anyone in management discuss seniority, to support this parroted assertion, she referred to a statement made supposedly by Jamie Fullenkamp, attributing to her the simple statement, “There’s no more seniority.” That was it. [Vol. VII, p. 1037-38]. However, this testimony is highly suspect, as the witness testified this statement was made by Fullenkamp “a little bit after Jamie took the position of head of housekeeping.” The record shows Fullenkamp assumed this job in April of 2012. [Vol. XVI, p. 2514]. This ALJ can take administrative notice that by that point in time the U.S.D.C. in NLRB v. Remington, had previously issued the 10(j) Order compelling Respondent to reinstate seniority. Respondent was in compliance with this Order by the time Fullenkamp assumed this new position. Therefore, it makes no sense that Fullenkamp would have this regarding the housekeeping department, at least not at that time.

The testimony was unclear, and appeared to relate only to a single incident on a single day. She testified: “On that day she came to work . . . before me.” The testimony proved nothing.

There were no seniority violations impacting Elda Buezo, for the reasons spelled out in section IV of this brief. Buezo did not testify concerning any impact of any seniority changes on any others in the housekeeping department.

Housekeeper Audelia Hernandez also testified on this issue, but likewise provided no probative testimony that seniority had been dishonored. After first giving lip service to the notion that seniority was gone, she squarely testified nothing happened to her schedule: “I kept the same schedule.” [Vol. VII, p. 937]. She went on to say, “The only thing is that I didn’t have the same duties,” [*Id.*], but provided no explanation as to what that meant or how that had anything to do with dishonoring seniority.

She also gave very confusing testimony regarding a scheduling situation on one occasion involving the Thursday and Friday of the Thanksgiving holiday period<sup>20</sup>, which maybe had something to do with overtime. [*Id.*, pp. 937-946 and 974-981]. To the extent this muddled testimony involved a denial of overtime, there is no seniority right to receive overtime under the expired collective bargaining agreement, and therefore no violation can be found. [*see*, **Exhibit GC-2**, and Articles therein relating to “Work Day”, “Workweek,” and “Overtime”]. This much does seem clear, though: The reason given for not scheduling Audelia Hernandez, when she thought she should have been scheduled, related to the fact there “was not enough work,” according to what Hernandez testified housekeeping director Eduardo Canas told her. [Vol. VII, p. 938, lines 3-12].

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<sup>20</sup> It’s not clear, at least to the undersigned, in what year this Thanksgiving issue occurred.

That being the case, no violation of the expired collective bargaining agreement occurred, inasmuch as scheduling in that department – as set forth in the CBA Article entitled “Scheduling,” [Exhibit GC-2] – is done on a *daily* basis (unlike all other departments), depending on the hotel’s *occupancy* count for the day. *See also*, Vol. XVI, pp. 2527-30 (Fullenkamp testimony describing scheduling method). One is compelled to surmise, therefore, that occupancy was low on this particular Thanksgiving Thursday and Friday (which is not surprising, as hotels in the U.S. are rarely busy on this important family holiday). In any event, this incident, even if somehow a violation of seniority rights to this one employee on this one isolated occasion, is *de minimis*, and certainly falls very far short of proving seniority in the department as a whole was dishonored.

Housekeeping employee Ana Rodriguez testified, regarding scheduling and seniority: “With the people who had higher seniority, with them it kept the same.” [Vol. XVI, pp. 2267]. She went on to assert, however, that unidentified “other ones” in housekeeping did not have their seniority honored. [Id.]. This latter assertion, however, was supported by only a single conversation related to a single occasion, with a manager temporarily in charge of housekeeping (“Jeff,” last name not recalled). [Id., pp. 2267-71]. On that occasion, there was a need to call in one or more extra housekeepers due apparently to unanticipated high occupancy. The two discussed the need to start calling housekeepers. She stated “Jeff” said, in regard to the calls, “call the one from the bottom,” and said further, “technically there is no seniority.” It appears “Jeff” was simply requesting a specific individual. In any event, it appears further Ms. Rodriguez was not involved herself in these calls, and that she is only speculating and relying upon non-specific hearsay, as she testified that right after this conversation: “I went home and

if they call somebody that has less seniority, you know, which I would think so because somebody was claiming about that the next day.” [Id., p. 2271, lines 13-15 (emphasis added)]. Accordingly, this witness had no personal knowledge seniority was dishonored on this one occasion; she wasn’t involved in making the calls to bring workers in. Her testimony amounts to mere speculation supported only by hearsay from an un-named “somebody.”

The only testimony the General Counsel provided, as evidence seniority was dishonored in the housekeeping department, is a handful of out-of-court statements by managers to the effect ‘there is no more seniority.’ In the absence of proof of actual schedule changes and proof that employees lost wages due to less-senior employees getting scheduled ahead of them, such testimony is inadequate. Further, based on the testimony above, it appears quite affirmatively there were no changes at all in scheduling by seniority. The testimony regarding a few isolated instances of de minimis violations is, as shown above, exceptionally weak and flawed.

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With the exception of the testimony by four banquet department employees (Fay Gavin, JoAnna Littau, John Fields and Vickie Williams <sup>21</sup>) and two restaurant employees (Gina Tubman and Kyoko Akers), all six of whom did testify to varying degrees of lost work based on abandonment of seniority, there is no evidence that Respondent otherwise engaged in a wholesale dishonoring of the seniority rules in the expired collective bargaining agreement. Subject to the exceptions just noted, the charge in paragraph 28(e)

of the Complaint should be dismissed.

**IX. The Charges Related to Leafletting at the Two Guest Entrances Should Be Dismissed Because the Entrances are Working and “Selling” Areas of the Hotel**

Paragraphs 17 and 18 of the Third Amended Complaint allege that on two occasions in September and October of 2011, Respondent’s General Manager Jon Kranock “prohibited off-duty employees from distributing union literature on hotel property.” It is undisputed the leafletters were not only on hotel property, they were standing directly in front of or to the immediate sides of the two guest entrances on 6<sup>th</sup> and 5<sup>th</sup> Avenues, under the porte-cocheres of both entrances. Mr. Kranock did not deny in his testimony that he asked the off-duty employees to move to the sidewalks, which are no more than “twenty-five, 30 feet away.” [Vol. XVIII, p. 3030-31]. He testified he had no problem with their exercise of First Amendment and section 7 rights to distribute information and communicate to the public from the sidewalks. [Id.].

Where the leafletters were standing, at both entrances, was directly under the covered entrance-ways – the porte-cocheres – where cars and tour vans pull in and load and unload guests and their luggage, and where guests are greeted, welcomed and assisted with luggage, and – if checking in – assisted with that process. [Id., pp. 3028-33]. In addition to being greeted and assisted on check-in by bell persons, they are also greeted by a lobby manager – in both the lobby and under the porte-cochere -- who offers arriving guests a cold drink in the summer and hot cider in the winter, answers questions, and assist with check-in. [Id., p. 3032]. This area, as Mr. Kranock stated, is “very well-

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<sup>21</sup> The complaint originally listed a “Susan Johnson” as a banquet server in this category. Her name was stricken by a approved motion to amend, and Vickie Williams

manicured and kept nice,” including planted flowers – which he referred to as providing the “curb appeal” – all as a part of creating the all-important “first impression” for arriving guests. Staffs from engineering and from housekeeping are regularly working in this area to keep it nicely maintained and tidy, including weekly power-washing. [Id.] \_

Bell person Troy Pricharcharn, a witness for the General Counsel, certainly understands the importance of the entrance ways and porte-cocheres – where he spends most of his work-day – to establishing the right initial ‘selling’ relationship between the guest and the hotel. He readily agreed on cross that when he helps guests with their luggage at both entrances, “part of [his] job is to give them a warm greeting . . . and welcome them to the hotel.” [Vol. pp. 1603-04]. He agreed that he has a “very important job at the hotel, because [he is] the hotel’s first impression,” and he understands that these “first impressions” created under the porte-cochere “are important” because it can “impact the entire guest experience.” [Id., p. 1604]. He agreed that “[i]f the guest is greeted warmly at the front entrance of the hotel under the porte-cochere that can color their perception of their entire stay in the hotel” in a positive way, and vice-versa – in a negative way for the entire stay -- if the hotel’s employees in that area are “rude and nasty or don’t smile or don’t speak to the guests.” [Id.]. Mr. Kranock, in his testimony, echoed these points, adding that the importance of the initial greeting at the entrances is emphasized to all new employees in orientation:

It’s . . . the most important first impression for our guests. So we have to maintain it at the highest level. We have to be attentive to the guests, we have to be greeting the guests, we have to make eye contact. It’s so important, that first impression, because it carries through all the way through the stay.

[Id., p. 3033].

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name was added. [Vol. XIX, pp. 3089-91].

And yet, incredibly, the ALJ in Remington I decided that the same actions at issue in that case – denial of leafleting under the porte-cochere by off-duty employees – constitutes an unfair labor practice.<sup>22</sup> The ALJ erred in this decision, through misplaced reliance on the questionable holding in Santa Fe Hotel, 331 N.L.R.B. 723 (2000), and held that the porte-cochere entrance-ways at the Sheraton Anchorage are *not* working areas. Anyone with any amount of experience as a guest at full-service hotels immediately understands that this decision is nothing short of ludicrous, and understands that the application of Santa Fe to the facts of this hotel and this case is simply bad law. The ALJ in this case should avoid committing this same error over again.

To begin, Santa Fe Hotel is weak legal precedent. The Board in Santa Fe Hotel adopted the decision of an ALJ who reached the conclusion that the front entrance of a hotel and casino (which had bellmen, valet parkers, gardeners, and security staff working there) is a “non-work” area for purposes of delineating where off-duty employees may and may not solicit others in the exercise of Section 7 rights. *Id.* at 727. In reaching his decision, the ALJ in Santa Fe relies almost solely on a 1952 department store case, Marshall Field, 98 N.L.R.B. 88 (1952), which distinguished between “public selling” areas and “public non-selling” areas of a department store. The latter included the “public waiting room” in this large early-1950s downtown Chicago department store, as well as the store’s public restaurant and washrooms, and a roadway owned by the department store that ran between the two buildings comprising the store which the public could use in accessing the store buildings. *Id.* at 91. The Board in Marshall Field held that off-duty employees could solicit union support in *all* of these public (so-called)

non-selling areas. Id. at 93, 94.

The 7th Circuit Court of Appeals, in Marshall Field v NLRB, 200 F.2d 375 (7th Cir. 1952), modified the Board's decision. The Court held that the employer's rule prohibiting the distribution of materials in public areas such as entrances, lobbies, and cafeterias was permissible, and held further that the Board's decision failed to determine how the rules "uniquely handicapped" the employees organizing efforts, and that it refused to acknowledge the very nature of Marshall Field's retail business. Id. at 380, 381, 382. In other words, the 7th Circuit rejected the very rationale the Santa Fe Hotel ALJ later used in reaching his conclusion.

The ALJ in Santa Fe Hotel analogized hotel and casino entrances to all of the public non-selling areas mentioned in Marshall Field, but failed to acknowledge the 7th Circuit's modification. 331 N.L.R.B. 723, 730. The oversight of this same 7th Circuit holding led to the ALJ's flawed findings in this case as well. Under the *Marshall Field* dissent and subsequent 7th Circuit ruling, the employer could prohibit solicitation in the store's lobby, entryway, cafeteria, and washroom. Only a semi-private roadway was fair game from the union's hand-billers. 200 F.2d 375, 382. The dissent stated (quoted with approval by the 7th Circuit):

"As a practical matter, all sections of a department store that are open to the public are inextricably interwoven with those which can be more literally termed 'selling areas' .... Such areas [as the public waiting room, public restaurant and washrooms] contribute to the desired relationship between retailer and customer, whether facilities are provided out of necessity, or for the customer's convenience, or merely to generate goodwill. They should not be converted into an area for the organization of employees. The statute does not command that result, and this Board should not facilitate it."

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<sup>22</sup> This part of ALJ Meyerson's decision is among the Exceptions currently pending before the Board in *Remington I*.

Id. at 378.

If there is one place where a hotel has both out of necessity and a desire to contribute to the relationship between the hotel and the customer, it is a hotel's entrances. This is where guests are first received, greeted, luggage unloaded, and car parked. [G.C. Ex. 24; Tr., pp. 681, 1288, 1327, 5570, 6525] By extension, it is easy to understand why the entrances to the Sheraton Anchorage "contribute[] to the desired relationship between" hotel and guest, and should not, therefore, "be converted into an area for the organization of employees." Marshall Fields v. NLRB, 200 F.2d 375, 378 (7th Cir. 1952). Neither should the entrances be converted into an area for publicizing the Union's dispute with management and its boycott. Id.

A NLRB General Counsel Memo advises that a hotel may restrict picketing and demonstration on private property without violating the Act. *See* 1992 NLRB GCM LEXIS 11 (NLRB GCM 1992). Specifically, the General Counsel advised the Region to dismiss the ULP against a casino hotel for preventing picketing at the hotel's main entrance way because of the "heavy" presumption against unauthorized access to an employer's property. The General Counsel observed that the employees had a "reasonable alternative to trespassory picketing and hand billing at the east pedestrian entrance, since the striking employees would have an unfettered right to appeal from the public sidewalk to all Employer customers who use that entrance." Id.

The Santa Fe Hotel ALJ made an additional error by referring to Marshall Field as the "seminal Board decision for determining what portions of [a department store] constitute working areas." 331 N.L.R.B. 723, 729. The Santa Fe ALJ is wrong. There is a whole host of "department store" decisions, and none of them make the kind of "public

non-selling” distinctions made by the Board (but rejected by the 7th circuit) in Marshall Field. This very point was emphasized by the 7th Circuit while pointing to several such cases. See e.g. J. L. Hudson Co., 67 N.L.R.B. 1403 (1946); Goldblatt Bros., Inc., 77 N.L.R.B. 1262 (1948); Meier & Frank Co., Inc., 89 N.L.R.B. 1016 (1950). In short, Marshall Field is not a “seminal case.” It’s an outlier, as is its progeny beginning with Santa Fe.

An employer has a right to control its property even if that control restricts certain union activity. The Board also balanced an employer’s right to control its property with the employees’ Section 7 rights in Peck, Inc., 226 N.L.R.B. 1174 (N.L.R.B. 1976) and found that the employer had an “immediate” interest in securing its property and rules in place prohibiting employees from remaining on the premises. In Peck, the NLRB found that the employer, a paper products manufacturer, did not violate the Act by discharging protesting employees who refused to leave the Employer's premises since their actions were intended to “prove a point” and “were not predicated on any necessary immediacy of action.” The employer’s interest in securing its property did not unduly interfere with or restrict the employees’ statutory rights. In a decision adopted by the board, the administrative law judge in Peck Inc. noted that off-duty employees are generally not entitled to [protest a grievance on-site] “at least *where there is a rule prohibiting their access to the property and they are warned about it.*” (emphasis in original).

Beyond an erroneous conclusion that a hotel’s front doors are non-work areas, there are still other reasons why Santa Fe is incorrect. For example, the Board in McDonald’s Corporation, 205 N.L.R.B. 404, 407-08 (1973), upheld McDonald’s rule prohibiting solicitation by off-duty employees in its restaurants. In sum, the Board

observed in McDonald's that restaurants are "not industrial establishments where the presence of a customer is a rarity. They were retail establishments open to the public and designed and operated so to please each customer that they would be financially successful." 205 NLRB 404, 407. Since restaurants constitute a retail business where customers deal directly with employees, the no-solicitation rule was appropriate since solicitation by union representatives would disrupt guests. Id. at 408. The same reasoning in McDonald's applies to the Hotel in that the Hotel's customers deal directly with employees and the presence of customers is not a rarity.

Just as it was true in McDonald's, it is true in this instance that the customer should be able to use a hotel's entrance without being subjected to unwanted contact with total strangers who are advocating a political position. The employer has the right to have a business where its customers can be free from solicitations and distributions from Union members during the union's fight with an employer. McDonald's Corporation, 205 N.L.R.B. 404, 407-08 (1973); May Department Stores, 15 L.R.R.M. 173 (1944) (finding a "reasonable ground" for prohibiting solicitation on the selling floor because "the solicitation, if carried on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business"); J. L. Hudson Co., 67 N.L.R.B. 1403 (1946) (employer operating a retail department store could properly prohibit union activity at all times on the selling floors, where customers were normally present); Goldblatt Bros., Inc., 77 N.L.R.B. 1262 (1948) (an employer's rules preventing a union solicitation's of employees at lunch counters inside it stores were valid, observing that "union solicitation in the restaurants is as apt to disrupt the Respondent's business as is such solicitation carried on in any other portion of the store in which customers are

present); Meier & Frank Co., Inc., 89 N.L.R.B. 1016 (1950).

In addition, the Decision failed to account for significant factual differences between Santa Fe Hotel and The Sheraton Anchorage Hotel & Spa. First, whereas the Hotel employees were subject to a no-solicitation rule, the same was not true under the facts in Santa Fe. In fact, the casino/hotel regularly held “holiday fairs and craft fairs,” and “off-duty employees [were] invited to participate and set up booths to sell products to the general public.” 331 N.L.R.B. 723, 727.

Santa Fe is further distinguished in that the respondent’s casino hotel encouraged its employees to return to the property to utilize the casino, see the shows, spend time bowling, use the ice skating rink, and spend their money on other hotel casino attractions. 331 N.L.R.B. 723, 726. The Santa Fe ALJ went so far as to place emphasis on how the hotel casino had no rule prohibiting employees from returning and utilizing the facilities while off-duty. Id. In contrast, here the Hotel employees were subject to a rule that prohibited them from being on property when off-duty without permission, and the four employees who were disciplined for their conduct had all been disciplined for this type of trespass before.

Also, unlike the Hotel, which sits on a single city block with close-by public sidewalks from which leafletters can easily reach their communication targets, the casino/hotel in Santa Fe sits on a 38 acre plot of land (15 miles away from the strip in Las Vegas), with public sidewalks and roadways a considerable distance from the front entrance (the opinion notes that cars entering the casino grounds, at the outer edge where the property meets the roadway, are going too fast to hand out leaflets). Id., 724. In this case, the leafletting employees were standing in the two main guest entries to the Hotel,

forcing guests to interact with them as they entered and departed from the Hotel. Unlike the employees in *Santa Fe*, the leafletters had the option of communicating with the Hotel guests by standing on the close-by public sidewalks adjacent to the driveway leading into the hotel on both the corner of 6th Avenue and Denali Street, and at the entrances to the 5<sup>th</sup> Avenue entrances from Denali and Eagle Streets.

What's more, had the protestors moved this short distances to the sidewalks, especially along Sixth Avenue, they would have enjoyed the publicity of demonstrating alongside one of the busiest streets in Anchorage, if not the state of Alaska. Instead, the leafletters chose to step in front of customers entering the Hotel.

Further, an employer is not required to allow off-duty employees to distribute union literature to the public on its property. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). In Babcock & Wilcox, the Court established that employers could not be compelled to allow non-employee union access to company-owned parking lots for distribution of union literature when other channels of communication were available to the union to reach the employees. *See also* NLRB v. Steelworkers (Nutone, Inc.), 357 U.S. 357 (1958) (approving the enforcement of otherwise valid no-distribution and no-solicitation rules against pro-union employees). The principles that applied to non-employees in Babcock & Wilcox must be applied to off-duty employees distributing handbills in work areas in this case. Providence Hospital, 285 N.L.R.B. 320, 321-322 (1987) (applying the Babcock & Wilcox balancing test when economic picketers and leafletters that included the employer's own employees). Specifically, the Board should consider whether the Hotel had a legitimate business interest in preventing them from soliciting guests in front of the Hotel entryways and from remaining on the property

while they were off-duty and whether that interest outweighs the employees' purported rights under Section 7.

ALJ Meyerson erred in Remington I by holding the Hotel's entrances were "non-work areas" due to his reliance on the improperly decided outlier case, Santa Fe. This ALJ will repeat that error if he follows suit with Meyerson. Even if the Board and the courts continue to uphold Santa Fe, that case does not apply to the Sheraton Anchorage and to the facts here, due to numerous factual distinctions shown above.

**X. Counsel for the General Counsel Failed to Prove the Charge Alleging Unlawful Interrogation in Violation of Section 8(a)(1) of the Act**

Paragraph 15 of the Third Amended Complaint alleges that on at least two<sup>23</sup> occasions in August and September of 2010 – when the trial in Remington I was underway – General Manager Denis Artiles, Ed Emmsley, and an "unnamed agent . . . interrogated its employees about their reasons for signing a union decertification petition."

This allegation relates to the use by Respondent of Johnnie's Poultry forms during the preparation of its defense in *Remington I*, specifically in connection with its defense of the charge that Respondent improperly withdrew recognition. The form provided the notice information required by Johnnie's Poultry Co., 146 NLRB 770 (1964), which was initialed by employees who agreed to sign the form and then provide a statement in response to the sole question posed on the form: "Below please list the reasons why you signed the decertification petition." Many of the signed forms containing responses to

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<sup>23</sup> Originally, "four occasions" were alleged in this paragraph of the Complaint. On the last day of the hearing, December 14, counsel for the General Counsel amended this paragraph to allege only two occasions.

this single question were admitted into evidence in Remington I.

No objections, challenges, charges or complaint amendments were raised by the counsel for the General Counsel in Remington I, or by ALJ Meyerson, related to the propriety or use of these forms. Counsel for the General Counsel in the present case has not asserted any charge allegations to the effect that the form itself does not meet the standards imposed by the Board under Johnnie's Poultry (discussed below). This charge, instead, alleges only violations of the Johnnie's Poultry standards via oral interrogation during two of the occasions when these forms were presented to employees. As shown below, though, counsel for the General Counsel has failed to prove this charge.

Two witnesses testified for the General Counsel in support of this allegation. The first witness, Somchai Hill, testified he was called into a one-on-one meeting with General Manager Denis Artiles, in the Jade Restaurant. Mr. Hill speaks only "some" English, and testified that he did not understand everything Mr. Artiles said to him in this meeting. [Vol., XII, p. 1912].

Mr. Artiles presented Mr. Hill with **Exhibit GC-96** – a Johnnie's Poultry form – which was blank and had no handwriting on it at that point. Mr. Hill alleges Artiles read the printed portion of the form to him, but he testified: "I didn't understand it very much." [Id.]. He then testified Mr. Artiles asked him to initial the three numbered items at the top of the document, and then Mr. Artiles handwrote – on a separate sheet of paper – the words that appear on the bottom half of **Exhibit GC-96**. According to Hill, Artiles then asked him to copy the same words onto the bottom half of **GC-96**, and sign the document in the two places where his signature appears. [Id., pp. 1913-17]. All of the handwritten entries on this document are by Mr. Hill's hand, but the substance of the

words was provided by Artiles.

While the foregoing testimony certainly describes an odd situation<sup>24</sup>, it does not amount to the unfair labor practice that has been charged here. The only material part of Mr. Hill's testimony is what followed:

Q. When the General Manager wrote down words on the different piece of paper, was it based on anything you told him?

A. No, it wasn't.

Q. Did you have any conversation with the General Manager before he wrote on the other piece of paper?

[There followed an objection and discussion between the ALJ and counsel, and the answer to the last question was then provided, as quoted here]

THE INTERPRETER: The reply was no.

ADMINISTRATIVE LAW JUDGE McCARRICK: OK. That's fine, sir. Thank you. Go ahead, Ms. Cherem.

\* \* \* \* \*

Q. Did you have any conversation – additional conversation with the General Manager before he wrote on the piece of paper besides the conversation that you already described to us?

A. There never was any.

Q. . . . At any point while you were in the Jade Restaurant [where the meeting was held] with the General Manager did the two of you discuss your views on the union?

A. There wasn't – there never was any of that.

Q. Before that day in the Jade Restaurant, had you ever talked to the General Manager about your views on the union?

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<sup>24</sup> The undersigned counsel, who participated in the hearing in *Remington I*, feels compelled to note, and state in his place as an officer of this tribunal, that neither he nor any of Respondent's counsel was aware of the conduct described by Mr. Hill. This was discovered for the first time when Hill testified in *Remington I* for the General Counsel (he testified there consistently with his testimony here). Regardless of what actually may have happened, Artiles certainly was not directed by Respondent or by Respondent's counsel to engage in the conduct Hill described. Such conduct is not, and was not, condoned by Respondent or Respondent's counsel.

A. There never was any.

\* \* \* \* \*

ADMINISTRATIVE LAW JUDGE McCARRICK: What did the General Manager say to you before you wrote these things down?

A. He didn't say anything, he just had me write it down.

ADMINISTRATIVE LAW JUDGE McCARRICK: How did you know to write it down?

A. Well, because he told me to write it down.

[Id., pp. 1914 – 1917].

The other witness who testified in support of paragraph 15 of the Third Amended Complaint was Jun Sangalang. Mr. Sangalang testified he was also given a copy of Exhibit **GC-96** in blank form, in a meeting with several other employees and with Chief Engineer Ed Emmsley, Sr. and another unidentified individual named “Joe,” who referred to himself as follows: “I am Joe . . . and I am not working with the Union or Sheraton.” [Id., pp. 1978, 1982 – 86]. Mr. Sangalang, however, never filled out or signed the *Johnnie's Poultry* form. [Vol. XVI, pp. 2491 – 93]. This latter fact stands to reason, inasmuch as the form on its face posed only the question, quoted above, relating to the “reasons” for signing the decertification petition, and Mr. Sangalang testified that he in fact never signed the decertification petition. [Id., p. 2492; a copy of the decertification petition is in the record as **Exhibit GC-97**].

The material part of Mr. Sangalang's testimony is as follows:

Q. Who talked to you about this document [**GC-96**, in blank form]?

A. It was Ed Emsley who mentioned this document. He handed it to us and said read it, you can sign it and there's no rush. As soon as you – when you sign it then you can give it to me. There's no rush, there's no time limit, just when you sign it.

[Vol. XII, pp. 1983 – 84]

\* \* \* \* \*

Q. . . . With regard to **GC Exhibit [96** <sup>25</sup>] in front of you, when – during this meeting do you recall anything that Ed Emmsley said about that document?

A. He does -- I don't recall anything that he said.

Q. Okay. And do you remember anything else about this meeting, anything else that was said at this meeting by anyone?

A. Well, we did not take long at this meeting. All that I recall is that Ed Emmsley was saying these are the documents, sign this and when you sign it give it to me and that's all. And then we left already.

[Id., pp. 1987 – 88].

The law regarding an employer's privilege to interrogate employees related to protected activity in the course of an investigation of facts concerning issues raised in a complaint is well established. Despite the Board's recognition of an "inherent danger of coercion," an employer may exercise this privilege, where necessary to the preparation of its defense for a pending trial. Johnnie's Poultry Co., 146 NLRB at 774 (1964). To minimize the coercive impact and to strike a balance between conflicting interests, the Board in Johnnie's Poultry enunciated a number of safeguards: (1) the purpose of the questioning must be communicated to the employee; (2) an assurance of no reprisal must be given; (3) the employee's participation must be obtained on a voluntary basis; (4) the questioning must take place in an atmosphere free from union animus; (5) the questioning

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<sup>25</sup> Counsel for the General Counsel Susannah Merritt misspoke when asking this question, by referring to **GC-97**, not **GC-96**. However, as made clear in the colloquy on page 1988-89, through line 8, it is clear she intended to refer to **GC-96**, and that all participants including the witness (who, as noted in the record, was holding **GC-96** in his hand when answering the questions quoted above) understood the question as relating to **GC-96**.

must not be coercive in nature; (6) the questions must be relevant to the issues involved in the complaint; (7) the employee's subjective state of mind must not be probed; the questions must not "otherwise interfere with the statutory rights of employees."

As noted above, the charge at issue does not challenge compliance with this standard based on the *Johnnie's Poultry* form created and used by Respondent in *Remington I*. The only question is whether either Somchai Hill or Jun Sangalang was interrogated in such a way that violates the standard. It is plainly evident from the testimony above that this is not the case. Mr. Hill could not have been clearer in stating there was no interrogation whatsoever. While Respondent, as noted in the footnote above, does not condone the actions which Mr. Hill described, by Mr. Artiles, nonetheless, it cannot be said based on this record that Hill was interrogated in any manner that would have a negative or chilling impact on section 7 rights, or violate the Johnnie's Poultry standard. Similarly, there is nothing in Mr. Sangalang's testimony that indicates any such violation.

**XI. The Union Contractually Waived the Right to Make Informational Requests Unrelated to Grievance; and Accordingly, the Charge Related to the Union's June 2010 Informational Request Must be Dismissed**

At paragraphs 29 (e), (f) & (i) of the Third Amended Complaint, General Counsel charges that Respondent "failed and refused" to furnish the Union with information requested on June 11, 2010. The information sought by the Union included recent and upcoming schedules in six departments, and also an "employee roster" that was to include names, job classifications, dates of hire and birth, addresses and phone numbers.

The expired collective bargaining agreement governing such requests, however,

does not obligate Respondent to provide this information. The relevant CBA provision reads as follows:

## ARTICLE XXXV

### General Provisions

Section 1. Except as may be specifically provided elsewhere in this Agreement, neither party shall be required during the term of this Agreement to provide the other party with any data, documents or information in its possession or under its control for any purpose except insofar as such data, documents, or information may be relevant to a grievance at any stage pursuant to Article VII.

Because counsel for the General Counsel failed to prove or show that the above June 2010 information request was “relevant to a grievance at any stage pursuant to Article VII,” or was at least in some way related to a pending grievance, therefore, given this provision of the CBA, there was no obligation under the unambiguous foregoing language for Respondent to produce the information requested.

The Board and the courts have recognized unions have a limited statutory right to request and receive information, related to aspects of administrating its collective bargaining responsibilities. *See, e.g., Timken Roller Bearing Co. v. N. L. R. B.*, 325 F.2d 746, 751 (6th Cir. 1963) (citations omitted). However, as this court went on to hold: “Even so, we recognize that the Union could have relinquished this right under the provisions of the bargaining agreement if it, as a part of the bargaining process, elected to do so. But such a relinquishment must be in ‘clear and unmistakable’ language.” *Id.*, 325 F.2d at 751; *see also Sw. Bell Tel. Co. v. N.L.R.B.*, 667 F.2d 470, 476 and n.6 (5th Cir. 1982) (“The Supreme Court has indicated that the union's right to information may be expressly waived,” citing *N. L. R. B. v. Acme Indus. Co.*, 385 U.S. 432, 435, 87 S. Ct. 565, 567, 17 L. Ed. 2d 495 (1967)).

The above-quoted provision from the expired CBA plainly meets the standard of “clear and unmistakable language” establishing a waiver and relinquishment by the Union of the right to make this information request. Accordingly, the charge in paragraph 29 referenced above must be dismissed.

## **XII. The Charge Relating to Late Posting of Schedules Should be Dismissed**

The Third Amended Complaint alleges that the schedules in the banquet department were not timely posted by Friday at noon, as set forth in the collective bargaining agreement. Several witnesses for the general counsel testified that the schedules *on occasion* were not posted by Friday at noon. There were no other witnesses from any other department who testified to this as a problem, and so the issue is confined to the banquet department. In short, there was no unilateral change to this provision in the collective bargaining agreement.

The testimony does not reflect the schedules were up late consistently. The schedules were in fact often up on time. Further, the testimony does not reflect that the schedules were up consistently at a specifically *different* time. Thus, it appears there was no unilateral change to this provision in the CBA. It appears instead, simply, that the managers in the banquet department were negligent in some times getting the schedule up at the correct time.

As there is no evidence of an intent to unilaterally change a practice mandated by the CBA, and instead merely isolated instances of negligence in this regard, the charge must be dismissed.

## **XIII The Charge Relating to “Impression of Surveillance” Should be Dismissed**

The only evidence in support of the charge that Respondent created an impression of surveillance are a mere two sentences in the testimony of Audelia Hernandez. [Vol. VII, p. 924]. Ms. Hernandez was testifying to a meeting with general manager Denis Artiles, in which there was a discussion concerning information received by Mr. Artiles that Ms. Hernandez had been observed on one of the guest floors soliciting signatures while on working time. The two sentences of testimony from Ms. Hernandez are as follows: “He said that there were several surveillance cameras around the hotel and that more surveillance cameras were going to be installed. So that he was going to investigate and then call me again on this issue.”

It is undisputed that Respondent had fixed surveillance cameras in various parts of the hotel. Indeed, the two fixed cameras on the basement floor (where housekeeping, engineering and the employee cafeteria are located) were discussed at length related to the final discipline matter involving Dexter Wray. In short, the employees were aware of video cameras throughout the hotel. No charges have been asserted relating to the placement of any of those cameras, or related to any use of those cameras. It is, therefore, odd that counsel for the General Counsel brings this particular charge, particularly given the slim evidence – two sentences by Hernandez. This statement by Artiles to Hernandez, if believed, was made only to Hernandez. This charge should be dismissed.

#### **XIV. The Scope of Appropriate Remedy Related to the Use of Banquet Servers Provided by a Third-Party Company.**

The Respondent at one point in the fall of 2010 considered outsourcing the

operation of the Hotel's Banquet Department to a third-party operator. Counsel for the General Counsel introduced in evidence internal Remington emails, Exhibits GC-94 and 95, which reflected a decision to do so. Todd Stoller, however, testified that his "opinion and advice was sought on this matter." [Vol. XVIII, p. 3056]. He testified the decision to outsource, though, "was later reversed" and "never implemented." [Id.].

It is undisputed, nonetheless, that banquet servers provided by a third-party company – Adams & Associates – were in fact used. Mr. Stoller testified he "became aware at a later date that the general manager, Mr. Artilles, had in fact been using Adams & Associates . . . to supplement the banquet department with temporary labor . . . on an *ad hoc* basis." He further explained that this "wasn't pursuant to a corporate directive." [Id., p. 3057].

The Record is clear, however, as reflected in Exhibit GC 92, that the use of banquet servers provided by Adams & Associates, which began in September of 2010, ceased in July of 2011. [See also, testimony by David Jones, Vol. XVII, p. 2719]. The practice, therefore, was in place for approximately 9 months.<sup>26</sup> During that 9 month period, it is undisputed that temporary banquet servers displaced some of the regular Sheraton servers. The record introduced in evidence will establish the extent to which individual servers were displaced. However, back-pay liability can only be established if it is shown, in individual cases with respect to individual banquet-server shifts, that a server (one) was available to work, and (two) would have worked but for not being scheduled because an Adam's server took his or her place, and (three) as to whom evidence was presented that union animus may have motivated the denial of the shift.

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<sup>26</sup> The practice was ended by Mr. Artilles' replacement, current General Manager Jon Kranock. [Id., p. 3058; see also testimony by Kranock on December 13].

This remedy can extend only to the four servers who testified with supporting evidence that they were denied shifts based on union animus, and that they were available to work, but were denied the shift due to an Adams server being utilized. These four employees are Joanna Littau, Fay Gavin, John Fields, and Vickie Williams. No such remedy can extend to any other server. Counsel for the General Counsel recognizes this, as reflected by the amendment to the Complaint made on the last day of the hearing, removing Susan Johnson, named in the complaint as an 8(a)(3) discriminatee (and adding Vickie Williams).

Further, with respect to the appropriate remedy, the Hotel's former controller, David Jones, testified supported by record evidence that on those occasions when Adams servers were utilized – typically only in the large banquet events – the regular servers also working that event made more in gratuities. Mr. Jones in his testimony walked through the calculation, (Vol. XVII, pp. 2711–28], and an illustration of the calculation is in the record as Exhibit R-32. In essence, the calculation shows the following. The hourly gratuity rate is calculated by dividing the number of total hours worked by each server in the day, divided into the total amount of the gratuity paid by the guest group(s). The hourly gratuity rate is then simply multiplied by the number of hours each server worked that day. In the hypothetical example shown on the top of Exhibit R-32, an event in which the guest group(s) pay \$10,000 in gratuity, with 5 regular servers working a total of 40 hours, works out to \$32.50 an hour in gratuity (which is paid on top of a regular fixed minimum cash wage, most recently, \$7.75). This amount, \$32.50, is not untypical. As the record evidence shows, including antidotal testimony from the banquet servers who testified, the hourly gratuity can range above \$50.00 an hour, and is usually

more of \$20.00 an hour.

As Mr. Jones explained, Adams & Associates was paid a fixed \$20.00 per hour per server. This amount was usually *lower* than the calculated hourly gratuity rate, as just noted. Mr. Jones testified that the *excess* above \$20.00/hour was distributed to the regular servers, not “to the house [hotel].”

The second example in the bottom half of Exhibit R-32, also described by Mr. Jones, assumes the first facts as the first example, except instead of 5 regular servers working a total of 40 hours, we have 3 regular servers working a total of 24 hours and 2 Adams servers working a total of 16 hours. The result: the regular servers earn \$40.83 per hour in hourly gratuity.

Accordingly, in setting the remedy, this ALJ should rule that back-pay for Littau, Gavin, Fields, and Williams should be reduced by the additional amounts they earned on each shift that they worked (in which the hourly gratuity rate exceeded \$20.00) by the additional amount they earned that shift by virtue of the fact that Adams servers also worked that shift.

**XV. No Monetary Remedy May Be Imposed Related to the Pension Fund Charge.**

The Third Amended Complaint at paragraph 28(h) alleges that Respondent “ceased making contributions to the UNITE-HERE National Retirement Fund on behalf of its Unit Employees.”

The evidence is undisputed, however, that the contributions have in fact been paid, and are current (as of the day of the hearing <sup>27</sup>). [*See*, testimony of Todd Stoller, at Vol. XVIII, pp. 3047-55; and Rick Sawyer, Vol. XIII, pp. 2172-83]. A copy of the

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<sup>27</sup> The undersigned states in his place as an officer of this tribunal that he has been informed that contributions remain current.

settlement agreement entered into with the National Retirement Fund is in the record as **Exhibit R-12**, and attached thereto is a copy of a letter from the Retirement Fund dated November 22, 2012, confirming that contributions were current as of that date.

As set forth in the opening section of this brief, all 8(a)(5) charges must be dismissed in the event the July 2, 2010 withdrawal of recognition is upheld as lawful. The same would apply, of course, to the charge set forth at paragraph 28(h) in the Third Amended Complaint. The settlement agreement was negotiated consistent with this fundamental legal reality. That is, as the agreement reflects on its face, and as Mr. Stoller testified, while Respondent has made fully compliant contributions for every month since July 2, 2010, in the event the withdrawal of recognition is upheld as lawful, these contributions will retroactively convert to withdrawal liability payments (under the multi-employer pension plan provisions in ERISA). The withdrawal-of-liability calculation will be based on the withdrawal date of July 2, 2010. As Mr. Stoller further testified, Remington always understood that withdrawal liability would be imposed.

The cessation of contributions after July 2, 2010 was not done with union animus. It was done simply because agreement first needed to be reached with the Retirement Fund to allow the retroactive conversion to withdrawal liability. Negotiations leading to this agreement were complicated and lengthy, however, the agreement was successfully achieved.

The value of the employees' pension benefit has not been harmed.

**XVI. The Discipline of Fay Gavin on March 19, 2010 was Justified, and the Respondent's Cooperation in the Grievance Process Was Reasonable**

Fay Gavin, an experienced banquet employee with high seniority, was appropriately disciplined for engaging in non-work activity while on the clock, and for intimidating a fellow employee. **Exhibit GC-6.** The witness who complained, a young banquet server, informed the H.R. Director Jamie Fullenkamp that Gavin told her she would be removed from the tip pool if she refused to wear a union button. **Exhibit GC-7** (the witness's statement to H.R., with her name redacted). Given Ms. Gavin's many years in the banquet department, and given the witness's novice status, it is entirely credible the latter would have believed Ms. Gavin possessed this power. This is borne out by the fact, as Ms. Fullenkamp testified, that the witness appeared genuinely fearful when she met with her. [Vol. XVI, pp. 2682-87 (she brought her husband along for support, as a further indication of her fearfulness)]. The witness – whose name, Sue Kennedy, has since been disclosed – did not want her identity revealed at that time.

Respondent cooperated appropriately and in a timely manner in response to the grievance, as reflected by **Exhibits GC-3** through **7**. The only non-cooperation was the refusal to disclose Ms. Kennedy's identity. This was reasonable, given the circumstances.

## **XVII. The Discipline of Shirley Grimes For Rude, Disrespectful Behavior Was Justified.**

Shirley Grimes, a banquet captain, was disciplined on January 14, 2011 for rude and disrespectful conduct directed toward a catering manager, Irene Kelly, who asked her to perform a usual work task. **Exhibit GC-78 and R-31** (the same discipline document; however, R-31 has attached to it the supporting statement by Kelly). As set forth in

Kelly's statement, Grimes said to her: "That's not our job it is housekeeping. You need to call housekeeping." She stated Grimes said this "in a very hostile way." Ms. Fullenkamp conducted an appropriate investigation, and spoke with both Ms. Grimes and Ms. Kelly. [Vol. XVI., pp. 2641-73].

As stated in the discipline: "Unfortunately, there have been previous complaints and concerns with regard to your communication and performance." The discipline recounted two similar prior instances. Ms. Fullenkamp testified that Ms. Grimes had a problematic history: "Shirley could get pretty rude at times. And it was for rudeness and unprofessionalism, not only with employees, but with customers." [Id., p. 2642]. This history is laid out in detail in the record, at pp. 2641 to 2673 (part of which was rejected in error, given the reliance on this history in reaching the disciplinary decision on January 24, 2011). In view of this history, and Ms. Fullenkamp's assessment upon interviewing both Grimes and Kelly, this discipline was entirely warranted.

**XVIII. Respondent Did Not Have a Duty to Bargain Over the Implementation of the Linen-less Banquet Tables.**

Todd Stoller testified to the company-wide implementation of linen-less banquet tables, "rolled out . . . almost every hotel that Remington manages now . . . including 100 percent of the full service hotels." The plan was initiated out of the environmental and cost-saving concern related to the laundering of the linens which, traditionally, are used in the banquet business. [Vol. XVII, pp. 3058-63].

Respondent's right to implement this change falls squarely within its rights under the CBA's management clause provision, cited and quoted in full in section V, which empowers management as follows: "to determine the methods, process and means of performing any and all work; to control the property and composition, assignment,

direction and determination of the size of operations, methods, means, services, products  
or facilities . . .”

s/ Karl M. Terrell

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**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 19**

In the Matter of:

**REMINGTON LODGING & HOSPITALITY,  
LLC, d/b/a THE SHERATON HOTEL,**

Charged Party,

and

**UNITE-HERE! LOCAL 878, AFL-CIO,**

Charging Party.

Case Nos. 19-CA-32599,  
et al.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Respondent's Post Hearing Brief was electronically filed with the Board's e-filing system with the Division of Judges and emailed to the following counsel:

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This 22nd day of February, 2013.

s/s Karl M. Terrell