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INTRODUCTION

The following brief in support of Exceptions to Administrative Law Judge Mary Miller Cracraft's March 5, 2014 Findings, Conclusions, and Order (hereinafter "ALJD") is respectfully submitted by Respondent (the "Space Needle"). The Space Needle operates an iconic observation tower and restaurant in downtown Seattle. It has had a collective bargaining relationship for many years with UNITE H.E.R.E. Local No. 8 ("Union") for its food and beverage bargaining unit.¹ (Tr. 508:20-23).

The parties have had a long history of stable labor relations since the 1980s. The parties have also been involved in a protracted labor dispute since 2011 because the Union has insisted on inserting new provisions relating to subcontracting and successorship into the labor agreement. The ALJD reached erroneous findings and conclusions that were unsupported by the record and contrary to Board precedent. The Complaint against the Space Needle must be dismissed.

PAYROLL DUES DEDUCTION

FACTS

The facts regarding this claim were not contradicted by the General Counsel and are as follows. The Space Needle's last collective bargaining agreement with the Union expired on May 31, 2011. (G.C. Exh. 33). The parties operated under a day-to-day extension of the Agreement until late May 2012. (Tr. 509:4-7; 745:2-10). At that time, the Space Needle announced that it was terminating the extension agreement and would be terminating the deduction of Union dues under the expired labor agreement. (Tr. 671:16-672:6). Accordingly, pursuant to then-existing NLRB law under *Bethlehem Steel*, 136 NLRB 1500

¹ References to the Administrative Law Judge Mary Miller Cracraft's March 5, 2014 Decision are indicated as "(ALJD ____)." Citations to witness testimony contained in the official transcript of the proceeding are indicated as "(Tr. PAGE : LINE)." Citations to exhibits are indicated as "(R. Exh ____, p. ____)" or "(G.C. Exh ____, p. ____)."

(1962), the Space Needle lawfully ceased deducting dues from employee paychecks on June 1, 2012. (Tr. 509:4-7; 745:2-10; G.C. Exh. 37).

Despite the lawfulness of Respondent's cessation of dues deductions, on June 5, 2012, the Union filed an unfair labor practice charge with Region 19 under Case No. 19-CA-082477 alleging that the Space Needle had unlawfully, without bargaining, ceased dues deduction at the expiration of the contract. (R. Exh.1). Region 19 issued a *Complaint and Notice of Hearing* on the Union's charge, setting a hearing date for January 22, 2013. (R. Exh. 3)² The Region did not withdraw this Complaint until March 6, 2013.

On December 12, 2012, the NLRB issued its decision in *WKYC-TV*, 359 NLRB No. 30 (2012). The Board announced in the *WKYC-TV* case that it was reversing the holding in *Bethlehem Steel* and was prospectively going to require an employer to bargain with a union before discontinuing dues deduction after the expiration of a labor agreement. (Tr. 13:14-15).

On December 19, 2012, the Union sent a letter ghostwritten by its attorney to Beth Reddaway, Human Resources Manager for the Space Needle. (G.C. Exh. 58; Tr. 509:8-17). The Union's labor counsel ghostwriting a letter to Reddaway was unusual, as previously when discussing the lawfulness of the dues cessation the Union communicated directly with the Space Needle's labor counsel. (R. Exh. 2). In its letter, the Union falsely stated that the *WKYC-TV* decision required the Space Needle to immediately resume the discontinued dues deduction program, and demanded that the Space Needle restore the dues check-off program by the next pay date. (*Id.*). At the time the Union sent the December 12 letter, it knew that the Space Needle's labor counsel was out of his office on vacation through the Christmas holidays and through a good part of the month of January. (Tr. 546:11-14; 675:19-676:4).

² The hearing date was subsequently moved to April 2013. (Tr. 713:3-13).

The Space Needle did not immediately respond to the Union's December 19 letter, nor did it reinstitute the dues deduction practice as demanded by the Union. (Tr. 655:1-14; 674:9-24; 681:4-16). Understandably, prior to committing to any position on the legal implications of *WKYC-TV*, the Space Needle was waiting for its vacationing labor counsel to weigh in on the issue which he did in February 2013. (Tr. 676:1-681:3).

In the interim, on January 2, 2013, the Space Needle sent a response letter to the Union. The letter was written by Ron Severt, the Space Needle's CEO, and signed by Robin Ylvisaker, the Space Needle's Vice President of Finance, because Beth Reddaway was out of the office. (Tr. 676:5-7; G.C. Exh. 59). The letter equivocally stated:

We are comfortable in our decision related to dues deduction post termination of the day-to-day extension of our Agreement on May 29, 2012, but feel the recent NLRB ruling supports your position that we should begin withholding dues as soon as you can provide us the information necessary to do so.³

The letter further stated that in order for the Space Needle to be able to restart dues deduction, it would need certain information from the Union. (*Id.*)⁴

Between January 4 and January 7, 2013, the Space Needle and office staff at the Union exchanged correspondence regarding the requested dues information. The Union never provided an accurate list of information requested by the Space Needle.

³This statement by the Space Needle describes the two positions of the parties in response to the Union's request for the Space Needle's position. The statement says on the one hand the Space Needle is comfortable with its position, and on the other hand there is support in the recent NLRB ruling for the Union's position. The statement does not state the Union is correct about the meaning of *WKYC-TV*. The language after the word "that" is grammatically on its face a description of the Union's position and not an affirmative statement that the Space Needle was agreeing with the Union's position. Both the Board and courts have found that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 US 693, 708 (1983). The ALJD properly found and concluded that this statement was equivocal. (ALJD, p. 4).

⁴As the Space Needle had not made a determination as to the legal implications of *WKYC-TV*, the letter did not state the Space Needle "must," "shall," or "will" restart the dues program. The letter stated "can," which means "be able to" and is permissive, not mandatory, language.

(Tr. 650:8-652:25).⁵ On January 11, 2013, Ylvisaker emailed Van Rossum at the Union. (G.C. Exh. 62). Ylvisaker notified Van Rossum that the Space Needle would not be able to get Union dues into the payroll system for January 8 due to errors in the documents received from the Union, and the next potential date for dues deduction would be January 29, 2013. (*Id.*).

Ylvisaker and Severt testified that at this time no decision had been made by the Space Needle as to whether or not to restart the dues deduction. (Tr. 652:17-22). Reddaway also testified that no such decision had been made. (Tr. 740:23-741:10). At this time, the Space Needle's labor counsel was still out of town on vacation and the Space Needle was therefore unable to obtain the legal guidance it needed to make a final decision. (Tr. 674:19-24). On January 21, 2013, Van Rossum emailed the Space Needle's labor counsel and stated that if the Space Needle restarted the dues deduction program, the Union would withdraw its pending unfair labor practice charge regarding dues deduction once check-off for new hires was reinstated. (G.C. Exh. 61).

On January 31, 2013, Van Rossum emailed Ylvisaker and Grimm again, stating that he would move to withdraw the unfair labor practice charge for the dues deduction as soon as payment arrived. (G.C. Exh. 62). The Space Needle never affirmatively responded to Van

⁵The ALJD erroneously concluded that the Union had responded with an accurate list of employees and the amounts owed. (ALJD p. 3 and p. 5). Reddaway worked to ensure that if the Space Needle decided that *WKYC-TV* required it restart dues deduction, that the Space Needle would be ready with accurate information and valid authorizations. (Tr. 713:20-25; 715:3-716:9; R.Exh. 14 and 19). The Union never provided accurate information. (Tr. 717:19-25; 718:5-719:25; 721:14-722:6; 724:1-728:24; 729:3-730:23; 739:24-740:21; R.Exh. 15, 17, 18; G.C. Exh. 62). Ylvisaker likewise testified that the Union failed to provide accurate information by the January 7 date and afterwards. (Tr. 660:14-17; 664:3-665:17). Likewise, the General Counsel possessed the burden to prove all elements of contract formation, including consideration and any conditions precedent to formation, and there was no showing by the General Counsel that there had ever been a provision of accurate information by the Union by January 7, 2013. In fact, at the time of February communication to the Union stating that the *status quo* would not change, the Union still had not provided accurate information. (Tr. 740:23-741:10).

Rossum's offer to drop the Union's unfair labor practice charge in exchange for restarting the dues deduction program. (Tr. 547:15-11). This was the first time in the parties' discussion that an offer was made by the Union.⁶

On January 24, 2013, the NLRB issued a decision in *C&G Distributing Co., Inc.*, 359 NLRB No. 53 (2013), which confirmed that the new rule established in *WKYC-TV* applied only prospectively and that the *Bethlehem Steel* decision would continue to apply to cessation of dues check-off prior to *WKYC-TV*.

On February 11, 2013, the Space Needle's labor counsel emailed Van Rossum, informing the Union that the Space Needle would be maintaining the *status quo* and would not be reinstating the dues deduction program as demanded by the Union. The Space Needle did so based upon the conclusion that the NLRB case law recently issued had confirmed that the Space Needle was correct under the law when it ceased deducting dues and it had no obligation to restart the dues deduction program. (G.C. Exh. 63).

Van Rossum had a telephone conversation with the Space Needle's legal counsel shortly after he received the February 11, 2013 email and they discussed the subject matter in the email. (Tr. 558:1-5; 558:21-25). In the conversation, Van Rossum was told that the Space Needle was not going to agree with the Union's position to restart dues. (Tr. 558:6-10). Van Rossum then stated, "If there is no deal, there is no deal. We aren't going to withdraw the charges." (Tr. 559:6-10). The Union never made any other offer or counteroffer after this rejection by the Space Needle of the Union's offer to withdraw charges in exchange for restarting of the dues program.

⁶The Space Needle never restarted the dues deduction program nor did it ever make any payment to the Union with regard to withheld dues. (Tr. 681:4-16). The *status quo* never changed.

On February 13, 2013, Van Rossum sent a letter (R. Exh. 4) to Beth Reddaway in which he discussed the dues deduction situation along with other issues. In that letter, Van Rossum stated:

Although just weeks ago **the Space Needle had committed to stop violating the National Labor Relations Act** by again providing it's represented employees with the option to use payroll deduction to pay their union dues. [Sic.] Now with no notice to the Union that **it is considering changing its position that it will abide by the law....**

(R. Exh. 4) (emphasis added). Thus, it is clear from the Union's own contemporaneous statements that it believed the parties had been discussing compliance with *WKYC-TV* and not, as erroneously found by the ALJD, negotiating a contractual bargained-for-exchange that would legally require the Space Needle to restart the dues deduction program and indefinitely operate that program on behalf of the Union.

On February 21, 2013, the Union filed a new charge against the Space Needle regarding the dues deduction situation, alleging that the Space Needle had violated the Act when, **"On or about February 12, 2013, the Employer announced it would continue to refuse to provide payroll dues deduction."** (Tr. 560:15-561:6) (emphasis added). Nothing in this charge referenced that an agreement had been reached by the parties.

After the filing of this charge by the Union, on March 6, 2013, the Region subsequently issued an order approving a withdrawal request dismissing the prior frivolous dues deduction Complaint issued by the Region, and withdrew the Notice of Hearing with regard to that prior frivolous charge (NLRB Case No. 19-CA-082477). Finally, on April 26, 2013, the Region issued its Complaint in the current case pending before the NLRB.

Exceptions #1-2: The ALJD erroneously failed to consider, find, and conclude that the Space Needle at all times complied with WKYC-TV.

It is undisputed that the Space Needle never changed the dues check off *status quo* in response to the Union's false representations relating to *WKYC-TV*. Accordingly, the Space Needle at all times complied with the legal requirements of *WKYC-TV* despite the Union's false representation as to what was legally required by *WKYC-TV*.

The *WKYC-TV* decision, as well as following cases like *C&G Distributing Co., Inc.*, held that the Space Needle was not obligated to restart its dues deduction program. Here, the Space Needle ceased deducting dues prior to the *WKYC-TV* decision and was not, therefore, legally required to restart the dues deduction program. There was no violation of the law when the Space Needle maintained the *status quo* and did not restart the dues deduction program.

The General Counsel's contractual agreement theory is premised on a case cited in Footnote 33 of *WKYC-TV*. This *dicta* is inapplicable because the Space Needle, despite the persistent false statements by the Union as to the requirements of *WKYC-TV*, never changed the *status quo*. Specifically, Footnote 33 of the *WKYC-TV* decision cites *Tribune Publishing Co.*, 351 NLRB 196 (2007), where the Board held that if an employer lawfully ceases a dues deduction program, but then changes the *status quo* and implements a direct deposit of dues system pursuant to an express agreement, the employer violates Section 8(a)(5) if it thereafter unilaterally terminates that new direct deposit system. (*Id.*). In the present case, unlike in *Tribune Publishing*, the Space Needle never changed the *status quo* by implementing a new dues deduction system and then subsequently unilaterally stopping the new dues deduction program. There was therefore no change in *status quo* and no unlawful unilateral change in working conditions.⁷

⁷Moreover, unlike in the present case, in *Tribune Publishing* there was no false contention by the union that new Board law required the employer to restart a direct deposit of dues program.

Exceptions #3-9: The ALJD erroneously failed to find and conclude that there did not exist offer, acceptance, and consideration in the context of a bargained-for-exchange necessary to find a binding agreement requiring the Space Needle to restart the dues deduction program.

Both the Board and courts have found that waivers of statutory rights are not to be lightly inferred, but instead must be “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 US 693, 708 (1983). The Board, in applying this test, has held that before a waiver can be found, a contract clause must specifically include the subject at issue, bargaining history must show that the matter was fully discussed during negotiations, and the party against whom waiver is sought must have consciously yielded its interest in the subject. *Johnson-Bateman Co.*, 295 NLRB 180, 184-88 (1989). Under Board law, an obligation arises only if the parties have a “meeting of the minds” on all substantive issues and material terms of the agreement. *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). Whether the parties have reached a “meeting of the minds” is objectively manifested by what the parties said to each other. *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992).

The Board has traditionally adopted many of the general elements of the common law of contracts. *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973); *Shreveport Garment Mfrs.*, 133 NLRB 117, 121 (1961); *NLRB v. Burkhart Foam, Inc.*, 848 F.2d 825, 829 (7th Cir. 1988) (“we may look to traditional rules of contract interpretation consistent with federal labor policies”); *Lozano Enterprises v. NLRB*, 327 F.2d 814, 819 (9th Cir. 1964); *Ben Franklin National Bank*, 278 NLRB 986 fn. 2 (1986). Where there is no meeting of the minds, there can be no agreement. *Palm Beach Pops*, 343 NLRB 176, 177 (2004). Board law requires that an agreement must be complete in order to show that there has been a “meeting of the minds” necessary to the formation of a contract. *American Standards*, 352 NLRB 644, 645 (2008). The Board applies the principle that the parties must have made

commitments in the context of a bargained-for-exchange of consideration. *Sacramento Union*, 296 NLRB No. 477, n.12 (1989).

Here, there is no clear and unmistakable language of waiver. The parties' discussions involved the legal implications of *WKYC-TV* and that the Space Needle would act lawfully to not violate the National Labor Relations Act. Long after the events in question, the ALJD erroneously found that an agreement was created that neither party intended and for which there does not exist evidence of contract formation. The ALJD relies upon only two documents—the December 19, 2012 letter from the Union, and the Space Needle's January 2, 2013 response. There exists no memorandum of understanding, no negotiation, no complete document, and none of the trappings of contract formation whatsoever to suggest what occurred was contract formation rather than discussions of legal compliance.

Importantly, the record does not include any writing that specifically states the Space Needle was contractually agreeing to restart the dues deduction program and operate it indefinitely on behalf of the Union. The language in the parties' discussions is clear: the Union falsely stated what *WKYC-TV* meant and demanded legal compliance with *WKYC-TV*. This is not a contract. Nowhere does the Space Needle in any communications state "the Space Needle shall resume and operate its dues deduction program and be contractually obligated to continue said program for the indefinite future."

There was no offer by the Union. The Union did not "request" that Respondent reinstate dues deduction. Instead, the Union falsely stated in its December 19, 2012 letter that *WKYC-TV* required the Space Needle to restart its dues deduction program and demanded the program be restarted by the next pay date. This is not an offer to enter into a contract. An offer is the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." REST

2d CONTR § 24. The key concept involves giving the addressee the apparent power to conclude a contract without further action by the other party. *Fletcher Harley Corp., v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 250-51 (3rd Cir. 2007).

There was no consideration offered by the Union. There exists no bargained-for-exchange created by these communications. This is not a contract whereby the Union can claim the Space Needle unequivocally agreed in exchange for some promise of value by the Union to contractually bind itself to restart and indefinitely operate a dues deduction program on behalf of the Union. The Union offered nothing of value and provided nothing value. The Union never stated anything such as “if you promise to do x, we promise to do y.” There was nothing in the Union’s false statement and compliance demand that a person could reasonably construe as negotiations of a bargained-for-exchange, or that any reasonable person would objectively believe that a contract binding both parties to some promised exchange of value could be completed upon acceptance of a thing of value from the offeror. In fact, the Union offered nothing in return.

There was no acceptance of an offer by the Space Needle. The Space Needles’ January 2, 2013 letter does not constitute acceptance of an offer, formation of a legally binding agreement, or the requisite legal requirements such as consideration, meeting of the minds, and bargained for exchange necessary to legally bind a person or entity to a future contractual obligation. “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” REST 2d CONTR § 50. An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance. REST 2d CONTR § 53. The offeror controls the manner and method of acceptance. *Id.* (at comments; *Fletcher Harley Corp.*, 482 F.3d at 250-51.)

The Union offered nothing to the Space Needle, and the Space Needle accepted nothing from the Union when it responded to the Union's false compliance demand. The Union demanded that the Space Needle restore the dues check-off practice by the next pay date. The Space Needle did not restore dues check-off practice by the next pay date, or at any time. Accordingly, there was no acceptance of any "offer" from the Union to enter into a contract no matter how unreasonably one attempts to construe the language in the Union's letter to the Space Needle.

The January 2, 2013 letter does not state an affirmative position, but merely describes both positions and that Respondent is comfortable with its position, while on the other hand, *WKYC-TV* provided some support for the Union's position. Nothing in this statement constitutes offer and acceptance or a bargained-for-exchange between the parties. It is a description of the parties' positions with respect to *WKYC-TV*.

The language relied on by the ALJD states "we can [be able to/have the power to] reestablish automated dues collection." (G.C. Exh. 59). The Space Needle said we "can," it did not say we "shall" nor did it say we "must." This is permissive language, not mandatory language. It is beyond dispute that "may" and "can" are permissive, not mandatory, terms. *Anderson v. Yungkau*, 329 US 482, 485 (1947); *Donaldson v. Informatica Corp.*, 420 Fed.Appx. 204, 206 (3rd Cir. 2011); *Source Search Technologies, LLC v. Lending Tree, LLC*, 2007 WL 1302443 *8 (D.N.J. 2007). Here, the Space Needle saying it "can" restart the dues collection even if all the other elements of contract formation were present, did not bind the Space Needle to restarting the dues collection program and operating it indefinitely on behalf of the Union. The language is permissive, not mandatory.

The language in the letter about when the Union can expect dues that are collected to be provided describes the customary delivery timing if compliance with *WKYC-TV* required Respondent to change the *status quo* and resume dues deduction. This language on its face states what the Union should “expect” if dues were collected by the Space Needle. It is undisputed that the *status quo* was not changed and dues were therefore not collected by the Space Needle. As dues were not collected by the Space Needle, the language is moot. The language merely states what one should expect if the Space Needle collected dues pursuant to *WKYC-TV*.

Exceptions #10-11: The ALJD erroneously failed to find and conclude that to the extent an agreement existed, the agreement was that the Space Needle would not violate the law after issuance of the *WKYC-TV* decision and it is undisputed that the Space Needle complied with the law after issuance of the *WKYC-TV* decision.

The ALJD erroneously found that the terms of the agreement between the parties required the Space Needle to restart and indefinitely operate a dues deduction program. This is erroneous because the terms of any purported agreement involved the legal implications of *WKYC-TV* and legal compliance with that new NLRB decision. Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning. REST 2d CONTR § 201. Here, when the context of the discussion between the parties is examined, it is clear that the parties were discussing compliance with the *WKYC-TV*, not negotiating a contractually binding agreement.

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

Spectrum Health-Kent Community Campus and International Union, United Automobile, 353 NLRB 996, 1001 (2009).

In the present case, the Union itself stated that all it believed the Space Needle had committed to was: “to stop violating the National Labor Relations Act” based upon the Union’s false statement as to the meaning of *WKYC-TV*. Likewise, the Space Needle’s witnesses also testified that they believed the context of the discussions related to the legal implications of *WKYC-TV* and whether legal compliance would require the Space Needle to restart the dues deduction program. (Tr. 652:8-18; 675:10-16; 676:8-20). Those communications show that the parties were contemplating and discussing legal compliance and *WKYC-TV*, rather than negotiating a voluntary agreement to restart dues deduction.

Accordingly, any “agreement” between the parties was that the Space Needle would act lawfully and not violate the law after the Board’s issuance of *WKYC-TV*. The discussion between the Union and the Space Needle was always legal compliance—what requirements did *WKYC-TV* impose upon the Space Needle, if any. Accordingly, the only agreement one could possibly find is that the terms of that agreement was the Space Needle would “abide by the law.”⁸ It is absolutely clear from its communication on February 13, 2013, that the Union viewed the prior communications and conduct of the parties to be a commitment by

⁸ In its opening statement, Counsel for the General Counsel stated: “This agreement was based upon the Union’s letter to the Space Needle on December 19, 2012 telling the Space Needle that *WKYC-TV* required the Space Needle to begin deducting dues, and the January 2, 2013 response from the Space Needle that informed the Union that the parties were in agreement that *WKYC-TV* meant that dues should be withheld.” (Tr. 13:16-22). Thus, the General Counsel’s very own theory at hearing was that the discussion between the parties related to the legal implications of *WKYC-TV* to the lawfully ceased dues program pursuant to *Bethlehem Steel*. It is also undisputed that the Space Needle never stated that the “parties were in agreement that *WKYC-TV* meant that dues should be withheld” as the General Counsel theorized at hearing. It is undisputed that *WKYC-TV* does not require the Space Needle to deduct dues and that the Space Needle has always been in full compliance with *WKYC-TV* and *Bethlehem Steel*. Accordingly, there was no breach of any purported agreement.

“the Space Needle “to stop violating the National Labor Relations Act.” Thus, the terms of any agreement between the parties must be construed as that the Space Needle would follow the legal implications of *WKYC-TV* and its effect, if any, upon the Space Needle’s lawful conduct pursuant to *Bethlehem Steel*.

This is also clear in the charge filed by the Union. On February 21, 2013, the Union filed a new charge against the Space Needle regarding the dues deduction situation, alleging that the Space Needle had violated the Act when, “On or about February 12, 2013, the Employer announced it would continue to refuse to provide payroll dues deduction.” (Tr. 560:15-561:6) (emphasis added). Notably, this charge was filed shortly after the end of the discussions between the parties that are at issue in the present case. Nowhere in this charge does it state the parties had entered into an agreement, enforceable or otherwise, binding the Space Needle to restart and indefinitely operate a dues deduction program on behalf of the Union. There is no mention of agreement or negotiation, or even a hint that the Union believed an agreement had been reached at the time of this contemporaneously filed charge.

Exceptions #12-13: The ALJD erroneously failed to consider, find, and conclude that to the extent there existed an agreement between the parties, the agreement was not breached.

To the extent there was an agreement to comply with the law, it is without dispute that the Space Needle was not violating the National Labor Relations Act by continuing its lawful cessation of the dues deduction program after *WKYC-TV* and there is, therefore, no breach of any such purported agreement.

Exception #14: The ALJD erroneously failed to consider, find, and conclude that any alleged agreement to restart dues deduction is barred by the Union's misrepresentation.

Although the issue was raised in the Respondent's Answer and Post-Hearing Brief, the ALJD failed to even consider whether the Union's misrepresentation bars the finding of an agreement in this case. A misrepresentation is an assertion that is not in accord with the facts. REST 2d CONTR § 159. If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party, any resulting contract is voidable by the recipient. REST 2d CONTR § 164.

The Board has long held that misrepresentation is a defense to an agreement or contract formation. *See, e.g., Checker Taxi*, 228 NLRB 639, 643-45 (1977) (where the union had drafted a contract and misrepresented what the language about leasing meant). In *Checker Taxi*, the employer accepted the union assurances that the language allowed leasing. Meanwhile the union had told its members that the language prohibited leasing. *Id.* After the employer's counsel had finally reviewed the language and told the employer that it prohibited leasing, the employer refused to sign the agreement. *Id.* The Board found that the union had actively misrepresented language to the employer and dismissed the charges against the employer. *Id.*

Similarly, in *U.S. Postal Service*, 204 NLRB 292, 293-94 (1973), the Board found that a union had misrepresented its intentions and the underlying facts to an employer in order to get an employer to agree to new vacation language. *Id.* The Board found that the union's misrepresentations invalidated the company's agreement to adopt the union's proposed language, stating in part "It is evident to us that Kaiser would not have done so had he known the underlying facts of the situation." *Id.* at 294. In these circumstances the Board found that there is no meeting of the minds and therefore no agreement. *Id.*

In the instant situation, the Union actively misrepresented the legal requirements of *WKYC-TV* in order to induce the Space Needle to resume dues deduction. The Union's attorney drafted a letter to the Space Needle's Human Resources Manager, falsely claiming that *WKYC-TV* required the Space Needle to restart dues deduction. The Union's attorney did so despite that past communications on the dues issues were handled with the Space Needle's labor counsel. The Union sent this letter during a time it knew the Space Needle's labor counsel was on vacation. While its labor counsel was unavailable, the Space Needle staff responded equivocally to the Union about the parties' respective legal positions.

The Union continued to actively misrepresent the *WKYC-TV* holding for at least two months. During this time, Region 19 of the NLRB inexplicably provided support for the misrepresentation by failing to withdraw its pending frivolous Complaint against the Space Needle for discontinuing its dues deduction program back in June of 2012, despite the holdings in *WKYC-TV* and *C&G Distributing*. Once the Space Needle was able to obtain accurate advice from its labor counsel, it notified the Union that it would not be changing its position, would continue the *status quo*, and would be following the law established under *WKYC-TV* and *C&G Distributing*.

The Union's active misrepresentations to the Space Needle staff regarding the legal requirements of *WKYC-TV* rendered any alleged "agreement" in this case invalid and voidable by the Space Needle. The Space Needle's labor counsel effectively voided and/or rescinded any purported agreement between the parties when he notified the Union on February 11, 2013 that the Union's statement as to the meaning of *WKYC-TV* was false and that the Space Needle would consistent with *Bethlehem Steel* and *WKYC-TV*, maintain the *status quo*.

Exceptions #15-16: The ALJD erroneously failed to consider, find, and conclude that the General Counsel’s claim that Respondent entered into a legally binding agreement to restart dues deduction is barred by the doctrines of unilateral and/or mutual mistake.

The ALJD erroneously relied upon *Muller-Gordon*, 179 NLRB 9 (1969) to find and conclude that unilateral mistakes of law cannot be rescinded. The phrase “unilateral” appears nowhere in the *Muller-Gordon* decision, nor does the case hold that unilateral mistakes of law cannot be rescinded. The facts of the instant situation show a mutual mistake by the parties, misrepresentation by the Union, and even a unilateral mistake by the Space Needle. Accordingly, the purported agreement is invalid, voidable and/or subject to rescission. *Muller-Gordon* is not on point.

Contrary to the conclusions of the ALJD, NLRB decisions hold that mutual and unilateral mistakes can void agreements. “[T]he law of mistake as it actually works ... is not capable of being reduced to any broad single doctrine ... that every attempt at a generalization or stated rule must take into account a variety of factors and must be limited to some particular combination of them ... that, despite the oft-stated assertion that a contract can be avoided only in the event of mutual mistake, this broad generalization is misleading and untrue ... and that decisions affording relief in instances of unilateral mistake are too numerous and too appealing to the sense of justice to be disregarded.” *Mary Bridge Children’s Hosp. and Health Care Center*, 305 NLRB 570, at n.8 (1991) (internal quotations omitted); Restatement 2d Contracts § 151, Comment b (erroneous beliefs as to facts and law treated same); Restatement 2d Contracts § 153 (contract is voidable where other party knew, had reason to know, or his fault caused the mistake); *Globe Union Inc.*, 245 NLRB 145, 147 (1979) (finding unilateral mistake); *Waldon, Inc.*, 282 NLRB 583, 586 (1986) (finding unilateral mistake); *Apache Powder Co.*, 223 NLRB 191 (1976) (finding unilateral mistake).

Here, the Union was misstating the holding the *WKYC-TV* at a time when it knew that the Space Needle's counsel was on vacation and previously issues of dues deduction were discussed directly with the Space Needle's counsel. As soon as the Space Needle's counsel reviewed the allegation in the Union's letter to Reddaway, he informed the Union that is interpretation of *WKYC-TV* was wrong. If one construes the mistake as only the Space Needle's mistake, the mistake is obvious and the doctrine of unilateral mistake bars any purported agreement.

“Mutual mistake results when both parties to a contract share a common assumption about a vital existing fact upon which they base their bargain and that assumption is false.” 17A Am.Jur. 2d Contracts § 202 (2013); *American Health Care Center*, 273 NLRB 1728, n.1 and 1733 (1985); *Cook County School Bus*, 33 NLRB 647, 653 (2001) (“the parties conduct should be governed by what they agreed to and not by what was mistakenly put in the contract”); enfd. *NLRB v. Cook County School Bus, Inc.*, 283 F.3d 888, 893 (7th Cir. 2002) (citing § 155 of Restatement 2nd of Contracts: “Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of mistake of both parties as to the contents or effect of the writing, the court may reform the writing to express the agreement). The law has long recognized that it is unjust to permit either party to a transaction, in which both are laboring under the same mistake, to take advantage of the other when the truth is known. *Gayle Mfg. Co., Inc. v. Federal Sav. and Loan Ins. Corp.*, 910 F.2d 574, 582 (9th Cir. 1990) (refusing to find a binding agreement where the law was evolving at the time and citing Restatement (Second) of Contracts § 152 (1981)). The Board applies the concept of mistake to find no contract was created as a result of a mistake. “[F]airness is best served by weighing the circumstances surrounding the mistake....” *Mary Bridge Children’s Hospital*, 305 NLRB 570, fn.8 (1991) (the Board affirmed the dismissal of

charges where no agreement was reached due to mutual mistake); *U.S. Postal Service*, 204 NLRB 292, 293-94 (1973) (the Board held that no binding agreement was reached as there was no meeting of the minds and the manager was operating under a mistaken belief of fact).

Here, the entire crux of the parties' discussion was what *WKYC-TV* legally required. The false interpretation was advanced by the Union in its original December 19, 2012 letter and continued to be advanced by the Union in its communications with the Space Needle and this charge that is the subject of this Complaint. What *WKYC-TV* required was not just material, it was the point of the entire discussion. There is no doubt, and no evidence to the contrary, that the Space Needle was not aware that the Union was misrepresenting *WKYC-TV* in its December 19, 2012 letter until its labor counsel reviewed the issue and notified the Union of its incorrect interpretation of *WKYC-TV*.⁹ Likewise, as to the mutuality of any mistake, if the Union's misrepresentation was unintentional and not negligent, clearly the Union was mistaken by repeatedly asserting that *WKYC-TV* required the Space Needle to immediately resume the dues deduction program. The Space Needle also was mistaken in its belief about the case by stating that the case provided support for the Union's position that the Space Needle was legally required to resume dues deduction. The Union's mistaken representation was clearly its own fault, especially since the letter was ghost-written by the Union's attorney. The Union falsely represented the meaning of *WKYC-TV*. The Union and not the Space Needle bears the risk of that false statement, and fairness dictates that such

⁹Region 19 of the NLRB was still insisting on pressing forward with its meritless Complaint that the original cessation of the dues deduction program in June 2012 was a violation of the NLRA. The General Counsel now admits there was no good faith basis for that Complaint and Notice of Hearing relating to the dues cessation in June 2012. (Tr. 13:3-6). Yet for some reason both Region 19 and the Union were continuing to advance that frivolous claim at the time of the communications between the parties relating to *WKYC-TV* compliance.

mistaken understanding by the parties cannot form the basis of an enforceable agreement. If there ever was a case of an obvious mistake in the formation of an agreement, this is it.

Exception #17: The ALJD erroneously failed to consider, find and conclude that the only Union offer with consideration was never accepted by the Space Needle.

A proposed settlement offer with some consideration was subsequently tendered by the Union. On January 21, 2013, the Union notified the Space Needle that once dues check-off for new hires was reinstated, the Union would withdraw its pending unfair labor practice charge. (G.C. Exh. 61). This offer was repeated on January 31, 2013, with an email from Van Rossum to the Space Needle, stating again that he would move to withdraw the Union's unfair labor practice charge as soon as the dues payment arrived. (G.C. Exh. 62). It is undisputed that there was never an acceptance of either of these offers. Van Rossum himself stated that he never got a response from the Space Needle to either of those two emails. (Tr. 547:15-549:7). He also confirmed that there was no agreement in a conversation with the Space Needle's counsel shortly after he received the Space Needle's correspondence of February 11, 2013 by stating, "If there's no deal, there's no deal," and telling the Space Needle the Union was not withdrawing its ULP charge. (Tr. 558:6-559:10). Furthermore, by offering to withdraw its pending unfair labor practice charge if the Space Needle restarted dues deduction, the Union essentially admitted that there was no prior agreement to resume dues deduction.

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SERVER RECALL

FACTS

The Space Needle is a seasonal business, generally utilizing a bid in each of the four seasons to set schedules for servers. (Tr. 33:15-24). In between bids, it will add shifts to the schedule when increases in business are anticipated. (Tr. 816:23–817:4). The ALJD correctly found that the Space Needle followed its traditional practices in 2013 in setting bids and adding shifts. (ALJD 17:1-8).

The Space Needle added 25 shifts to the schedule on March 25, 2013, and converted an additional five on-call shifts into regular shifts, for a total of 30 shifts. (Tr. 860:1-18; G.C. Exh. 32, p.13). These 30 shifts, in accordance with past practice, were offered by order of seniority to those already on the schedule. (Tr. 861:24-862:8). If a new shift appears on a given server's schedule for March 25, 2013, it means the server chose to pick up the shift. (Tr. 817:25-818:5; 859:20-25; 860:1-13; G.C. Exh. 32, pp.12-13; *see also* Tr. 120:22-121:22; 212:6-213:2; 213:7-18; 216:14-16; 1016:13-25). If shifts were not taken, servers on layoff would be recalled in order of seniority to fill these shifts. (Tr. 862:6-15). In 2013, there were 10 shifts left over after servers on the schedule selected and added shifts. (Tr. 862:11-863:11). Two servers with greater seniority than Julia Dube were recalled to fill these shifts. (Tr. 861:3-23). This is the longstanding practice. (Tr. 816:18-823:6; 913:10-915:10). This longstanding practice was followed at all times after expiration of the labor agreement in May 2012. (Tr. 823:7-14; Tr. 915:13-16). There is no other way for an employee on layoff to return to the schedule. (Tr. 825:15-18).

On April 3, 2013, Mike Douglas explained to the servers that with the addition of the shifts in March 2013, the Space Needle was adequately staffed for what it thought would happen with business levels. (Tr. 943:5-24; 946:8-960:21; G.C. Exh. 6). Douglas forecast

that the business levels would be similar to 2011. (Tr. 955:3-20). At this time, there also were two servers with greater seniority than Dube out on medical leave (Nicole Lum and Brenda Elston) who would eventually be returning to the schedule. (Tr. 865:17-22; 938:21-25). Business levels did not warrant adding additional shifts or lines to the schedule. The seniority windows of laid-off employees, including Dube, expired.

Mike Douglas' forecast that business levels in April 2013 would be like business levels in April 2011 was ultimately correct.¹⁰ (Tr. 974:16-975:2). The undisputed record evidence clearly shows there was no reason for addition of servers after the March 25, 2013 additions to the schedule. The guest count records for each year were admitted into evidence. (R. Exh. 34; Tr. 971:14-23; 988:10-20). The actual guest counts for April 2013 were 18,901, for April 2012 were 20,322, and for April 2011 were 18,835. (Tr. 971:23-974:12; 983:4-20). Thus, the guest counts for 2013 turned out to be almost exactly the same amount as in 2011.

Likewise, the labor hours for each year were admitted into evidence. (Tr. 978:10-979:8; 988:10-20; R. Exh. 36). These records show that the server hours for April 2013 were 3918; for April 2012 were 4486; and for 2011 were 3924. (Tr. 978:17-981:11; 986:2-8). Thus, again, the business levels in 2013 were nearly identical to the business levels in 2011. Likewise, with these numbers, one can divide the number of guest counts in Respondent Exhibit 34, by the number of server hours in Respondent Exhibit 36, and arrive at the meals per man hour (MPMH), which shows productivity by measuring how many meals per hour were produced for each server hour worked. (Tr. 985:16-986:8). The numbers show that in addition to the guest counts, the number of server hours and meals per man hour turned out almost identical in 2013 as it was in 2011. (Tr. 986:2-8). Specifically, the number of server

¹⁰The fact Douglas was correct that April 2013 would be like 2011, and not like 2012, corroborates that his decisions were reasonable. It also conclusively shows that there was no business justification for adding additional staff after the addition of shifts to the March 25, 2013 schedule. (Tr. 959:21-14).

hours worked was almost identical with a difference of six server hours in April 2013 as compared to April 2011, and the meals per man hour differed by .02 (4.80 MPMH in 2011 and 4.82 MPMH in 2013). Business levels did not warrant adding additional shifts or lines to the schedule.

The undisputed evidence at the hearing showed that the staffing levels for 2011 and 2013 were also the same. Specifically, counting the number of servers on the schedules in each year (G.C. Exh. 32, G.C. Exh. 67, and R. Exh. 37) shows the following staffing levels:¹¹

STAFFING LEVEL COMPARISON		
2011	R.Ex. 37	Number of Servers
April 3	p.15	38
May 13	p.21	40
June 17	p.28	50
2012	GC Ex. 67	Number of Servers
April 3	p.15	44
May 13	p.20	44
June 17	p.25	53
2013	GC Ex. 32	Number of Servers
April 3	p.14	39
May 13	p.20	40
June 17	p.26	53
Document Source: Schedules		

From the above, it is apparent that in addition to having nearly identical business levels as forecast by Douglas, the actual staffing levels are also nearly identical. Specifically, there are 38 servers listed on the schedule in on April 3, 2011, and 39 servers listed on the schedule on April 3, 2013. Furthermore, one can see that after Dube’s recall

¹¹April 3 is the date of Mike Douglas’ Memorandum, May 13 is the day after Dube’s recall window expired, and June 17 is the day the summer bid started. The server count is the number of servers on the schedule for the week in which the given date falls.

window expired in May 2013, the number of servers on the schedule was identical to the number of servers on the schedule on May 2011. There is nothing in the record to suggest that Dube should have returned to the schedule between the time Douglas, at Dube and Christensen's request, determined that the shifts added on March 25, 2013 had left the Space Needle adequately staffed. Moreover, on April 3 when Douglas made that determination, there were still three persons above Dube in seniority (Brenda Elston and Nicole Lum who were out on medical leave, and Tracey McCauley whose seniority had not allowed her to return from layoff).

As the business levels and the staffing levels are the same, it is conclusive that there existed no business justification for the addition of staff after March 25, 2013. Accordingly, regardless of any alleged protected activity, Dube would not have been recalled from layoff. Likewise, the fact that there was no deviation whatsoever from the past practice in adding servers to the schedule shows that any alleged animus or protected activity played no role in the addition of staff on March 25, 2013 when Dube's seniority did not allow her to return to the schedule. Moreover, the amount of shifts added (25 plus conversion of 5 on-call shifts to regular shifts), was far in excess of the amount of shifts that could have led to Dube's recall. Consistent with past practice the existing servers chose by seniority the shifts they desired to pick up. It was the action of the existing servers picking up additional shifts that adversely led to Dube not making it onto the schedule.

Exceptions #18-19: The ALJD erroneously erred in allowing the General Counsel to assert a new theory at the hearing inconsistent with the Complaint allegation regarding server recall.

An employer has the right to know specifically what the unfair labor practices are as alleged by the General Counsel. *Comau, Inc. and Wisne Automation Employees Association*, 2012 WL 6755113 (2012). Without a specific complaint allegation, the employer is not

accorded sufficient due process to defend itself on the issue and the issue should not therefore be considered. *Id.*; *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987). It is well established that a violation of the Act cannot be properly found where the violation was not alleged in the complaint. *Waldon, Inc.*, 282 NLRB 583 (1986).

The Complaint alleges “since about March 25, 2013, Respondent failed to recall its employees from layoff, including Julia Dube.” (Third Amended Complaint, paragraph 13(a)). There is nothing in this allegation to support the ALJD *sua sponte* and erroneously finding and concluding “that the General Counsel has shown manipulation of the recall process in order to preclude recall of employees until Dube’s seniority lapsed.” (ALJD, p. 24). The allegation was always that the Space Needle failed to recall Dube.

Throughout the hearing, the Space Needle repeatedly asked the General Counsel what its theory was and the General Counsel refused to articulate its theory. (Tr. 277:4-279:13). On day five of the hearing, the General Counsel stated its theory related to the job fairs which were held in May 2013 and are completely unrelated to the March 25, 2013 recall of servers. (Tr. 613:12-615:8). On day six of the hearing, the issue came up again and still there was no articulation of the General Counsel’s theory. (Tr. 669:12-670:3). On the eighth and final day of the hearing, the issue came up again and the General Counsel refused to articulate its theory. (Tr. 976:15-977:10). The General Counsel never stated its theory was the Space Needle “manipulated the recall of servers.” The ALJD should have rejected this post-hearing claim by the General Counsel because it was not presented at the hearing, and it was not consistent with the claims presented in the Complaint and at the hearing.

The ALJD properly found and concluded that the addition of 25-30 shifts to the schedule on March 25 does not constitute a unilateral change because there is an identical past practice of unilaterally adding lines and shifts. (ALJD p. 17). The ALJD properly

found and concluded that there was no merit to the complaint allegations relating to failure to recall employees from layoff to cover the new schedules and waiting until the right of recall expired for those laid off. (ALJD p. 17). The ALJD properly found and concluded that there is an identical past practice of unilaterally adding lines and shifts. (ALJD. p. 17). The ALJD properly found that that the evidence was uniformly that a business forecast determined the number of shifts and the timing of bids. (ALJD p. 16).

There was no “failure to recall” because there existed no business justification for adding additional staff after the March 25 addition. (Tr. 959:21-14). Dismissal of all allegations is required. *See, e.g., Garret Flexible Products*, 270 NLRB 1147, 1147-48 (1984) (reversing ALJ decision and ruling that 8(a)(3) violation was not established where the selection for layoff and recall was based upon lawful considerations and business concerns); *Wackenhut Corporation*, 290 NLRB 212, 215-16 (1988) (holding no 8(a)(3) violation where the employer’s manning levels had been met).

Van Rossum admitted that the Space Needle recalls employees based upon business needs and that determination has always been left to the Space Needle to make. (Tr. 532:8-534:7). After the addition of shifts in March 2013, the business levels did not justify recalling more employees than were recalled or adding staff beyond the staffing levels that existed. There is no dispute over this issue. Union Shop Steward Lou Christensen admitted that Mike Douglas was correct and that 2013 was like 2011. (Tr. 469:4-470:1). The records show that the business levels were consistent between 2011 and 2013 and the staffing levels were consistent between 2011 and 2013. All the evidence of record clearly establishes that there existed no business reason to add any additional servers after that date. The allegation in the Complaint is completely unsupported, contradicted by the record evidence, and without merit. There was no failure to recall servers since on or about March 25, 2013.

Exceptions # 18 and 20-42: The ALJD erroneously found that the Respondent “manipulated the schedule” to avoid recalling Dube, and failed to find and conclude that the Respondent did not manipulate the recall procedure in order to preclude recall of employees during Dube’s seniority window.

The ALJD erroneously found and concluded without any specificity that the General Counsel established manipulation of the schedule to preclude recall of employees until Dube’s seniority lapsed. (ALJD p. 24). There was no evidence presented whatsoever to establish that any schedule was ever manipulated at the Space Needle. Likewise, the ALJD erroneously alludes to changes in practice, without record support and contrary to the evidence of record, which is legally insufficient. *E&I Specialists*, 349 NLRB 446, 449-50 (2007)(deviations in procedures do not establish 8(a)(3) violation); *Denver Post Corp.*, 328 NLRB 118, n.2 (1999) (unilateral change does not establish 8(a)(3) violation); *Haynes-Trane Service Agency*, 259 NLRB 83, 87-88 (1981) (unilateral change does not establish 8(a)(3) violation).

The March 7 requisition form does not establish manipulation of the schedule.

The ALJD erroneously found and concluded that a March 7 requisition form anticipated servers would be recalled on May 15, but servers were instead recalled on March 25. (ALJD p. 25). The undisputed hearing testimony was that requisition forms are issued when it is anticipated that servers might be needed, but those are subject to change based upon what happens. (Tr. 1019:3-23). For example, after the addition of shifts and lines on the March 25, 2013 schedule, the requisition anticipated two servers being needed until May 15, 2013 (Lum and Elston were on medical leave and anticipated to return fully to the schedule in May). (G.C. Exh. 71). The March 7, 2013 requisition form referenced by the ALJD related to the summer bid and had no bearing on Dube’s recall window. (G.C. Exh. 21; Tr. 122:1-125:25). The ALJD misunderstood this evidence. Even if it were first thought on March 7, 2013 that there would be no persons added until May 15, 2013, the Space Needle added 25

shifts and converted five on-call shifts for the March 25, 2013 schedule. This was to the benefit of Dube and the other servers, as Dube could have been recalled had there been enough shifts left during that March 25, 2013 schedule addition to get to her seniority level. The ALJD erroneously determined that it was not to her benefit to have shifts added that could result in her recall. Adding shifts as business forecasts change to increase server levels leading to recall cannot as a matter of logic constitute manipulation of a schedule to prevent server recall. Adding shifts is what leads to recall from layoff.

There was no evidence presented that servers were forced to take a shift. The ALJD erroneously found and concluded without any record support that servers were forced to take shifts on the March 25, 2013 schedule. (ALJD p. 25). No witnesses testified that they were forced or required to pick up shifts. The record conclusively shows without contradiction that the 25 added shifts and the five converted on-call shifts were offered by order of seniority to those already on the schedule. (Tr. 861:24-862:8). Crystal Dare specifically testified that if a new shift appears on a given server's schedule for March 25, 2013, it means the server chose to pick up the shift. (Tr. 859:20-25; 860:1-13; G.C. Exh. 32, pp.12-13; *see also* Tr. 120:22-121:22; 212:6-213:2; 213:7-18; 216:14-16; 1016:13-25). Likewise, it is undisputed that the recall of Amico and Lindsay followed seniority. (Tr. 861:3-23). This longstanding practice was followed at all times after expiration of the labor agreement in May 2012. (Tr. 816:18-823:6; 823:7-14; 913:10-915:10; 915:13-16).

The ALJD speculated hypothetically that shifts could have been added without "consent" and by "fiat." (ALJD p.25). The only server testimony presented by the General

Counsel confirmed there was no manipulation of the schedule.¹² Specifically, server John Heckendorn testified that he did not recollect if he was asked to take a shift, but it would not matter because he never changes his “bid” (meaning schedule) as he is the most senior server. (Tr. 495:11-22). The ALJD somehow interpreted Heckendorn’s testimony that he did not recall being asked to take a shift to mean that he was forced to take a shift. Heckendorn’s statement that it wouldn’t have mattered if he was asked because his schedule never changes confirms that he was not forced to pick up a shift. Heckendorn also testified: “Question: Okay. And has management ever changed your schedule without a bid?” “Answer: Never.” (Tr. 495:8-10). Moreover, if the Space Needle failed to ask Heckendorn if he wanted to pick up a shift, this would have enhanced the chances that more shifts would have been available to recall Dube and other less senior servers on layoff. It would not have been an adverse action to those on layoff.

Yet, the ALJD cites this Heckendorn testimony as the evidence of the unsupported theory of Space Needle manipulation of the schedule to avoid recalling Dube on March 25. The ALJD got it completely wrong. The schedules for March 18 and March 25 show that Heckendorn retained the same number of shifts (4) before and after March 25. (G.C. Exh. 32, p.12-13). He was not forced to take a shift and no other server was forced to take a shift.

There was no change in practice with respect to on-call shifts. The ALJD erroneously speculated without record support that on-call shifts disappearing from the schedule was manipulation of the schedule. (ALJD pp. 25). Once again, the General

¹²Dube agreed that seniority was followed when servers Amico and Lindsay made it onto the schedule from layoff the week of March 25, 2013. (Tr. 336:3-20). Dube admits that her seniority was the reason she did not make it onto the schedule when shifts were added the week of March 25, 2013. (Tr. 336:3-7). Dube admits that until employees go through and choose shifts in order of seniority, one does not know who will make it onto the schedule. (Tr. 335:5-12). Dube admits that after her seniority window expired, the Space Needle offered her a rehire position performing the same job duties, but she refused the offer. (Tr. 346:19-349-7).

Counsel never called a single witness to say they were forced to take an on-call shift, dropped an on-call shift or otherwise developed any testimony about on-call shifts. The speculative theory is also nonsensical.

The Space Needle added 25 shifts to the schedule on March 25, 2013, and converted an additional five on-call shifts into regular shifts, for a total of 30 shifts, which was to the benefit of servers on layoff because it made more shifts available for potential recall. (Tr. 860:1-18; 1016:20-25; G.C. Exh. 32, p.13). The eight on-call shifts did not disappear, five were converted to regular shifts. The ALJD misunderstood this fact. The servers on the schedule picked up those on-call shifts. (Tr. 860:11-18; 887:16-21; 1016:20-25). As those servers had picked up shifts, there existed a greater potential that the 25 added shifts would result in laid-off employees coming onto the schedule. When the shifts were added, the Space Needle had no idea how many shifts would remain for the laid off servers. (Tr. 861:24-862:15).

The ALJD also erroneously determined that on-call shifts dropping from the schedule is a historical anomaly. This conclusion is contrary to the record. The schedules show dropping on-call shifts has occurred in all years. In 2013, 7 AM on-call shifts and 1 PM on-call shift disappear from the schedule on March 25, 2013. (G.C. Exh. 32).¹³ In 2012, 9 AM on-call shifts and 4 PM on-call shifts disappear from the schedule on April 2, 2012, 3 AM on-call shifts disappear from the schedule on May 7, 2012, and 1 AM on-call shift is removed on September 17, 2012. (G.C. Exh. 67).¹⁴ In 2011, 5 AM on-call shifts disappear

¹³ In 2012 and 2013, on-call shifts are indicated by Orange and Blue boxes on the schedule. In 2011, they are indicated by Orange and Green boxes on the schedule. One can see on-call shifts removed by comparing the number of on-call shifts on the prior week schedule to the on-call shifts on the current week's schedule. (Tr. 201:23-202:11).

¹⁴ GC Exhibit 67 contains two schedules for the Week of April 2, 2012 (pp. 14 and 15). The second schedule for the Week of April 2, 2012 (GC Exh. 67, p.15) shows the removal of the on-call shifts.

on June 13, 2011, 1 PM on-call shift disappears on June 20, 2011, 1 PM on-call shift disappears on June 27, 2011, and 1 AM on-call shift disappears on September 12, 2011. (R. Exh. 37). There is no basis to conclude that schedule was manipulated by dropping on-call shifts or by converting on-call shifts to regular shifts.¹⁵ The occurrence happens on all schedules across all timeframes and there was no testimony in the record or questions asked to support the ALJD's speculative theory. There is no evidence or testimony as to how an on-call shift, which is not even a work shift (Tr. 202:6-9) could possibly have played a role in manipulating the schedule to prevent recall of employees.

There was no change in practice with respect to reapplication and interviews.

The ALJD erroneously speculated without record support that an alleged statement by Dare to Dube that laid-off employees would be required to reapply and interview somehow established manipulation of the schedule. (ALJD p. 25). It is undisputed that even if the conversation occurred as alleged, that there was no change made requiring employees to reapply or interview. Accordingly, the conversation had no effect on any employees and could not possibly support a claim of manipulation of the schedule. This conversation between Dare and Dube is alleged to have occurred prior to Mike Douglas' April 3, 2013 memorandum where he expressly explains the recall and rehiring process, which was followed and did not deviate from past practice. (G.C. Exh. 6, p.3). Likewise, Mike Douglas had met with Dube and Christensen on April 1, 2013. (Tr. 305:3-5). That he responded to Dube's questions makes sense given his contemporaneous meeting with Dube. (G.C. Exh. 19). Douglas specifically informed Dube of the process. (G.C. Exh. 25). Since the alleged interviewing and reapplication change never actually occurred, it is clear that there was no

¹⁵This post-hearing speculation should have been pled in the Complaint and questions asked of witnesses. It was inappropriate for the General Counsel to attempt to invent a new theory for the ALJD after the hearing is closed. Without waiving any objections, the theory is unsupported in the record and contradicted by the actual evidence of record.

deviation from past practice or a manipulation of the scheduling process. The ALJD's determination to the contrary was erroneous.

What servers chose to do in May 2011 before the summer bid compared to what servers chose to do in March 2013 does not support a claim that the Space Needle manipulated a schedule. The ALJD erroneously found and concluded that servers in 2011 immediately before the summer bid chose to pick up less shifts than the servers in March 2013. (ALJD p. 25). This is beside the point and is logically unsound. The Space Needle cannot control how many shifts servers choose to pick up. That the servers who worked for the Space Needle in 2011 chose to pick up shifts before the summer bid in different numbers or ratios than the servers who worked for the Space Needle in 2013, is indicative of nothing. The servers make the decision to pick up shifts using their seniority. The Space Needle does not. There was absolutely no evidence in the record that would support a speculative statistical theory that how many shifts servers chose to add in May 2011 shows that their choices in March 2013 were suspicious.

Exceptions #43: The ALJD erroneously failed to consider, find and conclude that the General Counsel failed carry its burden by failing to establish an adverse action against the alleged discriminatees.

Under *Wright Line*, the General Counsel first must prove by a preponderance of the evidence that an employee's protected activity was a motivating factor in an employer's adverse action against the employee. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 964 (2004). As a threshold matter, this requires the establishment that the alleged discriminatees suffered an adverse action. *Kennametal, Inc.*, 358 NLRB No. 108, *12 (2012) (General Counsel has the burden of establishing an adverse action was motivated by anti-union considerations). The General Counsel must establish that some action by the respondent

caused an adverse effect on the term and conditions of employment of one or more employees. *Newcor Bay City Division*, 351 NLRB 1034, 1036 (2007).

The only alleged action is the addition of 25 shifts to the March 25 schedule, and the conversion of 5 on-call shifts to regular shifts. It is undisputed that management does not know how many laid off servers will make it onto the schedule when shifts are added to the schedule. (Tr. 334:21-335:12; 861:24-863:7). The more senior servers on the schedule chose to add 15 of the 25 new shifts and picked up the 5 converted on-call shifts. The most senior laid-off servers (Amico and Lindsay) elected to take the leftover shifts. This is completely consistent with the longstanding practice, which was never deviated from. The ALJD's findings and conclusions must be reversed. The Space Needle took no adverse action. There has been no identification of an adverse action. The amount of shifts added was consistent with business forecast, the staffing levels were consistent with staffing levels in prior years under similar conditions, and the amount of shifts could have resulted in Dube making it onto the schedule. Respondent did nothing adverse. The General Counsel failed to carry its burden.

Exceptions #44-50: The ALJD erroneously failed to find and conclude that the General Counsel had failed to establish that any of the alleged animus was a motivating factor in any adverse action taken against employees.

The required elements of discrimination include protected activity by the employee, employer knowledge of the activity, and employer animus. *St. George Warehouse, Inc.*, 349 NLRB No. 84, fn.28 (2007); *Willamette Industries*, 341 NLRB 560, 562 (2004); *Famer Bros Co.*, 303 NLRB 638, 649 (1991). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor" in the adverse

employment action. *Webco Industries*, 334 NLRB 608, fn.3 (2001);¹⁶ *Stamping Specialty Co.*, 294 NLRB 703, 713 (1989) (layoff was not unlawful where, *inter alia*, the evidence did not show that the resulting workforce prevented the employer from satisfying orders); *St. Vincent Medical Center*, 338 NLRB 888, 894 (2003) (this process is not intended to allow the substitution of the NLRB for that of the employer in determining how to run its business). Though knowledge of protected activity is an element, it does not follow that proof of that element will constitute proof of animus. *Caribe Ford*, 348 NLRB No. 74, n.8 (2006). “To hold otherwise is to pile inference on top of inference.” *Id.*

The ALJD findings and conclusions of purported animus on ALJD pages 17-27, are erroneous, speculative, and unsupported by the record and fail to establish that there existed animus towards Dube or other unrecalled employees for Union activity, or that protected conduct was a motivating factor in server staffing decisions made by the Space Needle. Evidence of animus must be sufficient to support and inference that an alleged discriminatee’s protected activity was a motivating factor in the employer’s adverse employment action. *Wright Line*, 251 NLRB 1083,1089 (1980). As indicated, the General Counsel failed to establish an adverse employment action. Likewise, the General Counsel failed to establish that protected activity somehow motivated any such adverse employment action. Dube has engaged in Union activity throughout her time at the Space Needle. (G.C. Exh. 35);¹⁷ *Newcor Bay City Division*, 351 NLRB 1034, 1039-40 (2007) (the Board

¹⁶Only if the General Counsel establishes each element, does the burden of persuasion shift to the employer. *Wright Line*, supra at 1089; *Corrections Corporation of America*, 347 NLRB No. 62 (2006); *State Plaza, Inc.*, 347 NLRB 755 (2006). The burden shifts only if the General Counsel establishes that protected conduct was a “substantial or motivating factor in the employer's decision.” *Budrovich Contacting Co.*, 331 NLRB 1333 (2000).

¹⁷The Space Needle has never challenged that Julia Dube, along with many other of its employees, engaged in Union activity. There was nothing unusual about Dube’s Union activity that would lead one to even speculate that management would be engaged in some “grand conspiracy” against her.

has declined to draw an inference of discrimination when the General Counsel picks a self-serving date in an effort to show that timing of an adverse action is suspicious).

The General Counsel has not established a causal link between the purported protected activity of Dube and the staffing level determinations that occurred from March-June 2013. It is undisputed that those staffing decisions and practices were in accord with business levels and did not deviate from past practices. The General Counsel failed to establish that any staffing level determinations in March 25, 2013, or afterwards, were tainted by motivation to retaliate against Julia Dube or any other server for purported Union activity or protected conduct.

Exceptions #51-52: The ALJD erroneously failed to find and conclude that the General Counsel had not alleged a “collateral damage” or “camouflage” theory and that the evidence did not support such a theory.

Midway through the Employer’s case at the hearing, the General Counsel belatedly moved to amend its Complaint to assert a theory of “camouflage,” and that request was granted over objection by the Employer’s counsel. During the hearing, the General Counsel apparently realized that both Dube and Tracey McCauley (the person above Dube in seniority) did not make it onto the March 25 schedule because there were not enough shifts left over after the existing servers picked up shifts according to seniority. As a result, the General Counsel impermissibly tried to side-step its *prima facie* requirements by alleging camouflage or collateral damage. *Kennemetal*, 358 NLRB No. 108, *13 (2012) (rejecting General Counsel effort to use “camouflage” theory to side-step *prima facie* requirements).

Moreover, such a speculative conspiracy theory was unsupported by record evidence. The General Counsel presented no substantial evidence as to why Dare would find such “camouflage” necessary or would believe it to the benefit of the Space Needle to place more than enough shifts that 4 servers potentially (including Dube) could have been recalled from

layoff in March 2013, and have two servers recalled from layoff after the shifts were chosen based upon seniority. The ALJD's camouflage finding and conclusion is unsupported by any record evidence and must be rejected.

Exception #53. Even if the General Counsel had presented a *prima facie* case and carried its ultimate burden, the ALJD erroneously failed to find and conclude that the Space Needle had met its affirmative defense by showing that the same action would have occurred regardless of Union Activity.

Assuming *arguendo* that the General Counsel established its *prima facie* case and its ultimate burden, the Space Needle clearly established its affirmative defense. "The existence of protected activity, employer knowledge of the same, and animus does not standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.*, 340 NLRB 1093, n.4 (2003); *see also American Gardens Management Company*, 338 NLRB 644, 645 (2002). Instead, it merely shifts the burden to the employer to show by a preponderance of the evidence that the same alleged adverse action would have happened even in the absence of the protected activity. *Desert Toyota*, 346 NLRB No. 3 (2005); *Webco Industries*, 334 NLRB 608, n.3 (2001); *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996); *Neptco, Inc.*, 346 NLRB 18, 19 (2005).

Dube would not have been recalled regardless of protected activity. The record clearly shows that during the timeframe in question the only persons who made it onto the schedule were Amico, Lindsay, Elston, and Lum, all of whom are above McCauley in seniority who is in turn above Dube in seniority. It is undisputed that past practice was followed. It is undisputed that business levels were nearly identical in 2013 as they were in 2011. It is undisputed that with those same business levels, the staffing levels and meals per man hour were exactly the same in 2011 and 2013. When the additions were made to the

March 25, 2013 schedule, the amount of shifts added to the schedule was correct for the business levels. As McCauley was not recalled, Dube also would not have been recalled.

There existed no business justification for adding shifts after the addition to the March 25, 2013 schedule. After her recall window expired, Dube needed to reapply in order to be rehired. She reapplied, was offered a position by the Space Needle, but refused the Space Needle's offer of rehire.¹⁸ Regardless of any alleged protected activity, the result would be the same. The affirmative defense is met and the allegations are without merit.

Once it is understood that the amount of shifts added was correct, and that there was no deviation from past practice in the addition of those shifts, what occurs afterwards is not even subject to management action. It is undisputed that seniority determines the order in which recalls from layoff occur. Dube had less seniority than the two persons recalled from layoff in March 2013. Dube had less seniority than the two persons who returned from medical leave in May 2013. Dube had less seniority than Tracey McCauley, who also was not recalled from layoff. It is therefore clear that Dube would not have been recalled from layoff regardless of her protected or union activity.

That Dube did not make it onto the schedule was the direct result of the established practice and seniority. At no point during Dube's layoff does the record show that the Space Needle deviated from the practice of filling shifts by seniority order, from its normal and historical staffing levels, or otherwise "should" have placed more shifts on the schedule until there were enough left over that Dube would be recalled from layoff. The question here is not whether the staffing decisions were the best decisions, but whether the staffing decisions were discriminatorily motivated. *Newcor Bay*, 351 NLRB at 1040; *Gem Urethane Corp.*, 284 NLRB 1349 (1987). There is no dispute that the staffing decisions added the appropriate

¹⁸ See Exceptions, pp. 54-55.

number of shifts and servers compare to the exact same levels in 2011. There is no dispute that there was no deviation from past practice. As noted above, the staffing levels, hours per server, and guests count comparison between 2011 and 2013 all show that the Space Needle was adequately staffed during the timeframe in question. Accordingly, Dube failing to make it onto the schedule would have happened regardless.

The hearing record shows that Douglas was correct in his April 3, 2013 determination that the Space Needle was adequately staffed and there existed no business justification for additional staffing after shifts were added the week of March 25, 2013. Douglas' determination that April 2013 would proceed like April 2011, and unlike 2012, was correct. The staffing levels were identical. For the nearly identical business levels in each year, on April 3 there were 39 servers on the schedule in 2013 and 38 servers on the schedule in 2011. On May 13, 2013 (first day after Dube's recall window expired), there were 40 servers on the schedule in 2013 and 40 servers on the schedule in 2011. Dube would not have been recalled regardless of protected activity.

The ALJD erroneously rejected the affirmative defense based upon the ALJD's unsupported and erroneous findings and conclusions relating to "manipulation of the schedule." As has been shown, there is no basis in the record for those erroneous findings and conclusions. There is no evidence in the record that employees were forced to pick up shifts. The evidence is to the contrary. There was no deviation from past practice in the placing the shifts on the schedule and following seniority. Business levels completely and historically justified the number of shifts and servers on the schedule. There existed no basis for adding shifts to the schedule after the addition to the March 25, 2013 schedule. Respondent's affirmative defense was established.

LETTER COMMUNICATING OPTIONS TO EMPLOYEES

Exceptions 56-59: The ALJD erred by finding that the February 5, 2013 letters to employees violated Section 8(a)(1) of the Act.

The information contained in the letters with respect to dues authorization was necessary as the Union was demanding the Space Needle restart deduction of dues and the Space Needle needed to be ready to do so if and when it was determined whether the Union was correct as to whether *WKYC-TV* required deductions to resume. (Tr. 664:17-25; 781:5-100).¹⁹ The letters were provided to inform employees on these topics and because a number of questions had been asked since the dues cessation. (Tr. 741:11-742:16; 742:17-744:12; 744:13-746:23; 749:1-20).

It is well established that an employer violates the Act if it deducts dues from an employee's wages without valid authorization by the employee. *General Instruments Corp.*, 262 NLRB 1178 (1982); *Mode O'Day Co.*, 280 NLRB 253 (1986). Informing the employees of the status of dues deductions, ensuring the employees' individual choice as to dues authorization, and answering employee questions was the Space Needle's lawful purpose in sending the February 5, 2013 letters to the employees. (Tr. 681:24-684:1; 741:11-745:11; G.C. Exhs. 26, 27 and 28). The dues deduction practice as outlined in the parties' expired labor agreement required that if the employee had decided to cease having dues deducted

¹⁹ When dues were being deducted regularly prior to the cessation of the program in May 2012, the status of dues authorization would be updated with each payroll. (Tr. 781:5-10). With the Union's demand that dues restart, the information needed to be updated all at once. (Tr. 664:17-25). The Space Needle needed to understand where employees were with respect to the dues authorization if the program was going to be restarted as a result of the Union's demand. (Tr. 699:11-19). Among other issues, the Union had provided inaccurate information, including inaccurate descriptions of deductions for individuals for whom there existed no authorization. (Tr. 665:8-14). That is a problem because the Space Needle cannot deduct money from an employee's paycheck without the proper authorization and accurate information. (Tr. 665:15-17). The information relating to dues authorization status and vetting the inaccurate information from the Union was the administrative purpose of the spreadsheet. (Tr. 731:14-732:17; R. Exh. 19).

such notice was required to be given to both the Employer and the Union. (G.C. Exhs. 33, p. 2). The language in the February 5, 2013 letters sent to the employees states:

Whether or not you join the union, it will not impact your wages, benefits or seniority, and you will still be eligible to participate in the medical and pensions plans. We are not suggesting that you do or do not resign your membership in the union, but we want you to be aware of our understanding of your options.

This language is completely in accord with longstanding Board precedent:

Established Board principle holds that while employers may not solicit employees to withdraw from union membership, they may, on the other hand, bring to employees' attention their right to resign from the union and revoke dues-check-off authorizations so long as the communication is free of threat and coercion or promise of benefit. In both *Perkins Machine Co.* and *Cyclops Corp.*, the Board approved the employer's supplying of withdrawal information and forms.

Ace Hardware Corp., 271 NLRB 1174, 1174-75 (1984).

In the present case, the language of the letters follows the language of the lawful letters in *Perkins Machine Co.*, *Cyclops Corp.*, and *Peoples Gas System*; compare G.C. Exhs. 26, 27, 28 and 29 with *Peoples Gas System*, 275 NLRB at 508-509. There was no showing by the General Counsel that the Space Needle provided anything other than a notification of the option, among the other options, and a sample form letter. The Space Needle did nothing beyond that ministerial and passive aid.²⁰

Accordingly, there was nothing unlawful about the letters, which followed long standing Board precedent and the language found lawful by that Board precedent. The ALJD erroneously relied upon *Air Flow Equipment, Inc.*, 340 NLRB 415, 418 (2003) and

²⁰In fact, the General Counsel did not call any bargaining unit members to testify about ever having requested a sample withdrawal form, or any communications whatsoever between management and a bargaining unit member when such a sample form was requested by a bargaining unit member. The record is completely devoid of any substantial evidence of assistance, communication, or even discussion about sample withdrawal letters between Space Needle management and employees.

Register Guard, 344 NLRB 1142, 1143-44 (2005),²¹ to find and conclude the letters were unlawful despite their obvious lawfulness. The ALJD did so based on the erroneous finding and conclusion relating to the dues deduction agreement (discussed *supra*), and the erroneous finding and conclusion that the Space Needle unlawfully tracked employee sympathies (discussed immediately below).

Exceptions 60-62: The ALJD erroneously found and concluded that the Space Needle unlawfully tracked employee action to obtain and complete union resignation forms.

The ALJD erroneously determined that the Space Needle may not know who is ceasing their dues through withdrawal from the Union because somehow it reveals union sympathies. (ALJD p. 8). This is not true. “Employees’ opposition to dues check-off is irrelevant to the issue of whether they support the union employees may prefer to pay their dues only at convenient times or in person, or may even be ‘free riders’ who desire and accept union representation without joining the union and paying dues.” *In re Metro Health, Inc.*, 334 NLRB 555, 556 (2001); *Landmark Intern. Trucks, Inc. v. NLRB*, 775 F.2d 148, 149 (6th Cir. 1985) (non-coercive letter was not rendered coercive by the employer's request that it be notified of resignations by its employees). The sample withdrawal letters were provided in connection with dues authorization and specifically state: “One option to you **if you do**

²¹ *Air Flow Equipment, Inc.*, involved a union organizing campaign and the return of authorization cards and there existed other threats and coercion against the employees. The employer monitored who actually returned their authorization cards by giving them the afternoon off to do so. Likewise, *Register Guard* involved a union organizing campaign where the employer had engaged in other coercive activity (solicitation of grievances and promises of wage increases). The present case involves a long and stable bargaining history from the 1980s, and a sample union withdrawal form provided upon request, not authorization cards in the context of a union campaign. Here, provision of a sample form does not tell the Space Needle whether the employee intended to fill out the form, give the form to a friend, bring the form to the Union for evaluation of whether it is an unfair labor practice, and so forth. The Space Needle provided a sample form—nothing else, which is lawful. Unlike in an election campaign, here an expired labor agreement existed, from which there could not be unlawful unilateral change, and required notice to the Employer of the employee’s choice as to cessation of dues deduction. (G.C. Exhs. 33, p. 2).

not wish dues to be deducted from your check is to resign union membership.” (G.C. Exh. 25 and 26) (emphasis added). However, for employees who had not joined the Union, there was no such statement. (G.C. Exh. 27). Accordingly, the provision of the option related solely to whether the employee desired to cease having dues deducted by electing the union withdrawal option. The ALJD properly found and concluded that knowledge of dues authorization or cessation was something the Space Needle was entitled to know. (ALJD p. 9).²²

The same reasoning applies to the Space Needle knowing pursuant to the expired labor agreement if an employee has chosen to not have dues deducted by resigning union membership. Providing a sample withdrawal letter when requested by employees is lawful. *Perkins Machine Co.*, 141 NLRB 697, 700 (1963) (providing sample withdrawal letter does not violate the Act); *Ace Hardware Corp.*, 271 NLRB 1174, 1174-7575 (1984); *Cyclops Corp.*, 216 NLRB 857 (1975) (it was lawful to inform employees of their right to withdraw and request employee notification to employer of union withdrawal so dues would not be improperly deducted); *Peoples Gas System*, 275 NLRB 505, 505-09 (1985) (there is no distinction between *Perkins* and the instant case with respect to the contractual requirement for *notification* of employee action).

There was no evidence of record whatsoever that the Space Needle was in any way aware of withdrawal from the Union for reasons other than employee choice as to cessation

²²The issue was whether an employee was choosing to cease dues authorization through the Union withdrawal option (G.C. Exhs. 26, 27, 28, and 29), which the Space Needle must know as part of any dues deduction program as properly found and concluded by the ALJD, and which the expired labor agreement of which there can be no unilateral change requires there be notice to the employer. (G.C. Exh. 33, p. 2). No person ever testified that there was tracking of employee withdrawals unrelated to cessation of dues deduction, or that employee withdrawals unrelated to request for cessation of dues deduction was ever even contemplated in this case. *Landmark Intern. Trucks*, 775 F.2d at 149, and *Cyclops Corp.*, 216 NLRB 857 (1975) (it was lawful to inform employees of their right to withdraw and request employee notification to employer of union withdrawal so dues would not be improperly deducted).

of dues deduction, or that the Space Needle in any way monitored, provided assistance to, or attempted to discern such conduct unrelated to the dues authorization issue.²³

Exception 63-65: The ALJD erroneously found and concluded that Human Resources Manager Beth Reddaway coerced an employee by telling him that if he signed a dues authorization form, he would owe six months of back dues.

An ALJ's credibility findings may not be contradictory to the clear preponderance of all the relevant evidence. *Standard Dry Wall Products*, 91 NLRB 544 (1950). When an ALJ looks beyond demeanor and uses other factors in the ALJ's credibility conclusions, the Board conducts an independent examination and comes to its own credibility determinations. *Canteen Corp.*, 202 NLRB 767, 769 (2002); *Starcraft Aerospace*, 346 NLRB 1228, 1231 (2006). Here, the ALJD found and concluded that Reddaway was a credible witness whose composure was remarkable and her competence undeniable. The ALJD's determination that Reddaway coerced Lee Plaster was based upon issues beyond demeanor of the witnesses, which the NLRB independently reviews.

The conversation between Reddaway and Plaster involved Plaster obtaining and filling out a dues deduction authorization form (Tr. 158:8-25), which it is undisputed is a lawful topic of conversation pursuant to the findings and conclusions in the ALJD. Plaster did not have a signed payroll dues authorization form in his file and wanted to sign such an authorization. (Tr. 401:1-5). The ALJD erroneously determined that a statement that an

²³ If an employee requested a form it would sometimes be known by the employer that the employee had asked for such a form. (Tr. 800:18-24; 798:7-12). Certainly, if Board precedent allows an employer to provide a sample form upon request, it is not unlawful to know if an employee has requested such a form. When the form was requested from managers, Human Resources would sometimes be aware if a given form was issued pursuant to an employee's request, but would not always know to whom the form was given. (Tr.: 192:4-8). There was no substantial evidence whatsoever presented that any manager at the Space Needle openly solicited employees to sign union withdrawal letters or ever discussed such sample letters outside the information provided in the letters. The letters state: "We are not suggesting that you do or do not resign your membership in the union..." (R. Exhs. 26, 27, and 28 at p. 2).

employee would owe back dues is “of dire financial consequences to an employee because he opted to take advantage of payroll dues deduction would prove daunting in any circumstances.” This is unsupported by the record because it is undisputed that **Plaster did not owe any back dues.** (Tr. 397:19-22). The meeting by all accounts was routine, with Plaster testifying that he filled out the dues deduction authorization form and the meeting was over. (Tr. 394:5-19).

Plaster’s memory of the contemporaneous events surrounding that conversation was not clear. (Tr. 399:20-400:21). Reddaway testified that she did not make the statement that Plaster alleges. (Tr. 747:25-748:25). Significantly, Reddaway did not possess information that would show her the back dues a given employee owed or any information at all about back dues owed to the Union. (Tr. 748:4-90). Reddaway never believed that if an employee requested dues deductions that the dues deductions would come out of the employee’s first check. (Tr. 748:4-24).²⁴ The ALJD erred by stating that Reddaway’s testimony was inconsistent. The answers relied upon by the ALJD were two different questions. (Compare Tr. 747:25-748:3 with Tr. 748:10-12). The alleged inconsistent answers are not inconsistent—they were two different questions. Reddaway was further questioned about her memory and whether she made the statement. Reddaway explained that she does not recall that conversation because there is no way she could have made the statement as she had no knowledge of any back dues being owed at the time she was alleged to have made the

²⁴Reddaway fields such questions from employees, and from managers on behalf of employees, and there is no allegation from any other employee that Reddaway or any manager conveyed inaccurate or mistaken information to an employee about back dues. (Tr. 749:1-20). Reddaway is an experienced human resources manager, the “go-to” person for answering of questions for Space Needle managers and employees involving the Union, and is the person who handles grievances and unfair labor practice charges for the Space Needle. (Tr. 710:1-711:8; 746:18-23). If Reddaway does not know an answer to a question, she does not guess—she reaches out to legal counsel to determine the correct answer. (Tr. 746:24-747:10).

statement. (Tr. 788:25-789:21). The logical conclusion on the evidence of record is that Plaster must have misheard or does not remember exactly what Reddaway said.

Furthermore, the purported statement, even if Plaster is credited, is a misstatement and not unlawful. *Galloway School Lines, Inc.*, 308 NLRB 33 (1992) (the Board held no violation of Section 8(a)(1) despite that the statement was inaccurate and given in a speech to all unit employees); *CL Frank Management, LLC*, 358 NLRB No. 111, *16 (2011) (“at worst, I find them to be nothing beyond non-coercive misstatements of fact that lacked the heavy-handed, chilling characteristics” of what has been defined as coercive conduct under Board law). Furthermore, the Board has held that misstatements of the law regarding employee union obligations do not violate Section 8(a)(1) because such statements are not a threat that the employer would decide to take any action or impose any dire consequences on the employee.²⁵ *New Process Co.*, 290 NLRB 704, 707 (1988); *Daniel Construction*, 257 NLRB 1276 (1981). Plaster’s memory of the alleged statement by Reddaway if credited is about what the Union would do, not what the Space Needle would do. It is not coercive. Accordingly, for all the foregoing reasons, the charge stating that Reddaway coerced Plaster by stating that if he signed a dues authorization form he would owe six months of back dues (Complaint, ¶9) must be dismissed.²⁶

²⁵Here, the record is devoid of proof that the purported statement by Reddaway, even if made, was false. There was no evidence that the Union did not intend to collect back dues from employees, unlike Plaster, who had not been paying dues.

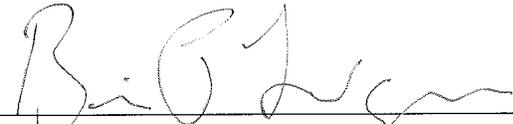
²⁶ It should be noted that this statement alleged in the Complaint does not even make sense. Whether you owe back dues to the Union is not premised upon whether you sign a dues authorization for deduction of back dues or not. The notion that an experienced human resources person like Beth Reddaway would think that signing a dues deduction authorization form legally triggered how much a person owed in back dues to the Union is nonsensical on its face.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the ALJD Findings, Conclusions and Order be reversed and the Complaint dismissed.

DATED at Seattle, Washington this 2nd day of April, 2014.

DAVIS GRIMM PAYNE & MARRA

A handwritten signature in black ink, appearing to read "Brian P. Lundgren", written over a horizontal line.

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ATTORNEYS FOR RESPONDENT/EMPLOYER
SPACE NEEDLE, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2014 I caused to be filed with the Executive Secretary of the National Labor Relations Board, via the NLRB E-Filing system, the foregoing ***“BRIEF IN SUPPORT OF RESPONDENT’S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE.”***

I further certify that true and correct copies of the same were served via electronic mail upon the following individuals at the email address specified for them as shown below; and paper copies of the same were mailed to the undersigned via U.S. Mail, First Class Postage prepaid, at the following physical addresses :

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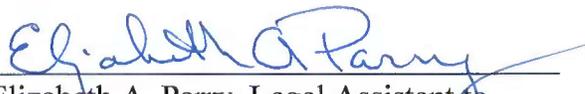
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