

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

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. Cases 20–CA–035123, 20–CA–035238, 20–CA–035253, and 20–CA–035223

August 31, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

On July 6, 2011, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondents filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondents filed a reply brief.

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

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Orders.

ORDER

The National Labor Relations Board adopts the recommended Orders of the administrative law judge and orders that the Respondents, CL Frank Management, LLC, CL Metropolis Management, LLC, and CL Vertigo

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

² There are no exceptions to the judge's dismissal of the complaint allegations that Respondent Hotel Frank violated Sec. 8(a)(1) by photographing or videotaping a union demonstration on July 22, 2010, and by telling housekeeping employees that there was "no union" and that they had no union protection, or Sec. 8(a)(5) by its unilateral changes at the Hotel Frank concerning the luggage room.

In affirming the judge's finding that Respondent Hotel Frank unlawfully photographed a group of off-duty employees and union officials who entered the Hotel Frank on September 8, 2010, to deliver a petition, we observe that, although the Respondent asserts that it lawfully photographed the group in order to document their trespass onto the Respondent's private property, there is no evidence that the Respondent ever asked the group to leave or that it has a rule prohibiting off-duty employees or union representatives from entering its hotels.

Management, LLC, a single employer d/b/a Hotel Project Group d/b/a Hotel Frank and 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, San Francisco, California, their officers, agents, successors, and assigns, shall take the action set forth in the Orders.

Kathleen C. Schneider and *Sarah M. McBride*, Attys., for the Acting General Counsel.

John A. Ontiveros, Atty., with *Keahn Morris*, Atty., on the brief (*Jackson Lewis*), and *Thomas H. Petrides*, Atty. (*K & L Gates, LLP*), for Hotel Project Group.

Kim C. Wirshing, Atty., for UNITE HERE! Local 2.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at San Francisco, California, on February 18, 2011. The proceeding is based on four charges filed by UNITE HERE! Local 2 (Union, Charging Party, or Local 2)¹ and two complaints initially issued on October 29, 2010,² by the Regional Director for Region 20 of the National Labor Relations Board (NLRB or the Board) on January 10, 2011, one, a consolidated complaint in Cases 20–CA–035123, 20–CA–35238, and 20–CA–35253, against the Hotel Project Group d/b/a Hotel Frank (Hotel Frank or Frank), and the other in Case 20–CA–035223 against the Hotel Project Group d/b/a Hotel Metropolis (Hotel Metropolis or Metropolis). On November 1, the Regional Director issued an order consolidating all four cases. However, on January 10, 2011, the Regional Director issued a separate amended complaint in Case 20–CA–035223 (the Metropolis complaint) and a separate amended consolidated complaint in the other three cases included in the November 1 consolidation order (the Frank complaint). The Metropolis complaint alleges that Respondent violated Section (8)(a)(1) of the National Labor Relations Act (the Act); the Frank complaint alleges that Respondent violated Section (8)(a)(3) and (1) of the Act. Respondent filed a timely answer to the complaints denying the substantive allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, Local 2,³ and Respondent, I make the following

¹ The first charge (Case 20–CA–035123) was filed against Hotel Frank on June 24, 2010. It was amended on July 13, and October 20. The second charge (Case 20–CA–035238) was filed against the Frank on August 20. It was amended on September 8 and October 4 and 7. The third charge (Case 20–CA–035253) was filed against the Frank on September 13. The fourth charge (Case 20–CA–035223) was filed against the Metropolis on September 13. It was amended on October 22.

² All further dates not showing a calendar year refer to 2010.

³ Local 2's arguments largely coincide with those of the Acting General Counsel. Accordingly, the arguments attributed to the Acting General Counsel below generally track those made by Local 2.

FINDINGS OF FACT

I. JURISDICTION

At relevant times, Respondent CL Frank Management, LLC, CL Metropolis Management, LLC, and CL Vertigo Management, LLC, admittedly a single employer, has been doing business as the Hotel Project Group. The Hotel Project Group (HPG), in turn, did business at relevant times as the Hotel Frank, the Hotel Metropolis, and the Hotel Vertigo, all of which are located in downtown San Francisco, California.⁴ Based on a projection of its operations from May 12, 2010, to the time of filed its amended answer on February 14, 2011, the Hotel Project Group d/b/a Hotel Frank admits that it will annually derive gross revenues in excess of \$500,000 and that it will purchase and receive goods and materials valued in excess of \$5000, which originate from locations outside the State of California. The Hotel Project Group d/b/a Hotel Metropolis made identical admissions as to its gross revenues and interstate purchases. Accordingly, I find each entity, the Frank and the Metropolis, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve the labor disputes encompassed by this consolidated proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The Hotel Project Group (HPG) was formed in April 2010 to manage three San Francisco boutique-style hotels, the Frank, the Metropolis, and the Vertigo. For several years prior to 2010,

Local 2 represented employees at the Hotel Frank (the Frank) and the Hotel Metropolis (the Metropolis) in separate units. The Hotel Vertigo, which is not involved in this proceeding, has never been organized.

The collective-bargaining units at the Frank and the Metropolis consist essentially of the bellmen, front desk clerks, room cleaners, utility workers, and laundry employees. The most recent collective-bargaining agreement at the Frank was effective by its original terms from October 1, 1996, through September 30, 1999. At the Metropolis, the most recent agreement was effective by its terms from November 1, 1998, through September 30, 1999. A series of extensions resulted in the terms of that agreement with certain modifications remaining effective through August 14, 2009.⁵ Both agreements were extensively modified and extended through September 1, 2004, and then extended with further modifications through August 14, 2009.

In more recent years, the three hotels were owned and operated by an entity called Personality Hotels. In late 2009 or early 2010 Personality Hotels filed for bankruptcy. On May

12, an entity named CRESS Hotel Portfolio acquired all three hotels at a bankruptcy sale and contracted with (HPG) to operate and manage those hotels. HPG's contractual arrangement to operate and manage the Frank continued through December 10; the contractual arrangement at the Metropolis continued through December 15.

On May 12, following the sale, HPG managers met with the employees at the hotels to inform them that they would all be offered employment. The employees at the Frank and Metropolis were provided with letters offering them employment on the following terms:

Please note: If you accept employment with the Company by signing this offer letter, then your terms and conditions of employment will change from what you previously had with your prior employer at this location. Significantly, the Company does not accept or assume and specifically rejects all of the terms and conditions that were set forth in the Collective Bargaining Agreement between your prior employer and Unite Here! Local 2, including all "Memorandum of Understandings" and "Side Letter" agreements. Instead, your new terms and conditions of employment will be as set forth in this offer letter, including the provisions of the Company's Employee Handbook, Job Descriptions, and Job Performance Standards that are enclosed with this offer letter and incorporated by reference. (The Company will, however, comply with its legal obligations as a successor employer, if triggered, to recognize and bargain with Local 2 regarding your employment to the extent required by law.)

The Company is offering employment to you under the following terms and conditions:

You will be hired into the same position and at the same hourly wage rate that you were earning immediately prior to Cress Frank 386 Geary Street LLC acquisition of the Hotel. You will be classified as a non-exempt employee, which means you will be eligible for overtime, meal periods and rest breaks as provided by law. The Company will determine your assignments, work schedules and shifts, but it will make a reasonable effort based on operational needs for you to keep the same schedules and shifts that you previously held.

Your employment with the Company will initially be pursuant to a 90-day probationary period, during which time the Company will assess your skills, ability and performance in your position. At or prior to the end of the 90-day probationary period, the Company will make a determination as to whether to retain you as a regular full-time or part-time employee of the Company under the terms set forth in this offer letter, or end the employment relationship.

The offer letter also detailed the medical and dental benefits that Respondent offered to provide through July 2010 and the vacation benefit applicable to full-time employees. The letter concluded with a mandatory arbitration provision and a deadline for acceptance. (GC Exh. 2.)

Although a minor brouhaha erupted at the Frank during the May 12 meeting in response to management's demand that that

⁴ The Hotel Vertigo, historically an unorganized entity, is not involved in this proceeding.

⁵ GC Exh. 34 contains the collective-bargaining agreement and the two extensions applicable to the Hotel Frank, f/k/a, the Hotel Maxwell. GC Exh. 46 includes the original agreement at the Metropolis as well as the two extensions.

the offer letters and acknowledgments for receipt of several other documents be signed and returned immediately, the employees were eventually permitted to return them signed before the start of their next work shift.⁶ All of the employees who had previously worked at the Frank and the Metropolis signed on to continue working at their respective hotels under HPG's management.

The written job performance standards HPG established when it took over play a key role in the case involving Marc Norton, a bellman at the Frank for 13 years and the alleged discriminatee. HPG also retained outside firms to evaluate compliance by hotel personnel with the service standards it established. These contractors sent unidentified personnel to stay at the targeted hotel as a "mystery guest." Following the stay, the mystery guest prepared a detailed written report about their experience based on the service standards HPG provided up front. Employee witnesses from the Frank referred to the mystery guests as "spotters" and their evaluations (labeled "Mystery Guest Reports" by one of the companies) as "spotter reports." Throughout this decision, I have adopted this shorthand nomenclature. At relevant times, HPG utilized two spotter firms, D.C. Blosser & Associates, and another identified only as "LRA." The owner and president of the Blosser firm, Dale Blosser, also conducted two employee training sessions at the Frank during Norton's tenure.

Wali met informally with Local 2 President Mike Casey and Local 2 Counsel Wirshing on May 25. He informed the union officials that HPG had taken over the operation of the hotels on behalf of the new owner. They then discussed the status of the union agreements at the hotels and argued about the applicability of the successor clauses in the last union contracts. Wali told Casey that HPG believed that the successorship clauses did not obligate it to apply the terms of the prior union contracts at those two hotels because the owner, in effect, purchased only the physical assets at a foreclosure sale rather than an ongoing business. For that reason, Wali argued that HPG had a right set its own terms and conditions of employment when it hired all of the former employees shortly after taking over the operations.

In a followup letter on June 8, Wali reiterated the same position with respect to the contractual successorship clauses. He also explained that HPG had set new terms and conditions of employment primarily because of objections it had to provisions in the prior agreements, particularly at the Hotel Frank. Noting his meeting scheduled for June 10 with Casey and a group of employees, Wali said he would review specific contract clauses he found objectionable at that time. Twice in the letter Wali offered to recognize Local 2 as the employee representative but only upon receipt of a formal demand for recognition. (R. Exh. 12.) Casey responded by letter dated June 8 demanding recognition (R. Exh. 13) and Wali replied on June 14 granting recognition and requesting available meeting dates from Casey. (R. Exh. 14.)

⁶ Several employees objected to the mass of materials they were asked to absorb and sign for in such a limited period of time. For example, the Hotel Frank employee handbook is a 60-page mostly single-spaced document. See R. Exh. 5.

Casey and Wali met again on June 10 at the Hotel Frank. About a dozen employees and two or three managers attended this exchange. Two additional bargaining sessions were held on July 1. That session was consumed primarily with the Respondent's review of the provisions in the prior agreements that it found objectionable. The bargaining session on September 10 dealt primarily with a review of Local 2's health plan.

B. The Issues

There are two common issues as to both Respondents. The first common issue is whether Respondents violated Section 8(a)(1) by issuing written warnings to six room cleaners who concertedly refused to clean all of their assigned rooms on June 28. The second is whether Respondents violated Section 8(a)(5) and (1) by unilaterally extending their initial probationary period by 45 days.

The Respondent Hotel Frank pleadings present these added issues:

1. Whether it violated Section 8(a)(1) by prohibiting the wearing union buttons.
2. Whether it violated Section 8(a)(1) by the conduct of an agent and supervisor who repeatedly told employees there "was no Union," or they "were not protected by the Union."
3. Whether it engaged in surveillance in violation of Section 8(a)(1) by taking photographs or appearing to take photographs of employees engaged in union activities.
4. Whether it violated Section 8(a)(3) and (1) by: (a) issuing Marc Norton an oral warning, (b) then a written warning, and finally (c) discharging him for his union activities.
5. Whether it violated Section 8(a)(5) and (1) by unilaterally removing a chair from the luggage room and requiring that the door between the front desk and the luggage room remain closed at all times.

C. Facts, Argument, and Conclusions about the Common Issues

1. The room cleaners' protest

Hotel Frank complaint paragraph 9 and Hotel Metropolis complaint paragraph 7 alleges that Respondent violated Section 8(a)(1) by issuing written warnings to room cleaners Souping Huynh, Amy Lum, Dinora Medrano, and Monica Solis, because they engaged in a concerted protest of the increased room cleaning requirements HPG imposed when it took over the hotel's operation. Paragraph 7 of the Hotel Metropolis complaint makes the same allegation as to room cleaners, Julia De Leon and Vilma Perez, at that hotel.

a. Relevant facts

One of the initial terms established by HPG altered the contractually established practices that governed the workload of the room cleaners employed at those two hotels. The base standard under the most recent union agreements had been 13 rooms per day. (GC Exh. 46, p. 50.) HPG increased that requirement to 15 rooms per day but it also lengthened the workday from 8 to 8-1/2 hours. Martinez, in particular, and Respondent in general claimed that the base requirement for the Hotel Frank cleaners was 14 rooms per 8-hour day under the prior union agreement. As employees are given half an hour

for lunch and have two 15-minute breaks, Respondent argues that by increasing the workday to 8-1/2 hours it maintained the average half an hour per room ratio that existed before it took over the operation of the hotels. (Tr. 22.) Both the old and new standards contain detailed, though different, refinements that reduce a cleaner's daily room cleaning load if rooms are located on different floors, if a specified number of assigned rooms involve guests checking out, or if other unusual situations exist.

When company and union officials met on June 10, Casey requested that HPG return to previous room cleaning work levels. (Tr. 278.) Wali refused on the ground that he was unwilling to make piecemeal agreements with the Union. (R. Exh. 14, p. 2.)

This change remained a bone of contention between the room cleaners and management. Some room cleaners complained to the union agents that they had to forgo their break periods in order to meet the new standard. In about mid-June, Rafael Leiva and Josephine Rivera, Local 2 field representatives for the Hotel Metropolis and Hotel Frank, respectively, met with a group of dissatisfied room cleaners to discuss the issue. They reached an agreement to protest the change through a "room drop," a prearranged plan for the participating room cleaners to stop work after cleaning 13 rooms unless management agreed to pay overtime to complete the other 2 rooms. Union Agents Leiva and Rivera scheduled the room drop for June 28, 2 days before the bargaining session scheduled for July 1.

When Leiva arrived at the Hotel Metropolis shortly after 4 p.m. on June 28, room cleaners DeLeon and Perez were engaged in a discussion about the room issue with the Hotel Metropolis manager, Kristopher Mangonon. DeLeon and Perez had cleaned 13 rooms up to that point and wanted Mangonon to take their remaining rooms "back" and credit them with a full day of work for the rooms they had already cleaned. In the midst of the discussion, Mangonon left to make a phone call. When he returned, he told the room cleaners: "Ladies, you're still on the clock. I know that you have a very long day, but I could not get the rooms back. You can go." DeLeon and Perez left without cleaning their remaining rooms. (Tr. 268-269.)

Rivera went to the Hotel Frank around the same time. She met with three of the four cleaners participating in the room drop along with Ali Abid, the Hotel Frank union steward, in the breakroom. They went to Executive Housekeeper Martinez' office as a group where they were joined after a short while by Monica Solis, the fourth cleaner involved. Rivera told Martinez that the cleaners were returning the rooms not cleaned up to that point and requested that she allow the cleaners to leave at that time or pay them overtime to stay and finish their rooms. Martinez attempted to call General Manager General Manager Stan Kott but he was not available. Although the group waited a few minutes for Kott to return Martinez' call, they finally went home when that did not happen. (Tr. 406-408, 663-664.)

The following day management issued nearly identical written warnings to all six of the room cleaners. After noting that the employee had not cleaned the required number of rooms the previous day, the warning stated:

Please be reminded that if you do not clean the required number of rooms that are assigned to you, then you will be subject to receiving written performance warnings that could lead to the termination of your employment if the problem persists.

(GC Exhs. 31, 32.)

b. Argument and conclusions

The Acting General Counsel argues that the conduct of the six room cleaners on June 28 was protected under Section 7 and therefore, the warnings they received on June 29 violated Section 8(a)(1). Respondent asserts that these six room cleaners engaged in a "slowdown." It analogizes their conduct to that of the employees in *First National Bank of Omaha*, 171 NLRB 1145 (1968), *enfd.* 413 F.2d 921 (8th Cir. 1969), and *Audubon Health Care Center*, 268 NLRB 135 (1983). In sum, Respondent argues that the room cleaners' conduct was unprotected.

The cases cited by Respondent pertain to partial or intermittent strikes. The Board and the courts have long held that such strikes are not protected under Section 7. *Vic Koenig Chevrolet*, 263 NLRB 646, 650 (1982) However, drawing the line between employee conduct that amounts to protected strike activity and unprotected intermittent or partial strike activity can often be difficult, albeit necessary, task *First National Bank*, *supra* at 1149.

The evidence of a slowdown as that term is traditionally used in labor relations law is weak. The room cleaners' shift starts at 8 a.m. (Tr. 90.) Their shift ends at 4:30 p.m., an 8-1/2-hour period that includes a 30-minute lunch period and two 15-minute breaks. (Tr. 72, 429.) With the exception of Solis, it appears that those participating in the job action simply ceased working at approximately 4 p.m. after cleaning only 13 rooms. (Tr. 267, 351, 663.) Although this evidence could suggest that they might have been slightly behind schedule, other evidence that the room cleaners frequently had to forgo their break periods (Tr. 89-90, 281) to complete their work on time makes any conclusion that a slowdown occurred throughout that day unlikely.

Instead, the evidence shows that the room cleaners involved ceased working altogether prior to the end of their shift. The Board presumes that "a single concerted refusal to work . . . is a protected strike activity; and that such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." *Polytech, Inc.*, 195 NLRB 695, 696 (1972).

I find the presumptively lawful action by the six room cleaners on June 28 has not been rebutted. The single work stoppage here was the direct result of the room cleaners' frustration over HPG's increase in the room cleaning assignments. Before the stoppage occurred, this group complained repeatedly to their immediate supervisor about this change. They also pressured Local 2 to do something about it. In turn, Casey made an effort at the June 10 meeting to have HPG reconsider the increase in room cleaning assignments. No evidence of a plan or pattern is present here. No other stoppage of any kind by any of the unit

employees occurred before or after the room cleaners June 28 job action. And finally, neither Local 2 nor the room cleaners have threatened further work stoppages of this nature.

Accordingly, I find that this brief work stoppage in protest of the increased room cleaning workload constituted protected concerted activity within the meaning of Section 7, and for this reason the June 29 warnings of potential discipline violated Section 8(a)(1), as alleged.

2. The probationary period extension

Paragraph 12(b) of the Hotel Frank complaint and paragraph 8(a) of the Hotel Metropolis complaint allege that about August 5, 2010, the hotels extended the initial 90-day probationary period for the unit employees by an additional 45 days.

a. Relevant facts

The employment letter given to employees on May 12 provided that the employees, though long-term employees at the respective hotels, must serve a probationary period. The employment letter stated:

Your employment with the Company will initially be pursuant to a 90-day probationary period, during which time the Company will assess your skills, ability and performance in your position. At or prior to the end of the 90-day probationary period, the Company will make a determination as to whether to retain you as a regular full-time or part-time employee of the Company under the terms set forth in this offer letter, or end the employment relationship.

In addition, employees were provided employee manuals. One provision in the Hotel Frank and the Hotel Metropolis manuals provided as follows:

INTRODUCTORY PERIOD

All new and rehired employees shall serve an introductory period of 90 calendar days commencing with their first day of employment. Any significant absence will automatically extend the introductory period by the length of the absence. * * * The Hotel reserves the right to extend the duration of the introductory period when such an extension is determined appropriate in the Hotel's sole and absolute discretion. * * * After completion of the introductory period eligible employees will receive the benefits described in this Handbook under the section entitled Benefits. [Emphasis added.]

(R. Exh. 5, p. 6 (Hotel Frank); GC Exh. 33, p. 6 (Hotel Metropolis).)

On August 5, Kott issued a memorandum addressed to all front-of-the-house staff members announcing the extension of the probationary period for 45 days from August 11, the end of the original probationary period.⁷ (GC Exh. 14.) Kott's memo cited the above-handbook provision essentially as authority for the action. The extension applied to all front desk, night audit,

and bell attendant staff members. Kott's memo said that the reasons for this action were the disappointing results from the most recent mystery guest reports and HPG's desire to give "everyone . . . the opportunity to succeed rather than making employment decisions regarding regular employment status at this time." An August 7 memo from Human Resources Manager Bryant Smith and Kott scheduled additional front of the house training sessions for August 16 at the Frank and August 17 at the Metropolis and the Vertigo. (R. Exh. 26; Tr. 529, 834.)

b. Argument and conclusions

Relying primarily on *LB & B Associates*, 340 NLRB 214 (2003), the Acting General Counsel argues that Respondent violated its duty to bargain under Section 8(a)(5) by failing to notify Local 2 and provide it with an opportunity to bargain before implementing the extension of the probationary period. Respondent, citing the principle controlling the outcome in *Monterey Newspapers, Inc.*, 334 NLRB 1019 (2001), argues that it did not violate its duty to bargain because its discretion to extend the introductory period for new hires was tightly circumscribed, i.e., the extension was limited to a 45-day period for the purpose of providing more training and getting further mystery guest reports. Respondents also argue on the basis of the holding in *Fresno Bee*, 339 NLRB 1214 (2003) (presumably the change dealing with the unilateral change in the payroll period), that they were not required to bargain about the extension because it did not materially affect employees' terms and conditions of employment.

I conclude that Respondent violated the Act as alleged. First, I reject Respondents claim that the extension of the probationary period did not materially affect the employees' terms and conditions of employment. The very nature of a probationary period implies a conditional employment status. Although Kott's memo stated that the employees put on the prolonged probationary period would receive those benefits the others would receive at the end of the 90-day period, the 45-day extension prolonged their unsettled employment status. The *Fresno Bee* case cited by Respondents is factually distinguishable. There the change at issue amounted to an adjustment of the employer's payroll periods that the Board described as, at most, a ministerial change with only a de minimis effect. And even in those few instances where some impact occurred, the employer quickly corrected it.

NLRB v. Burns Security Services, 406 U.S. 272, 278-281 (1972) holds that a successor employer, such as the Respondents here, may ordinarily free to set its initial terms and conditions of employment without bargaining over those matters with the employees' bargaining agent. Respondents did two things of relevance that fit within the penumbra of initial employment terms; they set a 90-day probationary period in the May 12 employment letters and they adopted a 60-plus page employee manual that contained numerous terms and conditions of employment that went far beyond the terms set forth in the May 12 employment letters. In effect, the employee manual gave notice to the employees that, as to the probationary period, their employer retained complete discretion to expand the probationary period as they saw fit. Fairly read, the manual

⁷ Based on the Kott's calculation that the 90-day probationary period ended on August 11, it is obvious that the Company presumed that the period began on May 13 rather than May 12, the date on which the hotel employees were actually hired by HPG. Therefore, if the initial 90-day period concluded on August 11, the 45-day extension would run through September 25.

provided Respondents with the ability to expand the probationary period by 6 days or 6 months for any reason it “deemed appropriate.”

Respondents’ reliance on *Monterey Newspapers*, supra, to justify the extension of the probationary period is misplaced. There the panel majority concluded that the employer’s discretion in setting new employee pay rates need not be bargained over so long as they fit within the narrow pay bands established as an initial terms when it took over from the prior owner. Here, the type of discretion retained by Respondents in their employee manuals is so broad as to give rise to the duty to bargain under *NLRB v. Katz*, 369 U.S. 736 (1962). Essentially, there are no limits on the Respondents’ discretion with respect to the probationary period. For that reason, I find Respondents violated Section 8(a)(5), as alleged, by failing to give Local 2 notice and an opportunity to bargain about the extension.

D. Facts, Argument, and Conclusions about the Other Hotel Frank Issues

1. The union insignia ban

Paragraph 6 of the operative complaint alleges that Respondent violated the Act when Stan Kott informed the Hotel Frank employees around June 4 by way of a memo that they could not wear union insignia. The Respondent’s amended answer denies the allegation but admits that Kott issued a memo to employees at that time regarding the uniform dress code.

a. Relevant facts

For many years several Hotel Frank employees wore small union insignia on their work uniforms to signify their allegiance and support for Local 2. Respondent’s employee handbook contained a detailed dress policy with a provision that banned the wearing of any “pins or other jewelry” except for the employee’s nametag. (R. Exh. 5, p. 27.) After Respondent took over the operation, many of the employees discontinued wearing their union buttons but a few did not.

Marc Norton, a bellman at the Frank, continued wearing his Local 2 button on his uniform. A week or so after HPG began operating the Frank, Peter Kim, the front-office manager at the time, told Norton that, on instructions from Maribel Olmeda, HPG’s human resources director, he had to remove his union button. On June 4 a notice was posted on the employee bulletin board signed by Kott. The substance of the notice reminded employees that the employee handbook provided that “name-tags are the only approved pin or accessory that is allowed to be worn on your uniform.”

Respondent Frank’s nametag-only policy is tantamount to barring employees from wearing union insignia as they had done for years. Wali’s testimony reinforces that conclusion:

Q. Okay. Your—your handbook talks about not wearing anything except a name tag on your uniform?

A. That is correct.

Q. So are you going to change your handbook now to allow union buttons?

A. We—in union circumstances, we would. However, when we took over these hotels, they were non-union, because you had not demanded the—the union had not demanded recognition yet. It and that’s where we erroneously

assumed, because we were not represented, that they should not wear the button. However, the minute the demand was made, again, erroneously, we believed that that was the cutoff point, that we would allow it. So to answer your question, in the event that we take a hotel over that is union, we will modify the book to allow the use of the button.

(Tr. 559–560.)

Subsequently, Norton brought the button ban to the attention of Local 2 President Mike Casey at a union meeting held for the hotel employees. Casey labeled the directive with an expletive and told the employees that he wanted them all to begin wearing their union buttons.

At the June 10 meeting between Wali and Casey with a group of the Hotel Frank employees, Casey informed Wali of his instruction to the employees about wearing union buttons and advised that the Company should not make an issue of it.⁸ (Tr. 56.) In his June 14 letter granting formal recognition to Local 2, Wali told Casey that employees would be permitted to wear union buttons now that the Union had been formally recognized. (R. Exh. 14, p. 2.)

b. Argument and conclusions

The Acting General Counsel argues that the evidence establishes that Respondent prohibited its employees from wearing union insignia at work and, as Respondent failed to justify the ban by showing special circumstances, its conduct violated Section 8(a)(1).

Respondent argues that Kott’s June 4 memorandum did not violate Section 8(a)(1) because Wali informed employees during the June 10 meeting that they would be permitted to wear union buttons (a claim which I have found to be unsupported by credible evidence) and later clarified the policy in the June 14 letter to Local 2. The Acting General Counsel argues that Respondent’s effort to invoke the repudiation doctrine as to this issue fails under the standard established in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Supreme Court approved the Board’s conclusion that, absent unusual circumstances, employer rules prohibiting employees from wearing union buttons at work unlawfully interfere with their Section 7 right to engage in union activities. Here, Respondent made no attempt to justify its rule limiting adornments on employee uniforms to company provided nameplates on the ground that some special circumstances warranted it. Instead, its defense tacitly acknowledges that no basis for a restriction exists by asserting that Wali effectively repudiated the interference with wearing union buttons that resulted from, and was obviously intended by, Kott’s June 4 notice.

I reject the contention that Wali effectively repudiated the interference with employee rights caused by Kott’s notice. Under

⁸ I do not credit Wali’s testimony that the button issue was resolved in front of employees at the June 10 meeting. (Tr. 480–481.) 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. For these reasons, I find his later contrary testimony unreliable.

the *Passavant* repudiation doctrine, the Board requires that, to be effective, the repudiation of prior unlawful conduct must be: (1) timely, (2) unambiguous, (3) specific in nature to the coercive conduct, (4) free from other unlawful conduct, (5) adequately published to the employees involved with no unlawful conduct following the publication, and (6) accompanied with assurances that no further interference with Section 7 rights will occur in the future.

Wali's words and conduct following the ban fails the *Passavant* standards. His quoted testimony above strongly suggests a lack of appreciation for the legal principles involved. Ordinarily, the wearing of union insignia by employees at work is not a privilege an employer can grant or withdraw based on its own house rules. The wearing of union buttons in the work place is a statutory right of employees absent unusual circumstances not present here. The fact that Kott's notice remained posted for several weeks and Wali's assertion that the rulebook provision at issue would be retained for use at nonunion locations precludes a finding that this unlawful conduct has been effectively repudiated.

I also find Respondent's reliance on *Agri-International Inc.*, 271 NLRB 925 (1984), misplaced. That case is clearly factually distinguishable. There two members of a three-member Board panel agreed with the administrative law judge's conclusion that the employer had adequately repudiated a series of employee interrogation by a group of supervisors. The judge analyzed the employer's repudiation claim using the *Passavant* standards. He found the following action taken by the employer's principal executive sufficient: (1) each supervisor personally informed that their conduct was illegal and that employees had the right to engage in union activity; (2) posted a notice on the employee bulletin boards for 60 days pledging that the conduct would not be repeated and informing employees of their statutory rights; (3) read the notice to the employees at a series of meetings called for that purpose; (4) required the errant supervisors to agree in front of the employees at particular meetings that they would abide by the notice read to the employees; and (5) mailed the notice to the home of each employee.

The credible evidence show only that Respondent notified the Union's president employees would be permitted to wear union buttons at the represented hotels. It gave no straightforward notice to employees that they could wear union insignia if they chose to do so. Respondent's limited step is insufficient to satisfy *Passavant*. Hence, by prohibiting employees from wearing union insignia, Respondent violated Section 8(a)(1), as alleged.

2. The executive housekeeper's statements

Paragraph 7 of the Hotel Frank complaint alleges that Respondent violated Section 8(a)(1) when Melanie Martinez, the executive housekeeper, told several employees on different occasions in June 2010 that there was "no union" and when she told employees in late July that they had no union protection.

a. Relevant facts

Jose Lara, a laundry worker at the Hotel Frank and a long-time Local 2 steward, works under Martinez' supervision. He acknowledged that he had learned following HPG's takeover

that Wali had met with Casey in an effort to "reach an agreement." He also knew about the ongoing contract negotiations between the Company and the Union.

Lara attends the morning meetings that Martinez conducts each day with the room cleaners, laundry employees, and the housemen. In fact, they take place in the laundry area where Lara works. He recalled that the first day HPG began operating the hotel, the room cleaners complained about the increase in the number of rooms they were assigned to clean. Martinez responded to that complaint and similar ones over the next couple of months by telling the cleaners they would have to comply with the new standard because there was no union anymore. Lara added, "She would often say . . . that there was no union contract, and that we were working without a contract." There then followed this colloquy between counsel for General Counsel and Lara:

Q. Can you repeat in English what you heard her say about the union during these morning meetings?

A. Yes, of course.

Q. Can you repeat that now in English.

A. Of course. (In English) She used to say, "Remember guys, we're not working for a union. We're not union anymore."

(Tr. 324-325.)

Monica Solis also remembered Martinez making similar comments about the absence of a union on six or seven occasions in June. In reference to the morning meetings, she said that Martinez would remind the room cleaners of various details they should not overlook and warned that they could be written up if they did. In this context, Solis said, Martinez would remind them that they "weren't protected by the union." (Tr. 356.)

Sometime around mid-June, Martinez assigned Lara and a coworker named Willy to get a rollaway bed at the Hotel Metropolis (about 5 blocks away) and put it in the penthouse suite at the Hotel Frank. There is no elevator to that suite situated at the top of the hotel. According to Lara, it had been a practice under the prior union agreement that employees could not be assigned to carry heavy items such as a rollaway up to the penthouse because there was no elevator to that location. Lara said that he and his coworker hesitated momentarily when Martinez first spoke about this assignment because of this practice. Before either of them could say anything, Martinez said, "You must do it now because there's no union." By way of explanation, Lara volunteered that Martinez "had knowledge of the entire contract" that existed under the prior hotel operator. (Tr. 326-327.)

Thomas Vargas is a long-tenured houseman supervised by Martinez. On June 10 he returned to work after a 2-month medical leave. Vargas acknowledged that when he returned to work he understood that Local 2 still represented the employees and that other members of management told him as much. (Tr. 317-318.) When Vargas submitted his doctor's release to Martinez before starting work, she told him about the new hotel ownership and added that there was no union anymore so he could do everything that she wanted him to do. (Tr. 308, 319.)

On June 23, Martinez told Vargas there was no union in the course of giving him a written warning for damaging a wall when a table he attempted to carry from the penthouse by himself slipped and rolled down the stair well. (Tr. 312; GC Exh. 38, p. 6.)

Around July 15, Vargas overheard Martinez make a similar remark when she talked to the room cleaners about a guest complaint at their morning meeting. Supposedly a room cleaner named Anna became very critical of HPG for increasing the number of rooms assigned to each cleaner and the lack of time to adequately complete their work.⁹ Martinez responded by saying that she cleaned 16 rooms a day when working as a hotel maid and that, as there was no union anymore, they were expected to clean their assigned rooms very well. (Tr. 310–311.)

Martinez remembered an occasion when the room cleaners complained about the increased number of rooms they had to service but claims that she did not respond to them in the manner Vargas attributed to her. Rather, Martinez said she told them they still had to follow company policy regardless if it's union or not. (Tr. 669.)

As recounted in more detail below, a protest occurred on June 28 when four of the room cleaners, assisted by Local 2 Representative Josephine Rivera, walked off before cleaning all of their assigned rooms. In addition, there is no evidence that Lara, Solis, Vargas, or any other employee ever challenged Martinez when she made statements about to the effect that there was “no union.”

b. Argument and conclusions

Contrary to the Acting General Counsel's claim, Respondent argues that Martinez is not a supervisor under Section 2(11) of the Act. Although I have concluded, in agreement with the Acting General Counsel, that Martinez is a supervisor within the meaning of Section 2(11) of the Act, I find the evidence insufficient evidence to establish that Martinez' “no union” remarks violated Section 8(a)(1).

The executive housekeeper's duties as described in the job description (GC Exh. 39) for the position provides as follows:

SUPERVISORY RESPONSIBILITIES:

Manages all employees in the Housekeeping Department. Is responsible for the overall direction, coordination, and evaluation of this unit.

Carries out supervisory responsibilities in accordance with the organization's policies and applicable laws. Responsibilities include interviewing, hiring, and training employees; planning, assigning, and directing work; appraising performance;

⁹ HPG also increased the length of the workday for the cleaners to 8-1/2 hours. The base standard under the most recent union agreement had been 13 rooms per day. GC Exh. 46, p. 50. However, Martinez claimed that the Hotel Frank cleaners were doing 14 rooms per 8-hour day under the prior union agreement. Both the old and new standards have detailed refinements that reduce the daily room cleaning requirement in situations where the cleaner's assigned rooms are located on different floors, where a specified number of assigned rooms involve guests scheduled to check out, and the like.

rewarding and disciplining employees; addressing complaints and resolving problems.

The duties described in this job description were not effectively rebutted by other credible evidence. Several are consistent with specific conduct by Martinez as shown throughout this record. Accordingly, I find the Martinez is a supervisor within the meaning of Section 2(11) because she is clearly vested with authority to interview and hire employees, assign and direct the work of employees, and discipline employees, all in the interest of the employer.

Relying on two decisions, *Becker Group, Inc.*, 329 NLRB 103 (1999), and *Ed Morse Auto Park*, 336 NLRB 1090 (2001), the Acting General Counsel advances the proposition that a “statement made by an employer to employees that there is no union at the facility after a union has been recognized as the Section 9(a) representative constitutes a Section 8(a)(1) violation.” (Acting GC Br., p. 20.) After careful study, I have concluded that the violations found in those two cases clearly turn on their peculiar facts rather than a per se rule of the type articulated in the above-quoted portion of the Acting General Counsel's brief.

In the *Becker* case, the “no union representation” remark found unlawful occurred in the context of a confrontation that erupted when a supervisor, who was about to issue disciplinary warnings to an employee, angrily ordered a newly appointed steward of a newly certified union seeking to serve as the employee's Weingarten representative from his office. The case does not stand for the broad proposition that a supervisor's remark without more would necessarily violate the Act. As my former colleague Judge Nations made clear in the following explanation for his conclusion on this point, the context made the violation:

However, I believe (supervisor) Smith's statement to (union steward) Cooper and Jennings (on September 30) that there was no union representation at Respondent's facility constitutes an 8(a)(1) violation. The Union was certified as the exclusive collective-bargaining representative of the Becker employees on July 19, following the July 1 election. . . . An employer, or its agents, cannot arbitrarily decide that a union does not have a presence in the employer's facility. The certification by the NLRB provides a 1-year presumption that the union represents the employees for purposes of collective bargaining. . . . Had Smith merely informed Cooper that under the circumstances of the meeting, Jennings had no legal right to union representation, I would not find a violation. However, his statement went much further. Considering that the statement made by Smith occurred as Cooper was attempting to engage in union representation, *there was a coercive nature to the statement*. Such a statement has a chilling effect on a unit representative's ability to represent and on the employee's right to be represented, and thus constitutes an 8(a)(1) violation. [Emphasis added.]

329 NLRB at 113.

The *Morse* case involved a similar form of hostile, supervisory interference with an employee's active effort to utilize the help of the newly certified union when meeting with manage-

ment over a pay dispute. On the relevant point, Judge Grossman found as follows:

The two employees (union steward Tucci and Fitzgerald, the nascent grievant) went to (supervisor) Riker's office, but he was busy and they went back to their work areas. About 45 minutes later, Riker came out to Fitzgerald's work area. Tucci's work area was next to Fitzgerald's, and he heard Fitzgerald tell Riker that Tucci had asked to be present at the meeting between Riker and Fitzgerald. Riker replied, "No way," and came over to Tucci's work area. "There's no Union here," he yelled at Tucci, "and you're not the f-king shop steward." Fitzgerald was then called to Riker's office.

After speaking with Fitzgerald, Riker told Tucci to accompany him to General Manager Naso's office. When they entered the office, Naso told Tucci that there was no union at the facility, and that Tucci was not the shop steward. Tucci handed Naso copies of the Union's notification to Respondent of its certification and the notice identifying Tucci as the shop steward. Tucci asked Naso whether he had received these documents, but Naso did not reply. He told Tucci that he did not "appreciate Tucci counseling the men," that he had a "bad attitude," and that he would terminate Tucci if he kept it up. Naso testified that he considered a writeup for Tucci, because he became "involved in other technicians' business with regard to other technicians' employment."

336 NLRB 1099.

Martinez' conduct, whatever it was, did not amount to anything resembling the crude, supervisory interference with representational activities present in those two cases. Martinez is a Filipina who acquired her position of responsibility after years of work as a room cleaner in the industry. The "back of the house" at the Hotel Frank that she directly supervises is populated by 14 room cleaners, 2 or 3 laundry workers, and 2 housemen. Several in this group are Hispanic, others are Chinese. Martinez speaks English and Tagalog but not Spanish or Chinese. She gives directions to her crew in English. Based on my limited observation at the hearing, and the fact that those few Hispanics from this crew who testified did so through a Spanish interpreter, I find it fair to assume that most have very limited English proficiency.

Given the linguistic stew found in this unit, I find Martinez' "no union" remarks, when considered in context, to be highly ambiguous. But at worst, I find them to be nothing beyond noncoercive misstatements of fact that lacked the heavy-handed, chilling characteristics so easily evident in the *Becker* and *Morse* cases. Through the period when they were made, employees openly wore their union buttons, attended the negotiating sessions, and engaged in protests of the new working conditions with the participation of the Local 2 representatives who had historically serviced this bargaining unit. And at best, it is possible, if not plausible, to view her "no union" remarks as a shorthand code easily understood by this diverse group of workers that let them know the old work rules embedded in the past union agreement, and practices that evolved under it, did not apply to HPG's new operation. Either way, I find the evi-

dence insufficient to sustain an 8(a)(1) violation. Accordingly, I recommend paragraph 7 be dismissed.

3. Photographing concerted activities

Complaint paragraph 8 alleges that Respondent engaged in unlawful surveillance on July 22 and September 8 when its agents took photographs, or appeared to take photographs, of employees engaged in union activities.

a. Relevant facts as to July 22

On July 22, Local 2 conducted a large demonstration estimated in size to include anywhere from 1000 to 1500 participants. The demonstration sought to put increased pressure on various downtown San Francisco hotels during ongoing contract negotiations to agree upon terms favorable to the union represented employees. Notices circulated in advance announcing the demonstration. It began on Market Street, the main east-west thoroughfare in downtown San Francisco, and proceeded to several different hotels in the area, including the Hotel Frank. The demonstrators stopped for a period of time at each targeted hotel to chanted slogans.

The demonstrators arrived at the Hotel Frank around 4 to 4:40 p.m. and remained there for 15 to 20 minutes. Kott described the scene as pretty chaotic as all traffic was stopped because the street and parts of the sidewalks on both sides of the street were filled with demonstrators. (Tr. 873-874.) Hotel Frank employees Ali Abid, Jose Lara, Marc Norton, and Jack Saltzberg joined the demonstrators in a show of support for Local 2 objectives. At least Abid had a banner as he joined the rally at the Hotel Frank. As the demonstrators arrived there, five of Hotel Frank managers, General Manager Stan Kott, Executive Housekeeper Martinez, Front Office Manager Peter Kim, Human Resources Director Olmeda, and Human Resources Manager Bryant Smith were standing on the sidewalk in front of the hotel.

Jack Saltzberg and Jose Lara saw Peter Kim take pictures of the rally in front of the Hotel Frank. (Tr. 329, 502.) Ali Abid saw Maribel Olmeda holding her cell phone in a manner that looked like she was taking pictures but he conceded that he did not know whether she actually took any pictures. (Tr. 388, 395.) A picture of Abid at the demonstration with his banner was posted on the employee bulletin board but there is no evidence as to who posted it. After the rally, Kim showed Saltzberg the photos he had taken. Saltzberg said that Kim's photos showed the demonstration and the Hotel Frank employees participating in the demonstration. (Tr. 503.) Kim did not testify and Olmeda did not deny Abid's assertion that she appeared to be taking photographs.

b. Argument and conclusions

Respondent's argument concedes that its agents took photos or videos while the demonstrators were at the Hotel Frank. As a general rule, photographing or videotaping employees engaged in protected activity violates the Act unless the employer can demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), citing *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976) ("[T]he

Board may properly require a company to provide a solid justification for its resort to anticipatory photographing.”)

Respondent Frank claims that it had a reasonable basis for photographing the July 22 demonstration in front of the hotel. The Acting General Counsel’s argues that the coercive effect of photographing the employees participating in the demonstration outweighs Respondent’s justification for taking them, i.e., that it was big enough to block traffic.

I agree with the Respondent Frank’s contention that there was a reasonable basis for photographing this large demonstration. The evidence describing the demonstration as large enough to block traffic in and around the hotel for 15 to 20 minutes so that its guests, and potentially emergency vehicles, were unable to travel to and from the Hotel Frank is not a minor matter. Respondent Frank further asserts that the size of the demonstration which spilled onto the sidewalks on both sides of the street provided it with a legitimate concern about maintaining the entrances and the exits to the hotel. Moreover, no evidence establishes that the photographs taken sought to zero in on the Hotel Frank employees, or that Respondent took any adverse action or other type of coercive measures against any employee for participating in the demonstrations. Instead, the evidence suggests that the four Hotel Frank employees who joined the demonstration would have likely been consumed by the sheer size of the crowd. For these reasons, I find the Acting General Counsel failed to establish that the photographing or videotaping of the demonstration on July 22 violated the Act. *Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001). Accordingly, I will recommend dismissal of this complaint allegation.

c. Relevant facts as to September 8

On September 8, a delegation of workers from the Hotel Frank and the Hotel Metropolis along with Local 2 Agents Anand Singh and Josephine Rivera went to the Wells Fargo headquarters in San Francisco to deliver a petition signed by 34 employees of the two hotels. The petitions stated that the employees would promote a boycott of the hotels until management ended “their anti-worker, anti-union campaign.”¹⁰

After the group finished at the bank headquarters, they proceeded to the Hotel Frank with the intention of presenting the petition to General Manager Kott. When they arrived in the hotel lobby they met Front Desk Manager Michael Infusino.¹¹ Upon learning of Kott’s unavailability, Norton informed Infusino about the beginning of the boycott. He proceeded to introduce others from the group so they could speak “about the egregious things (they felt) the hotel has been doing to its workers.” (Tr. 66.) Infusino willingly engaged the group, said nothing to indicate that they were trespassing or doing anything

¹⁰ Marc Norton, whose signature appears first on the petition and who claimed that he participated in planning the boycott and the events surrounding it, said the delegation consisted of himself and his partner, as well as six other workers from the Hotel Frank, one from the Hotel Metropolis, maybe three from other hotels, and the two Local 2 representatives. Tr. 62–63. Local 2 Agent Rivera provided a different accounting of the participants that I find to be less reliable. Tr. 410.

¹¹ Infusino succeeded Peter Kim as the front desk manager in mid-July.

unlawful, and made no demand that they leave. (Tr. 256, 786.) Instead, the group voluntarily left after about 10 minutes.

Executive Housekeeper Martinez, in the lobby on her normal rounds, saw the group engaged with Infusino. Norton said that she soon “she pulled out a camera and started clicking pictures.” (Tr. 67–68.) Martinez admitted taking a picture of Norton and the group but implied that she did so because Norton took a picture of her. (Tr. 673.) Infusino did not realize that Martinez had taken pictures until after the event. Martinez told him that she had taken pictures because the group had taken several pictures of him. (Tr. 786–787.)

d. Argument and conclusions

The Acting General Counsel argues that Respondent had no justification for photographing this exchange. Respondent contends that Martinez’ had a reasonable basis for taking pictures of the group because they were trespassers who were obstructing the lobby and “blocking guests’ ability to traverse in and out of the hotel.”

I find Respondent lacked a reasonable basis for the picture taking that occurred on this occasion. Its contention that the group’s brief presence in its lobby amounted to trespassing lacks merit where, as here, most were hotel employees or union agents authorized to visit the hotel and Infusino failed to object to anyone’s presence. I also reject Respondent’s contention that the group interfered with the comings and goings of hotel guests. This assertion is based entirely on Martinez’ claim that one guest had to walk around the group while they were speaking with Infusino in the lobby area. (Tr. 673.) Obviously, the petition bore a message the hotel did not care to hear but the group delivering it remained peaceful, orderly, and respectful throughout. In sum, I find Respondent lacked sufficient justification for the picture taking of the legally protected employee activity that occurred on this occasion and, for that reason, I have concluded that it violated Section 8(a)(1), as alleged. *National Steel & Shipbuilding Co.*, supra.

4. Marc Norton’s discipline and termination

Paragraph 10 of the Hotel Frank complaint alleges that HPG gave employee Marc Norton a verbal warning on June 23 and a written warning on August 31, and then terminated him on September 30, in order to discourage its employees from engaging in protected union and concerted activities.

a. Relevant facts

Marc Norton worked as bellman at the Hotel Frank for almost 12 years prior to his discharge on September 30 by HPG. As already described above, Norton participated in many of the Local 2 initiatives after HPG took over operation of the Hotel Frank. Even before HPG became the operator at the Hotel Frank, Norton took a keen interest in the in the bankruptcy proceedings involving the hotel where he worked that was instituted in early 2010. He attended hearings at the bankruptcy court as well as the foreclosure sale. After one of the hearings, a Local 2 attorney introduced Norton to Wali as an active union member at the Hotel Frank, and told Norton that Wali would likely take over operation of the Hotel Frank if Centerline, a subsidiary of Wells Fargo Bank, became the new owner of the hotel. That, in fact, occurred at the May 12 bankruptcy sale.

At the conclusion of the sale, Norton congratulated Wali and then went to the hotel to begin his work shift.

Shortly after Norton arrived at the hotel, a group of HPG officials, including Wali, Olmeda, and Howard Jacobs, arrived at the hotel to meet with the employees. Jacobs, at the time HPG's president and chief executive officer, assured the employees that they would all be hired at their same wage rate. He then began talking about what HPG's plans for providing fringe benefits, including health insurance and a pension plan. Norton twice interrupted him to point out that those benefits were contained in the union contract. Finally, Jacobs informed the group that HPG was not going to adopt the old union agreement. Immediately, Norton phoned union attorney Wirshing to report that "we have a problem here." As Norton described to Wirshing what he had just learned, Jacobs continued the meeting. By the time Norton finished his call, Olmeda was distributing HPG's new employee materials. Jacobs requested that the employees complete and sign all the necessary documents then and there. Again Norton spoke out arguing that the employees should not be required to sign the document without having the opportunity to read them. Following further discussion with the employees, Jacobs agreed that they given until the start of their next shift before their signed documents had to be submitted. Shortly after the meeting concluded, the hotel's interim general manager, Claudio Simic, confronted Norton about appearing upset at this initial meeting and questioned him about his standing with the Union. (Tr. 44-49.)

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. Those activities included:

- Circulating a petition among employees to become a union steward;
- Reporting General Manager Kott's union-button ban to the Local 2 president, continuing to wear a union button throughout the ban, and openly distributing union buttons to the hotel employees who attended the June 10 bargaining session;
- Attending the meetings between Local 2 officials and the Hotel Frank room cleaners that concerned their complaints about an increase in their workload and subsequently coordinating the June 28 room cleaners' protest with Local 2 officials;
- Participating along with four or five other Hotel Frank employees in the large Local 2 rally on July 22 when it arrived at the Hotel Frank;
- Initiating inquiries with the City of San Francisco bureaucracy and taking other actions that led to employer payments required under pertinent state labor codes and city ordinances to compensate employees for working nights without break periods, a sick leave benefit, and the cost of commuting to work. [GC Exhs. 17-26.]
- Assisting in the planning of the Hotel Frank boycott that started on September 8 and participating in the publication of that boycott by joining the delegation that went to Wells Fargo Bank and then to the Hotel Frank;

- Planning and participating in the subsequent picketing at the Hotel Frank in support of the boycott; and
- Attending the Local 2's bargaining sessions with the Hotel Frank.

After taking over hotel operations, HPG employed professional evaluation firms, referred to as "mystery guests." These firms assigned personnel to visit the hotel for a stay and then prepare detailed reports to hotel executives concerning the service provided during their stay. HPG also utilized an executive from one of these firms to conduct followup employee training.

Dale Blosser, owner of D.C. Blosser & Associates, conducted the first of the mystery guest training sessions on June 19. During his presentation, Blosser commented positively on an experience at another hotel where a room cleaner offered to assist him with his luggage when he stepped from an elevator at the floor where his room was located. Norton, who perceived this to be contrary to the historical practices at the Hotel Frank, raised his hand seeking to speak. Norton described his remarks after Blosser recognized him to speak thusly:

And I said, "Mr. Blosser, you may not know it, but you're walking into a mine field here." As soon as I said the word mine field he sort of gestured like this and sort of looked around the room in a sort of exaggerated gesture and said, "Mine field? Mine field? I don't see any mines."

And I said, "Well Mr. Blosser, you may not know it, but we're in the middle of a big union fight here."

And as soon as I said that I heard Mr. Kott over to my right say, "Marc, Marc."

And I said, "I'll be done in just a moment." And I proceeded to say, "Mr. Blosser, if you're going to talk about having room cleaners carry bags, then that's something that would be more appropriate to the bargaining table with our union president Mike Casey than at a training meeting."

When I got done saying that immediately there was a worker from—her name I believe is Bella from the Metropolitan who immediately spoke up and said, "This isn't about the union. This isn't about the union. This is about service."

And nobody tried to keep her quiet. And then Mr. Kott spoke up and he said essentially the same thing that Bella had said, which is, "No. This isn't about the union. We just have certain service standards that we want to uphold and that's what this is about." And that was the end of that discussion about the union.

(Tr. 78-79.)

On June 23, Kott called Norton to an office and spoke to him in with Olmeda and former Union Steward Jack Saltzman present about what his remarks to Blosser at the June 19 training session. Kott told Norton that he should not have talked about the union during the training session, that his remarks were disruptive and negative, and would likely have a negative influence on other employees. After speaking further about the topic, Olmeda spoke up. According to Norton, Olmeda said, "You know, Marc, everybody here is still on probation. And

we are going to be making some decisions at the end of that probation about who to keep on hand. (W)hen we make those decisions it's going to be important to us whether or not workers are on the same page with us."¹² At Kott's insistence, Norton agreed that at future sessions of that sort, he would speak to Kott privately about matters that involved the union "if possible and appropriate" and the meeting ended. (Tr. 82–83.)

Later, an unsigned memo of the meeting, labeled "Record of Conversation," was prepared and put in Norton's personnel file. (GC Exh. 7.) After summarizing Norton's conduct at the June 19 meeting, the Record of Conversation states:

Mr. Norton's tone of voice and demeanor was perceived as a very aggressive interruption. His overall behavior truly came across as being "anti-guest service" and against teamwork, whether he intended to or not and initially set a very negative tone to the start of the meeting.

The memo goes on to state that the managers stressed that the training was to "reinforce the hotel's expectations" concerning service standards that had been established for all employees. It concluded by saying that the hotel wanted Norton "to contribute to a positive work environment and promote an environment of team work for the good of the hotel, its guests and coworkers."

As time went on, Norton became highly critical of the mystery guest reports. In early August, Human Resources Manager Bryant Smith distributed memo addressed to the front-of-the-house staff about another mandatory training session that, as it turned out, Blosser also conducted.¹³ (GC Exh. 27.)

The day before Blosser's mid-August training session, Norton prepared and delivered a lengthy letter to Kott about a July 11 mystery guest report. Norton's letter contained numerous criticisms of the report and the hotel's practices. He first complained that "many of the matters raised by (the July 11) report properly belong at the bargaining table with our Union representatives, rather than being unilaterally imposed at a 'training session.'" He implied that confusion existed on the part of employees about who set the standards to be followed, what standards they were expected to follow, and how the employees were expected to know the ones to follow. He detailed "generic" mystery guest complaints about services and equipment that did not exist at the Hotel Frank. He suggested that at least one of the mystery guest's complaints (the failure of the front desk

clerk to do the bellman's work of loading luggage in a vehicle at curbside) reflected poorly on management for its under scheduling of bellmen and front desk personnel. He charged that aspects of the mystery guest's report were offensive (language difficulties with the room cleaners) and false (employees wearing union buttons but not nametags). He concluded his letter by expressing his "dismay at the fact that this inappropriate, inaccurate, and offensive 'Mystery Guest Report' appears to be the basis for the decision to extend our probation period by 45 days." There is no evidence that Kott responded to this particular letter.

On August 31, Kott gave Norton a written disciplinary notice for an incident that occurred on August 30 that involved Dayna Zeitlin, the HPG's director of sales and marketing as well as the assistant manager for the Hotel Frank, who maintained an office at the hotel. Before arriving at work that day, Zeitlin said she purchased a large quantity of candy to use for a hotel promotion. When she arrived at the hotel, she had one or two grocery bags filled with candy as well as her computer bag and a large purse.

Norton started out from the hotel lobby when he saw her taxi pull up at the curb in front of the hotel. As he got to within 5 to 7 feet of the taxi, he recognized Zeitlin in the cab. Assuming that she simply had taken a taxi to work that day as she had occasionally done in the past, Norton returned to his station in the hotel lobby. Norton claims that he did not see that Zeitlin had any luggage at all. Although Zeitlin claimed that she was in need of help, she admittedly did not ask him to assist her or otherwise speak with Norton who, she claims, was standing in the hotel lobby doing nothing. (Tr. 99–100, 600, 606.)

Later that morning, Zeitlin told Kott that Norton failed to help her when she arrived that morning. He, in turn, decided to discipline Norton after consulting with Human Resources Manager Smith and Front Desk Manager Infusino, Norton's immediate supervisor. He admittedly did not talk with Norton before reaching that decision and acknowledged that he made his decision based solely on Zeitlin's account because of her managerial position at the hotel. (Tr. 847.)

Norton's written warning (on a disciplinary form used by the hotel) summarizes the incident and identifies Norton's performance and behavior as the areas of concern that gave rise to the disciplinary action. The warning states: "We have previously spoken to you with regards to your attitude and the importance of working together as a team." It admonished Norton to treat other hotel employees "exactly how we expect our guests to be treated." Although another section of the form notes that Norton had "often set a great example of guest service," it concludes with the warning that any further incidents could result in added discipline or termination. (GC Exh. 9.)

On September 5 Norton prepared and submitted a letter to Infusino concerning the content of an early August mystery guest report and management's delay in furnishing the report to the employees.¹⁴ (GC Exh. 29.) His complaints about the de-

¹² Olmeda denied that she made the "same page" comment. She testified that she said "something along the lines" that the hotel had taken time to make sure employees understood the job performance standards so it would remain above its competitors. Tr. 628. Saltzman largely corroborated Norton's account, particularly Olmeda's "same page" comment. Tr. 506. Moreover, Norton's written note prepared shortly after the meeting reflects the "same page" comment by Olmeda. GC Exh. 56, p. 3. Given the degree of corroboration for Norton's account, and my lack of confidence in Olmeda's recollection, I credit Norton.

¹³ Smith's memo provided the times for two back-to-back sessions scheduled at the Hotel Frank on August 16 and stated that employees would be notified which session they were to attend. Norton, Ali Abid, the current Hotel Frank union steward, and Jack Saltzberg, the former union steward there, were the only employees scheduled to attend the second session on August 16. As it turned out, another employee ended up in their group but only because he had been late for the earlier session he had been scheduled to attend. Tr. 149.

¹⁴ Norton's letter implied that requests for the report had been made at the training session where it had been referred to frequently and discussed two requests after that session. His letter charges that the first postsession request, presumably made by union activist Jack

lay in providing the report appear to have sprung from the fact that the report had been discussed repeatedly at the August 16 training session conducted by Blosser. Norton noted that during the meeting Kott stated repeatedly that he “was not an ‘MVP’ in this report” and that Blosser had “acknowledged that (the employees) were being ‘blind-sided’ by this report.”

In the remainder of the September 5 letter, Norton responded to the adverse comments the mystery guest made about his performance. He challenged the guest’s assertion that he had not been “friendly and attentive” by noting that he had welcomed him to the hotel when they first met at the curb and chatted with him in the lobby in between helping other guests. He also denied the guest’s claim that he was “minimalistic” in his performance, and further denied that he had made no attempt to learn and use the spotter’s surname as preferred under the hotel’s service standards. No evidence shows that Infusino ever responded either verbally or in writing.

As previously noted (see sec. 3,c, above), Norton actively participated in the group of Local 2 agents and members who visited the Wells Fargo Bank and the Frank on September 8 to publicly announce Local 2’s boycott of the Hotel Frank. Thereafter, Local 2 Steward Abid and Norton planned picketing events in front of the Frank in furtherance of this boycott.

On September 15, 18, 23, and 29, Local 2 agents, employees from the Frank and Metropolis and other Local 2 members picketed in front of the Frank chanting slogans and distributing handbills (see GC Exh. 4) urging guests to join the boycott by checking out of the Hotel Frank. The first three picketing efforts began around noon and lasted a couple of hours or so. The September 29 picketing began later in the afternoon so the room cleaners could join the picketing when they got off work at 4:30 p.m. Although Norton participated in planning all of the picketing events, he only participated on September 18 and 29 because his work schedule precluded his participation on September 15 and 23. Each succeeding picketing event, Norton said, became progressively noisier as more participants joined in support of the boycott. (Tr. 68–72.) The participants had a large banner beginning with the third event and Local 2 Business Agent Rivera led the chanting with bullhorn on September 29.

On September 30, 5 days after his extended probationary period ended, Kott terminated Norton. He provided Norton with a full page memo to explain the termination that took effect immediately. The preliminary paragraphs addressed management’s goals and the standards of service implemented when it took over the operation of the hotel. The memo then cites Norton’s alleged performance deficiencies as the reason for his termination:

Saltzman, a week after the training session and 3 weeks after the date shown on the report ultimately furnished had not been provided because it was still undergoing editing for “unspecified corrections.” The second request, according to Norton’s letter, came on August 26 when Local 2 Steward Abid submitted a written request for the report. There is no evidence of a response to this September 5 letter from any hotel manager nor did any of the hotel managers, including Infusino—the addressee—who testified at the hearing seriously challenge the Norton’s assertions in this letter.

In evaluating your performance as a whole, we have determined that you are not fulfilling our expectations and that you have not demonstrated a consistent level of service at the standards that we have established.

As noted in the majority of the Mystery Shoppers reports, you consistently fail to attempt to learn and utilize the guest name; exhibit a lack of enthusiasm or attentiveness to guest needs; and often present minimalistic and less than personalized service. Management has reached the same conclusions regarding your performance based on Management’s personal observation of your performance during your probationary period. This level of performance and efforts by you are not acceptable or conducive to the serviced minded working environment we are striving to achieve.

Therefore, we have determined that your performance does not meet the standards that we have set in place to help position our hotel above our competitors, such that we will not be offering you regular full-time employment after the completion of your extended probationary period. Accordingly, we will be ending our employment relationship with you effective today.

(GC Exh. 10.)

HPG President Wali asserted that he made the decision to terminate Norton after consulting with Kott and Olmeda, and his consideration of Kott’s negative evaluation of Norton’s performance evaluation, the “writeups” in his file, and his disruptive conduct at the June training session.¹⁵ (Tr. 546.) Olmeda remembered that Wali consulted her about Norton’s termination. With some prodding, she recalled that they spoke about a week before Norton’s termination. She said that Kott recommended the termination based on his observation of Norton’s failure to measure up to the job performance standards even after the training that had been provided. (Tr. 631.)

Kott explained his recommendation to terminate Norton in this manner:

Q. Okay. And after having this, did you make any recommendation Mr.—I mean, what was the conclusion regarding Mr. Marc Norton’s employment?

A. It was my opinion that he was not meeting our standards.

Q. Okay. And what was that opinion based—I mean, you’ve mentioned a little bit. But can you be clear? Just tell us again what it was based on.

A. Yeah. Based on the overview of all of the shoppers’ reports as a whole and, you know, patterns and consistencies and, you know, missed opportunities within those areas, my own personal observations, you know, day-to-day and, you know, over that—over the entire period of time I’d been in the city.

...

Q. Okay.

¹⁵ Although Wali did not specifically identify the June meeting, there is no evidence warranting an inference that Wali could have been referring to any other meeting.

A. [F]eedback from his direct supervisor, observations of Mr. Norton in meetings, you know, our training meetings, I mean just the sum total of his demeanor and willingness to try to do more and do better with us as it related to the other staff members. I mean, it was just a lot of different things factored into it.

(Tr. 868–869.)

Infusino oversees and schedules the bell staff and other front of the house employee categories. In that capacity, he served as Norton's direct supervisor. Infusino explained that a "bellman's responsibilities are to assist the guests from the time they arrive at the hotel to the time they leave." (Tr. 699.) He asserted that "Mr. Norton's performance generally speaking for our standards was inadequate" (Tr. 712) and repeatedly affirmed for Respondent's counsel that the negative comments about Norton in various mystery guest reports were "consistent with [his] behavior and . . . job performance."

Infusino acknowledged that he never received a complaint about Norton's performance from a regular hotel guest and admitted that Norton never received any disciplinary action for failing to meet performance standards as noted in the mystery guest reports. Although Infusino asserted that he addressed performance issues as they arose, he had only a vague recollection of correcting Norton's conduct "[m]aybe two or three times." One, he said, concerned sitting at the concierge desk and the others he could not recall. (Tr. 784.)

b. Argument and conclusions

An employer's disciplinary action against an employee motivated by union animus violates Section 8(a)(3) of the Act. In determining the motive underlying an employer's adverse action against an employee, the Board employs a causation test first adopted in *Wright Line*, 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). As refined over the years, that test first requires the Acting General Counsel to persuade that a substantial or motivating factor for the employer's challenged decision was prohibited by the Act. If that burden is met, the burden of persuasion then shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. See *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996), and the cases cited there.

To carry his burden, the Acting General Counsel must establish by either direct or circumstantial evidence that (1) the employee engaged in a protected activity, (2) the employer knew of that activity, and (3) the employer took adverse action against the employee motivated in substantial part by the employee's protected activity. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), *enfg.* 314 NLRB 1169 (1994). If he succeeds in meeting this burden, then the burden of persuasion shifts to the employer who must show that the same action would have been taken even in the absence of the employee's protected conduct. An employer does not carry its burden by merely showing that it had a legitimate reason for imposing discipline against an employee; instead it must persuade that

the same action would have been taken even absent the protected activity by the employee. *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991).

(1) The June 23 warning

The parties disagree as to whether Norton's remarks at the June 19 meeting amounted to concerted activity and, if so, as to whether protected by the Act. It is well to note that the June 23 warning is alleged as a violation of Section 8(a)(3). That being so, I found the arguments by both sides confused and wide of the mark in determining the proper outcome on the issue presented by the Regional Director's complaint and the evidence adduced.

Respondent argues that there is no evidence that Norton had any support from any of his fellow employees for his activity at the June 19 meeting so his conduct fails the concerted activity tests established by the *Meyers* litigation.¹⁶ In essence, Respondent says that Norton acted on behalf of only himself. Respondent's argument lacks merit. Section 7 provides in pertinent part that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." A *Meyers*' concerted activity analysis just does not apply to these facts.

Even assuming that Norton acted alone, he engaged directly and unmistakably in Section 7 union activity. As the Acting General Counsel argues, "Norton's remarks were a clear outgrowth of his earlier Union activity and of his involvement as an employee representative in the negotiations for a collective-bargaining agreement." (Acting GC Br., p. 27.) Objectively speaking, Norton's statements at the June 19 meeting supported Local 2's efforts to bargain about employee working conditions that had been turned upside down by the extensive implementation of new terms and conditions of employment when HPG took over, including the imposition of detailed job standards that differed significantly from those which had existed at the hotel for years. In that sense, Norton spoke out to "assist" Local 2, as that term is used within the meaning of Section 7, with its representational duties.

Second, Respondent's alternative claim that Norton's brief interruption amounted to an unprotected disruption of the training session also lacks merit. The Board has long upheld the right of an employee, within limits, to speak about protected subjects at mandatory meetings conducted by their employer. *Prescott Industrial Products*, 205 NLRB 51 (1973). See also *J. P. Stevens*, 219 NLRB 850 (1975). *Prescott* described the limits as follows:

[T]here is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees en-

¹⁶ *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

gaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

205 NLRB 51, 51–52.

Here, Blosser recognized Norton's request to speak and he made a brief but relevant statement concerning a subject plainly protected by Section 7. He said nothing that comes close to the line separating protected and unprotected activity described above. On the contrary, any holding that Norton's brief, respectful, and restrained statement after being recognized to speak was unprotected because it "disrupted" the meeting would be tantamount, in my judgment, to applying the *Livingston Shirt* theory¹⁷ advanced by the dissenters in the *Prescott* case. Because that would effectively eviscerate an employee's right to engage in protected activity at a mandatory meeting absent the employer's approval, the principle embodied in the *Prescott* case, I am not at liberty to conclude that Norton's brief interruption at the June 19 meeting amounted to an unprotected disruption.

And third, the Acting General Counsel's brief analyzes Norton's conduct at the June 19 meeting using the four factor balancing test adopted in *Atlantic Steel*, 245 NLRB 814 (1979), in order to reach a conclusion he did not lose the protection of the Act. No reason at all exists to apply the *Atlantic Steel* balancing test to Norton's protected conduct here. As the facts show, Norton raised his hand to gain the speaker's recognition and, when recognized, he made very temperate remarks designed to point out to the speaker that the subject matter just addressed would be better taken up at the bargaining table between the hotel management and Local 2. Although Kott and another employee sought to discourage any discussion of labor-management issues at that time, no evidence shows that he engaged either of them in argument or made any rejoinder of any kind. Instead, he briefly finished what he had to say and then remained quiet throughout the rest of the training session.

In *Tampa Tribune*, 351 NLRB 1324 (2007), the Board explicitly stated that the *Atlantic Steel* balancing test is used to "assess whether an employee's *admittedly impulsive and unwise conduct* is so severe that it outweighs his or her Section 7 rights." (Emphasis added) This explanation is also implicit in the language used in *Atlantic Steel*, particularly its choice of the word "outburst" found in the third and fourth factors adopted as a part of the balancing test. It would be rationally absurd to describe patently protected conduct as an "outburst." The Board designed the *Atlantic Steel* test for cases where something occurs in the course of protected activity that gives rise to an arguable claim that the employee's conduct ceased to be protected. For example, the employee in the *Tampa Tribune* case referred to the company's vice president as a "stupid fucking moron" while talking with his supervisors about a series of letters the vice president had written to employees blaming

their bargaining representative for the lack of progress in negotiations. Similarly, the employee in *Atlantic Steel* used the term "lying son of a bitch," or "m—f— lie" (or "liar") in reference to his supervisor's statement while they talked about an over-time grievance.

Here, Norton did nothing of the kind. There is no impulsive or unwise conduct, no "outburst," that would give rise for an occasion to measure the protected nature of his conduct using the *Atlantic Steel* balancing test.

Although Kott and Olmeda might have been justified in attempting to persuade Norton on June 23 to make his objections to the trainer's statements known to them privately, they clearly engaged in unlawful coercion by warning that similar conduct or anything else not "on the same page" with management might be considered when deciding if he should be retained at the completion of his probationary period. By doing so, I find Respondent violated Section 8(a)(1) and (3), as alleged.

(2) The August 31 discipline

Counsels for the Acting General Counsel argue that Respondent's hostility toward Norton's union activity motivated this written warning. They further argue that Respondent failed to establish that it would have taken the same action even in the absence of Norton's protected union activity. Respondent argues that it lawfully warned Norton "because he intentionally failed to assist a co-worker carry bags." (R. Br., p. 11.)

The Acting General Counsel asserts that the reference in Norton's written warning to the fact that management had previously spoken to him about his "attitude and importance of working together as a team" is direct evidence of a discriminatory motive because it, in effect, incorporates the unlawful June 23 warning against speaking about protected union matters at a training session. That coupled with Kott's unwillingness to even listen to any explanation that Norton might have for what occurred before deciding to discipline Norton based on Zeitlin's report, provides an ample basis, the Acting General Counsel argues, for concluding that Norton's union activities contributed substantially to the issuance of this warning.

Plainly, Norton had engaged in substantial protected union activity by the end of August. Based on this record, it would be fair to infer that after the HPG commenced operating the Hotel Frank, Norton was the most ardent and outspoken supporter of Local 2 at the Hotel Frank. There is also ample evidence that the hotel management knew of Norton's considerable support for, and activities on behalf of, the Union. Further, the evidence establishes that Respondent disapproved of his open and persistent support for the Union. Early on Olmeda singled Norton out for wearing a union button on his work uniform. A month or so later, she warned Norton that his protected training session comments could threaten his employment. Undaunted, Norton continued his overt efforts by openly seeking support to become a union steward, by participating in the room cleaners' protest, by openly assisting union representatives during the bargaining sessions, by charging that certain of the management-inspired mystery guest reports contained inaccurate and offensive descriptions, and by participating in the Union's large demonstration on July 22. Norton's allegiance to the Union did not go unnoticed. Just a week or two prior to the Zeitlin inci-

¹⁷ Under *Livingston Shirt*, 107 NLRB 400 (1953), an employer may deny a union access to reply to a non-coercive, captive-audience speech made by the employer. The *Prescott* dissenters would have applied that holding even to the employer's pronoun employees.

dent, the hotel isolated Norton along with the experienced union stewards from the main group of employees when it conducted the August 16 training session.

The Acting General Counsel emphasizes the reference in this written warning to the unlawful warning of June 23. I agree that Kott's citation to Norton's earlier oral warning as reflective of an unacceptable "attitude" and "teamwork" conveys hostility toward Norton because of his protected conduct in that earlier context. In doing so, Kott's use of those terms in the more current context of failing or refusing to assist a fellow employee renders the terms much less ambiguous in assessing the presence or absence of a malevolent motive.

In addition, I put substantial stock in the summary nature of Kott's decision to discipline Norton based solely on Zeitlin's account. I, for one, found her account of the alleged incident as related from the witness stand singularly unimpressive. Her testimony exhibited a sufficient degree of confusion, exaggeration, and rash judgment to cause me to doubt, at least, her capacity to recall the occasion with a reasonable degree of accuracy and worst her veracity all together. At first, she confused her mode of transportation, insisting that she had driven her own auto. Perhaps that mistake may appear to be minor but the fact that she arrived in a taxi most likely explains Norton's approach toward her vehicle in the in the first place. No evidence shows that he or any other bellman routinely approached to assist her when she drove up in her private automobile. Moreover, her testimony about the number and the bulk of the bags she brought with her seemed to grow as her testimony wore on. Her charge that Norton observed her struggling with her load took on a hollow ring when she admitted that she never requested assistance of him or apparently any other hotel employee either then or at any other time that morning.¹⁸ In sum, I find the whole incident to be pretextual and infer from that conclusion that this action was taken by Respondent as a preliminary step to terminating eventually terminating Norton. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where the trier of fact finds that the stated motive for discipline is not credible, he or she may infer another motive, "one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference"). The scope of Norton's activity, Zeitlin's lack of credibility concerning the incident, and Kott's quick decision to discipline merits such an inference here. According, I find that the written warning violated Section 8(a)(3), as alleged, because it was substantially motivated by Respondent's hostility toward Norton's numerous activities in support of Local 2.

¹⁸ Respondent argues that Norton intentionally refused to assist Zeitlin on August 30. This argument is based on Zeitlin's unsupported assertion that Norton saw her "struggling" with her bags and returned to the hotel lobby without offering assistance. I find that evidence insufficient to find Norton's conduct was intentional. He credibly denied noticing that she had numerous bags, she never sought assistance, and the evidence otherwise fails to support the claim that that employees previously knew that guest service standards applied equally to hotel managers.

(3) Norton's September 30 termination

I find in agreement with the Acting General Counsel that Norton's open and extensive activity in support of Local 2, obviously well known to Respondent, coupled with the union animus HPG managers and supervisors exhibited from the outset of the takeover of operations at the Frank, including specifically the Olmeda's June 23 threat that Norton risked retention for speaking up in support of Local 2, provides an ample basis for the inference that his termination was substantially motivated by his prounion activities and sympathies. This is especially true where, as here, Norton appears to have been the only employee denied full-time status based on work performance and the fact that his termination occurred five days after his probationary period ended and the day following his participation in the most boisterous of all of the boycott demonstrations in front of the hotel.

Wali's reference to Norton's so-called disruption of a training session on June 23 coupled with the writeups in his file, which would include the one resulting from that incident, shows the extreme sensitivity that the Respondent Frank's management toward employee protected activity. But Norton's lawful activity on that occasion pales by comparison to his standing in front of the hotel the day before his discharge distributing handbills urging guests to check out of the hotel and potential guest to boycott the hotel due to the ongoing labor dispute. A comparison of these two types of conduct provides an ample basis for inferring 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.

Respondent Frank argues that it chose not to offer Norton full-time employment at the end of his probationary period because he consistently failed to meet its guest service standards, a fact verified by the mystery shopper reports and the personal observations by members of management as well as the August 30 incident involving Zeitlin. The Acting General Counsel further argues that Respondent Frank failed to establish as an affirmative defense that it would have taken the same action against Norton even in the absence of this his union activities. Instead, the Acting General Counsel argues that HPG's defense amounts to nothing but a pretext designed to rid itself of a strong Local 2 activist.

Although some of the mystery guest reports certainly faulted Norton for failing to meet certain guest service standards, other reports, notably the first Blosser report and the September 12 report, clearly praised Norton for certain aspects of his performance. Given the nature of these snapshots, and the lack of any credible evidence showing that Respondent Frank's managers and supervisors initiated any concrete corrective action directed at Norton specifically over the course of his probationary period,¹⁹ I find Respondent Frank has used these reports as a shield to hide its true motive for terminating this Local 2 activist. My conclusion seems all the more warranted by the fact

¹⁹ The only evidence of particularized corrective action in Norton's case is limited to vague, self-serving, and incredible assertions by Kott and Infusino that they occurred.

that Respondent Frank failed to take action against Norton prior to the expiration of his probationary period and the fact that as late as Norton's written warning based on Zeitlin's report Kott said that Norton "often set a great example of guest service." Accordingly I find the evidence in support of Respondent Frank's affirmative defense weak and insufficient to overcome the more persuasive evidence that Norton's persistent, and increasingly strident, activities in support of Local 2 motivated his termination. Accordingly, I have concluded that Norton's September 30 termination violated Section 8(a)(1) and (3) as alleged.

5. The luggage room door and chair

Paragraph 12(a) of the Frank complaint alleges that HPG violated Section 8(a)(1) and (5) of the Act on or about August 27 by posting a notice at the Hotel Frank informing employees that the door between the front desk and the luggage room had to remain closed, and by removing a chair located in the luggage room without first notifying and offering to bargain with Local 2 over these changes.

a. Relevant facts

At the May 12 meeting with employees, the HPG representatives distributed a list of rules applicable to the front of the house personnel. One of the rules required front desk workers and the bellmen "to assist the guests while standing with the exception of Bell Persons seated for Concierge functions . . . or reasonable accommodations as required by law." The HPG management also removed stools previously available to the front desk clerks to sit on while working and retained an ergonomics consultant to adjust the front desk computer equipment for use while standing.

Adjacent to the front desk area is a separate, rectangular room used for storage generally referred to as a "luggage" room. The room, which can be entered from the lobby area through a locked door to the left of the front desk, is used by the bell staff to store guest luggage, laundry and dry cleaning, and other miscellaneous items. The luggage room can also be entered from behind the front desk through a door that opens into the front desk area. An opening without a door at the back of the room leads into the office area of the front desk manager. The outer area of the front desk managers' office is used for overflow luggage and other miscellaneous storage. (GC Exh. 11.)

After the removal of the front desk stools, front desk employees, if not assisting a guest or busy with their other duties, began sitting in an unused chair that had long been stored in the luggage room. When doing so, they would keep the door to the front desk work area open in order to observe guests arriving at the front desk for service. (GC Exh. 36; R. Exh. 22.) Abid and Norton claim that the first front desk manager, Peter Kim, had permitted Jack Saltzberg to use the chair stored in the luggage room because of his bad back but Saltzberg did not confirm that assertion when he testified.

In mid-August Kott noticed the luggage room chair and asked Infusino what the chair was being used for. Infusino told Kott that employees occasionally used it for a short break or when speaking with him in his office. Following further dis-

ussion, Kott told Infusino to have the chair removed so there would be more space in the luggage room and Infusino did so.

A short while later, Infusino also posted a sign on the door leading to the front desk work area from the luggage room stating that the door had to remain closed at all times. Infusino explained that the sign went up after a guest entered the front desk work area where cash is kept. This intrusion, he said, occurred because the door was open and blocked the security camera mounted in the corner of the front desk work area near the door, thereby preventing the early detection of the guest. (Tr. 788-789.)

Admittedly, Respondent Frank gave no prior notice to Local 2 about the removal of the luggage room chair or the posting of the closed-door notice.

b. Argument and conclusions

The Acting General Counsel argues that Respondent Frank had a duty to bargain over the removal of the chair from the luggage room because its "removal . . . and (the) prohibition on keeping the luggage room door open . . . substantially changed the working conditions of the front desk staff by making them stand for the duration of their eight-hour shift." Respondent Frank argues it had no duty to bargain over that subject because the requirement for the front office staff to stand while on duty had been established as an initial term and condition established when it first began operating the hotel.

I agree with Respondent's contention. Respondent plainly established, as an initial term and condition of employment, a requirement that its front office staff stand while on duty. The fact that employees occasionally disregarded this requirement by using a chair that happened to have been stored in the luggage room is not sufficient to establish a practice sufficient to overcome Respondent's established policy such that a duty to bargain over removal of the chair that had been stored in the luggage room and the ancillary closed-door notice arose. Having concluded the dual requirement for employees to stand while working in the front desk area and that the door remained closed had never been altered either implicitly or explicitly, I find Respondent had no duty to bargain over the removal of the chair in August. *NLRB v. Burns Security Services*, 406 U.S. 272, 294-295 (1972). Accordingly, I recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent Frank and Respondent Metropolis are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing written warnings to employees Souping Huynh, Amy Lum, Dinora Medrano, and Monica Solis on June 29 for engaging in protected concerted activities; by prohibiting employees from wearing union insignia; and by photographing employees on September 8 while engaged in protected union activities, Respondent Frank engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By issuing written warnings to employees Julia De Leon and Vilma Perez on June 29 for engaging in protected concerted activities, Respondent Metropolis engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By issuing an oral warning to Marc Norton on June 23; by issuing a written warning to Marc Norton on August 31; and by terminating Marc Norton's employment on September 30, Respondent Frank engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. By extending the probationary period of the front-of-the-house employees for an additional 45-day period without notifying Local 2 and providing it with an opportunity to bargain over this change, Respondents Hotel Frank and Hotel Metropolis engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent Frank, having discriminatorily discharged Marc Norton, must offer him reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and benefits, and make him whole for any loss of earnings and other benefits. Backpay due Norton shall be computed on a calendar quarterly basis as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with added interest at the rate as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent Frank must also expunge from its records any reference to Norton's unlawful oral warning on June 23, his unlawful written warning issued on August 31, and his September 30 termination, and notify him in writing that such action has been taken and that any evidence related to these warnings and his termination will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Respondent Frank, having unlawfully issued written warnings to employees Souping Huynh, Amy Lum, Dinora Medrano, and Monica Solis on or about June 29, must expunge from its records any reference these unlawful warnings and provide each of them a notice written in the primary language used by them in their everyday affairs stating that such action has been taken and that any evidence related to these warnings will not be considered in any future personnel action affecting them. *Sterling Sugars, Inc.*, *infra*.

Respondent Metropolis, having unlawfully issued written warnings to employees Julia De Leon and Vilma Perez on or about June 29, must expunge from its records any reference their unlawful warnings and provide each of them a notice written in the primary language used by them in their everyday affairs that such action has been taken and that any evidence related to these warnings will not be considered in any future personnel action affecting them. *Sterling Sugars, Inc.*, *infra*.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

A. The Respondent, Hotel Project Group d/b/a Hotel Frank, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in activities on behalf of UNITE HERE! Local 2, or any other labor organization.

(b) Prohibiting employees from wearing a UNITE HERE! Local 2 insignia at work.

(c) Photographing employees engaged in protected union activity without a reasonable basis for anticipating misconduct by those employees or their supporters.

(d) Disciplining employees for speaking about subjects protected by Section 7 of the National Labor Relations Act at employee training sessions.

(e) Disciplining employees for engaging in protected activities on behalf of UNITE HERE! Local 2, or any other labor organization, or for engaging in lawful, concerted protests about existing terms and conditions of employment.

(f) Unilaterally increasing employees' probationary period, or changing other material terms and conditions of employment, without first providing notice of such a change to UNITE HERE! Local 2, and providing it with an opportunity to bargain concerning the proposed change.

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

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

(a) Within 14 days from the date of the Board's Order, offer Marc Norton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Marc Norton whole with interest for any loss of earnings and benefits suffered as a result of its discrimination against him as specified in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to Marc Norton's oral warning of June 23, written warning of August 31, and his termination on September 30, and within 3 days thereafter notify him in writing that this has been done and that these actions will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the June 29 written warnings issued to Souping Huynh, Amy Lum, Dinora Medrano, and Monica Solis on or about June 29, and within 3 days thereafter provide each of them with a written notice in the primary

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

language they use in their everyday affairs that this has been done and that this action will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facility in San Francisco, California, copies of the attached notice marked "Appendix A."²¹ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent Frank and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent Frank to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2010.

IT IS FURTHER ORDERED that the complaint as to Respondent Hotel Frank is dismissed insofar as it alleges violations of the Act not specifically found.

On these findings of fact and conclusions of law and on the entire record, I also issue the following recommended²²

ORDER

B. The Respondent, Hotel Project Group d/b/a Hotel Metropolis, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining employees for lawful, concerted protests about their terms and conditions of employment.

(b) Unilaterally increasing employees' probationary period, or changing other material terms and conditions of employment, without first providing notice of such a change to UNITE HERE! Local 2, and providing it with an opportunity to bargain concerning the proposed change.

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

²² See fn. 20, supra.

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

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

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the June 29 written warnings issued to Julia De Leon and Vilma Perez and, within 3 days thereafter, provide each of them with a written notice in the primary language they use in their everyday affairs that this has been done and that this action will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in San Francisco, California, copies of the attached notice marked "Appendix B."²³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent Hotel Metropolis and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent Frank to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2010.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting UNITE HERE! Local 2, or any other labor organization.

²³ See fn. 21, supra.

WE WILL NOT prohibit employees from wearing a UNITE HERE! Local 2 insignia.

WE WILL NOT photograph employees engaged in protected union activity without reasonable basis for anticipating misconduct by the employees or their supporters.

WE WILL NOT discipline employees for speaking about subjects protected by Section 7 of the National Labor Relations Act at training meetings

WE WILL NOT discipline employees for engaging in protected activities on behalf of UNITE HERE! Local 2 or any other labor organization

WE WILL NOT discipline employees for engaging in lawful, concerted activities to protest existing terms and conditions of employment, including the room cleaning requirements.

WE WILL NOT change our established employee probationary period, or other material terms and conditions of employment, without first providing notice to UNITE HERE! Local 2 and providing that union with an opportunity to bargain concerning any proposed change.

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

WE WILL offer Marc Norton full reinstatement to his former job without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Marc Norton whole for any loss of earnings and other benefits suffered as a result of our discrimination against him together with interest as provided by law.

WE WILL remove from our files any reference to Marc Norton's unlawful oral warning of June 23, 2010, unlawful written warning of August 31, 2010, and his unlawful termination on September 30, 2010, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that these actions will not be used against him in any way.

WE WILL remove from our files any reference to the unlawful written warnings issued to Souping Huynh, Amy Lum, Dinora Medrano, and Monica Solis on June 29, 2010, and, within 3 days thereafter, provide each of them a notice written in the primary language used by them in their everyday affairs that

this has been done and that this action will not be used against them in any way.

HOTEL PROJECT GROUP D/B/A HOTEL FRANK

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline employees for engaging in lawful, concerted activities in protest of existing terms and conditions of employment, including the room cleaning requirements.

WE WILL NOT unilaterally change our employees' probationary period, or other material terms and conditions of employment, without first providing notice to UNITE HERE! Local 2 and an opportunity for it to bargain concerning any proposed change.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL from our files any reference to the unlawful written warnings issued to Julia De Leon and Vilma Perez on or about June 29, 2010, and provide each of them a notice written in the primary language used by them in their everyday affairs that this has been done and that this action will not be used against them in any way.

HOTEL PROJECT GROUP D/B/A HOTEL METROPOLIS