

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

CL FRANK MANAGEMENT, LLC, CL METROPOLIS  
MANAGEMENT, LLC, AND CL VERTIGO  
MANAGEMENT, LLC, A SINGLE EMPLOYER D/B/A  
HOTEL PROJECT GROUP D/B/A HOTEL FRANK

Cases 20-CA-35123  
20-CA-35238  
20-CA-35253

and

UNITE HERE! LOCAL 2

and

Case 20-CA-35223

CL FRANK MANAGEMENT, LLC, CL METROPOLIS  
MANAGEMENT, LLC, AND CL VERTIGO  
MANAGEMENT, LLC, A SINGLE EMPLOYER  
D/B/A HOTEL PROJECT GROUP D/B/A/ HOTEL  
METROPOLIS

and

UNITE HERE! LOCAL 2

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Submitted by  
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## I. INTRODUCTION <sup>1</sup>

Immediately upon taking over the Hotel Frank and Hotel Metropolis on May 12, 2010,<sup>2</sup> as the judge correctly found, Respondent embarked on a course of unlawful actions including terminating and disciplining employees for engaging in union and protected concerted activity. In addition, the ALJ found Respondent promulgated an unlawful work rule prohibiting union buttons, failed to sufficiently repudiate the rule, engaged in surveillance of employees' union activities, and unilaterally changed the terms and conditions of employment for bargaining unit employees by extending their probationary period.

In response to the judge's findings, Respondent filed 155 Exceptions, many of which run afoul of Section 102.46(c) of the Board's Rules and Regulations by not specifically setting forth questions of procedure, fact, law or policy to which exception is taken. Due to Respondent's failure to comply with the Board's Rules and Regulations, the Board should disregard Respondent's exceptions.<sup>3</sup> Respondent filed a brief in support of its Exceptions which blatantly violates Sections 102.46(c)(1), (2) and (3) by not including a concise statement of the case containing all that is material; a specification of the questions involved and to be argued, along with a reference to the specific exception; and clear references to fact and law in support of their position on

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<sup>1</sup> The Administrative Law Judge is referred to herein as "judge." References to the ALJ's decision are noted as "ALJD" followed by the line and page number(s). References to the transcript are noted by "Tr." followed by the volume and page number(s). References to the General Counsel's exhibits are noted as "GC" followed by the exhibit number. References to Respondent's Exhibits are noted as "R" followed by the exhibit number.

<sup>2</sup> All dates herein refer to 2010 unless otherwise noted.

<sup>3</sup> Counsel for the Acting General Counsel has on this same day filed a Motion to Strike Respondent's Brief in Support of Exceptions.

each question. Respondent's brief in support of its exceptions does not address a single numbered exception, instead presenting general topic areas for argument. The general topics and arguments in no way identify which exceptions the arguments support. It is nearly impossible to address each of Respondent's 155 Exceptions, most of which are improper and purely baseless argument to begin with. For example, Respondent filed exceptions to each and every facet of the judge's findings of fact and conclusions of law regarding Marc Norton's discipline and termination. Counsel for the Acting General Counsel found it necessary to group the Exceptions according to the unfair labor practice charge to which they pertain and address them in a methodical manner by topic area.

## II. THE JUDGE'S CREDIBILITY FINDINGS

Respondent specifically excepts to a number of the judge's credibility findings.<sup>4</sup> These findings were primarily based on the judge's perception of the demeanor of witnesses and were well supported. The Board should give great weight to these determinations. Also, a large number of Respondent's Exceptions are based on the judge's findings of fact, which were fully supported by the record and involved credibility determinations. "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." *D & F Industries, Inc.*, 339 NLRB 618, fn.1 (2003) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)). Nevertheless, Respondent bases many of its Exceptions on

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<sup>4</sup> See, for example, Respondent's Exceptions 51, 70, 75, 77, 78, 120.

discredited testimony.<sup>5</sup> Respondent's Exceptions to the judge's credibility findings and Exceptions that are based upon discredited testimony should be dismissed.

### III. THE UNFAIR LABOR PRACTICES

#### A. Conditions of Employment First Implemented by Respondent

On May 12, Respondent met with employees of the Hotel Frank and Hotel Metropolis to inform them of the bankruptcy sale and that HPG was their new employer. During the meetings Respondent presented employees with a large packet of information, including a letter offering employment which clearly stated changes to the terms and conditions of employment. Respondent admits, and the judge correctly found Respondent to be a successor employer. (ALJD 10:26-28.) Respondent, however, makes several unsupported objections to the judge's findings regarding the initial terms and conditions and the employment status of the employees.<sup>6</sup> Respondent does not offer legal authority to support its Exceptions in its supporting brief. In addition, many of the Exceptions relating to the initial terms and conditions Respondent implemented are

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<sup>5</sup> The judge specifically discredited the testimony of the following witnesses: Bashar Wali, Maribel Olmeda, and Dayna Zeitlin. Respondent specifically excepts to the judge's failure to credit Wali's testimony that during the June 10 meeting he informed employees they could wear union buttons. (Exception 51). The judge explains his decision to not credit Wali's testimony because "The tone of his June 14 letter suggests otherwise and he initially started to testify about seeking advice of counsel after the issue came up at the June 10 meeting." (ALJD 11:fn 8). Respondent excepts to the judge's crediting of Norton's testimony over Olmeda regarding statements made during the June 23 meeting. (Exception 74). The judge explains his decision by pointing out the corroborative testimony (Tr. 506) and Norton's simultaneous notes (GC Exh. 56 p.3) to support Norton's version and the vague testimony of Olmeda. (ALJD 21:fn 12). The judge found Zeitlin's testimony to be "singularly unimpressive" and was caused to doubt her "veracity." (ALJD 29:6-9).

<sup>6</sup> See Exceptions 1, 2, 3, 32, 37, 38, 47, and 72.

irrelevant to the judge's findings of fact and conclusions of law.<sup>7</sup> Due to the complete absence of any record evidence or legal authority to support them, all of Respondent's Exceptions relating to the setting of initial terms and conditions of employment should be dismissed.

B. Marc Norton's Disciplines and Termination

1. June 23rd Discipline

Respondent held a training session for Hotel Frank employees on June 19 which was conducted by an outside consultant. Norton raised his hand in response to a comment made by the trainer and suggested the trainer was discussing items better left for the ongoing contract negotiations. (ALJD 20:43-47; Tr. 78, 79,292, 809). The judge correctly found that Norton engaged in union activity when he spoke up during the training session and, in doing so, "supported Local 2's efforts to bargain about employees working conditions that had been turned upside down by the extensive implementation of new terms and conditions of employment when HPG took over...". (ALJD 26:38-42). Respondent admittedly disciplined Norton for speaking up at the meeting. (GC Exh. 7). Therefore, the judge correctly found the resulting discipline to be unlawful. (ALJD 28:13-14). The judge also thoroughly analyzed and rejected Respondent's defense that Norton's brief remarks at the meeting amounted to an unprotected outburst. The record is replete with facts supporting the judge's analysis. (Tr. 78, 79, 293,303). Respondent filed Exceptions to every conceivable facet of these findings: from the judge's finding

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<sup>7</sup> See, for example, Exceptions 1, 32 and 47 which erroneously argue Unit employees are at-will employees; Exception 2 which deals with the irrelevant fact of whether or not Respondent issued job requirements for Bellman; and Exception 3 which deals with the irrelevant fact of how much time employees had to sign and return new hire information.

that Norton engaged in concerted activity,<sup>8</sup> to the content of Norton's remarks,<sup>9</sup> the applicable legal standard,<sup>10</sup> and the ultimate finding of unlawful conduct.<sup>11</sup> To the contrary, the judge's findings were based on detailed legal analysis and a lengthy record, including testimony and documentary evidence from all parties involved. (ALJD 26:17-27:14). Respondent's Exceptions to the June 23 discipline of Norton should be dismissed.

## 2. Marc Norton's August 31 Discipline

The judge found Respondent's decision to discipline Norton on August 31 for failing to help a supervisor carry bags of candy was unlawful "because it was substantially motivated by Respondent's hostility toward Norton's numerous activities in support of Local 2." (ALJD 29:25-26). This finding follows a well reasoned page and a half of analysis in which the judge sets forth the legal standard, makes credibility findings of the relevant witnesses, and discusses the pertinent facts which led up to the discipline. The judge properly credited General Counsel's witnesses over Respondent's. (Tr. 99-100, 598, 601, 605). Nonetheless, Respondent filed seven Exceptions related to the August 31st discipline.<sup>12</sup> There is ample evidence that the discipline was pretextual and taken as a step toward termination. (ALJD 29:17-23; Tr. 98, 847). The primary basis for Respondent's Exceptions to the August 31 discipline is the discredited testimony of Dayna Zeitlin. The judge found Zeitlin's testimony to be "singularly unimpressive" and caused him "to doubt, at least, her capacity to recall the occasion with a reasonable

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<sup>8</sup> See Exceptions 89, 90, 91, 92, 93, 94, 111.

<sup>9</sup> See Exceptions 95, 96, 99, 100, 101 and 110.

<sup>10</sup> See Exceptions 89, 94, 98, 105, and 106.

<sup>11</sup> See Exceptions 102, 103, and 107.

<sup>12</sup> See Exceptions 120, 121, 122, 123, 124, 125 and 126.

degree of accuracy and worst her veracity all together.” (ALJD 29:7-10; Tr. 598, 601, 605). As discussed above in Section II, the Board’s policy is to not overrule a judge’s credibility findings. There is nothing in the record evidence, or in Respondent’s brief in support of its exceptions, to support a departure from this policy, and thus, the Board should reject Respondent’s exceptions to the August 31 discipline.

### 3. Marc Norton’s Termination

The judge correctly found Respondent terminated Norton in retaliation for his union and protected concerted activities. (ALJD 26:30). The judge clearly stated Norton’s “open and extensive” activities in support of the Union, along with Respondent’s animus evidenced in the previous unlawful disciplines, “provides an ample basis for the inference that his termination was substantially motivated by his pro-union activities and sympathies.” (ALJD 26:30-35). Norton’s union activities are well documented in the record. (Tr. 40, 44-45, 48, 51-52, 55, 68-72,78, 254). Respondent filed numerous Exceptions regarding the judges findings and conclusion related to Norton’s termination.<sup>13</sup> All of the Exceptions should be dismissed for either misstating the judge’s findings or failing to offer legal authority in support of its argument.

Respondent takes exception to the judge’s finding that Norton’s termination was substantially motivated by his union activities. (Exception 127). However, as the judge properly noted in his decision, “From May 12 to virtually the day of his termination, Norton openly engaged in activities on behalf of the Hotel Frank employees and the Local 2 objectives.” (ALJD 20:8-9) The judge then goes on to highlight eight examples of Norton’s union activities. (ALJD 20:11-36). Respondent never refuted that Norton

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<sup>13</sup> See Exceptions 127 – 129, 131, 133, 135, 136 – 140, 143.

engaged in pro-union activities. Instead, Respondent asserted Norton was terminated for failing to meet performance standards. (Tr. 868:14 – 869:4). However, as the judge correctly found, Respondent never issued Norton discipline for failing to meet performance standards and refrained from taking any action against him until after his probationary period. (AJLD 30:24-25). Based on a lengthy, detailed discussion of the record evidencing Norton’s long list of pro-union activities, Respondent’s knowledge of such activities, Respondent’s animus as demonstrated in the June 23 and August 31 disciplines, and Respondent’s pretextual defense, the judge correctly applied *Wright Line*<sup>14</sup> in reaching his conclusion. There is ample record evidence to support the judge’s finding “that Norton’s termination almost certainly resulted from his aggressive boycott activities as opposed to his occasional failure to seek out and use a guest’s name or somehow appear enthused while otherwise providing reliable and competent service as a bellman.” (ALJD 29:47-30:6).

Respondent excepts to the judge’s findings about Norton’s performance, but does not cite specific findings in its overly broad, unsupported Exceptions. Respondent’s Exceptions 138 -146, which speak to Norton’s performance, each cite the entire page in which the judge lays out his complete analysis and conclusion of Norton’s termination. The evidence of Norton’s performance that Respondent asserts was never considered by the judge is indeed discussed in the same section Respondent cites as having ignored the evidence. (ALJD 29:30 -39:30). The record evidence referred to, however, is nothing more than testimony from Respondent witnesses Kott and Infusino whom the judge notes

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<sup>14</sup> 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) and later approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

offered nothing more than “vague, self-serving, and incredible assertions.” (ALJD 30:FN 19).

Respondent also takes exception to the judge’s finding that some mystery guest reports, which Respondent relies on for their pretextual defense that Norton was a poor performer, “clearly praised Norton for certain aspects of his performance.” (Exception 130). The mystery guest reports speak for themselves and the judge correctly pointed out that several of them praise Norton. Five of the reports refer to Norton’s professionalism, politeness, and personability. (GC Exh. 48 – 52). The first mystery guest report hailed Norton as the “MVP” of the hotel staff, commenting that Norton “was very active and helpful”, that he “showed good energy” and was the “best” at being attentive to the guest. (GC Exh. 47). Respondent’s exceptions to the contents of the mystery shopper reports are dishonest and should be dismissed.

In its Exceptions, Respondent excepts to various findings of the judge relating to the mystery guest reports.<sup>15</sup> As the judge correctly found, Respondent used the mystery guest reports “as a shield to hide its true motive for terminating” Norton. (ALJD 30:22-23). In its Exceptions brief, Respondent parses out the negatives relating to Norton in these reports rather than considering Norton’s entire performance as described in those reports or the performance of Respondent’s other employees as a point of comparison.

Much testimony was elicited that one of Norton’s chief deficiencies was he failed to use guest’s names. (Tr. 894). As one mystery guest noted, this was a universal failing of Respondent’s staff, not just Norton’s.<sup>16</sup> No one, including Norton, was ever

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<sup>15</sup> Exceptions 4, 130, 132, 137-143.

<sup>16</sup> GC Exh. 47 page 2, 3 and 6; GC Exh. 48 page 2, 6-8, 14, 19-22; GC Exh. 49, page 2, 11, and 12; GC Exh. 51 page 8-10, 12, and 13; GC Exh. 53, page 2, 6, 14.

disciplined for failing to use a guest's name. In one instance in the September 12, 2010 report, the shopper complimented front desk employee Bobbie for her greeting, and yet she never used the guest's name. (GC Exh. 52, page 17).

In many mystery guest reports, while the spotter noted things Norton could have done better as he noted with other employees, the shopper also complimented Norton. On July 10, 2010, the spotter noted that Norton "made an extra effort to help me. I felt pampered." (GC Exh. 48, page 18). In the report for August 8-9, 2010, the spotter twice noted "Marc was professional." (GC Exh. 49, pages 7 and 13). The only bellmen on duty that day were Norton and Ali Abid, and the bellman collectively received a score of 81%. That score would have been even higher except that Abid committed one serious infraction by leaving the guest's computer in the hall unattended, which the shopper deemed "unacceptable." (GC Exh. 48, page 5 and 6). In the September 9 report, the shopper found Norton "was polite and courteous." In the shopper report immediately preceding Norton's termination, the spotter found Norton to be "pleasant" and "very informative." (GC Exh. 62, page 14). The spotter also noted that Norton and one other employee "were both very pleasant and helpful."

That same September 9 report listed the bellman's overall score much lower than other reports. (GC Exh. 62). A more careful reading of the report shows that the bellman's performance was downgraded because there was no bellman present when the shopper arrived. Respondent regularly staffs only one bellman per shift. In addition to being at the front door to greet guests, the bellmen have numerous other duties including delivering luggage, escorting customers in the lobby, offering information about the area, arranging transportation, assembling the trays for room service, and delivering room

service. (Tr. 699-700; Resp. Ex. 4, 9, 10) Accordingly, much of the blame for that score rests with Respondent, who is solely responsible for staffing the hotel and not with the bellman. Moreover, in the 21 items listed in Problem Ownership/Solving/Empowerment section of that same mystery guest report, in reference to Norton, the spotter noted five positive problem solving solutions that were Norton's accomplishments: "I was given detailed instructions," "When I [sic] where I could buy a toothbrush, I was immediately given one complimentary;" "I was given good suggestions and directions;" and "I was given to excellent recommendations." (GC Exh. 52, page 4).

The mystery guest reports also list several different categories of performance and rate them. The bell staff is not the only department with short comings, yet it is the only department from which someone was terminated based upon these shopper reports. In the August 8-9 Report, the bell staff received an 81%, while the front desk staff received a 60% in that report and a 62% in the report preceding that one. (GC Exh. 49, page 1). The telephone services category received a 56% in the August 8-9 Report. In the August 31-September 2 Report, the front desk staff received a 69% and the Sales department a 38%. (GC Exh. 50, page 1). The September 12 report gave the sales department a 58% and the front desk staff a 62%. The Blosser & Associates Mystery Shopper Reports never give the front desk staff more than a 69%, and still, no one is terminated from that department based in whole or in part on those Mystery Shopper Reports. (GC Exh. 47, 48, 49, 50 52, 53).

With no facts or evidence to support their position, Respondent relies on discredited testimony in objecting to every line of the judge's analysis and conclusion of Norton's termination. Respondent's baseless argument should be rejected.

## B. Discipline of Hotel Housekeepers

The working conditions of the housekeepers at the Hotel Frank and Hotel Metropolis were an issue from the time Respondent took over the operations of the hotels. (ALJD 7:16-20; Tr. 278). After employees complained to their supervisor and the Union President approached Respondent at the bargaining table to no avail, the employees engaged in a job action to protest their working conditions. (ALJD 8:41-44; Tr. 263-268, 350-351, 405-408). As the judge correctly concluded, the limited job action on June 28 was protected concerted activity under *Polytech Inc.*, 195 NLRB 695 (1972). (ALJD 8: 37, 49-51). The housekeepers engaged in a single work stoppage to protest their increased work loads. (ALJD 8:40). There is no evidence to indicate a slow-down or a pattern or intermittent strikes.

Respondent's multiple Exceptions to the judge's finding of protected concerted activity are based wholly on a single distinguishable case and are unsupported by the evidence.<sup>17</sup> Respondent relies on *Audubon Health Care Center*, 268 NLRB 135 (1983) and objects to the judge's finding that it is distinguishable from this case (Exception 28). After teasing out Respondent's argument that the housekeepers engaged in a partial strike, the judge then carefully details the many ways in which the job action at issue is distinguishable from the cases cited by Respondent. (ALJD 8:12-37). The Board held the employees in *Audubon Health Care Center* engaged in an unlawful partial strike when they refused to do carry out one of their many job duties. *Audubon Health Care Center*, 268 NLRB 135,136 (1983). Here, the housekeepers refused to do all of their job

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<sup>17</sup> Exceptions 7-29, 147, 148.

duties in a single, specific incident in order to protest their increased workload.

Respondent's reliance on *Audubon Health Care Center* is misplaced.

Having found the housekeepers were engaged in protected activity, the judge correctly concluded Respondent's resultant discipline of the participating housekeepers was unlawful. (ALJD 8:49-51). The judge's finding is well supported by case law and should be affirmed. *Polytech Inc.*, 195 NLRB 695 (1972); *Mike Yurosek & Son*, 310 NLRB 831 (1993).

C. Unilateral Change to the Terms and Conditions of Employment by Extending the Probationary Period

It is undisputed that Respondent established an initial probationary period for all employees on May 12 and that Respondent extended the probationary period for the front of the house employees by 45 days. (ALJD 9:36-38; R. Exh. 5; GC Exh. 14). The judge thoroughly reviewed and discussed the documents that established, and then extended, the probationary period. (ALJD 9:11-10:46). Without offering any evidence in support of its objections to the resulting findings and conclusions of law, Respondent filed over a dozen Exceptions regarding the extension of the probationary period.<sup>18</sup>

The judge applied the proper legal standard regarding the right of a successor employer to set initial terms and conditions of employment. (ALJD 10:26) The issue relating to the probationary period, as correctly analyzed in the judge's decision, was the amount of discretion that the Respondent retained to change those conditions. (ALJD 10:42-43). Where implementation of a new term or condition is discretionary, the employer must first notify and bargain with the union. *LB & B Associates*, 340 NLRB 214, 217 (2003). The judge correctly distinguished this case from the limited discretion

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<sup>18</sup> Exceptions 1, 30-47, 150.

retained by the employer in *Monterey Newspapers*, upon which Respondent relies heavily. *Monterey Newspapers, Inc.*, 334 NLRB 1019 (2001). Unlike the tightly circumscribed discretion to set pay within a narrow band in *Monterey Newspapers*, Respondent retained enough discretion “to expand the probationary period by 6 days or 6 months for any reason it ‘deemed appropriate.’” (ALJD 10:35-36). In doing so, and then acting upon that discretion to change terms and conditions of employment without notifying the Union, Respondent violated Section 8(a)(5) of the Act as correctly concluded by the judge. This case is more similar to the facts in *Colorado-Ute Electric Assn*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991)(merit pay system unlawful where employer had retained unlimited discretion).

Furthermore, Respondent appears to argue that the bargaining unit employees were “at-will” employees and therefore, the employer was free to make changes to employees’ terms and conditions of employment. Respondent’s objection to the judge’s finding based on the “at-will” status of the affected employees completely misses the mark. (Exceptions 32 and 47). Respondent recognized UNITE HERE! Local 2 as the bargaining representative of the unit employees on June 14. (ALJD 6:8; R Exh. 14). Respondent admits that it recognized the Union. (R Exh. 14). Having done so, they can not argue that unit employees were at-will employees when the probationary period was extended roughly 90 days later. It is worth noting that Respondent again incorrectly asserts the at-will status of employees by way of arguing the extension of the probationary period therefore could not materially effect their employment status. (Exception 32). Respondent’s Exceptions show they fail to grasp the legal framework

applicable to a unilateral change in working conditions. All Exceptions to the extension of the probationary period should be dismissed.

D. Surveillance of Union Activity on September 8

Respondent filed more than ten Exceptions regarding the judges findings and conclusions related to the Union's delegation to the Hotel Frank on September 8th and Respondent's surveillance of the delegation.<sup>19</sup> The judge correctly found that a group of approximately 13 people from the Union and the community entered the Hotel Frank with a petition to boycott the hotel. (ALJD 18:25-29). Upon entering the hotel, the delegation met with manager Infusino in the lobby and informed him of the boycott. (ALJD 28:30, Tr. 66). Infusino testified to engaging the delegation without asking them to leave at any time. (Tr. 786). In fact, Respondent admittedly failed to call the police to report the alleged trespassers. (Tr. 688, 786). The judge correctly found there is no evidence to support Respondent's assertion that the members of the delegation were trespassing on hotel property. (ALJD 19:9-11). As the judge concluded based on record evidence, Respondent lacked a justification for photographing employees participating in the protected concerted activity. (ALJD 19:16-18).

Respondent's Exceptions to these findings are based primarily on discredited witness testimony,<sup>20</sup> misstatements of law,<sup>21</sup> or are simply unsupported assertions.<sup>22</sup> Respondent would have the judge find this delegation to be on point with the union activity in *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974), and takes exception to the judge's failure to distinguish that case. While the judge is under no such obligation, a

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<sup>19</sup> Exceptions 62 -71, 147

<sup>20</sup> See, for example, Exceptions 62 and 70.

<sup>21</sup> Exception 71.

<sup>22</sup> Exceptions 63 – 79.

quick inspection of *Berton Kirshner* reveals how different it is from this case. The union in *Berton Kirshner* came onto the employer's property to handbill employees and was immediately told to leave the property. *Id.*, 1081. Over the next several days, the union came back to handbill in the same manner, and the employer immediately called the police to remove the trespassers. *Id.* Here, as the judge noted repeatedly, Respondent never requested the Union leave the premises and never called the police to report trespassers. (ALJD 18:33-34; 19:11). The judge correctly found Respondent lacked a justification to photograph the hotel employees participating in the delegation.

Respondent's Exceptions should be dismissed.

E. The Prohibition of Union Buttons

Respondent prohibited employees from wearing union buttons from the moment it took over operations at both hotels, and then reinforced the union button ban in a memo posted June 4. (ALJD 11:9-20; R Exh. 5, pg. 27; GC Exh. 16; Tr. 127). Respondent filed over a dozen Exceptions to this straightforward set of facts and the judge's well reasoned analysis and conclusions.<sup>23</sup> Despite Respondent's own documents and testimony from CEO Bashar Wali<sup>24</sup> admitting Respondent banned employees from wearing anything other than nametags on their uniform, Respondent objects to the finding it prohibited employees from wearing union insignia. (Exception 59). Respondent's Exceptions to the judge's findings of fact are in direct opposition to the record evidence and should be dismissed.

Respondent further objects to the judge's failure to find Respondent effectively repudiated the prohibition on union buttons. (Exception 53). While Respondent asserts it

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<sup>23</sup> Exceptions 5, 6, 48 – 61, 147

<sup>24</sup> Tr. 559 – 560.

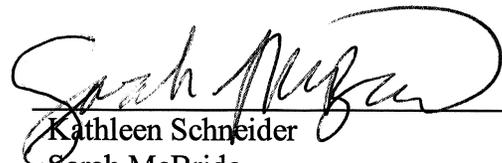
met the *Passavant* test for effective repudiation, the judge correctly found the facts simply do not support such a finding. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). The judge analyzed all six factors of the *Passavant* repudiation doctrine and correctly determined Respondent's actions failed to meet the test. (ALJD 12:28-36). Not only did Wali testify that the employee handbook preventing the wearing of union insignia would remain unchanged, but the memo reminding employees of the prohibition remained posted after any supposed repudiation. (ALJD 12:40-43; Tr 128). Respondent's Exceptions to the judge's findings regarding repudiation are meritless and should be dismissed.

#### IV. Conclusion

It is respectfully submitted that the judge's credibility rulings were correctly based on witness demeanor and should not be disturbed, and that the judge's findings of facts and conclusions of law were fully supported by the record evidence and by appropriate legal standards. Accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT San Francisco, California, this 9th day of September 2011.

Respectfully submitted,



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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CL Frank Management, LLC, CL Metropolis Management, LLC, and  
CL Vertigo Management, LLC, a single employer d/b/a Hotel Project  
Group d/b/a Hotel Frank

and

UNITE HERE! Local 2

Cases 20-CA-35123  
20-CA-35238  
20-CA-35253

DATE OF MAILING September 9, 2011

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

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**Subscribed and sworn to before me on**

**September 9, 2011**

DESIGNATED AGENT

**/s/ Vicky Luu  
NATIONAL LABOR RELATIONS BOARD**