

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

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

and

UNITE-HERE! LOCAL 878

Cases	19-CA-32599
	19-CA-32733
	19-CA-32734
	19-CA-32735
	19-CA-32736
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	19-CA-33047
	19-CA-33194
	19-CA-70707
	19-CA-70719

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*Susannah C. Merritt, Esq., and Rachel Cherem, Esq.,*  
for the Acting General Counsel.

*Karl M. Terrell, Esq., and Todd B. Stoller, Esq.*  
for the Respondent.

*Mark Westerberg, Esq. and Noah Sunflower, Esq.*  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Anchorage, Alaska, over 19 days between October 16 and December 14, 2012, upon the order further consolidating cases, third amended consolidated complaint and notice of hearing,

as amended<sup>1</sup>, herein complaint, in Cases 19–CA–32599 et al, issued on September 17, 2012, by the Regional Director for Region 19.

5 The complaint alleges that Respondent violated Section 8(a)(1) of the Act by creating an impression that employees’ union activities were under surveillance, by engaging in numerous acts of surveillance of employees’ union activities, by telling employees to remove union buttons, by coercing employees regarding testimony at an NLRB hearing, by interrogating employees about signing a union decertification petition, by maintaining and enforcing a rule limiting access to hotel property without manager’s approval, by maintaining and enforcing a rule prohibiting distribution of material in a work area or by soliciting guests at any time, by 10 maintaining and enforcing a rule limiting employee presence to work areas and limiting access to nonwork areas without approval of management, by prohibiting off duty employees from distributing literature at the hotel entrance or on hotel property, and by threatening to call police if employees failed to leave hotel property.

15 The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employee Fay Gavin, by reducing Gavin’s hours, and by giving Gavin a poor evaluation. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employees Ana Rodriguez, Audelia Hernandez, and Shirley Grimes. The complaint 20 alleges that Respondent violated Section 8(a)(1), (3), and (4) of the Act by disciplining and discharging employees Dexter Wray and Yanira Escalante Medrano. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by changing the schedule, reducing the hours of and discharging employee Elda Buezo. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by decreasing the shifts for banquet employees who supported 25 the union and by decreasing the number of hours for restaurant employees who supported the Union. Finally, the complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by increasing the number of shifts of banquet employees who signed a petition to decertify the Union.

30 The complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by banning Union Representative Daniel Esparza from the hotel facility, by banning the Union from the facility, by eliminating banquet employees’ scheduling preference sheets, by terminating its practice of posting banquet employee schedules by noon on Fridays, by ceasing to assign work and schedule employees according to seniority, by assigning engineering bargaining unit work to 35 nonunit employees, by changing its sick leave policy, by ceasing to make retirement fund contributions on behalf of unit employees, by subcontracting banquet server work, by reducing banquet server compensation by reallocating a portion of their gratuity to pay for the services of subcontractors, by changing banquet set up and server duties, by changing banquet server and set up staffing and scheduling and by refusing to provide information to the Union that was 40 necessary and relevant to their duties as collective-bargaining representative.

Respondent timely filed its answer<sup>2</sup> to the complaint and stating it had committed no wrongdoing.

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<sup>1</sup> On October 16, 2012, General Counsel moved to amend the complaint by removing any reference to Case 19–CA–32764, as that case was withdrawn, withdrawing complaint pars. 20(b) and (d) as well as other technical amendments. The motion was granted. See GC Exh. 1(pppp).

## FINDINGS OF FACT

5 Upon the entire record here, including the briefs from the Counsel for the Acting General Counsel (General Counsel) and Respondent, I make the following findings of fact.

## I. JURISDICTION

10 Respondent in its answer denied virtually every allegation in the complaint including the jurisdiction allegations of paragraphs 2 and 3.

15 This is not the first time this Respondent has been involved in litigation before the Board. After the record in the instant case closed, the Board decided *Sheraton Anchorage*, 359 NLRB No. 95 (2013). (*Remington I*). In *Remington I*, the Board affirmed the decision of Administrative Law Judge Gregory Meyerson and found that Respondent had engaged in numerous unfair labor practices, including unlawful withdrawal of recognition from the Union, unlawful refusal to bargain with the Union, maintenance and enforcement of overbroad and unlawful work rules, numerous unlawful disciplines and terminations, and multiple unilateral changes in terms and conditions of employment without notice to or bargaining with the Union.

20 In his decision Judge Meyerson found, based upon the parties' stipulation, that the Respondent, during the 12 months preceding the issuance of the first complaint, in conducting its business operations, derived gross revenues in excess of \$500,000, and also purchased and received at its Anchorage facility goods valued in excess of \$50,000 directly from points located outside the State of Alaska. There is no evidence that Respondent's business operations have failed to meet the Board's jurisdictional requirements at the present time. I find that the Respondent is now, and at all times material here has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30 II. LABOR ORGANIZATION

35 Respondent denied that Unite Here!, Local 878, AFL–CIO, here the Union, is a labor organization within the meaning of the Act. In *Remington I* Respondent also denied the labor organization status of the Union, however Judge Meyerson concluded that, “the evidence provided at the hearing through the testimony of numerous witnesses establishes that Local 878 negotiates collective-bargaining agreements on behalf of employees with various employers in the State of Alaska, the terms of which agreements provide for the wages, hours, and working conditions of the represented employees. Further, the evidence establishes that Local 878 engages in the processing of grievances under the terms of those collective-bargaining agreements on behalf of said employees, and that employees fully participate in the operation of

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<sup>2</sup> On October 19, 2012, Respondent moved to amend its answer to add additional affirmative defenses including laches and that Respondent has remedied unfair labor practices as ordered by the United States District Court in the 10(j) injunction. The motion was granted. See R.Exh. 11.

the Union and in the collective-bargaining process.”<sup>3</sup> No evidence was adduced in the instant hearing to establish that the Union no longer engages in the above enumerated functions. Accordingly, I find that at all times material here, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### *A. Respondents’ History with the Board*

Respondent operates and manages the Sheraton Anchorage hotel, a 370 room facility located in downtown Anchorage, Alaska. The Union has represented a unit of about 180 employees at the hotel for over 30 years. In its answer, Respondent denied the successorship allegations contained in complaint paragraph 2 and the appropriate unit allegations in paragraph 6. In *Remington I*, Judge Meyerson found that in December of 2006, the hotel property was purchased by Ashford TRS Nickle, LLC, (Ashford). Remington, the agent for the new owner, assumed management of the hotel and hired all of the existing employees. When Ashford bought the hotel, the previous manager of the hotel, Interstate Hotels and Resorts, Inc. d/b/a Sheraton Anchorage Hotel (Interstate) and the Union were parties to a collective-bargaining agreement in effect from March 1, 2005 to February 28, 2009. The parties in *Remington I* stipulated that Remington is a successor to Interstate with respect to the operation of the hotel.<sup>4</sup> Further, they stipulated that the Union was the exclusive collective-bargaining representative of the employees in the hotel unit, which unit constituted an appropriate bargaining unit within the meaning of Section 9(a) of the Act. The parties agreed that Interstate recognized the Union in successive collective-bargaining agreements, until the hotel was sold in December 2006. The most recent of those agreements is referred to as the expired collective-bargaining agreement.<sup>5</sup> Based on these facts, Judge Meyerson found that Respondent recognized the Union as its employees’ collective-bargaining representative and assumed the collective-bargaining agreement when it commenced operating the hotel in December of 2006. He also found that Respondent was a successor employer within the meaning of the Act and that the represented unit at the hotel which consisted of all employees, with the exception of guards, supervisors, managerial employees, clerical employees, and confidential employees was an appropriate unit.

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Based upon Judge Meyerson’s findings, as affirmed by the Board, as well as the parties’ stipulation here, I conclude that Remington was a successor to Interstate and that the Union was the exclusive collective-bargaining representative of the employees in the hotel unit, which unit constituted an appropriate bargaining unit within the meaning of Section 9(a) of the Act. I find that Interstate recognized the Union as such in successive collective-bargaining agreements, until the hotel was sold in December 2006. The most recent of those agreements was in effect from March 1, 2005 to February 28, 2009. I find that Respondent recognized the Union as its employees’ collective-bargaining representative and it assumed the collective-bargaining agreement when it commenced operating the hotel in December of 2006. Finally, I find that the unit the Union represented at the hotel consists of all employees, with the exception of guards, supervisors, managerial employees, clerical employees, and confidential employees, as set forth in paragraph 6(a) of the complaint.

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<sup>3</sup> *Remington I* at p. 3.

<sup>4</sup> At the hearing on October 16, 2012, Respondent stipulated that it is a successor to Interstate.

<sup>5</sup> GC Exh. 2.

The Board affirmed Judge Meyerson’s finding that the parties engaged in bargaining for a successor collective-bargaining agreement from October 27, 2008, through March 11, 2010. While he found that the parties bargained to impasse on August 21, 2009, that impasse was broken as a result of further negotiations on March 10, 2010. The Board found that Respondent’s continued refusal to engage in bargaining after March 11, 2010, showed it was not bargaining in good faith and constituted a violation of Section 8(a)(5) of the Act.

In addition, the Board found that Respondent violated Section 8(a)(3) of the Act commencing on November 19, 2009, when it suspended and/or issued written disciplinary warnings to nine union supporters who presented Respondent’s General Manager Articles with the Union’s boycott petition and on February 3 and 17, 2010, when it suspended and then terminated four union supporters who had distributed handbills outside the hotel calling on potential customers to boycott the hotel.

Further unlawful conduct found by the Board in *Remington I* included confiscation of union buttons by supervisors on about December 8, 2009, and since November 1, 2009, the maintenance and enforcement of unlawful rules of conduct in its employee handbook, all in violation of Section 8(a)(1) of the Act.

The Board also affirmed Judge Meyerson’s finding that Respondent violated Section 8(a)(5) of the Act by its unilateral assignment of security duties to bargaining unit engineers from July through September of 2009. He also found that Respondent violated Section 8(a)(5) of the Act when in mid-October of 2009 it unilaterally implement changes in the terms and conditions of the expired collective-bargaining agreement including increasing the number of rooms attendants were expected to clean from 15 to 17; ceasing to pay for meal breaks; and imposing a fee on employee purchases in the cafeteria.

The Board also found that on March 11, 2010, the Respondent prematurely declared an impasse in negotiations, and violated the Act on May 1, 2010, by unilaterally implemented a new medical insurance plan and by ceasing payments to the extant medical insurance plan (the Taft-Hartley Plan). In addition the Board found that since March 11, 2010, the Respondent has unlawfully failed and refused to continue negotiating with the Union.

The Board affirmed Judge Meyerson’s finding that a decertification petition presented by unit employees to Respondent on May 20, 2010, was tainted by Respondent’s pervasive, unremedied unfair labor practices and by the unlawful assistance Respondent’s managers and supervisors gave by coercing employees into signing the petition. Based on these findings, the Board concluded that Respondent’s July 2, 2010, withdrawal of recognition from the Union as the exclusive collective-bargaining representative of the bargaining unit and its continued refusal to continue negotiations violated Section 8(a)(5) of the Act.

### *B. The Current Unfair Labor Practices*

This case is yet a further chapter in Respondent’s unlawful refusal to recognize and bargain with the Union and its continuing efforts to undermine the Union by unlawfully threatening and coercing employees, by spying on employees’ union activities, by unlawfully maintaining and enforcing overly broad work rules, by disciplining union adherents not only for

their union activities but also for participating in Board proceedings, by banning union representatives from entering hotel property, by refusing to provide the Union with information necessary and relevant to perform its obligation as bargaining unit representative and by unilaterally changing bargaining unit employees' terms and conditions of employment.

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During the relevant period here, the management structure at the Sheraton Anchorage Hotel included General Managers Denis Artiles and John Kranock, who took over for Artiles in 2011, Human Resources Director Jamie Fullenkamp, Housekeeping Director Eduardo Canas, Executive Chef Glen Rydin, Chief of Engineering and Security Ed Emmsley Sr., and Banquet Manager Cindy Mathers.

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The union officials who were involved in this case include President, Marvin Jones, Business Agent Daniel Esparza and organizer Jessica Lawson.

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

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#### *a. The surveillance of employees' union activities*

##### i. The surveillance cameras

On April 14, 2010, Respondent's housekeeping porter Audelia Hernandez was called to a meeting in General Manager Artiles' office. Artiles told Hernandez other managers and employees accused her of distributing papers for the Union. Hernandez denied distributing papers for the Union. Artiles told Hernandez to sign her disciplinary form<sup>6</sup> which stated that, "it was reported by several associates that you, during your worktime, approached them during their worktime while they were on the clock, and asked them to sign a document regarding union issues." Hernandez refused to sign the form because she did not agree with the accusations. Artiles replied that there were several surveillance cameras around the hotel and more would be installed. He said he would investigate and talk to her further. I credit Hernandez' testimony as it was consistent and given without guile. Artiles was not called as a witness at this hearing.

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### Analysis

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Complaint paragraph 7 alleges that on about April 14, 2010, Artiles created an impression among its employees that their union activities were under surveillance by telling them that he had cameras up and would put up more at the facility.

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It is well settled that the Board's test for a violation of Section 8(a)(1) of the Act is that:

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[I]nterference, restraint, and coercion under Section 8 (a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways, Co.*, 124 NLRB 146, 147 (1959).

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<sup>6</sup> GC Exh. 53.

In *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001) the Board reaffirmed the principle that the coerciveness of an employer’s action or statements is not dependent upon the effect on the employees or the subjective reaction of the employee. In *Miller* the Board held that in determining the coerciveness of an employer’s remark:

5 The Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. . . . Moreover, as discussed above, speculation as to the subjective reactions of the Respondent’s other employees are irrelevant since the  
10 objective tendency of this statement is to interfere with the free exercise of employee rights. . . . Moreover, we reject the judge’s assessment of Hemphill’s reaction to Miller’s request. Rather, we must again assess the objective tendency of the statements to coerce employees, and not the employees’ subjective reactions.

15 Respondent suggests that in assessing whether there has been unlawful surveillance the subjective feelings of those who have been spied upon are a relevant consideration. Respondent’s position is unsupported by either Board law or the cases it cites. Neither *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982) nor *NLRB v. Computed Time Corp*, 587  
20 F.2d 790 (5th Cir., 1979) support the proposition that employees’ subjective feelings are a consideration in determining if Respondent’s action are coercive under Section 8(a)(1) of the Act. *U.S. Steel and Computed Time* merely stand for the proposition that whether an employer has created an unlawful impression of surveillance depends upon whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance.

25 The Board’s test for determining whether an employer has created an unlawful impression of surveillance is whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009);  
30 *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

In *Labor Ready, Inc.*, 327 NLRB 1055, 1059 (1999), the Board affirmed the ALJ who found that Respondent’s use of a video camera created an impression that employees’ union  
35 activities were under surveillance. In *Labor Ready* the employer did not set up the camera until after it became aware of employees’ union activities. The camera was used to surveil other employees protected activities and to dissuade them from engaging in union activities. While there was some dispute as to when the camera was turned on, the judge found the employees would have reasonably believed that it was set up to record their actions and was operating.

40 The issue here is not the use of surveillance cameras but rather Artiles’ statement to Hernandez, in the context of her protected activities, that there were surveillance cameras; that more would be installed in the hotel; and that he would investigate further and get back to her. A reasonable conclusion could be drawn from Artiles’ statement that he was going to determine  
45 if her defense had any merit by reviewing the surveillance recordings to determine if Hernandez’ conduct violated Respondent’s no solicitation rule, a legitimate purpose. However, the reference to more cameras being installed suggests a threat that Respondent would be setting up more cameras to more closely monitor Hernandez’ protected activity. I conclude that under all the circumstances, reasonable employees would assume from the statement that more surveillance

cameras would be installed and that their union or protected activities had or would be placed under surveillance in violation of Section 8(a)(1) of the Act. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

5     ii.     Managers' increased presence in the employee cafeteria

15           In early 2010, Union Representatives Esparza and Jones met with employees in Respondent's basement cafeteria on a daily basis during their breaks to discuss union issues. Esparza was present in the cafeteria from 10:30 a.m. until about 1:30 p.m. and again between  
10     5:30 p.m. and 6:30 p.m. in early 2010. In March and April 2010, Esparza noted that certain of Respondent's supervisors and managers, including Human Resources Director Fullenkamp, Chief of Engineering Ed Emmsley Sr., chef Rydin and Housekeeping Manager Eduardo Canas began visiting the employee cafeteria on a more frequent basis. Before March 2010, Esparza never saw Rydin in the cafeteria during the day. After March 2010, Rydin would stand with his  
15     arms folded for up to 15 minutes observing employees. Esparza saw Canas in the cafeteria only infrequently during the day but began coming more frequently in March and staying for half an hour. Emmsley would stay in the cafeteria the entire time Esparza was present during the day. Esparza noted that in March Fullenkamp began visiting the employee cafeteria for the first time  
20     during the evening hours.

25           In early 2010, it was Jones' practice to visit with employees 6 or 7 days a week in the cafeteria twice a day, at 10 a.m. for about 2 to 3 hours and again at 4 p.m. His testimony was consistent with that of Esparza that in April 2010, he began to see managers, including Emmsley, Fullenkamp, and Canas more frequently in the employee cafeteria than in late 2009<sup>7</sup> and early  
30     2010. Jones saw Emmsley in the cafeteria daily for 1–1-1/2 hours eating and talking to employees. Prior to early 2010, Jones saw Emmsley in the cafeteria four or five times a month. Canas was seldom in the cafeteria in late 2009 and early 2010 but was present three times a week for 30 minutes at a time after March. Likewise Fullenkamp was rarely in the cafeteria for an  
35     extended period in late 2009, but after March she was there three times a week in the morning and afternoon for 30 minutes at a time. I credit Jones and Esparza's testimony as they were in the best position to observe who came and went from the cafeteria and in no way tried to  
40     embellish their testimony.

45           Several employees for each party testified about the frequency of Respondent's managers in the employee cafeteria in early 2010. Since most of them were present for 30 minutes or less at a time between 10:30 a.m. and 1 p.m., I find that Esparza and Jones, by virtue of the length of time they were in the employee cafeteria on a daily basis, were in a more competent position to observe the presence of Respondent's managers.

50           Canas did not testify and Emmsley did not deny he was in the cafeteria more frequently. Fullenkamp testified that she has eaten in the employee cafeteria between noon and 1:30 p.m. four to five times a week since 1980, and is in and out of the cafeteria three to four times a day for coffee. She said she sees Emmsley four to five times a week in the cafeteria and that neither  
55     were more frequently in the cafeteria in early 2010 than in late 2009. Fullenkamp claimed that she saw Rydin eating in the cafeteria three to four times a week but she admitted that she and he

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<sup>7</sup> In late 2009 Jones was in the employee cafeteria twice a day, 3 to 4 days a week.

ate in the cafeteria at different times. She also ate at different hours than Canas and was in no position to competently testify about his or Rydins' presence in the cafeteria in late 2009 or early 2010.

5 I find that Fullenkamp's testimony was not reliable but was conveniently tailored to meet the needs of Respondent. In another context, Fullenkamp's explanation that the "Termination Record"<sup>8</sup> for Elda Buezo which states "termed by phone" means Buezo quit, is beyond belief. Her contention that it was Buezo who quit is also belied by Fullenkamp's notes<sup>9</sup> of her conversation with Buezo on June 15, 2011. The notes state, "6/15 Elda called. Told her since she didn't follow procedure & fill out correct paper work I considered her as she resigned." An email chain<sup>10</sup> dated June 6, 2011, between Fullenkamp and Remington Corporate VP Nancy Hafner concerning Buezo's termination, further discredits Fullenkamp's credibility. Fullenkamp asks Hafner if she can terminate Buezo and Hafner replies, "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." In essence, Hafner tells Fullenkamp, yes you can terminate her but call it a resignation. Fullenkamp was the ultimate convenient witness for Respondent. I do not credit Fullenkamp's testimony concerning the frequency of managers in the cafeteria or any other matter in controversy.

20 I find there is evidence to establish that Respondent's managers, including Emmsley, Rydin, and Canas, substantially increased their presence in the employee cafeteria in the period of early 2010 compared to their previous practice in late 2009, at a time when both the decertification petition and a rival pro-union petition were being circulated among Respondent's employees.

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#### Analysis

Complaint paragraph 8 alleges that beginning on or about March 16, 2010, through about July 2, 2010, Respondent through its managers and supervisors engaged in surveillance of employees union activities in the employee cafeteria.

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The Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. However, an employer may not do something out of the ordinary to give employees the impression that it is engaging in surveillance of their protected activities. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2006).

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In *Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1200 (1979), the Board found that it was out of the ordinary when supervisors departed from their usual practice of eating separately, and mingled with employees in the dining areas utilized by employees during break and lunch periods.

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Here the record reflects that from about March 16, 2010, through July 2, 2010, when Respondent withdrew recognition from the Union and banned the Union from the hotel property,

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<sup>8</sup> GC Exh. 129.

<sup>9</sup> R. Exh. 21.

<sup>10</sup> GC Exh. 131.

the presence of supervisors and managers in the employee cafeteria significantly increased in a manner out of their ordinary practice. This increased presence amounted to unlawful surveillance in the employee cafeteria where union representatives conducted meetings with employees on breaktime in violation of Section 8(a)(1) of the Act.

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iii. The June 22, 2010 bake sale surveillance

On about June 22, 2010, the Union held a bake sale in support of four employees that Respondent had fired. In *Remington I*, the Board found these employees were terminated in violation of Section 8(a)(3) of the Act. The bake sale was held from 3 p.m. to 6 p.m., on the public side walk on Eagle Street, near the hotel garage. About four to ten of Respondent's employees sold baked goods, and about 10 to 40 of Respondent's employees purchased baked goods.

It is undisputed that Respondent's security guards photographed and videotaped the bake sale from the roof of the parking garage for up to an hour.

In addition to the guards, Emmsley Senior also observed the bake sale from the front of the hotel on Fifth Avenue for 5 to 10 minutes and from the garage roof for about 45 minutes. Emmsley did not deny his observation of the bake sale.

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iv. July 6, 2010 press conference surveillance

On July 6, 2010, at 3:30 p.m., the Union held a rally regarding the return to work of four fired employees. About seven employees together with 30 to 40 other participants gathered on the public area of Denali Street near the Sixth Avenue entrance of the hotel. Union President Marvin Jones together with employees Troy Prichacharn, Ana Rodriguez, Gina Tubman, and Dexter Wray spoke at the rally about the employees returning to work and continuing to fight for a fair contract. The press conference did not block access to the Sixth Avenue entrance of the hotel.

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It is again undisputed that two of Respondent's security guards took photos and videotaped the rally. Jones saw one security guard standing about 10 feet behind the group, and another security guard photographing or videotaping from the sidewalk next to the hotel. The guards also videotaped the rally from the parking lot on Denali and from outside the hotel entrance.

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Shortly after the rally started, Artiles, Rydin, Canas, and Emmsley came out of the Sixth Avenue entrance and watched the press conference for about 10 to 15 minutes and then went back inside the hotel to watch the remainder of the rally through the hotel's restaurant window for about an hour. From there, Rydin took pictures of the rally through the window.

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v. July 30, 2010 surveillance of the union march of the rat

The "March of the Rat", so called because the Union placed an 18–20 foot tall inflated rat balloon on the public street in front of the hotel, took place in late July 2010. Over 100 participants, including at least 13 of Respondent's employees participated in this event. Those

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attending the rally gathered around a podium on Denali Street on the corner of Sixth Avenue. Jones and AFL–CIO President Vince Beltrani spoke, then the group circled the hotel shouting chants and holding picket signs. The rally lasted about an hour without blocking access to the hotel.

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There is no dispute that security guards photographed and videotaped the entire rally from the sidewalk and the parking lot near the hotel.

When the group arrived at the hotel, managers, including Artiles, Emmsley, Rydin, Canas, Spa Manager Julie, and Remington Human Resources VP Mary Villareal came out of the Sixth Avenue doors to watch the rally for from a few minutes to most of the event. Rydin taped the event, from behind Artiles, for 45 minutes to an hour. Emmsley also took photos of the rally.

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vi. August 26, 2010 surveillance of the union march

During an AFL–CIO conference on August 26, 2010, at about 3:30 p.m., representatives of the unions attending the conference joined with Respondent’s employees in a march from the Captain Cook Hotel to the Sheraton Anchorage Hotel. There were over 100 marchers including about 10 employees.

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At the Sheraton the crowd gathered around a truck parked on Denali Street near Sixth Avenue. Richard Trumka, president of the International AFL–CIO, and Rick Sawyer, International Regional Vice President for Unite Here, spoke from the truck bed. Also on the truck were Respondent’s employees Shirley Grimes, Joanna Littau, Troy Prichacharn, Ana Rodriguez, and Gina Tubman.

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For 10 to 15 minutes of this march, Respondent’s managers, including Artiles, Canas, Emmsley, Senior, Fullenkamp, and Rydin, stood outside the Sixth Avenue entrance to the hotel and watched. Two of Respondent’s security guards videotaped and photographed the entire march.

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### Analysis

Complaint paragraphs 9, 10, 11, and 12 allege that Respondent engaged in surveillance of its employees’ union activities at a June 22, 2010, bake sale, a July 6, 2010, press conference, a July 30, 2010, union rally and an August 26, 2010, union march.

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The Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), held that an employer’s mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. However, photographing and videotaping clearly constitute more than ‘mere observation’ because photographing creates fear among employees of future reprisals. Photographing in the mere, “belief that something might happen does not justify the employer’s conduct when balanced against the tendency of that conduct to interfere with employees’ right to engage in concerted activity.” *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997).

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In *Kingsbridge Heights Rehabilitation and Care Center*, 352 NLRB 6, 10 (2008), in order to validate photographing protected activity, the Board requires an employer to

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demonstrate that it had a reasonable basis to have anticipated misconduct by the employees and thus engaged in photographing or videotaping protected activity to record evidence of misconduct.

5            Respondent contends it had a need to observe, video and photograph the Union’s bake  
 sale, and peaceful marches because there had been an increase in vandalism and criminal  
 activity at the hotel in 2010. None of the incidents of vandalism and criminal activity testified to  
 by Emmsley could in any way be attributed to the Union or to the bargaining unit employees. In  
 fact none of the incidents Emmsely enumerated were caused in the course of a public union  
 10 event like a bake sale. It is pure speculation by Respondent to attribute any of the incidents to  
 the Union or bargaining unit employees. Respondent’s reliance on *Home Comfort Products Co.*,  
 180 NLRB 597, 600 (1970), is inapposite since there was no causal relation whatsoever between  
 the Union or Respondent’s bargaining unit employees and the acts of vandalism and criminal  
 activity at the hotel. Any subjective intent or motivation by Respondent in engaging in the above  
 15 surveillance is irrelevant as I ruled at the hearing.

Respondent’s photographing and videotaping of the bake sale and union rallies was  
 without justification and constituted unlawful surveillance in violation of Section 8(a)(1) of the  
 Act. However, the observation of the events by Respondent’s managers and supervisors appears  
 20 to have been mere observation of open, public union activity on or near its property and does not  
 constitute unlawful surveillance.

#### b. Removal of union buttons by Rydin and Fullenkamp

On July 7, 2010, bargaining unit Banquet Captain Shirley Grimes was at work wearing a  
 25 1-inch square gold and black union button that said Local 878, as she had every day since 1999.  
 While in the banquet area with fellow banquet server John Fields, chef Rydin came up to Grimes  
 and said take your button off. We are no longer union. Grimes took the button off and has never  
 worn it again at work.

In July 2010, shortly after he was reinstated by Respondent after his February 2010,  
 30 termination for leafleting, bellman Troy Prichacharn was at work wearing a pin like Grimes’  
 with the Local 878 logo. Fullenkamp came up to Prichacharn in the hotel lobby and told him,  
 “this place is not union, take the button off.”<sup>11</sup> Prichacharn removed the button and did not wear  
 it again until the 10(j) order was issued in 2012. I credit both Grimes and Prichacharn. Their  
 35 testimony was not rebutted.

#### Analysis

Complaint paragraph 13 alleges that Respondent in early July 2010, and mid July 2010,  
 40 told employees to remove their union buttons.

The Board has long recognized that wearing union insignia is protected under the Act.  
*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). Employers may not infringe upon  
 this right absent a showing of “special circumstances.” An employer violates the Act by

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<sup>11</sup> Tr. 1553, LL 6–7.

instructing employees not to wear union buttons, or to remove union buttons. *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008).

5 It is undisputed that both Rydin and Fullenkamp told employees to remove union buttons. No special circumstances for doing so were established in the record. By ordering employees Grimes and Prichacharn to remove their union buttons, Respondent violated Section 8(a)(1) of the Act.

c. Coercion by Emmsley Senior regarding NLRB testimony

10 Engineering employee Dexter Wray gave testimony on August 23 and 24, 2010, at the *Remington I* hearing about, among things, Emmsley’s unlawful assistance regarding the decertification petition. Artiles was present in the courtroom when Wray testified. Between the 2 days of hearing, on about August 24, 2010, in the morning before he testified, Wray had a conversation in the engineering shop with Emmsley. Emmsley told Wray that Wray had to go to court and then said, “don’t tell them about I had got you to sign the decert form or else I will lose my job.”<sup>12</sup> Wray said nothing and walked out of the shop. Emmsley denied making this statement.

20 In his brief, Respondent’s counsel repeatedly casts Wray as a liar. In support of this slur, counsel refers to several examples of Wray’s testimony in this case. First, Wray testified that on about July 5, 2010, Emmsley Senior told him that his hours were being cut from 40 to 32 hours. When Wray protested that he was the most senior employee, Emmsley told him it didn’t matter since there was no union so he could do what he wanted. Wray said his hours were cut for a period of between 2 to 4 weeks then he was restored to about 40 hours a week. However, it appears from Wray’s timecards<sup>13</sup> that his hours were cut by only a few hours in July and 25 August 2010. This is hardly the “bald faced lie” counsel accuses Wray of. Next counsel claims Wray lied when saying Emmsley Senior denied him a union representative after receiving discipline on about May 10, 2010, since Respondent had not yet refused to recognize the Union. However, a reading of the transcript<sup>14</sup> makes it unclear that the point in time Wray was referring to was after July 2, 2010, since he referenced to this incident as when Emmsley said there was no 30 Union.

35 Next counsel takes issue with Wray’s description of the location of the swearing incident, discussed below, claiming Wray put the incident in a nonpublic area. Wray did nothing of the kind. Wray said the incident occurred in the back of the house, in a first floor service area in a hallway.<sup>15</sup> The record reflects that the incident took place in a corridor. Respondent’s counsel, while assuming Wray meant a non-public area by his use of the term “back of the house”, never bothered to ask Wray what he meant by “back of the house.” This uncertainty over location is hardly a lie.

40 Finally counsel for Respondent accuses Wray of lying about whether he was playing poker the morning of October 23, 2010. Counsel claims that in testimony Wray denied playing

<sup>12</sup> Tr. 276, LL 4–5.

<sup>13</sup> R. Exh. 42.

<sup>14</sup> Tr. 307, LL 1–8.

<sup>15</sup> Tr. 320, LL 1–7.

poker before he went to work the morning of October 23.<sup>16</sup> Counsel then asserts that Wray admitted in a statement given to Union Representative Jessica Lawson, that he played poker that morning.<sup>17</sup> In the brief excerpt from his statement to Lawson, Wray did not explain what he meant by playing poker and it is likely that Wray was referring to his consistent testimony that he did go on line to the poker website not to play but to transfer play money to a fellow employee. The fellow employee, Ed Emmsley Jr., the son of Emmsley Senior who fired Wray, was never called as a witness by Respondent to rebut Wray’s assertion. I will draw an adverse inference that if called, Emmsley Junior would have testified adversely to Respondent.

Contrary to Respondent’s assertion, I do not share his opinion that Wray was a “bald faced liar.” Like Judge Meyerson, I will credit Wray’s testimony over that of Emmsley Senior whose testimony was given in rote answers to conveniently provide cover for Respondent’s defense. While Wray was not a well spoken man, his answers had a ring of truth to them unlike Emmsley’s rote denials.

Respondent’s counsel, in his brief,<sup>18</sup> suggests that if I credit Wray, I too am a liar. Respondent’s counsel writes, “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.” I find this suggestion offensive and inappropriate. Respondent’s counsel has cast my reputation for honesty and fairness as an administrative law judge in doubt and is a form of coercion and intimidation designed to have me discredit Wray. Respondent’s unfounded accusation is deserving of reproach.

#### Analysis

Complaint paragraph 14 alleges that on about August 24, 2010, Respondent coerced an employee regarding testimony at an NLRB hearing.

It is well settled that employer attempts to influence an employee’s testimony before the Board or discourage an employee from pursuing an unfair labor practice charge are unlawful. *Remington Electric*, 317 NLRB 1232, 1232 fn. 2, 1237 (1995); *Aero Metal Forms*, 310 NLRB 397, 398 (1993).

I find that Emmsley’s order to Wray not to testify about his solicitation of Wray to sign the decertification petition in the *Remington I* hearing was an unlawful attempt to influence an employee’s testimony before the Board in violation of Section 8(a)(1) of the Act.

#### d. Interrogation of employees by Artiles and Emmsley about signing the decertification petition

In September 1010, during the trial in *Remington I*, Somchai Hill, a food preparer at the Jade Restaurant in Respondent’s hotel, was called into a meeting with Respondent’s General Manager Artiles in the Jade Restaurant. Hill is a native Thai speaker and his English skills are limited. He required the assistance of a Thai interpreter at the instant hearing. Artiles does not

<sup>16</sup> At Tr. 335, L 17–25 Wray explains he was not playing poker that morning but was on the poker web site to transfer chips to a fellow employee.

<sup>17</sup> Tr. 419, L 22 to Tr. 420, line 1.

<sup>18</sup> Respondent’s posthearing brief, p. 35.

1 speak Thai. The conversation between Artiles and Hill was in English. Apparently in order to  
 5 bolster its defense concerning allegations of improper influence by the employer regarding the  
 decertification petition at issue in *Remington I*, Artiles presented Hill with a form<sup>19</sup> to fill out and  
 sign that is in the English language and was not translated for Hill. The form states that  
 Respondent wanted to ask Hill questions about a decertification petition he signed since it was  
 10 being challenged in an unfair labor practice charge filed by the Union. The form indicates that  
 the employee will not be retaliated against for anything said or not said to Respondent's  
 management, that the interview is voluntary, and that the employee is not required to answer  
 questions or talk to Respondent's management. The questionnaire then asks the employee to list  
 15 the reasons why they signed the decertification petition.

Hill testified that he did not understand all of the language on the form, nor did he  
 understand Artiles' explanation of the form. While not reading or understanding the form, Hill  
 20 signed and initialed it. On a separate piece of paper, Artiles wrote down items circled 1, 2, and 3  
 on the form and had Hill copy them onto the form. Hill had not discussed items 1, 2, or 3 with  
 Artiles during this conversation. I credit Hill. His testimony was given in a consistent manner  
 and was never rebutted. It had a ring of truth to it.

At some unidentified time presumably after July 2010, Respondent's banquet set up  
 25 employee Jun Sangalang was called into a meeting with several other employees to discuss  
 benefits with someone named Joe and Emmsley Senior. Joe gave Sangalang a packet of  
 information<sup>20</sup> together with the decertification petition.<sup>21</sup> Emmsley gave the employees the  
 questionnaire about the decertification petition,<sup>22</sup> discussed above, and told them to read it, sign  
 it, and then give it to him. Emmsley did not deny these statements. I credit Sangalang.

#### Analysis

Complaint paragraph 15 alleges that on two occasions in August and September 2010,  
 30 Artiles and Emmsley interrogated its employees about their reasons for signing a union  
 decertification petition.

General Counsel contends that the use of this form constituted unlawful interrogation. As  
 to Hill, the form was never explained to him in a language he fully comprehended so in essence  
 there were no warnings given. General Counsel also argues that the form itself violates the  
 35 requirements of *Johnnie's Poultry, Co.*, 146 NLRB 770, 775 (1964), since it asks for employees  
 subjective state of mind and the context in which the forms were distributed was not free of  
 employer coercion or hostility to union organization.

In *Johnnie's Poultry, Co.*, the Board held that where an employer has a legitimate reason  
 40 to inquire, such as the investigation of facts necessary to prepare the employer's defense for trial  
 of an unfair labor practice case the employer may legitimately question employees. However,  
 the Board has safeguards designed to minimize the coercive impact of such employer  
 interrogation. The employer:

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<sup>19</sup> GC Exh. 96.

<sup>20</sup> GC Exh. 103.

<sup>21</sup> GC Exh. 97.

<sup>22</sup> GC Exh. 97.

[M]ust communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

Even when an employer gives the necessary assurances, the manner and substance of employer questioning may violate the Act. The Board has held that questioning beyond the permissible scope of inquiry constitutes a violation of Section 8(a)(1). *See, e.g., Wisconsin Porcelain Co.*, 349 NLRB 151, 153 (2007); *Daniel Construction Co.*, 244 NLRB 704, 718 (1979).

Here when the general manager gave English language forms to a Thai speaker, without any spoken explanation in the Thai language, Respondent in essence provided no warning pursuant to *Johnnie's Poultry* and Respondent lost the privilege of being able to interrogate Hill regarding his reasons for signing the decertification petition.

General Counsel contends that the form is invalid on its face since, contrary to the admonition in *Johnnie's Poultry*, it asks for information concerning an employee's subjective state of mind. At the time this questionnaire was given to employees, Respondent was in the midst of the *Remington I* trial in which the validity of its withdrawal of recognition of the Union was in issue. The form asks for reasons why employees signed the decertification petition, an essentially subjective process. While arguably, the purpose of form was to establish evidence to show that the Union had actually lost the support of a majority of the bargaining unit employees, their subjective reasons for doing so are irrelevant. *Levitz Furniture Co.*, 333 NLRB 717 (2001).

Finally, given the context in which the forms were distributed, the use of the forms was inherently coercive. In the case of Sangalang, he and other employees were called to a meeting with engineering and security director Emmsley where they were told to fill out the forms. In Hill's case it was the general manager himself who gave and then filled out the form. This case is one in which it has been established both in *Remington I* and here, as discussed below, that Respondent demonstrated hostility to the Union and union activity by withdrawing recognition from the Union, unlawfully terminating its employees because of their union activity, and unilaterally changing terms and conditions of employment.

Contrary to Respondent's assertion, the allegation contained in complaint paragraph 15 is broad enough to encompass the validity of the form. It is the form that constitutes the interrogation as it asks for the reasons employees signed the decertification petition while Artiles and Emmsley effectuated the form's questions through their distribution.

Thus, Respondent's use of the form failed to comply with the requirements of *Johnnie's Poultry* and violated Section 8(a)(1) of the Act.

e. Enforcement of work rules

Complaint paragraph 16 alleges that Respondent has enforced the rules in its handbook described below.

- 5 a. Employees “agree not to return to the Hotel before or after [their] working hours without authorization from [their] manager.”<sup>23</sup>
- 10 b. Distribution of any literature, pamphlets, or other materials in a guest or work area is prohibited . . . Solicitation of guests by associates at any time for any purpose is also inappropriate
- 15 c. Employees “must confine their presence in the Hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the Hotel, parking lots, or outside facilities without permission of the immediate Department Head

There is no evidence that these rules have been rescinded or that employees have been advised by Respondent that they no longer have to follow these rules.

20 In *Remington I* at pages 2–3, the Board found that several work rules in Respondent’s employee handbook<sup>24</sup> overbroad and unlawful on their face or that their maintenance was unlawful.

25 The Board found that rule a., above, which requires employees to secure permission from the Respondent’s managers as a precondition to engaging in union or concerted activity on the employee’s off duty hours and in a nonwork area, is presumptively unlawful. See *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

30 As discussed below in section xi, Respondent enforced all three rules in October 2011, with respect to employees Joanna Littau, Scarlett Eickmeyer, and Fay Gavin.

35 The Board also found rule c., above, as maintained, was an anti-loitering rule intended to confine the employees to their immediate work areas and to prevent them from “roaming” the property and was illegal. *Palms Hotel & Casino*, 344 NLRB 1363, 1363, 1391–1392 (2005); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 649 fn. 16 (2004); *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *Palms Hotel & Casino*, the Board found that rule prohibiting employees from “loitering in company premises before and after working hours” violated Section 8(a)(1), because the terms “loitering” and “premises” could lead off-duty employees to conclude they could not engage in protected activities with other employees in nonworking areas of the respondent’s property. 344 NLRB at 1363 fn. 3. Any ambiguity in a no loitering rule “must be construed against the [employer] as the promulgator of the rules.” *Ark Las Vegas Restaurant*, 343 NLRB 1281, 1282 (2004). See also *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 655 fn. 3 (finding facially invalid rule against “[l]oitering on company property (the premises) without permission from the Administrator”).

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<sup>23</sup> Id. at p.33.

<sup>24</sup> GC Exh. 89.

The Board agreed with Judge Meyerson that rule c., above, created a total prohibition on all solicitation and distribution by the unit employees at the hotel and as maintained was unlawful. *Pace, Inc.*, 167 NLRB1089, 1098 (1967); *Care Initiatives, Inc.*, 326 NLRB 144, 156 (1996).

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Likewise, I find that these rules are invalid in their promulgation and enforcement and violate Section 8(a)(1) of the Act.

f. Prohibiting employees from distributing literature on the hotel property

10 In early October 2011, Respondent’s banquet server Joanna Littau was handbilling with fellow employee Scarlett Eickmeyer at the Sixth Avenue entrance to the hotel. They were about 10 feet from the front door and handing out flyers asking the public to boycott Respondent. General Manager John Kranock came through the front doors and asked what Littau was doing and who they were. Eickmeyer said they were both employees of the hotel. After some  
15 conversation about the two employees not working at the hotel too much, Kranock said, “You shouldn’t be here.”<sup>25</sup>

In late October 2011, Littau was again handbilling with fellow employee Fay Gavin at Respondent’s Sixth Avenue entrance at the same location about ten feet from the door to the  
20 hotel. The handbills asked patrons to boycott the hotel. After a period of time Kranock came out to where Littau was handbilling and said that Littau and Gavin could not be there. Gavin said a recent court case (apparently referring to Judge Meyerson’s decision) gave them permission to be there. Kranock responded, “according to the handbook and according to our policies you are not allowed to be here, you are trespassing.”<sup>26</sup> Littau again referenced Judge Meyerson’s  
25 decision finding the handbook rule unlawful. Kranock said he did not care about the decision since it wasn’t a real judge. After some give and take, Kranock said that they did not have the right to be handbilling and that he was going to call the police if they did not remove themselves to the public sidewalk some 30 feet away. Littau called over union organizer Mark Westerberg, who confronted Kranock and said the employees had a right to handbill. Kranock said he was  
30 going to call the police. Kranock did not deny these allegations. I credit both Littau and Gavin.

### Analysis

35 Complaint paragraphs 17 and 18 allege that in early October and late October 2010, Respondent prohibited off duty employees from distributing union literature near the main entrance of the hotel and threatened to call police if the employees failed to leave the hotel property.

40 The Act guarantees employees the right to distribute union literature on their employer’s premises during nonwork time in nonwork areas. *Republic Aviation Co. v. NLRB*, 324 U.S. 793, 803–804 (1945); *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110–111 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

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<sup>25</sup> Tr. 1165, L 1.

<sup>26</sup> Id. at p. 1170, LL 13–15.

Respondent's argument that the areas in front of the hotel entrances are work areas is unsupported by Board law. In *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000), a hotel-casino, claimed that the entire property was a working area because employees, at times, cleaned and maintained the parking lot, and security guards patrolled the lot. In *Santa Fe Hotel* the Board said that to hold areas such as the handbilled entrances outside its hotel-casino a work area would effectively destroy the right of employees to distribute literature. The Board in *Santa Fe* found that activities such as security, maintenance, and valet parking, which typically occur at the entrances to a hotel, are incidental to a hotel's primary function, and, thus, are insufficient to transform a hotel's front entrance area into a work area where the employer could lawfully ban employee distributions. The Board reaffirmed this principle in *Meijer, Inc.*, 344 NLRB 916, 917 (2005), a retail department store. The Board found that employees retrieving shopping carts and assisting customers to load purchases into cars was not work integral to its food distribution business, therefore, the customer parking lot was not a working area.

Kranock unlawfully enforced the three rules already found to be overly broad above. I find that Kranock's ban on employee handbilling at the hotel entrances was an overbroad application of its no solicitation no distribution rule and violated Section 8(a)(1) of the Act.

In addition, Kranock's threat to call the police if Gavin and Littau did not cease their protected activity violated Section 8(a)(1) of the Act. Under Board law an employer violates Section 8(a)(1) of the Act if it threatens to call the police in response to employees' protected union activity at its facility. *Winkle Bus Co.*, 347 NLRB 1203, 1219 (2006).

## 2. The 8(a)(3) allegations

### a. Discipline of Fay Gavin

Fay Gavin has worked as a banquet server for Respondent and its predecessors for 25 years. At all times material here her supervisor was Banquet Manager Cindy Mathers. Gavin has been very active in the Union for 20 years, serving on the Union's executive board and the negotiation committee for 20 years. After Respondent took over the Sheraton Anchorage hotel operations, Gavin took part in the rallies in 2010 and engaged in handbilling at the hotel. In February and March 2010, she passed out union buttons that said support the Fired Four, a reference to four employees Judge Meyerson found Respondent had fired unlawfully. One of the employees she gave a button to was Sue Kennedy at the hotel at the beginning of her shift.

#### i. The March 19, 2010 discipline

On March 19, 2010, Gavin was given a written reprimand<sup>27</sup> by Fullenkamp that stated:

On February 19, 2010, a banquet server came to see me and stated that you had given her a union button to wear to support the 4 associates that were terminated. She said she told

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<sup>27</sup> GC Exh. 24.

you that she did not want to wear the button and you told her if she did not wear the button you would take her name off the tip pool.

\* \* \*

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Fay, you do not have the authority to remove any associate name from the tip pool. Doing so will result in your immediate termination.

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Verbally harassing, intimidating and or making threatening statements to another associate are in violation of Remington’s company policy and will not be tolerated. . . .

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During the meeting Fullenkamp refused to disclose the name of the employee who had made the complaint against Gavin. Gavin asked Fullenkamp if she wanted to hear her side of the story and Fullenkamp replied that they thought the complaint was true. The employee, identified during the course of the trial as Sue Kennedy, provided Respondent with a statement<sup>28</sup> on February 22, 2010, that stated Gavin had told her she would have her name taken off the “tips paper” if she did not want to wear the button. According to Gavin, she offered Kennedy a button, said she only had a few and if she wasn’t going to wear it she would like it back. Nothing else was said between the two employees. The facts are essentially not in dispute

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#### Analysis

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Complaint paragraph 19(a) alleges that on March 19, 2010, Respondent disciplined Gavin.

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It is undisputed that Gavin was issued a written reprimand because she gave Kennedy a button in support of four fired coworkers. The only issue is whether this activity lost its protection as a result of Gavin’s alleged threat to Kennedy. In these circumstances, where the conduct for which the Respondent claims to have disciplined Gavin was protected activity, the *Wright Line* analysis is not appropriate. *Felix Industries*, 331 NLRB 144, 146 (2000); *Neff Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); and *Mast Advertising & Publishing*, 304 NLRB 819 (1991).

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Respondent’s defense is that Gavin was disciplined not because she was handing out buttons, but because she threatened to remove her coworker from the tip pool if she refused to wear the button. This defense is pretext. If such a threat was made it was patently an absurd and hollow one because it is undisputed that Gavin, a nonsupervisory employee, had no authority to take any banquet employee’s name out of the tip pool. It was standard operating procedure for the gratuity to be distributed through servers’ paychecks. The gratuity was based on how many hours each employee worked in the banquet department on any given shift. This payment was solely in the control of Respondent.

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Moreover, the evidence reflects that the incident was never investigated. Gavin was never asked about the incident prior to receiving discipline. Even when Gavin asked Fullenkamp if she wanted to hear Gavin’s side of the story during the disciplinary meeting, Fullenkamp was not interested in what Gavin had to say stating, “we believe it to be true.” This prejudgment of

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<sup>28</sup> GC Exh. 7.

Gavin and lack of a full investigation reflects further Respondent’s true discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

5 Even assuming the *Wright Line* test should apply, I find that Respondent was well aware of Gavin’s union activity and its sham investigation reflects its true discriminatory intent. I find that Respondent violated Section 8(a)(1) and (3) of the Act in issuing discipline to Gavin for allegedly threatening her coworker.

ii. The November 3, 2010 appraisal and reprimand

a) The reprimand

10 On about November 3, 2010, Gavin was called to a meeting with Mathers and Fullenkamp. At this meeting Gavin received a September appraisal<sup>29</sup> as well as a reprimand.<sup>30</sup> The reprimand was for missing two work shifts in October. The disciplinary action states in pertinent part:

15 On October 11, 2010 Fay, you were scheduled at 6:30 AM but called off saying you had personal reasons and would be out of town. You stated to me (Cindy Mathers) that you were not able to work the following week of October 18th-23rd. At this time I informed you that you needed to fill out the vacation or LOA form to see if your  
20 request would be approved. You did not fill out the requested forms. October 18, 2010 you were scheduled at 6:30 AM but called off saying you would be out of town. Our Company policy indicates that vacation or leave of absence time and or pay must be requested in advance and approved by the Department Head. Also, it is well known Hotel policy that vacations cannot be approved during period October 15 to  
25 January 15 because of business needs.

During the meeting Gavin told Fullenkamp and Mathers that she had given Rydin and Mathers advance notice that she was going to be out of town on the 18th.

30 Gavin had given Rydin her preference sheet<sup>31</sup> for September and October 2010, on August 9, 2010. On that form Gavin requested off October 14–18, 2010. As noted below, after July 2, 2010, Respondent stopped scheduling by seniority. As a result Gavin, one of the most senior banquet employees, was scheduled for no work in July, August, and September 2010.<sup>32</sup> Accordingly, Gavin was surprised to find out from a coworker, when the week’s schedule was  
35 posted on Friday, October 8, 2010, that she had been scheduled for a 6:30 a.m. shift on Monday, October 11, 2010. Gavin was at her house in Kenai, Alaska, several hours drive from Anchorage because her Anchorage home had flooded and was under construction.

40 Gavin called her supervisor, Banquet Manager Mathers, on the day the schedule was posted and told her she was unavailable to work October 11, 2010, because she had a flood at her house in Anchorage and was at her cabin in Kenai, Alaska. Mathers replied, “that’s okay, I’ll

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<sup>29</sup> GC Exh. 29.

<sup>30</sup> GC Exh. 33.

<sup>31</sup> GC Exh. 25.

<sup>32</sup> GC Exh. 28, pp 53–75.

take care of it.”<sup>33</sup> In that conversation Gavin told Mathers that she had given Rydin her August preference sheet and that she would not be available for a few more days in October. Mathers said that Respondent no longer used preference sheets and that Gavin would have to get a vacation leave or fill out paperwork for a vacation leave. Gavin said that she did not need a paid vacation.

On October 12, 2010, before Gavin left Anchorage, she met Banquet Captain Shirley Grimes at a union contract negotiations meeting at the union hall. Gavin asked Grimes if she would take a note to Fullenkamp just to let her know the days that Gavin was going to be out of town and had let Rydin and Mathers know this. The next day Grimes slid Gavin’s note under Fullenkamp’s office door.

While Gavin was out of town, she called Grimes on Friday, October 15, 2010, the day that the schedule was posted, to make sure she was not scheduled for the next week. Grimes told Gavin that she had been scheduled for 6:30 a.m. on October 18. Gavin immediately started calling Mathers and left three messages telling Mathers that she was not available for the October 18 shift.

When Gavin did not get a return call from Mathers, she called Rydin on Saturday, October 16, and left a message that she would not be available for the October 18 shift. When Rydin did not return her call, Gavin called the hotel on Sunday, October 17. Gavin spoke with Jeff, the manager on duty. Gavin identified herself to Jeff and said that she would not be there on Monday and that she had gone through all the steps to reach her managers and was not able to reach anyone. I credit Gavin’s testimony.

The record is clear that prior to July 2, 2010, banquet employees requested time off through filling out their preference sheets.<sup>34</sup> No other forms were required by Respondent. It was not until after Respondent refused to recognize the Union on July 2, 2010, that it changed the policy in the banquet department. In addition, the record is clear that scheduling of employees in the banquet department was based upon seniority under the collective-bargaining agreement. The most senior employees were given priority in the shifts requested and in taking days off. As set forth in more detail below, the record reflects that employees requested days off on their preference sheets and were not required to submit additional documentation.

Banquet employees Gavin, Joanna Littau, Mary Jo Audette, and Vicky Williams testified without contradiction that employees requested days off on the preference sheets without having to fill out any other forms.

Audette testified that after July 2010, when preference sheets were no longer being used by Respondent, she only had to notify Mathers orally if she had to be out of town for her other job and Mathers would not schedule Audette for that week. Mathers never told Audette she had to fill out any paperwork in addition to these oral requests.

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<sup>33</sup> Tr. 643, L 15.

<sup>34</sup> GC Exhs. 26 and 27.

In February or March 2011, Audette missed a scheduled shift. Audette called Mathers and apologized and Mathers told Audette not to worry about it. Audette was not disciplined for missing the shift.

5           Contrary to Respondent’s assertion in Gavin’s reprimand, the record reflects that banquet servers take time off during the busy season. Audette took time off in the fall and winter, Sue Kennedy took time off from October 2010 through March 2011, and Banquet Captain Carmelita Muse took time off during the week of Christmas in 2010.

b) The appraisal

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Over the course of this meeting Mathers reviewed each section of Gavin’s 2010 evaluation. In reviewing the section of Gavin’s appraisal dealing with Quality and Quantity of Work, Mathers read the comments that stated “You try to finish your duties that are assigned timely but I have witness (sic) you doing union work on the time clock.”<sup>35</sup> When Gavin denied doing union work on the clock, Mathers said she had seen Gavin doing it but could not give Gavin a specific example.

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Gavin had received annual performance evaluations from Respondent and its predecessors for many years. The evaluation form has a numerical grading formula from 1 to 4 points in six categories. A marginal grade is represented by the number 1. Acceptable is 2. Commendable is 3 and Outstanding is 4. Her September 2010 evaluation was all 1’s and 2’s, resulting in an overall grade of acceptable.

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In prior year’s evaluations Gavin had received much higher scores. In her 2007 appraisal<sup>36</sup> Gavin’s supervisors at Respondent had given her all commendable grades. Her 2008 appraisal<sup>37</sup> likewise contained an overall commendable rating. However, in Gavin’s 2009 appraisal<sup>38</sup> her scores slipped to only acceptable ratings. Included in the 2009 appraisal was the comment, “You also become preoccupied with conducting union business on the job which affects your productivity. Your goal is to not allow for outside interests to interfere with department productivity.” The evaluation contains the additional comment, “You interact positively with very few members on the team. You regularly voice negative comments on associates, department procedures and management.” It should be noted that Gavin was the union shop steward for the hotel at this time.

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The analysis

Complaint paragraphs 19(c) and (d) allege that on September 24, 2010, Respondent gave Gavin a poor evaluation and on November 3, 2010, disciplined Gavin.

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To establish a violation of Section 8(a)(3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that an individual’s protected activity was a motivating factor in the employer’s action. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Once the General Counsel makes this showing, the

<sup>35</sup> GC Exh. 29, p. 2.

<sup>36</sup> GC Exh. 30.

<sup>37</sup> GC Exh. 31

<sup>38</sup> GC Exh. 32.

burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. To sustain its burden the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of that activity, and that the activity was a substantial or motivating reason for the employer's action.

The General Counsel may meet its *Wright Line*, supra, burden with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances such as union animus, timing or pretext may sustain the Government's burden.

Furthermore, it may be found that where an employer's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); and *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Motivation of antiunion animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490–492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401 (7th Cir. 1992). If it is found an employer's actions are pretextual, that is, either false or not relied on, the employer fails by definition to show it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982), *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

Respondent was aware of Gavin's union activities including membership on the Union's negotiating committee, membership on the Union's Executive Board, shop steward, health and welfare trust member, participation in union rallies and union button distribution. Respondent's animus toward its employees' union activity has been well established here and in *Remington I*. General Counsel has established its burden under *Wright Line* and the burden shifts to Respondent to show Gavin's disciplinary action is based not on her union activity but upon her failure to fill out the proper leave forms prior to requesting days off.

#### c) The discipline

In August Gavin had given Respondent notice on her preference sheet for September and October 2010, that she would be off October 14–18, 2010. Moreover, on the same sheet she indicated she was unavailable on Mondays. Nevertheless, Respondent scheduled Gavin to work on October 11, a Monday and October 18. I have found below that Respondent's unilateral discontinuance of the use of preference sheets in scheduling bargaining unit employees violated Section 8(a)(5) of the Act. Respondent cannot benefit from its unlawful activity by claiming that Gavin failed to fill out the proper paperwork for time off. As the record reflects, until the unlawful July 2010 withdrawal of recognition, the preference sheet was the only required paperwork for requesting days off without pay.

Moreover, Mathers told Gavin it was ok that she not work the October 11 shift when she learned of the flood in Gavin's home. In addition, the disparate treatment received by Gavin when compared with Audette, suggests pretext and is evidence of Respondent's discriminatory

motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978).

5 Respondent violated Section 8(a)(3) of the Act when it disciplined Gavin for allegedly not notifying Respondent ahead of time of her unavailability for two shifts.

d) The evaluation

10 Poor evaluations that are based on discriminatory motive violate of Section 8(a)(3) of the Act. *DHL Express, Inc.*, 355 NLRB 680, 699 (2012); *Parkview Hospital*, 343 NLRB 76, 76 (2007); *Mammoth Mountain Ski Area*, 342 NLRB 837, 842–845 (2004).

15 Gavin’s poor evaluation in 2010, was part of an ongoing effort on the part of Respondent to discriminate against her because of her union activity. Respondent had already disciplined Gavin in March 2010, for handing out union buttons. Her November 2010 discipline for failing to fill out paperwork for time off was part of that continued effort. The poor appraisal was yet another step. After having glowing appraisals for several years, with the advent of the conflict in the hotel between Respondent and the Union, Gavin’s appraisals not only suffered but began to reflect Respondent’s animus toward her union activity. Included in the 2009 appraisal was the comment, “You also become preoccupied with conducting union business on the job which affects your productivity. Your goal is to not allow for outside interests to interfere with department productivity.” The 2010 evaluation contains the additional comment, “You interact positively with very few members on the team. You regularly voice negative comments on associates, department procedures and management.” Those comments together with the animus in her two reprimands reflect the causal link between Gavin’s union activity and her poor evaluation.

25 Respondent violated Section 8(a)(1) and (3) of the Act when it issued Gavin a poor evaluation on November 3, 2011.

30 b. The April 14–15, 2010 discipline of Ana Rodriguez, Audelia Hernandez, and Shirley Grimes

35 Ana Rodriguez was Respondent’s housekeeping supervisor, a bargaining unit position, since 2001. Rodriguez was a member of the Union’s negotiating committee from 2009 until she quit in September 2010. Rodriguez attended several union rallies, including in the cafeteria in April 2010, where the Union brought “8(a)(1)” cupcakes during break periods in an effort to tell employees they could talk about the Union during nonwork time. Rodriguez also wore a union button to work.

40 In March or April 2010, Rodriguez handed out a revocation form<sup>39</sup> for employees to sign revoking their support for the decertification petition. She gave the forms to about four or five of her coworkers in the cafeteria and in the hallway by the time clock before work. Rodriguez also spoke with a coworker named Neticia about the forms while she was working and asked Neticia if she would like to keep the Union. Rodriguez told her that she had a paper that she could sign

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<sup>39</sup> GC Exh. 18.

if she wanted to keep the Union. Neticia said that she was going to think about it. There is no evidence that Rodriguez showed the form to Neticia.

5 On April 14, 2010, Rodriguez was called to Artiles' office where Fullenkamp and Artiles gave her a written reprimand.<sup>40</sup> The reprimand stated:

10 On Thursday and Friday; 4/8-9/10, it was reported by several associates that you, during your work time, approached them during their work time while they were on the clock, and asked them to sign a document regarding union issues. . . . You must stop this behavior and action immediately.

15 You are in violation of Remington policies, as well as the hotel CBA. Specifically you are in violation of the Solicitation policy, section XXII of the handbook stating associates may not solicit while they are engaged in the performance of work tasks, nor may any associate be solicited while working. You also violated section IX, Harassment in the Workplace, because while on duty you verbally harassed and intimidated other associates by trying to get them to sign a document that is not work related. You are also in violation of Associate Rules and regulations by conducting personal business on company time and asking other associates to help you. You further violated Associate Rules and Regulations by not confining your presence in the hotel to the area of your assignment and work duties. . . .

\* \* \*

25 If you continue in this behavior or action, or there are any other complaints of this nature which are found to be valid, it will result in your immediate dismissal. . . .

30 Artiles then told Rodriguez that he was not paying her to do union work. Rodriguez said what are you talking about and Artiles replied that people said you are collecting signatures for the Union. When Rodriguez asked him to bring those people to her, Artiles said that he did not have to give Rodriguez any proof about anything. Other than the employee name and the signature lines, the formal notice of counseling issued to Rodriguez is identical to the one issued to Grimes and Hernandez. I credit Rodriguez' testimony.

35 Rodriguez and refused to sign the discipline and was not asked any questions by Artiles or Fullenkamp about this incident before she received the discipline.

40 Respondent's porter Audelia Hernandez had worked for Respondent and its predecessors for 9 years. Hernandez was a member of the Union and participated in the union rallies in 2010.

45 On April 14, 2010, Hernandez received the identical written discipline form<sup>41</sup> Ana Rodriguez had received, as discussed above. Hernandez was also called to Artiles office with Fullenkamp. Artiles said managers and workers are saying you are distributing papers for the Union. Hernandez responded she had never been distributing any papers from the Union and refused to sign the discipline. Artiles said there were many cameras in the hotel and more to be

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<sup>40</sup> GC Exh. 117.

<sup>41</sup> GC Exh 53.

installed and he could talk to her further about this incident. Hernandez replied that was good. Artiles said with or without the union he could dismiss anyone he wanted. He wondered why people with so many years with Respondent would risk their jobs to continue engaging in union activities. Artiles refused to provide Hernandez with the names of her accusers. Artiles' statements are un rebutted and I credit Herndandez.

Respondent's Banquet Captain Shirley Grimes had worked for Respondent and its predecessors since July 1999. Grimes, a member of the Union, attended the rallies in 2010, and handed out union buttons to employees before work. The Union asked Grimes to pass out the same union revocation<sup>42</sup> form Ana Rodriguez had passed out on breaks, before and after work. During a morning break in the employee cafeteria, Grimes asked several employees to sign the form.

On April 15, 2010, Grimes' banquet manager told her she had to go to the general manager's office. Once there, Grimes met with Artiles and Fullenkamp. Artiles gave Grimes a written warning<sup>43</sup> identical to those given to Rodriguez and Hernandez. Artiles told Grimes several employees said she was passing out the union revocation form in other break areas of the hotel on the clock and that would not be allowed. Grimes denied passing out petitions in other areas of the hotel on the clock. Grimes asked Artiles if he included on the clock while she was on break. Artiles said, "well, you're clocked in, aren't you."<sup>44</sup> I credit Grimes.

Kitchen employee Somchai Hill's un rebutted testimony established that, in the spring of 2010, he was asked by Mejia, in front of a supervisor, to sign the decertification petition while he was on the clock. Engineer Dexter Wray testified that in mid-May 2010, his supervisor, Emmsley Senior had solicited his signature as well as bellman Joel's for the decertification petition on multiple occasions while on the clock. In *Remington I*, Judge Meyerson found that Emmsley Senior solicited employees to sign a decertification petition. Respondent's managers participated in solicitation of the decertification petition on the clock.

### The analysis

Complaint paragraphs 20, 21, and 22 (a) allege that on about April 15, 2010, Respondent disciplined employees Rodriguez, Hernandez, and Grimes.

Grimes, Hernandez, and Rodriguez were disciplined for engaging in union activity by distributing the revocation forms. Since their discipline was "intertwined with the union and the protected concerted activity," a violation may be found based on this casual link alone. *Felix Industries*, 331 NLRB 144, 146 (2000); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000). An analysis under *Wright Line* is not necessary. Under *Felix Industries*, the only issue that remains is whether the three employees did anything while engaged in that activity that would cause them to lose the protection of the Act under Respondent's theory that the three employees solicited signatures while on the clock and in a harassing manner.

<sup>42</sup> GC Exh. 76.

<sup>43</sup> GC Exh. 77.

<sup>44</sup> Tr. 1343, L 3.

Other than the disciplinary forms, Respondent provided no evidence to support its assertions. Further, the evidence reflects that the three employees were disciplined for violating Respondent’s overbroad rules as each discipline states:

5           You also violated section IX, Harassment in the Workplace, because while on duty you verbally harassed and intimidated other associates by trying to get them to sign a document that is not work related. You are also in violation of Associate Rules and regulations by conducting personal business on company time and asking other associates to help you. You further violated Associate Rules and Regulations by not confining your presence in the hotel to the area of your assignment and work duties. . . .

15           Respondent’s true motives are further suspect since no investigation was conducted and the three discriminatees were not given an opportunity to explain their side of the case before the discipline was issued. In *Arkema, Inc.*, 357 NLRB No. 103 slip op at 1–2 (2011), an employee received a written reprimand, based on the company’s harassment policy, for urging a fellow employee to vote no in a decertification election. The Board found that the employer violated the Act by issuing the discipline, and concluded that the ALJ correctly applied the *Burnup & Sims* analysis as the employer did not have an honest belief that the employee engaged in misconduct during the protected activity. The Board found that the employer failed to investigate the incident, failed to allow the employee to refute the allegation and refused to identify the alleged victim, to inform the employee when the incident took place, or provide any of the ordinary information that would have given him a fair chance to defend himself.

25           Moreover, there is substantial evidence that Respondent allowed and encouraged solicitation on the clock with regard to the decertification petition and is further evidence of Respondent’s true motive. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

30           Here, Respondent failed to give the discriminatees an opportunity to defend themselves, disciplined them based upon overbroad rules, allowed other employees to engage in similar antiunion solicitation and therefore failed to show that it had honest belief that Grimes, Hernandez, and Rodriguez had solicited employee signatures on working time in a harassing manner. I find that Respondent violated Section 8(a)(1) and (3) when it disciplined Grimes, Hernandez, and Rodriguez.

#### c. Shirley Grimes January 19, 2011 discipline

35           Respondent’s Banquet Captain Grimes worked for Respondent since 1999. She had been a banquet captain for about 10 years. Her supervisor was Cindy Mathers. Grimes was involved in union activities, including attending union rallies in 2010, at the hotel and handing out union buttons. Rydin ordered Grimes to take off her union button in July 2010, and she was unlawfully disciplined for handing out union revocation forms in April 2010.

45           On January 19, 2011, Grimes received a written reprimand<sup>45</sup> for insubordination in refusing the order of the Catering Manager Irene Kelly to clean the dance floor and window sills in a banquet room being set up for an event. The reprimand states that Grimes told the catering manager, “no, that’s not our job—it is housekeeping!”

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<sup>45</sup> GC Exh. 78.

Grimes received the reprimand from Mathers and Fullenkamp. Grimes denied refusing the order to clean the dance floor and window sills and told Mathers and Fullenkamp that it was Jun Sangalang who made that statement. Fullenkamp had a statement from Kelly that stated it was Grimes who said, “That’s not our job it is housekeeping. You need to call housekeeping”<sup>46</sup> Neither Mathers nor Fullenkamp gave Grimes a chance to tell her side of the story. Fullenkamp told Grimes to resign before she had to fire her. When Grimes said she was not resigning, Fullenkamp said that she should have been fired a long time ago.

The events leading up to this reprimand occurred on about January 7, 2011. Grimes and Sangalang set up a room for an evening reception when the Catering Manager Kelly said the dance floor needed to be mopped and the window sills cleaned. Sangalang testified that it was he who told the catering manager that it was not their job but housekeeping’s and she should call housekeeping. Sangalang testified that he was never asked about this incident and he was not disciplined for his part in the incident. Grimes nevertheless cleaned the sills.

Fullenkamp admitted that she did not speak to Grimes to get her side of the story until she was issuing the discipline to Grimes. Fullenkamp admitted further that she did not speak to Sangalang about the incident until after she had issued the discipline to Grimes. She testified that Sangalang told her he could not recall the event. For the reasons I have discussed above, I do not find Fullenkamp to be a credible witness. I credit Sangalang whose testimony was given in an honest and forthright manner and whose demeanor suggested he was without guile.

#### Analysis

Complaint paragraph 22(b) alleges that on about January 19, 2011, Respondent disciplined Grimes.

General Counsel has established its burden under *Wright Line* that Grimes’ reprimand violated Section 8(a)(3) of the Act. Grimes’ union activities were well known to Respondent at the time she was disciplined. Respondent’s animus toward Grimes’ union activities has also been established as a result of her prior unlawful discipline and Respondent’s order for her to remove her union button. The burden shifts to Respondent to show in its defense it would have disciplined Grimes despite her union activity.

Respondent’s defense that Grimes was insubordinate in her comments to Kelly is a sham. Fullenkamp did not fully investigate this incident. Respondent assumed Kelly was correct even though Grimes and Sangalang denied Grimes was insubordinate. Fullenkamp did not even talk to Sangalang. Had she done so she would have known it was he not Grimes who uttered the comments to Kelly.

Fullenkamp’s sham investigation reflects Respondent’s discriminatory motive. The Board may infer unlawful motive based on an employer’s failure to conduct a meaningful investigation into the alleged wrongdoing and failure to give the employee the opportunity to explain their actions before issuing discipline. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998); *Rood Trucking Company*, 342 NLRB 895 (2004).

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<sup>46</sup> R. Exh. 31.

I find that Respondent's defense fails and that it violated Section 8(a)(1) and (3) when it issued this disciplinary action to Grimes.

d. The Dexter Wray discipline

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Respondent has employed Dexter Wray as an engineer to perform electrical and maintenance work, as well as plumbing from May 2008, until his termination on October 27, 2010. His immediate supervisor was Ed Emmsley, Sr.

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Wray was a union member and member of the Union's negotiating committee. He participated in the Union's 2010 rallies at the hotel and spoke at the July 6, 2010 rally in front of the hotel.

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It was un rebutted that in March 2010, Emmsley Senior told Wray that Artiles wanted to get rid of Wray because of his union activity. As noted above, in August 2010, Emmsley warned Wray not to testify at the hearing in *Remington I* about Emmsley's involvement in circulating and soliciting signatures on the decertification petition.

i. The May 10, 2010, pool overflow incident and discipline

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On May 10, 2010, Wray received a written reprimand<sup>47</sup> concerning a fountain/pool overflow in the hotel lobby. During his meeting with Emmsley Senior, Wray explained that he did not fill the pool, that it was another employee named Sam. Wray said that he did not know the pool was being refilled and that Sam had taken it upon himself to refill the pond. Emmsley said it was Wray's responsibility since he was the senior engineer. It is undisputed that while he was showing Sam how to drain and clean the pool, Wray was called away on another job to shut down the water for the entire hotel so that a valve could be repaired. While Wray never told Sam to refill the pool, Sam refilled the pool in Wray's absence. Sam was never written up nor did Sam testify.

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About a week later in the engineering shop Emmsley approached Wray and told him that if he signed the decertification petition, the pool overflow write up would go away.

Analysis

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The complaint does not allege that this incident violated Section 8(a)(3) or (4) of the Act. However, the allegation is closely related to the charge involving Wray's other discipline discussed below and was fully litigated at the hearing. *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004); *Pergament United States*, 296 NLRB 333, 334 (1989).

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Once again General Counsel has satisfied its burden under *Wright Line* that Respondent violated Section 8(a)(1) of the Act in that Wray had union activities well known to Respondent and Respondent has demonstrated hostility to Wray's protected activity.

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<sup>47</sup> GC Exh. 36.

Respondent’s defense is that it was Wray’s responsibility to ensure that the pool was refilled properly. If it is found an employer’s actions are pretextual, that is, either false or not relied on, the employer fails by definition to show it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982), *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

In this case, Respondent’s defense is pretext. Respondent blames Wray for the pool overflow even though there is no evidence that he caused it. The un rebutted testimony reflects that Sam, without Wray’s knowledge, while Wray was absent on another essential task, took it upon himself to refill the pool without Wray’s knowledge. The pool incident was a convenient excuse to fulfill Emmsley’s March 2010 statement that Artiles wanted to get rid of Wray because of his union activity. I find that in issuing Wray the May 10, 2010 discipline, Respondent violated Section 8(a)(3) of the Act.

ii Swearing incident and discipline

On July 7, 2010, Wray was given another written warning<sup>48</sup> for swearing. The warning states that Wray:

“used company equipment (radio) in an unauthorized manner to communicate non hotel information. His communication was witnessed by two individuals and heard by several on the radio. Dexter was heard by a corporate officer saying loudly to another employee- ‘I don’t need to put up with this shit.’”

\* \* \*

It is against company policy to use company equipment, supplies, etc for non company business. It is also a violation of policy to use profane, obscene or offensive language on the property at any time.

When Wray was given this warning by Fullenkamp and Emmsley Senior, Wray said that he was in the back of the house talking to another employee and Spa Director Lorraine Park was 10 to 12 feet away. There is no dispute that Wray used the word “sh—t.” There were no hotel guests in the vicinity. Wray’s two way radio was on at the time he uttered these words although he was not speaking into the radio.

General Counsel contends that the record reflects that Respondent disparately applied its rules in disciplining Wray. Respondent on the other hand contends there was no disparate treatment. Respondent contends that the General Counsel’s examples of profanity uttered by employees and management was somehow different from the profanity used by Wray since the General Counsel’s examples of disparate conduct occurred in nonpublic areas of the hotel and/or were not reported by the offended employee. When a complaint was made, discipline was issued.

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<sup>48</sup> GC Exh. 37.

Bellman Troy Prichacharn, Wray, and banquet employees Sam Tiger and Vicky Williams testified, it was common for employees at the hotel to use profanity. Tiger testified that although he frequently swore in front of his supervisor, Banquet Manager Cindy Mathers, he has never been counseled or disciplined by Mathers for use of profanity.

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Both Elda Buezo and Ana Rodriguez complained to Canas about housekeeping employee Lumni Deskaj swearing at them. In February 2010, Housekeeping Supervisor Ana Rodriguez reported to Director of Housekeeping Canas that she heard Lumni repeatedly say “oh my God,” “sh—t,” and “motherf—cker,” on his cell phone in the 14th floor hallway just outside guest rooms. In the summer of 2010, Rodriguez told Canas that she heard from housekeeper Maria Hernandez that Lumni was continuing to swear loudly in guest areas. Contrary to Respondent’s contention, Lumni was not disciplined for these incidents. Lumni was disciplined for incidents in December 2009, and November 2010.<sup>49</sup>

The record also reflects that managers, like Wray, used profanity in the presence of other employees, in public areas and over the hand held radio. In the summer of 2010, Director of Housekeeping Canas, said in Spanish to housekeeping employee Ana Rodriguez, motherf—ckers (cabrones) and cunt (coño) on more than once occasion. During the summer of 2010, Canas said to housekeeping employee Maria Hernandez, who was changing linens in a public guestroom, motherf—cker (cabrones). In April or May 2010, in a guest suite Canas said to Wray, I’ll be a son of a b—tch. In May 2010, Canas at the loading dock of the hotel told Lumni to stop bullshitting. In 2010, in a public corridor of the hotel Canas, with housekeeping employees Luz Maria Espinosa Sabala present, said: “Keep going, keep going, keep going until you come in bed.”<sup>50</sup> Later that day Carlos repeated this profanity to female employee Espinoza Sabala later that day while cleaning a guest room.

It was un rebutted that bellman Prichacharn in the summer of 2010, heard General Manager Artiles yell into his radio in the hotel lobby: “What the hell is going on? Where—where is security?”<sup>51</sup>

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In addition front Desk Manager Jeff Brown used the word “f—ck” and “f—cking” in regular conversation in various locations around the hotel during 2010. In late 2009 to early 2010, in the engineering shop Assistant Manager Julie Kopkechka said to Wray, engineering employee Ken and the assistant banquet manager, “Come go with me so I can get this drunken son of a b—tch of out this building.”<sup>52</sup> Again in January 2010, Kopkechka told Wray, “being that drunken b—tch won’t go home then I got to fire her.”<sup>53</sup>

It is ironic that the Spa Director Park, who reported that Wray had used profanity, used profanity herself. On July 23, 2010, Wray was on the elevator with Park, an engineer named John, and two housemen named Harka and Lumni. Park called Harka a “bullsh—tter” in front of the group. Wray complained about Park’s language to Fullenkamp. Respondent claims that a

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<sup>49</sup> R. Exhs. 24 and 25.

<sup>50</sup> Tr. 1295, LL 14–15.

<sup>51</sup> Tr. 1557, LL 1–25 and Tr.1558, LL 1–12.

<sup>52</sup> Tr. 355, LL 21–22.

<sup>53</sup> Tr. 357, LL 8–9.

memo<sup>54</sup> dated July 30, 2010, is a discipline for Park’s use of profanity. However, the memo is devoid of any adverse consequences for Park.

### Analysis

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Complaint paragraph 23(a) alleges that on about July 7, 2010, Respondent disciplined its employee Dexter Wray.

As already noted, General Counsel has established its *Wright Line* burden that Respondent violated Section 8(a)(3) of the Act since Respondent was aware of Wray’s union activity and has demonstrated antiunion animus toward him. If it is found an employer’s actions are pretextual, that is, either false or not relied on, the employer fails by definition to show it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982), *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

Contrary to Respondents contentions in its brief, the examples of profane language used by other employees and managers did occur in public areas of the hotel, i.e., the lobby, public corridors, as well as guest rooms. Respondent misrepresents the record in saying that no employee complained about profanity used in their presence. Ana Rodriguez complained twice to Canas about Lumni’s profanity without any result. The Lumni disciplines involved other incidents from December 2009, and November 2010. More significant is the use of profanity by supervisors and managers, Canas, Artiles, Park, Brown, and Kopkechka. Indeed, Artiles use of profanity is more egregious than Wray’s. Unlike Wray, Artiles was intentionally speaking into the radio that could be heard all over the hotel and was the highest ranking manager at the hotel. At best Respondent was inconsistent in enforcing its policy regarding use of profanity at worst it encouraged use of profanity through the example of its managers and supervisors. I find that Respondent’s discipline of Wray for use of profanity was a pretext to disguise its true object of trying to get rid of union adherent Wray. In so doing Respondent violated Section 8(a)(3) of the Act.

#### iii. The gambling incident and Wray’s termination

On August 23 and 24, 2010, Wray gave testimony<sup>55</sup> adverse to Respondent’s interests at the hearing in *Remington I*.

On October 23, 2010, Wray came into work at about 6:30 a.m. for his 7 a.m. shift. When he arrived, security guard Ed Emmsley Jr., Emmsley Senior’s son, asked Wray if he had his laptop. After Wray said that he did, Emmsley Junior asked Wray if he could transfer him \$100,000 in play money poker chips. Both Wray and Emmsley, Junior played poker on line at a site called PokerStars.com. Wray agreed and went to the break area at the back of the engineering shop and turned on his computer to the PokerStars website. By 6:55 a.m. Emmsley Junior had not logged on to the PokerStars website to receive the chips, so Wray clocked in at the clock near the human resources office and began work. He left his computer on. Wray used

<sup>54</sup> R. Exh. 43.

<sup>55</sup> GC Exhs. 34 and 35.

his own internet provider, Clearwire for his access to the PokerStars website that day, not the hotel internet provider. At about 9 a.m. that day, Wray returned to the shop and found his laptop was missing. At 11 a.m. Wray met Emmsley Senior on the 13th floor of the hotel. Wray asked if Emmsley had seen his laptop and Emmsley replied “oh that’s your laptop. I’m going to have to send you home.” When Wray asked for what Emmsley said “for gambling at work.”<sup>56</sup> Emmsley explained that he was not gambling at work, that he was performing a variety of tasks during the morning. Emmsley said he would investigate.

On about October 25, 2010, Emmsley claims that he reviewed October 23, 2010, recordings of cameras located in the hallway adjacent to the entrances to the engineering rooms beginning at 6 a.m.<sup>57</sup> According to Emmsley, the recordings showed that Wray first entered the engineering suite of three interconnected rooms<sup>58</sup> at about 6:58 a.m. Next Wray left the engineering rooms at 8:02 a.m. Wray reentered the engineering offices at 8:17 a.m. and left at 8:32 a.m. At 8:38 a.m. Wray reentered engineering and left at 8:54 a.m. At about 8:50 a corporate engineering vice president named Faren Ardis entered the engineering room. Ardis found Wray’s laptop opened to a poker website.<sup>59</sup> It is undisputed that there was an entrance to the engineering offices that the surveillance cameras could not capture.

On October 27, 2010, Wray was called to a meeting with Emmsley and Fullenkamp in her office. Emmsley told Wray that since he had three write ups in the last 6 months he had to terminate him. Wray was never asked for his side of the story.

Wray’s termination document<sup>60</sup> states in part:

On the morning of October 23, Dexter set up his personal lap top computer in a back storage area of the engineering shop. A corporate representative saw the laptop while searching for vinyl in the area. The laptop was hidden behind several pieces of furniture and out of plain view from anyone entering either doorway of the shop. The laptop screen was open to a poker website and the screen indicated that Dexter was logged in and had been playing.

The use of cell phones, email devices, etc. are prohibited from use during working hours. Additionally associates may not use company equipment, supplies, etc for personal purposes and access to the internet was through the Hotel’s Zenet internet access. Conducting personal business during work hours and gambling on company time or premises are also prohibited.

...

There was a violation of several company policies.

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<sup>56</sup> Tr. 339, LL 23–25.

<sup>57</sup> No copy of the recordings was produced for the record. The only disk of the October 23 surveillance cameras was given to Artiles. Respondent’s counsel asserts that Respondent could not find the disk. However, Artiles was never contacted by counsel to see if he had the disk. (Tr. 2870, LL 1–11.) The only evidence of the substance of the recordings is Emmsley, Senior’s testimony and a summary he produced listing times Wray entered and left the shop on October 23. (R. Exh. 36.) Given the failure to produce the recording and Emmsley’s lack of credibility, absent a copy of the recording, I am not willing to believe Emmsley’s assertion that Wray was not in the engineering shop before 6:58 a.m.

<sup>58</sup> R. Exh. 37.

<sup>59</sup> R. Exhs. 4 and 5.

<sup>60</sup> GC Exh. 39.

...  
 Dexter has had two other disciplinary actions in the last 5 months and this will be his third within that time frame. Because of the multiple violations as well as the serious nature of same in this third disciplinary action, Dexter’s employment will be terminated consistent with the Involuntary Termination provision in the Associate Handbook.

On January 1, 2012, Wray received an email<sup>61</sup> from the PokerStars website indicating that there were no real money poker games played from October 22–24, 2010.

### Analysis

Complaint paragraph 23(b) alleges that on about October 24, 2010, Respondent discharged Wray in violation of both Section 8(a)(3) and (4) of the Act.

Section 8(a)(4) of the Act makes it unlawful, “to discharge or otherwise to discriminate against an employee because he has file charges of given testimony under this Act.” In order to find a violation of Section 8(a)(4) of the Act, a *Wright Line* analysis is followed. *American Garden’s Mgmt. Co.*, 338 NLRB 644, 645 (2002). The timing of discharges may support a finding that the discharges were motivated by the employee’s testimony before the Board. *Gary Enterprises, Inc.*, 300 NLRB 1111, 1113 (1990).

As with the two previous disciplines Respondent gave to Wray in 2010, here I find that Counsel for the General Counsel has satisfied its *Wright Line* burden that Respondent violated the Act because Respondent was well aware of Wray’s union activity and his adverse testimony in *Remington I* and demonstrated antiunion animus toward him. Moreover, the timing of Wray’s discharge, only 2 months after giving testimony substantially adverse to Respondent in *Remington I*, suggests the motivation in his termination was his testimony before Judge Meyerson.

The evidence is undisputed that Respondent did not inquire of Wray his side of the story. Embarrassed that a corporate VP had found a laptop open to a poker website, Emmsley was determined to discipline Wray. Had Emmsley conducted a thorough investigation, he would have discovered that Wray was not gambling, as the January 2012 website email established, but that he was transferring chips to Emmsley’s son, and that he was not using the hotel’s website but his own to do so.

The significance of this is that assuming Wray was using his laptop, he was simply playing a game and not gambling, since there was no money that could be won or lost. This is also supported by Respondent’s own evidence, photos<sup>62</sup> purportedly taken of Wray’s laptop screen on October 23, 2010, that reflect he was using play money.

Respondent contends that Wray was lying when he said he did not play poker on October 23, 2010, based upon a written statement attached to his Board affidavit. In the attached statement Wray said that, “He got to the hotel at 6:30 a.m., so since he was there early he

<sup>61</sup> GC Exh. 40.

<sup>62</sup> R. Exhs. 4 and 5.

opened up his computer and started playing poker on it.”<sup>63</sup> No one questioned Wray as to what he meant by playing poker. More in depth examination may have reflected his transfer of chips to Emmsley Junior constituted “playing poker.” Respondent also argues that a review of surveillance cameras by Emmsley Senior establishes that Wray was gambling on his computer the morning of October 23, 2010. I have already noted above that Emmsley is the only source of what the cameras revealed and I do not find him credible. Moreover, it is undisputed that Wray could have exited or entered the engineering rooms via an entrance that the cameras could not detect. If Emmsley is to be believed, all the cameras show is that Wray entered and exited engineering between 6:58 a.m. and 8:54 a.m. No one saw Wray gambling. The fact that Ardis found a laptop open to a gambling website does not establish that Wray was doing any more than he claimed, transferring play chips to Emmsley Junior. The fact that the laptop was on does not establish that Wray was playing poker on worktime, merely that it was in an on position. The engineering rooms were open to a host of other people, including Wray, who could have struck a key on the laptop and turned the screen on. Thus, Respondent’s assertion that Wray was using his laptop during working hours must also fail as there is no evidence Wray was using his computer during working hours.

Respondent’s rush to judgment precluded a meaningful investigation and is further evidence of Respondent’s unlawful motive as well as pretext. *Firestone Textile Co.*, 203 NLRB 89, 95 (1973). Since I find Respondent’s proffered reasons for Wray’s termination were pretext, it precludes finding that Respondent would have terminated Wray despite his union activities and testimony before the Board. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). I find that in firing Wray, Respondent violated Section 8(a)(3) and (4) of the Act.

e. The termination of Yanira Escalante Medrano

Yanira Medrano was employed as a housekeeper by Respondent for about 6 years until her October 28, 2010 discharge. Medrano was assigned to a VIP floor that required extra care in cleaning. She testified that she had to regularly replace up to 25 shower curtains a week. During the relevant periods, her supervisor was Eduardo Canas. Medrano gave testimony at the *Remington I* trial on September 24, 2010, about Artiles’ threatening employees with reprisals if they did not sign the decertification petition and making threats to employees. Medrano refused Artiles’ demand that she gather more signatures on the decertification petition. Artiles was present when Medrano testified in *Remington I*. In addition, Medrano signed Elda Buezo’s petition<sup>64</sup> that Buezo gave to Respondent on October 18, 2010, protesting the suspension of Ana Rodriguez.

On October 28, 2010, Respondent terminated<sup>65</sup> Medrano for creating an unsafe condition by leaving chemicals and for unauthorized storage of hotel supplies in her locker.

On October 26, 2010, Medrano was called to meet Fullenkamp and Canas at her locker in the ladies’ locker room. The contents of her locker were on the floor of the locker room including cleaning chemicals, shower curtains, garbage bags, Medrano’s personal belongings and a picture frame. Fullenkamp told Medrano that she had opened her locker because Audelia

<sup>63</sup> Tr. 419, LL 24–25 and Tr. 420, line 1.

<sup>64</sup> GC Exh. 45a.

<sup>65</sup> GC Exh. 55.

reported there was blood coming from the locker. Fullenkamp said you have 12 shower curtains in your locker. Canas added that when the locker was opened they found 12 shower curtains and chemicals. He said you are not supposed to have these in your locker. Medrano said she kept them in her locker so she wouldn't run out because housekeeping doesn't have them. Canas said if they are out they are out. Medrano said she didn't like it when she is told she did not put something in a room.

On October 28, 2010, Medrano was called to a meeting in Fullenkamp's office. Fullenkamp said she had to fire Medrano because of what they found in her locker. When Medrano asked if they were firing her because she was a thief, Fullenkamp said no, not for stealing. You are fired because of the chemical. It was a risk for the hotel and your coworkers. Medrano said she was not the only one who kept cleaning chemicals in her locker. Fullenkamp said what is important now is you. When Medrano asked when Fullenkamp told her that she was not supposed to have cleaning chemicals or supplies in her locker, Fullenkamp made no reply.

The record is replete with evidence that virtually all of Respondent's housekeeping employees kept both cleaning chemicals and various supplies for the hotel rooms in their lockers before Medrano was fired. It is further clear that Respondent's supervisors were aware of this. Fullenkamp made regular unannounced inspections of the housekeepers' lockers in which she would have seen the chemicals and supplies. At the beginning of the day, the housekeepers went to their lockers, picked up their cleaning chemicals and supplies and then went to a meeting where they were given their room assignments for the day. At the assignment meetings the supplies and chemicals were in bags that were open at the top and clearly displayed the cleaning bottles and supplies. Canas was present at these meetings and would have seen the housekeepers' bags.

### Analysis

General Counsel has established that Medrano's testimony in *Remington I* and her union activity known to Respondent were motivating factors in her termination. Medrano's termination came about 1 month after her testimony in *Remington I* and within 10 days of signing the petition protesting Ana Rodriguez' suspension. The timing of discharges may support a finding that the discharges were motivated by the employee's testimony before the Board. *Gary Enterprises, Inc.*, 300 NLRB 1111, 1113 (1990).

Respondent's position that it was "shocking to management" that Medrano stored so much hotel property in her locker is simply pretext. Its contention that the amount of items stored in her locker appeared "to be staging hotel property there in relation to an ongoing theft of this property" is simply unsupported by the record.

Respondent's defense is no more than a bald faced pretext. Respondent was aware of and permitted its employees to keep a wide range of cleaning supplies and guest room supplies in their lockers. Moreover, there is no evidence that until Medrano was fired Respondent ever told its housekeeping employees that they could not store cleaning or guest room supplies in their lockers.

Even if Medrano violated Respondent's handbook rule by keeping hotel guest room supplies in her locker, the evidence established this rule was never followed or enforced until the

supplies were found in Medrano’s locker. Respondent was unable to offer any examples of employee discipline for violating a rule dealing with keeping hotel supplies in an employee’s locker.

5           Since I find Respondent’s defenses to Medrano’s termination are pretext, Respondent may not meet the *Wright Line* burden, and I find that Respondent violated Section 8(a)(3) and (4) of the Act in discharging Yanira Medrano. *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994).

f. The schedule change, reduced hours, and discharge of Elda Buezo

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Elda Buezo was employed as a housekeeper by Respondent and its predecessors since 1989. Buezo worked part time from 7 a.m. to noon Monday through Friday for 15 years. She was a union member since 1989 and a member of the negotiating committee from 2009 to 2011. Buezo attended the union rallies in 2010 and wore a union pin at work. When coworker Ana Rodriguez was fired by Respondent in September 2010, Buezo spoke to several coworkers and prepared a petition<sup>66</sup> that she gave to Fullenkamp on October 11, 2010, asking that Rodriguez be reinstated.

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After submitting the petition, on October 18, 2010, Buezo was called to a meeting with Fullenkamp and Canas. Fullenkamp told Buezo that this was not a reprimand but that Respondent paid Buezo to do her job and go home. Fullenkamp added, we don’t pay you to do activities not related to work. When Buezo asked what Fullenkamp meant, either Fullenkamp or Canas said you are collecting signatures. When Buezo said who says, Fullenkamp replied coworkers. When Buezo demanded that the coworkers be identified, Fullenkamp refused to identify the coworkers. When Buezo asked if she could talk to anyone at work, Fullenkamp replied that Buezo should talk about work related things and that she was not allowed to do anything inside of the hotel related to the Union. Fullenkamp told Buezo to just work and leave. Fullenkamp reaffirmed her comments to Buezo in a February 8, 2011 memo<sup>67</sup> to Buezo that stated in part:

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Elda, you must have misunderstood when you were advised in the HR office after the Ana petition was submitted. You were told to keep all union activities off company paid time. You are mistaken in your statement “that I not allowed doing any activity related to the union.” Of course you can engage in union activities, just do them on your own time and off Remington property.

i. The schedule change and reduction of hours

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In February 2011, Buezo had a conversation with her Supervisor Yolanda Hanna as to why Buezo had been reassigned from her regular duties on the 14th floor of the hotel. Hanna told Buezo that she was part time and Hanna needed someone who worked 8 hours. Buezo said she had much seniority and Hanna replied there was no more seniority at the hotel. Hanna told Buezo she would need her to work 8 hours during the high season from May to October 2011.

<sup>66</sup> GC Exh. 45a.

<sup>67</sup> GC Exh. 130.

On April 15, 2011, Buezo learned that the schedule showed her as no longer part time but now an on call housekeeping employee. An on call employee must call each day at 7 a.m. to see if there is work for that day. Buezo spoke with Fullenkamp on April 15 and Fullenkamp told Buezo she could not have the 14th floor rooms any longer because they needed a person to work 8 hours and this was the reason she was now on call. Fullenkamp told Buezo that they had offered her 8 hours. Buezo denied she had been offered to work 8 hours and said Hanna had said she would have to work 8 hours in the May to October busy season. It is un rebutted that Buezo told Fullenkamp that she would work 8 hours if necessary. While Fullenkamp said they would meet later about Buezo's on call status, the meeting never occurred. Buezo remained in on call status. Despite calling in every morning, from April 15, 2011, through May 19, 2011, Buezo worked only five 5-hour shifts. Contrary to Respondent's assertion, there is absolutely no evidence that before April 15, Respondent offered Buezo an 8-hour shift or that Buezo refused to work an 8-hour shift. Before April 15, Buezo had a regular schedule from 7 a.m. to noon Monday through Friday for 15 years. Buezo found there were less senior employees who had a regularly scheduled workweek. Buezo asked her Supervisor Margarita Lucero why she was on call when others with less seniority were scheduled. I credit Buezo's testimony that she was never offered an 8-hour shift and do not credit Fullenkamp for the reasons previously stated.

ii. Buezo's termination

It is undisputed that on May 20, 2011, Buezo called<sup>68</sup> both housekeeping and human resources and left messages that she had to go to Montana on an emergency. Buezo went to Montana because the mother of her boyfriend of many years was dying. While in Montana the mother died and Buezo attended the funeral. When Buezo returned from Montana on May 30, 2011, she was told there was no work. Buezo had no work assignments for June.

On June 7, 2011, Buezo was told to call Fullenkamp. Fullenkamp told Buezo that she had left without telling Respondent. Buezo told Fullenkamp she had left messages saying she had to leave for an emergency. Fullenkamp said they needed to schedule a meeting. Later that day Buezo called Fullenkamp and asked why she needed to meet with Fullenkamp and Fullenkamp replied that Buezo had failed to fill out a paper before leaving. Buezo said she did not know there was a paper to fill out. Fullenkamp said Buezo knew she should fill out a paper. A meeting was scheduled a few days later. Buezo cancelled that meeting and they agreed to meet on June 14, at 8:30 a.m. Buezo also cancelled that meeting and Fullenkamp suggested a phone meeting. Finally on about June 15, 2011, Buezo called Fullenkamp who told Buezo that since they could not meet and Buezo failed to fill out her paperwork before she left for Montana, Buezo had resigned.

Fullenkamp testified that if Buezo had come to one of the meetings that Buezo cancelled, filled out the leave of absence form and provided Fullenkamp with the funeral program, Buezo would not have been fired. Respondent contends that it was Buezo who resigned voluntarily. However, an email chain<sup>69</sup> between Fullenkamp and Remington Corporate Vice President Nancy Hafner concerning Buezo's termination dated June 6, 2011, explains why Fullenkamp insisted in her testimony that Buezo resigned. In the email Fullenkamp asks Hafner if she can terminate

<sup>68</sup> GC Exh. 50, page 2, Buezo's phone bill, shows phone numbers 343-3121 and 343-3126 which are for Respondent's housekeeping and human resources departments respectively.

<sup>69</sup> GC Exh. 131.

Buezo and Hafner replies, “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.” In essence, Hafner tells Fullenkamp, yes you can terminate her but call it a resignation. Moreover, Fullenkamp’s notes<sup>70</sup> of her conversation with Buezo on June 15, 2011, belie her assertion that Buezo resigned voluntarily and are consistent with the email with Hafner. The notes dated June 15, 2011, reflect, “6/15 Elda called. Told her since she didn’t follow procedure & fill out correct paper work I considered her as she resigned.” In addition Buezo’s “Termination Record”<sup>71</sup> does not show Buezo quit but that she was terminated. Based upon the above, I credit Buezo’s testimony that she did not quit voluntarily and discredit Fullenkamp. I found Buezo to be a forthright and consistent witness. While not a native English speaker, her testimony and demeanor suggested she was telling the truth.

### Analysis

Complaint paragraph 25(a) alleges that on about April 15, 2011, Respondent changed the schedule of employee Elda Buezo from regular part time to an on call schedule. Complaint paragraph 25(b) alleges that from April to May 2011, Respondent reduced Buezo’s hours.

Buezo’s Union and protected concerted activity and Respondent’s knowledge of that activity is well documented. Buezo’s gave testimony adverse to Respondent in *Remington I* in the fall of 2010, and met with Fullenkamp and Canas in October 2010, to present the Ana Rodriguez petition. During that meeting, Canas and Fullenkamp told Buezo that she could not conduct this protected activity while she was at work or on Remington property, demonstrating their hostility to her protected activity.

On April 15, 2011, Buezo learned that Respondent had placed her in on call status after 15 years working a regular part-time schedule. This change in work schedule resulted in Buezo’s hours being reduced from 25 hours a week to 25 hours a month.

In *Queen Kapiolani Hotel*, 316 NLRB 655, 664 (1995), the Board, in affirming the ALJ, found that changing an employee from a regular schedule to “on call” status violated Section 8(a)(3) of the Act. I find that given Respondent’s knowledge of her union and protected activity as well as its demonstrated hostility to its employees’ union activity, General Counsel has established its initial burden under *Wright Line*.

Respondent contends in making Buezo on call it acted within its power under the management rights provision of the expired collective-bargaining agreement to discontinue Buezo’s 5-hour schedule when Buezo declined the opportunity to work an 8-hour schedule.

This is an interesting position for Respondent to take since it had by this time declared impasse, ceased honoring most of the provisions of the collective-bargaining agreement and refused to recognize the union.

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<sup>70</sup> R. Exh. 21.

<sup>71</sup> GC Exh. 129.

Respondent's argument that the management rights provision of the expired and disregarded collective-bargaining agreement somehow gave them the right to determine schedules is misplaced. The collective-bargaining agreement containing the management rights clause had expired. The Board consistently has held that a waiver of bargaining rights under a management rights clause does not survive the expiration of a contract. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 655 (2001); *Buck Creek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), and enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

Respondent's management rights defense is mere post discrimination invention. There is no evidence that Buezo ever refused to change to an 8-hour shift and when Fullenkamp asked Buezo if she was willing to take an 8-hour shift, Buezo said that she would. Despite telling Buezo that Fullenkamp would set up a meeting with the director of housekeeping to discuss the possibility of Buezo working 8 hours, that meeting never took place.

Since Respondent's defense for placing Buezo in on call status fails and is mere pretext, Respondent fails to overcome its *Wright Line* burden to show that it would have placed Buezo in on call status regardless of her Union and protected concerted activity. Where an employer's asserted reason for an adverse action is false, the Board may infer that employer is concealing an unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Respondent violated Section 8(a)(1) and (3) of the Act for placing Buezo in on call status and thereby reducing her hours.

Complaint paragraph 25(c) alleges that on about June 15, 2011, Respondent discharged Buezo.

As I have found with her change to on call status and reduction in hours, I find that General Counsel has satisfied its burden of proof under *Wright Line* to show that Buezo's union activities were known to Respondent and Respondent was motivated by its demonstrated hostility to Buezo's union and protected activity in firing her.

Respondent's defense is that Buezo voluntarily resigned her post with the hotel. This is more pretext. As seen in the emails between Fullenkamp and Hafner on June 6, 2011, and Buezo's termination document, Respondent found an opportunity to fire a known union adherent and call it a resignation. Shifting explanations for adverse employee actions is evidence of discriminatory intent as well as pretext. *Abbey's Transportation Services, Inc. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983); *Seminole Fire Protection, Inc. v. NLRB*, 306 NLRB 590, 592 (1992).

I find that in firing Buezo on June 16, 2011, Respondent violated Section 8(a)(1) and (3) of the Act.

- g. The August 2010 decrease in shifts for banquet employees Joanna Littau, Fay Gavin, John Fields, and Vicki Williams

Before Respondent’s unlawful withdrawal of recognition of the Union in July 2010, the parties’ expired collective-bargaining agreement at article XIV, section 1<sup>72</sup> provided for use of seniority in all departments in scheduling employees. The record is likewise clear that after July 5 2010, seniority was no longer considered by Respondent in making banquet department work assignments. After July 2, 2010, Respondent no longer followed seniority in, among things, shift assignments or hours of work. After withdrawing recognition from the Union in July 2010, Fullenkamp in both her capacities as human resources director and later director of housekeeping, Rydin as executive chef in charge of kitchen employees and restaurant servers, 10 Mathers as banquet manager, and Emmsley Senior as chief engineer all told their employees that Respondent no longer followed seniority.

Joanna Littau

15 Banquet server Joanna Littau was actively engaged in union activities. She was union shop steward and a member of the Union’s negotiating committee since 1998. As shown in Respondent’s schedules from February 2010 to November 2010<sup>73</sup>, Littau was sixth in seniority on February 2010, when Judge Meyerson found Respondent unlawfully terminated her for distributing boycott leaflets. Respondent reinstated Littau on about July 4, 2010. In August and 20 September 2010, Littau testified in the *Remington I* hearing.<sup>74</sup> General Manager Artiles was present during her testimony.

Through her preference sheets, Littau indicated she was available to work both morning and afternoon Tuesday through Thursday, and mornings only on Friday and Saturday. Before 25 July 2010, Littau worked about 25 to 30 hours per week during the busy season at the hotel and as much as 40 hours per week. During the slow season of June, July, and August, Littau worked 15 hours or less per week. Littau’s W-2s<sup>75</sup> reflect that she earned \$28,382.03 in 2008 and \$14,391.83 in 2009. Respondent reinstated Littau around July 4, 2010.<sup>76</sup> Littau was listed as sixth in seniority through the schedule beginning July 17, 2010, and she was scheduled to work 30 on July 23—24, 2010.<sup>77</sup> After the week of July 24, 2010, Respondent ceased scheduling according to seniority and availability. While Littau continued to be available to work, she lost her position of seniority and was no longer scheduled to work.<sup>78</sup> From July 24 through December 2010 Respondent scheduled Littau to work only on September 6, 2010, despite the fact less senior employees were scheduled to work.<sup>79</sup>

35 In 2011 Littau’s availability did not change and she did not tell Respondent she was unable to work. However, the record reflects that Respondent scheduled Littau less than 20 times in 2011.<sup>80</sup> Littau’s W-2s<sup>81</sup> reflect that her earnings were \$2,107.21 for 2011.

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<sup>72</sup> GC Exh. 2, p. 14.

<sup>73</sup> GC Exh. 28.

<sup>74</sup> GC Exhs. 60 and 61.

<sup>75</sup> GC Exh. 72.

<sup>76</sup> Compare GC Exh. 28, pp. 44 and 47.

<sup>77</sup> *Ibid.*, at p. 50.

<sup>78</sup> *Ibid.*, at p. 57.

<sup>79</sup> *Ibid.*, at pp. 57–92.

<sup>80</sup> GC Exhs. 71 and 73.

<sup>81</sup> GC Exh. 72.

Fay Gavin

Banquet server Fay Gavin was the most senior of Respondent’s banquet servers in July 2010. Her union activity is discussed above as is Respondent’s knowledge of her union activity.  
 5 I have found that Respondent has violated Section 8(a)(1) and (3) of the Act in giving Gavin a poor performance review and in disciplining her on March 19, 2010, and November 3, 2010.

10 Before July 2010, Gavin worked 3 to 4 days a week during the high season of fall and winter. Banquet schedules from February through May 2010<sup>82</sup> show Gavin worked an average of 2 to 3 days per week.

15 As noted above, after July 2010, when Respondent stopped scheduling by seniority and availability, Gavin’s hours dropped dramatically. Despite being the most senior banquet server, Respondent did not schedule Gavin to work in July, August, September, or early October of 2010,<sup>83</sup> although less senior servers were scheduled. On October 11, 2011, Respondent scheduled<sup>84</sup> Gavin for 6:30 a.m. although Gavin had worked mostly evenings for 25 years. Respondent next scheduled Gavin to work October 18 and November 3, 2010, again for a morning shift.<sup>85</sup>

20 In January and February 2011, Gavin was scheduled<sup>86</sup> for three shifts. From March through July 2011, Respondent did not schedule Gavin.<sup>87</sup> From July through November 2011, Respondent scheduled Gavin one to two shifts per month.<sup>88</sup> Her scheduling increased slightly in December 2011, the peak banquet season.<sup>89</sup>

25 John Fields

30 Banquet server John Fields was second in seniority before July 2010.<sup>90</sup> Fields has been a member of the Union since 1986 and has worn a union button at work. He is a member of the union negotiating committee. Fields was available for any shift any day of the week. Before July 2010, during the early high season in September and October, Fields worked less than 40 hours per week but during the high season of November and December his hours increased to about 40 hours per week. In the banquet season from February to May 2010, Fields was scheduled for about five shifts per week.<sup>91</sup> During the slow summer season Fields worked about 30 hours per week. The record reflects that Fields worked an average of two to three shifts per  
 35 week in June and early July 2010.

Consistent with Respondent’s abandonment of seniority after July 2, 2010, in the week of July 24, 2010, Fields went from second to eleventh in seniority on the schedule.<sup>92</sup> While Fields

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<sup>82</sup> GC Exh. 28.

<sup>83</sup> Ibid., at pp. 53–75.

<sup>84</sup> Ibid., at p. 75.

<sup>85</sup> Ibid., p. 79.

<sup>86</sup> GC Exh. 73, pp. 1–16.

<sup>87</sup> Ibid., at pp. 17–58.

<sup>88</sup> Ibid., at pp. 59–78.

<sup>89</sup> Ibid., at pp. 79–96.

<sup>90</sup> GC Exh. 28, p. 50.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid., at p. 53.

continued to be available, he was not scheduled for work in August, September, and October of 2010, although less senior servers were scheduled. Respondent did not schedule Fields again until November 4, 2010.<sup>93</sup> Fields was scheduled three times for the rest of the peak season, November and December 2010.<sup>94</sup>

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Fields availability never changed in 2011. In January and February 2011, Respondent scheduled Fields for an average of only one to three shifts per week.<sup>95</sup> From March until the end of July 2011, Fields was not scheduled despite less senior employees working.<sup>96</sup> For the rest of 2011, Fields got very few shifts.<sup>97</sup>

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Vicki Williams

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Banquet bartender Vicki Williams was Respondent's most senior banquet bartender until July 2010.<sup>98</sup> Williams participated in union events, and wore a union pin during her 6 years at work.

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For the years before July 2, 2010, Williams preference sheets showed she was available to work on Wednesday at 2 p.m., Friday after 2 p.m., and Saturday after 3 p.m.<sup>99</sup> Williams testified that in the October to January high season for banquet bartenders, Williams worked an average of 20 hours per week. During the slow season, Williams said she worked 1 night per week, on average. This is consistent with the schedules in the record.<sup>100</sup>

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Beginning with the schedule for the week of July 24 2010, Williams moved to second place on the banquet bartender list.<sup>101</sup> Katie Keim, who had previously been fourth in seniority for banquet bartenders, moved to number one.<sup>102</sup>

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In August 2010, Williams complained to management regarding Respondent's changes to the schedule and its failure to follow seniority under the collective-bargaining agreement. Williams first complained to Rydin, then to Fullenkamp.<sup>103</sup>

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In September 2010, while Williams was available, she worked less often than lower seniority bartenders, such as Keim.<sup>104</sup> For the week of September 25, 2010, Respondent moved Williams to the bottom of the schedule of seven bartenders.<sup>105</sup> Respondent failed to schedule Williams during October, November, and the first part of December 2010, the busy season.<sup>106</sup>

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<sup>93</sup> Ibid., pages 55–79.

<sup>94</sup> Ibid., pages 81, 87, 89.

<sup>95</sup> GC Exh. 73, pp. 1–18.

<sup>96</sup> Ibid., at pp. 19–58.

<sup>97</sup> Ibid., pp. 59–96.

<sup>98</sup> GC Exh. 28, p. 52.

<sup>99</sup> Ibid., at p. 52.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid., at pp. 53–54.

<sup>102</sup> Ibid., pages 52–54.

<sup>103</sup> GC Exh. 84.

<sup>104</sup> GC Exh. 28, pp. 63–70.

<sup>105</sup> Ibid., at p. 72.

<sup>106</sup> Ibid., at pp. 72–86.

In about October 2010, Williams told Mathers that she had increased her availability to Tuesday through Sunday after 3 p.m. Mathers said that “a certain part of the scheduling was based on attitude and that my name had been tossed around as not being all that happy with the changes that were going on, in fact that I’d been a little bit lippy about it.”<sup>107</sup> Mathers said that if Williams could keep a good attitude, she could get shifts.

While Respondent scheduled<sup>108</sup> Williams to work on December 10, 11, 17, and 18, 2010, lower-seniority bartenders received more shifts per week on days Williams was available.<sup>109</sup>

In December 2010, Williams told Fullenkamp that it was great to have a shift. Williams said she understood that they were being scheduled based on attitude, so it was her intention to keep her attitude good and keep her chin up, her head down, and behave herself about union stuff. It is unrebutted that Fullenkamp responded, “Good, because that’s what it takes to get a shift around here.”<sup>110</sup> Williams was an honest and forthright witness who testified without any hostility. I will credit her testimony.

From January through April 2011, Williams’ availability did not change but she did not receive the number of shifts she had in the past.<sup>111</sup> From mid-March through early August 2011, Williams was not scheduled for any shifts.<sup>112</sup>

#### Analysis

Complaint paragraph 26(a), as amended, alleges that Respondent decreased the number of shifts for those employees who supported the Union, including Littau, Gavin, Fields, and Williams.

Employees who avail themselves of rights under a collective-bargaining agreement also engage in protected activity under the Act. *Grinell Fire Protection Systems Co.*, 328 NLRB 585, 604 (1999).

General Counsel contends that Respondent singled out employees Gavin, Fields, Littau, and Williams, all possessing high seniority in the banquet department, for retaliation because they have engaged in protected activity.

Respondent contends there is no evidence that seniority was discontinued in any department or that employees lost any money. I find this position is simply not supported by the evidence as set forth in detail above.

The record is clear that Littau, Gavin, Fields, and Williams all have engaged in protected activity including complaining about the changes to the banquet schedule, being members of the union negotiating committee, and being shop stewards. Littau and Gavin have been found to have been unlawfully discriminated against. Respondent has confirmed that in order to get

<sup>107</sup> Tr. 1497, LL 15–18.

<sup>108</sup> GC Exh. 28, pp. 87–90.

<sup>109</sup> Ibid.

<sup>110</sup> Tr. 1499, LL 9–11.

<sup>111</sup> GC Exh. 73.

<sup>112</sup> Ibid., at pp. 21–61.

scheduled, an employee should not complain about the scheduling changes and behave themselves about union matters. The record demonstrates that each employee was not scheduled when less senior employees were scheduled in violation of the seniority provisions of the expired collective-bargaining agreement. No rational explanation was given for why these four employees had their schedules reduced in favor of less senior employees.

General Counsel has established under *Wright Line* that Respondent discriminated against Littau, Gavin, Fields, and Williams. They were all engaged in union activity known to Respondent or complained to Respondent about the new scheduling without seniority. Respondent made it clear that getting scheduled required behaving themselves when it came to union matters and not complaining about Respondent's unlawful procedures in scheduling. Respondent's inability to proffer any rational basis for failing to schedule these most senior employees establishes that its true motivation was to punish those who supported the Union. In *Amber Foods Inc.*, 338 NLRB 712, 716 (2002) the Board held that where the employer failed to introduce any evidence to rebut General Counsel's prima facie case, a violation must be found. In reducing the shifts of Littau, Gavin, Fields, and Williams Respondent violated Section 8(a)(3) of the Act.

h. The July 2010 decrease in hours for restaurant employees Gina Tubman and Kyoko Akers

Before July 2, 2010 Respondent scheduled employees in its Jade Restaurant pursuant to the seniority provisions of the expired collective-bargaining agreement. It is un rebutted that before July 2010, Respondent used seniority to determine which shifts, hours, and days off employees selected. For example, if the restaurant manager needed to send a server home early, the senior person was asked if they wanted to go home. Ultimately the least senior server was sent home early if the more senior servers wished to work.

Gina Tubman

Gina Tubman has worked as a server for Respondent in the Jade Restaurant for more than 15 years. She is the most senior of all restaurant servers. Tubman was a member of the union negotiating committee since 2009, participated in and spoke at union events, and was found illegally discharged in *Remington I* for distributing boycott flyers. She gave testimony<sup>113</sup> about her discharge at the *Remington I* hearing, while General Manager Artiles was present.

Prior to her February 2010 discharge, Tubman worked from 5:30 a.m. to 1:30 p.m., Wednesday through Sunday. As the most senior restaurant server, Tubman generally worked 40 hours per week, and her average number of hours per week did not change at all depending on the season.

Tubman was reinstated by Respondent on July 3, 2010. It is un rebutted that in the last week of July 2010, Respondent began sending Tubman home early. On July 28, 2010, Tubman began her shift from 5:30 a.m. to 1:30 p.m. together with two or three servers. At about 10 a.m., Restaurant Supervisor Sam told Tubman that Rydin said she had to go home. Tubman went into the kitchen and asked Rydin why he was sending her home since she was most senior. Rydin said that she had already made her money and that there was no seniority any longer.

<sup>113</sup> GC Exh. 90.

On July 29 and 30, 2010, Respondent sent Tubman home at around 8 a.m. Respondent sent Tubman home early even though two to three servers were scheduled each day and Tubman was most senior.

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In the first week of August 2010, Respondent continued to send Tubman home before the end of her shift, usually when the third server of the morning came in to work. For the rest of August 2010, Respondent sent Tubman home early every other day despite the fact that Respondent had scheduled two or three less senior servers per day. Payroll records reflect that Tubman hours dropped to 50 hours for the 2-week pay period in the first part of August and rose to 61.25 hours for the second pay period in August.<sup>114</sup>

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It is un rebutted that in August 2010, Jade Restaurant Manager Fernando Durante told bellman Troy Prichacharn that Rydin told him to get rid of Tubman all the time, and that, if it was not busy, to send Tubman home. Durante said that Rydin told him that Tubman “is trouble” and “if there’s no need, send her home.”<sup>115</sup> In a conversation shortly thereafter, Durante told Prichacharn that Rydin does not like Tubman and always wants to get rid of her.

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Respondent continued to send Tubman home between 9 a.m. and 11 a.m., every other day from August through part of December 2010. If a third server came in, then Respondent sent Tubman home early for the day. As a result, in October, November, and December 2010, Tubman worked only 58.75 to 70.25 hours per 2-week pay period.<sup>116</sup> Tubman had previously averaged around 40 hours per week.

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While in December 2010, Tubman began receiving more hours, she continued to be sent home early, at about 11 a.m. or 12 p.m., about once per week, if a third server came in that day. While Tubman was on vacation during the month of April 2011, the schedule<sup>117</sup> no longer listed employees by seniority. Tubman’s name went from first to fourth on the schedule for morning restaurant servers.

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In May 2011, Mathers and Rydin made the restaurant schedule. In May and early June 2011, Mathers told Tubman to go home early whenever a third server came in to work, about every other day. Tubman told Mathers that if she was going to continue to send her home early, Tubman wanted to work only 2 days per week so that she could get another job that provided health care. Mathers scheduled Tubman only 2 days per week until March 2012, after the 10(j) order issued and Tubman’s number of days worked increased.<sup>118</sup>

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<sup>114</sup> GC Exhs. 136(p), p. 19 and 136(q), p. 18.

<sup>115</sup> Tr. 1598, LL 3–5.

<sup>116</sup> GC Exhs. 136(t), p. 19; 136(u), p. 20; 136(v), p. 20; 136(w), p. 20; 136(x), p. 22 and 136(y), p. 19.

<sup>117</sup> GC Exh. 86, p. 25

<sup>118</sup> GC Exh. 87.

Kyoko Akers

Jade Restaurant server Kyoko Akers has worked for Respondent and its predecessors for 14 years and was second in seniority in July 2010, among Jade restaurant servers. Akers attended union rallies in 2010, and has worn a union button at work. Before July 2010, Akers worked morning shifts Saturday through Wednesday for approximately 35 to 40 hours per week.

On or about July 25, 2010, after starting her shift at 5:30 a.m., restaurant manager Sam Rydin was sending her home at 8:30 a.m., even though three less senior servers were still working. Akers spoke to Rydin about why she was being sent home since she had seniority. Rydin told her that the hotel was nonunion and there was no seniority. Akers then spoke with Fullenkamp and said Rydin told her the hotel was nonunion and there was no seniority. Fullenkamp confirmed that the hotel was not union, and there was no more seniority. Again on July 26, 2010, at about 9 a.m., Respondent sent Akers home early while three less senior servers remained at work. Payroll records reflect a drop in Akers' hours. Akers worked 78 hours for the 2-week pay period ending July 16, 70 hours for the pay period ending July 30, and 56.25 hours for the pay period ending August 13, 2010.<sup>119</sup>

For the weeks of October 30 to November 7, 2010, Respondent posted a restaurant schedule<sup>120</sup> that had Akers working 4 days while less senior servers Alvin Daubs and Jocelyn Morales, who had signed the decertification petition,<sup>121</sup> each worked 5 days. Akers asked Mathers why she had fewer days than less senior servers Alvin and Jocelyn. Mathers told Akers that Rydin told her that Alvin and Jocelyn had "first priority."

In 2011, Respondent continued to schedule Akers for less than 5 days per week<sup>122</sup> although her availability remained unchanged at 5 days per week. Respondent also scheduled Akers to work from 5:30 to 11:30 a.m.<sup>123</sup> rather than her usual 5:30 a.m. to 1:30 p.m. shift she worked before July 2, 2010.

### Analysis

Complaint paragraph 26(b) alleges that beginning in about July 2010, Respondent decreased the number of hours for those restaurant employees who supported the Union, including Gina Tubman and Kyoko Ayers.

General Counsel contends that Respondent violated the Act by altering the hours and shifts of top-seniority restaurant servers Tubman and Akers. Respondent again argues there is no evidence that seniority was discontinued in any department or that employees lost any money. Once again I find this position is simply not supported by the evidence as set forth in detail above.

Both Tubman and Akers were active union members, whose activities were well known to Respondent. Tubman was fired unlawfully in February 2010 for distributing boycott flyers.

<sup>119</sup> GC Exh. 136(n), p. 22; 136(o), p. 18; 136(p), p. 19.

<sup>120</sup> GC Exh. 85, p. 54.

<sup>121</sup> GC Exh. 97.

<sup>122</sup> GC Exh. 86, pp. 3–23.

<sup>123</sup> Ibid. at p. 45.

Rydin stated she was “trouble” and he wanted to get rid of her. Apparently the way to get rid of Tubman and Akers was to reduce their hours to the point they would quit. Respondent was nearly successful with Tubman as she told Mathers she had to find other work in order to get health insurance because Respondent had cut her hours so severely. Both Tubman and Akers complained about Respondent not following seniority and were told there was no seniority because there was no union. I find that General Counsel has established its burden under *Wright Line* that Respondent discriminated against Tubman and Akers given their union activity known to Respondent and the general animosity toward employees’ union activities which supplies the requisite motivation.

Since Respondent here has proffered no rational basis for its departure from the use of seniority and for reducing both Tubman and Aker’s hours, I find Respondent violated Section 8(a)(1) and (3) of the Act. *Amber Foods Inc.*, 338 NLRB 712, 716 (2002).

i. The August 2010 increase in shifts for banquet employees who signed the decertification petition

In the spring of 2010 a decertification petition was signed by Respondent’s employees at the hotel.<sup>124</sup> In the banquet department Supaporn Kennedy, Nestor Arguson, Flora Sanchez, Stella Hernandez, Carmelita Muse, and Katie Keim signed the petition<sup>125</sup> which was given to Respondent. Based upon this petition, Respondent withdrew recognition from the Union on July 2, 2010.

As of July 17, 2010, Sanchez, Hernandez, Kennedy, and Arguson ranked 11, 23, 25, and 28 in seniority among servers. On the same date bartender Katie Keim was fourth in seniority.<sup>126</sup> The next schedule for the week of July 24, 2010, had the names of the servers and bartender who signed the decertification petition on the top of their respective job categories.<sup>127</sup> As of July 24 the banquet server schedule listed Kennedy at the top of the list, Arguson second, Sanchez third, and Hernandez fifth. Keim moved to the head of the list for banquet bartenders.

Not only were these individuals listed higher on the banquet schedules than the union supporters but they were also scheduled for more hours than the employees who supported the Union.

Supaporn Kennedy

Supaporn Kennedy was 25th in seniority for banquet servers before she signed the decertification petition.<sup>128</sup> Based on her low seniority, Kennedy worked about one shift per week in February 2010, no shifts in March and April 2010, zero to two shifts per week in May 2010, and no shifts in June and July 2010.<sup>129</sup>

<sup>124</sup> GC Exh. 97.

<sup>125</sup> Compare GC Exh. 28, schedules, with the names on the decertification petition and the seniority rosters, GC Exh. 93, to identify the banquet employees who signed the decertification petition.

<sup>126</sup> GC Exh. 28, pp. 50–52.

<sup>127</sup> *Ibid.* at p. 53.

<sup>128</sup> *Ibid.* at p. 51.

<sup>129</sup> *Ibid.* pp. 1–51.

By July 24, 2010, Kennedy was at the top of the list of banquet servers.<sup>130</sup> From August 10 through October 17, 2010, Kennedy worked about three to five shifts per week.<sup>131</sup> Kennedy was off work from October 2010 until March 2011.

5 When Kennedy returned to work in April and May 2011, she was again scheduled for about three to five shifts per week.<sup>132</sup> During the slow month of June, Kennedy was still scheduled for about two to three shifts per week, when higher-seniority servers did not work.<sup>133</sup>

Flora Sanchez

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Banquet server Flora Sanchez was 11th in seniority for banquet servers just before July 2, 2010.<sup>134</sup> Commensurate with her seniority, she worked about three banquet shifts per week from February to May 2010.<sup>135</sup> For June and the first part of July 2010, Sanchez worked only one shift.<sup>136</sup>

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However, after the decertification petition was received by Respondent and after withdrawal of recognition on July 24, 2010, Sanchez was moved to third in seniority and began receiving more shifts.<sup>137</sup> During August 2010, during the banquet slow season, Sanchez received about one shift per week.<sup>138</sup> From September through the end of December 2010, Sanchez received about five shifts per week.<sup>139</sup> At the same time Littau, who had been sixth in seniority, did not work.<sup>140</sup>

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From January through March 2011, Sanchez worked three to five shifts per week in the banquet department and additional shifts in the Jade Restaurant.<sup>141</sup> In April through June 2011, Sanchez received about one to two banquet shifts per week and more shifts in the Jade Restaurant.<sup>142</sup> In July and August 2011, during the slow season, Sanchez was scheduled for one shift per week as a server and had more shifts in the Jade Restaurant.<sup>143</sup>

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Stella Hernandez

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Banquet server Stella Hernandez was 23rd in seniority prior to signing the decertification petition.<sup>144</sup> Based on her low seniority, she worked 2 weeks in mid-February 2010, and received one shift per week.<sup>145</sup> Likewise from late February through April 2010, Hernandez did not

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<sup>130</sup> Ibid. at p. 53.

<sup>131</sup> Ibid. at pp. 57–75.

<sup>132</sup> GCEXh. 73.

<sup>133</sup> Ibid.

<sup>134</sup> GC Exh. 28, p. 50.

<sup>135</sup> Ibid. at pp. 1–35.

<sup>136</sup> Ibid. at pp. 36–49.

<sup>137</sup> Ibid. at p. 53.

<sup>138</sup> Ibid. pp. 55–61.

<sup>139</sup> Ibid. at pp. 65–92.

<sup>140</sup> Ibid. at pp. 67–92.

<sup>141</sup> GC Exh. 73, pp. 1–26.

<sup>142</sup> Ibid. at pp. 27–52.

<sup>143</sup> Ibid. at pp. 51–68.

<sup>144</sup> GC Exh. 28 at pp. 50–52.

<sup>145</sup> Ibid. at pp. 1–4.

receive any shifts.<sup>146</sup> In May 2010, Hernandez worked two to three shifts per week for most of May 2010, but in June and July she did not work.<sup>147</sup>

5 By July 24, 2010, Hernandez was fifth in seniority.<sup>148</sup> From September to December 2010, Hernandez was scheduled for about three to five shifts per week.<sup>149</sup> Throughout 2011 Hernandez received more shifts than her prounion counterparts.<sup>150</sup>

Nestor Arguson

10 Nestor Arguson was least senior among banquet servers before he signed the decertification petition.<sup>151</sup> While Arguson's name was on the banquet schedule the week of February 21, 2010, Respondent scheduled him only once as a banquet server until after July 2, 2010.<sup>152</sup>

15 By July 24, 2010, Arguson jumped to second in seniority on the banquet server schedule.<sup>153</sup> For example, the week of July 24, 2010, Arguson worked two banquet shifts, on July 27 he was one of two servers working, on July 29 he was the only banquet server scheduled to work.<sup>154</sup> Arguson also worked shifts on August 14 and August 21, 2010, ahead of more senior servers.<sup>155</sup>

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Katie Keim

25 Katie Keim was least senior among four bartenders at the time she signed the decertification petition.<sup>156</sup> In line with this seniority, Keim worked no shifts in February 2010, one shift in March 2010, two shifts in April 2010, and no shifts in May, June, and the first part of July 2010.<sup>157</sup>

30 As of July 24, 2010, Keim became the most senior banquet bartender.<sup>158</sup> From this point on through May 2011, Keim received more shifts than union supporter Williams.<sup>159</sup>

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<sup>146</sup> Ibid. at pp. 6–26.

<sup>147</sup> Ibid. at pp. 27–52.

<sup>148</sup> Ibid. at p. 53.

<sup>149</sup> Ibid. at pp. 63–92.

<sup>150</sup> GC Exh. 73.

<sup>151</sup> GC Exh. 28, pp. 50–52.

<sup>152</sup> Ibid. at pp. 6–52.

<sup>153</sup> Ibid. at p. 53.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid. at pp. 57–60.

<sup>156</sup> Ibid. at p. 53.

<sup>157</sup> Ibid. at pp. 1–52.

<sup>158</sup> Ibid. at p. 54.

<sup>159</sup> GC Exh. 28, pages 55–92 and exh. 73, pp. 1–44.

## Analysis

Complaint paragraph 27 alleges that beginning in about August 2010, Respondent increased the number of scheduled shifts to those banquet employees who signed a petition to decertify the Union.

This allegation is an unusual twist on the *Wright Line*<sup>160</sup> test for finding unlawful employer discrimination in terms and condition of employment in order to discourage union activity. Here the alleged employer motivation is not the discouragement of union activity but the encouragement of antiunion activity. Nevertheless, the test remains the same. Under *Wright Line*, the General Counsel's burden in all cases turning on employer motivation is to establish by a preponderance of the credible evidence that an unlawfully discriminatory consideration, usually, the employer's hostility to a union or to union activities, was a motivating factor in the action of the employer challenged by the complaint. If such a showing is made, the burden of proof shifts to Respondent to show that it would have taken the same actions without regard to its unlawful motivation. *Miramar Hotel Corp.*, 336 NLRB 1203, 1211 (2001); *General Clay Products Corp.*, 306 NLRB 1046, 1052–1053 (1992).

The only difference between this case and a conventional *Wright Line* case is that here, the acts of discrimination said to have been motivated by the Respondent's wish to rid itself of an unwanted union presence were not acts of discrimination against pronoun workers, but acts for the benefit of antiunion workers who signed a decertification petition.

General Counsel's threshold burden is to establish by a preponderance of the credible evidence that the antiunion activities of the four employees named in the complaint were motivating factors in the Respondent's decisions to give the increased shifts to those particular employees. An unlawful employer motive may be inferred where the employer's stated reasons for the action in question are themselves seen by the trier of fact as false or highly dubious in the light of reliable surrounding evidence. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The evidence establishes that Respondent had knowledge that the four employees were against the union since their signatures were affixed to the decertification petition that was given to Respondent before these employees began receiving increased shifts in July 2010. That their antiunion sympathies were a motivating factor in Respondent's decision to give these benefits is established by the importance Respondent placed upon the decertification petition as a means to rid itself of its bargaining obligations with the Union. In this regard Respondent encouraged and had several supervisors assist in the distribution of the petition and in soliciting signatures on the petition. The significance of the petition to Respondent was demonstrated by Chief Engineer Emmesly Senior when he told Wray that if Wray signed the petition, his discipline would go away. Further, Respondent offered no cogent reason why it would give its least senior servers more shifts than its more experienced wait staff, leading to the inference that rewarding the loyalty of antiunion employees motivated Respondent's action. I find that in giving the four employees discussed above more shifts than they had been receiving prior to July 2010, violated Section 8(a)(3) of the Act.

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<sup>160</sup> 251 NLRB 1083 (1980).

### 3. The 8(a)(5) allegations

#### a. The April 24, 2010 ban of Union Representative Esparza from the hotel

Article VIII, section 1, of the parties' expired collective-bargaining agreement provides:

5 A Business Representative or other authorized representative of the Union shall be permitted to visit the premises of the Employer at any reasonable time during working hours and such visits shall not interfere with work or service to or to cause  
10 embarrassment to guest or customers. Union representatives will exercise reasonable efforts to provide the Human Resources Office with as much advance notice as is feasible when they plan to visit. Business Representatives and other authorized representatives of the Union shall conduct employee interviews in non-working areas (i.e., employee cafeteria) and all such interviews shall be conducted during the Employee's non-working time.<sup>161</sup>

15 Before July 2010, it was the parties' practice for the Union to call either Fullenkamp or Artiles and let them know they were coming to speak with bargaining unit members. The union officials who went to the hotel to visit including, business agent Esparza and President Jones, would call in advance and speak to Fullenkamp or Artiles or leave a message before they arrived.  
20 The union officials generally met with employees in the basement employee cafeteria.

Daniel Esparza was the Union's business agent for about 4 years. He was the only union official who was fluent in the Spanish language, a language spoken by a significant number of bargaining unit employees.

25 On February 22, 2010, the Union received a letter<sup>162</sup> from Artiles complaining that Jones had failed to notify Artiles prior to a visit to the hotel and that Esparza had screamed at employees in the employee cafeteria on February 9, 2010. In the letter Artiles limited union visitation to twice a day for 1 hour per visit and demanded that he be personally contacted before  
30 the Union came to the hotel. In addition, Artiles threatened:

If union representatives cannot conduct themselves in a professional manner and treat our associates with dignity and respect, they will be asked to leave the property immediately.

35 Jones showed Artiles' letter to Esparza who denied that he had yelled at any bargaining unit members. About a week later Jones met with Artiles at the hotel and told him that Esparza denied the accusations contained in his letter. Artiles replied that, "this is what happens in war, when you have a war."<sup>163</sup> Jones asked Artiles to meet with Esparza and Artiles agreed.

40 About April 15, 2010, Esparza went to Artiles' office and spoke with him about the employees' accusations and gave his side of the story. After Esparza was finished with his

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<sup>161</sup> GC Exh. 2, p. 9.

<sup>162</sup> GC Exh. 110.

<sup>163</sup> Tr. 2087, LL 20–21.

explanation, Artiles said, “Okay, then you’ll—it might be true what you said to me, okay, but I got a job to do and I’ve been ordered to keep you out, so I got to do what I need to do.”<sup>164</sup>

5 Artiles thanked Esparza for not using Sheraton employees in a March 2010 union rally, because if the Union had used Respondent’s bargaining unit employees, “I will fire them right on the spot because it’s against company policy he would have had to fire them right on the spot because it’s against company policy.”<sup>165</sup>

10 On April 21, 2010, Artiles sent another letter<sup>166</sup> to Jones that made further accusations that Esparza had threatened bargaining unit employees and banned Esparza from the hotel property. Prior to this edict, there was no bargaining with the Union about Esparza’s access to the hotel. Respondent failed to call Esparza’s accuser Delores Cuellar. While the other accuser Margarito Lucero was called as a witness by Respondent, she provided no testimony concerning Esparza’s conduct toward her. Moreover, Artiles was never called as a witness. I credit  
15 Esparza’s testimony here as I did earlier. His testimony was detailed, consistent and he made no efforts to embellish.

### Analysis

20 Complaint paragraph 28(a) alleges that on April 21, 2010, Respondent banned Union Representative Daniel Esparza from the hotel.

25 It is well established that the union access provisions of a collective-bargaining agreement survive its expiration. Further the practice of an employer in allowing union agents access to its premises to meet with employees becomes a term and condition of employment that may not be unilaterally changed. *Great Western Coca-Cola Bottling Co.*, 265 NLRB 766, 778 (1982); *Oaktree Capital Management, LLC*, 355 NLRB 1272, 1272 (2010).

30 The parties’ expired collective-bargaining agreement granted union access to the hotel and the parties had established a practice allowing union representatives to visit the cafeteria during employee breaks. No bargaining over the denial of access by Esparza ever took place before Artiles unilaterally decided to bar his presence. Moreover, it is clear from Artiles’ un rebutted statement to Jones that, “this is what happens in war,” shows that his complaints regarding Esparza were false. This was later confirmed in Artiles’ statement to Esparza after  
35 Esparza was denied access to employees, “Okay, then you’ll—it might be true what you said to me, okay, but I got a job to do and I’ve been ordered to keep you out, so I got to do what I need to do.”

40 Respondent violated Section 8(a)(1) and (5) when it unilaterally barred Union Representative Daniel Esparza from the hotel on April 21, 2010, without giving the Union an opportunity to bargain about the issue.

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<sup>164</sup> Id. at p. 99, LL 8–10.

<sup>165</sup> Id. at p. 99, LL 21–22.

<sup>166</sup> GCEXh. 111.

b. The July 2, 2010, ban of the Union from the hotel

On July 2, 2010, Respondent’s attorney Arch Stokes sent the Union a letter<sup>167</sup> immediately withdrawing recognition from the Union as the exclusive bargaining representative of unit employees because a decertification petition had been filed.

On about July 2, 2010, Jones, and Union Representative Lawson visited with bargaining unit employees in the employees’ cafeteria at the hotel. After about 30 minutes Artiles, Canas, and Rydin approached Jones. Artiles spoke to Jones in the hallway outside the cafeteria and asked Jones if he had received the letter. When Jones said no, Artiles told him the Union was not allowed on the property. Jones then said he recalled the letter and said he was not taking it seriously since the NLRB was deciding if the Union had lost majority status. Artiles said that it was Respondent’s position that it was not a union house. When Jones asked Artiles if he was asking him to leave the hotel, Artiles replied, yes.

On July 3, 2010, Artiles sent the Union a letter<sup>168</sup> stating that the Union no longer represented a majority of Respondent’s employees and that “Accordingly, neither you nor any other representative of local 878 may attempt to enter the hotel’s property for any purposes related to the representative capacity you no longer possess.

This decision was made without notice to or bargaining with the Union.

#### Analysis

Complaint paragraph 28(b) alleges that on July 2, 2010, Respondent banned the Union and its representatives from the hotel.

Respondent’s defense to this unilateral change is that its withdrawal of recognition of the Union, based upon the decertification petition, relieved it of its obligation to bargain with the Union about this change. However, since Judge Meyerson in *Remington I* found that Respondent’s withdrawal of recognition was unlawful, Respondent’s defense cannot stand. *Great Western Coca-Cola Bottling Co.*, 265 NLRB 766, 778 (1982). I find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally barring union representatives from the hotel on July 2, 2010.

c. The July 2010 elimination of banquet employees’ scheduling preference sheets

After withdrawing recognition from the Union on July 2, 2010, the record is clear that Respondent no longer used preference sheets<sup>169</sup> or, as discussed above, seniority, in scheduling banquet department bargaining unit employees. This decision was made without notice to or bargaining with the Union. Jones testified that the use of preference sheets was negotiated between the parties and was the subject of a side letter.

<sup>167</sup> GC Exh. 108.

<sup>168</sup> GC Exh. 109.

<sup>169</sup> GC Exh. 81, sometimes referred to as an availability sheet.

Preference sheets were filled out by banquet employees to indicate the days and hours they were available to work. Based on need, availability, and seniority employees were assigned days and shifts. Days off were also requested on the preference sheet. Since days off did not involve vacation pay, no other form was required and Respondent generally granted the time off.

5

The decision to cease using preference sheets was confirmed in a July 25, 2010 memorandum<sup>170</sup> from Rydin which stated: “There are to be no more schedule changes, trades etc with out (sic) my approval. Please submit any changes in writing to me.” A September 6, 2010 memorandum<sup>171</sup> from Artiles to banquet employees regarding banquet schedules stated that:

10

Associates will be scheduled according to the business we have and the overall hours the associate is available to work. Flexibility in scheduling your work hours is a normal requirement for our hotel and the industry.

15

These memoranda were a departure from use of seniority and employees preference sheets in creating the schedule, and eliminated employees’ ability to give away shifts according to seniority and availability.

In addition to the memos, Respondent’s change in use of seniority and preference sheets in scheduling unit employees was confirmed by Banquet Manager Mathers, who told banquet employees that Respondent no longer used seniority or accepted preference sheets when scheduling banquet employees. Banquet employees Mary Jo Audette, Fay Gavin, Joanna Littau, and Vicky Williams all testified that in the summer and fall of 2010, Mathers told them that Respondent no longer accepted or followed preference sheets. In place of seniority, Mathers said Respondent had substituted availability, attitude, and appearance.

25

These changes are further confirmed by the banquet employees’ schedules for the week of July 24, 2010.<sup>172</sup> The schedule now listed the banquet employees in nonseniority, nonalphabetical order, removed the a.m. and p.m. indications of availability in the row next to each banquet employee’s name and removed employee telephone numbers that had allowed banquet staff to trade shifts. This reflects that Respondent began scheduling banquets without regard to seniority or availability. The effect of these changes is discussed above, reflecting that less senior servers were scheduled ahead or formerly high and mid seniority servers.

30

After the February 2012 United States District Court 10(j) injunction, Respondent again recognized seniority and scheduled banquet employees according to seniority and availability.<sup>173</sup>

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#### Analysis

Complaint paragraph 28(c) alleges that on about July 2010, Respondent eliminated banquet employees’ preference sheets.

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The Board has found work schedule posting requirements and bidding procedures are terms of employment that constitute mandatory subjects of bargaining. *Beverly Health and*

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<sup>170</sup> GC Exh. 79.

<sup>171</sup> GC Exh. 70.

<sup>172</sup> GC Exh. 28, pp. 53–54.

<sup>173</sup> GC Exh. 74.

*Rehabilitation Services, Inc.*, 335 NLRB 635, 636 (2001); *Benteler Industries, Inc.*, 323 NLRB 712, 715 (1997). Respondent scheduled banquet employees for many years through the use of preference sheets together with seniority. By terminating its past practice of scheduling according to preference sheets without notice to or bargaining with the Union, Respondent  
5 violated Section 8(a)(1) and (5) of the Act.

d. The July 2010 cessation of posting banquet employees' schedules by noon on Friday

Article XIX, section 5 of the expired collective-bargaining agreement provides that except for the housekeeping department, the “[s]chedule will be posted weekly by 12 noon on  
10 Fridays.”<sup>174</sup> Shortly after July 2, 2010, Respondent stopped posting the banquet schedule by early Friday afternoon for 3 to 4 weeks. Respondent did so without notifying or offering to bargain with the Union.

Complaint paragraph 28(d) alleges that in July 2010, Respondent terminated its practice  
15 of posting banquet employee schedules by noon on Fridays.

As noted above, posting work schedules is a mandatory subject of bargaining. *Beverly Health and Rehabilitation Services, Inc.*, supra. Failure to post for a 3 to 4-week period was a material change and appears to be a part of Respondent’s pattern of repudiating the terms and  
20 conditions of employment embodied in the expired collective-bargaining agreement absent impasse. I find the failure to post the work schedules violated Section 8(a)(1) and (5) of the Act.

e. In July 2010 Respondent ceased assigning work and scheduling by seniority

Article XIV of the expired collective-bargaining agreement<sup>175</sup> deals with seniority.  
25 Section 1 provides in part, “seniority shall be the controlling consideration in determining shift changes, shift assignment, days off, layoffs, recalls from layoffs, hours of work, and vacation scheduling.” Section 2 provides that, seniority shall be by departments and job classifications within the departments.

30 The record reflects that before July 2010, Respondent scheduled banquet servers, banquet captains, banquet bartenders, banquet set up, engineers, room attendants, housekeeping supervisors, porters, kitchen, and restaurant servers according to seniority.

35 After July 2, 2010, Respondent no longer followed seniority in, among things, shift assignments or hours of work. After withdrawing recognition from the Union in July 2010, Human Resources Director Fullenkamp, Executive Chef for the Kitchen Rydin, Banquet Manager Mathers, and Chief Engineer Emmsley Senior, Front Desk Manager Jeff Brown, and Housekeeping Director Hanna all said that Respondent no longer followed seniority.

40 It is un rebutted that after July 2010, Fullenkamp told restaurant server Kyoko Akers, banquet server Fay Gavin, housekeeping porter Audelia Hernandez, and housekeeper Maria Hernandez, there was no more seniority.

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<sup>174</sup> GC Exh. 2, p. 20.

<sup>175</sup> Id. at p. 14.

It is also undisputed that in July and August 2010, Rydin told the restaurant employees he scheduled that, as the hotel was no longer Union, he could schedule as he wished. It is un rebutted that Mathers told several banquet employees that Respondent was scheduling banquet employees based on attitude, availability, and appearance, and that she could schedule how she  
 5 wanted. Engineer Dexter Wray credibly testified that Emmsley Senior in response to his question as to why Emmsley Senior was cutting his hours if he was highest in seniority, responded that it did not matter now, that there was no more Union so he could do what he wanted to do. In July or August 2010, Front Desk Manager/Acting Housekeeping Manager Jeff Brown, housekeeping manager Yolanda Hanna, and Fullenkamp, all told housekeeping  
 10 employees there was no more seniority.

Banquet set up employees were scheduled according to seniority until August 2011.<sup>176</sup> However, as of the schedule for the week of August 6, 2011, Respondent no longer listed names on the set up schedule in seniority order, but rather alphabetically.<sup>177</sup> In October 2011,  
 15 Respondent completely restructured the banquet set up department without regard to seniority.

Respondent returned to scheduling according to seniority after the 10(j) injunction ordered it to do so.

#### Analysis

20 Complaint paragraph 28(e) alleges that in about July 2010 Respondent ceased assigning work and scheduling employees according to seniority.

It is well established Board law that the seniority provisions of an expired contract survive and must be followed absent impasse. *L & L Wine & Liquor Corporation*, 323 NLRB  
 25 848, 853 (1997).

By abandoning the use of seniority in assigning work throughout the hotel, as required in the expired collective-bargaining agreement, from July 2010 until at least February 2012, Respondent violated Section 8(a)(1) and (5) of the Act.

30 f. In July 2010 Respondent assigned engineering unit work to nonunit employees

The engineering department is responsible for performing building maintenance that includes checking the building water pumps, meters, and mechanical room, answering  
 35 maintenance calls, and doing preventative maintenance.

Before July 2010, Respondent scheduled its engineers according to seniority. Seniority also guided employees' preference for days off, hours, and overtime. When hours were cut, the lowest person in seniority was cut first.

40 In July 2010, Dexter Wray was most senior in the engineering department. Wray averaged 40 hours work plus overtime during the summer high season and 40 hours per week during the winter slow season.

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<sup>176</sup> GC Exh. 101.

<sup>177</sup> GC Exh. 102.

In early July 2010, Emmsley Senior announced to the engineers that he was going to cut back everyone's hours. Wray asked why Emmsley Senior was cutting his hours, as he had highest seniority. Emmsley Senior replied that it did not matter now, that there was no more Union so he could do what he wanted to do. Emmsley Senior explained that he was reducing hours so that he did not have to lay anybody off, which, was contrary to how the seniority system had worked in the past.

While Wray testified that Emmsley Senior reduced engineers' hours to 32 hours per week, his timecards<sup>178</sup> reflect that Wray's hours were cut by only a few hours in July and August 2010, and he then resumed his normal hours.

After 1 p.m., when 'Wray was off duty, there were no other bargaining unit engineering employees in the hotel until 3 p.m. Wray assumed that Emmsely Senior performed any necessary calls between 1 p.m. and 3 p.m. because Emmsely said he had used Wray's tools. Wray never actually saw Emmsely perform bargaining unit work. While Emmsley Senior told Wray that he was tired because he was doing the engineering job and security, this is not enough to establish he performed bargaining unit work rather than his supervisory duties in engineering and security.

#### Analysis

Complaint paragraph 28(f) alleges that in about July 2010, Respondent assigned engineering bargaining unit work to nonunit employees.

While it is well established that the performance of unit work by supervisors is a mandatory subject of collective bargaining, I am unable to find that there is sufficient evidence that Emmsley Senior performed bargaining unit work. Wray never saw Emmsley perform bargaining unit work and he is speculating based upon Emmsley's use of Wray's tools that bargaining unit work was performed. No explanation was given for what Emmsley may have used the tools for. I will recommend that this allegation be dismissed.

#### g. The July 2010 change in sick leave policy

Article XXVI of the expired collective-bargaining agreement<sup>179</sup> covers the subject of sick leave. Section 1 provides that "sick pay will be available to Employees from the first through the sixth day of any absence caused by sickness or accident where the sickness or accident causes the Employee to be absent three or more consecutive shifts." Section 5 of the sick leave article provides that if the employer has reason to believe an employee is abusing sick leave, it may request the employee provide written certification of the reason for the sick absence by a physician.

It is undisputed that after withdrawing recognition from the Union on July 2, 2010, until February 2012, Respondent began following its own employee handbook<sup>180</sup> with respect to sick leave policy rather than the collective-bargaining agreement. In early July 2010, Respondent

<sup>178</sup> R. Exh. 42.

<sup>179</sup> GC Exh. 2, p. 27.

<sup>180</sup> GC Exh. 89.

posted<sup>181</sup> an excerpt of its policy on absenteeism and tardiness from the Remington employee handbook.

Section V of the handbook deals with absences and tardiness and states that, “Three (3) or more absences in a six (6) month period, either excused or unexcused, may result in disciplinary action or possible termination.” This provision of the handbook also requires a physician’s written release prior to returning to work, where an employee is absent for three or more consecutive days.<sup>182</sup> Under the heading Sick Pay, Respondent’s employee handbook provides that:

No sick pay will be paid for the first day of an illness; sick pay will begin on the second day of the illness.

Associates must notify their supervisor of their illness on the first day out ill, and each day thereafter that the associate remains ill. If the associate fails to report his illness, sick pay will not be paid for days the associate does not report.<sup>183</sup>

On or about October 18, 2010, Respondent issued housekeeper Elda Buezo a formal notice of counseling<sup>184</sup> that states:

Company policy indicates that 3 or more absences in a 6 month period may result in disciplinary action or possible termination. Elda has missed 3 days of work within a 2 month period as shown below:

September 14, 2010 Called in sick.  
September 17, 2010 Called in sick.  
October 14, 2010 Called in sick.

During the disciplinary meeting, Fullenkamp told Buezo that her absences constituted a violation of the policy in the Remington employee handbook.

In February 2011, Housekeeping Manager Hanna told porter Audelia Hernandez that Respondent required a doctor’s note for her to be out sick for 1 day of work. Hernandez went to the doctor, who gave her a note for 3 days’ rest. Hernandez did not receive sick leave pay for her absences due to illness. At no time did Respondent give notice to or bargain with the Union about this change.

#### Analysis

Complaint paragraph 28(g) alleges that in July 2010, Respondent changed its sick leave policy.

It is well established that sick leave policies are mandatory subjects of bargaining. *Pratt Industries, Inc.*, 358 NLRB No. 52, slip op. at 1, 8–9 (2012). Changes to sick leave reporting

<sup>181</sup> GC Exh. 88.

<sup>182</sup> *Ibid.* at p. 18.

<sup>183</sup> *Ibid.* at p. 6.

<sup>184</sup> GC Exh. 46.

requirements have a material impact on terms and conditions of employment. Further where the new requirements provide for disciplinary consequences the changes are a material change in terms and conditions of employment. *Pratt Industries, Inc.*, supra at 9.

5 Here Respondent unilaterally changed the extant sick leave policy embodied in the collective-bargaining agreement when it enforced the provisions of its employee handbook policies. Respondent announced and implemented the new rule that employees could receive discipline for three absences within a 6-month period, even if the employee was legitimately absent due to illness, as demonstrated by Fullenkamp’s statement to Buezo during her  
10 disciplinary meeting. Further, as demonstrated with Buezo, Respondent actually imposed discipline for illness-related absences based on this new rule.

By applying the sick leave and absence and tardiness provisions of its employee handbook rather than the collective-bargaining agreement, sick leave provisions without notice to or  
15 bargaining with the Union Respondent violated Section 8(a)(1) and (5) of the Act.

h. In July 2010 Respondent ceased payments to the UNITE-HERE! National Retirement Fund

20 Article XXXIV<sup>185</sup> of the expired collective-bargaining agreement provided that Respondent was to make pension fund contributions for bargaining unit employees to the Alaska Hotel and Restaurant Employees Pension Trust. Since about 2009, the pension contributions were made to the UNITE-HERE! National Retirement Fund. It is undisputed that on October 12, 2010, Respondent’s counsel sent a letter<sup>186</sup> to the Union’s pension trust fund stating that as a result of a decertification petition having been submitted to Respondent by a majority of  
25 employees at the hotel, Respondent had withdrawn recognition from the Union and was no longer making payments into the pension trust.

It is undisputed that, from at least August 2010, Respondent failed to make payments into the Union’s pension fund.<sup>187</sup> There is no dispute that Respondent never gave notice to or  
30 bargained with the Union before making this change. While Respondent reached a financial settlement<sup>188</sup> with the Pension Fund Trust, it did not reach any settlement with the Union regarding this unilateral change.

Respondent contends that Respondent through its settlement with the Pension Trust is  
35 current on pension contributions and there was no animus involved in the failure to make the pension trust payments. Motivation is irrelevant, but as General Counsel concedes that the pension trust payments are current, it does not seek a monetary remedy only a notice positing.

40 Since it has been found in *Remington I* that Respondent’s withdrawal of recognition was unlawful, Respondent is not privileged to cease making pension contributions. Employee pensions are a mandatory subject of bargaining and any unilateral change in a pension plan without bargaining with the Union violates Section 8(a)(5) of the Act. *Columbia Portland*

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<sup>185</sup> GC Exh. 2, p. 38

<sup>186</sup> GC Exh. 112.

<sup>187</sup> GC Exhs. 113–116.

<sup>188</sup> R. Exh. 12.

*Cement Co.*, 303 NLRB 880, 884 (1991). Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally ceased making contributions to Respondent’s Pension Fund.

i. The October 2011 subcontracting of bargaining unit banquet server work

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Article IX, section 8 of the collective-bargaining agreement<sup>189</sup> provides that if Respondent decides to subcontract out bargaining unit work, it shall first notify and bargain with the Union about the proposed action.

10

Union President Jones testified that the parties’ understanding regarding subcontracting of banquet servers’ work was that as long as Respondent used all of its bargaining unit servers, it could then call for temporary banquet servers from a third party employer. Up until July 2, 2010, this understanding was followed and Respondent did not use temporary banquet servers from Adams & Associates or any other third-party company. Three of Respondent’s most senior banquet employees said that they had never seen temporaries working in Respondent’s banquet department, while another long-term employee recalled that she had seen temporaries working, at most, once per year, during Christmas time. Union President Jones testified that prior to 2010, the hotel used temporary banquet servers two to three times per year.

15

20

It is uncontested that from September 19, 2010, to July 24, 2011, Respondent regularly brought in temporaries from subcontractor Adams & Associates to work as servers in its banquet department.<sup>190</sup> This was done without notifying or bargaining with the Union.

25

At some functions during the 2010–2011 banquet season half or more of the staff were temporaries at times. The ratio of temporaries to Respondent’s servers per day or event varied greatly. The number of temporaries used in a particular event ranged from one to 19.

30

During the 2010–2011 banquet season, many of Respondent’s senior servers received very few shifts, despite being available to work, as discussed above. Further, the use of temporary servers greatly affected Respondent’s banquet servers because they lost money by not being scheduled. If Respondent’s servers were not working, they did not get their hours for pension and vacation time.

Analysis

35

Subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise. *Sociedad Espanola de Auxilio Mutuo y Beneficia de P.R.*, 342 NLRB 458, 458 (2004). Moreover, the expired collective-bargaining agreement provided that if Respondent decided to subcontract bargaining unit work, it would first notify and bargain with the Union. Respondent did neither.

40

Respondent contends that there can be no back pay liability since there is no evidence that a server was available to work and would have worked but for not being scheduled

<sup>189</sup> GC Exh. 2, pp. 11–12.

<sup>190</sup> GC Exh. 92(a)–(cc).

because an Adam's server took his or her place. Respondent further contends that there is no evidence that union animus may have motivated the denial of a shift. I need not reach this contention at this time since this issue should be reserved for compliance.

5 I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to comply with the terms of the expired collective-bargaining agreement dealing with subcontracting.

j. In October 2010 Respondent reduced banquet server pay by reallocating part of their gratuity to a third party provider

10 As reflected in article XX of the expired collective-bargaining agreement, Tips, Gratuities and Service Charges<sup>191</sup> As provided in the expired collective-bargaining agreement:

15 Gratuities will be allocated twenty percent (20%) to the employer and eighty percent (80%) to Employees, with a guarantee of a minimum of thirteen percent (13%).

20 Respondent has at all times material charged guest groups a 15 percent gratuity on their food and beverage sales. An event that results in a \$10,000 food and beverage bill will produce a gratuity of \$1500. The usual practice was that of the \$1500 gratuity, \$200 would be kept by Respondent and \$1300 would be distributed to the banquet employees.

25 Prior to Respondent's regular use of temporary banquet servers, Respondent divided the 13 percentage points among the banquet servers based on the hours worked that day.<sup>192</sup> During the term of the collective-bargaining agreement, this practice was followed. Respondent added together the total number of hours worked by banquet servers for the day, and then divided that total number of hours worked into the gratuity. Since it is a pooled gratuity, if there were multiple events in a day, the 13 percent gratuity of all the events was combined and then divided evenly by the total number of hours worked that day.

30 When Respondent began using the Adams & Associates temporary servers from September 2010 to July 2011, it paid Adams & Associates \$20 per hour for each temporary server provided.<sup>193</sup> Respondent admitted that this \$20 per hour came out of the 13 percent of the gratuity pool normally allocated for Respondent's bargaining unit banquet servers. After  
35 reducing the gratuity pool allocated for bargaining unit banquet servers by the amount paid to Adams & Associates, Respondent divided the remaining gratuity pool among Respondent's unit banquet servers.

40 The actual gratuity amount distributed to Respondent's bargaining unit servers on days when temporary servers worked varied based on the size of the event and hence the size of the gratuity as well as the number of Adams & Associates employees used. Respondent used a hypothetical example<sup>194</sup> of the new gratuity system where the customer was charged \$10,000 for food and beverage where five servers worked for a total of 40 hours. Three of Respondent's

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<sup>191</sup> GC Exh. 2, p. 12.

<sup>192</sup> Ibid.

<sup>193</sup> GC Exh. 92(a)-(cc).

<sup>194</sup> R. Exh. 32.

banquet servers worked 8 hours each at the event, for a total of 24 hours, and two Adams temps worked 8 hours each, for a total of 16 hours demonstrated. Under example 2 Respondent reduced the 13 percent gratuity to the bargaining unit servers by the amount paid to the Adams temps, i.e., \$20 per hour times 16 hours for a total of \$320. The bargaining unit gratuity pool was reduced from \$1300, 13 percent of \$10,000, to \$980. The \$980 was then divided among the three unit servers.

Respondent admitted that this constituted a change from the way it had previously distributed banquet gratuity. Respondent did not notify or offer to bargain with the Union before this change occurred.

### Analysis

Complaint paragraph 28(j) alleges that in about October 2010, Respondent reduced banquet server compensation by reallocating a portion of their gratuities to pay for the services of a third party provider of banquet servers.

The Board has found that the distribution of tips among employees is a mandatory subject of bargaining and a unilateral change in the manner of tip distribution is unlawful. *Stephenson Haus*, 279 NLRB 998, 1003 (1986); *Statler Hilton Hotel*, 191 NLRB 283, 284, 287 (1971).

In the instant case the collective bargaining agreement provided for a minimum tip distribution to employees of 13 percent. By reducing the gratuity pool by the amount owed to Adams & Associates for use of its temps, Respondent reduced the tip pool below the contractually agreed upon 13 percent without giving notice to or bargaining with the Union.

Respondent contends that this new method of distribution benefitted banquet employees scheduled to work. While the unlawful use of subcontracted temps may have increased the share of the tip pool to those unit employees left serving, as in Respondent's hypothetical, the law is clear that any unilateral change made without bargaining to impasse is unlawful even if it benefits employees. *Grosvenor Orlando Assoc., Ltd.*, 336 NLRB 613, 617 (2001). Moreover, as the Supreme Court held: “[t]he employer is prohibited from making unilateral changes in working conditions during negotiations—even though the terms of employment are thereby improved—lest the union be denigrated in the employees’ eyes and its existence, as an inevitable result, imperiled.” *General Transformer Co.*, 173 NLRB 360, 376 (1968) (citing *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949)).

I find that in changing the allocation of money to the tip pool, Respondent violated Section 8(a)(5) of the Act.

In October 2011, Respondent changed banquet set up and server job duties

In October 2011, Respondent changed banquet server and set up staffing and scheduling

As reflected in the banquet servers’ schedules before October 2011, Respondent’s banquet department consisted of about 25 banquet servers, a banquet manager, banquet captains,

banquet bartenders, and bartender backups.<sup>195</sup> Servers' duties included setting tablecloths, silverware, napkins, and dishes on tables. Servers also prepared butter, creamers, and roll baskets. Banquet servers served the food and cleared the dishes and plates. The banquet servers also cleared the glassware and china from the tables. Servers picked up trash from the tops of the tables, then removed linens.

The banquet setup schedules reflect that Respondent employed approximately 12 banquet set up employees in the banquet department before October 15, 2011.<sup>196</sup> Set up employees set up tables and chairs, moved partition walls, brought stages, dance floors, and flags, cleaned the room, vacuumed and laid out glasses, water, pens, and paper. After banquet events, set up broke down the tables, put the tables on carts, stacked chairs, vacuumed, removed garbage, cleaned the room, and set up the room for the next function.

Before October 2011, banquet set up shifts lasted 6 to 8 hours.<sup>197</sup> Morning shift was from about 6 a.m. to 2 p.m., and night shift was about 2 to 10 p.m. During high season more than one set up employee worked each shift but during summer slow season one employee worked the morning shift and two employees worked in the evening.

The collective-bargaining agreement seniority article provided at article XIV, section 9,<sup>198</sup> that:

Employees may be cross-utilized in job classifications within their department other than their regular job classification to perform available work in a temporary position.

In October 2011, Respondent restructured its banquet department as part of its linen-less table initiative, through which it acquired brushed aluminum tables. In October 2011, before any changes occurred, Respondent's food and beverage director, Dorrance Scott told set up employee Samuel Tiger that, although he had a hard time picking, Respondent would use Tiger as the nighttime setup guy and employee Adel as morning set up. At the time, Tiger and Adel were eighth and fourth in seniority, respectively.<sup>199</sup>

In about October 2011, at a meeting of set up employees, Scott said that Respondent had purchased new tables and was going to reduce the number of set up employees and combine server and set up job duties. Scott also said if set up employees were not available to work at 4 a.m., they had no work.

In the first week of October 2011, Respondent conducted a meeting of all banquet department employees together with General Manager Kranock, Scott, and Mathers. Kranock announced he was going to make several changes in the departments. He said he was going to have only one set up employee per shift. Kranock said Respondent was going to use different types of tables and that duties of servers and set up would be combined. Mathers said banquet employees would no longer be scheduled by seniority but on the basis of their attitude and availability.

<sup>195</sup> GC Exh. 73, p. 71.

<sup>196</sup> GC Exh. 102, p. 31.

<sup>197</sup> GC Exh. 102.

<sup>198</sup> GC Exh. 2, p. 16.

<sup>199</sup> GC Exh. 102, p. 27.

As announced, the October 15, 2011 banquet set up schedule<sup>200</sup> reflects there were only two set up employees, Tiger and Adel. Consistent with Respondent’s combination of server and set up duties, former set up employees Jun Sangalang, Efren Gardiola, Ener Pineda, Eric Pineda, and Quenton could now be found listed on the banquet server schedule for the week of November 5, 2011.<sup>201</sup>

As promised, in October 2011, banquet servers job duties changed. Respondent told the servers to open tables, push carts loaded with chairs and tables, set chairs around tables, break down meeting rooms, stack chairs, tape down register chords, vacuum and pick up garbage. All of these duties had been formerly performed by set up employees.

Respondent did not notify or offer to bargain with the Union before announcing or implementing any of the banquet changes. Only after the Section 10(j) injunction requiring Respondent to recognize and bargain with the Union, months after the changes occurred, did Respondent even discuss the purchase of the new tables with Union President Jones.

The changes to the banquet department, including the use of only two set up and the practice of assigning servers to set up work, are ongoing.

#### Analysis

Complaint paragraph 28(k) alleges that in about October 2011, Respondent changed banquet set up and banquet server job duties and paragraph 28(l) alleges that in October 2011, Respondent changed banquet server and set up staffing and scheduling.

Job descriptions have been found to be a mandatory subject of bargaining and a material change in job description without notice to the union or bargaining to impasse has been found to be a unilateral change. *ABB, Inc.*, 355 NLRB 13, 18. (2010). Further, employee job assignments is a mandatory subject of bargaining and a material change in job assignments without notice to or bargaining with the union is a unilateral change. *Flambeau Airmold Corp.*, 334 NLRB 165, 171–172 (2001). In addition, the Board has found an increase in job duties to constitute an unlawful unilateral change. *Bundy Corp.*, 292 NLRB 671, 678 (1989). As noted above, seniority provisions of an expired contract survive and must be followed absent impasse. *L & L Wine & Liquor Corporation*, 323 NLRB 848, 853 (1997). The Board has found scheduling of employees is a mandatory subject of bargaining. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 636 (2001); *Benteler Industries, Inc.*, 323 NLRB 712, 715 (1997).

General Counsel contends that Respondent unlawfully changed employees’ terms and conditions of employment by reducing the number of regularly scheduled banquet set up employees, choosing which banquet set up employees would continue working as set up employees without regard to seniority, changing the schedules and hours of the former set up employees in the new combined position of set up/server, and requiring banquet servers and former set up employees to perform a new set up/server job.

<sup>200</sup> GC Exh. 102, p. 32.

<sup>201</sup> GC Exh. 73, p. 73. Respondent did not produce the schedules for the weeks of September 19–November 4, 2011.

Respondents' changes substantially affected both the set up employees' and servers' jobs. For the two set up employees who remained, they had more work to perform and their hours were changed. Those set up employees who became banquet servers received fewer hours, had  
 5 changed job duties, and their pay rates were changed. Servers had the entire nature of work performed changed and they performed more manual labor involved. The changes to the working condition of the servers and set up employees was material and substantial.

Respondent contends that it implemented a company-wide linen less banquet table  
 10 program and that its right to implement this change falls squarely within its rights under the expired collective-bargaining agreement's management clause provision. Unfortunately for Respondent, a management rights clause does not survive the expiration of a collective-bargaining agreement. The Board consistently has held that a waiver of bargaining rights under a management rights clause does not survive the expiration of a contract. *Beverly Health and*  
 15 *Rehabilitation Services, Inc.*, 335 NLRB 635, 655 (2001); *Buck Creek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), and enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988). Accordingly, Respondent's argument regarding the linen less tables is rejected.

20 Since changes to seniority, scheduling, hours, and job duties are mandatory subjects of bargaining, Respondent violated Section 8(a)(5) of the Act by implementing these changes without first notifying and offering to bargain with the Union.

k. The March 30 and April 20, 2010 information requests concerning  
 Server Fay Gavin's grievance

25 On March 24, 2010, the Union filed a grievance regarding Fay Gavin's March 19, 2010,<sup>202</sup> discipline for allegedly coercing an employee into wearing a union button. On March 30, 2010, Esparza requested the name of the employee that accused Gavin of wrongdoing.<sup>203</sup>

30 On April 7 and 27, 2010,<sup>204</sup> Respondent replied to the Union, but never provided the requested information until June 13, 2012. On April 27, 2010, Respondent provided the Union with a copy of the employee's statement with the name redacted, and asserted that this witness did not wish to speak with the Union.

35 Complaint paragraph 29(a) alleges that since about March 30, 2010, the Union has requested that Respondent furnish it with the name of the associate that accuses Gavin of wrongdoing.

An employer has an obligation to provide relevant information to the Union in order for it to perform its duties as collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385  
 40 U.S. 432 (1967). Names of witnesses to an incident for which an employee received discipline are presumptively relevant. *Metropolitan Edison Co.*, 330 NLRB 107 (1999); *Boyertown Packaging Corp.*, 303 NLRB 441 (1991); *Pennsylvania Power*, 301 NLRB 1104 (1991).

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<sup>202</sup> GC Exh. 3.

<sup>203</sup> GC Exh. 5.

<sup>204</sup> GC Exhs. 6 and 7.

When an employer contends that relevant information requested by the union is confidential, the employer has the burden of establishing the confidentiality interest. With respect to assertions of confidentiality, the Board balances the union’s need for the information against the employer’s legitimate and substantial confidentiality interest. Further, an employer claiming that relevant information is confidential has a duty to seek an accommodation. *Piedmont Gardens*, 359 NLRB No. 46, Slip op. at 2 (2012).

When an employer argues that disclosure of a witness’ name would result in harassment, the employer has a duty to produce the witness names where the concerns of harassment were speculative and outweighed by the union’s need for the information.” *Piedmont Gardens*, supra at 3–4; *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006); *Metropolitan Edison Co.*, 330 NLRB 107 (1999).

Respondent unlawfully failed to respond to the Union’s March 30, 2010, request for the name of the associate accusing Gavin of alleged wrongdoings. While Respondent may contend that it did not provide the name of the witness out of concerns for threats and confidentiality, Fullenkamp’s testimony failed to show that concerns regarding threats were anything more than speculation, and does not outweigh the Union’s long-established right to obtain the names of witnesses to an incident leading to the discipline of an employee. Respondent could have requested that the Union keep the witness’s name confidential; yet Respondent presented no evidence that it did so. As such, Respondent violated Section 8(a)(1) and (5).

1. The April 20, 2010 information requests concerning the Audelia Hernandez, Ana Rodriguez and Shirley Grimes’ grievances.

On April 14 and 15, 2010, Respondent issued identical disciplines to Grimes, Hernandez, and Rodriguez for soliciting signatures while on the clock in a harassing and intimidating manner. On April 20, 2010, the Union filed separate grievances<sup>205</sup> on behalf of Grimes, Hernandez, and Rodriguez. In each grievance the Union made an information request for a list of witnesses to start the investigation. On April 20, 2010, Respondent replied<sup>206</sup> to each grievance and refused to provide the Union with a list of witnesses at that time.

On April 30, 2010, the Union sent Respondent a follow-up letter<sup>207</sup> renewing its request that Respondent list the persons accusing Grimes of inappropriate behavior. On May 5, 2010, Fullenkamp responded<sup>208</sup> to Esparza and refused to provide the names of employee witnesses, claiming that these employees expressed concerns about having their identities revealed to the Union and feared harassment and/or retaliation from the Union. Respondent presented no evidence showing the basis for employees’ fear of harassment from the Union.

While the Union has never withdrawn Grimes, Hernandez, or Rodriguez’ grievances, it withdrew the information requests on June 13, 2012.

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<sup>205</sup> GC Exhs. 8, 10, and 12.

<sup>206</sup> GC Exhs. 9, 11, and 13.

<sup>207</sup> R. Exh. 2.

<sup>208</sup> R. Exh. 3.

Complaint paragraph 29(b) through (d) alleges that Since on about April 20, 2010, the Union has requested that Respondent furnish it with a list of witnesses relating to the grievances of Grimes, Hernandez, and Rodriguez.

5 For the reasons cited above with respect to the Gavin information request, Respondent violated the Act by refusing to provide the names of witnesses regarding the disciplines of Shirley Grimes, Audelia Hernandez, and Ana Rodriguez. As a result, Respondent violated Section 8(a)(5) by failing to provide relevant, requested information to the Union.

10 m. The June 11, 2010 information request for schedules for by department and an updated employee roster

On June 11, 2010,<sup>209</sup> the Union made a written request of Respondent for 3 weeks of schedules for the banquet, engineering, guest services, housekeeping, kitchen, and restaurant departments at the hotel. In the same letter the Union requested an updated employee roster, including the employee's name, date of hire, date of birth, job classification, address, and phone number. On June 17, 2010,<sup>210</sup> Fullenkamp requested the basis for the Union's need for the requested information. On July 12, 2010,<sup>211</sup> the Union explained that the requested information was relevant and necessary both for effective bargaining and representation of unit members and renewed the Union's requests for information. Respondent failed to respond further and failed to provide the requested information.

On June 13, 2012, the Union withdrew this request for information.

25 Complaint paragraph 29(e) alleges that since about June 11, 2011, the Union requested that Respondent furnish it with schedules and an undated employee roster.

The Board has held that information concerning bargaining unit employee information is presumptively relevant, including, names, addresses, phone numbers, job classification, date of birth, and seniority lists and data. *Essex Valley Visiting Nurses Assoc.*, 353 NLRB 1044 (2009); *River Oak Ctr. for Children*, 345 NLRB 1335 (2005); *Staff Builders Services*, 289 NLRB 373 (1988). Similarly, the Board has held the schedules and hours of work for bargaining unit employees are presumptively relevant. *Postal Service*, 308 NLRB 358 (1992).

35 Respondent contends that article XXXV of the expired collective-bargaining agreement<sup>212</sup> does not require Respondent to provide the information requested. Article XXXV provides:

40 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.

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<sup>209</sup> GC Exh. 14.

<sup>210</sup> GC Exh. 15.

<sup>211</sup> GC Exh. 16.

<sup>212</sup> GC Exh. 2, p. 39.

Respondent reasons that because counsel for the General Counsel failed to prove that the June 11, 2010, information request was relevant to a grievance under article VII of the collective-bargaining agreement, there was no obligation under expired article XXXV for Respondent to produce the information requested.

Essentially, Respondent is arguing that this language amounts to a waiver by the Union of its rights, much like a management-rights clause. Like a management-rights clause, however, this type of waiver language does not survive the contract’s expiration. Thus, Respondent’s argument is rejected. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 655 (2001); *Buck Creek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), and enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide presumptively relevant information including schedules and an employee roster including name, date of hire, date of birth, job classification, address, and phone number.

#### CONCLUSIONS OF LAW

1. Respondent Remington Lodging & Hospitality, LLC d/b/a/ the Sheraton Anchorage is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Unite-Here! Local 878, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective-bargaining representative of Respondent’s employees in the following appropriate collective-bargaining unit:

All the employees employed at the Sheraton Anchorage hotel, with the exception of guards, supervisors, managerial employees, clerical employees, and confidential employees, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Maintaining and enforcing the following access rule in its employee handbook:

Employees “agree not to return to the Hotel before or after [their] working hours without authorization from [their] manager.”

(b) Maintaining and enforcing the following access rule in its employee handbook:

Employees “must confine their presence in the Hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the Hotel, parking lots, or outside facilities without permission of the immediate Department Head.

(c) Maintaining and enforcing the following solicitation and distribution rule in its employee handbook:

5                   “Distribution of any literature, pamphlets, or other materials in a guest or work area is prohibited . . . Solicitation of guests by associates at any time for any purpose is also inappropriate.”

(d) Interrogating employees about their union activities.

10                   (e) Engaging in surveillance of its employees’ union activities.

(f) Creating the impression that its employees’ union activities were under surveillance.

15                   (g) Coercing its employees regarding their testimony at an NLRB hearing.

(h) Telling employees to remove their union buttons.

20                   (i) Prohibiting off duty employees from distributing union literature on hotel property

(j) Threatening to call the police on its employees or have its employees arrested because they were engaged in union activity.

25                   4. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(3) of the Act:

30                   (a) By disciplining its employee Fay Gavin on March 19, 2010, reducing her hours in September 2010, giving her a poor evaluation on September 24, 2010, and by disciplining her on November 3, 2010, because she engaged in union activities.

(b) By disciplining its employee Ana Rodriguez on April 14, 2010, because she engaged in union activities.

35                   (c) By disciplining its employee Audelia Hernandez on April 14, 2010, because she engaged in union activities.

40                   (d) By disciplining its employee Shirley Grimes on April 15, 2010, and by disciplining her on January 19, 2011, because she engaged in union activities.

(e) By disciplining its employee Dexter Wray on May 10, 2010, and July 7, 2010, and by discharging him on October 24, 2010, because he engaged in union activities.

45                   (f) By discharging its employee Yanira Escalante Medrano because she engaged in union activities.

(g) By changing its employee Elda Buezo’s schedule from part time to on call on April 15, 2011, by reducing her hours from April to May 2011, and by discharging her on June 15, 2011, because she engaged in union activities.

5 (h) By decreasing the shifts of its banquet employees Joanna Littau, Fay Gavin, John Fields, and Vicki Williams beginning in August 2010, because they engaged in union activities.

10 (i) By decreasing the hours of its restaurant employees Gina Tubman and Kyoko Akers beginning in July 2010, because they engaged in union activities.

(j) By increasing the number of scheduled shifts for banquet employees Supaporn (Sue) Kennedy, Nestor Arguson, Flora Sanchez, Stella Hernandez, Carmelita Muse, and Katie Keim beginning in August 2010, to discourage employees from engaging in union activities.

15 5. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(4) of the Act:

20 (a) By discharging its employee Dexter Wray on October 24, 2010, because he gave testimony to the Board in the form of affidavits and testified at an unfair labor practice proceeding before the Board in Case 19–CA–32148 et al.

25 (b) By discharging its employee Yanira Escalante Medrano because she gave testimony to the Board in the form of affidavits and testified at an unfair labor practice proceeding before the Board in Case 19–CA–32148 et al.

6. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(5) of the Act:

30 (a) By unilaterally and without bargaining with the Union, banning Union Representative Daniel Esparza from the hotel on April 21, 2010.

35 (b) By unilaterally and without bargaining with the Union, banning the Union and all of its representatives from the hotel on July 2, 2010.

(c) By unilaterally and without bargaining with the Union, eliminating banquet employees’ scheduling preference sheets in July 2010.

40 (d) By unilaterally and without bargaining with the Union, terminating its practice of posting banquet employee schedules by noon on Fridays in July 2010.

(e) By unilaterally and without bargaining with the Union, ceasing to assign work and scheduling employees according to seniority in July 2010.

45 (f) By unilaterally and without bargaining with the Union, changing the sick leave policy in the parties’ expired collective-bargaining agreement in July 2010.

(g) By unilaterally and without bargaining with the Union, ceasing to make contributions to the Unite Here National Retirement Fund on behalf of bargaining unit employees in July 2010.

5 (h) By unilaterally and without bargaining with the Union, subcontracting bargaining unit work beginning in October 2010.

10 (i) By unilaterally and without bargaining with the Union, reducing banquet server compensation by allocating a portion of their gratuities to pay for the services of third party banquet servers in about October 2010.

(j) By unilaterally and without bargaining with the Union, changing banquet server and set up duties in October 2011.

15 (k) By unilaterally and without bargaining with the Union, changing banquet server and set up staffing and scheduling in October 2011.

20 (l) By failing and refusing to provide the Union with information necessary for and relevant to the Union’s performance of its duties as the exclusive collective-bargaining representative of bargaining unit employees including:

(1) The name of the associate that accused Fay Gavin of wrongdoing in the grievance of unit employee Gavin.

25 (2) A list of witnesses to start the investigation in the grievance of bargaining unit employee Shirley Grimes.

30 (3) A list of witnesses to start the investigation in the grievance of bargaining unit employee Audelia Hernandez.

(4) A list of witnesses to start the investigation in the grievance of bargaining unit employee Ana Rodriguez.

35 (5) The most recent schedules for the week ending June 5th and 12th and the upcoming schedules for June 18th for the banquet, engineering, guest services, housekeeping, kitchen and restaurant departments.

(6) An updated employee roster including the employees’ first and last names, date of hire, date of birth, job classification, address and phone number.

40 REMEDY

45 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent discharged its employees Dexter Wray, Yanira Escalante Medrano, and Elda Buezo, issued disciplinary warnings to its employees

Fay Gavin, Ana Rodriguez, Audelia Hernandez, Shirley Grimes, and Dexter Wray, changed the schedule of Elda Buezo to on call, and reduced the hours or shifts of Elda Buezo, Joanne Littau, Fay Gavin, John Fields, Vicki Williams, Gina Tubman, and Kyoko Akers, my recommended order requires the Respondent to make them whole. My recommended order also requires the Respondent to offer Dexter Wray, Yanira Escalante Medrano, and Elda Buezo immediate reinstatement to their former positions, displacing if necessary any replacements, or if their positions no longer exist, to substantially equivalent positions, without loss of seniority and other privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. My recommended order further requires that backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The recommended order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful discharges and warnings issued to the above named employees, and to notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make any reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against them in any other way.

Also, having found various provisions in the Respondent's employee handbook unlawful, the recommended order requires that the Respondent revise or rescind the unlawful rules, and advise its employees in writing that said rules have been so revised or rescinded.

Further, as I found that the Respondent made certain unlawful unilateral changes in the terms and conditions of employment of the unit employees, I shall recommend that the Respondent be ordered to, at the request of the Union, rescind any and all of those changes. These include banning of Union Representative Daniel Esparza as well as the Union and all union representatives from the hotel property, the elimination of the use of scheduling preference sheets for banquet employees, the failure to post banquet employee schedules by noon on Fridays, the cessation of assigning work and scheduling employees according to seniority, changes in sick leave policy from the terms of the collective-bargaining agreement, the cessation of contributions to the Unite Here National Retirement Fund, the subcontracting of banquet server work, reduction in compensation for banquet servers by reallocating a portion of their gratuity to pay for third party banquet serves, changing banquet server and set up job duties, and changing the scheduling and staffing of banquet servers and set up employees.

The Respondent shall be required to make whole bargaining unit employees for all losses they suffered as a result of the Respondent's unlawful unilateral changes, plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. As the Respondent has a large number of employees whose primary language is Spanish, the Respondent shall be required to post the paper notice in both English and Spanish. A significant number of the Respondent's employees speak neither English nor Spanish as their primary language. However, it

would be impractical to translate the notice into each of the many native languages spoken by each and every employee.

5 In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (2010).

10 General Counsel also requests that discriminatees be reimbursed for any excess taxes owed as a result of a lump-sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint.

15 In *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Board ordered that retroactively it will routinely require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year. The Board concluded  
20 that it is the General Counsel’s burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

25 Pursuant to *Latino Express*, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>213</sup>

### ORDER

30 The Respondent, Remington Lodging & Hospitality, LLC d/b/a/ the Sheraton Anchorage its successors, and assigns, shall

35 1. Cease and desist from

(a) Maintaining and enforcing the following access rule in its employee handbook:

40 Employees “agree not to return to the Hotel before or after [their] working hours without authorization from [their] manager.”

(b) Maintaining and enforcing the following access rule in its employee handbook:

Employees “must confine their presence in the Hotel to the area of their job assignment and work duties. It is not permissible to roam the property

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<sup>213</sup> 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 shall be waived for all purposes.

at will or visit other parts of the Hotel, parking lots, or outside facilities without permission of the immediate Department Head.”

5 (c) Maintaining and enforcing the following solicitation and distribution rule in its employee handbook:

“Distribution of any literature, pamphlets, or other materials in a guest orwork area is prohibited . . . Solicitation of guests by associates at any time for any purpose is also inappropriate.”

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(d) Interrogating employees about their union activities.

(e) Engaging in surveillance of its employees’ union activities.

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(f) Creating the impression that its employees’ union activities were under surveillance.

(g) Coercing its employees regarding their testimony at an NLRB hearing.

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(h) Telling employees to remove their union buttons.

(i) Prohibiting off duty employees from distributing union literature on hotel property.

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(j) Threatening to call the police on its employees or have its employees arrested because they were engaged in union activity.

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(k) Disciplining its employee Fay Gavin on March 19, 2010, reducing her hours in September 2010, giving her a poor evaluation on September 24, 2010, and by disciplining her on November 3, 2010, because she engaged in union activities.

(l) Disciplining its employee Ana Rodriguez on April 14, 2010, because she engaged in union activities.

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(m) Disciplining its employee Audelia Hernandez on April 14, 2010, because she engaged in union activities.

(n) Disciplining its employee Shirley Grimes on April 15, 2010, and by disciplining her on January 19, 2011, because she engaged in union activities.

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(o) Disciplining its employee Dexter Wray on May 10, 2010, and July 7, 2010, and by discharging him on October 24, 2010, because he engaged in union activities and for giving testimony to the Board in the form of affidavits and testifying at an unfair labor practice proceeding before the Board in Case 19–CA–32148 et al.

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(p) Discharging its employee Yanira Escalante Medrano because she engaged in union activities and for giving testimony to the Board in the form of affidavits and testifying at an unfair labor practice proceeding before the Board in Case 19–CA–32148 et al.

(q) Changing its employee Elda Buezo’s schedule from part time to on call on April 15, 2011, by reducing her hours from April to May 2011, and by discharging her on June 15, 2011, because she engaged in union activities.

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(r) Decreasing the shifts of its banquet employees Joanna Littau, Fay Gavin, John Fields, and Vicki Williams beginning in August 2010, because they engaged in union activities.

(s) Decreasing the hours of its restaurant employees Gina Tubman and Kyoko Akers beginning in July 2010, because they engaged in union activities.

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(t) Increasing the number of scheduled shifts for banquet employees Supaporn (Sue) Kennedy, Nestor Arguson, Flora Sanchez, Stella Hernandez, Carmelita Muse, and Katie Keim beginning in August 2010, to discourage employees from engaging in union activities.

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(u) Refusing to bargain in good faith with Unite Here!, Local 878, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the following collective-bargaining unit:

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All the employees employed at the Sheraton Anchorage hotel, with the exception of guards, supervisors, managerial employees, clerical employees, and confidential employees, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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(v) Unilaterally and without bargaining with the Union, banning Union Representative Daniel Esparza from the hotel on April 21, 2010.

(w) Unilaterally and without bargaining with the Union, banning the Union and all of its representatives from the hotel on July 2, 2010.

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(x) Unilaterally and without bargaining with the Union, eliminating banquet employees’ scheduling preference sheets in July 2010.

(y) Unilaterally and without bargaining with the Union, terminating its practice of posting banquet employee schedules by noon on Fridays in July 2010.

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(z) Unilaterally and without bargaining with the Union, ceasing to assign work and scheduling employees according to seniority in July 2010.

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(aa) Unilaterally and without bargaining with the Union, changing the sick leave policy in the parties’ expired collective-bargaining agreement in July 2010.

(bb) Unilaterally and without bargaining with the Union, ceasing to make contributions to the Unite Here National Retirement Fund on behalf of bargaining unit employees in July 2010.

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(cc) Unilaterally and without bargaining with the Union, subcontracting bargaining unit work beginning in October 2010.

(dd) Unilaterally and without bargaining with the Union, reducing banquet server compensation by allocating a portion of their gratuities to pay for the services of third party banquet servers in about October 2010.

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(ee) Unilaterally and without bargaining with the Union, changing banquet server and set up duties in October 2011.

(ff) Unilaterally and without bargaining with the Union, changing banquet server and set up staffing and scheduling in October 2011.

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(gg) Failing and refusing to provide the Union with information necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of bargaining unit employees including:

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1. The name of the associate that accused Fay Gavin of wrongdoing in the grievance of unit employee Gavin.
2. a list of witnesses to start the investigation in the grievance of bargaining unit employee Shirley Grimes.
3. a list of witnesses to start the investigation in the grievance of bargaining unit employee Audelia Hernandez.
4. a list of witnesses to start the investigation in the grievance of bargaining unit employee Ana Rodriguez.
5. the most recent schedules for the week ending June 5th and 12th and the upcoming schedules for June 18th for the banquet, engineering, guest services, housekeeping, kitchen and restaurant departments.
6. an updated employee roster including the employees' first and last names, date of hire, date of birth, job classification, address and phone number.

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(ii) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed 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) At the request of the Union, the Respondent shall rescind the unilateral changes made in its employees' terms and conditions of employment implemented on or about July 2010, which changes included eliminating banquet servers' scheduling preference sheets, terminating its practice of posting banquet employees' schedules by noon on Fridays, ceasing the assignment of work and scheduling of employees according to seniority, changing its sick leave policy from that contained in the expired collective bargaining agreement, and ceasing to make contributions to the Unite Here National Retirement Fund;

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5 (b) At the request of the Union, the Respondent shall rescind the unilateral changes made in its employees' terms and conditions of employment implemented on or about October 2011, including the subcontracting of bargaining unit server work, reducing banquet server compensation by reallocating a portion of their gratuity to pay for third party banquet servers, changing banquet server and set up job duties, and changing banquet server and set up staffing and scheduling.

10 (c) At the request of the Union, the Respondent shall grant reasonable access to the hotel upon reasonable notice to Union Representative Daniel Esparza and all union representatives.

15 (d) Make whole its employees for any losses incurred as a result of its unilateral changes made in the terms and conditions of their employment, plus interest as provided for in the Remedy section of this decision.

20 (e) Within 14 days of the Board's Order, offer Dexter Wray, Yanira Escalante Medrano, and Elda Buezo full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed;

25 (f) Within 14 days of the Board's Order, rescind the suspensions, written disciplines and poor evaluations issued to Fay Gavin, Ana Rodriguez, Audelia Hernandez, Shirley Grimes, and Dexter Wray.

30 (g) Make Dexter Wray, Yanira Escalante Medrano, Elda Buezo, Gina Tubman, Joanna Littau, Fay Gavin, John Fields, Vicki Williams, and Kyoko Akers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

35 (h) Within 14 days of the Board's Order, remove from its files any references to the unlawful discharges, suspensions, written disciplines and poor evaluations of Dexter Wray, Yanira Escalante Medrano, Elda Buezo, Fay Gavin, Ana Rodriguez, Audelia Hernandez, and Shirley Grimes and inform them in writing that this has been done, and that the Respondent's unlawful discrimination against them will not be used against them as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

40 (i) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other earnings and benefits due under the terms of this Order;

45 (j) Within 14 days of the Board's Order, revise or rescind the rules in its employee handbook where employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager;"

(k) Within 14 days of the Board’s Order, revise or rescind the rules in its employee handbook where employees “must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head;”

(l) Within 14 days of the Board’s Order, revise or rescind the rules in its employee handbook where “distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate;”

(m) Within 14 days after service by the Region, post at its hotel in Anchorage, Alaska, copies of the attached notice marked “Appendix” in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 19, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 July of 2009; and

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 6, 2013

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John J. McCarrick  
Administrative Law Judge

## APPENDIX

### NOTICE TO EMPLOYEES

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

FEDERAL LAW GIVES EMPLOYEES 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  
Chose not to engage in any of these protected activities

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT refuse to recognize and bargain collectively with UNITE-HERE!, Local 878, AFL-CIO (the Union), as the exclusive collective-bargaining representative of our hotel employees, including by unlawfully withdrawing recognition of the Union.

WE WILL NOT ban the Union or its representatives from our hotel without first bargaining with your Union about it.

WE WILL NOT eliminate banquet employees' scheduling preference sheets without first bargaining with your Union about it.

WE WILL NOT stop posting banquet employees schedules by noon on Fridays without first bargaining with your Union about it.

WE WILL NOT stop assigning work and scheduling employees by seniority without first bargaining with your Union about it.

WE WILL NOT change our sick leave policy from the terms of the expired collective-bargaining agreement to that contained in our employee handbook without first bargaining with your Union about it.

WE WILL NOT cease making contributions to the Unite Here National Retirement Fund for you without first bargaining with your Union about it.

WE WILL NOT subcontract banquet server work without first bargaining with your Union about it.

WE WILL NOT reduce banquet server pay by giving a part of your gratuity to pay for third party banquet servers without first bargaining with your Union about it.

WE WILL NOT change the job duties of banquet servers or set up employees without first bargaining with your Union about it.

WE WILL NOT change banquet server and set up staffing and scheduling without first bargaining with your Union about it.

WE WILL NOT refuse to provide your Union with information that is relevant and necessary for the Union to perform its job as your collective-bargaining representative.

WE WILL NOT interrogate you about your feelings towards the Union.

WE WILL NOT spy on your union activities or create the impression we are spying on your union activities by photographing or videotaping those activities or by being present in your cafeteria for excessive periods of time.

WE WILL NOT demand that you stop wearing your union buttons.

WE WILL NOT try to improperly influence your testimony at an NLRB hearing.

WE WILL NOT maintain and/or enforce our employee handbook rule that you agree not to return to the hotel before or after your working hours without prior authorization from your manager.

WE WILL NOT maintain and/or enforce our employee handbook rule that you must confine your presence in the hotel to the area of your job assignment and work duties, and that you are not permitted to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without prior permission of the immediate department head.

WE WILL NOT maintain and/or enforce our employee handbook rule that distribution of any literature, pamphlets, or other materials in a guest or work area is prohibited, or that solicitation of guests by associates at any time for any purpose is inappropriate.

WE WILL NOT threaten to call the police or have you arrested for handbilling outside the doors of our hotel seeking to have members of the public boycott our hotel.

WE WILL NOT discipline you for concertedly handbilling outside the doors of our hotel seeking to have members of the public boycott our hotel.

WE WILL NOT discipline you for soliciting signatures of employees in support of a petition to have an employee reinstated.

WE WILL NOT discipline you, fire you, give you a poor evaluation, cut your hours of employment, reduce you from part time to on call, decrease your shifts or increase your shifts in order to discourage your union or other activities that are protected under Section 7 of the National Labor Relations Act or for giving testimony at an NLRB hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by the National Labor Relations Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our hotel employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL provide the Union with the information that it requested on March 30, 2010, regarding witness named in the Gavin grievance, the information requested on April 20, 2010, regarding the Grimes' Hernandez, and Rodriguez grievances, and the information requested on June 11, 2010, regarding department schedules and an updated employee roster.

WE WILL resume making payments to the Unite Here National Retirement Fund.

WE WILL reinstate our policies of using employee preference sheets for scheduling, of posting banquet schedules by noon on Fridays, of assigning work and scheduling employees by seniority, and of following the expired collective bargaining agreement policies regarding sick leave.

WE WILL recognize your right to engage in protected concerted and union activity by wearing union buttons.

WE WILL recognize your right to engage in protected concerted and union activity by handbilling our customers outside the front doors to the hotel.

WE WILL recognize your right to solicit employee signatures during nonworking time for petitions to us dealing with wages, hours, and other terms and conditions of employment.

WE HAVE reinstated Dexter Wray, Yanira Escalante Medrano, and Elda Buezo to their former positions of employment.

WE HAVE made Dexter Wray, Yanira Escalante Medrano, Elda Buezo, Gina Tubman, Kyoko Akers, Joanna Littau, Fay Gavin, John Fields, and Vicki Williams whole for any loss of earnings and benefits, including interest, they sustained as a result of our discharges, and reduction in shifts and hours.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all records of the discrimination against Dexter Wray, Yanira Escalante Medrano, Elda Buezo, Gina Tubman, Kyoko Akers, Joanna Littau, Fay Gavin, John Fields, Vicki Williams, Ana Rodriguez, and Audelia Hernandez, and WE WILL within 3 days thereafter, notify them in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

WE WILL expunge or revise the rule from our employee handbook that employees may not return to the hotel before or after their working hours without authorization from their manager.

WE WILL expunge or revise the rule from our employee handbook that employees must confine their presence in the hotel to the area of their job assignment and work duties, and that they may not roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of their immediate department heads.

WE WILL expunge or revise the rule from our employee handbook that prohibits employees from distribution of any literature, pamphlets, or other material in a guest or work area, or from soliciting hotel guests at anytime for any purpose.

WE WILL within 14 days of the Board's Order inform you in writing as to the manner in which we have revised, rescinded, expunged, or modified those rules in our employee handbook, which were found to be unlawful, to now comply with Federal Labor Law and your rights under the National Labor Relations Act.

REMINGTON LODGING & HOSPITALITY, LLC, D/B/A  
THE SHERATON ANCHORAGE

\_\_\_\_\_  
(Employer)

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.nlr.gov](http://www.nlr.gov).

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078  
(206) 220-6300, Hours: 8:15 a.m. to 4:45 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, (206) 220-6284.