

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LYTTON RANCHERIA OF CALIFORNIA
d/b/a CASINO SAN PABLO

and

Cases 32-CA-025585
32-CA-025665
32-CA-064020
32-CA-086359

UNITED HERE LOCAL 2850

*Gary M. Connaughton, Esq.,
Angela Hollowell-Fuentes, Esq.,
for the Acting General Counsel.*

*Richard J. Curiale, Esq., and
Joseph C. Wilson, Esq.
of San Francisco, California
for the Respondent.*

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on October 29 through November 1, 2012. On February 4, 2011, Unite Here Local 2850, (the Union) filed the charge in Case 32—CA—025585 alleging that Lytton Rancheria of California, d/b/a Casino San Pablo (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On April 4, 2011, the Union filed the charge in Case 32—CA—025665 against Respondent. On September 7, 2011 the Union filed the charge in Case 32—CA—64020. The charge in Case 32—CA—086359 was filed by the Union on July 31, 2012. On August 29, 2012, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. On October 11, 2012 the Regional Director issued amendments to the complaint. On October 12, 2012 the Regional Director issued a complaint in Case 32-CA-086359. The complaints were consolidated on October 19, 2012.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record,

from my observation of the demeanor of the witnesses,¹ and having considered the post-hearing briefs of the parties, I make the following.

Findings of Fact

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I. Jurisdiction

The Respondent, with an office and principal place of business in San Pablo, California, has been engaged in the operation of a commercial gaming and entertainment establishment, including a gaming casino, restaurant and cocktail bar (the Casino). In the 12 months prior to issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000. Further, Respondent received goods and services valued in excess of \$5,000 from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. The Bargaining

Respondent operates a commercial gaming and entertainment establishment, including gaming casinos, restaurants, and cocktail bar at a location in San Pablo, California (the Casino). The Casino employs approximately 470 employees. The Union represents approximately 160 employees at the Casino. The most recent collective-bargaining agreement between Respondent and the Union was effective by its terms from November 2006 through November 2009.

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Bargaining for a successor agreement began in November 2009. The parties met 14 times for bargaining between November 2009 and January 25, 2011, including a session on October 18, 2010. During the October 18, 2010 bargaining session, the primary focus of the bargaining was the issue of healthcare. Present for the Union was its Chief Negotiator, Wei-Ling Huber. Representing Respondent was Attorney Richard Curiale and Attorney Kathryn Ogas. Curiale started the session by stating that Respondent had gotten a response from its healthcare provider. Curiale said that it would be too expensive for Respondent to switch to the Union's health plan. Curiale presented a new comprehensive contract proposal which, included two new healthcare options. The Union did not reject these proposals but expressed its problems with the employee cost of the healthcare proposals.

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The next bargaining session was held on November 3, 2010. At this meeting Curiale pressed Huber to make a choice on the two healthcare options offered by Respondent. Huber refused to do so. Huber made a counter-proposal which included a wage proposal.

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¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

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5 The parties next met on November 17, 2010. At this meeting, Curiale proposed a
healthcare plan that was less costly for employees than the two choices offered on October 18.
Respondent would also be offering a \$350 signing bonus. Curiale said the Union had to accept
or reject the plan within the next two days. Huber answered that while the new healthcare
proposal was a large improvement over what had been offered previously, the Union could not
accept the plan outside the framework of a complete agreement. Huber added that if
Respondent implemented this healthcare proposal, the Union would not file unfair labor practice
charges as long as Respondent continued to bargain over the rest of the contract. Curiale said
10 that the healthcare issue needed to be decided that day. Curiale stated that the Casino was
unwilling to talk about money because the Lytton Tribe (that owned the Casino) did not want to
bargain about anything other than healthcare at that time. The Union caucused, and then
Huber answered that she could not give an answer that day or the next day. Huber asked for a
counter-proposal on language issues that were still outstanding. Curiale said he would take the
15 healthcare offer off the table but he was not sure that he was authorized to do so. Curiale then
ended the meeting.

20 On November 18, the parties met again for bargaining. The Union accepted the
Respondent's healthcare plan. Huber stated that the Union was only accepting the healthcare
plan and nothing else. Huber stated that issues such as healthcare eligibility were still up for
negotiations as well as wages. Curiale stated that everything but healthcare was still open.
Huber accepted the healthcare plan but stated she intended to negotiate over every other issue.
She said that in January 2011, when the parties would start negotiating wages again, she would
give Respondent a higher wage proposal. Curiale said he understood.

25 The parties next met on November 24 but did not discuss wages. The parties met again
on December 16, 2010. During this meeting Curiale stated that Respondent was not going to
move on anything. Curiale said he would get the Union a final proposal.

30 On January 25, 2011, the parties met again. Curiale started the meeting by distributing
a letter and a proposal he characterized as Respondent's last, best and final offer. The letter
called on the Union to have its members vote on the last, best and final offer, which proposed a
wage and benefit freeze for the life of the proposed two-year contract. Curiale stated that
Respondent had put all its money into the healthcare plan and that there was nothing more. He
35 urged the Union to have its membership vote on the last, best and final offer. Huber insisted
that there was still \$1.1 to \$1.2 million available in new money. She stated that she did not think
Respondent was taking negotiations seriously. The Union then gave Respondent a
comprehensive bargaining proposal which included a wage increase. Curiale rejected the
Union's proposal and again asked that the Union take the last, best and final offer to its
40 membership for a vote.

45 On February 2, 2011, the Union sent an e-mail to Respondent asking to meet for further
negotiations. After not hearing from Curiale, Huber sent another e-mail on February 13. In this
e-mail Huber stated that the Union would submit the Respondent's final offer to the employees
but, that the Union needed to clarify the last, best and final offer. Curiale responded by e-mail
that there was no need to meet and that he would send an errata sheet with corrections to the
final offer.

50 On February 25 Huber received an e-mail from Curiale clarifying certain aspects of
Respondent's final offer. On March 7, Huber wrote Curiale and raised questions concerning the
final offer and requested that the parties meet.

On May 20 the Union submitted Respondent's last best and final offer to its membership for a ratification vote. The offer was rejected by the union membership. Huber then contacted Curiale to resume bargaining.

5 The parties then meet on June 24. Huber stated that she wanted to talk about Respondent's last, best, and final offer and the Union's reaction to it. She also wanted to talk about her costing of the proposal, a new Union proposal and the cost of the Union's new proposal. Curiale said that negotiations were over and that he would focus on litigation. Huber had a new proposal to offer, but Curiale left the meeting before she could present it.

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On June 27, Curiale sent Huber a letter stating that the parties were at impasse and that further negotiations would be futile. On July 9, Huber sent Curiale a letter which contained the Union's newest wage proposals. Respondent did not respond to this letter.

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1. The Section 8(a)(1) allegations

On Friday, December 17, 2010, a group of employees presented a petition about collective bargaining to Respondent's managers. On the following Wednesday or Thursday, James Grant, Respondent's director of guest safety, called Eddie Leroy Johnson, gaming floor person, at home. Grant told Johnson that what the employees had done was not against the rules but that he would like to know in advance of any planned Union activity so that Respondent could schedule it so that the employees did not inundate a particular manager. Grant admitted calling Johnson about the petition and telling him that the employees could do what they wanted as long as they followed proper guidelines.

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On the morning of January 1, 2011, bargaining unit employee Nelson Yip was working as a cocktail server in the Casino. That morning Yip found a \$100 bill on the floor and put that bill in with his cash tray. At about 2 a.m. that morning Yip was called into an investigatory meeting by Peter Demarest, security manager and Buddy Jah, security supervisor. Manager Felipe Guzman questioned Yip about whether he intended to keep the money. Guzman said that he was going to do an investigation and told Yip not to tell anybody and not to contact anyone about the investigation. Guzman admitted that he told Yip not to talk to any employees about the investigation.

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In July 2011, several of Respondent's employees demonstrated in support of an employee who had been terminated. The next day employee Isadoro Saravia Ramos was called into a meeting with human resources manager, Chris Mavroudis and Sous Chef Jaime Menjivar. Menjivar acted as an interpreter as Ramos only spoke Spanish. Mavroudis asked what had happened the day before. Ramos said that the Union members were there to support an employee who wanted his job back, Mavroudis stated that he was concerned about the employees' safety and that he was worried that the Union could bring in people to make a ruckus. Ramos answered that as Union members the employees protested legally. Mavroudis then questioned what else the Union was going to do. Ramos did not answer that question.

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45 The complaint alleges and Respondent admits that Respondent maintained the following rules in its employee handbook:

(a) Unacceptable Behavior

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Gossiping about other Team Members (including supervisors, managers, directors, etc.)

(b) Team Member Conduct and Work Rules

The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:

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Insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers’

(c) Solicitation, Distribution and Bulletin Boards

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Team Members may not solicit or distribute literature in the workplace at any time for any purpose.

(d) Team Member Conduct and Work Rules

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The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:

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Making false, fraudulent or malicious statements to or about a Team Member, a guest or San Pablo Casino.

(e) Access

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Team Members are not permitted in the back of the house areas more than thirty (30) minutes prior to the beginning of their shift or longer than thirty (30) minutes following the end of their shift, except under the following circumstances:

1. To conduct business with Human Resources;
2. Pre-arranged training sessions or orientations;
3. With the approval of a director, manager or supervisor.

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Respondent stipulated that the handbook contained these provisions from August 2010 until about May 2011, when the employee handbook was rewritten and redistributed. The new handbook does not contain these provisions.

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2. The alleged changes to the Union’s access to the casino

The expired collective-bargaining agreement contains the following provision regarding Union access to the Casino:

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Properly authorized Representatives of the Union shall be permitted to enter the Employer’s premises through the team member entrance in order to investigate the status of all employees and to investigate the conditions to see that the Agreement is being enforced. Upon entering the premises, Union Representatives shall notify the management that they are on the premises. In the event it is necessary for the Union Representative to visit the premise outside the normal business hours (for example on the graveyard shift) the Representative shall provide management with reasonable advance notice of the visit.

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It is understood that the Union Representative shall not conduct business on the Casino floor other than to advise an employee that they are on the premises. At all times, Union Representatives shall conduct themselves in such a manner as to ensure that there is

no unreasonable interruption or interference with the duties of an employee or the Employer's operation.

5 During the period 2004 through December 2010, the union representatives entered through the front entrance of the Casino. Union representatives checked in at the security station when they entered the Casino and were escorted by a security officer to the employee cafeteria in the "back of the house." According to the Union's witnesses they were not required to have an escort to move around the back of the house.

10 On December 17, 2010, Union Rrepresentatives Andrew Dadko and Yulisa Elenes went to the Casino to meet with a group of off-duty employees. When Dadko and Elenes entered the Casino, they signed in at the security desk and obtained their visitor badges and were escorted to the employee cafeteria. None of the employees were in the cafeteria. Elenes called one of the employees and learned that the employees were on the second floor. Dadko and Elenes
15 proceeded to the second floor employee breakroom. On the way, they passed by the security guard. Dadko and Elenes began a discussion with several employees. James Grant, Respondent's director of guest safety, entered the breakroom and asked Dadko and Elenes to step out of the room and talk to him. Dadko and Elenes refused this request. After several requests to go with Grant, Dadko and Ellenes finally left the breakroom and returned to the
20 employee cafeteria.

Grant later spoke with Dadko and Ellenes in the cafeteria. Grant told them they had to stay in the cafeteria. Grant asked if they would stay in the cafeteria and Dadko answered "we'll see." Thereafter, Dadko and Ellenes left after returning their visitor badges.

25 On December 21, Curiale sent Huber a letter concerning Dadko's visit of December 17. Curiale stated that union representatives were barred from entering the Casino until the parties had a discussion regarding Union conduct of visits. Curiale also threatened to have Dadko arrested if he entered the Casino again.

30 On December 27, Huber sent Curiale an e-mail stating that she wished to meet with Respondent. She also stated that Respondent could not bar Dadko from its premises. Curiale responded that same day, stating that he would be out of the country and would not be able to meet until January 11, 12 or 13. Huber responded that the date was too far off and that
35 someone else should appear for Respondent. Curiale responded that there was nothing he could do.

40 On January 11, 2011, Huber sent Curiale an e-mail setting forth the Union's account of the December 17 incident. She denied that Dadko and Elenes had evaded security and denied that Dadko was intimidating. When Huber met with Curiale on January 11, Curiale stated that the Union representatives needed to have an escort to move from one place to another in the Casino. Curiale stated that the Union would have to notify the Casino in advance of a visit; the Union representatives would have to ask for an escort to move from one place to another; the Union would have to agree to Respondent's 30-minute rule; and that the Union agree not to
45 assign Dadko to the Casino.

After a caucus, Huber said the Union would agree to advance notice and to getting an escort to move around the Casino but would not agree to the 30-minute rule. She also said the Union could not agree to barring Dadko from the Casino.

50 On January 18 Curiale sent Huber an e-mail about the access issue. Curiale stated that he was not barring Dadko from participating as a union representative, but only barring him from

the Casino. Curiale stated he would allow other union representatives to access the Casino if they advised Respondent in advance; they sign in; agree to be escorted to the place they wish to go; they agree to ask for an escort to go to another part of the Casino; and they agree to ask for an escort when they leave the Casino. Further, Curiale asked the Union to agree that its meetings would not require employees to enter 30 minutes before their shift or remain 30 minutes after their shift. Huber stated that she would discuss the proposal with her team.

Huber responded by e-mail on January 25, agreeing that the Union would advise Respondent in advance of a visit; they would sign in; they would ask for an escort; they would ask for an escort to move from one place to another, and would ask for an escort to leave the Casino.

On January 25, 2011 the parties met at Respondent's training center. As this property is separate from the Casino, Dadko was permitted to attend.

On February 2, 2011, Huber sent Curiale an e-mail, agreeing to advance notice and escort procedures but rejecting the 30-minute rule.

On March 10, 2011, Union representative Max Alper called in advance and then checked in at the security desk. After being escorted to the employee cafeteria, Alper asked to be escorted to where the employee schedules were posted. The security guard stated that he had to check with management. Mavroudis came to the cafeteria and told Alper that he could not go to where the schedules were posted. Mavroudis offered to e-mail Alper the schedules.

On March 21, 2011 Alper called in advance and was escorted to the employee cafeteria. Alper asked to be escorted to the employee break room. Security supervisor Buddy Jah said he would have to check with Mavroudis. Jah returned and said that Alper could not go to the break room. When Alper inquired as to why he could not go, Jah said that was what he had been told.

On March 24, 2011 Alper called in advance and checked in with security when he arrived. Alper was met by Mavroudis and Grant. Mavroudis asked the purpose of the visit. Alper replied that he never in the past had to provide the purpose of the visit. Mavroudis stated that if Alper did not provide the purpose of the visit, he would not be allowed to enter the Casino. Alper stated that he believed this was an unfair labor practice. Mavroudis directed Alper to call the Casino's attorney if he had any more questions.

On March 30, 2011 Alper called Mavroudis to inform him that he would be visiting the Casino that day. Mavroudis asked the purpose of the visit. Alper answered that he did not believe that was a proper question. Alper informed Mavroudis that he had a meeting with an employee. Mavroudis asked the name of the employee and how long the meeting would last. Alper said he would not answer those questions. Mavroudis stated that if Alper did not tell him the purpose of the meeting, the name of the employee and the length of the meeting, Alper would be denied access. Alper said he believed this was an unfair labor practice.

On March 31, 2011 Alper and C-en Yu, a Union intern, arrived at the facility. They planned to meet with employee Isadoro Ramos. Alper had called earlier and left a message that he was going to visit. Alper and Yu checked in at the security desk and were told to wait. Security Supervisor Alex Lanier told Alper that he had to speak with Mavroudis and that Mavroudis would not be in until 9 a.m. Alper said that he had called the day before and spoke with Mavroudis. Lanier said that he had spoken with Mavroudis and was just following orders. Alper and Yu gave back their visitor badges and went outside. Once outside, Alper called Ramos and told him that he was at the front entrance. Ramos was in uniform but not scheduled

to work for 20 minutes. When Ramos arrived at the security desk, Alper stepped back inside to talk to him.

5 Lanier told Alper and Yu that they had to leave. Alper said that what Lanier was doing was unlawful. Lanier told Ramos to return to the Casino. Alper told Lanier that Ramos wanted to meet with the Union. Ramos' supervisor arrived and Ramos left. Lanier then told Alper that he had to leave and that if he did not, Lanier would call the police. Alper said that would be unlawful. Alper and Yu then walked outside and waited for the police.

10 When the police officer arrived he spoke with Lanier. Then the police officer told Alper and Yu that they had to leave and if they did not leave, Lanier would make a citizen's arrest. Alper and Yu left the property. Before they left, Lanier gave them a form letter stating that they were banned from the Casino.

15 On January 31, 2012, Curiale sent an e-mail to Alper stating that Union Representative Jessica Medina was barred from the Respondent's property. Medina was barred based on an incident which occurred on December 7, 2011. A grievance meeting was held on December 7 at Respondent's training center, separate and apart from the Casino. Alper and Medina attended the meeting on behalf of the Union. After the meeting was over, Alper attempted to talk with Mavroudis. Grant walked over and Mavroudis walked away. Grant told Alper and Medina that they needed to leave. Grant asked Alper and Medina to leave four or five times before they finally left.

3. The information requests

25 The complaint alleges and Respondent admits that on the following dates, the Union requested in writing that Respondent furnish it with the following information:

30 (a) January 5, 2011

A copy of [the] security tape that shows the incident concerning employee Nelson Yip who was terminated for allegedly failing to turn in money that he found on the Casino floor.

35 (b) January 19, February 2, and March 7, 2011:

The method for calculating employee turnover and turnover rates for each year from 2005 to 2010.

40 (c) February 2 and 13, and March 7, 2011:

A copy of the security and badge procedures/requirements. . . . imposed by the City of San Pablo.

45 (d) February 13 and March 7, 2011:

(1) The total tip and service charge income for each worker for the entire calendar year 2010.

(2) All reports, worksheets, filings and other documents related to the December 2010 IRS tip rate and the IRS tips reported for all bargaining unit employees, including but not limited to gaming techs, gaming floor workers, bartenders, barbacks, servers, and porters.

50 (e) March 7, 2011:

- (1) In order to access the impact of the proposal, please provide the total hours paid for Easter in 2010 and 2009 and the sign-in sheets or timecards for Memorial Day 2010 and 2009.
- 5 (2) Please provide daily sign in [sic] sheets or timecards for the period between November 2010 and February 2011, so we can assess how this change in benefits eligibility would impact employees,
- (3) Job titles of four named employees (Melody Navarette Denate; Sachin Batajoo; Clayton Cox; Victor M. Figueroa) if they are bargaining unit employees.
- 10 (4) Please also provide the list of employees with their job titles and hire dates, who were enrolled in both medical and pension during the period immediately before January 2011.
- (f) March 11, 2011:
- 15 (1) Schedules for all departments for the same period (December 1, 2010 through February 10, 2011).
- (2) Copy of Nelson Yip's sales receipts for New Year's Day between 1a.m. and the end of his shift.
- (3) An updated roster of employees with names, addresses, phone numbers, classifications, and date of hire.
- 20 (g) June 15, 2011:
1. Information regarding a grievance involving employee Peung Phontavy;
2. Employee personnel file.
- 25 3. All surveillance tapes related to the incident.
4. All paperwork, documents e-mails, memos, notes and investigations related to all incidents related to listening, following instructions, timing and plate production and food quality from the past 12 months.
- (h) June 15, 2011:
- 30 1. Information regarding a grievance involving employee Patricia Gomes
2. Schedules for all cocktail servers for the past 12 months
3. Section Assignments for all cocktail servers for the past 12 months.
- (i) August 25, 2011:
- 35 1. Information regarding the same grievance involving employee Patricia Gomes:
2. Schedules for all cocktail servers for the past 12 months.
3. Section Assignments for all cocktail servers for the past 12 months.
4. Cash out slips for all cocktail servers for the past 12 months.
- 40 (j) July 6 and July 13, 2011:
1. Information regarding a grievance involving employee Nirmani Kalakheti:
2. All paperwork, documents, e-mails, memos, notes and investigations related to the separation.
- 45 3. All paperwork, documents, e-mails, memos notes and investigation related to all bereavement leaves from the past 3 years.
4. All paperwork, documents, e-mails, memos notes and investigation related to all personal leaves from the past 3 years.
- (k) July 13 and 14, 2011:
- 50 Schedules for all unit employees for the months of June and July 2011.
- (l) August 25, 2011:

1. Information regarding sonority-based job bidding and the hiring of part-time employees:
2. Schedules for all departments with Union represented employees for the past 12 months.

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(m) August 25, 2011:

1. Information regarding a grievance about vacation pay:
2. A list of employees who took vacation in the past 3 years, including name, classification (job title) weekly base rate, average weekly pay for all weeks worked by the employee during the year preceding the vacation, amount paid for vacation.

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(n) August 25, 2011:

1. Information regarding the hiring of part-time employees;
2. A list of all terminated employees in the past 12 months, including name, hire dates, termination dates, classification (job title) and status (PT or FT).
3. A list of all current employees.

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Respondent had a security taperecording regarding the termination of employee Nelson Yip. Dadko requested to see the taperecording in support of a grievance concerning the termination - Curiale and Mavroudis refused to turn over the tape.

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In January, February and March 2011, the Union requested the method for calculating employee and turnover rates for each year from 2005 to 2010. That information was not turned over to the Union until February 2012.

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The Union requested the security and badge procedures/requirements imposed by the City of San Pablo. Respondent is an Indian Casino and there are no City of San Pablo procedures or requirements.

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The Union requested information regarding holiday pay. Respondent provided some but not all of the information requested on June 15. With respect to the Phontavy grievance, the Respondent provided the information that it had. Respondent did not provide information regarding the Gomes grievance. Respondent provided the information regarding the Kalakheti grievance. Respondent did not supply the schedules for employees for June and July 2011. Further, Respondent did not furnish the schedules for all departments that were requested in August 2011. Respondent did not furnish the information requested about vacation pay. Finally, Respondent did not furnish the information requested about the hiring of part-time employees.

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4. The alleged unilateral changes

In June 2011, Respondent distributed to part-time employees a memorandum which, among other things announced that beginning on July 1, 2011, these employees would be receiving new benefits, including holiday pay and additional days off without pay. After July 1, 2011, part-time employees began receiving holiday pay for the first time. Respondent did not notify the Union or afford the Union the opportunity to bargain over this matter.

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Respondent did not provide health benefits from March to September 2011, to bargaining unit employees Isabel Garrido, Al Balbuena, Rodolfo Trinidad and Ali Challal. These employees worked 16 shifts a month during that period. The collective-bargaining agreement states that Respondent must provide healthcare benefits to employees who work more than 16 shifts a month in the month preceding the month in which contributions are due. When Respondent was notified by the Union of its failure to provide benefits for these employees, Respondent reduced the number of shifts to 15 for these employees. Respondent contends that it never provided such benefits for part-time employees.

B. Respondent's Defense

Respondent contends that impasse was reached after the Union rejected its last, best and final offer. Respondent contends that the Union brought a barrage of information requests and filed grievances to harass Respondent. Respondent contends that its access rules and policies are for a legitimate business reason.

III. Analysis and Conclusions

A. The Respondent Was Obligated to Bargain

The general rule is that when parties are engaged in negotiations for a new agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home*, 335 NLRB 96 (2001); citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line Enterprise*, the Board recognized only two exceptions to that general rule: "when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action", 335 NLRB at 374.

A genuine impasse exists when there is no realistic possibility that continuation of negotiations would be "fruitful" and both parties believe that they are "at the end of their rope." *Pratt Industries*, 358 NLRB No. 52 at 6 (2012). Whether a bargaining impasse exists is a matter of judgment, and bargaining history, the good faith of the parties in negotiations, the length of the negotiations . . . , [t]he importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding to the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.*, 163 NLRB 475, 478. Since impasse is a defense to allegations of bad-faith bargaining, it must be proven by the party asserting it and it will not be lightly inferred. *Sacramento Union*, 291 NLRB 552, 556 (1988).

In the instant case, the parties bargained for 14 sessions from November 2009 to January 2011. It was not until November 18, 2010 that the parties reached agreement on the healthcare plan. At that time the Union told Respondent that it was only agreeing to the healthcare plan and that all other issues were still on the table. During the negotiations on November 24 and December 16, 2011, there was no substantive discussion of wages. The Union had come to the January 25, 2011 session with the intent to bargain over wages and benefits. Respondent had determined that it would demand a wage freeze and that it would not move from that position. Respondent had determined that the Union would never agree to that wage proposal and thus Respondent offered its last, best and final offer. Respondent assumed the parties were at impasse. The Union, on the other hand, did not believe the Parties were at impasse and wished to negotiate over wages and benefits. Respondent refused to meet and bargain. Finally, on May 20, the Union placed the last best and final offer to a membership vote.

The last best and final offer was rejected. The Union attempted to bargain and Respondent refused.

Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if that issue is of such overriding importance to the parties that the impasse on that issue frustrates the progress of further negotiations. *Camet Co.*, 331 NLRB 1084, 1087 (2000). The Party contending that an impasse on a single critical issue justified its declaration of impasse must demonstrate three things:

[F]irst the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on the critical issue led to a breakdown in the overall negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. *Richmond Electrical* 348 NLRB 1001, 1003 (2006) citing *Calmat Co.*, 331 NLRB at 1097.

Here the Parties put off negotiations on wages until the issue of healthcare was resolved. In January 2011, when the Union was prepared to bargain over wages and benefits, the Respondent made its last, best and final offer. While the Union was willing to negotiate, Respondent refused to negotiate any further. While the parties may have been deadlocked on wages, Respondent prematurely declared an impasse, while the Union was still negotiating. I find that Respondent declared an impasse prior to reaching impasse with the Union.

As stated above, the fact that Respondent believed that the Union would never agree to Respondent's wage proposals does not establish an impasse. In light of the limited bargaining about wages and the Union's willingness to continue bargaining, I cannot find the parties had reached a deadlock regarding this issue.

When the Union members rejected Respondent's last, best and final offer, the parties were still not at impasse. The Union clearly indicated it was willing to bargain. However, when the parties met on June 24, Respondent refused to listen to any Union proposals.

1. The information requests

The general rule is that an employer has a statutory obligation to supply requested relevant information which is reasonably necessary to the exclusive bargaining representative's performance of its responsibilities. *Boise Cascade Corp.*, 279 NLRB 429 (1986).

It is well-established that a union is entitled to whatever information is relevant and necessary to its representation of the bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967); *SBC Midwest*, 346 NLRB 62, 64 (2005). In *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), citing *General Electric*, 290 NLRB 1138, at 1147, the Board held that "Once a union has made a good faith request for information, the Employer must provide relevant information promptly, in useful form." The test used by the Board for determining whether a Respondent has supplied the information in a reasonable amount of time is that set forth in *West Penn Power Co.*, 339 NLRB 587 (2003) (enfd. In pertinent part 349 F. 3d 233 (4th Cir. 2005) Accord: *Earthgrains Co.*, 349 NLRB 389:

In determining whether an Employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well established that duty to furnish requested information

cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.

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Respondent contends that the Union filed grievances and information requests to harass Respondent. However the evidence establishes that the information sought was reasonably related to the Union grievances.

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The taperecording regarding the termination of employee Nelson Yip would be relevant to a grievance concerning the termination. Respondent did not turn over the taperecording because it believed it was irrelevant. However, Respondent could not unilaterally make that determination. The information concerning employee turnover was not given to the Union for over a year. Respondent does not contend that the information was not provided due to a mistake. The Union requested information regarding the requirements of the City of San Pablo. However, no such requirements exist. Thus, Respondent had no information to provide.

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The Union requested documents related to the IRS' tip rate. Respondent did not provide the requested documents. The Union sought information in regard to bargaining over holiday pay and medical benefits. Respondent did not provide the information because it felt that it was being harassed. The Union sought information regarding employee schedules. The Union sought such information to investigate a potential grievance. Further, the Union sought an updated roster of employees. Respondent failed to furnish such information.

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The Union requested information regarding a grievance involving employee Peung Phontavy. Respondent only provided what it deemed relevant and did not provide all the information. Respondent could not unilaterally decide what is relevant. The Union sought information regarding the grievance of employee Patricia Gomes. Respondent did not provide the information, allegedly, because it provided an e-mail allegedly establishing that Gomes was not discriminated against. Again, Respondent cannot unilaterally determine the relevance of the information sought.

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The Union sought information regarding the grievance of employee Kalakheti. Respondent again unilaterally decided that the information was not relevant. The Union requested the schedules for the months of June and July 2011. Such information is presumptively relevant. Respondent refused to provide the information unless the Union alleged a violation of the contract. The Union could request the information to determine whether or not to file a grievance.

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The Union sought information regarding seniority-based job bidding in support of a grievance. Respondent did not supply this information. The Union sought information regarding the payment of vacation pay for grievance purposes. Respondent did not provide this information.

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The Union sought information regarding a grievance concerning the hiring of part-time rather than full-time employees. Respondent determined that there was no merit to the grievance and did not furnish the information. Respondent could not unilaterally make that determination.

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In summary, after January 31, 2011, Respondent did not provide information because it believed the requests were made for harassment purposes.

2. The unilateral changes

Respondent issued a memorandum on June 8, 2011, granting part-time employees holiday pay and additional days off without pay. Respondent did not notify or bargain with the Union about these changes.

Under the Act, before an employer may effect a material and substantial changes in the employees' wages, hours and other conditions of employment, it must notify the employees' collective-bargaining representative and afford the representative an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1238 (1994) enf. 73 F.3d 406 (D.C. Cir. 1996). The notice given to the union must be sufficient to allow a meaningful chance to bargain before the change is implemented. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Intersystems Design Corp.*, 278 NLRB 759 (1986). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by instituting these changes.

During the period from March to September 2011, four employees who were classified as part-time employees worked 16 or more shifts per month. Respondent contends that these employees were part-time employees and therefore, not eligible for health benefits. The Agreement provided that Respondent provide healthcare benefits to employees who work more than 16 shifts a month, in the month preceding the month in which contributions are due. When the Union questioned the status of these employees, Respondent unilaterally reduced the number of shifts worked by the employees. Respondent did so without notice to or bargaining with the Union.

3. Union access

Board law is well-settled that a union's access to represent employees on an employer's premises is a mandatory subject of bargaining. *American Commercial Lines*, 291 NLRB 1066, 1072 (1988). In addition, a union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. *Turtle Bay Resorts*, 353 NLRB 1242 (2009).

Here the Respondent had a legitimate rule requiring an escort to move around the Casino. However, Respondent unilaterally required the Union to notify it of the purpose of the meeting. Respondent unilaterally conditioned access on the Union having a scheduled meeting with an employee.

C. The 8(a)(1) Allegations - Interrogation

The Board's test for determining whether interrogation of employees concerning their union activities or the union activities of other employees is set out in *Rossmore House*, 269 NLRB 1176, 1177 (1984):

Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

The Board has said that a totality of the circumstances test must be applied, even when the interrogation is directed to unit members whose union sympathies are unknown to the employer. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the considerations taken into account by the Board in determining whether, under the totality of the circumstances, the interrogation was coercive include: Whether the employee interrogated was an open and active

union supporter; whether there is a history of employer hostility towards or discrimination against union supporters, whether the questions were general and non-threatening, and whether the management official doing the questioning had a casual and friendly relationship with the employee being questioned. *Sunnyvale Medical Clinic*, supra at 1218.

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I find that the interrogation of employee Isadoro Ramos, violated Section 8(a)(1) of the Act. Here the employees had engaged in protected action and the questions pertaining to the Union's future action tended to restrain and coerce employees in violation of Section 8(a)(1). I find by this conduct, in the context of unlawful suspensions, Respondent violated Section 8(a)(1) of the Act.

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Security manager Felipe Guzman instructed employee Nelson Yip not to talk to anyone about the investigation affecting his appointment. This action violated the Act because it tended to interfere with Yip's right to concerted action with other employees concerning his possible discipline. *Fresenius USA Mfg.*, 358 NLRB No. 138 at fn.1 (2012); *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 178 (1997).

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Conclusions of Law

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1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

4. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally establishing rules that prohibit union access to the Casino.

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5. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally announcing and implementing new benefits for part-time employees.

6. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide contractual health benefits for four unit employees.

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7. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide relevant information necessary for bargaining and grievance handling.

8. Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee.

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9. Respondent violated Section 8(a)(1) of the Act by telling an employee not to discuss his investigation with other employees.

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10. Respondent's conduct above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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Remedy

5 Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

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The Respondent, Lytton Rancheria of California d/b/a Casino San Pablo, its officers, agents, successors, and assigns shall

1. Cease and desist from

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(a) Refusing to bargain collectively with Unite Here Local 2850.

(b) Unilaterally changing rules regarding Union access to the Casino.

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(c) Unilaterally announcing and implementing new benefits for part-time employees.

(d) Unilaterally refusing to make benefit payments for certain employees.

(e) Refusing to furnish relevant information to the Union.

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(f) Coercively interrogating any employee about union support or union activities.

(g) Telling employees not to discuss their investigations with other employees.

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(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

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All full-time and regular part-time food and beverage, maintenance, and housekeeping employees, including barbacks, bartenders, broiler server, casino servers, lead food servers, American line cooks, Asian Line cooks, broiler porters, casino porters, concession workers, hosts/hostesses, lead cook, lead utility worker, housekeepers, lead housekeepers, slot technicians and gaming floor persons employed by Respondent at its San Pablo,

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² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

California gaming establishment; excluding all other employees, guards, and supervisors, as defined by the Act.

5 (b) On request by the Union, rescind any unilateral changes it has implemented in its employees' terms and conditions of employment.

10 (c) Make whole Al Balbuena, Isabel Garrido, Redolfo Trinidad, and Ali Challal, for any loss of earnings and other benefits suffered as a result of the discrimination against them by not receiving contractual health benefits starting in March 2011 to September 2011, including, but not limited to, reimbursing them for any medical expenses or costs they incurred as a result of not receiving their contractual health insurance for that period.

15 (d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

20 (e) Within 14 days after service by the Region, post at its facility in San Pablo, California copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2010.

30 (f) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by Region 32 attesting to the steps the Respondent has taken to comply herewith.

35 Dated, Washington, D.C., March 5, 2013.

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Jay R. Pollack
Administrative Law Judge

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50 ³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL NOT unilaterally change rules regarding Union access to the Casino.

WE WILL NOT unilaterally announce or implement new benefits for part-time employees.

WE WILL NOT unilaterally refuse to make benefit payments for certain employees.

WE WILL NOT refuse to furnish relevant information requested by the Union for collective bargaining or grievance handling purposes.

WE WILL NOT coercively interrogate employees about union support or union activities

WE WILL NOT tell employees not to discuss their investigations with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All full-time and regular part-time food and beverage, maintenance, and housekeeping employees, including barbacks, bartenders, broiler server, casino servers, lead food servers, American line cooks, Asian Line cooks, broiler porters, casino porters, concession workers, hosts/hostesses, lead cook, lead utility worker, housekeepers, lead housekeepers, slot technicians and gaming floor persons employed by Respondent at its San Pablo, California gaming establishment; excluding all other employees, guards, and supervisors, as defined by the Act.

WE WILL on request by the Union, rescind any unilateral changes we have implemented in our employees' terms and conditions of employment.

WE WILL, make whole Al Balbuena, Isabel Garrido, Redolfo Trinidad, and Ali Challal, for any loss of earnings and other benefits as a result of not receiving contractual health benefits starting in March 2011 to September 2011, including, but not limited to, reimbursing them for any medical expenses or costs they incurred as a result of not receiving their contractual health insurance for that period.

WE WILL furnish relevant information requested by the Union for collective bargaining or grievance handling purposes.

LYTTON RANCHERIA OF CALIFORNIA d/b/a
CASINO SAN PABLO

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

ANY INTERESTED INDIVIDUAL WHO WISHES TO REQUEST A COPY OF THIS NOTICE OR A COMPLETE COPY OF THE DECISION OF WHICH THIS NOTICE IS A PART MAY DO SO BY CONTACTING THE BOARD'S OFFICES AT THE ADDRESS AND TELEPHONE NUMBER APPEARING IMMEDIATELY ABOVE.