HTH Corporation, Pacific Beach Corporation and Koa Management, LLC, a single employer, d/b/a Pacific Beach Hotel *and* International Longshore and Warehouse Union, Local 142

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Pacific Beach Corporation d/b/a Pacific Beach Hotel *and* International Longshore and Warehouse Union, Local 142. Cases 37–CA–7311, 37–CA–7334, 37–CA–7422, 37–CA–7448, 37–CA–7458, 37–CA–7470, 37–CA–7472, 37–CA–7473, 37–CA–7476, 37–CA–7478, 37–CA–7482, 37–CA–7484, 37–CA–7488, 37–CA–7537, 37–CA–7550, and 37–CA–7587

June 14, 2011

DECISION AND ORDER, REMANDING IN PART

BY MEMBERS BECKER, PEARCE, AND HAYES

On September 30, 2009, Administrative Law Judge James M. Kennedy issued the attached decision.[1] The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Union filed a brief in opposition to the Respondents' exceptions, and the Respondents filed reply briefs. The General Counsel and the Union each filed cross-exceptions and supporting briefs, the Respondents filed answering briefs, and the General Counsel and the Union each filed reply briefs. The Respondents also filed a "Motion to Remand and Reopen the Record for the Taking of Additional Evidence," the General Counsel and the Union filed oppositions, and the Respondents filed a reply.

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 and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to modify his remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

Background

This case represents the latest chapter in the Respondents' ongoing efforts to impede the rights of employees of the Pacific Beach Hotel (Hotel) to select and be represented by International Longshore and Warehouse Union, Local 142 (the Union). In 2002, when the Union first sought to represent Hotel employees, the Board set aside the representation election based on coercive interrogation of employees and maintenance of an overly broad no-solicitation rule by Respondent HTH Corporation (HTH). *Pacific Beach Hotel*, 342 NLRB 372 (2004). Similarly, the Board found that Respondent Pacific Beach Corporation (PBC) interfered with employee free choice in the 2004 rerun election by granting employees promotions and raises during the critical period.[5] *Pacific Beach Hotel*, 344 NLRB 1160, 1163 (2005).

On August 15, 2005, the Board certified the Union as the exclusive bargaining representative of a unit of Hotel employees. The instant case involves allegations that the Respondents thereafter engaged in numerous and wide-ranging unfair labor practices during negotiations with the Union for an initial contract, culminating in the Respondents' unlawful withdrawal of recognition from the Union on December 1, 2007, and their multiple unilateral changes.

[1] On March 29, 2010, after the judge issued his decision, the United States District Court for the District of Hawaii issued an injunction under Sec. 10(j) of the National Labor Relations Act, ordering the Respondents to: recognize and bargain with the Union; resume contract negotiations and honor all tentative agreements reached by the parties; offer immediate interim reinstatement to wrongfully discharged employees; immediately rescind, at the Union's request, any unilateral changes to bargaining unit employees' terms and conditions of employment that the Respondents made after November 30, 2007; and to post the order and read it aloud. *Norelli v. HTH Corp.*, 699 F.Supp.2d 1176 (D. Haw. 2010).

[2] The Respondents have 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.

The Respondents also contend that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful review of the judge's decision and the entire record, we are satisfied that the Respondents' contention lacks merit.

At the General Counsel's request, we correct the judge's inadvertent error in the description of the collective-bargaining unit contained in his decision.

[3] We shall modify the judge's remedy in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[4] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language, and we shall substitute a new notice to conform to the recommended Order as modified.

[5] Because the Union won the election notwithstanding this objectionable conduct, the Board did not set aside the election.

Instant Case

At all times since the Union's certification, the Respondents—HTH, PBC, and Koa Management (Koa)—have jointly operated the Hotel. There is no dispute that these companies constitute a single employer. Although a separate company—Pacific Beach Hotel Management (PBHM)—nominally operated the Hotel and negotiated with the Union during part of 2007, the judge found, and we agree, that the Respondents were the "true employer" at all times relevant to this proceeding in operating the Hotel and controlling negotiations with the Union.

The judge also found that the Respondents committed numerous violations of the Act following the Union's certification. We agree with the judge, for the reasons he stated, that the Respondents violated Section 8(a)(1) of the Act by: promulgating overbroad rules discouraging employees from engaging in protected concerted activity; polling employees concerning their union membership, activities, and sympathies;[6] and threatening employees with job loss if the Hotel had to close because of union boycotts. We further agree with the judge that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag,[7] and Virbina Revamonte, all of whom were members of the Union's bargaining committee.[8] We also agree that the Respondents violated Section 8(a)(5) and (1) of the Act by: bargaining in bad faith for an initial contract with the Union; withdrawing recognition from the Union on December 1, 2007;[9] unilaterally promulgating overbroad rules discouraging employees from engaging in protected concerted activity; unilaterally changing housekeepers' workloads; unilaterally imposing new conditions of employment on employees; unilaterally implementing wage increases for both tipping and nontipping category employees; and refusing to provide requested information to the Union.[10]

The General Counsel has filed cross-exceptions, arguing that the judge erred by failing expressly to find that PBHM was an agent of the Respondents. The General Counsel and the Union further except, arguing that the judge erred in not finding that the Respondents violated the Act, on December 1, 2007, by failing to rehire all discharged employees, unilaterally imposing a 90-day probationary period, and unilaterally reassigning employees and lowering their wage rates. As set forth below, we find merit in these cross-exceptions. The Union additionally excepts, arguing that the judge erred in failing to find that employees of the Shogun Restaurant, which the Respondents unilaterally closed, are entitled to reinstatement or other appropriate relief. As set forth below, we remand this issue to the judge.

I. THE STATUS OF PACIFIC BEACH HOTEL MANAGEMENT

As noted above, the Respondents—HTH, PBC, and Koa—operated the Hotel. As found by the judge, from the Union's certification on August 15, 2005, until December 2006, the Respondents *directly* bargained with the Union, and bargained in bad faith. The Respondents steadfastly adhered to bargaining proposals on union recognition, management rights, and a grievance procedure that would have allowed the Union no role in representing employees. As found by the judge, these proposals "demonstrate rather clearly that Respondents entered into the bargaining process with the mindset of evading [their] responsibility, mandated by Section 8(d) of the Act, to bargain in good faith with the objective of reaching a collective bargaining agreement" (footnote omitted).[11] Although the Respondents otherwise went

[6] Although we agree that the Respondents unlawfully polled their employees, we do not find unlawful interrogation. This violation was not pleaded in the complaint and finding it would be cumulative of the polling violation and would not affect the remedy.

[7] In adopting the judge's finding, we further note that, although the Respondents claimed that they did not rehire (and thereby effectively discharged) Bumanglag because they did not need an additional mechanic and because Bumanglag was less skilled than another mechanic in air-conditioning and refrigeration maintenance, the evidence shows that after December 1, 2007, the Respondents hired at least five new employees in the maintenance department and that Bumanglag was EPA certified in air-conditioning and refrigeration.

[8] As explained in fn. 14 below, we also find that these discharges violated Sec. 8(a)(5).

[9] At the hearing, the Respondents attempted to justify their withdrawal of recognition by presenting evidence of a general consensus that employees did not support the Union in late 2007, as well as a decertification petition purportedly signed by a majority of employees in mid-2008. The judge refused to admit this evidence, and he rejected the Respondents' offer of proof. The Respondents renewed the offer of proof in their motion to remand and reopen the record for the taking of additional evidence, which the General Counsel and Union opposed. We agree with the judge that the evidence proffered by the Respondents would not support its withdrawal of recognition. General employee testimony would not provide the required proof of actual loss of majority support under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001). Further, the alleged mid-2008 decertification petition postdated the Respondents' withdrawal of recognition by several months. Therefore, we deny the Respondents' motion.

[10] The Respondents did not except to the judge's finding that it violated Sec. 8(a)(1) of the Act by threatening an employee with unspecified consequences for being assertive during the collective-bargaining process. No party excepted to the judge's dismissal of the allegation that the Respondents violated Sec. 8(a)(1) by engaging in coercive surveillance of union demonstrations and rallies.

[11] Member Hayes agrees that the Respondents' overall conduct indicated bad-faith bargaining. He does not agree, however, with the judge's finding that certain individual proposals indicated bad faith. For example, Member Hayes would not find that the Respondents' management-rights proposal or their open-shop proposal independently reflected bad faith. In addition, Member Hayes would not rely on the

through the motions of bargaining, it was not, as the judge found, "for the purpose of reaching an agreement, but only for the purpose of running out the certification-year clock." Indeed, frequent statements by Robert Minicola, the regional vice president of operations for both HTH and PBC, emphasizing that the Union had only won the election by one vote, further support a finding of bad-faith bargaining.

From January 1 to November 30, 2007, Koa, on behalf of the Respondents, contractually delegated management of the Hotel to the Outrigger Group d/b/a PBHM. Koa also delegated to PBHM the responsibility for negotiating a collective-bargaining agreement with the Union. During this time, however, the Respondents maintained control of the Hotel, as well as authority to approve any agreement that PBHM might reach with the Union. The Respondents also retained the unfettered right to unilaterally terminate the management agreement with PBHM at any time prior to June 1, 2008. As found by the judge, the Respondents used PBHM as part of a scheme to evade their obligations under the Act and weaken the Union. After PBHM began to make progress in its negotiations with the Union, the Respondents notified PBHM on August 3, 2007, that they were terminating the management agreement, effective November 30, 2007. The Respondents then resumed operation of the Hotel, effective December 1, 2007, discharged all employees, rehired some but not all, withdrew recognition from the Union, and made several unilateral changes in terms and conditions of employment.

As set forth above, during PBHM's management of the Hotel, the Respondents were the "true employer" of the Hotel employees. Thus, even during PBHM's management of the Hotel, the Respondents continued to be the employer of the bargaining unit employees.

The General Counsel excepts, however, to the judge's failure to specifically find that PBHM was the Respondents' agent. The Respondents argue that the judge's failure to make such a finding precludes the Board from finding the Respondents liable for any unfair labor practices committed during PBHM's management of the Hotel. We disagree. In any event, we agree with the General Counsel that PBHM was the Respondents' agent.

The Board applies common-law agency principles to determine the existence of an agency relationship. See, e.g., *Wal-Mart Stores*, 350 NLRB 879, 884 (2007). The Board may find an agency relationship between the purported agent and the principal where the agent possesses either actual or apparent authority to act on the principal's behalf.

> [A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent.

Id., citing *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004), quoting *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 fn. 4 (1991).

In *Wal-Mart*, the Board further explained:

> For responsibility to attach under either theory of agency, it is not necessary that the principal expressly authorize, actually desire, or even know of the action in question. A "principal is responsible for its agent's actions that are taken in furtherance of the principal's interest and fall within the general scope of authority attributed to the agent." *Tyson Fresh Meats*, supra, 343 NLRB at 1337, quoting *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984). Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, *Agency*, § 33.

Id. Applying these principles here, it is manifestly clear that PBHM was the Respondents' agent. At no time did PBHM act on its own as the employer of the Hotel employees. Instead, it acted on the Respondents' behalf. While PBHM, in accordance with the management agreement and the Respondents' wishes, deliberately obscured the Respondents' control of the negotiations, the Respondents retained control of the Hotel, approval of any agreement that might be reached with the Union, and the right to terminate PBHM's authority unilaterally. Under these circumstances, we conclude that PBHM was the Respondents' agent.

II. THE FAILURE TO REHIRE EMPLOYEES

The General Counsel excepts to the judge's failure to specifically find that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to rehire several employees as of December 1, 2007, when the Respondents resumed direct management of the Hotel. We find merit in the General Counsel's contention.

In September 2007, in preparation for resuming management of the Hotel from PBHM, the Respondents decided that they would not retain all of the Hotel's employees, and that they would require current employees

judge's conclusory inference that 37 bargaining sessions and 170 tentative agreements were insignificant or indicative of surface bargaining.

to reapply for their jobs. The Respondents also decided to close the Shogun Restaurant, one of three restaurants located in the Hotel. After conducting a brief reapplication process, the Respondents refused to rehire various employees, including the seven members of the Union's bargaining committee. As mentioned above, we adopt the judge's finding that the Respondents violated Section 8(a)(3) and (1) of the Act when they effectively discharged these seven employees by choosing not to rehire them.

On exception, the General Counsel argues that the judge erred in failing to find that the Respondents unlawfully failed to rehire additional "unnamed employees."[12] Consistent with the complaint, the evidence shows that, without bargaining with the Union, the Respondents offered employment to substantially fewer employees than were employed prior to December 1.[13] We agree with the General Counsel that the Respondents' refusal to rehire unit employees on December 1 was akin to a permanent layoff, a mandatory subject of bargaining. Accordingly, we find that the Respondents violated Section 8(a)(5) and (1) of the Act, and that the affected employees are entitled to an appropriate remedy.[14] See, e.g., *Kajima Engineering & Construction*, 331 NLRB 1604, 1618–1620 (2000); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

III. THE UNILATERAL IMPOSITION OF A 90-DAY PROBATIONARY PERIOD

After the Respondents resumed management of the Hotel, they unilaterally imposed several new rules on employees. As noted above, the judge found, and we agree, that these unilateral changes were unlawful. One of these changes was the Respondents' implementation of a 90-day probationary period for all rehired employees. Although the judge recommended ordering that the unilateral changes be rescinded, and that the Respondents make employees whole for any losses suffered as a result of those unilateral changes, he did not specifically order the Respondents to reinstate and make whole any employees discharged during the probationary period. The General Counsel excepts to this omission, but concedes that the Respondents may avoid backpay and reinstatement obligations if they can establish that any discharges were lawful without regard to the new probationary period. We find merit in the General Counsel's exception, and we shall order the Respondents to reinstate and make whole any employees discharged during the new probationary period whose discharges are not shown in compliance proceedings to be lawful without regard to that unlawfully imposed condition.[15]

IV. THE UNILATERAL REASSIGNING OF EMPLOYEES AND THE LOWERING OF THEIR WAGES

The General Counsel also contends that the judge failed to rule on the complaint allegation that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally reassigning certain employees and lowering their wages after the Respondents resumed management of the Hotel. We find merit in this exception. At the hearing, Vice President of Operations Minicola admitted rehiring some bargaining unit employees, effective December 1, 2007, for positions that differed from what they held prior to December 1, and at wage rates less than what the Respondents previously had paid them. Because the Respondents did not bargain with the Union about these position changes or the lowering of the employees' wages, these changes clearly violated the Act. See *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1066 (2006).

V. THE SHOGUN RESTAURANT EMPLOYEES

The judge found that the Respondents unilaterally closed the Hotel's Shogun Restaurant and laid off the restaurant employees, both in violation of Section 8(a)(5) and (1) of the Act. The Union argues on exception that the judge erred in failing to provide these laid-off employees with a make-whole remedy. The Respondents oppose this argument, noting that the General Counsel stated on the final day of the hearing that he was not seeking a remedy for these employees.

We will remand this issue to the Chief Administrative Law Judge, who may designate another judge in accordance with Section 102.36 of the Board's Rules and Regulations to prepare a supplemental decision.[16] Once a violation of the Act has been established, the Board has full authority to fashion an appropriate remedy. See *Schnadig Corp.*, 265 NLRB 147 (1982). Ordinarily, the Respondents' unilateral closure of the Shogun Restaurant and the layoff of the employees would warrant a remedy.

[12] The complaint alleged that "On or about November 30, 2007, Respondents . . . permanently terminated certain of the unit employees whose names are not known with certainty by the General Counsel, but who are known to Respondents." The complaint further alleged that these actions violated Sec. 8(a)(5) and (1) of the Act.

[13] This group of employees is also distinct from the 11 employees who had worked at the Shogun Restaurant, and who also were not rehired. The Shogun employees are discussed below.

[14] For the same reason, we find that the Respondents' discharge of the seven members of the union bargaining committee also violated Sec. 8(a)(5) and (1).

[15] We shall also order the Respondents to remove from their files any reference to the unlawful discharges and notify the affected employees in writing that this has been done and that the discharges will not be used against them in any way.

[16] The Board has been advised that Administrative Law Judge James M. Kennedy is retired.

However, in light of the limited record on this issue, and the lack of explanation for the General Counsel's disclaimer of a remedy, we shall remand this matter to the judge to determine whether a make-whole remedy is appropriate. Cf. *Holder Construction Co.*, 327 NLRB 326, 326 fn. 1 (1998) (rejecting the General Counsel's exceptions seeking reinstatement of two employees discharged for engaging in protected concerted activities, where the General Counsel at hearing disclaimed any intent to seek reinstatement, and attorney for one of the employees neither objected to the General Counsel's disclaimer nor excepted to withholding of reinstatement remedy).[16]

AMENDED CONCLUSIONS OF LAW

1. Respondents HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC, together doing business as Pacific Beach Hotel, constitute a single employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. Each is therefore jointly and severally responsible for the remedy of the unfair labor practices of the others.

2. International Longshore and Warehouse Union, Local 142 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since the Board certified it as the 9(a) representative of the Hotel employees on August 15, 2005, the Union has represented a majority of the Hotel's employees in the appropriate bargaining unit.

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

(a) On or about October 12, 2007, the Respondents promulgated overbroad rules through employment offers and/or the issuance of a new employee handbook that discourage employees from engaging in union and other protected activity.

(b) On April 23 and again on April 25, 2008, the Respondents polled employees concerning their union membership, activities, and sympathies.

(c) During negotiations with the Union, Robert Minicola, the regional vice president of operations for both HTH and PBC, threatened unspecified consequences to an employee for being assertive during the collective-bargaining process.

(d) On April 25, 2008, the Respondents, through Minicola and Human Resources Manager Linda Morgan, threatened employees with the loss of their jobs if the Hotel had to close because of union boycotts.

5. The Respondents committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging the following employees on December 1, 2007, because they were union activists: Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte.

6. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

(a) Beginning in January 2006 and continuing through the end of December 2006, the Respondents bargained with the Union with no intention of reaching an agreement.

(b) Between January 1 and December 1, 2007, the Respondents contractually delegated PBHM to run the Hotel and to bargain collectively with the Union on the Respondents' behalf as their agent. However, at no time were the Respondents relieved of their obligation to bargain collectively in good faith with the Union. The Respondents used PBHM as a middleman as part of a scheme to disguise their decision to deprive the employees of union representation and to escape their obligation to collectively bargain in good faith. When PBHM and the Union were close to reaching an agreement, the Respondents canceled their operating agreement with PBHM in order to defeat any collective-bargaining agreement that PBHM might have successfully negotiated.

(c) On December 1, 2007, the Respondents withdrew recognition of the Union as the Section 9(a) representative of the unit employees.

(d) On or about October 12, 2007, the Respondents unilaterally and without bargaining with the Union promulgated rules through employment offers and/or the issuance of a new employee handbook.

(e) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union changed housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower.

(f) In October 2007, as a predicate to their resumption of management of the Hotel, the Respondents unilaterally and without bargaining with the Union imposed new conditions of employment on their employees, including requiring them to apply for their own jobs and treating them as new employees, requiring drug tests, and imposing a 90-day probationary period.

(g) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union closed the Sho-

[16] Because the General Counsel did not include this charge in the complaint, and because he affirmatively stated at the hearing that he was not seeking a remedy for these employees, Member Hayes would dismiss this allegation.

gun Restaurant and discharged an undetermined number of employees who worked in that restaurant.

(h) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union laid off Hotel employees.

(i) On December 1, 2007, the Respondents discharged the following employees without bargaining with the Union: Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte.

(j) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union reassigned certain employees to different positions and unilaterally lowered their wages.

(k) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union implemented wage increases for both tipping and nontipping category employees.

(l) In April, May, September, and October 2007 and April 2008, the Union made various demands for relevant information concerning the legal relationship between PBHM and the Respondents, information concerning the management agreement between PBHM and the Respondents, and information concerning the Respondents' resumption of management of the Hotel and changes to unit employees' terms and conditions of employment that the Respondents wished to effect after they resumed management of the Hotel. The Respondents never replied to any of these requests and did not provide the requested information.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondents violated Section 8(a)(3), (5), and (1) by discharging Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte, we shall order the Respondents to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra. The Respondents shall also be required to expunge from their files and records any and all references to the unlawful discharges, and to notify Kanaiaupuni, Miyashiro, Hatanaka, Villanueva, Recaido, Bumanglag, and Revamonte in writing that this has been done and that the discharges will not be used against them in any way.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith and subsequently withdrawing recognition from the Union and by failing to furnish the Union with information requested in April, May, September, and October 2007 and April 2008, we shall order the Respondents: on request of the Union, to bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement; and to furnish the Union with the information requested in April, May, September, and October 2007 and April 2008. Further, the General Counsel has requested that the Board order the Respondents to reinstate all tentative agreements agreed to by the Respondents or PBHM during their negotiations with the Union. In light of the Respondents' unlawful withdrawal of recognition from the Union, we will order the Respondents, on the resumption of bargaining, to reinstate all tentative agreements reached by the parties for purposes of good-faith bargaining. See *Health Care Services Group*, 331 NLRB 333 (2000).

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees on December 1, 2007, without bargaining with the Union, we shall order the Respondents to offer the employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra. The Respondents shall also be required to expunge from their files and records any and all references to the unlawful discharges, and to notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees' job positions and changing wages and other terms and conditions of employment, including promulgating and maintaining overbroad rules, we shall order

the Respondents to rescind any or all of the unilateral changes and overbroad rules and restore the previously existing wages and other terms and conditions of employment. To the extent that any unlawful unilateral changes have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring or authorizing the Respondents to rescind such improvements unless requested to do so by the Union. We shall further order the Respondents to make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by imposing a 90-day probationary period on Hotel employees after December 1, 2007, we shall order the Respondents, in the event that they discharged any unit employee as a result of their unilaterally imposed 90-day probationary period policy, and that employee would not have been terminated under the preexisting lawful policy, to offer the employee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, make him whole for any loss of earnings and other benefits suffered as a result of his discharge, and remove from their files any reference to the unlawful discharge and notify the affected employee in writing that this has been done and that the discharge will not be used against him in any way.

The Respondents except to the judge's recommendation of a 12-month extension of the certification year. We find such an extension to be warranted. The Respondents engaged in a number of coercive unfair labor practices that undermined the Union and prevented the parties from reaching an agreement. Although the Respondents and the Union met for 37 bargaining sessions and reached approximately 170 tentative agreements, the Respondents merely went through the motions during negotiations with no intention of completing an agreement. Further, as found by the judge, although PBHM and the Union made some progress in negotiations, that progress was illusory because the Respondents purposely canceled their management agreement with PBHM in order to sabotage the progress made by the parties. Under these circumstances, the Respondents did not allow the Union a full opportunity to bargain during the certification year. See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed.Appx. 331 (D.C. Cir. 2005).

Our dissenting colleague argues that it is inappropriate in this case to order a 12-month extension because of the progress made by PBHM and the Union in negotiations. However, the Board has broad discretion to fashion "a just remedy" to fit the circumstances of each case it decides. *Excel Case Ready*, 334 NLRB 4, 5 (2001), citing *Maramont Corp.*, 317 NLRB 1035, 1037 (1995). See also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984). The Board may order "a complete renewal of a certification year, even in cases where there has been good-faith bargaining in the prior certification year." *Glomac Plastics, Inc.*, 234 NLRB 1309, 1309 fn. 4 (1978), enfd. 592 F.2d 94 (2d Cir. 1979). "Such a position takes cognizance not only of the realities of collective-bargaining negotiations as well as the realities of the effect of *any* bad-faith bargaining in the prior year" (original emphasis). Id. While we do not dispute that PBHM and the Union made progress in bargaining toward a collective-bargaining agreement, the critical factor here is that the Union did not enjoy the benefit of the certification year, because the Respondents' bad faith infected the entire course of negotiations.

The Respondents also except to the judge's recommendation of extraordinary remedies, consisting of a broad cease-and-desist order, the reimbursement of negotiating expenses to the Union, and the public reading of the notice by a responsible corporate executive. We agree with the judge that these remedies are warranted.

First, in light of the Respondents' proclivity to violate the Act and their serious misconduct that demonstrates a general disregard for their employees' fundamental rights, we agree with the judge that a broad cease-and-desist order is warranted, enjoining the Respondents not only from committing the kinds of violations found in this case but from violating the Act "in any other manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

Second, in *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*,118 F.3d 795 (D.C. Cir. 1997), the Board established the following standard for the award of negotiating expenses:

> In cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the re-

> spondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. As noted above, this approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

As discussed above, the Respondents bargained with the Union with no intention of reaching an agreement and purposely sabotaged the progress made by the Union in its negotiations with PBHM. Thus, we will order the Respondents to reimburse the Union for its negotiating expenses. Our dissenting colleague argues that this remedy is inappropriate because of the progress made by PBHM and the Union in negotiations. We reject this argument for the same reason that we rejected his position regarding the 12-month extension of the certification year, i.e., the Union did not enjoy the benefit of the certification year because the Respondents' bad faith infected the entire course of negotiations.[17]

Third, we will also order the Respondents to have the attached notice publicly read by a responsible corporate executive in the presence of a Board agent or, at the Respondents' option, by a Board agent in the presence of a responsible corporate executive. This remedy is appropriate here because the Respondents' violations of the Act are sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. See *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

[17] Member Hayes finds several provisions of the amended remedy to be internally inconsistent, specifically the reinstatement of tentative agreements between the Union and PBHM, requiring Respondents to reimburse the Union for negotiating expenses, and imposing a 12-month extension of the certification year. From January 1to November 30, 2007, when PBHM handled contract negotiations with the Union on behalf of the Respondents, the facts indicate that PBHM made considerable progress toward a collective-bargaining agreement. Indeed, it appears that the Respondents terminated their agreement with PBHM for this very reason. In his view, it is incongruous to order reinstatement of those tentative agreements, presumably reached through good-faith bargaining, while also requiring reimbursement for bargaining costs that produced those agreements, and further discounting this time of productive bargaining when computing extension of the certification year. Thus, Member Hayes would not order reimbursement for bargaining costs incurred during bargaining with PBHM, and he would extend the certification year for 6 months. Member Hayes would also not require that the notice be read to employees.

ORDER

The National Labor Relations Board orders that the Respondents, HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC, a single employer, Honolulu, Hawaii, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified consequences if they engage in protected concerted activities.

(b) Threatening employees with closure of their work facility if they engage in activities on behalf of the Union.

(c) Polling employees about their union membership, activities, and sympathies.

(d) Discharging or otherwise discriminating against employees for supporting International Longshore and Warehouse Union, Local 142, or any other labor organization.

(e) Failing to bargain in good faith with the Union and withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time, and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assis-

tant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(f) Failing and refusing to recognize and bargain with the Union by unilaterally laying off employees on December 1, 2007, without first notifying the Union and giving it an opportunity to bargain.

(g) Changing job positions and terms and conditions of employment of unit employees without first notifying the Union and giving it an opportunity to bargain.

(h) Promulgating and maintaining a rule against "Discouraging Potential or Actual Customers" designed to prevent employees from engaging in boycotts or other public demonstrations in support of a labor dispute.

(i) Promulgating and maintaining a rule prohibiting employees from sharing any information that they acquire in the course of their employment.

(j) Promulgating and maintaining in their employee handbook rules that: (1) prohibit employees from sharing information with the media and outsiders; (2) require employees to keep confidential certain information about the business operations of the Hotel; (3) prohibit employees from leaving the property or their work areas during working hours; (4) prohibit employees from making derogatory statements about other employees, supervisors, or the Hotel/parent corporation; (5) forbid employees from being on Hotel property when not scheduled to work, enforced by a property pass rule; (6) ban employees from "loitering or straying into areas not designated as work areas, or where your duties do not take you"; and (7) prohibit "unauthorized" discussions in "public" areas.

(k) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees.

(l) 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 necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharges of Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte and, within 3 days thereafter notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

(d) In the event that the Respondents discharged any unit employee as a result of their unilaterally imposed 90-day probationary period policy, and that employee would not have been terminated under the preexisting lawful policy, take the following actions: offer the employee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; make him whole for any loss of earnings and other benefits suffered as a result of his discharge; and remove from their files any reference to the unlawful discharge and notify the affected employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification is

extended 12 months from the date that the Respondents begin to comply with this Order.

(f) Reinstate, for purposes of good-faith bargaining, the tentative agreements reached between the Respondents/PBHM and the Union from the commencement of bargaining until December 1, 2007.

(g) Within 14 days from the date of this Order, offer any employees that the Respondents unilaterally laid off without bargaining on December 1, 2007, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(h) Make any employees that the Respondents unilaterally laid off without bargaining on December 1, 2007, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(i) Within 14 days from the date of this Order, remove from their files any reference to the unlawful layoffs of any employees that the Respondents unilaterally laid off without bargaining on December 1, 2007, and, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

(j) Rescind the overbroad rules, and on request by the Union, rescind the changes in the terms and conditions of employment for unit employees that were unilaterally implemented from October to December 2007, and make unit employees and former unit employees whole for any loss of earnings and other benefits suffered as a result of those rules and unilateral changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(k) Furnish to the Union in a timely manner the information requested by it in April, August, and September 2007 and April 2008.

(l) Pay to the Union its expenses incurred in collective-bargaining negotiations from the commencement of negotiations on January 5, 2006, until December 1, 2007, the date that the Respondents unlawfully withdrew recognition from the Union.

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

(n) Within 14 days after service by the Region, post at their Honolulu, Hawaii facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since January 5, 2006.

(o) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by a responsible corporate executive in the presence of a Board agent or, at the Respondents' option, by a Board agent in the presence of a responsible corporate executive.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the issue of the appropriate remedy for the Respondents' unilateral closing of the Shogun Restaurant and layoff of the restaurant employees is severed and remanded to the Chief Administrative Law Judge, who may designate another judge in accordance with Section 102.36 of the Board's Rules and Regulations to take further appropriate action consistent with this decision.

IT IS FURTHER ORDERED that the designated judge shall prepare and serve on the parties a supplemental decision, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified consequences if you engage in protected concerted activities.

WE WILL NOT threaten you with closure of your work facility if you engage in activities on behalf of the Union.

WE WILL NOT poll you about your union membership, activities, and sympathies.

WE WILL NOT discharge or otherwise discriminate against you for supporting International Longshore and Warehouse Union, Local 142, or any other labor organization.

WE WILL NOT fail to bargain in good faith with the Union and withdraw recognition from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

WE WILL NOT fail and refuse to recognize and bargain with the Union by unilaterally laying off employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT change your job positions and terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT promulgate and maintain a rule against "Discouraging Potential or Actual Customers" designed to prevent you from engaging in boycotts or other public demonstrations in support of a labor dispute.

WE WILL NOT promulgate and maintain a rule prohibiting you from sharing any information that you acquire in the course of your employment.

WE WILL NOT promulgate and maintain in our employee handbook rules that: (1) prohibit you from sharing information with the media and outsiders; (2) require you to keep confidential certain information about the business operations of the Hotel; (3) prohibit you from leaving the property or your work areas during working hours; (4) prohibit you from making derogatory statements about other employees, supervisors, or the Hotel/parent corporation; (5) forbid you from being on Hotel property when not scheduled to work, enforced by a property pass rule; (6) ban you from "loitering or straying into areas not designated as work areas, or where your duties do not take you"; and (7) prohibit "unauthorized" discussions in "public" areas.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL, within 14 days from the date of the Board's Order, offer Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte, and, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, in the event that we discharged any unit employee as a result of our unilaterally imposed 90-day probationary period policy, and that employee would not have been terminated under our preexisting lawful policy, offer the employee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of his discharge, and WE WILL remove from our files any reference to the unlawful discharge and notify the affected employee in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification is extended 12 months from the date that we begin to comply with the Board's Order.

WE WILL reinstate, for purposes of good-faith bargaining, the tentative agreements reached between us/PBHM and the Union from the commencement of bargaining until December 1, 2007.

WE WILL, within 14 days from the date of the Board's Order, offer any employees that we unilaterally laid off without bargaining on December 1, 2007, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any employees that we unilaterally laid off without bargaining on December 1, 2007, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of any employees that we unilaterally laid off without bargaining on December 1, 2007, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL rescind the overbroad rules and, on request by the Union, WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented from October to December 2007, and make unit employees and former unit employees whole for any loss of earnings and other benefits suffered as a result of those unilateral changes and rules, with interest.

WE WILL furnish to the Union in a timely manner the information requested by it in April, May, September, and October 2007 and April 2008.

WE WILL pay to the Union its expenses incurred in collective-bargaining negotiations from the commencement

of negotiations on January 5, 2006, until December 1, 2007, the date that we unlawfully withdrew recognition from the Union.

HTH CORPORATION, PACIFIC BEACH CORPORATION, AND KOA MANAGEMENT, LLC, A SINGLE EMPLOYER, D/B/A PACIFIC BEACH HOTEL

Dale K. Yashiki and *Trent K. Kakuda,* for the General Counsel.
Wesley M. Fujimoto and *Ryan E. Saneda (Imanaka, Kudo & Fujimoto),* of Honolulu, Hawaii, for the Respondents.
Danny J. Vasconcellos (with *Herbert R. Takahashi* and *Rebecca L. Covert* on brief) *(Takahashi, Vasconcellos & Covert),* of Honolulu, Hawaii, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge.[1] This case was tried before me in Honolulu, Hawaii, over 13 hearing days beginning November 4, 2008, and closing on February 27, 2009. The amended consolidated complaint, issued on September 30, 2008, by the Regional Director for Region 20 of the National Labor Relations Board (the Board) is based on original unfair labor practice charges filed by International Longshore and Warehouse Union, Local 142 (the Union) on various dates between January 22, 2007, and May 15, 2008. Many were amended along the way; the last amendment occurring on August 29, 2008. The amended consolidated complaint (the complaint) alleges that Respondents HTH Corporation, Pacific Beach Corporation and Koa Management, LLC have violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). Respondents deny the allegations.[2]

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. All parties have filed briefs which have been carefully considered. Based on the entire record of the case,[3] as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

There are three Respondents in this matter and their relationship is under scrutiny here. The first is HTH Corporation, which in many respects serves as a parent or holding company of the Pacific Beach Hotel. The second, a subsidiary of HTH, is Pacific Beach Corporation (PBC) which operated the Hotel before January 2007 and resumed operating it in December of that year. Finally, there is Koa Management, LLC which was created by HTH to satisfy the requirements of a lender, the UBS Bank, as the Hotel had become collateral for a loan to HTH.

The complaint alleges that all three entities are engaged in interstate commerce. Respondents admit that the hotel as a business entity, and therefore HTH and PBC, have gross revenue exceeding $500,000 and purchase products, goods, and materials valued in excess of $5000 which originate outside the State of Hawaii. They therefore admit that PBC, at least, is an employer engaged in interstate commerce within the meaning of Section 2(3), (3), and (6) of the Act. However, they deny that HTH and Koa Management are employers within the meaning of the Act, since they don't directly employ anyone.

Below, I will sort out the various relationships that HTH, PBC, and Koa all have with one another, but for purposes of jurisdiction over this matter it suffices to observe that the Hotel is clearly engaged in interstate commerce and meets the Board's retail industry standards for the assertion of jurisdiction.

In addition, there is a fourth business entity which should be identified at this stage. This is a hotel management company known as Pacific Beach Hotel Management or simply PBHM. PBHM was specially created for the purpose of directing the operations of the Pacific Beach Hotel under a contract with HTH/Koa. It was owned by The Outrigger Enterprises Group. Outrigger owns, among other things, the Outrigger and Ohana hotel chains in Hawaii and some Pacific Islands. It is independent of the HTH entities.

A. Background

The Hotel is a large 837-room hotel in Waikiki. Taking up most of the city block bounded by Kalakaua, Liliuokalani, Kuhio, and Kealohilani Avenues, it consists of one 38-floor tower (the Ocean Tower on the Kuhio side) and one 17-floor tower (the Beach Tower, facing Kalakaua). The towers are connected by a lower central building accommodating the main entrance, a shopping mall, several restaurants, and the Oceanarium, a large multistory saltwater fish tank which can be viewed from restaurants on three different floors. The central section also houses meeting rooms on the third floor and a multifunction room on the seventh floor. Finally, there is a large parking structure topped by a tennis court located on the Kuhio Avenue side.

The Union's organizing drive was begun in 2002 at a time when the business was in the hands of Herbert T. Hayashi (H. Hayashi). Indeed, it is fair to say that the Pacific Beach Hotel is the Hayashi family's principal business. Through HTH (the name taken from Herbert's initials) the family also owns other businesses, including other hotels,[4] but the jewel is the Pacific

[1] The first six volumes of the transcript erroneously described me as an attorney hearing officer connected to the San Francisco Regional Office. That description is not correct. The court reporter's errata on p. 998, the fourth page of vol. VII, more properly described me as "Judge." Moreover, my branch, part of the Division of Judges, is not in any way connected to the Regional Office.

[2] Given the large number of amendments, the General Counsel, for the convenience of the parties, issued a "Complaint Conformed to Reflect All Amendments as of January 13, 2009." GC Exh. 1(rrrr). That document is convenient to use as the operative complaint.

[3] The General Counsel's motion to correct the record is granted.

[4] HTH owned the King Kamehameha Hotel in Kona on the Big Island until 2007, though it did retain title to the real property on which it sits. It also owns the Pagoda Hotel & Floating Restaurant in Honolulu.

Beach Hotel. Much of the Hotel's business traditionally has come from Japan where Herbert's nephew, John Hayashi (J. Hayashi), serves as the Hotel's agent. The evidence shows that J. Hayashi receives a substantial commission for sales originating in Japan. H. Hayashi died in 2005, leaving his share of the business to his daughter Corine Hayashi (C. Hayashi). C. Hayashi has since married and her last name is now Watanabe.

The first NLRB election was conducted on July 31, 2002. The election was overturned by the Board in its decision in *Pacific Beach Hotel*, 342 NLRB 372 (2004). A second election was conducted on August 24, 2004. Among other things, the second election involved challenged ballots in a sufficient number to affect the outcome. The Board in *Pacific Beach Corp.*, 344 NLRB 148 (2005), ruled first that, certain challenged ballots should be opened and counted, and second, in the event the revised tally resulted in a majority favoring union representation, a certification of representative was to be issued; if it did not, the Union's objections were to be sustained, and a third election conducted. The ballots were opened, counted, and a revised tally issued showing that the Union had won by one vote. Accordingly, on August 15, 2005, the Regional Director issued a certificate of representative in favor of the Union. It should be noted that the employer to whom the certification ran was HTH. This one-vote margin of victory would become a flashpoint in the collective-bargaining negotiations which would follow.

Robert M. (Mick) Minicola appeared on the scene in December 2003. He had previously worked for The Outrigger Group in a variety of capacities. He was, and is, an experienced hotelier. He is a formidable personality. He testified that he went to work for both HTH and Pacific Beach Corporation on the same day. He was originally hired as regional general manager, to oversee the King Kamehameha Kona Beach Hotel, the Pagoda Hotel and Floating Restaurant, as well as the Pacific Beach Hotel. As time passed, and with the death of H. Hayashi, Minicola's duties expanded. During times material to this litigation, Minicola had become the regional vice president of operations for both Pacific Beach Corporation and HTH. He reports to Corine Watanabe (Watanabe). She would appear to be the chief executive officer, though she is corporate vice president for both HTH and Pacific Beach Corporation. Watanabe did not testify in this matter, permitting Minicola to describe the relationships of the various entities. He testified that HTH is a closely held corporation whose shares are held by an entity known as the Hayashi Family Trust.

Since January 2005, apparently coincident with H. Hayashi's death, the officers and executives of HTH and Pacific Beach Corporation have been identical. Both Watanabe and J. Hayashi are members of the board of directors for both HTH and Pacific Beach Corporation. He is also a corporate vice president of both entities. Watanabe, J. Hayashi, and Minicola are all on the direct payroll of Pacific Beach Corporation, and not HTH. HTH, through those individuals, however, issues directives to the Pacific Beach Corporation and its executives. There is a corporate interlock as well as an operational interlock.

In 2004, HTH created Koa Management when a new lender came on the scene to refinance a loan which had previously been held by a Japanese bank. The new lender, UBS Bank, wished to protect itself in the event of a default. It insisted that a so-called "lockbox" entity be created which would collect all receipts from the Hotel. In the event of a default, the bank could conveniently seize the lockbox. Koa served that function. So long as the loan was not in default, the money passed through Koa and on to Pacific Beach Corporation as the Hotel operator.

Koa is incorporated as a limited liability corporation and its only member is Pacific Beach Corporation. Watanabe is its special member and she controls it, albeit with UBS Bank oversight.[5] Koa, like HTH, has no employees itself. In fact, Koa would have no existence except for the fact that it is integrated into the corporate mesh. As will be seen, it was Koa which signed the management agreement with PBHM, not Pacific Beach Corporation or HTH. Indeed, Watanabe's signature is on all the appropriate documents. And, when PBHM was ousted, Koa signed another agreement—but with PBC, the original operating company.

The General Counsel contends here that all three entities constitute a single employer. Indeed, although it also offers some alternatives to that theory, its primary thrust has been to demonstrate that HTH, Pacific Beach Corporation, and Koa Management are all one and the same. I find the facts prove that conclusion and that it will be unnecessary to consider any of the alternatives. Curiously, Respondents in their brief tend to ignore this primary theory and concentrate on the others.

As noted above, the first unfair labor practice charge in this case was filed on January 22, 2007. That would usually mean that the limitations period set forth in Section 10(b) of the Act began 6 months before that date, or June 23, 2006, would have an impact on the analysis here. Indeed, the facts have been developing since 2002, given the two elections and the reruns ordered by the Board, some of which are connected to unfair labor practices. It therefore behooves any observer of these facts to be aware of what transpired in the past, even though technically all of those matters are not material. What is material, however, is the Hotel's response to the certification of August 15, 2005, even though that is beyond the 10(b) period. Yet in order for Section 10(b) to have any role here it must have been properly invoked—by motion or by affirmative defensive pleading. It is not jurisdictional. If not so invoked, the Board will deem it to have been waived. *Public Service Co.*, 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833, 833 fn. 1 (1993); *McKesson Drug Co.*, 257 NLRB 468, 468 fn. 1 (1981). Cf. *K & E Bus Lines*, 255 NLRB 1022, 1029 (1981); *Laborers Local 252 (Seattle & Tacoma Chapters AGC)*, 233 NLRB 1358 fn. 2 (1977), which require the defense to be timely at the beginning of the matter or be waived. Posthearing briefs are too late. Also *Glazier Wholesale Drug Co.*, 209 NLRB 1152, 1153 fn. 1 (1974). Here, Respondents have not invoked Section 10(b) in any manner—not by motion, not by affirmative defense and not even by posthearing brief. Accord-

[5] The record, in various places, refers to the Wachovia Bank as the institution with which HTH/PBC dealt. The confusion, if any, is clarified when one understands that Wachovia served as UBS Bank's agent for the purpose of administering the loan.

ingly, I deem them to have waived the limitations period as a defense.

Beginning with the certification, it appears that Respondents and the Union held approximately 37 bargaining sessions between November 2005 and December 14, 2006. One should not be overly impressed with that number of bargaining sessions, although it might suggest hard, but good-faith bargaining. That suggestion is immediately dispelled when one learns that at the second session Respondents provided the Union with General Counsel's Exhibit 19, a collective-bargaining proposal.

Section 1 of that proposal, Union Recognition, eliminates in its entirety the language of the Board certification. It substitutes the following: "The employer has and shall maintain at any and all times its sole and exclusive right to unilaterally and arbitrarily change, amend, and modify the certified bargaining unit set forth in Case 37–RC–4022, and any and all hours, wages, and/or other terms and conditions of employment at-will." This language clearly seeks to deprive the Union of the certification itself and to assign the scope of the unit to its sole discretion. The certified bargaining unit description is set forth in the footnote.[6]

[6] All full-time, regular part-time, and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bus help, wait help, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2d, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

Therefore, the proposal is, from the very outset, a rejection of collective bargaining. *Standard Register Co.*, 288 NLRB 1409, 1410 (1988) (insistence to impasse on deletion of unit description from collective-bargaining contract violates Sec. 8(a)(5)); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 551 (1973), enfd. in relevant part 495 F.2d 1384 (8th Cir. 1974) (holding that the bargaining representative is entitled to have description of the appropriate unit embodied in the contract). Also *Bremerton Sun Publishing Co.*, 311 NLRB 467, 468, 474 (1993).

It is true that the proposal could be construed as an initial starting point, but Respondent maintained that bargaining position throughout the entire course of bargaining, all the way through its final repudiation of the Union in December 2007. It has never wavered from this view. Furthermore, this issue has nothing to do with the strength of the Union which won the certification by the single vote. Instead, it is designed to negate the Union's representative status in its entirety.

Also within the proposal is a management-rights clause that proposes essentially the same thing, but with more detail.

> 1.A.a. The Hotel has and shall retain the sole and exclusive right to manage its operation and direct its workforce at will. All management rights, powers, authority and functions, to manage its operations and direct the working force, regardless of frequency or infrequency of their exercise, shall remain vested exclusively in the Hotel. It is expressly recognized that such management rights, powers, authority and functions include, but are not limited to, the right to select, hire, discipline and discharge employees at-will; transfer, promote, reassign, demote, layoff and recall employees; establish, implement, and amend rules and regulations, and policies and procedures; determine staffing patterns; establish and change work hours and work schedules; assign overtime; assign and supervise employees; establish service standards and the methods and manner of performing work; determine and change the duties of each job classification; add or eliminate job classifications; determine and change the nature and scope of operations; determine and change the nature of services to be provided and establish the manner in which the Hotel is to be operated; and any and all other functions of management. The Union shall not abridge these rights or any residual rights of management. The Union shall not directly or indirectly oppose or otherwise interfere with the efforts of the Hotel to maintain and improve the skill, efficiency, ability and production of its work force, the quality of its product, or the method and facilities of its services.
>
> 1.A.b. It is agreed and understood between the parties hereto that the management rights, powers, authority, and functions referred to herein shall remain exclusively vested in the Hotel except insofar as specifically surrendered by express provisions contained in this agreement.

The management-rights clause, expansive as it is, must also be read in conjunction not only with the recognition clause, but also with the so called Complaint Procedure, found in section 24 of the proposal. The Complaint Procedure was a response to

the Union's relatively standard grievance-arbitration proposal which ultimately called for dispute resolution by a neutral third party. The Hotel's proposal was quite different:

> 24.a. and b. [omitted.]
>
> 24.c. The steps in the Complaint Procedure shall be as follows:
>
> *1st Step*—The employee or Union shall first present the complaint in writing to the Department Manager or his designee.
>
> *2nd Step*—If the department manager or his designee does not adjust the complaint to the complainant's satisfaction within ten (10) calendar days from the time the complaint is presented, the complainant may present the complaint to the director of human resources, or his designee. Presentation to the Director of Human Resources or his designee must be made in writing within the next eight (8) calendar days.
>
> *3rd Step*—If the Director of Human Resources or his designee does not adjust the complaint to the complainant's satisfaction within ten (10) calendar days from the time the complaint is presented, the complainant may present the grievance to the General Manager or his designee. Presentation to the General Manager or his designee must be made in writing within the next eight (8) calendar days. The decision of the General Manager or his designee shall be in writing and must be rendered within fourteen (14) calendar days from the date the complaint is presented to the General Manager or his designee. All decisions of the General Manager under this section shall be final and binding upon the parties.
>
> 24.d. If management representatives fail to answer within the time specified in any step, the complaint shall be deemed unadjusted and the complainant may take the next step to secure a determination of its merits.
>
> 24.e. [omitted.]
>
> 24.f. If any adjustment of the complaint is decided in any of the steps, no retroactive adjustment shall exceed thirty (30) Calendar Days from the date of the submission of the complaint at Step 1.

As the General Counsel aptly observes, these three proposals are all of a piece. The first is a demand for cessation of any control whatsoever over the bargaining unit itself. The second sets parameters which allow the Union virtually no say in the nature of the jobs held by employees which the Union represents. The third, facially allowing for some sort of appeal procedure in the event of an on-the-job grievance, actually sets up only an illusion. Not only does it all end up in the hands of the general manager, a remedy can only reach back 30 days from the time the grievance was initiated. This would mean that if an employee had been paid improperly for several months under Respondent's own pay system, it would not be obligated to make any sort of correction beyond the 30-day limit. Clearly, such a system is not designed to allow for any objective, fair-minded, oversight. An employee's valid grievance could conceivably never be remedied simply because of the arbitrariness of the general manager.

These three proposals demonstrate rather clearly that Respondents entered into the bargaining process with the mindset of evading its responsibility, mandated by Section 8(d) of the Act,[7] to bargain in good faith with the objective of reaching a collective-bargaining agreement. It did not wish to grant the Union any authority whatsoever over the wages, hours, and terms and conditions of its employees' employment. It wished to reserve all those matters solely to itself.

Nevertheless, it did go through the motions. Yet, it was not for the purpose of reaching an agreement, but only for the purpose of running out the certification-year clock. From the beginning, according to union negotiator David Mori, there were problems. Minicola asked for a 6-week delay and observed that the Union had "only won by one vote." Then there was the excuse that "budget planning" needed to take place first. This was complicated by the death of Herbert Hayashi whose funeral warranted an extension. The first meeting did not occur until November 29, 2005, some 3-1/2 months after the certification had issued.

At that meeting the Union was accompanied by its negotiating committee members, all rank-and-file employees who were identified to Minicola and who subsequently routinely signed in on roster sheets provided for the meetings. From time to time, the Union's negotiating committee's members changed. However, participating as a member of the negotiating committee had consequences. In December 2007, when PBC resumed operations, the individuals whom it chose to retain did not include seven of the negotiating committee's members.

In any event, at the first negotiation session Mori hoped to be able to persuade Minicola to follow the outline of the collective-bargaining contract which Minicola had negotiated with the Union's president, Fred Galdones, covering the King Kamehameha Kona Beach Hotel on the Big Island. That hope would not be met. According to Mori, the first order of business discussed that day was Minicola's insistence that before he would begin to bargain, the Union needed to agree in writing to certain ground rules which they were obligated to sign. These included that there would be only one spokesperson for each party, noneconomic issues would be negotiated before the economic issues, and before adjourning they would schedule the date for the next negotiation meeting. Mori agreed to those ground rules. Mori became the union spokesman and Minicola took that role for Respondent.

First, Minicola insisted that Mori read the entire King Kamehameha-based proposal to the Company's committee, even though Minicola was entirely familiar with it. Second, Mori describes that almost immediately problems began with scheduling. Minicola insisted that he could not get his people "off" to attend the negotiations. So no negotiations could be scheduled in December. Mori also recalls that during the meet-

[7] In pertinent part Sec. 8(d) states: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

ing Minicola said he wanted to advise the Union that the Hotel intended to give nonbargaining unit employees a Christmas bonus, but would not be giving such a bonus to members of the Union's bargaining unit asserting that it was somehow "illegal," because he would have to bargain with the Union. When Mori responded that the Union would have no problem with the Hotel granting the bonus, Minicola reportedly responded that he couldn't bargain about the Christmas bonus because it was an economic measure and the Union had agreed to put off economic negotiations until the noneconomic issues had been resolved. And, true to his word, Minicola granted a Christmas bonus to the nonbargaining unit employees, but not to the members of the bargaining unit.

Frankly, this must be seen as nothing more than a simple reprisal against the employees because they voted in favor of union representation—indeed, Minicola's "one-vote win" resentment which this exposed continues to this day. It was followed by the January 5, 2006 proposals which I have discussed above.

On January 19, 2006, the Union rejected Respondents' proposal for an open shop in favor of the standard union shop provision. Minicola asserted that a union shop was illegal and once more observed that the Union had only won the election by one vote. Minicola also rejected the Union's proposal concerning dues checkoff even though he had accepted the same proposal at the King Kamehameha in Kona.

According to Mori, due to Minicola's intransigence concerning the "one vote" victory, a number of employees began to circulate a petition to demonstrate the Union's strength. At a meeting on April 27, 2006, the Union's bargaining committee members presented Minicola with a signup sheet containing more than 70 percent of the employees' signatures. Minicola, in general, was not impressed and continued to maintain the bargaining posture he had taken earlier.

Sometime in September 2006 Mori learned from sources other than Minicola and the company bargaining committee that some sort of agreement had occurred between the Hotel and The Outrigger Group. Indeed, negotiations had taken place and an agreement had been reached. The details would not really become clear to the Union until the instant unfair labor practice hearing.

While it is not necessary to detail all the false starts, it is fair to say that beginning in 2005, in the wake of Herbert Hayashi's death and the appearance of the Union on the scene, Corine Hayashi and Minicola began to seek options concerning management of the Hotel. Conversations occurred between Minicola and various Hawaiian and national hotel chains concerning possible business arrangements. Among the chains were the InterContinental Hotels Group, ResortQuest, and The Outrigger Group; the last is concentrated in Hawaii, though all three are international in scope.

Initially, The Outrigger Group proposed a joint-venture agreement of some sort to Corine Hayashi. Fearing loss of ownership of the Hotel itself Minicola and Hayashi rejected that concept. Ultimately, the parties agreed upon a management agreement whereby an Outrigger subsidiary would operate the Hotel rather than PBC.

B. The Management Agreement

The hotel management agreement under which the Outrigger group began operating the Hotel was signed on September 7, 2006.[8] It is signed by Corine Hayashi on behalf of Koa Management, LLC and by David Carey, president of Outrigger Enterprises on behalf of its subsidiary PBH Management, LLC. (PBHM). The document consists of 37 pages of terms plus an additional 30 pages of attachments. Clearly it did not simply spring into being in September 2006, but had been under discussion and negotiation for quite some time. Furthermore, the Koa entity was essentially unknown as the hotel operator or owner. The current owner was known to be either PBC or HTH, not Koa. Furthermore, the terms of the agreement required it to be kept confidential, so the Union would have had no idea what Koa was, even if it had been able to review the document. The Union was well aware of HTH and PBC, but Koa was a Hayashi secret. Later, its existence became known but its role remained a mystery. During the hearing it all became clear, but the PBHM negotiators, acting pursuant to the agreement's terms, deliberately obscured it during the collective-bargaining negotiations.

The terms of the management agreement also bear on the nature of Respondents' approach to collective bargaining. First, it required PBHM to hire all the current hotel staff in their same jobs and with the same rates of pay and benefits. Second, it obligated PBHM to honor the employees' seniority dates.

Third, the agreement obligated PBHM to bargain with the Union, but did impose some limitations on PBHM's authority. The agreement contained language found in paragraph 3.2 of the management agreement which on its face seems to limit PBHM's ability to enter into contracts on the Hotel's behalf. It states that PBHM must obtain the UBS Bank's approval for any "major" agreement affecting the Hotel which was more than 1 year in length and which could not be terminated upon 30 days notice or, if the cost to the Hotel exceeded $350,000 or if it extended beyond the initial term of the management agreement but could not be terminated upon the Owner's 30 days notice.

This clause caused some problems of interpretation for PBHM's chief collective-bargaining negotiator, Mel Wilinsky.[9] Clause 3.3e. of the management agreement required PBHM to recognize the Union as the sole bargaining representative of the bargaining unit employees and asserted that from the date the management agreement became effective, that PBHM "shall assume Owner's obligation to negotiate with the Union and shall be responsible for completing negotiations with the Union, all at and as an Owner's Expense." It also required notification to the Union of the change. The Outrigger executives were uncertain whether clause 3.2 applied to any collective-bargaining agreement it might reach with the Union. Clearly, the payroll would exceed $350,000 and the term of the agree-

[8] The document itself, GC Exh. 38, bears the date "7th, 2006," demonstrating a scrivener's error in failing to recite the month of September. There is, however, no dispute about the date.

[9] PBHM's other negotiators would include General Manager Bill Comstock, Human Resources Manager Carise Iguchi, and Daryl Akiyoshi, whose role is unclear but who had been part of Minicola's HTH/PBC team.

ment would probably be longer than 1 year. Yet, both PBHM and Minicola would allow the ambiguity to continue well into the term of the management agreement. It was not until the instant hearing that Minicola expressly asserted that clause did not apply to any collective-bargaining agreement. Certainly during the course of collective bargaining, PBHM's negotiators were operating under the belief that the Owner's (Koa's) permission or approval was required before PBHM could sign a collective-bargaining contract. Indeed, on July 30, 2007, PBHM's attorney, Richard Rand, wrote a letter to Respondents' attorney, Ronald Leong, which, inter alia, sought such permission as the likelihood of a successful negotiation became apparent.

In the letter Rand specifically asked, "If Owner and you are now implying, for whatever reason, in your July 29 e-mail that Owner's consent is not required for the 2-year contract and the other terms as set out in the Union's proposal, we would appreciate your written confirmation of that position and we will proceed with and conclude the Union negotiations without the Owner's consent." By letter dated August 3, 2007, Minicola responded to Rand's letter (as well as one written by Wilinsky to Corine Hayashi on August 2 which specifically requested approval) with a notice of termination of the management agreement, written on HTH letterhead. Neither Rand's letter to Leong asking for clarification nor Wilinsky's request for permission was ever specifically answered.

Therefore, despite Minicola's testimony to the contrary, I find that it was Respondents' intention to impose approval authority of any collective-bargaining agreement which PBHM might reach with the Union and that the management agreement's limitation clause on major contracts was from the outset intended to do just that.

Nine months earlier, in late October 2006, notice was given to the Union that PBHM would begin operating the Hotel on January 1, 2007. In addition, Corine Hayashi sent thank you letters to each of the employees describing the steps to be taken next.

In the meantime, of course, Minicola, assisted by John Lopianetzky (then the Hotel's food and beverage manager) had been negotiating with the Union. Lopianetzky was asked whether Minicola during the course of the 2005–2006 period had ever mentioned to the Union's negotiators if Minicola had ever referenced the "one-vote" victory. Lopianetzky said that Minicola had done so but he couldn't recall when or on how many occasions. He acknowledged that he, himself, had said the same thing "once or twice."

Melvin Kaneshige, Outrigger's executive vice president for real estate and development, was Outrigger's lead negotiator for the PBHM management agreement. He testified, corroborated by his contemporaneous notes, that during a meeting on May 19, 2006, Minicola observed, with regard to the union negotiations, that in August the NLRB's 1-year certification period would expire and that "[we] can move to decertify." He went on to say that Minicola did not believe that negotiations would be concluded by August. In addition, Minicola remarked again that the Union had won by only one vote. Kaneshige remembered that Minicola made the one-vote reference several times during the course of the negotiations over the management agreement. And, during that same meeting he also recorded that Minicola had said Corine Hayashi was "pissed off" at the employees. He did record her reason, but could not read his own handwriting nor could he independently recall what Minicola asserted she was angry about.

Aside from Minicola's remark to Kaneshige that he doubted that the union negotiations would be concluded by August, the management agreement specifically required PBHM to assume all previous negotiated agreements that HTH had reached with the Union. Kaneshige testified that Minicola told him that the Hotel had not granted any wage increases since a 1996 3.6-percent across-the-board increase, though there had been some annual bonuses during that timeframe.

Also under the terms of the management agreement, PBHM was obligated to provide employment to John Lopianetzky. Although not mentioned by name, Lopianetzky is the individual guaranteed employment under clause 3.3.d. "[PBHM] shall offer employment to the person holding (immediately prior to the Effective Date) the position of Director of Food and Beverage of the Hotel, upon terms and conditions determined by Operator in its sole discretion, and if such person does not accept Operator's offer, Operator shall, at Owner's expense, consult with such person for a period of eighteen (18) months after the Commencement Date to ensure a cooperative transition in the management of the food and beverage areas of the Hotel [but if PBHM hired the individual directly, it, and not the Owner, would pay his salary]."

In fact, Lopianetzky chose the consultancy rather than the directorship of the department; in that role he advised and assisted PBHM's general manager, Bill Comstock, on a wide variety of matters. These included interviewing job applicants and recommending the hire a various employees for specific food and beverage jobs. Under the agreement, PBHM was obligated to provide Lopianetzky weekly reports concerning the performance of the food and beverage department. Lopianetzky, in turn, reported such matters to Minicola.

Moreover, clause 3.3.c. gave Koa the right to determine who the Hotel's general manager was to be. As a result of that clause, Comstock's hire was vetted by Minicola himself. That clause is most curious as one would think that PBHM and/or Outrigger, as the operator, would want to make that decision for itself. Nevertheless, Outrigger agreed to permit Minicola to select PBHM's general manager.

As 2006 wound down, there were several more negotiation sessions between the Union and Minicola. On December 7, 2006, Minicola provided Respondent's Last and Final Offer. In that proposal it maintained the same position that it had always maintained concerning the recognition clause, specifically, the right to "unilaterally and arbitrarily change, amend, and modify the certified unit set forth in [C]ase 37–RC–4022, and any and all powers, wages, and/or terms and conditions of employment at-will." Similarly, it maintained its overbroad management-rights clause, its insistence on open shop (which even imposed a 31-day waiting period for employees to voluntarily join the Union), left dues collection to the Union's own efforts (thereby rejecting the checkoff proposal), proposed the State minimum wage for all of the tipping category employees and a 75-cent wage increase for nontipping categories. It also maintained the

"complaint procedure" but modified it to the extent that an employee could, after a negative decision by the general manager, file a complaint with the "Department of Labor."

In some respects this last modification of the complaint procedure was worse than the original. Injecting the Department of Labor into a contract interpretation issue is generally beyond the scope of such agencies which have specific statutory duties that do not include interpreting the terms of a collective-bargaining contract. Moreover, the proposal did not even specify whether it was the Hawaii Department of Labor or the United States Department of Labor. This change demonstrates how illusory Respondents' proposal actually was.

By making that observation, I do not wish to give the impression that there had been no progress between Mori and Minicola. Indeed, General Counsel's Exhibit 17 sets forth approximately 170 tentative agreements concerning a proposed contract. A perusal of the exhibits, however, reveals that these are unremarkable noneconomic matters. No doubt many of them came from the King Kamehameha Kona Beach contract. In large part, despite its numbers and weight, the exhibit fails to offset the bad faith seen elsewhere in Respondents' proposal's.

At the end of 2006, all these matters were turned over to the PBHM negotiating team. Under the terms of the management agreement, PBHM was obligated to accept the status of negotiations as they had been left upon Respondents' departure. Thereafter, over the next 6 months or so, both PBHM and the Union made additional, even significant, progress toward concluding an agreement. The Outrigger executives responsible for collective bargaining were generally familiar with the law and the obligations it imposed and they approached the bargaining table with the idea that they would be able to reach an agreement with the Union, even as Minicola looked over their shoulders. Recall that Minicola had placed one of his people on the PBHM committee—Daryl Akiyoshi.

In early August 2007, when Minicola notified PBHM that it was canceling the management agreement effective December 1, 2007, PBHM changed its bargaining team. Wilinsky was replaced by attorney Richard Rand. In some measure, this change occurred because Outrigger realized that legal problems were on the horizon, particularly those relating to collective bargaining. As a result, PBHM and the Union memorialized the number of the tentative agreements which they had reached. General Counsel's Exhibit 26 sets forth a number of items, among which are a union recognition clause which did not maintain the undermining elements found in Respondents' previous proposal and a complaint procedure which provided for a relatively traditional grievance-arbitration clause. It also established a daily housekeeping limitation providing that housekeepers would be assigned 16 rooms per day in the Ocean Tower and 15 rooms per day in the Beach Tower. The tentative agreements found in that exhibit were signed off by both Wilinsky and Mori. These all took place prior to Minicola's August 3 letter canceling the management agreement.

In addition, once Rand became PBHM's negotiator, new wage rates were negotiated for every job classification at the Hotel. That agreement was reached on August 30, 2007. Later, the duration clause was reached in mid-November 2007. Both of those tentative agreements were signed by Rand and Mori.

C. Information Demands—Corporate Relationships

I have adverted to some of the material leading up to Minicola's decision to terminate the management agreement, in the context of describing the continued control Respondents maintained over the Hotel during PBHM's incumbency. Equally pertinent, however, is Respondents' response to Rand's letter which preceded the cancellation. As noted above, Rand was seeking clarification concerning whether PBHM needed the owner's permission to finalize a collective-bargaining contract. Connected to that, however, were certain union demands for information.

Mori, having negotiated with Wilinsky for 6 months, had learned a few things about PBHM's relationship to Respondents. Wilinsky had said something which Mori realized meant that PBHM was not entirely in charge of the negotiations, despite Minicola's assertion that Respondents no longer had any interest in the outcome of the negotiations. Moreover, Mori knew that the Hotel itself remained in the hands of the Hayashi family and that PBHM's contract was not of indefinite duration.

Due to his incomplete understanding (caused by HTH and Koa's secrecy under the terms of the management agreement), on April 17, 2007, Mori wrote two identical letters. One went to PBHM's Wilinsky and the other went to HTH's Minicola. He explained his purpose in the first two paragraphs of the letter:

> [The Union] has been involved in contract negotiations first with HTH Corporation and now with PBH Management LLC/Pacific Beach Corporation dba PBH for an inordinate length of time. Over the past six (6) months, negotiations with HTH and/or PBH management LLC have been disingenuous at times and have bordered on the Company/Employer's negotiators being in violation of its duty to bargain in good faith. On January 11, 2007 the Company's proposal was to have the "Agreement" changed from "Pacific Beach Corporation dba Pacific Beach Hotel" to "PBH Management LLC, dba Pacific Beach Hotel" to reflect the hotel's managerial changeover effective January 1, 2007.[10]
>
> The ILWU has sought information from the Company to substantiate the correct corporate entity which has the control "over contract negotiations as well as terms **and** conditions of employment for the bargaining unit members represented by the ILWU, Local 142." Accordingly, the ILWU hereby requests copies of the following documents: [Underscore in original.]

This was followed by a list of 24 items most of which related to the negotiations for the management agreement as they may have involved HTH, PBC, Outrigger, or PBHM. In addition,

[10] A year earlier, in March 2006, Minicola had insisted that Pacific Beach Corporation be the signatory party to the contract, rather than HTH Corporation. At that time many of the personnel documents had contained HTH headers, including pay stubs and other materials available to employees. That issue never was resolved and when PBHM was inserted into the bargaining process, yet another entity had appeared whose legal status as the true employer was unclear. Indeed, there was a substantial question for the Union, given PBHM's subsidiary status to Outrigger, whether Outrigger might qualify as the true employer.

Mori sought a true copy of the management agreement, not knowing which enterprises were the actual contracting parties. In this regard, Mori was clearly in the dark about the existence of Koa Management, the entity which Corine Hayashi had actually used.

Minicola responded by telephone telling Mori that his attorneys had advised that he did not have to respond since neither HTH nor PBC were involved in the negotiations. He did not give a written response. Wilinsky, on the other hand, sent Mori a letter decrying, to some extent, Mori's assertions concerning good-faith bargaining as well as Mori's contention that the Union did not really know who the employer was. He pointed to a number of earlier statements by both PBHM and Minicola to the effect that PBHM had become the employer at the Hotel. He also attached some material supporting his contentions as well as three heavily redacted pages from the management agreement, including the signature page. Although there is one earlier obscure reference to Koa Management, a letter from a PBHM vice president to the ILWU's contract administrator which referenced Koa Management as the Hotel owner, the signature page was the first clear view of Koa Management Mori had seen. Its appearance without any explanation sparked a new area of inquiry. After all, Corine Hayashi was known to be the owner of both HTH and PBC. So where had Koa come from?

Now enlightened about the existence of Koa Management and its intermediate status between PBHM and HTH/PBC, but still unclear regarding Koa's role and remaining suspicious about PBHM being part of some sort of concealed stratagem to trick the Union out of its certification (a possible "bait and switch' or to accept a 'pig in a poke"[11]), Mori wrote two more letters attempting to acquire better information. These were both written on May 30, 2007, one to Wilinsky and the other to Minicola. After explaining his purpose, he asked for 13 numbered items. This time Koa Management was a principal target of his demands, though he continued to seek agreement combinations involving HTH, PBC, Outrigger, and PBHM. In each instance, he asked for agreements which described the authority of any of those entities to approve, reject, or modify any collective-bargaining agreement or other arrangement which had an affect on the wages, hours, and terms and conditions of employment of the bargaining unit employees. He was clearly seeking information about which entity had control of the negotiations. Minicola responded by letter on June 7, 2007. The request was familiar to Minicola and he referenced earlier requests for information about the same topic. He said that he was aware an identical letter had been sent to Wilinsky. He "reminded" Mori that "HTH Corporation is no longer the employer of the Pacific Beach Hotel employees." He observed that the Union was meeting with Wilinsky on a weekly basis and that HTH "has no intention of interfering with the negotiations between ILWU and PBH Management, LLC and will continue to deny your attempts to meet with our President." He accused Mori of seeking to circumvent the negotiation process. Minicola did not provide any information sought by Mori's letter.

Curiously, during the same time frame Mori learned that Minicola was taking a variety of "hands on" steps with Hotel employees. Mori:

> Well, for starters, you know, in my conversation with Mr. Minicola as well as Mr. Wilinsky—and it's not covered in any of this information requests—I asked even if we could have a letter from Ms. Hayashi at the time, or Mr. Carey, just to confirm that, you know, in writing that—who is the proper entity.
>
> And there was no willingness to oblige, and there was also, you know, several comments made by Mr. Wilinsky and Mr. Comstock that, you know, certain things couldn't be done because HTH Corporation still was the owner.
>
> Some of the concerns I raised was that, you know there was report of Mr. Minicola directly making contact with employees. He appeared to still have, you know, a free access to the employees, and there was one incident where especially came to mind, because Mr. Minicola had actually called me up and asked to meet with me. And he had a concern about this—an open letter that got to Ms. Hayashi. And he was actually doing an investigation, and he had actually interviewed several employees.
>
> And I also, you know, again, expressed my concerns and objection to Mr. Wilinsky and Mr. Comstock, that why was Mr. Minicola being allowed the right to interview or investigate their employees?
>
> And the comment was, he represents the owner, so they had no real say on the matter. They had to obligate [sic] [oblige] the request of the owner.

The semi-anonymous open letter incident is revealing on several fronts. It is found as an attachment to General Counsel's Exhibit 34 and consists of a handwritten letter signed by "The Workers and there familys'." [Sic.]) The envelope was addressed to Corine Hayashi from "The Work Force" and contained a separate sheet having a traced outline of a child's hand. Written on the tracing was the phrase "The hands of our children" together with a cartoon drawing of a smiling child. The text of the letter is in the footnote.[12] The letter has an unmistakable pleading tone.

[11] *Merriam-Webster* defines "pig in a poke" as "something offered in such a way as to obscure its real nature or worth."

[12] Text of the letter (unedited):

Ms. Hayashi.

The workers at Pacific Beach Hotel are still in negotiations after 16 month's, and with over 85% of the workers' wanting a union contract we still get no respect.

Mr. Wallinsky and Mr. Minicola has told our negotiating committee that you still have the final say, and that Outrigger Hotels has nothing to do with outcome of the contract. Ms. Hayashi we are still trying to secure a future for our family's so please make your father proud and do the right thing and give the workers a contract. The Hotel can still make a profit if "We" have a union contract, but this contract cannot be "open shop." This would create hostility in the Hotel and in turn affect your profit margin.

The workers know you have a big a social event on May 4. (The Hawaii Opera Theater.) We will be out in force and look forward to informing the public at this event, and other social

Minicola, however, in his letter of May 8 to Mori said the letter "appears to be designed to threaten and intimidate, and puts the Company in a position of needing to take action to protect Ms. Hayashi's safety." Certainly, its reference to informing the public about the labor dispute at a public event involving Hayashi is nothing more than what the Union was already doing at the Hotel—demonstrating for a collective-bargaining contract. It is far from a threat of physical harm. Nonetheless, Minicola chose to make that accusation to Mori. Curiously, Minicola acknowledges that Mori and the Union were probably not behind the letter's writing but does ask the Union to do something about it. He goes on to reiterate Respondents' contention that the factual assertions in the letter concerning Respondents' role as the actual employer was incorrect. He also asserts that any demonstration at the Hawaii Opera Theater "should be avoided" as Hayashi would be mistakenly identified as employer.

Mori's principal point, however, was not the direction the letter said it would take, but the fact that Minicola instituted an independent investigation concerning who wrote it and how it got to Hayashi. Minicolalearned, by interviewing employees (putatively employed by PBHM) directly. He spoke to members of the bell staff to try to identify who had dropped the letter off at the bell desk and who had transmitted it to Hayashi. His purpose was not benign; it was to prevent employees from contacting someone they believed had ultimate authority over collective bargaining. Indeed, I find here, that the employees were correct. Hayashi's enterprises are in fact the true employer of the entire hotel staff. Furthermore, had Minicola actually determined who had written the letter I have no doubt that he would have insisted upon discipline being levied and that PBHM would have had no authority to resist.[13] Moreover, it should be observed, the letter was entirely protected by Section 7 of the Act.

Mori's concern about Minicola's easy bypass of PBHM as the employer was legitimate. It was indeed evidence that PBHM's authority was circumscribed by circumstances which Mori did not then understand and which had been withheld from him. Those circumstances are set forth in the management agreement which he had not yet seen. Accordingly, his demand for information about HTH's and PBC's authority over PBHM was quite proper.

Moreover, Wilinsky and Rand knew it. In his letter of July 30, 2007, to Leong, Rand observed that the only information which had been previously provided to the Union had been a redacted version of the agreement. He stated that PBHM disagreed with Respondents that the information which the Union was seeking was irrelevant. He observed that there were limitations on PBHM's authority as imposed by the Owner and that "Under the National Labor Relations Act (NLRA) any limit on a negotiator's authority to bind the employer to a CBA *must* be disclosed to the other party. *Metco Products, Inc.*, 289 NLRB 76 (1988); *Sands Hotel & Casino*, 324 NLRB 1101, 1108–1109 (1997) (and cases cited therein)." He went on to say that such disclosures needed to be made before the agreement was finalized.

In addition, Rand observed that although "no one at Outrigger, HTH or Koa has control over the terms and conditions of the hotel employees and that [PBHM] alone is negotiating the CBA, [PBHM] believes Owner's requirement that it consent to the CBA is a limitation on [PBHM's] authority as the employer-negotiator and that this limitation *must* be disclosed to the union by providing the union with a copy of section 3.2(c) of the Management Agreement." Accordingly, he asked for permission to provide that material to the Union.

That portion of the letter is followed by another entitled "Agency Shop." Here, Rand, explains to Leong why he believes it appropriate to move off the open shop proposal, which had been HTH/PBC's proposal from the beginning and which PBHM had carried forth, and proposed an agency shop instead. He had advised Respondents shortly before, that an agreement could be reached with the Union if it included some form of union security and that an agency shop agreement would be satisfactory to the Union. He says, in support (nodding to Minicola's one-vote victory fixation), that PBHM believes that the Union is not supported by an overwhelming majority but that the Union would not go away quietly and that there is no indication that the employees have any intention of commencing a decertification. In his view the negotiations could not be concluded without agreement on the issue and that negotiations are interfering with the hotel operations. From his perspective the agency shop was a compromise which would "graphically demonstrate" that union dues (agency fee) would demonstrate that union representation has a price. "We believe in the end the agency fee will prove to be the ultimate undoing of the Union at the Hotel since employees will come to realize that unions are about dues, and not about helping employees." Rand made additional arguments and observations which are business-related, also supporting the need for compromise on the union-security question.

Rand's assessment of the likelihood of reaching a collective-bargaining agreement with the Union was based, at least in part, on the fact that he and Mori on July 26 had signed off on pay scales for over 150 job classifications throughout the Hotel. See General Counsel's Exhibit 27. (The list of pay scales, though signed by Rand, had actually been negotiated between

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events in the future. A so please do what is right and we can all move forward together and continue to make Pacific Beach very profitable.

We congratulate you on your recent marriage, and now that you have a family of your own we hope that you understand the plight of the workers.

Thank you

The Workers and there family's

[13] Additional evidence of Respondents' belief that it retained control the Hotel was its decision to replace hallway carpeting without consulting PBHM and Minicola's penchant for speaking directly to department managers without going through PBHM's general manager. And curiously, PBHM simply adopted the HTH/PBC personnel forms and procedures, in some cases not even bothering to change the logo heading the document. There is also evidence, from Barry Wallace, an Outrigger Hotels Hawaii vice president, to the effect that Minicola insisted upon inserting himself into nearly every management decision which PBHM wished to make. Wallace's testimony is not, in my opinion, as significant as the other matters showing Respondents' continued meddling since it is not a as specific. Nonetheless, it is consistent with those other matters.

Mori and Wilinsky. Rand was certainly involved during that period, but on August 10, 2007, Wilinsky withdrew in favor of Rand and Rand became PBHM's principal negotiator, serving until the management agreement ended on November 30, 2007.)

Rand concluded his letter by saying, "Should Owner continue to refuse to [grant] the above two requests for the consent, [PBHM] believes Owner will be in breach of the covenant to reasonably consent to the requests and will cause [PBHM] to no longer be able to bargain in good faith. [PBHM] does not want to bargain with the Union if its ability to reach a settlement which it believes is in the best interests of the hotel is impaired by Owner's refusal to consent to an agreement that extends beyond one year, or any agreement that contains agency shop. To do so would in our judgment constitute bargaining in bad faith; [PBHM] agreed to assume Owner's obligation to bargain with the Union on the assumption that [PBHM] could do so in good faith. [PBHM] accordingly would have no choice but to conclude that Owner is in breach of the Management Agreement and to ask Owner to assume the obligation to negotiate with the Union and to complete negotiations with the Union." He asked for a response by noon 2 days later.

Following up on Rand's letter, Mel Wilinsky sent a short version directly to Corine Hayashi on August 2, 2007, attaching Rand's letter to Leong. He observed that Leong had not responded by the deadline and reiterated PBHM's need for permission to provide the information requested by the Union concerning both the management agreement and the owner's approval to propose the 2-year collective-bargaining agreement as Rand had described. That letter would appear to have crossed Minicola's response that day, hand-delivered to Outrigger President David Carey.

The response, as we have seen, was Minicola/HTH's August 3, 2007, cancellation of the management agreement. That termination was based upon clause 18.3 of the agreement which said the Owner "may terminate this Agreement for any reason whatsoever in the exercise of its sole discretion at any time from the commencement date to and including June 1, 2008."

Minicola's cancellation letter proposed that December 1, 2007, be the transition date where the Owner would once again be the manager of the Hotel. He asked for a meeting of appropriate persons to begin the "unwinding" process. It should be recalled at this point that Koa Management was the so-called "lock box" corporation set up for the benefit of UBS bank. It is also the entity which Corine Hayashi used to make the arrangement with Outrigger's PBHM to operate the Hotel, even though until that time Pacific Beach Corporation was the operator and subsidiary to HTH.

Eventually, the transition was memorialized in a hotel management and service agreement between Koa Management and Pacific Beach Corporation. It is dated December 1, 2007, and is signed by Corine L. Watanabe on behalf of both entities. Unlike the PBHM management agreement, which microscopically detailed all matters, this document consists of only of four pages. In large part it is Watanabe speaking to Watanabe authorizing or limiting Watanabe's operation of the Hotel.

It seems self-evident from this fact pattern that Minicola and Watanabe née Hayashi were taking this step in order to create the appearance of successorship. Under successorship rules as established by decisions under the Act, a successor corporation may set the initial terms and conditions under which the employees of a continuing operation would be obligated to work. And, of course, where supported by proof that the incumbent Union has lost its majority status, it could lawfully refuse to recognize the Union. Frankly, this has all the ingredients of a sham.

Nevertheless, PBHM was to continue as the employer until midnight the night of November 30–December 1, 2007. This meant that PBHM was obligated, at least under the terms of the management agreement, to continue bargaining with the Union.

During that timeframe at least two tentative agreements were signed off by both Mori and Rand. The first was the wage scale mentioned above but the other was duration of the agreement. The contract was to begin on the day it was ratified and last for 1-calendar year from that point. Mori testified that at that point there were only two major items left, the dues checkoff and the agency shop.

On August 10, 2007, PBHM sent several letters, apparently to comply with the State Dislocated Workers Act, to the employees notifying them that as of December 1, 2007, PBHM would no longer be employing them as it would no longer be the hotel manager. It did not say anything concerning what Respondents intended to do. Simultaneously, PBHM's president (and Outrigger president), David Carey, sent a letter to each employee thanking him or her for their service and promising to work with Pacific Beach Corporation, who he said would take over the hotel management, to make the transition as smooth as possible. He also attached a so-called update concerning negotiations with the Union, essentially describing the status as perceived by PBHM's bargaining team. He listed the so-called "open contract issues" as being the recognition clause, the union-security matter, dues checkoff, some pay matters, substance abuse policy, subcontracting, and successorship. In addition, he attached a copy of the press release which was being sent to the local press that day. Oddly, his list of open issues and Mori's two remaining issues are not congruent.

Also that day, PBHM (seemingly by its general manager Comstock) conducted a meeting of employees to say, verbally, the same things which were set forth in the letters. Minicola was not a part of any of these PBHM meetings.

Sometime in August, four hotel employees had written letters to the editor of the Honolulu Star-Bulletin. Those letters were published by that newspaper on August 19, 2007. The four employees were Guillerma Ulep, Todd Hatanaka, Larry Tsuchiyama, and Virginia Recaido. All four of these individuals were members of the Union's bargaining committee. Two, Hatanaka and Recaido were not kept in December. Each letter, to some extent, complained about working conditions and the fact that the Hotel had failed to bargain in good faith with the Union. In addition, some complained about the fact that there had not been a raise in over 10 years. They also asserted that the Union represented an overwhelming majority of the employees and that 2 years of negotiations was too long. In essence, they accused the Hotel of denying the employees the chance to gain the American Dream. They also complained that the Employer was unreasonably insisting upon an open

shop, despite the overwhelming majority of employees who favored some form of union security.

D. Information Demands—Effects of PBC Resuming Operations

On September 11, 2007, the Union's negotiator, Mori, wrote a letter to Minicola asking for a variety of information. Specifically, Mori wanted to know who had made the decision to end PBHM's management, and asked for copies of documents between Koa and PBHM covering that matter. He also asked for plans being made by PBC concerning the hotel employees who would be terminated and also asked for the document under which PBC would assume management of the Hotel.

Mori then asked for other information including the commitments that HTH and/or PBC would make concerning the retention of the hotel employees. He asked if PBHM had sought to make certain that PBC would retain the staff. He further asked if PBC would be offering employment to all the employees and whether some might be offered employment by HTH or Outrigger. He also demanded the list of all of the bargaining unit employees who had been working for PBHM as of August 10, 2007, together with relatively standard personnel information concerning those employees.

In addition, he asked whether there were any agreements or commitments on meeting and satisfying the continuation of employees' benefits and entitlements. He asked about the terms and conditions which PBC would seek in hiring employees who were currently with the Hotel. Finally, he wanted to know whether PBC would be requiring substance abuse testing or imposing a probationary period upon them, together with any documents which might describe these things. He asked for a response within 5 days.

Minicola did not respond and a second letter was eventually sent on October 11, 2007, in which the demands were repeated.

E. Demand to Continue to Recognize the Union

Meanwhile, on August 27, 2007, the Union's contract administrator, Michael M. Murata, wrote Minicola observing that the Union had been negotiating with PBHM and that it continued to be the sole and exclusive collective-bargaining agent for the Hotel's employees and that it wished to continue negotiations including union recognition and Respondents' acceptance of all the tentative agreements which had previously been reached. He asked Minicola to contact Mori in order to arrange negotiation meetings.

Receiving no response, although the hiring procedures had gone forward as described below, Murata wrote a second letter to Minicola on November 28, 2007. He referred to the earlier letter and again asked for recognition of the Union and commencement of negotiations before November 30. He asked Minicola to contact Mori to make the arrangements.

F. The Rehiring Process

Under PBHM's management agreement, PBHM had been obligated to hire all the employees who had been employed by Pacific Beach Corporation. It did so. However, when PBHM was ousted from operating the Hotel, the same seamless change did not occur. Instead, PBC instituted an application process. Beginning on September 15, 2007, all of the hotel employees were told that if they wished to remain with the Hotel, they would be obligated to reapply for their jobs. The reapplication process took about 2 weeks or 10 days.

The offer language can be found in some exemplars as part of General Counsel's Exhibit 79. It set the wage rate at the employee's then current rate (keeping the right to adjust it), established a 90-day "introductory" period, described the employment as "at will" (unless a contract or collective-bargaining contract said otherwise), required the applicant to pass a drug screen and said that the benefits package would be described at a later date. It provided a signature line for the employee to accept the offer.

At some point prior to actually offering jobs to the applicants, Minicola testified that he consulted with his director of sales and marketing and the controller. He made some business projections in an effort to determine how many employees the Hotel should hire in each department. In connection with that process he also attempted to establish a budget. In addition, he says he discussed the issues with HTH's corporate director of human resources, Linda Morgan, as well as the individual who had been his liaison with PBHM, John Lopianetzky. He asserts that they developed a six factor test to help determine which employees should be hired. In large part, these were subjective. Respondents do concede that they did not review any personnel files, either from the PBHM period or from the pre-PBHM period. Instead, they asked midlevel managers to provide their input regarding their knowledge of individual employees. Principally, that activity was carried out by Lopianetzky, Morgan, and Christine Ko, the executive housekeeper.[14] Morgan gave testimony that Minicola was the one who made the decision to keep most of the department heads out of the decisionmaking process. Yet, so far as I can tell, Ko was the only department head involved in the process. The other two were Lopianetzky and Morgan. Morgan, however, had no direct knowledge about the work performance of any employee over the past 10 months. Lopianetzky's association was somewhat better, since he had provided oversight for the food and beverage department's employees during the PBHM regime. The explanation was that speed was required and additional input from department heads, some of whom might be replaced themselves, would slow the process.

During the timeframe these tasks were being carried out, Minicola had gone on a business trip to Hong Kong. It is fair to say that a large number of these decisions resulted in the rehire of current staff. In fact, shortly before he made that business trip in early October, Minicola had decided to close the Shogun Restaurant.[15] Simultaneously, Minicola decided to resume a free breakfast program for hotel guests which PBHM had jettisoned. He apparently hoped some of the employees who had

[14] Ko had been executive housekeeper for PBHM. On October 15, 2007, Respondents' director of human resources, Morgan, asked Ko to perform the same job for PBC. Ko accepted and was immediately tasked to select the housekeepers to be retained. Ko said she was given only a few hours to accomplish that duty.

[15] The Shogun was one of the signature restaurants of the Hotel. Its shutdown necessarily meant that the kitchen and wait staff of the food and beverage department would be reduced by the number of individuals employed at the Shogun.

worked for The Shogun could be assigned to the Neptune Garden restaurant which would be operating the breakfast plan.

Minicola testified that he did not wish to review or use the existing personnel files because it would have been "unfair." His explanation was that while some departments were understaffed, others were overstaffed and that referring to the personnel files could have meant that an employee with a bad record would be retained instead of an employee with a better work record in a department that needed a staff reduction. His "fairness" explanation for not reviewing the personnel files makes little sense as they would have reflected the employees' quality of work. Accordingly, he insisted upon using the six factors. These factors were attitude, job performance, flexibility in scheduling, attendance, customer service, and teamwork.

While facially neutral, in fact, as will be seen below, in application this allowed for picking and choosing, resulting in the decisions not to rehire seven members of the Union's bargaining committee. General Counsel's Exhibit 71 lists 424 employees on the hotel staff as of November 30, 2007, the day before Respondents resumed operations on December 1. The exhibit was prepared during the second session of the hearing from electronic data maintained by PBHM and was produced under subpoena. The list actually would have complied with one of the Union's demands for information, set forth above, as it described each employee's job title, wage rate, and employee status, whether full-time, part-time, or on-call. Clearly, this information and other similar information which the Union sought could have been provided in response to the Union's demands. Outrigger's system contained all that information in an easily obtainable electronic format. It is clear that Respondents could have obtained the information from PBHM without any significant effort beyond requesting it.

G. Demonstrations

As the Union observes in its brief, beginning as early as 2006, it conducted a number of rallies in front of the Hotel. In addition, it notified portions of the Respondents' customer base in Japan of the labor dispute. These activities were continuing through the date of the hearing and apparently were the source of significant irritation on the part of Corine Watanabe. A number of the employees were quite visible in their boycotting activity. These included Cesar Pedrina and Guillerma Ulep. Both of these individuals had worked for the Hotel for about 20 years. Pedrina was a senior purchasing clerk and union activist. Ulep was a housekeeping employee who participated in many of the rallies in front of the Hotel. Both served on the Union's bargaining committee.

Minicola maintained an office on the second floor of the building on Liliuokalani Avenue directly across from the hotel entrance. On September 20, 2007, a sidewalk rally was held on Liliuokalani Avenue in that narrow space. That location served two purposes: first, to serve as a confrontation between the Hotel and its arriving guests and second, to let Minicola know that the Union was not relenting in its efforts for a contract. Mori said that during the demonstration he telephoned Minicola to ask if he could come up to the office "to see him." Mori testified that Minicola hung up on him. When Mori reported to the demonstrators what Minicola had done, a group of them, without Mori's approval, went up to Minicola's office. Apparently they had no success, but Minicola did testify that he remembered seeing about 20 employees at that rally, including some of the Union's bargaining committee members.

Another rally was held on October 31, 2007. These employees were undergoing the rehiring process and were expressing displeasure with the direction that process was taking. In both cases, hotel security officers were present.

By January 25, 2008, almost 2 months later, Respondents had completed all its hiring decisions. It had refused to deal with the Union in any way. Respondents had just opened business offices in the Kaimuki district of Honolulu, not far from Diamond Head, perhaps 3 miles from the Hotel itself. Minicola, together with other corporate officials, maintained an office there. Todd Hatanaka, Keith (Kapena) Kanaiaupuni, and Rhandy Villanueva, three union bargaining committee members who had not been rehired were leafleting the area under the eye of one of the Union's organizers, Bill Udani. Minicola drove up and Udani engaged him in a conversation as Minicola made his way into the building. The conversation began on edgy terms when Kanaiaupuni offered to shake hands Minicola. Minicola refused and Kanaiaupuni, annoyed, asked why Minicola was upset since it was he and Hatanaka who should be upset because they were the ones without jobs.

The group then began a discussion out on a sidewalk, joined by yet another union organizer, Lance Kamada, during which Minicola told the group: "You guys made this personal," when during Christmas Hatanaka and Kanaiaupuni had personally named him as the one who had not hired them back. Several times Kanaiaupuni asked Minicola why he was upset and Minicola replied that the decision had been for business reasons, but . . . according to Kanaiaupuni . . . Minicola also said he "was upset about the boycott and the leafleting." The employees responded to that by asking him what he had expected them to do because they needed a contract. At that point a third union organizer, Eadie Omanaka, asked Minicola if he respected the employees' decision for the Union, and once again Minicola pointed to the fact that the Union had won the election by only one vote. Kanaiaupuni retorted reminding Minicola that he had rejected a subsequent petition signed by 70 to 80 percent of the employees who had reaffirmed their support of the Union.

It started to rain and Minicola invited the employees inside the doorway where the conversation continued. Hatanaka testified that Minicola said that when PBHM (Outrigger) came in to manage the Hotel, one of the conditions Hayashi had imposed was that Outrigger needed to hire all the employees, but because of the union activities and rallies during 2007 she had become upset and offended and no longer cared if the employees were rehired when PBC resumed operating the Hotel. The General Counsel properly observes that Minicola's response here is consistent with testimony given by Mel Kaneshige of Outrigger. It is also consistent with Union President Fred Galdones' uncontested testimony that on November 17 he had called Minicola requesting a meeting, but Minicola had declined saying he had been advised by his attorney not to talk to the Union because Respondents had not yet begun to operate the Hotel. Galdones followed up on December 3 with another telephone call but Minicola responded that they were not going

to recognize the Union, that no collective bargaining would occur and that Watanabe was taking things personally because the Union's boycott campaign and other activities[16] were affecting the financial condition of the Hotel.

On December 4, 2007, Galdones wrote Minicola a confirmation letter to confirm Minicola's statement on the telephone that the Company was not recognizing the Union as a representative of the hotel employees and would not engage in collective bargaining. So far as the record shows, Minicola did not respond to Galdones' letter. Nevertheless, it is undisputed that Respondents had no intention of recognizing the Union upon its resumed operation of the Hotel on December 1.

Simultaneously with its takeover and its refusal to recognize the Union, Respondents also discharged (through PBHM) all of the then current employees. Since it had also instituted the application process, it also offered employment to substantially fewer employees. Consistent with its concept that the employees were "new," it imposed a new employee manual's rules upon them. Each of the employees coming from the PBHM payroll to Respondents' payroll was given an employment processing packet along with their job offers. The packet included a "conflict of interest" policy sheet which they were obligated to sign. The policy stated:

> *Discouraging Potential or Actual Customers.*
>
> Any advice by any Pacific Beach Corporation employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of Pacific Beach Corporation to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination.

Any fair reading of this rule leads to the conclusion that it was designed to prevent employees from engaging in activity protected by the Act, specifically boycotts or public demonstrations in front of the Hotel in support of a labor dispute. Furthermore, Respondents have offered no factual argument demonstrating the rule's neutrality to support its issuance.

Also in the packet was a similar document for the employee to sign entitled "Confidentiality Statement." The relevant aspect of the rule states:

> Any information acquired by myself during the performance of my duties pursuant to my employment act, or in association with, or outside the scope of my employment, at the Pacific Beach Corporation, shall be regarded as confidential and solely for the benefit of Pacific Beach Corporation.

In the context of the Act, such a rule would bar an employee from discussing his or her wages, hours, and terms and conditions of employment with other employees or with outside individuals such as their union representatives. Information sharing such as this is specifically protected by Section 7 of the Act.[17]

Also part of the employee manual are additional rules which were imposed upon the newly re-transferred employees. Listed by the General Counsel in its brief, they are rules which: (a) Prohibit the sharing of information with the media and outsiders.[18]; (b) Require employees to keep confidential certain information about the business operations of the Hotel.[19] (c) Bar employees from leaving the property or their work areas to during working hours.[20] (d) Prohibit employees from making derogatory remarks.[21] (e) Forbid employees from being on

[16] Two examples of such activities involved employees' children. During the Christmas holidays the Union used children to leaflet the public using a tourist trolley. A similar incident occurred a few weeks later in January during the Martin Luther King holiday. In that encounter, Kanaiaupuni and other union members had stepped down from the trolley and encountered Minicola standing in front of the Hotel watching the leafleting.

[17] In pertinent part Sec. 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[18] Specifically, this rule first requires an employee to refer outside inquiries to the general manager and the employee's supervisor and than bars him or her from discussing their job or any aspect of the Company's operations and/or corporate business with the press "or anyone not employed by our company." This, of course would prohibit an employee from discussing employment matters with his or her Union.

[19] In large part, this tracks the confidentiality statement set forth above. Understandably, it lists legitimate business matters such as sales figures, marketing goals, profit margins, merchandise markups, sales reports, and operating reports. However, it also lists and mixes business matters with material which employees may utilize while exercising rights under the Act. For example, it bars employees from reporting to outsiders the "names and addresses of employees *and* hotel guests." While clearly the names and addresses of hotel guests can legitimately be held confidential, the names and addresses of fellow employees cannot, for it inhibits employees from engaging in conduct protected by Sec. 7. It also bars employees from providing the employee handbook to outsiders, such as union organizers or representatives. And finally, it bars employees from discussing their compensation "with anyone." Clearly, this too, is a barrier intended to prevent employees from engaging in Sec. 7 activity.

[20] This rule bars employees, not from leaving work while they are on the clock, but when they are off the clock, such as during breaks and meal periods. If they need to leave, they are obligated to obtain the prior consent of their supervisor. This rule would appear to be aimed at preventing employees from leaving work in order to engage in a lawful strike or demonstration. It would also appear to prevent an employee from attempting to meet a union official out on the public sidewalk or at a nearby meeting place. Again, this is aimed at prohibiting Sec. 7 activity.

[21] Specifically, this rule prohibits employees from "making . . . derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation." Clearly the definition of derogatory remarks is unsettled. There are obviously negative things which can be said about an employer which are protected by law, such as contentions that the employees are overworked or underpaid. Yet, this rule would reach such protected conduct. And, of course there good reason to prohibit certain types of derogatory comments about fellow employees or supervisors because they can negatively influence the working atmosphere. The latter is a legitimate purpose behind such a rule; the former is not. Respondent has conflated the two and they are so intertwined now that the two cannot be separated and employees would be confused concerning its breadth. Finally, I can envision circumstances in a labor dispute where disparaging remarks might nonetheless be protected by the Act, yet prohibited by this rule.

hotel property when not scheduled to work, except for two exceptions: a 30-minute window when entering or exiting the property before and after work and using the fitness center for 2 hours either before or after work. This is enforced by a property pass rule.[22] A closely connected rule (f) bans employees from "loitering or straying into areas not designated as work areas, or where your duties do not take you." That rule, too, is unlawful for the reasons set forth in the footnote. (g) Prohibit "unauthorized" discussions in "public" areas. The rule itself says that employees are prohibited from "Discussing business, personal, or unauthorized matters in public areas where guests may be able to overhear the conversation." Again, the phrase "public areas" is most ambiguous and mixes areas of legitimate business concern with areas of nonlegitimate business concern. For example, a public area might well be intended to apply to actual work areas such as the main lobby or a guestroom hallway. Respondents have a legitimate concern over work-related conversations which guests and customers might overhear. However, other public areas might be the parking structure or even restrooms open to the public, where private conversations would not be disruptive, yet could conceivably be overheard. Even so, those areas are not appropriate to regulation concerning work-related matters, particularly where they are protected by Section 7.

Also in conjunction with taking back operational control was a question of wage rates. Instead of concerning itself with or accepting the wage rates which had recently been negotiated between Mori and Rand, on December 1, 2007, Respondents announced that the workers would be getting a raise. Housekeepers and stewards received a $1-per-hour raise, while others received 75 cents. Those individuals were in the "nontipping" category, meaning their remuneration was not normally connected to gratuities. Those job classifications which were connected to gratuities, such as restaurant wait staff, bellman, and the like, were only granted a 10-cent hourly increase. As with other matters, this was not discussed with the Union in any way since Respondents had no intention of recognizing the Union or honoring its certification.

Respondents' refusal to continue to recognize the Union as it again took over the Hotel, triggered additional demonstrations in front of the Hotel. I earlier cited that evidence in support of the contention that Respondents, in the form of Watanabe (and Minicola, too), had direct knowledge of the participation of members of the union organizing committee's involvement. In addition, given their statements to the effect that the demonstrations had become "personal," one might infer union animus from those statements. However, there is more that can be discerned from Respondents' observations of the rallies.

The General Counsel has asserted that at least some of the rallies were closely observed by Minicola and that he was engaging an unlawful surveillance of protected activity when he did so. While it cannot be said that Minicola's observations necessarily were coercive, there is another allegation of unlawful surveillance and or polling which is substantially more coercive.

In late April 2008, Respondents, now fed up with the Union's continued and stepped up demonstrations, decided to prove once and for all that the Union did not represent a majority of its employees. This was to counter the Union's "Justice on the Beach" campaign occurring during a Japanese holiday period known as Golden Week. On April 25, Respondents' department managers held a series of meetings with employees.

One of the cashiers, Jacqueline Taylor-Lee, testified about the meeting she attended in the Oceanarium Restaurant with staff from both restaurants.[23] About 25 employees attended. Minicola began the meeting by observing that there was a boycott taking place outside the Hotel at that moment. John Lopianetzky (now the Hotel's general manager), Kazu Watanuke (in charge of Japanese sales), Edwin Dagdag (the new food and beverage manager), and Linda Morgan stood in support of Minicola.

Taylor-Lee describes what Minicola said:

> He started off, he welcomed everybody. And then he—basically, he wanted to talk to us about the boycott, and whatever was going on outside. We had rallies going on that day.
>
> And the first thing I believe he started off with was, um, if you agree with what's going on outside, he hears it loud and clear, and it's fine.
>
> But if you don't, we want to hear from you. So, for those of you who don't agree with this, come over to HR, and we wanna hear from you.
>
> . . . .
>
> After that, he said his hands were tied. Yeah, he needed to hear—he needed to get feedback, he needed to hear from the employees.

Watanuke and Morgan both made comments as well. Taylor-Lee recalled Watanuke saying that he had recently been to Japan to solicit business but that no one wanted to talk to him.

Of Morgan, Taylor-Lee said: "[S]he mainly talked about our medical benefits. She told everybody—she asked everybody, 'Where can you find another job that would pay for your medical benefits? We pay $600 for you, your family. Where can you get another job like that?' And she kept asking us, over and over again. And nobody answered."

After that, she said, Minicola proffered something to the effect of "[I]f we continue the way we're going, meaning the

[22] First, the General Counsel properly observes that company property is not really defined in the rule. It is clearly subject to an interpretation prohibiting them from being on the hotel premises in its entirety. Such a rule is no doubt valid for working areas, but has no application to nonworking areas such as the parking structure or even some of the restaurant seating areas. In any event, Respondents have not offered any justification for the rule. Rules such as these are subject to the *Tri-County Medical Center* tripartite test for validity. 222 NLRB 1089 (1976). Under that case such rules are valid only if they (1) limit access solely with respect to the interior of the plant and other working areas; (2) are clearly disseminated to all employees; and (3) apply to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. Since Respondents have offered no reason for the rule, and since its ambiguities are obvious, the rule is unlawful.

[23] The Shogun was now closed, so these employees were from the Oceanarium and Neptune's Garden.

hotel, we're—we probably, all of us, will be out of jobs. And then he said, you know, 'we' meaning the managers would probably get other jobs, but what about you? Can all of you get other jobs?"

A similar meeting was held outside the housekeeping office. Cesar Pedrina attended one of those meetings with about 40 to other employees. As before, Minicola, Morgan, Lopianetzky, and Watanuke were present. One of Morgan's HR assistants, Monica Draper, was also there.

Pedrina testified that Watanuke told the group that he had been to Japan and had seen people passing out flyers about the Pacific Beach Hotel. Minicola asked the employees if they knew what a boycott was and supplied that the boycott was designed to hurt the Hotel, an object with which he disagreed. Pedrina reports Minicola saying that if the employees agreed with him, they should go to Draper's office or Morgan's office and speak with the HR managers. Guillerma Ulep corroborated Pedrina, but expanded slightly upon what Minicola had said. Her testimony: "He told us about the business going so slow because of the boycott, and it's affecting each and every worker, especially those with lower seniority. And he told us that if we want to do something about it, we have to go to the Human Resources office." Ulep testified that Morgan referred to the recent shutdown of Aloha Airlines, saying she pitied the employees who had lost their jobs and benefits there.

Although Ulep did not go to the HR office as invited, she was able to identify four employees who did. Even so, she said that after the meeting she no longer participated in any of the union rallies. She no longer wishes to be identified with union supporters because she fears for her job. Like Ulep, neither Pedrina nor Taylor-Lee went to the HR office.

General Counsel's Exhibit 53 consists of a cover letter together with handwritten notes taken by Draper during this timeframe. The cover letter, addressed to the investigating Board agent, advises that Draper had taken the notes during her discussions with members of the maintenance department on or about April 23, 2008, along with other employees and some typewritten notes taken by other HR staff. The notes, which redact the names of the interviewees, are undated but nonetheless all detail the employees' disagreement with the Union and their disagreement with its boycott. They are clearly the product of the postmeeting interviews which Minicola had solicited.

It would appear that the maintenance department met as a group with Draper and nine of them adopted the same statement to the effect that there were 8 million Japanese union members but they did not want to come to the Hotel because guests are concerned about the noise from the rallies. It concluded, "The boycott does not help ees, it hurt ees we don't understand how Union knows where we live, they come to our homes . . . We oppose boycott."

This is followed by 41 handwritten entries from redacted employees, all of whom expressed opposition to the boycott. There are also 12 typewritten entries by redacted employees to the same effect. The final entry is again handwritten by a redacted employee who says, "We don't want to follow the step of Aloha Airline. We need a job which is dependable and reliable on like what have right now. Please stop the boycott and make our life live better." [Syntax in original.]

Thus, it is clear that the HR department interrogated 63 employees concerning their union sympathies and desires, all after providing them with the Company's point of view and implied threat of job loss. These interrogations are unlawful on several fronts. First, the whole thing qualifies as an unlawful poll. There is no evidence that any of the safeguards required by *Struksnes Construction Co.*, 165 NLRB 1062 (1967), were in any way followed. Under that case, the Board has consistently required that a polled employee be provided safeguards concerning the information sought. Specifically, the employer must advise the employee that the purpose of the poll is: (1) to determine the truth of the Union's claim of majority, (2) that no reprisals will be made for providing the information. In addition, (3) the poll must be by secret ballot, and (4) the employer must commit no unfair labor practices or create a coercive atmosphere. Accordingly, since Respondents did not make any effort whatsoever to protect the employees from coercion, it is self-evident that this polling procedure was unlawful under Section 8(a)(1).[24] In addition, it qualifies as straightforward coercive interrogation concerning the employees' union sympathies, activities and desires. Finally, by cutting from the herd the employees who had been persuaded to reject the Union's tactics, it exposed those employees who continue to favor the Union and its tactics. That, too, was coercive and violates Section 8(a)(1). See *Houston Coca-Cola Bottling Co*., 256 NLRB 520 (1981). Plus, in the final analysis, and despite its coercive nature, it did not even demonstrate that the Union had lost its majority. Indeed, determining the Union's majority status by this tactic may not have even been the purpose. If its purpose was to halt the boycott, it failed. If its purpose was to intimidate employees from further union activities, it succeeded to some extent. See Ulep's decision to refrain.

Certainly Minicola's remarks and Morgan's rhetorical question concerning "where else could they get a job if they lost this one?" is a threat to close the business which violates Section 8(a)(1) since it is not supported by any objective criteria.

As for the surveillance allegations, I am not persuaded. These are aimed at Minicola's observation of the rallies held in front of the Hotel's porte-cochere and right in front of Minicola's office window on the other side of the street. Clearly, at least one purpose of using that location as a rally point was to attract Minicola's attention to it. In those circumstances, it is difficult to conclude that Minicola's expected (hoped for) response could have had a coercive impact. In large measure, this was the Union's invitation for him to make an appearance. Even if he chose to walk through the rally or encountered employees stepping off trolleys in the middle of such a rally, his presence, in a place where he would normally be, cannot be said to be coercive. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993) (an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance).

[24] Furthermore, Respondents failed to give the Union advance notice that the poll was to be taken. *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), enfd. as modified 923 F.2d 398 (5th Cir. 1991).

H. Discrimination against the Seven Bargaining Committee Members

I return now to Respondents' decision not to retain a number of employees when it resumed operating the Hotel on December 1, 2007. Sometime in September, Minicola and his management team began work on determining which employees it would retain. As discussed above, it decided not to retain the entire staff as it had forced PBHM to do in January. Minicola contends that he reviewed occupancy rates and forecasts which informed his decisions. Part of that analysis included his decision to close the Shogun Restaurant. Minicola appears to have made the staffing level decisions on his own. There is no evidence that the individuals who compiled the data which he says he relied on contributed to the staffing level numbers he selected. Furthermore, as noted, the personnel jackets of applicants were ignored. Instead, he permitted Lopianetzky and Morgan to make most of the decisions. Morgan, as HR director, had no firsthand knowledge of the day-to-day performance of any employee. Accordingly, she enlisted the carryover executive housekeeper, Christine Ko, to select the housekeepers and floormen. On September 15, when Ko was given little time to formulate her list, Minicola had gone on the business trip to the Far East.

No detailed analysis of Minicola's thinking was ever presented in evidence. Neither he nor Lopianetzky could recall any specific number to be applied to any particular department, whether a reduction or an increase. Likewise, Morgan could not remember any number which applied to any other department except for housekeeping. There she knew that six employees needed to be denied employment. Even so, there is no explanation concerning why it was six, rather than any other number. Yet, she and Lopianetzky both agreed that Minicola told them how many employees needed to be subtracted by department. Curiously, at one point, Minicola testified that he never told anyone how many positions were to be eliminated. Instead, he waited for all the applications to come in and then made his determinations. Once he had a stack of applications for a particular department, he says he told Morgan and Lopianetzky what he wanted from that stack. He claimed he didn't really tell them what he was thinking.

The upshot of all this is that there is no credible record explanation for the process that was used, aside from whatever was in Minicola's, Lopianetzky's, or Ko's mind. It became a subjective process, somewhat tempered by the six factors mentioned above. With that as an introduction, I turn to the circumstances of each of the committee members who were not retained.

Darryl Miyashiro—Miyashiro was a longtime member of the Hotel's banquet staff. He had been hired in 1992 and worked continuously until November 30, 2007, when his application for employment was not accepted. He was the most senior member of that staff. He was a member of the Union's negotiating committee, having been selected by his fellow employees. He participated in all of the contract negotiations, even up through his last day of employment. He was a strong union advocate. Indeed, he had personally negotiated with Minicola concerning a work distribution issue in both the Shogun Restaurant and banquet department. During some of those negotiations he became involved in some direct disagreements with Minicola. Minicola became angry with Miyashiro, pointed a finger at him, and asserted that he had "dealt with" Miyashiro when Miyashiro had sponsored a petition to change the gratuity system. At one point during the pre-PBHM negotiations, Miyashiro had challenged a Minicola/Lopianetzky counterproposal deemed to be ridiculous and told them it was a slap in the face. Minicola had lashed back.

Miyashiro had an outstanding record as an employee. In 2003, he had been employee of the year and had been awarded a $1000 bonus. He turned down several promotion offers and had received no discipline whatsoever until a trash fire incident in 2006.

Lopianetzky testified that he chose not to (re)hire Miyashiro for two reasons: the trash fire and a complaint by a coworker which had never been discussed with him. The trash fire incident occurred when he discarded into a trash can a used sterno canister which he believed had been extinguished. Unfortunately, it had not been and a fire ensued which was quickly extinguished without damage to anything other than the trash can. This occurred during Miyashiro's tenure as a negotiation committee member and discipline was imposed upon him during a sidebar to the negotiations. Minicola told Miyashiro that he would normally have suspended an employee for 2 weeks for such an incident, but because Miyashiro was such a good employee he was going to reduce it to 1 day. Lopianetzky, apparently disagreed, believing that the incident was too dangerous to be treated so lightly. Even so, Lopianetzky signed off on the 1-day suspension, including a negotiated modification stating, "This disciplinary action will not be precedence [sic] setting."

The second reason given by Lopianetzky, an undescribed incident involving a fellow employee seems to have no support. He gave testimony to that effect, but his prehearing affidavit given to the Board investigator did not mention the incident whatsoever. More likely, his testimony is an afterthought. I find whatever may have occurred involving the coworker did not actually play a role in the decision to not retain Miyashiro. Accordingly, I give the second reason no weight whatsoever.

It is clear that the decision to not retain Miyashiro had nothing to do with the reasons given by Lopianetzky. He understood that the sterno incident could play no role in personnel decisions. Nor, do I think, that it did. Miyashiro's outspoken and assertive union activity made him a target in the course of Respondents' effort to shed itself of the Union in December 2007. Since Respondents had no intention of recognizing the Union when it resumed operations, it certainly had no desire to continue to employ a strong union activist such as Miyashiro. I find, therefore, that Respondents discharged Miyashiro because he was a union activist who could not be restrained. Accordingly, his discharge violated Section 8(a)(3) and (1) of the Act. In addition, Minicola's remark that he had "dealt" with Miyashiro in the past for his protected conduct is a threat of unspecified consequences should Miyashiro assert himself in the same fashion again. It violates Section 8(a)(1).

Todd Hatanaka—Hatanaka had been hired in November 1988. Initially, he worked in the purchasing department, but sometime in 2000 had become a bartender in the food and bev-

erage department. He became a member of the union bargaining committee in 2006, having been selected by staff at the Oceanarium Restaurant. He continued as a bargaining committee member until November 30, 2007. He had an exemplary record, the last discipline having been levied upon him in 2001. As noted above, Hatanaka was one of four employees whose letters to the editor, critical of negotiations, were printed in the Star-Bulletin.

Lopianetzky asserted that he did not rehire Hatanaka because he "would not close checks in a timely manner" and some of his managers had made such complaints. Lopianetzky, however, was unable to support that assertion. Indeed, it is not clear when Hatanaka's supposed shortcomings occurred. Lopianetzky had great difficulty identifying the managers who made such complaints. He managed to mention one of the Shogun managers by name on his first day of testifying and on his second day identified an audit manager by name. How an audit manager would have any knowledge about the prompt closing of checks is unclear. Finally, there is no record that any manager ever spoke to Hatanaka about this supposed shortcoming. Lopianetzky admits that he never did so. Clearly, there is no record of any specific incident, much less any record of repeated incidents.

Lopianetzky also contended that Hatanaka "was not the most personable bartender' and he was uncomfortable tending bar. Once again, there is no record whatsoever pertaining to this perceived deficiency. In fact, when Hatanaka served as the bartender/cashier at the Shogun buffet his duties did not involve being especially personable. There, all he had to do was be polite, deliver beverages to the customer's table, and later ring the dinner check at the register. Had Hatanaka had problems with customers, or even with coworkers, some sort of record would have been made. None was. Lopianetzky was not even certain whether any manager had ever taken steps or been directed to take steps to rectify whatever issues Lopianetzky claims to have seen. Frankly, Lopianetzky's contention here is not credible.

Respondents also assert that the main reason for not keeping Hatanaka was because the Shogun Restaurant had been closed and bartending shifts had been lost. That reason, however, is unpersuasive because one of the individuals kept was Edwin Nagasako, a bartender who in 2007 had jeopardized Respondents' liquor license by serving liquor to a minor, receiving a liquor commission citation for doing so. Compared to the trifling shortcomings exhibited by Hatanaka, choosing Nagasako over Hatanaka makes no business sense whatsoever, even assuming that the restaurant closing necessitated the loss of a bartender shift.

Therefore, I find that Lopianetzky's testimony is unreliable. Accordingly, since the reasons advanced to justify Hatanaka's discharge is neither supported nor plausible, the remaining evidence leads to the conclusion that Respondents discharged Hatanaka because of his union activities, specifically his support of the Union during the timeframe in which Respondents were trying to evade their responsibilities under the Act. There has been no rebuttal of the prima facie case. Hatanaka's discharge violated Section 8(a)(3) and (1) of the Act.

Ruben Bumanglag—Bumanglag was a maintenance I employee who had worked in that department since 1996. He was one of three maintenance I employees on staff during the changeover. The other two were retained; he was not, even though he filed a timely application. In fact, during the application process in September 2007, Bumanglag appeared in a union television commercial relating to the ongoing labor dispute. He was one of the early organizers prior to the first election, and testified at two representation election hearings. After the Union won the second election, he was chosen as a member of the union bargaining committee, providing information concerning the maintenance, curator, and landscaping departments.

Bumanglag's work history was exemplary. The only discipline which seems to have been applied to his record involved an incident for which the entire maintenance department was chastised. That occurred in 1998, 9 years before Respondents decided not to retain him. That incident is so remote and so unfocused that it would be unreasonable to have used it in the changeover process.

Lopianetzky and Minicola each testified that they had input into the decision. However, their reasons differed. Lopianetzky asserted that Bumanglag had failed to properly repair some convection ovens in the Shogun Restaurant. Minicola testified that Bumanglag was part of a crew of employees that caused the electrocution of a sous chef in the banquet department, apparently due to some improperly repaired equipment. The sous chef's hand was burned, but to an extent not clear from the record. Respondents did not even examine Bumanglag about these episodes.

Despite these incidents, if they occurred, no record was kept and no discipline was levied at the time. Indeed, the dates of these incidents are not shown in the record. Lopianetzky admits that he did not ask Bumanglag's immediate supervisor to discipline him for failing to properly fix the ovens. Furthermore, there is no evidence that Minicola took any steps concerning the so-called electrocution incident. Since someone got hurt in that event, a record should have been kept, either for OSHA reasons or for a workers' compensation claim. But none was.

In addition, Respondents contends that Bumanglag was really no different than the other two maintenance I employees, observing that both of them were also union supporters. However, it is clear that Bumanglag's union activities were far greater, as were his commitment to the Union by becoming heavily involved in negotiations. Appearing in the television commercial made him a far bigger concern and therefore a bigger target.

Again, Respondents' effort to rebut the General Counsel's proof fails the plausibility test. Respondents' reasons are not only inconsistent and unsupported, they are made of whole cloth. They do not rebut the prima facie case. Bumanglag's discharge violated Section 8(a)(3) and (1) of the Act.

Virbina Revamonte—Revamonte had worked for Respondents since 1989, most recently in food and beverages as a pantry I worker. She was one of the employees originally involved in union organizing, serving as a union observer during both elections and giving testimony in both of the postelection hearings conducted by the Board. She was an original member of

the Union's negotiating committee. In that role, she was fairly active, particularly when it came to changes in the employee handbook. In June 2006, she suffered an on-the-job injury and was off work for about 2-1/2 months, returning in a light-duty capacity in early September. She worked in one of the Hotel's retail stores during that time. In April 2007, her condition became aggravated and she was forced to go on workers' compensation leave. She remained in that status through the December 1, 2007 changeover date. She was aware of the obligation to file a job application and did so. Despite her August 27 application, Respondents did not offer her any job. At that time, she was seventh in seniority; plus, Respondents retained about ten pantry employees.

Minicola explained that Revamonte was not offered because the kitchen department was going to be reduced and they had no confirmation that she would be able to work. Similarly, Lopianetzky testified that she was not available to work. Connected to that is the observation that Revamonte was not on the active payroll of the time of the transition. Revamonte testified, however, that she said on her application that she was available for work. Moreover, she did not limit the hours available because of the disability.

In view of my finding elsewhere in this decision that the entire transition was part of a scheme to avoid unionization, and therefore had no real validity, I find that Respondents chose to bypass Revamonte for discriminatory reasons. Her availability or unavailability had no bearing on Respondents' decision. She was a union activist, she was deemed to be a bit off the radar due to her workers' compensation leave and was considered a low risk person to discharge. Moreover, Respondents' explanation that it did not know whether she was available for work clearly fails as a credible explanation. She had said she was available on her application form and if Lopianetzky had a doubt, he could easily have spoken to her. Either way, she was entitled to maintain at least the very status that she then occupied—workers' comp leave. Beyond that, Respondents did recall people who were not on the active payroll. One example is Vickie Sabado, a housekeeper who was on workers' comp at the time of the transition. In addition, another housekeeper, Joel Pancipanci, was an on-call employee. Both Sabado and Pancipanci were offered jobs. If these two were offered employment, there was no need to disconnect Revamonte from her job. The General Counsel's prima facie case has not been rebutted. Revamonte's discharge violated Section 8(a)(3) and (1) of the Act.

Virginia Recaido—Recaido had worked as a full-time housekeeper at the Hotel for about 15 years. Compared to the group of housekeepers who were retained on December 1, 2007, she had far more seniority than most of them. In 2005, her coworkers had selected her to become a member of the Union's bargaining committee. Indeed, she was one of three members of the housekeeping staff who were selected for the committee. She had been quite vocal, particularly concerning the fact that there was inadequate time for room attendants to eat their lunch when they had 16 rooms to clean each day. She says that, apparently in response, Minicola told them that if it were not for the goodness of Corine Hayashi most of the committee members would not be working at the Hotel.

Recaido participated in a number of the union rallies in front of the Hotel, was a leafleter, and occasionally spoke to representatives of the news media about a labor dispute. Indeed, her comments had been quoted in the newspapers and she had appeared in at least one union-sponsored television commercial. Her August letter to the editor criticizing the progress of negotiations was printed in the Star-Bulletin. The executive housekeeper, Christine Ko, acknowledged that she was aware of Recaido's public stance.

According to HR Manager Morgan and Ko, Recaido was simply bypassed due to the system which had been put in place, somehow failing to meet one of the six criteria. Which of these criteria Recaido failed to meet is entirely unclear. Ko contended that Recaido did not have a good attitude, was not a team player, was insubordinate and had a poor attendance record. She cited two incidents leading her to that conclusion. The first involved an incident where an unnamed housekeeper had supposedly failed to check a bed which had become soaked with blood. Recaido, incredulous, said something challenging Ko's version and demanded to know the name of the housekeeper. Ko, naturally, refused to comply but used the incident to suggest that Recaido was not a team player and harbored elements of insubordination. I think it is clear that Recaido doubted the veracity of the report, believing that it constituted a smear of the housekeeping staff's integrity, possibly blaming the wrong person. Even so, Ko said she simply "counseled" Recaido. It is quite possible that Recaido's challenge had a protected aspect to it, though on this scant record, that is not clear.

The second incident involved a day which involved a large number of checkouts. Ko, whose knowledge was secondhand, said Recaido told assistant housekeeper Bobbi Hind, that each staff member should be given only six checkouts that day and the Hotel should hire additional housekeepers. This incident does not support the "not a team player" accusation; in fact it is actually protected by Section 7 of the act as an act of mutual aid and protection of her fellow employees. Certainly, Ko took no steps to discipline Recaido over the incident at the time.

But what really puts Ko's explanation into the untenable category was the fact that Respondents retained employees whose histories of transgressions were far worse. For example, housekeeper Imelda Garibaldi was suspended for 1 day for refusing to wipe down hallway baseboards, saying it was not her job and then publicly arguing about it. Similarly, housekeepers Rosita Callo-Fieldad and Lydia Diego received warnings/counseling after guest complaints concerning bloody material found on bed sheets. The record shows several employees received warnings for failing to treat fellow employees with respect and courtesy, specifically over some room discrepancies and hurt feelings. One, Juanita Lucas, was the target of some gossip concerning her room discrepancies. Indeed, prior to the changeover of December 1, 2007, she had received a number of discrepancies and had been forced to turn over some unserviced rooms to a runner, as she had been unable to handle her daily assignment. Nevertheless, all of these individuals were retained over Recaido whose work performance was clearly superior.

Again, given Respondents' hostility and antipathy to unionization, and the hollowness of the assigned reasons for not keep-

ing her, is clear that the General Counsel's prima facie case has not been rebutted. Recaido was discharged in violation of Section 8(a)(3) and (1).

Rhandy Villanueva—Villanueva worked in the housekeeping department as a houseman. He had been employed by the Hotel for over 14 years. As a houseman, he performed a variety of tasks in support of the housekeeping staff, assisting with room cleaning as called upon, hallway and public area custodial work, and as a runner providing services (such as delivering rollaway beds) to hotel guests. He was classified for payroll purposes as a housekeeper II.

Villanueva was selected by the housekeeping staff to be one of its representatives on the Union's negotiating committee. He served continuously on that committee from its inception in 2005 through the changeover in December 2007. During that timeframe he missed only two bargaining sessions. He often sat directly across the table from Minicola. In addition, he manned the Union's information booth on Kuhio Avenue behind the Hotel. On one occasion he noticed Minicola observing him as he attended rallies in front of the Hotel. Villanueva, like the others, had also filled out a job application form.

Shortly before the changeover, he says Ko asked him if he had received a job offer. When he responded that he had not, she told them that she was "surprised." He then asked her for a letter of recommendation and she agreed to provide one.

Ko told another story. She said that he was not hired because he failed to complete work assignments, had committed safety violations, and had a poor attendance record. She cited an instance where he had supposedly failed to knock on a room door when delivering a rollaway bed, even though the guest had placed a "do not disturb" signed on door. In that instance, he should have asked housekeeping supervision to call the room. In another incident he supposedly left a rollaway bed in the hallway after a checkout rather than returning it to its proper location. Ko also says Villanueva committed two safety violations: once over-stacking trash bags on a cart, allowing them to fall and on another occasion pushing one trash bin with another. Despite these transgressions, Ko admitted that there were no written disciplinary records on file for Villanueva.

To the extent that Villanueva had any absentee problems, they were attributed to an asthma-like condition. Each of these was explained by a doctor's note and Villanueva never failed to give notice of his situation. There were no no-call, no-show absences. His work was generally very good.

Villanueva was the only houseman who was not retained. As with the other housekeeping employees, Ko did not consult any personnel jacket entries for her decision and recommendation. Indeed, is not entirely clear who made the decision to not retain Villanueva since Villanueva testified Ko was surprised to learn he had not been retained. Ko, though, made some kind of recommendation and Morgan reviewed it. Whoever made the recommendation, made an odd choice given the records of those housemen who were retained. Housekeeper II Frederico Galam had been disciplined five different times between March 1 and September 30 2007. At least one of those was for entering a guest's room without authorization, something he had been counseled for previously. He also received a written warning for blocking an elevator door with a trash bag and was given another written warning for improper use of a guest elevator. Finally, in September 2007 Galam was given a 3-day suspension for changing his work assignment without a manager's permission. Ko signed off on each of the written disciplinary records.

Given Galam's clearly inferior record compared to union activist Villanueva's, the only conclusion that can be reasonably drawn is that Respondents chose not to recall Villanueva because of his union activism, including his long participation as a member of the Union's negotiating committee. The General Counsel's prima facie case, fraught with animus, has not been rebutted. Villanueva was discharged in violation of Section 8(a)(3) and (1).

Keith Kapena Kanaiaupuni—Kanaiaupuni, frequently described in the record as Kapena, had worked for Respondents since 1983 and was a 25-year veteran who had served for most of that time as a full-time bellman. The front-of-the-house employees chose him as their representative on the Union's negotiating committee. He later became chairman of the committee. Although he received an hourly wage of only $7.25 an hour, that job is considered gratuity-based. Indeed, there is a $3-porterage fee for each piece of luggage hauled by members of the bell staff. The porterage remuneration is shared by the bell staff, based on the number of hours each works during a pay period.

Kanaiaupuni became embroiled with Minicola during the pre-PBHM negotiations over who would share the porterage "kitty." In the past, managers had been part of the distribution, but the bell staff believed that was improper since managers did not handle any luggage. In addition, some of the money had been shared by parking lot attendants. Moreover, the porterage was a significant amount of income for each of the bellmen. Apparently, the managers were handling the money and taking a cut before the distribution. The negotiations between Kanaiaupuni and Minicola were protracted and heated, even involving shouting matches. Eventually, Minicola relented and gave control of that money to the bellmen as a group. Later, when the bellmen changed the distribution formula, Minicola became upset and attempted to regain control, saying he would not make the same mistake again.

The porterage became a point of contention a second time when another bellmen made a mistake and transposed some numbers on the distribution spreadsheet resulting in a mistaken payment. For some reason Minicola took offense and threatened to fire Kanaiaupuni for stealing since he was the recipient of the overpayment. When Kanaiaupuni explained that he did not do the payroll and did not make out the spreadsheet, Minicola was forced to relent. As for the incident itself, the error was corrected and the proper individual received the correct payment.

Also during negotiations Minicola became exercised with Kanaiaupuni over a misunderstanding involving one of Minicola's proposals concerning combining the doorman job with the valet job and/or hiring an outside contractor to run the parking valet station. Kanaiaupuni somehow got involved with the valets who reported that he had told them that they would lose their jobs if the company proposal were implemented. Minico-

la became upset with Kanaiaupuni over the incident, although Kanaiaupuni explained how the miscommunication occurred.

Whether Kanaiaupuni accurately or inaccurately described to the valets what had happened during negotiations, it is immaterial for our purpose. As the committee chair, Kanaiaupuni was attempting to provide information concerning negotiations to affected employees. That conduct is protected by Section 7 of the Act and his abilities to describe negotiation events to fellow employees is none of Respondents' business.

Respondent's managers do not tell a consistent story concerning who made the decision to not retain Kanaiaupuni. Lopianetzky said that was Minicola and Morgan. Morgan said it was Lopianetzky and Minicola after she shared some information with them concerning some of Kanaiaupuni's coworkers' complaints about him. She was quite vague about these complaints and could not describe them; neither could she say whether any of the complaints resulted in any discipline. Minicola said he did not hire Kanaiaupuni because of some attendance questions and because he grumbled about the work of the other employees. As for the grumbling, Minicola admitted that he had never heard Kanaiaupuni do so.

If attendance was actually a factor in the decision to retain employees, Kanaiaupuni's record is clearly superior to the attendance records of fellow bellmen Mark Nishida and Michael Bradshaw. As the General Counsel observes, in the 7 years before the PBHM takeover, Nishida had been disciplined 25 separate times, 23 of which were for absences or tardies. Bradshaw was disciplined 21 times for absences and tardies. Kanaiaupuni received only seven disciplines for attendance issues during that same timeframe.

The grumbling question seems to be made of whole cloth, for there is no evidence whatsoever in the record concerning any such incident, unless one looks to Kanaiaupuni's behavior during negotiations. If that is what the Minicola and Morgan are referring to, it was protected conduct and may not be used to support a discharge.

Clearly, the General Counsel has made a prima facie case that Respondents discharged Kanaiaupuni in violation of Section 8(a)(3) and (1) of the Act. Moreover, Respondents' assigned reasons for selecting him for discharge do not hold water and are entirely unpersuasive. Accordingly, I find that Respondents have not rebutted the prima facie case.

II. CONCLUSIONARY FINDINGS

Any analysis of this case must begin with some basic understanding of Board law concerning the continued obligation to recognize and bargain with a certified labor organization. Generally speaking, once a union is certified as the exclusive collective-bargaining representative of a group of employees, that union's status cannot be changed absent a legitimate movement by the employees themselves to do so. Thus, although it is often said, and the statute confirms it, during the first year of the certification the Union's majority status may not be challenged at all. It is unrebuttable. And, after the certification year expires, the presumption of majority status continues. Over the years, the Board has modified that concept only a little. In 2001, the Board decided *Levitz Furniture Co. of the Pacific*, 333 NLRB 717. In that case, after a short survey of the history of the treatment of postcertification year analyses, supra at 723, the Board solidified the rule as follows:

> In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition *unless it can prove that an incumbent union has, in fact, lost majority support.*
>
> . . . .
>
> *Withdrawals of recognition.* The fundamental policies of the Act are to protect employees' right to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships. If employees' exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees. It also means that collective-bargaining relationships must be given an opportunity to succeed, without continual baseless challenges. These considerations underlie the presumption of continuing majority status:
>
> The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. . . . The resulting industrial stability remains a primary objective of the Wagner Act, and to an even greater extent, the Taft-Hartley Act. Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support. [Fn. omitted.]
>
> Where unions continue to enjoy majority support, promoting stability in bargaining relationships and insuring employee free choice are one and the same.
>
> [Emphasis supplied.]

Thus, under *Levitz*, an employer absent *actual proof* that the union has lost its majority status may not withdraw or refuse to recognize a 9(a) incumbent union.

Connected to that aspect of Board law, Respondents sought to prove a loss of majority by anecdotal evidence concerning the number of employees who actually participated in the demonstrations outside the hotel. See Mr. Sanada's offer of proof in volume XI; he also proffered in Respondent's Exhibits 12 and 12(a) (found in the Rejected Exhibit envelope), evidence to the effect that the employees perceived some sort of "general consensus" that they were against the Union's boycott and therefore against the Union. Such evidence is entirely conjectural and in any event is belied by Respondents' own actions when they (unlawfully) interrogated its employees in April 2008. The numbers it unearthed at that time did not come close to disestablishing the Unions' majority status, even 5 months

after it withdrew recognition. Moreover, it never conducted a lawful poll, nor was it presented with an uncoerced disaffiliation petition. For those reasons, I rejected the offer of proof and the evidence supporting it and barred Respondents from presenting the hearsay evidence some of its employee witnesses might have provided. More specifically, see *Port Printing Ad & Specialties*, 344 NLRB 354, 357–358 (2005), enfd. per curiam 192 Fed.Appx. 290 (5th Cir. 2006).

The second point to bear in mind is that this involves protracted negotiations for a first contract in circumstances where there is strong evidence that Respondents were seeking to evade their obligation to negotiate in good faith. There are several factors in play concerning this point. First, is its never-changing effort to impose an illegal recognition clause on the Union, forcing it to abandon its lawfully won bargaining unit description. This is closely connected to its management-rights clause and its virtually absurd dispute resolution proposals. It is true, that during the PBHM regime, progress was made on those fronts. But that progress was illusory, for as soon as PBHM began asking for permission to enter into a collective-bargaining agreement, Respondents canceled its arrangements with PBHM, effectively sabotaging all the progress PBHM had made. Indeed, the entire concept of bringing PBHM into the situation as some sort of surrogate would appear to be bad faith in and of itself. It became apparent, over the course of the hearing, that PBHM was suspicious of Respondents' motives from the outset, but proceeded anyway as a means of turning a profit. What it did not understand was that it was supposed to serve as a dead end for the Union, a place for the Union to become trapped, humbled and de-energized. Instead, PBHM and its owners understood their legal obligations under the Act and actually attempted to reach an agreement with the Union. From Respondents' point of view, this was an undesirable direction.

A corollary to this second point is that since PBHM had failed to carry out its "mission" as Respondents perceived it, all of its explanations for canceling the management agreement with PBHM are basically false. In this regard, Respondents have asserted that PBHM was failing in its responsibility to manage the Hotel properly. These included charges that PBHM was finagling the budget, failing to install the Stellex computer system in a timely way, and permitting the Oceanarium fish tank to lose its oxygenation together with a massive loss of Watanabe's beloved tropical saltwater fish collection.

The only possible perceived valid reason for declaring PBHM to be incompetent is the fish tank issue because its value was immeasurable. And, and it is no doubt true that Minicola's assessment that large number of dead fish in the tank would be offensive to restaurant customers who normally had an excellent view of the tank and its occupants. Still, the incident occurred in May and was fairly rapidly cleared up, even if not all of the fish were readily replaced. By August 3, when Minicola canceled the management agreement, the issue was essentially resolved, even if not forgotten. Moreover, during the investigation process, the tank incident was not included in Minicola's affidavit in which he explained the reasons for PBHM's cancellation. Minicola's explanation, to the effect that the investigator did not ask him the question, seems lame in the circumstances. If it had been a significant factor in the decision to cancel the management agreement, Minicola would not have omitted it. His explanation cannot be credited, particularly because of how acute he says Watanabe's sense of loss was. If the loss had been as significant to the decision as he said, given its sharpness, he would not have omitted it from his affidavit. Accordingly, I conclude that the fish tank incident had little to no bearing on Respondents' decision to terminate the PBHM management agreement.

The other two reasons, PBHM's supposed to finagling of the budget and its failure to timely install the Stellex reservation system are unimpressive as well.

First, under the terms of the management agreement, preliminary budgets projections were known to be flawed, in the sense that they were to be corrected once PBHM had managed the hotel for 3 months and real numbers could be supplied. In fact, the management agreement set forth that exact scenario. Specifically, see paragraph 10.3. Furthermore, that paragraph is entitled "No Reliance on Projections." When actual numbers could be supplied so projections could be made more reliably, rather than accepting those facts, Minicola and Watanabe became exercised over the effect that these numbers appeared to show negative performance compared to the previous numbers. Yet everyone understood, or should have understood, that the previous numbers were estimates and targets, not reflective of actual revenues. That being the case, Minicola's testimony on the point must be regarded as disingenuous insofar as it was a reason for canceling the PBHM agreement. In fact, the Hotel was performing reasonably well despite a market downturn.

The Stellex issue and the declining occupancy rate are intertwined. I think it is fair to say that the Stellex system, installed in June, was late. Two observations can be made about that fact. The first is that it was installed was later than either Outrigger or Respondents wanted. Second, even if it had been installed as promised, its full impact on reservations would not have taken effect for almost a year. Being installed in June meant that it was only operational for about 6 weeks. The way it operated was to place Respondents' Hotel as a "partner" on Outrigger's reservations website. Thus, any potential on-line Outrigger guest when reaching that website saw not only Outrigger's own eponymous hotels and a link to its Ohana properties, he also saw a link to the Pacific Beach Hotel.

Unlike Respondents, Outrigger marketed principally to the continental United States, Canada and perhaps the remainder of the Americas. Respondents had marketed the Pacific Beach Hotel principally to Japan and other far Eastern markets. Thus, Stellex was the Pacific Beach Hotel's first major marketing effort in North America. It could not have been expected to reap immediate benefits. Stellex, nevertheless, if left in place, would have exposed the Hotel to this entirely new market. It was a long-term strategy, but cancellation of the PBHM management agreement undercut it entirely. Minicola's blame, targeted at PBHM's handling of the Stellex installation, like the fish tank incident, does not fit the time line very well. Once in place, Minicola never permitted it the opportunity to succeed.

In sum, the reasons as cited by Respondents for canceling the management agreement are not especially persuasive. Standing alone, one might consider them to be justifications. However, they did not stand alone. The elephant in the room was the

Union. PBHM was succeeding too well with the Union. It was about to enter into an agreement which would last at least 2 years and would give the Union significant authority over the manner in which Respondents dealt with its employees. That had been intolerable since the one-vote win in 2005 and remained so in 2007. Indeed, the Union's persistence and its resort to international boycotting and public demonstrations had worn thin with both Minicola and Watanabe. As Minicola said, they were taking it "personal."

Based on the foregoing, I have no difficulty in concluding that the reason Respondents canceled the PBHM agreement was to avoid having a union representing the Hotel's employees. Indeed, in reviewing the management agreement and Respondents' general behavior toward the Union, it seems clear that the entire concept of inserting an "independent" manager such as PBHM was nothing more than a long-term scheme to wash the Union from the Hotel. It was designed to make it appear that Respondents were a bona fide successor to PBHM where it could also claim that the Union's one-vote majority of 2 years before had become dissipated. If so, it reasoned, it could simply treat all of the employees as if they were new hires and set the new terms and conditions. Even if it could not rid itself of the Union entirely, at the very least it could ignore all of the collective bargaining that had gone before and set initial terms and conditions of employment under cover of the holding in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). There, the Court recognized that in a normal successorship an employer is free to set the initial terms and conditions upon which it will hire the employees. In other words, it is not obligated to accept an existing collective-bargaining agreement. The Court went on to say that there would be circumstances where it would be perfectly obvious that the successor intended to retain all of the employees in the bargaining unit that it would be appropriate to have him initially consult with the employees' bargaining representative before fixing those initial terms and conditions.

Respondents' scheme here anticipated that it might be obligated to both recognize and/or consult with the employees' bargaining agent, the Union. To avoid that, and to guarantee that the Union's one-vote majority could be seen as lost, it chose to discharge seven known union activists. After all, if the Union only had a one-vote majority, that majority would be extinguished if known union adherents no longer worked for the Hotel. And, as I have shown above, Minicola did exactly that when he discharged the seven bargaining committee members. Indeed, those discharges have above been found to be illegal and in violation of Section 8(a)(3) and (1).

Once it had accomplished destroying the Union's majority, it deemed itself free to behave as if it were a new employer, and not a successor under the NLRA. This ruse, however, is as transparent as it is simple. Its principal problem is not that it is difficult to discern but that it has created an intricate web of violations. Because nothing it did when it resumed operations upon PBHM's departure was with the Union's consent, nearly everything it imposed on the employees violated the Act.

As the General Counsel correctly observes, the Supreme Court held in *NLRB v. Katz*, 369 U.S. 736 (1962), that an employer violates Section 8(a)(5) and (1) by unilaterally imposing new and different wages, hours, or other terms and conditions of employment upon bargaining unit employees without first providing their collective-bargaining representative with notice and an opportunity to bargain regarding the change. The topics over which such an employer must bargain are those which are regarded as mandatory bargaining subjects—wages, hours, and other terms and conditions of employment. Specifically, see *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 at 349 (1958). In addition, an employer must respond factually with reasonable demands for information concerning not only underlying data germane to collective bargaining, but to information reasonably related to collective bargaining. This includes such matters as limits imposed on a bargainer and information concerning the nature of the actual employer.

More specifically, the general rule is that an employer is obligated to provide the employees' statutory bargaining representative with information in its possession relevant to collective bargaining. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Fafnir Bearing Co*., 146 NLRB 1582 (1964), enfd. 362 F.2d 716 (2d Cir. 1968). Furthermore, the Board in *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988), said Section 8(a)(5) obligated an employer to provide a union with the requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. When the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000) (same).

The Act favors transparency. *Otay River Constructors*, 351 NLRB 1105 (2007). Some items demanded, of course, are producible on their face given the fact that they are presumptively relevant to collective bargaining. Others are producible upon a showing that they are indeed relevant, even if not presumably so. Here, one of the principal demands the Union made as a contract began to appear on the horizon was to determine who the actual employer was. It knew, of course, that PBHM was doing the bargaining and was the direct employer, at least for that moment.

What it did not know was what limitations Respondents had placed upon PBHM. PBHM bargainers had hinted that there were some, but they were confidential and could not be revealed. The Union knew, from its prior experience bargaining with Minicola, that Minicola would not agree to anything close to a reasonable recognition clause. It also knew that suddenly the employing entity had magically become PBHM. Yet it could see Minicola working in the background, every day. The Union reasoned that if Respondents were really in control, then they were the parties to be bound by the contract. But the Union could not get access to the information it needed to determine whether it could safely sign a contract with PBHM. If it did so, would it be binding on Respondents in the event that Respondents reappeared on the scene? In those circumstances, information concerning the true employer was highly relevant to not only the recognition clause, but the signature clause as well. Therefore, I find that information relating to the true

nature of the Respondents and their relationship with PBHM was information that was highly relevant and could not be kept from it by a claim of confidentiality. The information is clearly relevant to the intelligent negotiation of a collective-bargaining contract. *Western Massachusetts Electric Co.*, 228 NLRB 607, 623 (1977). (Seniority data on nonunit employees who might have the right to displace unit employees.) Respondents violated Section 8(a)(5) by refusing and by directing PBHM to refuse to supply such information, including the relevant portions of the management agreement. Cf. *Leonard B. Herbert, Jr. & Co*., 259 NLRB 881, 883 (1981) (Employer required to produce information about "double breasting" at his companies as it is presumptively relevant to collective bargaining.) Also cases cited therein: *Associated General Contractors of California*, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980), and *Doubarn Sheet Metal*, 243 NLRB 821 (821 (1979). *Blue Diamond Co.*, 295 NLRB 1007 (1989) (demand for information to determine whether multiple companies were actually a single employer).

Any objective analysis of this wide-ranging state of affairs must recognize that all of these things are of a piece. They are all designed with one purpose in mind: evasion of the Act. Respondents have chosen to defy not only the will of their employees, but the statute which provides for those employees' mutual aid and protection—Section 7 of the Act. It has rejected the validity of the certification under Section 9, its general duty to bargain in good faith as required by Section 8(d), its concomitant duty under Section 8(a)(5) to provide relevant information to the Union and its unlawful discharge of seven employees under Section 8(a)(3). And this summary does not even reflect the wide variety of unlawful unilateral changes it undertook beginning in December 2007.

Unilateral Changes

Since none of the changes are in dispute, I need not do more than provide a list of these unilateral changes. Suffice it to say that under *Katz*, all of them are mandatory subjects and all of them were imposed or implemented without first bargaining with the Union:

1. In mid-October 2007 Respondents imposed a conflict of interest rule upon its employees, effective December 1.

2. In mid-October 2007 Respondents imposed a confidentiality rule upon its employees, also effective December 1.

3. On December 1, 2007, Respondents granted wage increases to its bargaining unit employees, $1 per hour for housekeepers and banquet stewards, 75 cents per hour for all other nontipping category employees and 10 cents per hour for its tipping category employees.

4. On about December 1, 2007, Respondents increased the number of rooms its housekeepers were to clean per day, from 16 to 18 in the Ocean Tower and from 15 to 17 in the Beach Tower.

5. On December 1, 2007, Respondents imposed a new employee handbook containing a wide variety of rules affecting working conditions, many of which interfere with employee rights as defined under Section 7, but all of which relate to terms and conditions of employment.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondents discriminatorily discharged Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte, they must offer them reinstatement to their previous jobs, or if they are not available, to substantially similar jobs, and make them whole for any loss of earnings and other benefits they may have suffered. Respondents shall take this action without prejudice to their seniority or any other rights or privileges they may have enjoyed. Backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondents make a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondents shall be required to expunge from their personnel files any reference to their illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982). In each case they will also be ordered to advise each of them in writing of the expunction and that the discharge will not be used against any of them in any way.

With regard to the 8(a)(5) allegations, there are essentially three types: the general refusal to bargain/refusal to continue to recognize, refusals to provide information and a variety of unilateral changes. With respect to the unilateral changes, Respondents will be ordered to roll all of them back, together with an appropriate restoration option. It will also be ordered to promptly supply the requested information.

As for the general refusal to bargain and the withdrawal of recognition, the General Counsel is seeking both ordinary and extraordinary remedies. Given the fact that Respondent has not bargained in good faith from the time it made its first counterproposal on January 5, 2006, the certification year will be extended for 1 year from the date of the Board's bargaining order. See generally *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), and *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978), enfd. in part 592 F.2d 94 (2d Cir. 1979).

With respect to the extraordinary remedies, the General Counsel seeks an order requiring Respondents to make whole employee negotiators for any earnings lost while attending bargaining sessions. It also requests an order requiring Respondents to pay the Union for its costs and expenses in preparing for and conducting collective-bargaining negotiations from January 1, 2006, through November 30 2007.

As the Board has stated the test, if it is quite clear that Respondents' unfair labor practices can fairly be said to "have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies" in cases of unusually aggravated conduct, then extraordinary remedies are appropriate. *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in pertinent part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. (1997). And, as the General Counsel argues, requiring Respondents to reimburse for bargaining costs is appropriate where there is a "direct causal relationship between the [Em-

ployer's] action in bargaining and the charging party's losses." *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190 at 1195 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003) (consent judgment). See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967).

I find here that Respondents' conduct easily fits the test. There is no debate that Respondents engaged in bad-faith bargaining from the outset, then entered into a scheme whereby it could "wash" the Union's certification from itself and behave as if the employees had never selected the Union as their bargaining representative. In the process it discharged seven of the Union's principal adherents—both as a retaliation and as means of reducing what it perceived as the Union's thin majority. Accordingly, the General Counsel's requested extraordinary remedies will be granted.

Finally, because Respondents have a proclivity for violating the Act, because of the serious nature of the violations and because of Respondents' unyielding and egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondents to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Finally, given the nature of these unfair labor practices as I have described, I find that merely posting the notice will not have the salutary effect necessary to deter Respondents from this behavior in the future. It is necessary for all persons to become vigilant and aware of future unfair labor practices or repetitions of those committed in the past. Accordingly, in order to educate the employees about what Respondents have done in the past and what it is doing or likely to do in the future, I shall recommend that one of Respondents' responsible corporate executives in the presence of a Board agent read the attached notice (Appendix) to the employees during shift meetings called for that purpose. See *Excel Case Ready*, 334 NLRB 4 at 5 (2001). The Board agent may also answer employee questions at the meeting.

CONCLUSIONS OF LAW

1. Respondents HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC together doing business as Pacific Beach Hotel constitute a single employer under the Act and is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC together constitute a single employer under the Act and are jointly and severally liable for the unfair labor practices found herein.

3. International Longshore and Warehouse Union, Local 142 is a labor organization within the meaning of Section 2(5) of the Act.

4. At all times since the Board certified it as the 9(a) representative of the employees of the Hotel on August 15, 2005, the Union has represented a majority of the Hotel's employees in the appropriate bargaining unit.

5. At no time between August 15, 2005, and December 1, 2007, has the Union lost its majority status in that bargaining unit.

6. At no time between August 14, 2006 (the end of the certification year), and December 1, 2007, have Respondents offered to prove that the Union had actually lost its majority status.

7. Beginning in January 2006 and continuing through the end of December 2006 Respondents bargained collectively with the Union with no intention of reaching an agreement.

8. Although between January 1, 2007, and December 1, 2007, Respondents contractually delegated PBHM to run the Hotel and to bargain collectively with the Union on Respondents' behalf, at no time were Respondents relieved of the obligation to bargain collectively in good faith with the Union.

9. Respondents utilized PBHM as a middleman as part of a scheme to disguise its decision to deprive the employees of union representation and to escape its obligation to collectively bargain in good faith and when PBHM was about to reach a contract with the Union, Respondents canceled its operating agreement with PBHM to defeat any collective-bargaining contract which PBHM might have achieved.

10. Respondents' conduct as described in paragraphs 7 and 9 above violated Section 8(a)(5) and (1) of the Act and constituted a general refusal to bargain in good faith.

11. On December 1, 2007, Respondents withdrew recognition of the Union as the 9(a) representative of the employees in the bargaining unit and thereby violated Section 8(a)(5) and (1) of the Act.

12. On or about October 12, 2007, Respondents unilaterally and without bargaining with the Union made a number of unilateral changes in the terms and conditions of employment enjoyed by bargaining unit employees. This was accomplished by promulgating rules through employment offers and/or issuance of the new employee handbook. The rules prohibited employees from discouraging potential or actual customers, and imposed a conflict of interest policy and confidentiality policy. These rules are overbroad and thereby discourage employees from engaging in Union and or other protected activity. They independently violate both Section 8(a)(1) and also constitute unilateral changes in violation of Section 8(a)(5) and (1) of the Act.

13. On December 1, 2007, Respondents without bargaining with the Union unilaterally changed the housekeepers' workloads by adding two additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower, thereby violating Section 8(a)(5) and (1) of the Act.

14. In October 2007, as a predicate to resuming operations themselves, Respondents unilaterally and without bargaining with the Union, imposed as a condition of continued employment new conditions on its employees including requiring them to apply for their own job and treating them as new employees, requiring a drug test, and imposing a 90-day probationary period all in violation of Section 8(a)(5) and (1) of the Act.

15. On December 1, 2007, Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who

worked in that restaurant, in violation of Section 8(a)(5) and (1) of the Act.

16. On December 1, 2007, Respondents unilaterally and without bargaining with the Union implemented wage increases for both its tipping and nontipping category employees, thereby violating Section 8(a)(5) and (1) of the Act.

17. In April, May, September, October 2007 and again in April 2008 the Union made various demands for relevant information concerning the legal relationship between PBHM and Respondents, information concerning the PBHM management agreement, information concerning the changeover from PBHM's operation of the Hotel to Respondents, and information concerning the terms and conditions to be applied to employees after the changeover was effected. Respondents never replied to any of these demands, nor did id provide the requested information, and thereby violated Section 8(a)(5) and (1) of the Act.

18. On December 1, 2007, Respondents discharged the following employees because they were union activists and thereby violated Section 8(a)(3) and (1) of the Act: Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte.

19. On April 23, 2008, and again on April 25, 2008, Respondents polled/interrogated its employees concerning their union activities, sympathies, or desires and thereby violated Section 8(a)(1) of the Act.

20. Minicola's threat of unspecified consequences to an employee for being assertive during the collective-bargaining process violated Section 8(a)(1).

21. On April 25, 2008, through Minicola and HR Manager Linda Morgan, Respondents violated Section 8(a)(1) when they threatened employees with losing their jobs if the Hotel had to close because of the boycotts.

22. Respondents did not engage in coercive surveillance when Minicola observed union demonstrations and rallies on the public street/sidewalks in front of the Hotel and his office.

[Recommended Order omitted from publication.]