

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

LOCAL 471, ROCHESTER REGIONAL JOINT
BOARD, WORKERS UNITED (SODEXO, INC.)

and

Case 3-CB-9172

SHARRON RODRIGUE, an Individual

and

Case 3-CB-9176

TINA MAYOTTE, an Individual

Alfred M. Norek and Brie Kluytenaar, Esqs.,
for the Acting General Counsel.
*Lucinda Lapoff, Esq. (Chamberlain, D'Amanda,
Oppenheimer & Greenfield, LLP)*, for the Respondent.

DECISION

Statement of the Case

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Albany, New York, on February 23 and 24, 2011. The underlying charges were filed by Tina Mayotte and Sharron Rodrigue against Local 471, Rochester Regional Joint Board, Workers United (Local 471 or the Union). On October 27, 2010,¹ a complaint issued alleging that Local 471 violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by negotiating vacation pay and scheduling provisions, which harmed the charging parties.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

¹ All dates herein are in 2010, unless otherwise indicated.

Findings of Fact

I. Jurisdiction

5 At all material times, Sodexo, Inc. (the Company), a corporation, with an office and place
of business in Albany, New York, has provided food services at the Empire State Plaza (the
facility). Annually, it derives gross revenues exceeding \$500,000, and purchases and receives at
the facility goods and services exceeding \$50,000 directly from points located outside of New
York. Thus, Local 471 admits, and I find, that the Company is an employer engaged in
10 commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local 471 also admits, and I find, that it is a labor organization within the meaning of
Section 2(5) of the Act. It further admits, and I find that the Union of Needletrades, Industrial,
and Textile Employees and Hotel Employees and Restaurant Employees International Union
15 (UNITE-HERE) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

20 The Company employs 45 food service workers at the facility, where it operates a
catering enterprise, restaurants, and food kiosks. The facility is located at the Empire State
Plaza, which is a complex that services New York’s executive and legislative branches. The
facility is run by General Manager Laurie Jenkins, Director of Catering Stephanie Forgue-Dolan,
25 and Senior Director of Labor Relations Harold Taegel.

Local 471 represents the following unit (the unit) at the facility:

30 All cafeteria and food service employees, which includes all cooks, bakers, food
service workers/cashiers, food service workers, utility workers, hosts and
hostesses, house wait staff, bus persons, wait staff and bartenders, but excludes
managers, office clerical employees . . . and all supervisory employees.

35 (GC Exh. 5, Art. 1). Michael Roberts is Local 471’s district director, and Elizabeth Wiener has
been a business agent since December 2009. She succeeded Jason Crane, who served as a
business agent from June 2008, through December 2009. Prior to Crane, Theresa Hammer held
a business agent position for decades.² Josephine Franco is a Local 471 executive board and
bargaining team member, as well as a shop steward at the facility.

40 Local 471 and the Company have been parties to successive collective-bargaining
agreements. Taegel and Wiener negotiated the January 1, 2009, through December 31, 2012
collective-bargaining agreement (the 2009–2012 CBA). The 2009–2012 CBA succeeded the
May 1, 2005, through December 31, 2008 collective-bargaining agreement (the 2005–2008
45 CBA).

² Hammer separated under dubious circumstances, after the Union was placed under a trusteeship in 2007.

Over the years, Local 471 has undergone several significant evolutions. These changes are described by the following table:

Period	Status
Pre-July 2004	Local 471 was affiliated with the Hotel Employees and Restaurant Employees International Union (HERE), and identified as Local 471, HERE.
July 2004	Union of Needletrades, Industrial, and Textile Employees (UNITE) merged with HERE, which resulted in the formation of Local 471, UNITE-HERE.
January 2005	Local 471, UNITE-HERE became Local 471, Rochester Regional Joint Board, UNITE-HERE.
2007	Local 471, Rochester Regional Joint Board, UNITE-HERE was placed under a trusteeship.
Early 2009	Following the trusteeship, Local 471, Rochester Regional Joint Board, UNITE-HERE disaffiliated from UNITE-HERE, and became Local 471, Rochester Regional Joint Board, Workers United.
2009 to present	Local 471, Rochester Regional Joint Board, Workers United affiliates with the Service Employees International Union (SEIU), and becomes Local 471, Rochester Regional Joint Board, Workers United, SEIU, which is its present iteration.

(GC Exhs. 14, 27, 28, 30, 32).

B. UNITE-HERE’s Organizing Attempt

During the roughly 18-month gap between the expiration of the 2005–2008 CBA and the consummation of the 2009–2012 CBA, UNITE-HERE attempted to organize the unit and appropriate it from Local 471. In furtherance of this effort, it enlisted Hammer, the former business agent, to solicit support from unit employees.

1. Hammer’s visit to the facility

a. Record evidence

On January 27, Hammer visited the facility and beseeched unit employees to sign the following petition on behalf of UNITE-HERE (the petition):

We the undersigned employees . . . don’t want to be represented by [Local 471] We still want UNITE HERE to represent us and . . . authorize . . . [it] to serve as our . . . representative. We demand that Sodexo immediately enter into collective bargaining with . . . UNITE HERE.

(GC Exh. 15). Hammer testified that, during her visit, Rodrigue escorted her around the facility, introduced her to employees, and lobbied them on her behalf. She recalled several workers promptly signing the petition, and stated that Rodrigue persuaded Mayotte, another unit employee, to meet them at the facility and assist with the petition.

Hammer recollected that, at some point, Wiener, the current business agent, arrived at the facility, began tracking her whereabouts, and engaged in the following conduct:

5 She was making dirty faces at me, and taking pictures of me, and on the phone, and stalking around and that type of behavior.

Hammer testified that she eventually eluded Wiener. She stated that, after losing Wiener, she observed Shop Steward Franco shout these comments at an unidentified unit employee:³

10 Why did you sign this petition? [Hammer’s] . . . a phony, . . . counterfeiter . . . [and] embezzler.

15 She recalled Franco also calling her a “thief,” questioning the intellect of whoever signed the petition, and ordering employees to retract their signatures. Hammer reported that Rodrigue, Mayotte, and others signed the petition. (GC Exh. 15.) She added that, although Franco demanded her to surrender the petition, she declined and eventually departed the facility.

20 Rodrigue and Mayotte confirmed that they aided Hammer with the petition. Mayotte witnessed Franco calling Hammer an embezzler and making other derogatory comments. Mayotte stated that she admitted to Franco that she signed the petition, after being demanded to confess her allegiance to UNITE-HERE.

25 Wiener stated that she visited the facility on January 27, after being told about Hammer’s visit. She stated that she stayed at the facility throughout the day, spoke to employees, and coincidentally encountered Hammer. She denied, however, stalking Hammer. She admitted knowing about Rodrigue’s activities, but, denied knowing about Mayotte’s activities.

b. Credibility analysis

30 I fully credit Rodrigue’s and Mayotte’s testimony regarding the January 27 events. Their demeanors were credible, reliable, and truthful. They were consistent, and equally helpful on direct and cross-examination.

35 I will draw an adverse inference against Local 471’s unexplained failure to call Franco to rebut the many animus-bearing statements attributed to her by Hammer, Rodrigue, and Mayotte. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness “who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge.”).

40 I do not credit Wiener’s claim that she was unaware of Mayotte’s organizing activities. First, I found her demeanor to be less than credible. She was a cagey witness, who while cooperative on direct, was intermittently hostile on cross. She periodically parsed the wording of questions, in order to avoid responding to tougher queries. I also find that, in a small, 45-person unit, it is implausible that employees would have failed to tell Wiener about Mayotte’s organizing activities. I similarly find it inconceivable that Franco, who was openly hostile to

³ Franco, without any explanation, failed to testify at the hearing.

Mayotte and a staunch Local 471 supporter, would have neglected to tell Wiener about Mayotte’s confessed support for UNITE-HERE.

5 Lastly, because Hammer testified that Wiener stalked her and openly demonstrated animus against her organizing activities, and Wiener denied such conduct, I must make a credibility resolution. For several reasons, Hammer wins this credibility battle. Wiener’s demeanor, as noted, was less than credible. It is also unlikely that Wiener made a special trip to the facility after being forewarned about Hammer’s activities, and then completely resisted the opportunity to directly observe her reception by the unit.

10 **2. UNITE-HERE’s RC petition**

15 On January 28, Hammer filed with the National Labor Relations Board (the Board) an RC-Certification of Representative Petition on behalf of UNITE-HERE (the RC petition), which sought to represent the unit. (GC Exh. 16.) Rodrigue and Mayotte, thereafter, visited employees at their homes, and asked them to support UNITE-HERE. Within weeks, however, the drive floundered, and the RC petition was withdrawn. (GC Exh. 17.)

20 ***C. The February 18 Overflow Meeting***

25 **1. Record evidence**

30 On February 18, Local 471 held a meeting concerning overflow issues. Local 471 uses an overflow list, which is a list of members available to work for signatory employers on a temporary, as needed, basis. A huge catering event at the facility, for instance, typically generates multiple referrals from the overflow list.

35 Rodrigue testified that she attended the meeting.⁴ She recollected that, before the meeting began, District Director Roberts approached her, and made the following comments:

40 You probably won’t want to attend this meeting . . . because I’m going to make the nomination that you are not going to be allowed to be a Union member anymore. You’re going to be thrown out of the Union. We’re going to take you down and you’re not going to be affiliated with the Union. . . .⁵

45 She indicated that, in spite of this admonition, she attended and sat beside Mayotte. She stated that Roberts opened the meeting by publicly indicting her conduct, and stating that, “she was going to be under charges and thrown out of the Union.” She added that Roberts repeatedly asked her whether she understood the seriousness of her actions. She indicated that, when she responded that “people should have choices,” he flatly countered that, “he would take her down.”

Rodrigue reported that Jay Manning, another Local 471 member, also stated:⁶

45 ⁴ Although not determinative of the underlying issues, Rodrigue stated that the meeting occurred on February 25.

⁵ Roberts failed, without explanation, to testify at the hearing.

⁶ Manning failed, without explanation, to testify at the hearing. Although he is not currently a Union member, he was previously a Local 471 executive board member.

I want her out of here. She doesn't belong here. She's not a Union member. She should be taken out. She's trying to organize UNITE-HERE and bring them in.

5 She stated that people were upset by this exchange, and recalled Mayotte imploring Roberts and Manning to suspend their assault. She added that she, consequently, filed unfair labor practice charges against Local 471, which were withdrawn in exchange for an apology. (GC Exhs. 19–21.)

10 Mayotte also testified about the overflow meeting. She essentially corroborated Rodrigue's testimony.

15 Wiener testified that, before the meeting began, Local 471 received charges from Lane Williams, a unit employee, which alleged that Hammer and Rodrigue had engaged in conduct detrimental to Local 471 by distributing the petition. (GC Exh. 34.) She indicated that District Director Roberts told Rodrigue about these charges before the meeting began, and opened the meeting by announcing the charges. She indicated that Williams later withdrew the charges, before any further action was taken against Rodrigue.

2. Credibility analysis

20 I fully credit Rodrigue's account of the meeting. As noted, I found her to be a credible witness. Her testimony was corroborated by Mayotte, and essentially uncontradicted by Wiener.

25 I will also draw an adverse inference against Local 471 for failing, without explanation, to call Roberts to rebut Rodrigue's and Mayotte's accounts of the several animus-laden statements attributed to him. See *Douglas Aircraft Co.*, supra.

D. Rodrigue's Vacation Pay Issue

1. Record evidence

30 Rodrigue, who has been employed at the facility for 3 years, works in the Albany Room, a buffet-style restaurant. She is paid at the hostess classification, and monitors the buffet, cleans and arranges tables, seats patrons, and processes payments. She has been the sole unit employee assigned to the Albany Room since September, which means that any changes regarding the Albany Room uniquely affect her, and no other unit employee.

35 Under the 2005–2008 CBA, Rodrigue's vacation pay was calculated in the following way:

40 Pay for a week of vacation will be . . . 1/52nd of . . . W-2 earnings for the previous calendar year. . . .

45 (GC Exhs. 4–5). In 2009, under the latter calculus, she received roughly \$650 per vacation week.

The May 13 tentative agreement amended the vacation pay provision. The amendment solely capped vacation pay for the house wait staff, but, left the overall vacation pay equation unchanged for Rodrigue and the remainder of the unit. Specifically, it newly provided:

5 Pay for a week of vacation will be . . . 1/52nd of . . . W-2 earnings for the previous calendar year. . . .

Notwithstanding the foregoing, pay for a week of vacation for House Wait Staff will be Two Hundred and Fifty Dollars (\$250.00).

10 (GC Exh. 11 at Art. 12, Sec. 4) (emphasis added under new language).

On May 26, Wiener sent the following, unsolicited, email to the Company:

15 It was recently . . . brought to my attention that Albany Room staff [i.e. Rodrigue] is paid vacation time 1/52nd of their W2s. As you know, this does not hold the same for the rest of the catering department. There needs to be consistency.

20 (GC Exh. 12). There is no evidence that Wiener contacted Rodrigue, before instigating this controversial issue. Her email also conspicuously failed to mention that Rodrigue was the only affected employee. On the same date, Taegel responded:

25 We are looking into how the Albany Room catering staff are paid vacation. I am assuming that the union's position is that the Albany Room catering employees [i.e. Rodrigue] should receive the same \$250.00 for a week for paid vacation as we agreed to for the House Wait Staff. Please confirm. . . .

(Id.)

30 In July, the 2009–2012 CBA was executed. The 2009–2012 CBA modified the tentative agreement, and added a special vacation pay cap provision for Rodrigue, the solitary Albany Room employee. This amendment provided as follows:

35 Pay for a week of vacation will be . . . 1/52nd of . . . W-2 earnings for the previous calendar year. . . .

40 Notwithstanding the foregoing, pay for a week of vacation for House Wait Staff and wait staff who normally work in the Albany Room will be Two Hundred and Fifty Dollars (\$250.00).

(GC Exh. 13 at Art. 12, Sec. 4) (emphasis added under new language). There is no evidence that the unit ratified, or was otherwise advised of, this change.

45 Rodrigue testified that, in January 2011, she was astonished, when she received a \$250 vacation payment, instead of her customary \$650. She related that she was never forewarned of this change by Local 471. (See GC Exh. 22.) She complained that, as the sole Albany Room employee, she was uniquely affected by this amendment. She reported that, once she protested,

Local 471 filed the following grievance on her behalf:

Since on or around December 27, the Company has improperly paid [Rodrigue’s] . . . vacation time. . . . The cap on waitstaff vacation should not apply to hourly hostess pay. . . .

(GC Exh. 23.) The Company later sustained the grievance, and made her whole. (U. Exh. 13A.)

Wiener testified that she was unaware that Rodrigue was a hostess, and errantly considered her house wait staff. She added that her email solely attempted to maintain consistency amongst house wait staff. (GC Exh. 12.) She stated that, once her error was discovered, she filed a grievance. (GC Exh. 23.) She said that her error was supported by a seniority list, which incorrectly identified Rodrigue as wait staff.⁷ (U Exh. 10.) She denied that Rodrigue’s organizing activities had any connection to her actions. She failed to explain, however, why she approached Taegel, without first contacting Rodrigue about the matter.

2. Credibility analysis

I do not credit Wiener’s testimony that Rodrigue’s dissident organizing activity had no bearing on her handling of this issue. As stated, I found her demeanor to be less than credible. I also find it unlikely that Wiener, whose chief role is to represent workers, would normally agree to slash someone’s vacation benefit without first discussing the matter with them, unless she had a retaliatory motivation. I find it similarly unlikely that Wiener would raise a controversial issue of this nature in a sua sponte manner, unless she had an invidious intent. Finally, I find it plausible that Roberts, Wiener’s superior, vicariously accomplished his threat to “take down” Rodrigue via Wiener’s action. I do not, as a result, credit Wiener’s denial.

E. House Wait Staff Scheduling Issues

1. Record evidence

The Company employs the following house wait staff employees at the facility:

House Wait Staff	Seniority/Hire Date
Williams	May 5, 1997
Franco	September 30, 2000
Mayotte	August 1, 2006

⁷ A conflicting report, however, identified Rodrigue as a Hostess, and Williams, Franco and Mayotte as “Bnqt Supp Wkr II” employees. (U Exh. 13B).

(GC Exhs 4, 13; U Exhs. 10, 13B.) They serve as waiters and waitresses at catered events, and, as a result, receive an hourly wage, a pro rata share of the gratuity,⁸ and health insurance benefits, as long as they worked at least 1040 hours in the prior year. (GC Exh 13.) Given the direct relationship between their hours of work and health insurance eligibility, scheduling has historically been an important issue for this constituency.

Under the 2005–2008 CBA, house wait staff received assignments on a rotating basis, which meant that the Company chronologically sorted through the weekly catering schedule and distributed assignments to them in order of their seniority, with the cycle repeating until all work was evenly allocated (the rotation system). Taegel stated that the rotation system permitted the Company to equitably distribute assignments, without regard to an event’s timing or gratuity. (GC Exh. 24.) He related that the rotation system was a longstanding facility practice and industry custom. He added that this system permitted the Company to maintain a core staff, where employees each received a proportional share of the work.⁹ He testified that, on this basis, he proposed memorializing the rotation system into 2009–2012 CBA. (GC Exh. 7 at 18.)

Taegel stated that he was surprised, when his proposal to memorialize the rotation system into the 2009–2012 CBA was rejected by Local 471. He stated that Local 471, instead, proposed replacing the rotation system with another system, which would permit house wait staff to bid on weekly assignments by seniority (the bidding system). He explained that the proposed bidding system permitted senior house wait staff to hoard the best assignments that involved the largest gratuities, in lieu of such assignments being evenly distributed under the rotation system. He recalled a May 12 bargaining session, where Franco, a member of Local 471’s bargaining team and executive board, proclaimed that the rotation system had to be eliminated because Mayotte, a less senior employee, was working more hours than she was. He added that, throughout bargaining, Franco fiercely supported transitioning to the bidding system. He indicated that the Company eventually, but very reluctantly, conceded this issue during bargaining, in order to achieve labor peace. (GC Exh. 11.)

The parties’ tentative agreement, consequently, memorialized the new bidding system:

Section 9. Rotation. “House Wait Staff” as defined in Section 8 of this Article, will be scheduled in accordance with the following rotation system: . . .

- Catering shifts will be bid and catering jobs will be assigned with the most senior employee receiving the first assignment as long as such assignment does not put the employee into overtime. . . . Subsequent assignments will then follow in accordance with seniority ranking. . . .

(Id. at 10); see also (GC Exhs. 25, 42–43).

Mayotte testified that she was economically injured by the bidding system in multiple ways. First, as the least senior house wait staff employee, she receives the last chance to bid on assignments. Second, she related that, under the bidding system, house wait staff workers review

⁸ The gratuity for an event equals 15% of the bill.

⁹ He recalled Crane, the former Business Agent, also describing this system as “an industry practice.”

BEO¹⁰ forms prior to accepting assignments, which permits senior employees to “cherry pick” the best assignments involving the greatest gratuities. She noted that, under the prior rotation system, assignments were blindly distributed, without consideration of the BEO or potential gratuity, and that she previously obtained a greater share of premium assignments. Third, she reported that, under the bidding system, she has also been assigned fewer “pop-ups.”¹¹ She stated that, prior to July, pop-ups were offered to staff on a rotational basis; whereas, under the bidding system, pop-ups are bid on the basis of seniority, and normally appropriated by Franco and Williams. She stated that, as a result, she now works for the Company at General Electric Research, in order to regain her lost income.

Mayotte testified that Franco routinely complained that the catering department was overstaffed. She recalled a September 2007 meeting, where Franco and Williams asked the Company to lay her off. She also recollected an April or May conversation, where Franco threatened that she would lose hours of work once negotiations concluded, and taunted that she “should just wait and see.”

Hammer testified that, in September 2007, she attended a meeting, where Franco and Williams vociferously complained that the catering department was overstaffed, and insisted that Mayotte be laid off. She stated that, while she served as business agent, she and the Company consistently opposed Franco’s grievances and requests seeking Mayotte’s layoff.

Taegel testified that the Company’s catering business at the facility has steadily decreased since 2008. He stated that, at some point, Wiener told him that there might not be enough work remaining for three house wait staff employees, and suggested that he lay off the least senior employee, Mayotte, until business volume increased. He indicated that he rejected Local 471’s invitation to lay off Mayotte.

Wiener testified that Local 471 proposed the bidding system for many reasons. First, she indicated that Franco and Williams, the two most senior house wait staff, were being assigned fewer work hours, which compromised their ability to meet the 1040 hour threshold for health insurance benefits. She added that grievances were filed about this issue from 2007 to 2009. (U Exhs 7–9.) She explained that the concerns underlying these grievances came to fruition, when Williams, the most senior house wait staff employee, failed to work 1040 hours in 2010, and then lost his health insurance coverage in 2011. She stated that the bidding system addressed this dilemma. Second, she explained that the proposal gathering worksheets, which Local 471 solicited from the unit during negotiations, supported changing to a seniority-based, bidding system. (See U Exh. 16.) Third, she related that the new system gave employees greater control over their schedules. Lastly, she offered that Local 471, which had been seeking enhanced vacation benefits for the catering department during negotiations, withdrew their vacation proposal as a quid pro quo for gaining the bidding system.

Wiener acknowledged that Crane, her predecessor, believed that the rotational system represented the fairest scheduling system. (See also GC Exh. 31.) Although she related that the three house wait staff workers assigned to the catering department were having difficulty

¹⁰ “BEO” is an acronym for banquet event order form, which describes, inter alia: the meal to be served; the number of patrons; the duration of the gathering; and other logistics.

¹¹ Pop-ups are catered events, which arise after the schedule has been posted.

meeting the 1040 hour threshold for health insurance, she denied ever advocating a layoff.

2. Credibility analysis

5 I fully credit Taegel’s testimony that Franco advocated replacing the rotation system with the bidding system during the negotiation of the 2009–2012 CBA, and expressly cited Mayotte being assigned greater hours as a rationale for her position. I fully credit Hammer’s and Mayotte’s testimonies that Franco repeatedly requested Mayotte’s layoff, and historically complained about the quantity of hours that she worked. I credit Mayotte’s testimony that 10 Franco threatened that she would lose hours of work under the 2009–2012 CBA, as well as her description of how the bidding system has economically harmed her. Taegel, Mayotte, and Hammer were credible, and their testimonies were essentially un rebutted, as well as consistent with the overall record.

15 Because Taegel testified that Wiener requested Mayotte’s lay off, and Wiener denied such commentary, I must make a credibility determination. For several reasons, I credit Taegel’s account. First, as noted, I found his demeanor to be truthful. He was candid, and appeared to be a witness with a limited stake in the outcome. Wiener’s demeanor, as stated, appeared to be less than truthful. Second, I find it probable that Wiener, who was willing to abandon Mayotte’s 20 interests by agreeing to the bidding system, would have similarly advocated her layoff. Third, Taegel’s testimony is consistent with Mayotte’s and Hammer’s un rebutted testimonies that Franco, a union agent, has repeatedly sought Mayotte’s layoff in the past. See (U Exhs. 7–9.)

III. Analysis

25

A. The Legal Framework

A labor union owes a duty of fair representation to the workers that it represents. *Vaca v. Sipes*, 386 U.S. 171 (1967). A union breaches this duty, when its conduct toward a unit 30 employee is arbitrary, discriminatory, or in bad faith. *Id.* Along these lines, Section 8(b) of the Act provides:

35 It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . [or]; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8(a)(3)]. . . .

40 An essential element of any violation of Section 8(b)(1)(A) is restraint or coercion in the exercise of a Section 7 right, i.e., the right to form, join, or assist a labor organization, or to refrain from such activity. Opposition to union officers or policies are protected Section 7 activities. *Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867 (1985).

45 The Board employs *Wright Line*, 251 NLRB 1083 (1980), in allocating the burdens of proof in 8(b)(2) cases. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). Moreover, in *Ironworkers Local 340 (Consumers Energy Co.)*, 347 NLRB 578, 579 (2006), the Board held:

To establish a prima facie case under *Wright Line*, the General Counsel must

5 establish that [the employee’s] . . . protected concerted activity was a substantial or motivating factor in the Respondent’s adverse employment actions. . . . If the General Counsel makes the required initial showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of [the employee’s] protected activity.

Id.

10 A union does not, however, breach its duty of fair representation simply because it negotiates contract provisions, which are beneficial to one constituency over another, as long as it has a rational, nondiscriminatory rationale. See *Firemen & Oilers Local 320 (Philip Morris, U.S.A.)*, 323 NLRB 89 (1997). If, however, a Union favors one group of represented employees for reasons that restrain or coerce others in the exercise of their Section 7 rights, or for reasons that are arbitrary or demonstrate bad faith, a negotiated contractual provision violates the Act. See, e.g., *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617 fn. 3 (1995) (union violated Sec. 8(b)(1)(A) when it favored one group, who were members for a longer duration); *Reading Anthracite Co.*, 326 NLRB 1370 (1998) (union violated Sec. 8(b)(1)(A) and (2) when it favored one group, who were members of one local union rather than another); *Red Ball Motor Freight*, 157 NLRB 1237 (1966), *enfd.* 379 F.2d 137 (D.C. Cir. 1967) (union violated Sec. 8(b)(1)(A) when, for political reasons, it agreed to place at the bottom of the seniority list employees from one of two merged facilities), *Barton Brands, Ltd.*, 213 NLRB 640 (1974), *enf. denied* 529 F.2d 793 (7th Cir.1976) (union violated Sec. 8(b)(1)(A) and (2), when it negotiated a new seniority clause for internal political reasons).

25 Additionally, “the Board has found the duty of fair representation breached where the union’s conduct was motivated by an employee’s lack of union membership, strifes resulting from intraunion politics, and racial or gender considerations.” *Postal Service*, 272 NLRB 93, 104 (1984). A union, therefore, breaches its duty of fair representation, when its actions are taken to advance its agents’ interests, at the expense of its rank and file members. See, e.g., *Local 600 (UAW)*, 225 NLRB 1299 (1976) (union violated Sec. 8(b)(1)(A), when its chairman refused to appeal a grievance, which would have reduced his overtime opportunities); *Explo, Inc.*, 235 NLRB 918 (1978) (union violated Sec. 8(b)(1)(A) and (2) when its business agent, for personal reasons, appointed his son-in-law to a steward position, which afforded super seniority and a superior schedule); *Local 417 (UAW)*, 245 NLRB 527 (1979) (union violated Sec. 30 8(b)(1)(A), when its agent refused to process a grievance due to personal animus).

35 ***B. Local 471’s Handling of Rodrigue’s Vacation Pay Issue
Violated Section 8(b)(1)(A) and (2)***

40 I find that Local 471’s handling of Rodrigue’s vacation pay issue was unlawful. This issue was created by Wiener’s May 26 email to Taegel, which asked the Company to agree to add language to the 2009–2012 CBA that effectively capped Rodrigue’s weekly vacation pay at \$250. Wiener’s request, which was made sua sponte, was adopted by the Company, and incorporated into the 2009–2012 CBA. Counsel for the Acting General Counsel contends that 45 these actions were intended to retaliate against Rodrigue because she assisted Hammer with the petition, and, as a result, violated Section 8(b)(1)(A) and (2).

1. Prima facie case

I find that counsel for the Acting General Counsel has demonstrated that Rodrigue’s protected activity was a substantial or motivating factor in Local 471’s handling of her vacation pay issue. Specifically, counsel has shown that: she exercised a Section 7 right when she attempted to organize the unit on behalf of UNITE-HERE; Local 471 knew of her activities; Local 471 harbored animus against such activities; and this animus motivated its handling of her vacation pay issue.

Rodrigue exercised her Section 7 rights, when she distributed the petition and aided Hammer’s organizing effort. See *Sheet Metal Workers Local 16 (Parker Sheet Metal)*, supra. She solicited employees to sign the petition at the facility, introduced them to Hammer, signed the petition herself, recruited Mayotte to aid the campaign, and visited workers at their homes on behalf of UNITE-HERE following the filing of the RC petition.

Local 471 knew about her activities. Wiener admitted such knowledge, and Roberts demonstrated knowledge when he publically ostracized her activities at the overflow meeting.

Local 471 harbored significant animus against her activities. On February 18, for example, Roberts publicly proclaimed that charges had been filed against her, and threatened that she would be, “thrown out of the Union . . . [and] take[n] . . . down,” because of her dissident activities. Significant animus can also be gleaned from Wiener stalking Hammer, while Rodrigue escorted her around the facility on January 27, as well as Franco’s disparaging comments against Hammer and any other UNITE-HERE supporters on the same date. The relatively close timing between Rodrigue’s organizing activity and Wiener’s sua sponte suggestion to the Company to slash her vacation benefits further demonstrates animus. Or put another way, Wiener’s May 26 email occurred within only a few months of Rodrigue’s activities. Lastly, the fundamentally unreasonable and clandestine way that Wiener handled Rodrigue’s vacation pay issue smacks of animus. Wiener, whose main function is to represent employees, covertly raised an issue with Taegel, which solely harmed Rodrigue and exclusively benefited the Company. This action was taken without Wiener talking to Rodrigue either beforehand or after the fact, and without the unit’s approval or ratification. This matter was, instead, essentially concealed in the 2009–2012 CBA, and left to ambush Rodrigue. Lastly, I find it likely that an attempt to oust an incumbent union, and replace it with a predecessor union that had been trusted and ousted, was deemed a hostile action by Local 471’s leadership, which would have prompted Wiener’s ill will. I find, accordingly, that Local 471’s agents harbored extensive animus against Rodrigue’s Section 7 activities.

Based upon the extensive level of animus found herein, I find that counsel for the Acting General Counsel has demonstrated that Local 471 retaliated against Rodrigue’s dissident organizing activities by engineering the reduction of her vacation benefits. As a result, a prima facie case has been adduced.

2. Affirmative defense

Local 471 failed to establish that it would have handled Rodrigue’s vacation pay issue in the same manner, absent her dissident organizing activities. In its defense, Wiener explained that she solely sought to treat all house wait staff consistently regarding the \$250 vacation cap, and

errantly believed that Rodrigue was house wait staff. She added that, once her error was discovered, Local 471 filed a grievance and Rodrigue was subsequently made whole. For several reasons, I reject this assertion. First, as stated, Wiener was a less than credible witness. Second, her contention that her mistake was innocent in nature is greatly outweighed by the extensive record of animus present herein. As stated, if her intentions were truly innocuous, she would have minimally discussed the matter with Rodrigue before agreeing to slash her vacation benefit, and similarly afforded her the courtesy of advising her about the change after it was enacted. Third, I do not find that Local 471’s subsequent attempt to remedy Rodrigue’s issue by filing a grievance, eradicates the invidious motivation that initially prompted this issue. Thus, I find Local 471 failed to satisfactorily prove its affirmative defense, and, as a result, conclude that its actions regarding Rodrigue’s vacation issue were unlawful.

3. Conclusion

Accordingly, Local 471 violated Section 8(b)(1)(A) and (2) of the Act, when Wiener engineered the capping of Rodrigue’s weekly vacation pay. See *Ironworkers Local 340 (Consumers Energy Co.)*, supra. Local 471 failed to prove that it would have taken the same action against Rodrigue, absent her protected activity.

C. Local 471’s Negotiation of the New Bidding System With the Company Violated Section 8(b)(1)(A) and (2)

Local 471’s negotiation and implementation of the house wait staff bidding system, which economically harmed Mayotte, violated the Act. Counsel for the Acting General has advanced two related theories of a violation. First, counsel contends that Local 471 unlawfully negotiated the bidding system, in order to retaliate against Mayotte for engaging in dissident organizing activities. Second, counsel avers that Local 471 unlawfully negotiated the bidding system, in order to advance Franco’s economic interests (i.e. the interests of a steward, and bargaining team and executive board member), over Mayotte’s economic interests (i.e. the lesser interests of an ordinary rank and file member). I find that each theory has merit, and Local 471 possessed a dual invidious motivation, when it negotiated the bidding system.

1. Prima facie case

Counsel for the Acting General Counsel demonstrated that Mayotte’s protected activity motivated Local 471’s negotiation of the bidding system. Counsel has also shown that Franco’s superior status as a steward, and bargaining team and executive board member, played a controlling role in the enactment of the bidding system.

Mayotte exercised a Section 7 right, when she distributed the petition and aided UNITE-HERE’s organizing effort. She solicited employees to sign the petition at the facility, introduced them to Hammer, signed the petition herself, and visited workers at their homes on behalf of UNITE-HERE following the filing of the RC petition.

Local 471 knew that Mayotte aided UNITE-HERE’s organizing drive. As discussed under my earlier credibility analysis, I do not credit Wiener’s denial of such knowledge.

Local 471 demonstrated significant animus against any activities connected to UNITE-

HERE’s organizing campaign. Such animus was previously described under my analysis of the Rodrigue vacation pay allegation.

Local 471 also negotiated the bidding system, in order to pacify Franco, its steward, and negotiating team and executive board member. Franco was granted the bidding system as a consolation prize, after her repeated requests to lay off Mayotte were denied by the Company.¹² The Company’s refusal to lay off Mayotte resulted in Franco staunchly advocating the bidding system throughout bargaining, and expressing that Mayotte’s ability to work greater hours under the rotation system supported this changeover. Local 471’s stance on the bidding system became so intense that Taegel believed that he would be unable to reach an agreement with Local 471 on the 2009–2012 CBA, until he conceded this point. The fact that Local 471 would elevate this isolated issue, which only benefited two house wait staff employees, over the interests of the rest of the unit in concluding 18 months of bargaining, demonstrates that its actions were politically taken to advance Franco’s pecuniary interests. Finally, I find it likely that Wiener, a new business agent, with very limited prior labor relations experience, wanted to gain Franco’s confidence by obtaining the bidding system, in order to earn her allegiance.

In sum, I find that counsel for the Acting General Counsel has demonstrated that Local 471 negotiated the bidding system, in order to both retaliate against Mayotte’s dissident organizing activities, and promote the interests of Franco, a shop steward and politically active member. Local 471 understood that, under the bidding system, which rewarded seniority, the more senior Franco would gain a substantial scheduling advantage over Mayotte.

2. Affirmative defense

In its defense, Local 471 avers that it had a rational, nondiscriminatory motivation behind its pursuit of the bidding system. It contends that the bidding system sought to advance the unit’s seniority interests, which is a legitimate policy. It added that the proposal gathering worksheets completed by the unit prioritized pursuing seniority-based issues in negotiations. I find that this defense lacks merits, and is deeply undercut by the significant level of animus against Mayotte’s dissident activities, and the transparent manner that the bidding system aided Franco. I also note that the bidding system was not even remotely mandated by the unit, given that it solely had an isolated impact on the three-person house wait staff, and no obvious impact on anyone else.

3. Conclusion

Accordingly, I find that Local 471 violated Section 8(b)(1)(A) and (2) of the Act, when Wiener negotiated the bidding system, which directly harmed Mayotte, a dissident member, while advancing the interests of Franco, a politically active member and ally. See *Auto Workers Local 600 (Ford Motor)*, supra; *Explo, Inc.*, supra. Local 471 failed to prove that it would have taken the same action against Mayotte, absent her protected activity and Franco’s obvious stake in the bidding system.

¹² It is undisputed that Franco repeatedly sought Mayotte’s layoff, in order to increase her own work opportunities. Moreover, at some point, Wiener even requested Taegel to lay off Mayotte.

Conclusions of Law

1. Sodexo, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 5 2. Local 471 is a labor organization within the meaning of Section 2(5) of the Act.
3. UNITE-HERE is a labor organization within the meaning of Section 2(5) of the Act.
4. Local 471 is, and, at all material times, has been the exclusive bargaining representative
10 for the following appropriate unit at the facility:

All cafeteria and food service employees, which includes all cooks, bakers, food
service workers/cashiers, food service workers, utility workers, hosts and
hostesses, house wait staff, bus persons, wait staff and bartenders, but excludes
15 managers, office clerical employees, chef managers, pastry chefs, and all
supervisory employees.
5. Local 471 violated Section 8(b)(1)(A) and (2) of the Act by amending article 12, section
20 4, vacation pay, of the 2009–2012 CBA, in a manner that was detrimental to Rodrigue
because of her Section 7 activities on behalf of UNITE-HERE.
6. Local 471 violated Section 8(b)(1)(A) and (2) of the Act by negotiating, and effectuating,
a new scheduling and bidding system for house wait staff employees under article 25 of
the 2009–2012 CBA in a manner that was detrimental to Mayotte because of her Section
25 7 activities on behalf of UNITE-HERE, and in order to advance the economic interests of
Franco, a steward and politically active member.
7. The unfair labor practices committed by Local 471 are unfair labor practices affecting
commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

30 Having found that Local 471 has engaged in certain unfair labor practices, I find that it
must be ordered to cease and desist and to take certain affirmative action designed to effectuate
35 the policies of the Act.

Local 471 is ordered to distribute appropriate remedial notices electronically via email,
intranet, internet, or other appropriate electronic means to its members and employees, in
addition to the traditional physical posting of paper notices on a bulletin board. See *J. Picini*
40 *Flooring*, 356 NLRB No. 9 (2010).

Local 471 must provide written notice to the Company, within 14 days of the date of this
Order, with a copy furnished to Rodrigue and Mayotte, which requests: the deletion of the
unlawful vacation pay provision referring to “wait staff who normally work in the Albany
45 Room” under article 12, section 4 of the 2009–2012 CBA; and the rescission of the unlawful
scheduling and bidding system for house wait staff employees under article 25 of the 2009–2012
CBA. Such written notice shall also request further bargaining with the Company, which would
be limited in scope to addressing the issues delineated above.

5 Local 471, having taken unlawful action against Rodrigue and Mayotte shall be ordered to make them whole, to the extent that it has not already done so, for any loss of wages, overtime, gratuities, vacation pay and other benefits that they may have suffered as a result of Local 471’s unlawful actions, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Local 471, its officers, agents, successors, and assigns, shall

15 1. Cease and desist from

20 a. Restraining or coercing Rodrigue, Mayotte, or any other employee in the exercise of their Section 7 rights by negotiating, and effectuating, contractual terms with the Company, which are detrimental to such employees because of their protected concerted and dissident union activities.

25 b. Restraining or coercing Mayotte or any other employee in the exercise of their Section 7 rights by negotiating, and effectuating, contractual terms with the Company, which advance the economic interests of one constituency of employees over another on the basis of internal union political reasons.

30 c. Failing to represent employees for reasons that are unfair, arbitrary, and invidious.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 a. Request the Company, in writing, to delete the portion of article 12, section 4 of the 2009–2012 CBA, which caps vacation pay for “wait staff who normally work in the Albany Room” at \$250 per week, and provide a copy of this request to Rodrigue.

b. Request the Company, in writing, to rescind the language in article 25 of the 2009–2012 CBA, which addresses the scheduling and bidding system for house wait staff employees, and provide a copy of this request to Mayotte.

45 _____
¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

c. Request the Company in writing to engage in further bargaining, which would be limited in scope to addressing the vacation pay cap and house wait staff scheduling issues described herein.

5 d. Make Rodrigue and Mayotte whole, with interest, for any loss of wages, overtime, gratuities, vacation pay, and other benefits associated with negotiating, and effectuating, with the Company the following changes under the 2009-2012 CBA: the \$250 vacation pay cap for “wait staff who normally work in the Albany Room” under article 12, section 4; and the new scheduling and bidding system for house wait staff employees under
10 article 25.

15 e. Within 14 days after service by the Region, physically post at its union office and hiring hall in Saratoga Springs, New York, as well as any other places where notices to members and employees are normally posted, including its union business bulletin board at the facility, if any exists, and electronically distribute via email, intranet, internet, or other electronic means to the members and employees that it represents, or has represented, within its
20 upstate New York jurisdiction since May 13, 2010, copies of the attached notice marked “Appendix.”¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all
25 places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all current unit employees and former unit employees employed by the Company at the facility since May 13, 2010.

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

Dated, Washington, D.C., August 9, 2011.

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Robert A. Ringler
Administrative Law Judge

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¹⁴ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

NOTICE TO MEMBERS AND 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

In recognition of these rights, we hereby notify our members and employees that:

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

WE WILL NOT retaliate against any employees because they support another union.

WE WILL NOT negotiate changes in our current collective bargaining with Sodexo, Inc., which change the catering scheduling system in a way that harms Tina Mayotte, or reduces Sharon Rodrigue's weekly vacation pay, because they supported another union, or in order to advance the interests of our shop stewards, bargaining team members, or executive board members.

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

WE WILL treat all employees we represent in a fair and impartial manner.

WE WILL promptly notify the company, in writing, that we have no objection to the rescission of the catering scheduling system and \$250 vacation pay cap in the current collective-bargaining agreement, which respectively harmed Mayotte and Rodrigue.

WE WILL make Mayotte and Rodrigue whole, with interest, for any loss of wages, overtime, gratuities, vacation pay, and other benefits they may have suffered as a result of our unlawfully negotiated changes to the catering scheduling system and vacation pay cap.

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Niagara Center Building, 130 South Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.