UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and Case 3-CB-9172

SHARRON RODRIGUE, AN INDIVIDUAL

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

and Case 3-CB-9176

TINA MAYOTTE, AN INDIVIDUAL

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

ALFRED M. NOREK, ESQ.
National Labor Relations Board
Leo W. O'Brien Federal Building
Clinton Ave. & N. Pearl St.
Albany, New York 12207

Counsel for the Acting General Counsel

LUCINDA LAPOFF, ESQ.
Chamberlain, D'Amanda, Lewis & Oppenheimer & Greenfield LLP
2 State Street, Suite 1600
Rochester, New York 14616-1397

Counsel for the Respondent

SUBJECT INDEX

Page

I. Introduction.....5

II Facts of the Case.....6

III Points of Fact and Law Addressing the Specific Exceptions.....28

Exceptions 1 and 2.....28

Exception 3.....35

Exception 4.....36

Exception 5.....37

Exception 6.....37

Exception 7.....38

Exception 8.....40

IV Conclusion.....40

TABLE OF CASES

Airline Pilots Assn. v. O'Neil, 499 U.S. 65, 77 (1991).....30

Barton Brands, 228 NLRB 889, 892 (1977).....30, 33, 36

Firemen & Oilers Local 320(Phillip Morris, U.S.A.), 323 NLRB 89, 90 (1997).31, 33, 36

General Truck Drivers Local 315(Rhodes & Jamieson), 217 NLRB 616, 619 (1975).....30

Graphic Communications Local 1-M (Bang Printing), 337 NLRB 662, 674 (2002).....29

International Automated Machines, 285 NLRB 1112, 1123 (1987).....34

J.J. Cassone Bakery, Inc., 350 NLRB 86, n.2 (2006).....37

The Kroger Co., 312 NLRB 7, 12 (1993)..... 31, 39

Local 340, Ironworkers (Consumers Energy Co.), 347 NLRB 578, 579 (2006).....28

Local 600 (UAW), 225 NLRB 1299 (1976).....31, 34

Machinests Local Lodge 2777 (L-3 Communications), 355 NLRB No. 174 (2010)...29, 34

Paperworkers Local 1048 (Jefferson Smurfit Corp.), 323 NLRB 1042, 1044 (1997).....28

Postal Service, 336 NLRB 1182, 1191 (1980).....37

Postal Service, 272 NLRB 93, 104 (1984).....31

Roadway Express, Inc., 355 NLRB No. 23 (2010).....37

Standard Dry Wall Products, 91 NLRB 544 (1950).....37

State County Employees AFSCME Local 1640 (Children's Home of Detroit), 344 NLRB 441, 446 (2005).....29

Teamsters Local 42 (Daly, Inc.), 281 NLRB 974, 976 (1986).....30

Teamsters Local 435 (Super Valu, Inc.), 317 NLRB 617, 631 (1995).....30

Town and Country Supermarkets, 340 NLRB 1410, 1421, n.7 (2004).....28

Union De Obreros De Cemento Mezclado (Better Roads Asphalt, 336 NLRB 964 (2002).....29

Wenner Ford Tractor Rentals, Inc., 315 NLRB 971-972 (2002).....29

Wright Line, 251 NLRB 1083 (1980)..... 28, 35, 40

I. Introduction

On February 22 and 23, 2011, a formal hearing was held in the above-captioned matter pursuant to a Consolidated Complaint and Notice of Hearing and amendments thereto, herein collectively called the "Complaint." (T. 6, 7; G.C. Exs. 1(e), 1 (h) and 2) The Complaint, in substance, alleged that Local 471, Rochester Regional Joint Board, Workers United, herein called "Local 471," "Respondent" or "Union," violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by requesting and obtaining, during the course of bargaining for a successor collective-bargaining agreement with Sodexo, Inc., modifications to practices concerning rotation of banquet assignments and vacation pay at the Empire State Plaza bargaining unit in order to reward supporters of the Respondent and to punish supporters of UNITE HERE, a rival labor organization. The Complaint further alleged that the change from the rotation system was negotiated to benefit Respondent's agent Josephine Franco. Respondent's Answer, as amended at the hearing, admitted preliminary matters but denied the commission of any unfair labor practices. (T. 8-12; G.C. Exs. 1(g), 1(l) and 3)

On August 9, 2011, Administrative Law Judge Robert A. Ringler issued his decision (JD(ATL)-22-11) in which he concluded that Respondent violated Section 8(b)(1)(A) and (2) of the Act by "engineer[ing] the capping of Rodrique's weekly vacation pay" and by "negotiat[ing] the bidding system which directly harmed Mayotte, a dissident member, while advancing the interests of Franco, a politically active member and ally.

On September 6, 2011 Respondent filed exceptions, individually detailed and addressed at Part III herein.

II. Facts of the Case[1]

A. Affiliation History of Local 471

Prior to July 2004, Local 471 was affiliated with the Hotel Employees and Restaurant Employees International Union (HERE) and represented employees at hotels, food service providers, race tracks and convention centers and restaurants in upstate New York. (T.98; G.C. Exs. 27 and 28) In July 2004, HERE merged with UNITE creating UNITE HERE. (T. 102; G.C. Exs. 27 and 28) On January 1, 2005, Local 471 affiliated with the Rochester Regional Joint Board of UNITE HERE (Joint Board). The merger and subsequent affiliation did not result in changes in the day-to-day operations of Local 471 until November 2007 when Wolfgang Hammer, the long term chief officer, and business agent Theresa Hammer, Wolfgang's sister, resigned. At that point Michael Roberts became the Albany district director of the Joint Board. (T. 102, 103) On December 3, 2007, UNITE HERE placed Local 471 under trusteeship and appointed Gary Bonadonna, manager of the Joint Board as trustee and Roberts as deputy trustee. (T. 102) In early 2008, Jason Crane was hired as Theresa Hammer's replacement. Crane left the Joint Board's employ and was replaced by Elizabeth Weiner in June 2009. (T.223-224, 255)

On March 6, 2009, the Joint Board voted, as did 14 other joint boards, to disaffiliate from UNITE HERE. On March 21, 2009, the Joint Board and the 14 other joint boards formed a new union, Workers United, which subsequently affiliated with the SEIU. (G.C. Exs. 27 and 28)

For a period of time, competing representation claims by Workers United and UNITE HERE, both locally and nationally, resulted in a "spate of competing litigation,

[1] An overview of the facts, which span a lengthy period of time, is necessary to understand the specific exceptions.

unfair labor practice charges and petitions for election, and petitions before the NLRB at units all over the country."[2] (G.C. Exs. 14, 27, 28, 30 and 32) The rift between UNITE HERE and Workers United was not resolved until July 2010 when the parties allocated assets, future jurisdiction and certain bargaining units each side would retain. Allocation of the remaining units was resolved through an arbitrator's decision dated September 21, 2010, which awarded the remaining 65 units to one or the other party. Germane to the instant case is the award of the unit of Sodexo employees at the Empire State Plaza to Workers United. (G.C. Ex. 14 at p. 6)

B. Operations at the Empire State Plaza

For approximately 15 years, Sodexo, Inc., ("Sodexo") in various corporate forms and Local 471, in its various affiliations, have been parties to a series of collective-bargaining agreements in a unit[3] of food service workers and catering staff employed at the Empire State Plaza (the "Plaza") in Albany, New York, a complex housing New York State governmental buildings interconnected by an underground concourse. (T. 37, 104 and 105) The Plaza contains cafeterias and other food service venues serving the public and state workers. (T. 38, 104) Catering events, serviced by Sodexo, are held in various venues throughout the Plaza. (T. 38, 106) Sodexo was preceded at the Plaza by a number of national food service providers, including DAKA, ARAMARK and Compass, each of whom were parties to labor agreements with Local 471. (T. 102)

[2] The quote is taken from the decision of Impartial Arbitrator Fredric R. Horowitz. (G.C. Ex.14 at p. 2)
[3] As of the hearing, the unit consisted of approximately 40-50 members. (T.39)

C. Negotiations for the 2005-2008 Collective-Bargaining Agreement[4]

The negotiations, led by Harold Taegel[5] for Sodexo and Theresa Hammer for Local 471, resulted in a tentative agreement dated May 12, 2006, reflecting changes to the prior agreement. (T. 40; G.C. Ex. 4) Item 25 of the tentative agreement is a "Side Letter of Agreement"[6] designating Josephine Franco, Lane Williams and Anne Marie Hayes as "regularly scheduled banquet (catering) employees" and provides they will receive pension benefits and be eligible for medical coverage if they work a minimum of 1040 hours over the course of a calendar year. The agreement, as described by Taegel and Hammer, reflects recognition that due to peaks and valleys in the catering business house banquet employees may not work 20 hours a week, the number required to be eligible for contract benefits, but would over the course of the year work enough to meet the required hours. (T. 42, 110) The side letter also provided that the named employees would receive $250 for each week of vacation pay. Taegel and Hammer explained that this provision was an improvement since under the existing contract, vacation pay for the three employees was based on hourly pay and did not reflect the fact that catering earnings were primarily based on a 15% gratuity billed to the customer. (T. 42-43, 111, and 112) The vacation pay provision was implemented but, by oversight, not included in the 2005-2008 collective-bargaining agreement. (T. 46, 113)

D. The Practice for Assigning Work to House Banquet Staff Prior to August 2009

For as long as Theresa Hammer serviced the unit, the practice under Sodexo and its predecessors was to assign work to banquet staff on a rotation basis, whereby the

[4] The agreement, executed in September 2006, ran from May 1, 2005 to December 31, 2008. (G.C. Ex. 5)
[5] Taegel holds the title of Senior Director of Labor Relations. (T.36)
[6] The side letter was new to the 2005-2008 agreement. (T.44)

written schedule for the week was prepared by banquet manager Stephanie Forgue and distributed on Thursdays. Anne Marie Hayes left the employ of Sodexo in September 2009. Thereafter, the rotation started with the most senior employee (Lane Williams) receiving the first assignment, followed by Josephine Franco receiving the second and then Tina Mayotte[7] the third before starting over, if necessary, for additional assignments for the week. The next week Franco led the rotation followed by Mayotte in the third week. (T. 47, 113, 218-220; G.C. Ex. 24) If an individual "called off" a scheduled job, Forgue contacted the other house banquet members and assigned the job to the first member to respond. (T.221)

The schedule did not include information as to the nature of the job the staff member would be performing. Upon reporting to work the member received a "BEO" (banquet event order) which provided details of the event, including venue, number of attendees and food service. (T.210)

Catering jobs that arose after the weekly schedule was prepared, referred to as "pop-ups," were assigned to the person last scheduled to work on the weekly schedule. (T.222)

The assignment rotation process is an industry practice and followed at the other area Local 471 houses that perform catering, including the Gideon Putnam and Crowne Plaza hotels.

(T. 47, 48, 114-115, 151, 152) Taegel,[8] corroborated by Hammer, explained that the practice "allows an employer to keep a core group regularly available earning enough

[7] As discussed infra, Mayotte was hired in January 2007 as a fourth house banquet employee. (T. 208)
[8] Taegel has vast experience negotiating labor agreements in the food service industry. Prior to his employment with Sodexo he held senior positions with ARAMARK and Canteen, who along, with Sodexo, constitute the major employers in the industry. (T. 37)

money so they don't go somewhere else. So they we can have their loyalty basically and they can have some kind of equity in terms of their earnings." (T. 48, 114-115)

If Sodexo needed additional staff to cover an event it contacted the Local 471 hiring hall. Individuals sent from the "overflow list" were paid hourly and did not receive benefits. (T. 45) On occasion, banquet manger Forgue offered house banquet staff opportunities to work in hourly paid unit positions to fill in for employees on vacation or to work a concession, such as manning a food cart, at a public event held at the Plaza on a weekend. (T.214)

In early 2008, business agent Jason Crane called Mayotte and asked for her opinion on the rotation process, explaining that Josephine Franco wanted the assignment method switched from rotation to seniority. Mayotte responded that the rotation system was the fairest to employees and the most practical to administer. Crane said he was going to speak to the other house catering employees and get back to her. (T.223-224). In a follow-up call, Crane told Mayotte that the current system was fair and would not be changed. (T. 224) Crane reported in a memo to staff that he and Franco met with Taegel and General Manager Laurie Jenkins on February 27 [2008] and the parties "agreed that the current rotation system, if properly implemented, is the most equitable way to distribute hours." (G.C. Ex. 31) The rotation system remained in effect until August 2010. (T. 336)

E. Employment History of Mayotte at the Empire State Plaza

Mayotte started working "overflow" at the Plaza in 2001. In January 2007, at the initiation of Sodexo managers Forgue and Jenkins, Mayotte was hired as the fourth house banquet staff member. (T.208, 209) Through the instigation of Franco, Mayotte was

transferred for the summer of 2007 to an hourly paid position in the Albany Room venue before returning in September 2007 to the house banquet position where she has since remained. (T. 211) Her return from the Albany Room was preceded by a meeting held in September 2007, attended by Jenkins, Hammer[9] and house wait staff. The meeting started with Franco and Williams[10] "screaming" they wanted Mayotte out because there was not enough work to spread around. Jenkins responded that Sodexo needed Mayotte and she had not negatively affected the other employees hours. (T.118) Jenkins told Franco and Williams "She [referring to Mayotte] works here. This is her job. She is your co-worker." (T.212) At some point during the meeting Franco said if Mayotte is not going to be fired then assignments should be made by seniority. (T.119)

Throughout her employment with Sodexo as a house banquet member Mayotte has held a second job as a banquet employee at a local Holiday Inn. (T.214) In addition, she has worked "on and off" as an hourly employee at a Sodexo facility at General Electric Research and Development, herein "Sodexo/GE." (T. 216, 251) In 2010, she worked a total of 157 hours at Sodexo/GE, all of which took place after July 2010 when the seniority bidding system, discussed below at Section N, went into effect. (T. 250)

F. Employment History of Sharron Rodrigue at the Plaza

Rodrigue, who had previously worked overflow at the Plaza, was hired by Jenkins in January 2008 for the staff of the Albany Room, a food venue open to the public at lunch during the week, offering a buffet meal, and utilized at other times for catering events. (T.156) As established by Jenkins at the time of hire, Rodrigue is the first person

[9] Hammer related she had not met Mayotte before the meeting. The meeting was so unruly that Hammer threatened to leave the meeting if Franco and Williams "didn't change their conduct." Hammer described Mayotte as crying at the meeting that she was a single mother with several children. (T.117)
[10] Hammer related that Hayes, the third house banquet member and shop steward at the time, was opposed to Franco's requests directed at Mayotte. (T.117)

used to staff catered events in the Albany Room and the first person utilized at other Plaza venues if additional staff beyond the house banquet staff is needed. (T. 157, 158 and 375) At the start of Rodrigue's employment, the Albany Room was staffed by three employees. Since June 2010, Rodrigue has been the only Albany Room employee. (T.160)

Rodrigue is paid an hourly wage for her regular day duties and receives the contract benefits applicable to employees who work 20 hours or more per week. (T.163, 187; G.C. Ex. 18) In this regard, until the events discussed at Section O, Rodrigue's weekly vacation pay was based on 1/52nd of her W-2 earnings, a number approximating $650. (T.187)

For banquet work Rodrigue is paid as on overflow employee, i.e. the banquet hourly rate plus a 15% gratuity billed to the customer.[11] (T.163)

G. Negotiations for a Successor Agreement: January- March 2009

Prior to the onset of formal negotiations for a successor contract to the 2005-2008 agreement, Taegel and Crane engaged in discussions to standardize non-economic contract administration language for incorporation into future agreements at various units where Local 471 represented Sodexo employees. (T. 50) In the course of the discussions, Crane said some of the house banquet staff wanted to have something other than a rotation system. Crane said he had investigated how assignments were handled at other locations and looked at alternative ways to make assignments. Crane said that after reviewing the options "he was of the opinion that the rotation system was the fairest system" and was, in fact, the industry practice. (T.50-51)

[11] In 2010, Rodrigue had year-to-date earnings as of December 9 of $12,881 in the pay category "regular" and $9,436 in "Banquet Gratuities." (G.C. Ex. 18)

The first bargaining session took place on January 22, 2009. Sodexo was represented by Taegel, accompanied by Pete Wikowski, vice president of operations, and Jenkins. (T.55) Local 471 was represented by Crane and bargaining committee members Herb Grant, Janice Bush and Iosaline Thompson. The session opened with Crane saying he wanted a quick and painless negotiation. Crane presented an initial proposal.[12] Later in the day Taegel presented a counter proposal, titled "Employer Non-Economic Proposal Presented to the Union On January 22, 2009."[13] (T. 55; G.C. Ex. 7) The document, which Taegel had largely prepared in advance based on the preliminary discussions with Crane, consisted of taking the 2005-2008 agreement and making deletions, through strike outs, and additions in bold print or otherwise labeled as "new." (T.56-57) Based on the earlier discussions, the document at Article 24, Section 9, proposed language memorializing the existing rotation practice which had not previously been reduced to writing. (T.56-57, 60) Taegel testified that Sodexo made the proposal so there would be "no confusion about what the system is for assigning work to the house wait staff." (T. 58) The parties' met the following day[14] at which time Sodexo presented a document titled "Employer Economic Proposal." (T. 58; G.C. Ex. 8) Taegel reviewed the economic situation at the Plaza operation, the past settlement, and addressed why Sodexo wanted the rotation practice incorporated into a contract. (T.59). The Union did not respond to the rotation proposal at either of the first two sessions. (T.58, 59)

---

[12] The record does not indicate whether the proposal was made orally or in writing. (T. 55)

[13] Taegel explained that "non economic" proposals are those that do not have an impact on the employer or economic benefit to employees. Generally, non economic items are resolved before proceeding to discussion on economic proposals. (T.59)

[14] Franco attended this session and subsequent sessions as the fourth employee member of the Union's negotiating committee. (T.58)

The parties next met on February 6, 2009. Notwithstanding the informal understanding with Crane regarding rotation and the Union's silence on the issue at the earlier sessions, Franco said the "Union wants the option of having house wait staff scheduled according to seniority." (T.62) Taegel responded there will be language in the labor agreement and "the rotation language was the fairest way of doing that." He said if the "Union wanted something other than the rotation language, then they need to make a counter proposal on it." (T. 63) Taegel testified that "it was clear to [him] that this [the change in position] was coming from Joanne, who is on the negotiating committee. But that seemed to be the basis in the shift in what I was led to believe was going to be a relatively easy matter to get the rotation language in the contract." (T.62)

A few days before the bargaining session scheduled for March 9, 2009, Taegel and Crane had an "off-the-record" phone conversation regarding what it would take on wages to get a settlement. Crane indicated that $1.00 to $1.10 over three years might do it. Taegel raised concerns over the status of the Local 471 pension plan. Crane replied that the plan might be merging with the national UNITE HERE plan. (T. 64-65).

At the March 9 session, Taegel raised questions over the impact of the vote, which had taken place over the weekend, for the Rochester Joint Board to disaffiliate from UNITE HERE. During the meeting Taegel said he had been led to understand that $1.10 "ought to get the deal done." Roberts responded, "No, it has to be $1.50." Taegel persisted in asking questions about the impact of the disaffiliation vote and said he had serious questions as to the representation status of Local 471. After about 10 minutes, the meeting abruptly ended with Roberts walking out, saying he didn't want to answer any more questions. (T.63-66)

H. Hire of Elizabeth Weiner as Business Agent

Elizabeth Weiner was hired in June 2009 as the Union's business agent as Crane's replacement[15]. (T.255) Weiner had no prior experience as a business agent and minimal collective-bargaining experience.[16] (T. 255, 258-259)

In July 2009, Weiner called Franco[17] to introduce herself and arrange for Franco to give her a tour of the Plaza. This constituted Weiner's first visit to the complex. (T.261) The start of Weiner's employment coincided with a period of time when Sodexo, because of the uncertainty of Respondent's representation status, limited the access[18] of Respondent's business agents to public areas and to employees' non-working time. (T.263, 281) During this period Sodexo continued to recognize the stewards for processing of grievances. Consequently Weiner, in her own words, "communicate[d] with Jo Ann [Franco] as a method, as a means to be able to represent the workers because they were recognizing grievances from the stewards." (T.281)

From the beginning of their relationship, and repeatedly thereafter, Franco asked Weiner why the seniority language of the contract, referring to Article 8, Section 3,[19] did not apply to members of her department for purposes of assigning work. Franco also repeatedly questioned why Mayotte was retained on the rotation, expressing a concern that there were not enough hours available for staff to qualify for health and welfare benefits. (T.280-281)

---

[15] There was no overlap in employment between Crane and Weiner. (T.257)
[16] Weiner's bargaining experience consisted of participating in negotiations for a contract as a member of a CWA staff union. (T.258-259)
[17] At all times relevant to the instant case, Franco served as shop steward, negotiating team member and an elected member of the executive board, the Union's governing body. (T.99, 169, 262)
[18] The access restrictions were lifted in August 2009. (T.262-263)
[19] The section provides "Seniority shall also apply whenever possible to scheduled days off, shifts and vacation schedules. (G.C. Ex. 5 at p. 6)

In preparation for the resumption of bargaining, Weiner reviewed file records of what had transpired, met with the bargaining committee to reconstruct a timeline of what proposals had been made, and addressed issues the committee raised. (T.299-300). In these discussions Franco, the sole negotiating team member from the house wait staff, said she wanted seniority rights recognized and vigorously insisted that assignments for house wait staff be based on seniority. (T. 302) Weiner's preparation also included reviewing a spread sheet provided by Sodexo in September 2009 listing wage rate, seniority dates and job classifications for each unit member as well as speaking with employees, including Mayotte. (T.303). In this regard Weiner asked Mayotte for her opinion on the rotation system and whether bidding would work. Mayotte responded that the rotation system was the best system for everyone. The two talked about having a meeting where house wait staff could discuss the issue. Weiner said she would get back to Mayotte but had no further contact or discussion with Mayotte on the topic. (T.224-225, 303)

I. Resumption of Bargaining on October 15, 2009

Due to legal challenges arising from the disaffiliation action and the uncertainty as to Local 471's representation status, bargaining did not resume until October 15, 2009. (T. 67) The session centered on a review with Weiner, who had now replaced Crane, of the status of the earlier negotiations. (T. 69)

J. Theresa Hammer and the Events of January 27, 2010

Theresa Hammer held the position of business agent for Local 471 from 1991 until November 2007. As business agent she serviced the unit at the Plaza as well units at hotels and institutions, such as universities. (T. 98, 100) Over the years she held various

leadership positions in Local 471, including president, recording secretary, trustee of the insurance and pension funds, and member of the executive board. (T.99, 100)

As a result of communications received by Hammer towards the end of 2009 from Rodrigue, Mayotte[20] and other Plaza employees, expressing dissatisfaction with the representation provided by the new leadership of Local 471, Hammer arranged to meet early January 2010 with the national leadership of UNITE HERE and was hired as an organizer. (T. 171, 104, 120; G.C. Ex. 16)

On the morning of January 27, 2010,[21] Hammer walked into the Liberty Café venue at the Plaza and sought out Rodrigue who was in the back kitchen. Hammer told Rodrigue she was there to speak with the workers about supporting the old union, i.e. UNITE HERE. She asked for Rodrigue's assistance in speaking with employees and soliciting signatures on support petitions. Rodrigue then took her morning break and proceeded to accompany Hammer in speaking with workers. (T.121-122, 171) While returning from break, Rodrigue called Mayotte, who was not scheduled to work, and asked her to come to the plaza and assist Hammer. (T.173) Shortly after returning to her work area, Rodrigue was confronted by Franco, accompanied by Weiner. Franco, pointed at Rodrigue and yelled, "She's the one, she wanted Theresa, she wants the different union here; she's the one getting all the people to sign up." (T.174, 175)

Mayotte arrived at the Plaza at around 10:30 a.m. but could not locate Hammer. While Mayotte was speaking with co-workers (identified as Amanda and Sue), Franco

---

[20] Hammer and Rodrigue have been friends since grade school. Hammer serviced the Gideon Putnam Hotel where Rodrigue served as shop steward for 15 years. Rodrigue served as a member of the Local 471 executive board during the administration of Wolfgang Hammer (T.128, 169) Mayotte's friendship with Hammer arose from Hammer's intervention to quell Franco's efforts to cause Mayotte's discharge. (T.225-226)

[21] Hereafter, unless otherwise indicated, all dates refer to 2010.

confronted the group and yelled, "Did you sign that piece of paper." Mayotte questioned Franco, "Why are you telling people Theresa embezzled money. You shouldn't be telling people that. You don't know what you are talking about." (T.228-229)

After separating from Rodrigue, Hammer went to the Corning Tower venue where she met with employees. Hammer cut the visit short in order to avoid a confrontation when Weiner arrived on the scene. (T.122, 287) Later in the day Hammer witnessed Franco confront a worker in the "Coffee Coach." Franco in a loud voice said, "Why did you sign this petition? You don't know what you're signing. She's a phony, she's a counterfeiter; she's an embezzler." (T.124-125) Franco proceeded to confront other employees yelling, "Did you sign that petition?" and demanded that they remove their names from the petition. (T.125-126)

Later in the day Weiner accompanied by Roberts, and carrying a video camera, went into Jenkins office. Roberts told Jenkins that he wanted to know about Sodexo's participation[22] in the union busting that "occurred here today." (T. 289)

The following day, January 28, Hammer, on behalf of UNITE HERE, filed a representation petition[23] (Case 3-RC-11957) with the Board's Albany Resident Office (T. 127; G.C. Ex. 16) The representation petition was supported with a showing of interest petition signed by Rodrigue, Mayotte and others during Hammer's visit to the Plaza. (T. 121, 176, 230; G.C. Ex. 15)

---

[22] On February 3, Respondent filed an 8(a)(2) and (5) charge in Case 3-CA-27533 alleging, inter alia, that Sodexo was assisting a rival labor organization. The charge was subsequently withdrawn on March 30. (G.C. Ex. 32)

[23] By letter of February 17, the Regional Director approved UNITE HERE's request to withdraw the petition. (G.C. Ex. 17)

K. "Off-the Record" Meeting of January 29

On January 29, Taegel, Roberts and Weiner met at the Clarion Hotel in Albany for what was supposed to be a private meeting to "sort out what the parameters might be for reaching a contract." (T.71) The meeting opened with Roberts saying he needed to know two things "or Sodexo will not like what is going to happen." Roberts demanded that Dizzine [referring to Sodexo's vice president of operations] and Jenkins come to the meeting immediately and look him in the eye and answer whether they were engaged in union busting. Roberts demanded that Sodexo immediately agree to a new contract with wages retroactive to January 1, 2009 without a change in the gratuity on box lunches. Taegel responded that neither Dizzine nor Jenkins would be coming and the understanding was that no management representatives or employees committee members were to attend the meeting. Taegel also said the Union could go to the NLRB if Roberts thought Sodexo was involved with the filing of the election petition. Roberts said he wasn't going that route, this was the real world. Taegel asked if he was being taped, a reference to Roberts' encounter with Jenkins on January 27. Robert's denied such. Taegel said he was here to talk about how the parties could reach a settlement on a new contract. Roberts said he was telling Taegel what it would take. Taegel responded that Roberts did not sound like someone who was engaged in good faith negotiations and, given the level of distrust, the parties needed to have a federal mediator involved. Roberts said, "We aree done" and departed with Weiner (T.73-74)

L. Threats Directed At Rodrigue

On the afternoon of February 14 Rodrigue approached a group of employees sitting in the cafeteria waiting to begin preparation for a large catering event. One of the

workers asked Rodrigue to sit with them. Executive Board member Jay Manning, who was with the group, directed remarks at Rodrigue, including "We're going to take her down;" "She doesn't belong here;" "I don't want anything to do with her;" and "She needs to be out." (T.178) Later that evening, while working the event, Franco approached Rodrigue and said, "I want you out of the Union. You're not going to have a job by the time we're done" and referred to the fact that Rodrigue had signed people up for UNITE HERE.[24] (T.180)

On or about February 25 Rodrigue attended a meeting at the Clarion hotel, scheduled for the purpose of discussing "overflow." Roberts approached Rodrigue outside the hotel before the meeting and told her that she probably should not attend the meeting because you are going to be thrown out of the union, "We're going to take you down." (T.179-180) Despite the advice, Rodrigue attended the meeting, sitting with Mayotte. Roberts opened the meeting by saying that Rodrigue would be charged with organizing for UNITE HERE and would be thrown out of Local 471.[25] Roberts repeatedly asked Rodrigue if she understood the seriousness of what she had done. She responded, "Don't people have choices." Manning, one of 40 attendees, said Rodrigue "didn't belong here." (T. 182) Mayotte spoke up and said "this is not the place for this. The meeting has nothing to do with what happened at Sodexo. It's supposed to be about overflow." (T.131, 182) Roberts asked Rodrique if she was going to report on the content

[24] Rodrigue filed a charge in Case 3-CB-9105 related to the events of February 14. (G.C. Ex. 20). Respondent filed a charge on March 17, Case 3-CB-9055, based on Sodexo rejecting Respondent's referral of Manning as an overflow employee. Respondent subsequently ascertained that Sodexo's action was based on Sodexo learning of Manning's encounter with Rodrique on February 14. (T. 296-296) The respective charges were later mutually withdrawn as a result of a non-Board resolution. (T. 183, 185-186, 296, 388)

[25] Prior to the meeting Williams, in a written communication dated February 12 requested Respondent "to investigate the actions of Theresa Hammer and Sharon Rodrigue for actions detrimental to the Local..." Williams subsequently withdrew the request as to Rodrigue (T. 291, 294; G.C. Ex. 34)

of the meeting to anyone and she said she would not. At that point the meeting proceeded to its scheduled agenda. (T. 231)

M. Resumption of Bargaining On March 19

With the uncertainty of the overall status of the UNITE HERE pension and health insurance funds being resolved at the end of 2009, bargaining resumed on March 19, under the auspices of federal mediator Ed Jones. (T.70-71) Taegel presented a 12 page "Employer Economic Proposal," which included the rotation proposal of January 22, 2009. (T.75-76; G.C. Ex. 9) At the session, Taegel confirmed that Sodexo's proposal included the retention of the $250 vacation pay for house wait staff. (T.77) The parties reached a number of tentative agreements. However, Respondent continued to oppose Sodexo's rotation proposal and insisted that the system be changed to bidding by seniority. (T. 77)

The parties met next on May 12. The session started with discussion on surcharges arising from the merger of the local pension plan into a national plan. During the discussion on Sodexo's rotation proposal, Franco commented that a "less senior catering person was receiving more hours because of the way the rotation is currently being administered." (T.80)

At the session of May 13, Sodexo presented a "final offer." (G.C. Ex. 10) A tentative contract agreement was reached when the Respondent conceded to Sodexo's proposal on the box lunch commission, a major objective for Taegel, in return for Sodexo agreeing to the Respondent's proposal on seniority for assignments to house wait staff. (T.81-82; G.C. Ex.11) At the hearing, Taegel explained that he agreed to the seniority proposal, even though he did not think the proposal was fair, since Sodexo had

Taegel responded by email of the same date:

> I am assuming that the union's position is that the Albany Room catering employees should receive the same $250 for a week of paid vacation as we agreed to for the House Wait Staff. Please confirm. (G.C. Ex. 12)

Weiner got back to Taegel and confirmed that the Union was indeed looking to include Albany Room staff in the $250 vacation pay group. (T.86). Notwithstanding that the issue of vacation pay for Albany Room staff had not come up during the bargaining sessions, Taegel made the change, reflected as follows in the new agreement (January 1, 2009-December 31, 2012) executed in July 2010:

> 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). (T. 86-87; G.C. Ex. 13 at p. 11)

N. The Effect of the Negotiated Changes on Mayotte

On or about May 20, in a telephone conversation Mayotte asked Weiner how the bid system would work and whether staff would be able to look at BEOs before bidding. Weiner replied that was a good question and she would get back to Mayotte. Mayotte said she did not think staff should be able to review BEOs before bidding. (T.236) In June, having not heard from Weiner, Mayotte initiated another telephone call and again asked how the bid system would work. Weiner said that Williams would pick first, followed by Franco and Mayotte. Mayotte asked if staff would be able to look at BEOs before selecting jobs. Weiner replied they would not. (T.237-238)

On August 5, written "Catering Scheduling Guidelines" were distributed to the house banquet staff. (T.238; G.C. Ex 25) As implemented, the process starts with the required presence of the staff at 10 a.m. on Thursday in the office where they review the schedule, prepared by Forgue, and BEOs. Thereafter, Williams, followed by Franco and

then Mayotte initial their shift selection on the schedule. "Pop-ups," other than those which can be performed by an employee already scheduled, are assigned on the same basis. (T.239, 240-243; G.C. Exs. 25 and 26) By reviewing a BEO the staff member is able to determine which jobs to bid on based on the compensation for the event, which could range from $20 dollars for serving a continental breakfast for 10 people to $100 for a lunch for 50 people to $200 for a dinner. (T. 237)

The change in the assignment practice has resulted in severe economic consequences for Mayotte. The requirement that Mayotte be physically present at 10 a.m. on Thursday to select a job, if any is available after selection by Williams and Franco, results in her being unable to accept other employment on Thursdays, as she has done in the past, and involves a round trip drive in excess of an hour between her residence and the Plaza and parking expenses for which she is not compensated. (T.239, 245) To offset the loss of hours at the Plaza, Mayotte secured hourly compensated work, a total of 157hours during the period July –December 2010, at Sodexo/GE, a separate bargaining unit.[27] (T.250) Mayotte's loss of scheduled hours at the Plaza is compounded by the fact that she has not worked a "pop-up" since the change was instituted, other than a "pop-up" arising during her scheduled shift. (T. 245) With the contract change, Franco has taken all of the pop-ups in the Albany Room.[28] (T. 166, 245) Mayotte has suffered additionally since the procedure for assigning concession opportunities has changed to a seniority

[27] Mayotte related that local Sodexo management indicated to her that hours worked at Sodexo/GE would count towards the required hours (1040) for qualifying for health insurance under the Plaza collective-bargaining agreement. (T.251)

[28] Prior to implementation of the new contract Mayotte regularly worked in the Albany Room when additional banquet staff was needed. In this regard Rodrigue related that Williams and Franco did not chose to work in the Albany Room (T.166)

basis. Mayotte worked only one concession in 2011 as of the date the unfair labor practice hearing closed. (T. 243, 244)

In practice, the negotiated change had no impact on Williams; rewarded Franco and punished Mayotte. Under the predecessor contract Williams "called off," i.e. called in sick, if assigned a "pop-up" in the Albany Room. Under the new contract, with Williams not choosing to work a pop-up in the Albany Room, all of this work has gone to Franco. (T. 166) As acknowledged by Weiner, under the old contract Williams had a practice of "calling off" weekend assignments, which are generally the most lucrative work. (T. 348-349) Under the new contract, with Williams refusing to take weekend assignments, the jobs goes to Franco. (T.352)

Weiner acknowledged she was aware from servicing the unit and complaints from Sodexo that Williams had often called off regularly scheduled shifts, causing Sodexo to be put in the position of finding a replacement. Weiner acknowledged she was unaware of Mayotte ever turning a job down. (T.314-315)

Complaints made by Franco in 2009 to local Sodexo management that Mayotte, who had less seniority, nevertheless had more hours than herself or Williams were met with the response that Mayotte did extra work because she [Franco] and Williams did not choose to do additional work. (T.246) Payroll records for hours worked in 2010 illustrate that Franco was the prime beneficiary of the change. In this regard the records show that Williams worked 956.62, the fewest hours of the group and in fact failed to meet the 1040 minimum to for health insurance coverage.[29] (T.246; U. Ex. 1) For the same period

[29] In a conversation held in January 2011, Weiner argued to Taegel that Williams should be covered for insurance because business was slow and he did not lose hours through any fault on his part. Taegel said Williams could have had the hours but turned down work. Weiner suggested that the problem could be

Franco worked 1067 hours and Mayotte a total of 948.[30] Where in the past earning opportunities were equalized, in 2010 Williams grossed $28,197; Franco grossed $30, 408 and Mayotte $27,727.[31] (U. Ex. 1)

O. The Effect of the Negotiated Change on Rodrigue

Prior to the new contract, Rodrigue's vacation pay was based on 1/52nd of her W-2 earnings in the Albany Room. As discussed, in 2009 she received weekly vacation pay of approximately $650. (T. 187) In accordance with the terms of the new contract, Rodrigue was paid $250 for vacation weeks taken in October 2010 and January 2011[32]. (T. 186)

P. Respondent's Case

Weiner testified that there "were multiple reasons [why] the Union decided to advance the seniority system." In her words, "one of them included a conversation-a concern the Company had raised regarding Lane calling off of jobs. I believe it specifically referred to jobs on Saturdays and Sundays because he had childcare obligations and duties." (T.344) The other reason given was that a "majority of the members," referring to Franco and Williams, wanted the change. (T. 345)

---

solved by laying off the least senior employee [referring to Mayotte]. Taegel responded, "We need to keep three people attached. This is hardly the time to be doing something like that." (T. 93-94)

[30] The figure is exclusive to Mayotte's hours at the Plaza and does not include hours from her non-unit second job at Sodexo/ GE (T.250; U.Ex.1)

[31] The figure is exclusive to her earnings at the Plaza and reflects subtraction of her Sodexo/GE earnings from Plaza earnings. (T.250.)

[32] On December 30, following efforts to resolve the Complaint, Respondent filed a grievance with Sodexo regarding the failure to properly calculate Rodrigue's vacation pay. (T. 190; G.C. Ex 23) The grievance was resolved with Sodexo agreeing to "calculate Sharron Rodrigue's vacation based on her Host/Hostess rate." Weiner testified that she was unaware until reviewing payroll records in October 2010 that Rodrigue in effect, held two jobs, i.e. hourly hostess and wait staff in the Albany Room. She proffered no explanation as to why a grievance was not filed in October. (T.371; U. Exs. 13-A and 13-B) Rodrigue was subsequently paid by Sodexo additional vacation pay based on 1/52nd of her hostess hours in the Albany Room. (T. 190, 373)

At the hearing Respondent introduced a number of documents, discussed below, in support of its contention that the change to seniority bidding was instituted at the request of the majority of the house wait-staff members. A grievance dated January 22, 2008, filed by Franco as shop steward, on behalf of herself, Hayes and Williams, contends that Sodexo was in violation of the seniority provisions of the contract by the hire of a fourth person [referring to Mayotte]. By letter dated January 31, 2008 to Taegel, Crane requested a step 3 grievance meeting. (U. Ex. 9) It appears from the Crane memo of March 2008 that the grievance was dropped after Crane met with local Sodexo management and concluded that the rotation system was "the most equitable way to distribute hours."(G.C. Ex. 31)

A document faxed to Hammeron August 28, 2007, requests that a grievance be filed on behalf of Franco, Hayes and Williams concerning the hire of Mayotte. (T. U Ex. 7) The document appears related to the meeting described at Section E. [33]

In an email to Taegle, dated August 20, 2009, Franco, as shop steward, wrote that she had filed a class action grievance [relating to Mayotte] on July 21 which Jenkins had yet to respond to. (U. Ex. 8)

By email of August 20, 2010, subsequent to the new contract, Franco, as shop steward, filed a "class action" grievance relating to the failure to accord a catering staff member an event in the Albany Room. Jenkins, in a response of the same date, denied the grievance as the "event was an Albany Room event, so home wait staff is scheduled first..." (U.Ex.15)

[33] Hammer testified that, at the time, grievances could not be filed under the contract by individuals, only the Union, and that she did not chose to file a grievance which would negatively impact Mayotte.(T. 119,148,150)

Apparently in support of a contention that the Union harbored no ill-will towards Rodrigue, Weiner related that on December 9, 2010, she filed a grievance on Rodrigue's behalf when Franco bumped Rodrigue from working a catering assignment in the Albany Room. (T 374-375; U. Ex.12) Weiner explained she did not want to set a precedent that catering department staff could bump into events in the Albany Room. (T. 375)

III. Points of Facts, Law and Argument Addressing the Specific Exceptions

Exception 1 ("The ALJ's finding that the Union possessed 'dual invidious motivation') when it negotiated the bidding system is not supported by record evidence.")

Exception 2 ("The Union's Affirmative Defense is Amply Supported In the Record.")[34]

Judge Ringler's finding of "dual invidious motivation" is fully supported by the record and application of legal principles regarding unlawful discriminatorily motivated conduct and the duty of fair representation.

The Board applies the *Wright Line*[35] analytic framework to alleged discrimination by a union. *Town and Country Supermarkets,* 340 NLRB 1410, 1421, n.7 (2004). Thus, as discussed in *Local 340, Ironworkers (Consumers Energy Co.*), 347 NLRB 578, 579 (2006):

> Under *Wright Line* the General Counsel must establish that [an individual's] protected concerted activity was a substantial motivating factor in the Respondent's adverse employment actions. Id. 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 individual's] protected activity.

See also, *Paperworkers Local 1048 (Jefferson Smurfit Corp.),* 323 NLRB 1042, 1044

[34] Discussion of these exceptions is combined since the exceptions relate to the application of shifting burdens of proof to a single set of facts.
[35] 251 NLRB 1083 (1980)

(1997)("In order to establish discriminatory motivation, the General Counsel must show union or other protected activity, knowledge, animus, and an adverse action taken which has the effect of discouraging the protected activity. Inference of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing and false reasons support such inferences."); *State, County Employees AFSCME Local 1640 (Children's Home Of Detroit),* 344 NLRB 441, 446 (2005)("The Respondent's failure to explain its handling of Murphy's grievance leaves its hostility to Murphy as the unchallenged reason for such action"); *Graphic Communications Local 1-M (Bang Printing)* 337 NLRB 662, 674 (2002)("it is the 'true purpose' or 'real motive' behind the actions of a labor organization which determines whether its demands were actually motivated by 'purely personal or arbitrary reasons..."); *Wenner Ford Tractor Rentals, Inc.*, 315 NLRB 964 (1994).

A cogent discussion of the duty of fair representation is set forth in *Union De Obreros De Cemento Mezclado (Better Roads Asphalt),* 336 NLRB 972-971 (2002):

> It is well established that a union breaches its duty of fair representation toward employees it represents when it engages in conduct affecting those employees' employment conditions which is arbitrary, discriminatory or in bad faith. *Vaca v. Sipes,* 386 U.S. 171 (1967). In serving the unit it represents, a union, as the employee's bargaining representative must be afforded a "a wide range of reasonableness." See *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953). The "wide range of reasonableness must be exercised in "good faith with honesty of purpose, and free from reliance on impermissible considerations. *Auto Workers, Local 651 (General Motors Corp.),* 331 NLRB 479, 480 (2000), quoting *P.P.G. Industries,* 229 NLRB 713, 715 (1977)....A Union does violate its duty of fair representation if disposition of a grievance was "motivated by ill will or other invidious considerations." *Bottle Blowers Local 106 (Owens-Illinois, Inc.,)* 240 NLRB 324 (1979).

Additional guidance is found in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174, at slip op. p. 6-7 (2010):

> The duty of fair representation requires a union "to serve the interests of all [unit] members without hostility or discrimination toward.... any...." *Vaca v. Sipes,* supra, 386 U.S. at 177. A union is accordingly prohibited, when acting as a statutory representative, from taking action against an employee or group of employees based upon considerations that are irrelevant, invidious, or unfair. *Miranda Fuel Co.,* 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).
>
> The Board may find discrimination within the meaning of the duty of fair representation when a union's conduct is motivated by an employee's lack of union membership, disagreement with union policies, or opposition to union leaders. The Board reviews the evidence to determine whether the General Counsel has established by the preponderance of the evidence that the Union's conduct was motivated by discriminatory reasons. *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479 (2000). Discrimination under the duty of fair representation thus "requires inquiry into the subjective motivation behind union action." *Trinka v. Auto Workers,* 30 F.3rd 60, 63 (7th Cir. 1994).
>
> *****
>
> In sum, the Board considers whether employees have been singled out for adverse treatment or whether the union has demonstrated a legitimate explanation for treating the employees differently.

The duty of fair representation extends to the negotiation of collective-bargaining agreements. *Airline Pilots Assn. v. O'Neill,* 499 U.S. 65, 77 (1991) In a series of cases, the Board has found violations of the duty of fair representation where, in negotiations, a union took a "bargaining stance calculated to win a political advantage by pitting a majority group against a minority." *General Truck Drivers Local 315 (Rhodes & Jamieson),* 217 NLRB 616, 619 (1975). See also, *Barton Brands,* 228 NLRB 889, 892 (1977)("...the Union could absolve itself of liability only if it could 'show some objective justification for its conduct beyond placating the desires of the majority of the unit employees at the expense of the minority."); *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974, 976 (1986); *Teamsters Local 435 (Super Valu, Inc.*), 317 NLRB 617, 631 (1995)("Further, Respondent failed to make any attempts to resolve any conflicts of

interest between the two groups of employees..."). Cf. *Firemen & Oilers Local 320 (Philip Morris, U.S.A.)*, 323 NLRB 89, 90 (1997)(no violation was found in negotiating a seniority provision that favored one group over the other where, in the absence of bad faith or invidious motivation, "the Respondent took into account legitimate interests of both groups in crafting its compromise on seniority, and therefore did not act arbitrarily or irrationally.").

Actions taken to favor or benefit union agents (*Local 600 (UAW),* 225 NLRB 1299 (1976)) or "grounded upon the existence of a conflict between the union agent's private, personal interests" (*Postal Service*, 272 NLRB 93, 104 (1984)) or based on "ill will" (*The Kroger Co.*, 312 NLRB 7, 12 (1993)) violate the duty of fair representation.

At the onset of Mayotte's hire, at a time when Franco did not hold a position with Local 471, Franco pushed in vehement language for Mayotte's removal from the rotation and for a period of time was successful. Franco overall attempt to remove Mayotte, or in the alternative, change to a bidding system, was unsuccessful while Hammer serviced the unit. Hammer, who had long experience in the industry, refused to process a grievance which would cause the discharge of a unit member or allow for an inequitable distribution of work. (T.117- 119, 208, 209, 211, 212; U. Ex.7) With the resignation of Hammer and upon assuming the position of shop steward, Franco renewed her efforts by filing a grievance in January 2008 contending that the hire of Mayotte as a house banquet staff member violated the seniority provisions of the contract. (T.344, 345; U.Ex.9) Crane investigated the practice and concluded that the rotation system was the most equitable way to distribute hours. During the course of preliminary contract discussions, Crane told Taegel there had been a desire by some of the house banquet staff to have something

other than rotation but that he had looked into options and concluded that rotation was the fairest system. He also told Taegel he was aware that rotation was the industry practice. (T.50-51) At the first bargaining session held on January 22, 2009, Sodexo presented a "non-economic" proposal which was based on the preliminary discussions between Taegel and Crane. The proposal included language memorializing the existing rotation system. Respondent voiced no opposition to the rotation proposal at this session or the session of the following day. (T.55-58, 60; G.C. Ex 7) At the next session held on February 6, 2009, Franco, who had not attended the first session, announced that the Union wanted the option of having house wait staff scheduled according to seniority. (T.62, 63) After this session bargaining effectively ceased and was not renewed until issues over the disaffiliation were resolved and Weiner was hired as Crane's replacement. (T.66)

Weiner readily confirmed that Franco was the driving force for insisting on the change. Upon hire, Weiner reached out to Franco for a tour of the Plaza. (T.261) In their very first meeting, Franco asked Weiner why the seniority language of the contract did not apply to members of her department for purposes of assigning work and asked why Mayotte was on the rotation when there were not enough hours for staff. (T. 280-281)

In preparation for bargaining, Weiner met with the Union's bargaining team during which time Franco said she wanted seniority rights recognized so that assignment for house banquet staff would be based on seniority. (T.299-300, 302)

Sodexo ultimately capitulated to the Union's seniority demand, notwithstanding that Taegel personally did not believe the change was fair, as a condition of reaching a

contract after negotiating for a year and a half beyond the expiration of the 2005-2008 agreement. (T.82-83)

As detailed below, Weiner listed two reasons for the Respondent's insistence on bidding by seniority. The first reason was to accommodate Sodexo's concern about Williams calling off jobs because of professed child care issues. (T.344) The second was that a majority of the house [meaning Franco and Lane] wanted the change. (T.345)

That the bidding language would adversely impact Mayotte is hardly surprising. That Franco, not Williams, would be beneficiary of the change is not evident by the new language on its face but hardly surprising given Williams' work history. By pushing for the change Franco became the big winner with a total of 1067 hours in 2010. Williams, who logically should have had no problem reaching the 1040 minimum for benefits, somehow worked only 956 hours while Mayotte worked 948. (T.239, 245, 250; U.Ex.1) With the new seniority language the lucrative weekend work forsaken by Williams was grabbed up by Franco to the detriment of Mayotte. Franco's "cherry picking" reached down to taking all the "pop-ups" and concession work. (T.352) The results of the change and the instability it brought to the unit are illustrative of why rotation, with its equitable distribution of work, is the industry practice.

Weiner affirmed that a prime reason for making the proposal was because the change was desired by a majority of the house wait staff. Respondent pointedly presented no evidence or argument at the hearing that it had based its decision on an objective basis beyond, in the language of *Barton Brands*, supra, 228 NLRB at 892, "placating the desires of the majority of the unit employees [Franco and Williams] at the expense of the minority." Unlike the situation in *Firemen and Oilers Local 30*, supra, 323 NLRB at 90,

n.4, Respondent made no effort to "take into account legitimate interests of both groups in crafting its proposal." The invidious nature of the change is demonstrated by the fact that Franco alone is the beneficiary of the change, a result that was inevitable as soon as pen was put to executing the contract. The fact that the provision was negotiated to benefit Franco, the holder of multiple union leadership positions including shop steward, negotiating committee member and executive board member, provides an independent basis for establishing a breach of the duty of fair representation under the Board's decisions in *Postal Service*, supra and *Local 600,* supra.. The record is replete with evidence that Franco harbored animus towards Mayotte. Franco's personal animosity and ill-will toward Mayotte is demonstrated by the exhibits offered by Respondent showing that Franco repeatedly sought Mayotte's removal from the banquet staff. Moreover, Franco's actions taken upon the hire of Mayotte leading to the meeting in September 2007, where Jenkins told Franco the staff needed to accept the fact that Mayotte was part of the group, and the confrontation between the Franco and Mayotte on January 27, 2010 when Hammer visited the Plaza, described above in Section also demonstrates animus. Yet another example of "ill will" by Franco is the unjustified claim by Franco made during bargaining, and other times, that Mayotte, a "less senior catering person" was receiving more hours because of the way the rotation was currently being administered, ignoring the fact that Williams refused work and Mayotte, contrary to the others, took any extra work made available. Under *The Kroger, Co.,* supra, the "ill will" motivation independently establishes a violation of the duty of fair representation. Respondent's ill-will remains unabated. As late as January 2011, Weiner suggested to Taegel that the problems could be resolved if Mayotte was laid off. In the language of *Machinist Lodge*

2777, supra, 355 NLRB No. 54 at slip op p.7, Mayotte was "singled out for adverse treatment" and the union has failed to demonstrate "a legitimate explanation for treating [her] differently."

The fact that the change was made, according to Weiner, to accommodate Williams' child care difficulties, without any mention or consideration whether Mayotte, a single mother had child care issues, is demonstrative of conduct which is based on arbitrary and invidious considerations. Again, it provides an independent basis for establishing a violation of the duty of fair representation.

The record abundantly supports Judge Ringler's finding, based on the facts and case law discussed above the Respondent, on multiple grounds, violated the duty of fair representation in negotiating the change in the method of assigning work to house banquet staff. The record independently supports his finding, under a *Wright Line* analysis, that Respondent's actions were taken to reward Franco in her various positions as a union agent and to punish Mayotte for her support for Hammer and Unite-Here. It is hardly surprising that Respondent chose not to present Franco[36] as a witness to rebut the abundant animus dripping from her statements she uttered, including the confrontation of January 27, 2009 when Franco publically berated Mayotte for assisting Hammer. Respondent was well aware of Mayotte's close association with Rodrigue and Hammer. Respondent seized on the negotiations to punish Mayotte for her protected activities; to reward Franco for her role as steward and negotiator; and to demonstrate to the unit that dissident activity would not be tolerated.

[36] Respondent's failure to call Franco is telling and warrants the drawing of an appropriate adverse inference. See *International Automated Machines*, 285 NLRB 112, 1123 (1987)

Exception 3. ("The ALJ erred when he found that Mayotte was economically harmed by the seniority-based scheduling system.")

As detailed earlier, the change in the scheduling system resulted in a severe economic impact on Mayotte. The requirement that she be physically present at 10:00 a.m. on Thursdays to select a job, assuming any are available after selection by Williams and Franco, results in her losing the opportunity to accept other employment on a Thursday, as she had in the past. She also incurs a one hour round trip drive and parking expenses for which she is not compensated. (T.239, 245) With the change, all of the "pop up" work, previously assigned by rotation has been claimed by Franco. (T.166, 245) Where, in the past, hours of work were equalized, payroll records for 2010, adjusted to delete Mayotte's non-unit hours worked at another Sodexo facility, reveal that Franco worked 1067 hours and Mayotte a total of 948. (U. Ex. 1) The fact that the bidding language would adversely impact Mayotte is hardly surprising. That Franco, not Williams, would be the beneficiary of the change is not evident by the new language on its face but hardly surprising given Williams' work history. By pushing for the change Franco became the big winner. Williams, who logically should have had no problem reaching the 1040 minimum for benefits, somehow worked only 956 hours while Mayotte worked 948. With the new seniority language the lucrative weekend work forsaken by Williams was grabbed up by Franco to the detriment of Mayotte. Franco's "cherry picking" reached down to taking all the "pop-ups" and concession work. The detrimental effect of the change continues unabated. This exception is without merit, and its assertions are in direct contravention of payroll records offered at the hearing by the Respondent. Inherent in the Exception is the flawed contention that Mayotte is to be punished because she sought and obtained outside employment in order to feed her

family when the Respondent caused her unit hours to be slashed. The ultimate issue as to monies owed is, of course, to be determined at the compliance stage of the case.

Exception 4. ("The ALJ erred when he found that Franco unduly influenced the negotiations to benefit herself.")

As detailed at length in the discussion of Exceptions 1 and 2, and incorporated by reference, all roads in this case lead to Franco. Weiner, whether out of naivety or some other motivation, accommodated Franco and caused the change which benefited only Franco. Franco was hardly demure in her actions or silent as to her intent. Indeed as discussed below, her effort to claim all work for herself alone extended to attempting to claim Rodrique's work. (T.374-375, U. Ex. 12) Respondent's failure to call Franco as a witness at the hearing to explain her actions, including her blatant threats directed toward Mayotte and Rodrique, is hardly surprising given the enormity of the record. The record fully supports Judge Ringler's finding.

Exception 5 (The ALJ erred when he found that Weiner was not credible.")

Judge Ringler detailed his credibility analysis in great length (ALJD, p. 11, l.5-20; p. 14, l. 3-11) His conclusions were appropriate, based on his observation of the witnesses, and supported by the record. As succinctly noted in *J.J. Cassone Bakery, Inc.*, 350 NLRB 86, n. 2 (2006) "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950, enfd. 188 F.2d 362 (3rd Cir. 1951)." The exception is without merit and unwarranted.

Exception 6. ('The ALJ should have deferred the vacation cap issue to the grievance settlement negotiated by the parties.")

As detailed in the discussion of Exception 8 below, and incorporated by reference herein, this exception ignores the fact that Respondent is the party that negotiated the change to punish Rodrigue, and took no action until on the eve of trial after Complaint had issued. The resolution of the grievance is limited to a one shot monetary compensation and in no manner addresses the unfair labor allegations or removes the offending language of the contract dictated by the Respondent or provides for what will happen in the future. In these circumstances, and in light of the Respondent's overt hostility and animus, deferral is unwarranted. See *Roadway Express, Inc.,* 355 NLRB No. 23, slip op. p. 7 (2010)("Where the interests of the charging party grievant conflict with the interests of his or her union representative, the arbitral proceedings are not fair and regular and the Board does not defer to arbitration."); *Postal Service,* 336 NLRB 1182, 1191 (1980)("The Board has long held that it is not consonant with statutory policy to defer to arbitration, or in this case to a grievance settlement, when the interests of the charging party discriminatee is in obvious conflict with the interests of the Union.")

Exception 7. ("Absent deferral, the ALJ erred in finding Counsel for the General Counsel met his prima facie burden under Wright Line regarding the vacation cap and that the Union failed to prove its affirmative defense.")

Franco's action of instigating application of the house wait vacation language to staff in the Albany Room is hardly the benign act made out by Respondent. Through the course of negotiations up to ratification of the tentative agreement, the issue of vacation pay for the Albany Room was never raised or considered. (T.86-87) It was only after the draft agreement was circulated, that Franco pushed Weiner for the inclusion. (T.87, 328)

As steward, Franco was well aware that Rodrigue, in effect. worked two jobs. Accordingly, Weiner's claim of ignorance of the nature of Rodrigue's job is unworthy of credit and under law irrelevant. See *The Kroger* Co., supra, 312 NLRB at 12. Franco took the action in a background of unrelenting, not to mention unrebutted, threats of retaliation directed at Rodrigue by Franco, Manning and Roberts for assisting Hammer. Franco's unjustified attempt to grab Rodrigue's work in the Albany Room in December 2010, described by Weiner on Respondent's case, demonstrates the continued extent of Franco's hostility which motivated her to push for the post-ratification modification. (T.174, 175, 178, 179,180, 182) Under the cases discussed with respect to the discussion of Exceptions 1-3, the vacation cap change, as appropriately found by Judge Ringler to have been negotiated out of ill-will, violates the duty of fair representation.

Respondent effectively conceded at the hearing that its agents harbored animus against Rodrigue for engaging in protected activity by assisting the organizing effort of UNITE HERE. The threats from Respondent's agents were blatant, i.e. ranging from Manning's threat "we're going to take you down," to Franco's "you're not going to have a job by the time we're done with you." (T.180) There is no issue that Respondent was well aware of Rodrigue's protected activities. The testimony is unrebutted that Franco, in the presence of Weiner, confronted Rodrigue on the eventful day of January 27 and screamed "She's the one, she wanted Theresa; she's the one signing up people." (T.174-175) Roberts flat out told Rodrigue at the overflow meeting of February 25 that she was going to be thrown out of the Union for assisting Hammer. (T.179-180) At the instigation of Franco, Respondent followed through on the threat when the opportunity arose. No effort was made by the Respondent to speak or otherwise consult with Rodrigue, the sole

Albany Room employee, before making the post-ratification change. Franco as a long-term employee and steward, was well aware of the duality of Rodrigue's job and knew the consequences that would flow from the language capping vacation pay for Albany Room staff. As noted, Respondent cannot rely on Weiner's professed ignorance of Rodrigue's job duties when Franco was well aware of those duties. Moreover, Weiner testified that she reviewed payroll records, provided by Sodexo in late September 2010 that provided job classifications and wage rates. (T.303)

With the General Counsel's initial *Wright Line* burden abundantly established, the burden shifted to the Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of Rodrigue's protected activity. Respondent utterly failed to do so. Vacation pay for Albany Room staff was a non-issue during the 2005-2008 contract negotiations; a non-issue when Crane led the bargaining, and was a non-issue until after ratification when Franco initiated the change. Respondent has failed to meet its obligation to establish that it would have made the change in the absence of Rodrigue's protected activity. The record, by a preponderance of evidence, supports Judge Ringler's finding that the change was made at the instigation of Franco to punish Rodrigue for supporting Hammer and UNITE HERE.

Exception 8: ('The ALJ made numerous factual errors with respect to the evidence. The factual errors are listed below with respect to record citations to the correct testimony and exhibits. These "facts" were used by the ALJ to support his ultimate findings and thus infect the entire decision with reversible error.")

In response to each listed "error," designated by counsel for Respondent as (a)-(j), are transcript page citations supporting Judge Ringler's specific findings.

(a) T. 127

(b) T. 227, 228

(c) T. 129, 230

(d) T. 284-289, 296

(e) T. 180-183, 230, 231

(f) T. 230, 231

(g) T.303, 304

(h) T. 37, 47, 48, 50, 55, 56-58, 62, 81, 82 113-115,117-119, 151, 152, 188, 208, 212 218- 220, 223-224, 235, 246, 280, 281, 344, 345; G.C. Exs. 7, 9,11, 24; U. Exs.8, 9, 15

V. Conclusion

Judge Ringler's decision is supported in law and fact. At the hearing Respondent made no attempt to controvert the witnesses presented by the General Counsel. Respondent failed to meet its burden of establishing a justification for its actions other than, as admitted by Weiner, that the actions were taken at the instigation and behest of Franco. The record amply supports Judge Ringler's conclusion that the changes were motivated to reward Franco and to punish employees who sought representation through a different union. Accordingly it is respectfully requested that the Board adopt the findings and conclusions of Judge Ringler

Respectfully submitted,

Alfred M. Norek
Counsel for the Acting General Counsel
National Labor Relations Board
Leo W. O'Brien Federal Building
Clinton Avenue and North Pearl Street
Albany, New York 12207

Dated at Albany, New York
This 4th day of October 2011

STATEMENT OF SERVICE

Copies of the foregoing Answering Brief To Respondent's Exceptions of Counsel for the Acting General Counsel to Administrative Law Judge Robert Ringler were served this date on the following parties:

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street
Washington, DC 20570

Lucinda Lapoff, Esq.
Chamberlain, D'Amanda, Oppenhemer &
Greenfield
1600 Crossroads Blvd.
Two State Street
Rochester, New York 14614

Sharon Rodrique
1200 Van Antwerp Rd.
Schenectady, New York 12309

Tina Mayotte
20 Normal Griffin Way
Valley Falls, New York 12309

Alfred M. Norek, Esq.
National Labor Relations Board
Leo W. O'Brien Federal Building
Clinton Avenue and North Pearl Street
Albany, New York 12207

Dated at Albany, New York
This 4th day of October 2011