UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

REMINGTON LODGING & HOSPITALITY, LLC

Case Nos. 29-CA-093850
29-CA-095876

and

REMINGTON LODGING & HOSPITALITY, LLC AND HOSPITALITY STAFFING SOLUTIONS, LLC, joint employers

and

LOCAL 947, UNITED SERVICE WORKERS UNION, INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Brent E. Childerhose
Ashok C. Bokde
Lara M. Haddad
Counsel for the General Counsel
National Labor Relations Board, Region 29
Two MetroTech Center, Fifth Floor
Brooklyn, New York 11201

TABLE OF CONTENTS

TABLE OF AUTHORITIES

As set forth in the decision of Administrative Law Judge Raymond P. Green, Respondent committed multiple significant violations of the Act in response to the Union's campaign.[1] While these violations are well-established in the record, Respondent nonetheless continues to insist it has done nothing wrong. Contrary to Respondent's claims, the ALJ correctly found that:

(1) Respondent unlawfully subcontracted its housekeeping work;

(2) Respondent unlawfully failed to consider for hire the housekeeping department;

(3) Respondent committed multiple violations of Section 8(a)(1); and

(4) Respondent unlawfully discharged Margaret Loiacono.

This brief will discuss each of these violations and address the misrepresentations Respondent makes in denying any wrongdoing.

DISCUSSION

(1) Respondent unlawfully subcontracted its housekeeping work. (Respondent's exceptions 1, 2, and 3)

Respondent's first three exceptions pertain to Respondent's decision to subcontract the housekeeping department after learning of the Union's organizing campaign. The ALJ appropriately found that Respondent was motivated by anti-union animus in making this decision and subcontracted the work unlawfully. ALJD 8:31-39. Contrary to what Respondent argues in its exceptions, the evidence shows: (A) Respondent had knowledge of the Union's campaign when it decided to subcontract the housekeeping department on June 28, 2012; (B) Respondent effectively derailed the Union's campaign by subcontracting the housekeepers; and (C) Respondent subcontracted the housekeeping department to avoid the Union and not for any legitimate business purpose.

[1] On the first page of the ALJ's decision, the second case number, 29-CA-095876, was inadvertently omitted from the opinion. The Board's decision should correctly include both case numbers.

(A) Respondent had knowledge of the Union's campaign when it decided to subcontract the housekeeping department on June 28, 2012.

Despite Respondent's denial of knowledge in its first exception, the evidence shows Respondent knew of the Union's campaign before it decided to subcontract the housekeeping department. Union agent Jose Vega had been visiting the hotel and distributing business cards since April, and there is no dispute that the then-director of housekeeping, Andrew Arpino, obtained one of Vega's cards. Arpino first questioned employee Veronica Flores on June 10 about Vega's presence at the hotel, which resulted in Flores calling off the planned meeting with the Union for that day. Flores' testimony was never rebutted at trial. Respondent never called Arpino to testify at trial, despite Arpino remaining a manager of Respondent. The Board has held that an adverse inference can be drawn when a party fails to call a witness assumed to be favorably disposed toward the party, and such an inference is warranted here. See *Parksite Group*, 354 NLRB 801 (2009).

While Respondent avoided calling Arpino to testify, it argues that Flores' testimony should not be believed. While there was some confusion regarding the exact date Arpino interrogated Flores about the Union, the interrogation clearly occurred prior to Respondent's decision to subcontract the department. Flores testified that, as a result of the interrogation, she cancelled an initial meeting she had arranged with Jose Vega from the Union for June 10. Tr. 140. Vega also testified at trial and verified that this had occurred. Tr. 104. While Respondent argues that minor inconsistencies invalidate the whole of Flores' testimony, such an argument is unrealistic and distracts from the key fact undisputed in the record – Respondent was aware of the Union before it decided to subcontract the housekeeping department.[2]

[2] Ninfa Palacios testified that Respondent questioned her about the Union in May 2012. ALJD 4:18-20. While Respondent questions Palacios' credibility, clearly the unrebutted testimony of Veronica Flores and Jose Vega is sufficient to establish Respondent's knowledge of the union campaign prior to June 28.

The ALJ appropriately credited Flores' testimony. ALJD 5:2-5. The Board gives broad deference to credibility findings and does not overturn them unless it is convinced by a clear preponderance of the evidence that those credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951); *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131 (1993); *Storer Communications, Inc.*, 297 NLRB 269, fn.2 (1982). Respondent has failed to meet its burden of proof, and the ALJ's credibility determinations with regard to Flores' testimony should be upheld.

(B) Respondent effectively derailed the Union's campaign by subcontracting the housekeepers.

Respondent argues in its second exception that its subcontracting of the housekeepers had no effect on the Union campaign. However, under current law, the Board does not allow a bargaining unit to consist of both employees of an employer, and employees of that employer and a staffing company, unless there is consent by both the employer and the staffing company. See *Oakwood Care Center*, 343 NLRB 659 (2004). In the current case, the Union sought to represent essentially a wall-to-wall unit at the hotel; a unit comprised of housekeepers as well as other employees employed directly and solely by Respondent. As a result of Respondent's subcontracting of the housekeeping department, the Union was prevented from seeking its petitioned-for unit as long as HSS was involved. As HSS ended its relationship with Respondent effective October 19, 2012, leaving Respondent the sole employer of all the employees at issue, the Union's petitioned-for bargaining unit is again viable. In the interim, however, Respondent successfully prevented the Union from getting an election in its desired bargaining unit.

(C) Respondent subcontracted the housekeeping department to avoid the Union and not for any legitimate business purpose.

Respondent was not only aware of the Union's campaign, but decided to subcontract its housekeeping department because of it. In its third exception, Respondent claims that it acted for legitimate business reasons. However, Respondent failed to adequately demonstrate any such reason at trial. ALJD 8:36-39. Rather, the evidence shows Respondent acted with an unlawful motive which can reasonably be inferred for four reasons: (i) it was highly unusual for Respondent to subcontract the housekeeping department; (ii) the timing of the subcontracting decision is highly suspect; (iii) Respondent's asserted bases for subcontracting are unconvincing; and (iv) Respondent's later actions demonstrate Respondent's animosity toward the Union's campaign. Consequently, the ALJ was correct to find an unlawful motive and support the ALJ's conclusions.

(i) It was highly unusual for Respondent to subcontract the housekeeping department.

Respondent operates about 70 hotels in the country and does not subcontract the entire housekeeping department at any of them. Tr. 683. Rather, Respondent prefers to employ its housekeeping staffs directly, as subcontracting is more expensive. Tr. 471-472, ALJD 7:30-32. While some of Respondent's hotels may use subcontracted work on a supplemental basis, this was not the case at the Hyatt Hotel, where HSS was brought in to take over the entire department. Tr. 683. Respondent provided no example of similar contracting at any of its hotels, and on the basis of the record, its complete subcontracting of the housekeeping department was unprecedented.

(ii) The timing of the subcontracting decision is highly suspect.

The Board has long considered coincidental timing of an employer's adverse action to be evidence of an improper motive. See e.g., *Equitable Resources Exploration*, 307 NLRB 730 (1992). In the current case, Respondent made the unusual decision to subcontract its

housekeeping department on June 28, shortly after confronting Veronica Flores about the Union earlier in the month. That day, divisional vice president of operations Sileshi Mengiste made his recommendation, and the subcontracting was approved within hours. Tr. 474, GC Ex. 20. At trial, Respondent's vice president of operations, Evan Studer, indicated that there was discussion of subcontracting prior to the June 28 decision. As with much of his testimony, Studer would not provide any specific details. Tr. 477-478. Respondent then sought to move with unusual speed, contacting HSS and wanting HSS to start "the next day." Tr. 410. Respondent's unusual haste once it learned of the Union campaign – both in making the decision, and in seeking to have HSS begin – is further evidence of Respondent's unlawful motive.

(iii) Respondent's asserted bases for subcontracting are unconvincing.

Respondent's purported reasons for subcontracting the entire housekeeping department are undermined by the record evidence. Respondent gives two reasons it subcontracted with HSS at the Hyatt Hotel: low customer satisfaction scores and staffing levels. Tr. 474, 634. Upon examination, however, neither of these reasons survives scrutiny.

Respondent did not subcontract the housekeepers because of low customer satisfaction scores.

While Respondent's customer satisfaction scores at the hotel were relatively low within the Hyatt brand, Respondent failed to demonstrate that subcontracting was actually intended to address that problem. While paying HSS to employ the housekeeping department was more expensive for Respondent, Respondent provided no persuasive explanation as to how HSS could make improvements Respondent itself could not make. Tr. 511-512. At trial, the only specific change Studer could cite was that HSS would provide one extra supervisor. Tr. 512. Certainly, Respondent had no need to subcontract an entire department if all it needed was an additional supervisor.

While Respondent claims customer satisfaction scores were the sole measure of customer dissatisfaction, the scores themselves appear unreliable. Tr. 482, GC Ex. 3. For example, a category like "internet service" appears to fluctuate randomly over the course of the year, independent of any changes being made by the hotel. Tr. 82-83, GC Ex. 3. More pertinent to the work of the housekeepers, some of the highest scores for "guest room" during the year occurred under HSS. GC Ex. 3. Nonetheless, Respondent's own witnesses undermined the value of the scores, insisting the housekeepers' performance did not improve under HSS. Tr. 501-502. While the worst "guest room" scores occurred under Respondent in December 2012, Respondent's witnesses insisted housekeeping services greatly improved after HSS. Tr. 693-694.

With regard to contracting with HSS specifically, Respondent's position becomes further incoherent. According to Studer, when Respondent first took over, it removed HSS in part because of problems with customer satisfaction. Tr. 471. Respondent then claims that, when it had problems with customer satisfaction, it turned to HSS to address the problem. This reasoning becomes further convoluted in that Respondent maintained its own management of the department even after contracting HSS to address any problems. It is clear that Respondent did not subcontract the department out of concern for customer satisfaction.

Respondent did not subcontract the housekeepers because of staffing levels.

Respondent claims that it subcontracted HSS because it was having problems maintaining adequate staffing. This claim is also dubious. Respondent itself was able to hire a complete replacement staff in a month after learning HSS was leaving. Additionally, were staffing a legitimate concern, Respondent could have sought supplemental staffing as had previously been used at the hotel. While Respondent may regularly hire employees given employee turnover in the industry, it did not subcontract the department out of staffing concerns.

To the extent that staffing is ever an issue, it is not a problem Respondent normally addresses by subcontracting an entire department. Tellingly, Respondent has no intention of ever subcontracting again. Tr. 533.

(iv) Respondent's later actions demonstrate Respondent's animosity toward the Union's campaign.

As discussed below, Respondent's eventual discharge of the entire housekeeping department, as well as the actions and statements of its agents demonstrate Respondent's animus towards the Union's campaign. On two separate occasions, both housekeeping supervisor Percida Rosero and human resources director Osiris Arango told an employee that Respondent brought in HSS because of the Union. Tr. 175-176, 275-276. Given the significance of Respondent's later violations, there should be no question Respondent subcontracted the housekeepers because of an unlawful motive. The ALJ correctly found the subcontracting of the work was unlawful. ALJD 8:36-39.

(2) Respondent unlawfully failed to consider for hire the housekeeping department. (Respondent's exception 4)

The ALJ found that, once HSS informed Respondent it would end the contract effective October 19, Respondent refused to hire back the housekeeping employees because of their continued union activities. ALJD 10:17-19. In its fourth exception, Respondent argues that it was not unlawfully motivated in ending the employment of the housekeeping department, and argues two justifications for its actions: (1) it had to replace the entire housekeeping staff because of the low customer satisfaction ratings; and (2) Respondent was concerned that HSS would take the housekeepers with it to another hotel. Neither of these reasons has any merit.

Respondent had no legitimate reason to replace the housekeeping department based on performance. Throughout this case, Respondent has argued that the customer satisfaction ratings

were the determining factor in all its decisions regarding the evaluation and subcontracting of the housekeeping department. To the degree that Respondent asserts it had discharged HSS's entire housekeeping staff because of customer satisfaction, it should be noted that two of the four highest months for guest room ratings for the year occurred in September and October. GC Ex. 3. The lowest rated month was in December 2012 (when employees worked directly for Respondent), and there is no evidence Respondent disciplined, yet alone discharged, anyone in response to those low scores. GC Ex. 3.

Respondent provided no evidence whatsoever showing any deficiencies in the performance of the housekeeping department. Rather, Respondent's own witnesses confirmed that there were good employees among those discharged. When asked if there were any good employees, director of housekeeping Blanca Dunleavy said, "...all of them, they are good people. I have no issues with them." Tr. 699. General manager Jeff Rostek also confirmed that there had been good employees among those discharged. Tr. 510. When asked if Respondent had considered keeping any of the good employees, Rostek declined to provide any answer: "I don't -- I don't know. I don't recall..." Tr. 510. While Respondent claimed that staffing had been a problem, it provided no lawful explanation for not keeping good employees.

Respondent claims it had to end the employees' employment out of concern HSS would move them to a competing hotel. Tr. 533-534, 693. However, as the ALJ found, this assertion is "absurd." ALJD 10:11. HSS had no contract with any competing hotel, and specifically waived any contractual restriction so Respondent could keep the housekeepers. Tr. 443, 452, 465, GC Ex. 4. HSS would not have waived its contractual rights to the employees if it had any place to use them. Tr. 465. This was obvious to Respondent, and its claims to the contrary are untrue.

Respondent ended the employment of its housekeepers to end the union campaign – there is no other plausible explanation.

(3) Respondent committed multiple violations of Section 8(a)(1). (Respondent's exceptions 5, 6, and 7)

The ALJ appropriately found that Respondent repeatedly violated Section 8(a)(1) of the Act. Respondent objects to these findings in its fifth, sixth, and seventh exceptions. Contrary to Respondent's claims, however: (A) Respondent engaged in unlawful threats and interrogations; (B) The complaint was appropriately amended at trial; and (C) "Fact #2" of Respondent's campaign material was unlawful. The ALJ's finding of violations should be adopted.

(A) Respondent engaged in unlawful threats and interrogations.

Eight different employees testified at trial as to Respondent's threats and interrogations in response to the union campaign. While supervisor Percida Rosero was one of Respondent's primary actors committing these violations, Respondent never called her as a witness. In its fifth exception, Respondent again denies violating the Act, but makes no meaningful argument in its defense. The ALJ rightly credited all of the General Counsel's witnesses and correctly found that Respondent committed multiple violations of Section 8(a)(1), and those findings should be adopted by the Board. ALJD 10:39-40.

(B) The complaint was appropriately amended at trial.

The General Counsel timely subpoenaed documents from Respondent which were not provided until mid-trial. Tr. 382, 525-526. Included in these documents was a flyer labeled "Fact #2." GC Ex. 22. As discussed below, the flyer was distributed to employees and contained an unlawful threat as found by the ALJ. ALJD 13:14-16. In its sixth exception, Respondent claims that the ALJ inappropriately allowed the General Counsel to amend the complaint at hearing to include this flyer. The amendment was made prior to the General Counsel resting its case-in-

chief, and Respondent has had every chance to dispute the illegality of the flyer. The amendment to the complaint was formally made as GC Ex. 24, despite Respondent's claim otherwise in its exceptions. Respondent's due process rights have not been violated, and its sixth exception should be rejected.

(C) "Fact #2" of Respondent's campaign material was unlawful.

The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by distributing Fact #2 to employees. ALJD 13:14-16. Fact #2 states:

> "**Question:** Would the enforcement of work rules change if the Union is voted in?
>
> **Answer:** YES! The rules would be applied and enforced more strictly. Right now, managers have a lot of flexibility, and room to be fair. We believe in "extra chances" (except for very serious violations).
>
> In a Union hotel, that would go away. The rules would *have* to be enforced *very* rigidly. That's just the way it is in 'union' companies – employers are *afraid* of "doing favors"; *afraid* of being flexible.
>
> Why is that? Because 'union' companies worry that when they give an otherwise good employee an 'extra chance', the union will use it against them later on – by a grievance filling – when the same violation is committed by an employee who *really does* deserve to be fired.
>
> *This is a bad thing for good employees.*" GC Ex. 22.

Employers cannot impose, or threaten to impose, more onerous working conditions as a result of unionization. *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995). Specifically, it is unlawful for an employer to make a statement that, if a union were to succeed in its campaign, employees would suffer a loss of flexibility at work. See *id.* at 484 (finding unlawful a supervisor's explanation that under a union contract, employees would lose flexibility in their work schedules). In Fact #2, Respondent stated unequivocally that the work rules "would be applied and enforced more strictly." It then goes on to state that currently, managers can be very flexible, and have "room to be fair;" but "in a Union hotel, that would go away." It then states, in italics, that "The rules would *have* to be enforced *very* rigidly." Finally, the entire flier is labeled

under a bold, larger-font heading: "FACT." Any employee reading this statement would clearly understand it to mean that if the union is voted in, workplace rules will automatically be enforced more strictly and flexibility will end. This threat is a violation of Section 8(a)(1) and the ALJ's finding and conclusions should be affirmed.

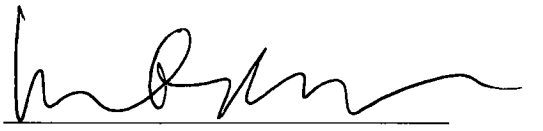
(4) Respondent unlawfully discharged Margaret Loiacono. (Respondent's exception 8)

The ALJ correctly found that Respondent discharged Loiacono in violation of Section 8(a)(1). ALJD 16:9-10. Respondent, in its eighth exception, asserts that it did not discharge Loiacono in violation of Section 8(a)(3). While Respondent is confused as to what violation the ALJ found, the evidence is clear that Respondent discharged Loiacono because it viewed her as "a potential obstacle in relation to [its] own election campaign propaganda." ALJD 16:8-9. While Respondent focuses on the fact that Loiacono was not herself actively involved in supporting the Union, that fact is irrelevant. An employer violates the Act if it retaliates against an employee it believes engaged in protected activity, regardless of whether or not the employee *actually* engaged in the activity. E.g., *The Earthgrains Company,* 351 NLRB 378 (2007). The ALJ correctly concluded that, while Loiacono did not join or support the Union, Respondent's management viewed her as a potential obstacle in relation to their own anti-union campaign, and discharged her in violation of Section 8(a)(1). ALJD 16:6-10.

CONCLUSION

For all of the reasons cited above, the General Counsel respectfully requests that the Board reject and dismiss each of Respondent's exceptions and adopt the Administrative Law Judge's decision.

Respectfully submitted July 3, 2013.



Brent Childerhose
Counsel for the General Counsel
National Labor Relations Board, Region 29
Two MetroTech Center, Fifth Floor
Brooklyn, New York 11201