Reno Hilton Resorts d/b/a Reno Hilton *and* International Union, United Plant Guard Workers of America. Case 32–CA–15856

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 19, 1998, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent and the General Counsel filed exceptions and cross-exceptions, respectively, and supporting briefs, the General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's cross-exceptions and a reply brief in support of its own exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt his remedy and recommended Order as modified and set forth in full below.

AMENDED REMEDY

We shall modify the judge's remedy by providing for a broad cease-and-desist order, in light of the Respondent's repeated violations,[3] and in conformity with the broad language contained in his recommended Order and notice. We shall further order the Respondent to rescind its subcontract for security officers and to cease and desist from unlawfully entering into such contracts, and we shall require restoration of the status quo ante by ordering the Respondent to reestablish its in-house security force,[4] offering all the unlawfully terminated security officers immediate and full reinstatement to their former positions of employment and making them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's discrimination against them on January 13, 1997, in the manner provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

ORDER

The National Labor Relations Board orders that the Respondent, Reno Hilton Resorts d/b/a Reno Hilton, Reno, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, and coercing its security officers in violation of Section 8(a)(1) of the Act by contracting out their work and discharging them because they selected the International Union, United Plant Guard Workers of America to represent them as their collective-bargaining representative.

(b) Discriminating against its security officers in violation of Section 8(a)(3) and (1) of the Act by discharging them and contracting out their work because they selected the Union.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Reestablish its in-house security force by rescinding and severing all subcontracted security operations.

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[1] We find merit in the Respondent's exception to the judge's drawing of an adverse inference from the Respondent's failure to call former officials who were involved in the decision to subcontract the security services. See *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998) (no adverse inference drawn from a respondent's failure to call supervisors who no longer worked for it); *Goldsmith Motors Corp*., 310 NLRB 1279 fn. 1 (1993) (no adverse inference drawn from failure to call former business partner). However, we expressly affirm the judge's drawing of such an adverse inference from the Respondent's failure to adduce testimonial and documentary evidence from Director of Security Dave Bennett.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings

[3] In providing a broad cease-and-desist order here, we are mindful of the Board's admonition in *Hickmott Foods, Inc.,* 242 NLRB 1357 (1979), that "such an order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Applying this analysis here, we find that a broad order is fully warranted because the Respondent's unlawful discharge of its entire security guard force, some 64 employees, is not only an egregious violation of the Act, but also demonstrates, as explained by the judge, "*Hilton*'s proclivity to violate the Act and its animus toward unionization in general." (See ALJD at fn. 14 and accompanying text.) In this regard, we observe that in *Reno Hilton,* 319 NLRB 1154 (1995), a case cited by the judge, the Board adopted the judge's recommendation that a broad cease-and-desist order should issue because the Respondent's numerous violations of the Act in that case, most of which involved the planning and participation of the Respondent's highest officials, "demonstrated a proclivity to violate the Act and . . . exhibited a general disregard for the employees' fundamental statutory rights." Id. at 1193. We find that the Respondent's unlawful discharge of its security guards on January 17, 1997, little more than a year after the Board's issuance of its decision in *Reno Hilton*, supra, further demonstrates the Respondent's proclivity to violate the Act and that here, as in *Reno Hilton,* supra, a broad cease-and-desist order is fully warranted

[4] At the compliance stage of this proceeding, the Respondent may introduce evidence that was not available prior to the unfair labor practice hearing, if any, to demonstrate that resumption of an in-house security force would be unduly burdensome. *Lear Siegler, Inc*., 295 NLRB 857, 861–862 (1989).

[5] We shall also modify the recommended Order by requiring the Respondent, if it has gone out of business or closed its facility, to mail copies of the attached notice to all current employees and former employees employed by the Respondent at any time since January 13, 1997. *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container*, *Inc.*, 325 NLRB 17 (1997).

(b) Within 14 days from the date of this Order, offer its former security officers full reinstatement to their former positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of the Respondent's unlawful subcontract on January 13, 1997, as set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify the discharged security officers in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Reno, Nevada facility and mail to each of the involved security officers, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 13, 1997.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our security officers by contracting out their work and discharging them because they selected the International Union, United Plant Guard Workers of America to represent them as their collective-bargaining representative.

WE WILL NOT discriminate against our security officers by discharging them and contracting out their work because they selected the Union.

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

WE WILL reestablish our in-house security force and WE WILL rescind and sever all subcontracted security operations.

WE WILL, within 14 days from the date of the Board's Order, offer our former security officers full reinstatement to their former positions without prejudice to their seniority or any rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and benefits they may have suffered as a result of our unlawful subcontract on January 13, 1997.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of our security officers and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not used against them in any way.

RENO HILTON RESORTS D/B/A RENO HILTON

Virginia L. Jordan, Esq., for the General Counsel.
Joseph E. Herman, Esq. (Morgan, Lewis & Bockius, LLP), of Los Angeles, California, for the Respondent.
Scott A. Brooks, Esq. and *Gregory, Moore, Esq*. *(Jeakle, Heinen, Ellison & Brooks & Lane, P.C.),* of Detroit, Michigan, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge**.** Pursuant to notice a hearing in this matter was held before me in Reno, Nevada, on March 10, 11, and 12, 1998. The original charge was filed on December 20, 1996, by International Union, United Plant Guard Workers of America (the Union). On August 21, 1997, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Reno Hilton Resorts d/b/a Reno Hilton (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Re-

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

spondent, in its answer to the complaint, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard; to call, examine, and cross-examine witnesses; and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Union, and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Nevada corporation with its office and place of business located in Reno, Nevada, where it is engaged in the business of operating a hotel-restaurant-casino complex. In the course and conduct of its business operations, the Respondent annually purchases and receives goods valued in excess of $5000 which originate outside the State of Nevada, and annually derives gross revenues in excess of $500,000. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether the Respondent contracted out its security guard work in violation of Section 8(a)(1) and (3) of the Act.

B. The Facts

The genesis of this matter is set forth in detail in a Decision and Order of the Board[1] involving the organizational campaign among the Respondent's security guards which commenced in June 1993. Following the filing of a representation petition, an election was conducted on November 18, 1993. Thereafter, election objections and unfair labor practice charges were filed by the Union, and the matters were consolidated for purposes of hearing. On August 18, 1994, the administrative law judge in that proceeding issued his decision recommending, inter alia, that the election be set aside as a result of various unfair labor practices, infra, committed by the Respondent. During the pendency of that matter before, the Board the Union filed a new representation petition which resulted, over the Respondent's objection, in a second election which was conducted on September 28, 1995. This election, by a vote of 44 for the Union and 33 against the Union, culminated in the certification of the Union as the collective-bargaining representative of the following unit of employees:

> All full time and regular part-time security personnel, including security officers and central dispatch employee, employed by Reno Hilton Resort Corporation d/b/a Reno Hilton at its Reno, Nevada facility performing guard duties within the meaning of Section 9(b)(3) of the Act; excluding all other employees, including stage watch employees, security clerks, officer clerical employees, professional employees, confidential employees, and supervisors as defined in the Act.

In the above-mentioned decision, the Board found that the Respondent committed a panoply of serious violations of the Act in attempting to thwart the employees' desire for union representation, and that certain violations were committed by high ranking managers, namely Direct of Security Dave Bennett and Administrative Assistant Bob Balentine. The violations include the following acts and conduct: an extensive campaign of unlawful employee surveillance both by supervisory personnel and by certain employees who were recruited by the Respondent as paid campaigners against the Union; unlawful implied promises of benefits by requesting that the employees wait months to see what the Respondent could do for them, after which they could form their own in-house association if they continued to remain unsatisfied; and the unlawful discharge of an employee.

The Respondent hired an outside labor consulting firm, the Burk Group, represented by Ward Ruple, to assist it during each of the two preelection campaigns. Ruple conducted employee meetings. Former security guard Gary Parillo testified in the instant proceeding that prior to the second election he was instructed by management to pick up Ruple at the airport and bring him to the Respondent's facility. As he was chauffeuring Ruple back to the casino Parillo volunteered to Ruple that he was on the Respondent's side because he was concerned that if the Union got in the jobs of the security guards would be eliminated. Ruple suggested that they meet at some later date and discuss what Parillo could do to possibly assist the Respondent in keeping the Union out.

About a week later Parillo, who was campaigning against the Union, was summoned by Ruple to the office of Chief Bennett, the director of security. On the back of Bennett's office door was a color-coded chart with the names of security guards designated as being for or against the Union. Parillo was asked by Ruple if he could help assist in categorizing the guards as yes or no voters, and Parillo cooperated by designating certain guards whom he believed would clearly be opposed to the Union. Ruple attempted to enlist Parillo's further assistance and asked if he would be willing to meet again and provide Ruple with any additional information. Parillo said that he would do what he could, but thereafter avoided Ruple because, as Parillo testified, "I didn't like Mr. Ruple." Parillo testified that during the course of this conversation Ruple handed Parillo a one-page typewritten document containing "numerical figures . . . pertaining to how much they could save by getting rid of us and bringing in cheap labor."

This conversation which took place, according to Parillo, about a week prior to the second election, caused him to become very concerned with the loss of his job in the event of a union victory. Parillo testified that he "probably" told other employees about the conversation, and that he prepared and posted antiunion posters warning that the jobs of the security guards would be eliminated if the Union prevailed in the election.[2]

Lee Boekhout , a former security guard, was a very reluctant witness on behalf of the General Counsel and, while asserting that he had tried to put the entire unfortunate matter behind him and could not remember with any degree of accuracy what had

[1] *Reno Hilton,* 320 NLRB 197 (1995).

[2] I credit the unrebutted testimony of Parillo.

transpired, specifically confirmed the accuracy of what was contained in his affidavit given to a Board agent and signed by him on September 23, 1997. Boekhout was strongly antiunion during the two election campaigns and did not participate in the strike which occurred in August 1996, infra. Boekhout's affidavit states, inter alia, as follows:

> Shortly before the second election I spoke to supervisor Russ Pigni about the whole subject of what was coming up at the Hilton. It was just a general sort of conversation. I don't recall which one of us brought up the subject. Pigni told me that he thought the Union did not have a chance, but that if it did win the election that things would really get rough. To the best of my recollection he did not state specifically what he meant.
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> Also, shortly after the election I had a conversation with the administrative assistant to the director of security, Bob Ballantine. I recall going into the office and discussing something to do with one other security personnel who supported the Union. I do not recall who the employee was or what the situation was. During this conversation we talked about the union having won the election. Ballantine told me that things were now going to get really rough, they were just starting now and the longer it went the rougher it would get. He told me that we would get through it. I don't believe these were the exact words but this was definitely the message I got.
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> On or about October 25th or 26th, 1996 [sic],[3] about a month or so after the election I was in the security office when director of security, Dave Bennett, returned from a meeting upstairs. He waived at me to follow him inside . . . He told me that they had made a presentation to Jim Anderson [vice-president of the Hilton corporation and the Respondent's chief negotiator in subsequent negotiations] and the others—he didn't name who—at the meeting concerning going to contract security and that they had bought it. He said that they had told him that they could save more than $500,000. He told me that they had said do it. He then told me that they may have lost the battle but that they had won the war. He said that they were gone. I believe I said oh, shit. Bennett told me not to worry about it, that my job was protected, that he had managed to save the 10 or 11 of us.
>
> Bennett did not actually say the word subcontracting, but I knew what he meant when he said they were gone. I knew he meant the Union. When he referred to the 10 or 12 of us he meant those security officers who supported the Company and not the Union.
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> At or about the first week of December 1996 after the Union had been notified that the Hilton was going to subcontract the security work I went to Dave Bennett's office to talk to him. It was just the two of us. I asked him where I stood. He told me not to worry, that he had us guys covered. He said at least that was one thing he had managed to do to protect us. He said our jobs were protected.
>
> I also remember what I believe is another conversation I had with Ballantine shortly after the second election in 1995. It is possible that it happened during the conversation I related, in paragraph four above, but I think it's as separate conversation.
>
> During this conversation he mentioned the possibility of subcontracting. He told me that this was a long, drawn-out procedure and the Company would have to go through the process. I think he used another word, but I can't remember now. He meant the collective-bargaining process and all the meetings for getting a collective-bargaining agreement. He said it was going to get rough.

Boekhout's affidavit goes on to relate that he had various conversations with Ballantine and with Director of Human Resources Lynn Wright regarding the matter of changing the job titles of those security guards who were loyal to the Respondent in order to keep them employed after the subcontracting of the security guard work eliminated the others. Wright told him that there were a lot of things that the Respondent could do in this regard. Later, shortly prior to the termination of all the security guards, infra, Bennett told him that he had been advised by upper management that he was unable to save the loyal security guards from discharge as this would give the Union grounds for a lawsuit.[4] Bennett told Boekhout that he had "blown up" at Anderson as a result of this and was very upset and apologized to Boekhout and said he was very sorry.

The Respondent elected not to file election objections to the second election and some 5 weeks later, on November 7, 1995, preparatory to the commencement of contract negotiations, an introductory meeting took place between Eugene McConville, the Union's International president, Terry Fowler; the Union's regional director, and James Anderson; vice president of the Hilton corporation, the Respondent's parent organization. At this meeting Anderson identified four areas of concern regarding the upcoming negotiations, including wages and contracting out of the security guard work. McConville testified that wages, of course, was always a contract issue, but he was surprised when Anderson raised the matter of contracting out as a significant matter because, to his knowledge the Respondent had never previously raised this as a possibility in its preelection campaigning.

Thereafter, during a 9-month period between the dates of November 27, 1995, and August 6, 1996,[5] there were 15 negotiating meetings between the parties, sometimes with a Federal

[3] As noted above, the second election was held on September 28, *1995* (rather than 1996). I find that this reference to 1996 is a typographical error and that in fact Boekhout, who affirmed what was contained in his affidavit and who I find was a very reluctant yet highly reliable witness regarding the accuracy of what was contained in his affidavit, was truthfully recounting to the Board agent what Bennett told him. Moreover, Bennett was not called as a witness in this proceeding to rebut any evidence proffered through Boekhout's testimony or his affidavit; nor did Human Resources Director Wright, who did testify in this proceeding, contradict anything stated by Boekhout regarding his conversations with her on the subject of affording special employment opportunities to those employees who had assisted the Respondent in combating the Union.

[4] The Union's charge, filed on December 20, 1996, contained, inter alia, the allegation that the Respondent was discriminating against union members by permitting nonunion members to transfer to other jobs, thus enabling them to retain employment with the Respondent.

[5] On December 19, 1995, the Board issued its above-mentioned decision in the underlying matter, and on February 2, 1996, during the course of contract negotiations, the Respondent posted the requisite notice and thereafter otherwise complied with the Board's Order.

mediator. McConville was the chief negotiator for the Union, and Anderson was the chief negotiator for the Respondent.

From the outset of bargaining each of the Respondent's contract proposals included a provision reserving for itself the unfettered right to contract out the security guard work. Throughout the course of bargaining the Respondent never deviated from this proposal and continued to insist upon it. This was of very serious concern for the Union, and throughout negotiations the Union presented various counterproposals to the Respondent's subcontracting proposal: to eliminate it entirely; to modify it by making it applicable only in certain extraordinary circumstances such as, for example, inability to pay because of financial hardship; to consider it or permit the Respondent to hire new security guards at a lower tier of wages in return for an agreement to retain all the current security guards without loss of pay or benefits; and to permit such a contract provision at some time down the road after a hiatus of between 6 months to a year in order to give the parties some experience in dealing with each other under a union contract.

The Respondent would not agree to such counterproposals despite the fact that Anderson, according to McConville, on numerous occasions, said that the Respondent had no present intention to contract out the bargaining unit work, but only wanted the "flexibility" that such an option afforded the Respondent in the event that sometime down the road contracting out became economically feasible and the Respondent elected to do so.

Although subcontracting was a frequent topic of discussion, the parties had agreed that negotiations on wages would be deferred until other items had been either resolved or stalemated. At the meeting on May 29, 1996, the Respondent presented the Union with a wage survey of security guards in ten casinos in the Reno area, including the Flamingo Hilton, another Hilton property. The survey showed that the wages of the Respondent's security guards were much higher than those of security guards at any other area hotel/casino. For example, the highest wages paid to Respondent's security guards was $12.62 per hour, $2 per hour higher than the highest wages of security guards at the Flamingo Hilton who earned $10.61 per hour. Moreover, of the approximately 64 security guards in Respondent's employ, some 45 of them were at or near the top rate of pay.[6]

McConville testified that at the May 29, 1996 meeting, as it did not appear worthwhile to unduly extend negotiations when no progress was being made, he suggested that the Respondent present its final offer at the next meeting, scheduled for June 24, 1996. At this time no proposal on wages had been made by the Respondent.

At the June 24, 1996 meeting the Respondent presented its initial wage proposal, providing for a wage freeze with the right to subcontract. This offer was unacceptable to the Union. The Respondent did present another "final offer" proposing a top rate of $10.43 per hour, lower than the $10.61 amount that the highest paid security officers at the Flamingo Hilton-Reno were receiving, and that the wages of all security guards who were earning more that this amount be reduced.[7] It arrived at this figure by averaging the high rates of all the Reno area properties surveyed. Further, it proposed that if the Union accepted this wage reduction, the Respondent would agree not to contract out the security guard work during the first year of a 3-year contract, but retained the unfettered right to contract out the work thereafter. These proposals were unacceptable to the Union.

The next meeting was held on July 24, 1996. The Respondent proposed to freeze all wages with the understanding that it retain the right to contract or subcontract any work. The Union countered with an offer to freeze wages for those employees earning more than $11.50 per hour and proposed certain other wage changes for new employees and those earning less than $11.50 per hour, provided that the Respondent agree not to subcontract out for the entire period of a 1-year agreement. This was unacceptable to the Respondent.

On July 29, 1996, the Union formally rejected the Respondent's proposal and voted to strike. The strike began that afternoon and lasted some 2 weeks, until August 12, 1996. Approximately 30 unit employees continued working during the strike, and the Respondent additionally utilized temporary employees and security personnel from other Hilton hotels in place of the striking workers.

The parties met again on August 6, 1996. The Respondent submitted the same final proposal that was rejected by the Union previously. It appears that some 40 employees were entitled to incremental increases sometime prior to August 12, 1996, and the Union, after insisting that it would remain on strike if the employees were denied these increases, agreed upon a contract containing a wage freeze as of August 12, 1996. The 1-year contract, extending from August 12, 1996, through August 11, 1997, gave the Respondent the unconditional right to contract or subcontract any work.

McConville, while fearful that the Respondent would indeed exercise its right to contract out the work, nevertheless was hopeful that it would not do so in deference to the many employees who elected not to join the strike, as this would result in their termination. Further, he thought that perhaps after a period of adjustment a satisfactory relationship would be developed and the Respondent's animosity toward the Union would be ameliorated.

By letter dated November 1, 1996, the Respondent advised the Union that it had "had an opportunity to explore, in detail, avenues for providing cost effective and qualitative security services through the utilization of an outside contractor," and requested a meeting at the earliest possible date to discuss this matter. Thereafter, on November 19, 1996, the Respondent sent a cost comparison to the Union indicating that it was able to contract out the security work for a base wage of $7.50 per hour.

The parties met on November 25, 1996. The Respondent demonstrated that by contracting out the work at $7.50 per hour it could save over $500,000 per year. It thereupon proposed to reduce the wages of its security guards to $7.75 an hour, which included the wage rate of $7.50 an hour and an additional 25-cent an hour to account for the profit margin that the Respondent would be paying the security firm, American Protective

[6] The Respondent purchased the property from Bally's; Bally's had purchased the property from the MGM Grand. The Respondent retained all of Bally's security guards, many of whom had begun their employment with the MGM Grand, and credited the security guards with their prior seniority while employed by MGM and/or Bally's. Thus, at all times material, some 27 security guards had between 12 and 18 years of seniority although it appears that security guards could reach the top rate after about 6 years.

[7] This would have reduced the wages of all but 11 security guards.

Services (APS).[8] McConville presented various arguments against the efficacy of contracting out the work, including loss of immediate supervision of the workforce; the replacement of dedicated and proven security officers with transitional workers who were likely to be dissatisfied with the low wages and would be looking for more remunerative jobs elsewhere; and the distinct probability that APS would soon be seeking higher-rates on renegotiation of its initial contract.

At this meeting McConville told Anderson that it was clear that the Respondent was motivated by union animus and simply wanted to get rid of the Union, as during negotiations it had offered a wage rate of $10.43 per hour with no contracting out for a year, and now it was offering nearly $3 per hour less. Anderson denied that this was the Respondent's motive and said that the Respondent "just recently found out that now we can get it cheaper than what we thought." Anderson stated that the Respondent intended to contract out the work.

By letter dated December 2, 1996, the Respondent's president, Feren Szony, advised the Union that the Respondent intended to subcontract the work of the security officers, including direct supervision of those officers, effective at 12 midnight on January 13, 1997. McConville replied by letter dated December 17, 1996, stating, inter alia, "that it was clear that Hilton wanted to replace the security officers strictly in retaliation for the officers having the courage to organize and then to strike the Reno Hilton when a reasonable agreement could not be reached."

Thereafter, the Union filed the instant charges and engaged in bargaining over the effects upon the workers of the Respondent's determination to contract out the work. During the course of "effects" bargaining, in addition to paying the employees accrued vacation pay, the Respondent stated that it was willing to also provide a severance package amounting to a total cost of between $160,000 and $200,000, premised upon employee longevity. However, this severance package was conditional and was offered only in exchange for the withdrawal of all pending legal matters including, apparently, the instant matter, and the agreement by the Union and the employees not to sue the Respondent for any claims arising out of their termination. This was unacceptable to the Union. On January 13, 1997, all the Respondent's security guards were dismissed and were replaced with employees of APS.

Michael Caryl is director of finance for Hilton Gaming in northern Nevada. Hilton Gaming is comprised of the Respondent and the Flamingo Hilton-Reno. Caryl testified that the Respondent had incurred a decline in net revenues from 1995 to 1996 of over $10 million (from $136 to $126 million). The financial statement introduced into evidence by the Respondent also shows that its operations were profitable and that it earned over $7.6 million before taxes in 1996.

Caryl further testified that in November 1996 he was advised by Feren Szony, president of the Respondent, and Lynn Wright, director of human resources, that the Respondent was considering subcontracting its security force. He was given subcontracting data by Wright and asked to analyze the financial costs of subcontracting this work; he calculated that the Respondent would experience an annual savings of $562,733 and reported this to management.

[8] Initially, the Respondent contacted and received information from Vanguard Protective Services which subsequently merged with American Protective Services.

Caryl testified to other cost savings jointly undertaken by the two properties. In the latter part of 1994 the separate laundry departments for each property were consolidated into one department located at the Respondent's facility. This consolidation resulted in wage savings of $120,000 annually and the layoff of certain laundry department employees of Flamingo Hilton-Reno. And in early 1995, the separate bakeries for each property were consolidated, the Respondent retaining its bakery and the Flamingo Hilton-Reno laying off its bakery employees; this cost savings amounted to $53,000 annually.[9] Further, in 1996 the separate accounting departments were consolidated to some degree, resulting in an annual cost savings of $100,000 and the elimination of certain jobs. Finally, according to Caryl, the managerial operations of the two properties' respective gift shops have been combined, and the bowling pro shop at the Respondent's facility has been leased out.

Caryl testified that the security officers at the Flamingo Hilton-Reno are not unionized and that their work has not been contracted out; nor have their wages or benefits been reduced.

Jeff Eaton is director of food and beverage and has been working for the Respondent since about 1993. Eaton testified that his department currently employs approximately 520 employees and in January 1997 the employee complement was between 580 to 590 employees. According to Eaton, expense reduction is a continuing concern. He prepared a document showing that 12 cocktail server positions were eliminated in January 1996, for a total savings of $110,905.60; that 12 bus person positions were eliminated in the Grand Canyon Buffet in October 1995, for a total savings of $160,652.70; that 14 employees were eliminated from Marco Polo's, an Asian restaurant that the Respondent decided to close for lack of business in December 1995, for a total savings of $322,684.94; and streamlining of the managerial staff in the food and beverage department resulted in the elimination of three managers in March 1997, for a total savings of $135,645. At the time of the hearin, no aspect of the food and beverage department has been subcontracted, nor have the wages or benefits of any food and beverage employees been reduced.

Charles Barry is the vice president of gaming surveillance and internal security for the Hilton Hotels Corporation, and has held this or a similar position since 1985. He is responsible for security operations at all of the Hilton's gaming properties: the Las Vegas Hilton, Bally's Las Vegas, the Flamingo Hilton, Flamingo Laughlin, O'Sheas, the Flamingo Hilton-Reno, the Reno Hilton (the Respondent), Bally's Park Place in Atlantic City, the Atlantic City Hilton, and two properties in Australia. None of the security officers at any Hilton casino, other than those of the Respondent here, have ever been represented by a labor organization.

[9] In *Flamingo Hilton-Reno*, 321 NLRB 413 (1996), enfd. 141 F.3d 1177 (9th Cir. 1998), the Board found that that respondent, by refusing to bargain with the newly elected collective-bargaining representative of its laundry workers and bakery workers, and by closing the laundry and bakery and laying off the workers and transferring the work to the Respondent here was, inter alia, conduct violative of the Act. It should be noted that the Respondent's bakery and laundry workers have not been unionized. The Board, inter alia, ordered that the Flamingo Hilton-Reno reopen its laundry and bakery operations and offer the laid-off employees immediate reinstatement to their former positions with back pay. In *Flamingo Hilton-Reno*, supra, the Ninth Circuit Court of Appeals enforced the Board's order in full.

Barry testified that he first became aware that the Respondent was considering subcontracting its security force "at some point prior to November 1st, 1996." When asked at the hearing by counsel, "What was your view of the possibility of subcontracting the Reno Hilton security services," Barry testified as follows:

> In my opinion a proprietary guard service is better than subcontracting. It is due to the fact that I had some concerns about the integrity of an outside guard service as far as the type of background investigation conducted on the officers, the quality of officers, what type of control we would have over those officers, how would disciplinary actions be held, or be handled, and things of that nature.

Barry testified that he changed his mind about contracting out when, on November 1, 1996, he participated in a meeting on that date at the Respondent's premises during which APS was invited to give a written and verbal presentation outlining the security services it would provide. Prior to this occasion Barry recalls only one conference call during which the economics of subcontracting was preliminarily discussed between corporate personnel including Barry, Anderson, and Bud Seely, president of Hilton's Nevada gaming operations, together with Respondent's president, Szony, Dave Bennett, director of security; and Lynn Wright, human resources director; according to Barry, no decision of any kind was made during this phone call.

Those present at the November 1, 1996 meeting were: Feren Szony, the Respondent's president, Mark Rittorno, the Respondent's general manager, Dave Bennett, Respondent's director of security, and Jim Anderson, senior vice president of human resources for Hilton Hotels.

Barry testified that during the meeting, which lasted approximately one-half hour, he had certain concerns that were addressed, "such as what type of background investigations [APS] conducted on their security officers, whether or not their security officers held work cards, the turn over rate for their company, things that had been concerns of mine." Barry testified that his concerns were answered satisfactorily, and he became a supporter of the feasibility of subcontracting to APS. However, at no time did he make an independent investigation of APS, nor does he know whether anyone else made an independent investigation of APS.

At the end of the meeting there was no decision made to contract with APS, and Barry did not recall any meeting thereafter between management personnel where subcontracting was discussed. He does not know who made the decision to subcontract, nor does he have any idea of who was in on the subsequent deliberations. Barry testified that he was not the person who made the final decision to contract with APS; and, in fact, even if he had vetoed the idea, he could have been overruled by corporate management.

Barry testified that to his knowledge, the subcontracting has "worked out very well": there have been substantial cost savings and no significant operational problems of which he is aware.

Barry testified that no other president of any other Hilton gaming property in Nevada has proposed that the security officers be contracted out. Further, even after becoming knowledgeable regarding the savings that could be realized from contracting out, he did not contact the presidents of other Nevada properties to suggest to them that they, too, look into subcontracting as a cost-savings measure; nor has he considered contacting any security service to investigate this option on behalf of any other Hilton properties over which he has authority.

Specifically, regarding the possibility of contracting out the security guard work at the Flamingo Hilton-Reno, Barry testified that, "My understanding that the salary level of security officers at the Flamingo Hilton-Reno are in line with the rest of the community as far as the security officers at other properties are concerned," and therefore there would be no cost advantage to contracting out.[10] For the same reason, namely, that "there wouldn't be any potential cost savings" due to fact that the wage rates of the other properties are in line with general area wage rates, Barry has declined to consider contracting out for any other properties.

Lynn Wright has been the director of human resources for the Respondent since July 1993. Wright previously had held the same position at the Flamingo Hilton-Reno. Wright testified that while she was working for the Flamingo Hilton-Reno the Hilton corporation had initiated a nationwide program, called the Profit Enhancement Program (PEP), designed to enhance profitability through cost savings by analyzing all expenditures, both personnel and non-personnel related at all Hilton properties throughout the country. The Respondent took over the operations of Bally's, in 1992, and shortly thereafter the Hilton PEP program was implemented at that facility. At each property a team of supervisory and non-supervisory individuals from each department was established to "brainstorm" ideas for efficiency and cost savings and make recommendations to a steering committee. Implementation of cost efficiencies resulting from such recommendations continued thereafter.

Wright testified that Dave Bennett, director of security, was one of the members of the PEP committee from the Respondent's security department. All ideas emanating from each department were presented to the then president of the Respondent, Bill Sherlock, who was the head of the Respondent's PEP steering committee. The PEP records show that the security department alone presented 33 cost-reduction ideas and 44 service improvement ideas (ideas which would not necessarily reduce costs, and sometimes required increased costs, but which would improve service or efficiency) to the steering committee; each idea was acted upon by being designated as "go" or "no go."

Of the 33 cost reduction ideas submitted by the security department representatives, none suggested a wage reduction of any kind or of subcontracting out the entire security department. Several ideas did recommend the elimination of certain security guard jobs. It appears that these ideas were proposed and recommended by Bennett and were thereafter approved, with the resulting net reduction in the in-house security force of some 8 individuals (12 individuals were apparently dismissed, however 4 supervisors were apparently hired to replace some of them).

Three ideas, however, did deal with the issue of subcontracting certain security officer work. Thus, idea 117 suggested that the Respondent "Contract outside security to patrol lobby and Front desk area." This, according to the recommendation form, would have resulted in the dismissal of three security guards and the contracting out of their work at a lower rate, resulting in a savings of $24,000. Bennett recommended "no go" on this

[10] The record shows that in 1996 the average wage for security officers at the Flamingo Hilton-Reno was $8.80, and in 1997, after a wage increase, the average wage increased to $8.92 per hour.

idea. As set forth in the Idea Evaluation Sheet, the adverse consequences were stated as follows: "Would have to train in Hilton policy and procedure; Would not be as professional a Hilton Security Officers," and the idea, under the heading of "Implementation considerations" was considered to be "High Risk" in terms of "Liability."

Similarly, idea 118 was as follows: "Contract with outside Security Agency to Patrol Hotel." This, according to the recommendation form, would have eliminated 12 of the Respondent's in-house security guards and would have resulted in the contracting of such work at a net savings of $96,000. For the same reasons as noted for idea 117, and the additional implementation consideration denoted as "Hilton Standards," Bennett recommended "no go" and this idea was not implemented.

Finally, idea 119 was as follows: "Contract with outside Security Agency to patrol property." This, according to the recommendation form, would have eliminated six of the Respondent's security guards and would have resulted in the contracting out of the work at a net savings of $48,000. For the same reasons as noted above for idea 118, Bennett recommended "no go" and this idea was not implemented.

According to Wright, the terminology "High Risk" referred to "whether or not there was any effect on the operation, whether it materially changed the operation" or impacted other financial, customer relation or liability considerations; "Hilton Standards" referred to the fact that the idea "would be unique to Hilton standards, because we don't have any other…properties that have subcontracted services"; and further, that the change may affect "brand name" customer satisfaction if customers do not receive the same quality of service from one property to another.

Wright testified that none of the ideas that were ultimately adopted by the Respondent's security department were considered to be "High Risk." Further, Wright was unable to recall any specific statements by Bennett, during discussions among the Respondent's mangers, wherein Bennett explained his reasons for changing his mind about the efficacy of subcontracting the Respondent's security force.

Wright testified that only six Hilton properties worldwide have unionized security departments, and none of these are gaming properties. Further, prior to the Respondent's elimination of its in-house security force, the Respondent was the only gaming property in the Hilton chain with a unionized security department.

Wright testified that during negotiations the Respondent's insistence on an unconditional subcontracting provision was extremely important in order to insure that the Respondent would have the flexibility to implement cost savings at any time. Thus, Wright testified that, "We realized that the expenses of our security services were far greater than those of our competitors in the area, and we needed to have a competitive edge." Wright testified that it was not until after the collective-bargaining agreement was signed that the Respondent made a "detailed study" of subcontracting which, according to Wright, it had not made prior to the execution of the agreement.

Wright testified that the Respondent routinely conducts area wage surveys on an annual basis, and that it had completed an area wage survey of certain gaming properties in the Reno, Nevada area in by October 1995. The survey, introduced into evidence, is entitled, "Security Survey-October 1995," and was in the Respondent's possession before the first bargaining session with the Union.

Wright testified that there had been informal discussions about subcontracting the security force with Szony and Bennett "since I first got there" which, as noted above, was in July 1993. Bennett, who continues to be employed by the Respondent as director of security, did not testify in this proceeding. According to Wright, Bennett is the individual who first made contact with any outside security contractors, and Wright never talked with, interviewed, or investigated any potential contractors.

Wright testified that immediately after the November 1, 1996 meeting with the APS representatives, the Respondent's managers (she does not recall whether Barry was present) met and it was decided that if the Respondent intended to proceed with the idea of subcontracting it would be helpful to notify the Union and give them the opportunity to match the offer of APS. Wright said that she was impressed with the presentation of APS, as the APS representatives were able to satisfactory respond to the questions concerning recruiting of personnel and staffing.[11] Thereafter, according to Wright, she participated in the decision to enter into a contract with APS. Those involved in making the decision were, in addition to Wright, Barry, Szony, Bennett, Rittorno, and Seely, whom Wright referred to as the "big boss" as he was then president of Hilton Gaming Corporation and in charge of all of Hilton's gaming operations world-wide. Seely is no longer employed by Hilton. Wright testified that the final decision to subcontract was made on approximately November 15, 1996, and that Szony was the person responsible for making the final decision.

Wright testified that at the November 25, 1996 meeting the Union was given the opportunity to match the savings resulting from contracting out. McConville accused the Respondent of attempting to eliminate the Union, and Anderson responded that the Respondent's motivation was not to rid itself of the Union, but to run its security services in the most cost-efficient and effective fashion.

The subcontracting took effect on January 13, 1997. Prior to this time the Respondent had utilized subcontracting for security services only for "outside venues in our amphitheater" to augment the existing staff for conferences and exhibits and events that would require 24-hour security coverage

At the time the Respondent took over the operation of Bally's, it inherited Bally's approximately 2500 employees. In 1996, at the time when it was decided to contract out the security work, the Respondent's employee complement had been reduced to approximately 2000 employees. One hundred and ten positions were eliminated in 1996–1997, including the 64 security guards. In 1996 the average wage for security officers at the Flamingo Hilton-Reno was $8.80, and in 1997, after a wage increase, the average wage increased to $8.92 per hour.

Wright testified that the Respondent's maintenance mechanics are currently represented by the Stationary Operating Engineers, and the International Association of Stage and Theatrical Employees represents the stage hands and related employees.

By memorandum dated February 26, 1996, to Feren Szony entitled, "Cost Savings of Contract Security," with copies to Barry and Wright, Bennett states as follows:

> I have recently met with representatives of Vanguard Security Services and Pinkerton Security Services to obtain pricing in-

[11] It is clear that APS would have to recruit and hire the necessary security guards, and did not have a ready complement of security guards in its employ to send to the Respondent.

> formation of implementing an outside security service for the Reno Hilton. The preliminary figures along with administration advantages makes this a program we should explore.
>
> . . . . .
>
> NOTE: Attached are the two bids from the security services companies and some ideas as to why a contract security company can better serve us than in-house security.[12]

Neither Seely, Szony, nor Ballentine are currently employed by the Respondent or any Hilton entity. Bennett, as noted above, continues to be employed by the Respondent in the same position as director of security. None of the above-mentioned individuals testified in this proceeding.

C. Analysis and Conclusions

The General Counsel has presented a strong prima facie showing that the Respondent's contracting of its entire security force, resulting in the dismissal of some 64 security officers, was motivated by considerations proscribed by the Act. Thus, most of its security guards were long-time employees of the Respondent and its two predecessors, and were highly paid in relation to the security guards employed by the other area casinos. The Respondent has been well aware of the fact for many years that it could realize very substantial savings by contracting out its security officer work. Yet despite annual wage surveys showing that its security officers were by far the highest paid in the Reno area, it never sought to freeze or reduce their wages to comparable levels or to contract out their work until immediately after the Union prevailed in the election as the employees' their collective-bargaining representative.

What this shows is that until the Union became the employees' collective-bargaining representative, the Respondent highly valued its security guards and was willing to pay them a substantial premium, compared to the other Reno properties, including their own sister property, the Flamingo Hilton-Reno, for their services. It must be presumed that the Respondent believed they were worth what they were receiving. Finally, the Respondent has elected not to contract out the nonunion security guard work at its other properties even though it claims it has had favorable experience with the subcontracting here, and even though its additional savings would be considerable.

It was not until after the Union prevailed in the election that the Respondent began to investigate the possibility of contracting out such work. Thus, the same individual, Director of Security Bennett, who vetoed the idea of contracting out on prior occasions with an unequivocal "no go," was instrumental in advocating the idea upon the Union's certification as the employee's collective-bargaining representative. As noted above, in 1993, in conjunction with the ongoing profit enhancement program, which was specifically designed to identify methods of enhancing profitability through cost savings, the Respondent decided that although it could have saved a total of $168,000 annually by eliminating 21 security guards (ideas 117, 118, and 119, supra)[13] it determined that such cost savings were not sufficient to outweigh what the Respondent then perceived as controlling negative factors.

As noted above, I have credited the account of Boekhout, a former security guard, who related in an affidavit his conversations with certain management representatives, including Bennett. It is very revealing that sometime in October 1995, about a month after the September 28, 1995 election and shortly prior to the commencement of bargaining on November 7, 1995, prior to the time the Respondent could have been aware of whether the Union would agree to wage concessions, Bennett candidly advised Boekhout, whom Bennett knew to be staunchly antiunion, that the decision had already been made that the Respondent intended to contract out the work. Boekhout's testimony is worth recounting here:

> I was in the security office when director of security, Dave Bennett, returned from a meeting upstairs. He waived at me to follow him inside. He told me that they had made a presentation to Jim Anderson and the others—he didn't name who—at the meeting concerning going to contract security *and that they had bought it*. He said that they had told him that they could save more than $500,000. *He told me that they had said do it. He then told me that they may have lost the battle but that they had won the war. He said that they [the Union] were gone*. I believe I said oh, shit. Bennett told me not to worry about it, that my job was protected, that he had managed to save the 10 or 11 of us. [Emphasis added.]

Bennett's remarks strongly indicate that the decision to contract out was a reaction to and the immediate result of the unionization of the Respondent's security force.

Thereafter, shortly after the decision to contract out was announced, both Bennett and Wright apologetically told Boekhout that, contrary to the Respondent's initial intention, in fact there would be no way for the Respondent to provide other jobs to employees who assisted it in combating the Union. By such statements the Respondent established that its mindset at the time was to protect those employees whom it considered loyal, and to discharge the others, thus reaffirming the animus that it harbored from the outset of the Union's organizational campaign as found by the Board in the above-cited case. Further decisions demonstrate Hilton's proclivity to violate the Act and its animus toward unionization in general. Thus, in addition to the above-cited cases involving the Hilton Flamingo-Reno's shutting down of unionized departments and laying off union employees, an additional Board decision and three administrative law judge decisions, assuming that such decisions are adopted by the Board, exhibit the modus operandi of Hilton corporation gaming entities when confronted with union organizational campaigns.[14]

The General Counsel, having established a prima facie case in support of the complaint allegation here as set forth above, the burden of proof is shifted to the Respondent to explain what lawful business considerations caused it to abruptly change its policy regarding contracting out, and to demonstrate that it would have contracted out its security force for lawful business

[12] At the hearing the parties stipulated that this memorandum was furnished to the General Counsel pursuant to a subpoena request for such documents, and that the Respondent sought the "attachments" from all individuals who should have received a copy of them; however, the Respondent was unable to locate the said attachments.

[13] This amounts to a savings of $8000 per security guard. This savings of $8000 per security guard in 1983 is very comparable to the savings realized by the Respondent as a result of contracting out its entire security force in 1997.

[14] See *Reno Hilton*, 319 NLRB 1154 (1995); *Flamingo Hilton-Laughlin*, 324 NLRB 72 (1997). Also see administrative law judge decisions in *Reno Hilton*, 1998 LEXIS 34 (Jan. 21, 1998*); Flamingo Hilton-Reno*, 1997 LEXIS 1020 (Dec. 11, 1997); *Flamingo Hilton-Laughlin*, 1997 LEXIS 991 (Dec. 1, 1997).

considerations.[15] In this regard the Respondent maintains that it had the absolute right to contract out, having negotiated such a contract provision with the Union in good faith;[16] that it had an established practice of reducing costs by eliminating employee and other expenses in order to increase its profits; and that it was motivated by economic, not antiunion, considerations.

The Respondent maintains that the Region's dismissal of the 8(a)(5) bad-faith bargaining allegation is dispositive of its right to contract out; thus, if the bargaining was undertaken in good faith and such bargaining resulted in a contract provision giving it the right to contract out, then this right is absolute. The Respondent's rationale is clearly erroneous. It is axiomatic that merely because the Respondent has negotiated the unfettered right in a collective-bargaining agreement to contract out unit work at any time, such right to contract out does not unfetter and insulate the Respondent from the sanctions of the Act prohibiting it from discriminating against employees because of their union activity. An employer may reserve for itself many prerogatives in a union contract such as, for example, the right to discharge employees "at will" or to change their job assignments, yet it is not free to exercise these contractual prerogatives for purposes prohibited by the Act.

The Respondent relies on *Automatic Sprinkler Corp*., 310 NLRB 401 (1995), in support of its foregoing contention. There the Board found that the employer violated Section 8(a)(3) of the Act by terminating all of its union employees and subcontracting the work its employees had previously performed. Further, the Board determined that the terms of a collective-bargaining agreement giving the employer the right to subcontract did not afford it protection from Section 8(a)(3) of the Act, as its decision to subcontract was discriminatorily motivated. The Sixth Circuit did not adopt the Board's rationale and, in a two to one decision (the dissenting judge strongly arguing that the majority erred in failing to consider the Board's rationale) reversed the Board.[17] Thereafter, the Unions' petition for certiorari was denied by the Supreme Court.[18] While *Automatic Sprinkler Corp*. is certainly factually distinguishable from the instant matter, as there the employer fundamentally changed the nature of its business by becoming a general contractor and contracting out the work of all its employees, nevertheless the holding of the Sixth Circuit seems to be that if an employer negotiates a collective-bargaining agreement giving it the right to contract out, the employer's discriminatory motive for exercising this right is irrelevant. Clearly this isolated decision neither reflects Board law, nor, as contended by the Respondent, mandates the dismissal of the instant matter. Rather, the Respondent's motive for exercising this contractual right is determinative of the issue in this proceeding, namely, whether the Respondent's decision to contract out the work was discriminatorily motivated in violation of Section 8(a)(3) of the Act.

Respondent contends that its contracting out of the security force is to be viewed as a continuation of an ongoing past practice of cost reduction. Thus, the Respondent, together with its sister property, the Flamingo Hilton-Reno, have demonstrated an established past practice of reducing costs by shutting down and consolidating their bakery and laundry departments[19] and combining other units, such as portions of their accounting departments and the management of their gift shops, and that the Respondent has otherwise reduced costs by laying off employees, shutting down an unprofitable restaurant, and leasing out its pro-bowling shop.[20]

There is certainly no contention by any party here that the Respondent is not privileged to cut costs as it deems expedient, whether by consolidating business units, laying off employees, contracting out,[21] or by any other means, provided that its cost cutting is not motivated by considerations proscribed by the Act, namely, a desire to discriminate against its employees in violation of the Act. However, as noted above, in addition to Hilton's established past practice and proclivity to violate the Act when confronted with the potential unionization of its employees,[22] the evidence adduced in support of the General Counsel's prima facie case shows that in fact, during the height of its cost cutting PEP program, the Respondent's considered decision was a definitive and documented "no go" with regard to contracting out any portion of its in-house security force despite the fact that such savings were stated to be about $8000 per employee per year, the same as the savings Respondent maintains it has currently realized from contracting out.[23]

Regarding its contention that it was motivated by economic or other lawful business considerations, the Respondent's evidence is sorely wanting, as not one individual who was instru-

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *in NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[16] The Union filed a charge alleging that the Respondent had engaged in bad-faith bargaining in violation of Sec. 8(a)(5) of the Act. This allegation was dismissed by the Regional Director and the dismissal was affirmed upon appeal.

[17] 120 F.3d 612 (6th Cir. 1997).

[18] 118 S.Ct. 1675 (1998). It appears that the Board did not petition the Court for certiorari and accepted the Sixth Circuit's decision as "the law of the case."

[19] As noted above, this "past practice" on which the Respondent relies was found by the Board to be violative of the act.

[20] Following the close of the hearing here, the Respondent filed a motion to reopen record, asserting that on April 17, 1998, in furtherance of its cost-cutting program, it announced to its employees that it had decided to subcontract its Patiio Room coffee shop operations to an independent restaurant operator, Chevy's Fresh Mex Restaurant, resulting in the loss of 132 jobs and at substantial cost savings to the Respondent. The Respondent's motion was denied.

[21] However, the Union here continues to maintain that Respondent did not bargain in good faith. This contention, having been previously resolved, is not an issue in this proceeding.

[22] In *Flamingo Hilton-Laughlin*, supra, the Board found the violations so pervasive and serious that it imposed a bargaining order. Further, in that case the Board stated (slip op. at p. 2):

> In this connection, the record shows that Jim Anderson, Hilton's corporate senior vice-president, labor relations and personnel administration, played a major role in orchestrating the Respondent's unlawful campaign against the Union. We agree that Anderson's continued employment is a factor undercutting the Respondent's management turnover defense to the imposition of a bargaining order.

[23] In this regard there is some dispute as to the actual savings realized by the Respondent. Thus, the Respondent's position is that after the first year, during which it incurred substantial expenses associated with the dismissal of its in-house security force, it expected to save about $500,000 per year. The Union takes the position that the potential savings are considerably less and are dependent on other contingencies, such as the renegotiation of APS's contract with the Respondent or cost saving measures that could have been negotiated between the Respondent and the Union upon the expiration of the 1-year collective-bargaining agreement.

mental in making such a decision was called by the Respondent as a witness in this proceeding. Under the circumstances it is reasonable to assume, and I find, that the testimony of such witnesses would be adverse to the Respondent's position.[24] Moreover, it is significant that a memo written by Director of Security Bennett and sent to a number of Respondent's officials and managers, is missing several pages, one of which, according to Bennett's memo, sets forth his ideas regarding the advantages of contracting out. Thus, page one of Bennett's memo states:

> NOTE: Attached are the two bids from the security services companies *and some ideas as to why a contract security company can better serve us than in-house security*. [Emphasis added.]

Under the circumstances, where *none* of the copies can be located and where Bennett, who continues to occupy the position of director of security, has not been called as a witness to attempt to furnish or convey the substance of the missing portions of his memo, I am also constrained to conclude that what was contained in the memo would similarly be adverse to the Respondent's interests in this proceeding.

On the basis of the foregoing, I find that the Respondent has not satisfied its burden under *Wright Line*, and I accordingly find that the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act as alleged by contracting out its security officer force and dismissing its entire complement of security officers on January 13, 1996.

[24] See *Douglas Aircraft Co*., 308 NLRB 1217 fn. 1 (1992). See also *Champion Rivet Co.,* 314 NLRB 1097, 1098 fn. 8 (1994):

> When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. It may be inferred that the witness, if called, would have testified adversely to the party on that issue. See *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(3) and (1) of the Act by contracting out the work of its security officers and dismissing its entire complement of security officers on about January 13, 1996.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer each of the security officers who were unlawfully terminated on about January 13, 1996 immediate and full reinstatement to their former positions of employment and make them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's discrimination against them in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix," and shall be required to mail a signed copy of the notice to each of the security officers involved here.[25]

[Recommended Order omitted from publication.]

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