

Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage and UNITE HERE! Local 878, AFL-CIO. Cases 19-CA-032148, 19-CA-032188, 19-CA-032222, 19-CA-032238, 19-CA-032301, 19-CA-032334, 19-CA-032337, 19-CA-032349, 19-CA-032367, 19-CA-032414, 19-CA-032420, 19-CA-032438, 19-CA-032487, 19-CA-032598, 19-CA-032600, and 19-CA-032609

April 24, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On August 25, 2011, Administrative Law Judge Gregory Z. Meyerson issued the attached decision.¹ The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Acting General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions,² cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions only to the

¹ On February 2, 2012, after the judge issued his decision, the United States District Court for the District of Alaska issued a temporary injunction under Sec. 10(j) of the Act, ordering the Respondent to recognize and bargain with the Union; resume contract negotiations, and honor all tentative agreements reached by the parties; at the Union's request, rescind the unilateral changes made in its employees' terms and conditions of employment; and post the order and read it aloud to employees. *Ahearn v. Remington Lodging & Hospitality*, 842 F. Supp. 2d 1186 (D. Alaska 2012).

² No exceptions or cross-exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by (1) confiscating union buttons from an employee in December 2009, and (2) denigrating the Union in March 2010 by informing employees that it would unilaterally implement a new health plan. Similarly, no exceptions or cross-exceptions were filed to the judge's dismissals of allegations that the Respondent violated the Act by (1) engaging in surface bargaining, (2) unilaterally upgrading its surveillance cameras, (3) unilaterally refusing to honor its employees' dues-checkoff authorizations, and (4) stating to employees that joining the Union would be futile.

The Acting General Counsel moved to strike the Respondent's exceptions and brief, asserting that they lack sufficient citations to the record and are therefore inadequate under Sec. 102.46(b)(1) of the Board's Rules & Regulations. We deny the motion. The Respondent has "sufficiently identifi[ed] the portions of the judge's decision the Respondent claims are erroneous." *Ybarra Construction Co.*, 343 NLRB 35, 35 fn. 1 (2004).

³ The Respondent has 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

extent consistent with this Decision and Order, to amend his remedy, and to adopt his recommended Order as modified and set forth in full below.⁴

The Respondent operates a hotel in Anchorage, Alaska. The Union represents a bargaining unit comprising employees in about 40 job classifications. In late October 2008, the parties began bargaining to replace a collective-bargaining agreement set to expire on February 28, 2009. The consolidated complaint alleges that the Respondent committed a host of violations of Section 8(a)(1), (3), and (5) of the Act. The judge found merit in most of the complaint's allegations but dismissed others. Except as discussed below, we affirm the judge's findings for the reasons he stated.

1. The October 2009 changes to terms and conditions of employment

We adopt the judge's finding that the Respondent violated its duty to bargain in good faith when, in October 2009, it unilaterally implemented certain changes to unit employees' terms and conditions of employment. Under Section 8(d)(3) of the Act, "no party to [a collective-bargaining agreement] shall terminate or modify such contract, *unless the party desiring such termination or modification*" first provides at least 30 days' notice to the Federal Mediation & Conciliation Service (FMCS) regarding the parties' labor dispute (emphasis added). Consistent with that statutory language, the Board places the burden of notifying the FMCS on the party initiating contract modification or termination. *Mar-Len Cabinets, Inc.*, 243 NLRB 523 (1979), enf. denied in relevant part 659 F.2d 995 (9th Cir. 1981), on remand 262 NLRB 1398 (1982). Here, the Respondent initiated the modification of the contract but failed to notify the FMCS of

(3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ We will modify the judge's recommended Order to conform to the violations found and to our standard remedial language. Additionally, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we will order the Respondent to compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee. We will also substitute a new notice to conform to the Order as modified.

The Respondent excepts to the judge's finding that it unlawfully withdrew recognition from the Union in violation of Sec. 8(a)(5) and (1), but it does not argue that the judge's recommended affirmative bargaining order is improper even assuming the Board affirms the judge's 8(a)(5) finding in this regard. We therefore find it unnecessary to provide a specific justification for that remedy. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

the parties' labor dispute before making the changes. Accordingly, we find that those changes were unlawful.⁵

2. The discipline of nine employees who presented a boycott petition

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining nine off-duty employees for peacefully presenting a boycott petition to General Manager Dennis Artiles in the hotel lobby. In doing so, we agree with the Acting General Counsel that the Respondent failed to adequately except to the judge's finding. Under Section 102.46(b)(1) of the Board's Rules & Regulations, "[e]ach exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken" The Respondent's exceptions and brief in support contain 11 numbered exceptions. None challenges the judge's finding that the Respondent unlawfully disciplined the nine employees. The Respondent does briefly allude to the discipline when excepting to the judge's separate and distinct finding that the decertification petition was tainted by the Respondent's unfair labor practices. The Respondent, however, fails there to offer a sufficiently specific argument for overturning the judge's finding that the discipline constituted an unfair labor practice. Accordingly, we adopt the judge's finding on procedural grounds. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) (excepting party must specify on what grounds the judge's findings

⁵ The Respondent cites *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995 (9th Cir. 1981), for the proposition that the notice requirement of Sec. 8(d)(3) is satisfied if either party timely notifies the FMCS of the labor dispute. In the present case, the Union filed an F-7 Notice to Mediation Agencies with the FMCS, but the record does not indicate the date of the filing. Thus, even under the Ninth Circuit's view, we would adopt the judge's finding of a violation. The Respondent failed to prove that the Union filed its notice at least 30 days before the Respondent implemented its October 2009 changes. The Respondent claims that the judge erroneously precluded it from developing the record on this point when he granted the FMCS's petition to revoke a subpoena duces tecum served on it for "telephone records of any telephone used by the FMCS" showing communications between the FMCS and the Union between August 2009 and July 2010. For two independent reasons, we find that the judge did not abuse his discretion in revoking the subpoena. First, 29 CFR §1401.2 prohibits the FMCS from responding to a subpoena where, as here, the Director of the FMCS has not given his approval. Second, the bare telephone records have little, if any, tendency to support a finding that the Union filed an F-7 Notice with the FMCS regarding this particular labor dispute 30 days or more before the relevant changes. We also note that "[a]ny member of the public may make a request in writing under the Freedom of Information Act for a copy of the notice filed with FMCS, thus, providing the parties and the interested public with a uniform means to ascertain whether and when notice was given to FMCS." See <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=127&itemID=19661> (last visited on April 12, 2013). Under these circumstances, we do not find that the judge erred in revoking the subpoena.

should be overturned), enfd. 456 F.3d 265 (1st Cir. 2006).⁶

3. The Respondent's handbook rules

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by maintaining or unlawfully enforcing eight rules in its employee handbook. Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), a rule is unlawful if it explicitly restricts Section 7 activity or if there is a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

We rely solely on the third prong of *Lutheran Heritage Village* in adopting the judge's finding that the Respondent maintained the following unlawful rules:

- The rule confining employees to the area of their job assignment and work duties and barring them from "other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head";
- The rule prohibiting distribution of literature in guest areas or work areas, solicitation during working time, or solicitation of guests at any time for any purpose;

⁶ Even had the Respondent filed a proper exception and supporting argument, we would adopt the judge's finding. The nine employees were engaged in union and other protected concerted activity when they peacefully presented the boycott petition to Artiles. In the disciplinary notices issued to the employees, the Respondent cited four handbook rules the employees allegedly violated when presenting their boycott petition. None of those rules supports its claim. As explained in further detail below, the Respondent's rule against employees accessing the hotel while off duty without prior management approval is unlawfully overbroad because it gives the Respondent unfettered discretion to grant or deny off-duty employees access for any reason it chooses, including to prevent employees from engaging in Sec. 7 activity. See *Saint John's Health Center*, 357 NLRB 2078, 2080-2082 (2011). As for the rule against roaming outside of one's assigned work area, it does not apply to off-duty employees by the Respondent's own account. Moreover, that rule and the remaining two rules, barring a conflict of interest with the hotel and against engaging in indecent or publicly embarrassing behavior, may not be invoked to discipline employees for peacefully acting in concert for mutual aid or protection. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) (rejecting employer's argument that an established plant rule against leaving work without management permission privileged employer to discharge employees for protected strike activity). As the judge correctly found, the nine employees did not lose the Act's protection by engaging in any misconduct when presenting the boycott petition to Artiles. See *Postal Service*, 251 NLRB 252, 252 (1980) (allegedly insubordinate behavior during the course of protected activity does not cost employees the Act's protection unless "opprobrious" or "extreme"), enfd. 652 F.2d 409 (5th Cir. 1981). Accordingly, there is no merit to any argument that the four rules somehow permitted the Respondent to discipline the employees for presenting the boycott petition.

- The rule against having a conflict of interest with the hotel;
- The rule against behavior that violates common decency or morality or publicly embarrasses the hotel; and
- The rule against insubordination or failure to carry out a job assignment.

The Respondent cited those rules when it unlawfully disciplined the nine employees who presented the boycott petition to General Manager Artiles or when it later unlawfully discharged four of those same employees for distributing leaflets on hotel property. Under these circumstances, continued maintenance of those rules reasonably tends to chill further protected activity. See *Albertson's, Inc.*, 351 NLRB 254, 258–259 (2007) (holding that the meaning of an otherwise unoffending confidentiality rule was informed by the employer's application of it to Sec. 7 activity). We find it unnecessary to decide whether any of those rules is invalid on its face because so finding would not affect the remedy.⁷

⁷ Chairman Pearce would find that the Respondent's rules confining employees to their work area, restricting distribution and solicitation, and prohibiting employees from publicly embarrassing the Respondent are overbroad and thus unlawful, even absent enforcement. The rule confining employees to the area of their job assignment and work duties and barring them from "other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head" would reasonably be understood by employees as prohibiting activity protected under Sec. 7 of the Act without prior management approval at times when they are properly on the Respondent's property, but off the clock, such as during authorized breaks and meal times. *Marriott International, Inc.*, 359 NLRB 144, 147 (2012) (rule restricting access to interior and exterior areas of hotel "unless on a specified work assignment" or with the permission of management overbroad); *Pacific Beach Hotel*, 356 NLRB 1397, 1424 (2011) (rule prohibiting "straying into areas not designated as work areas, or where your duties do not take you" overbroad), *enfd.* 693 F.3d 1051 (9th Cir. 2012). Moreover, the rule is not limited to working hours and would reasonably be understood by employees to apply when they are off duty, such as before and after work. The rule is thus invalid for the same reasons as the Respondent's off-duty access restriction, discussed below. That is, it does not restrict access solely to the interior of the facility and it does not apply to access for all purposes, but rather leaves management with unfettered discretion to grant or deny access for any reason it chooses. *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

Chairman Pearce would find the rule prohibiting "distribution of any literature, pamphlets, or other material in a guest or work area" and "solicitation of guests by associates at anytime for any purpose" to be overbroad for two reasons. First, it prohibits distribution in nonselling areas open to guests and the public, such as restaurants, bars, sidewalks, parking lots, and hallways. *Dunes Hotel*, 284 NLRB 871, 878 (1987). Second, it "trenches upon the right of employees under Sec[.] 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment." *Guardsmark, LLC*, 344 NLRB 809, 809 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007); *NCR Corp.*, 313 NLRB 574, 576 (1993) ("Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor or-

Additionally, we agree with the judge that three additional rules appearing in the Respondent's employee handbook are facially unlawful. The Respondent maintains an access restriction under which each employee "agree[s] not to return to the hotel before or after my working hours without authorization from my manager." In *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976), the Board held that an employer's rule barring off-duty employee access to a facility is valid only if it limits access solely to the interior of the facility, is clearly disseminated to all employees, and applies to off-duty access for all purposes, not just for union activity. We find that the access rule fails the first and third prongs of the *Tri-County* test. The Respondent's rule is not limited to the interior of the hotel and it does not restrict off-duty access for all purposes, but rather leaves management with unfettered discretion to grant or deny access for any reason it chooses. See *Saint John's Health Center*, *supra* ("In effect, the Respondent is telling its employees, you may not enter the premises after your shift except when we say you can. Such a rule is not consistent with *Tri-County*."); *Sodexo America LLC*, 358 NLRB 667, 668 (2012).⁸

We also agree with the judge's finding that the Respondent's rule governing employee disclosure of confidential information is facially overbroad. Under that rule, "[a]ssociates are not to disclose any [] confidential or proprietary information except as required solely for the benefit of the Company in the course of performing duties as an associate of the Company Examples of confidential and proprietary information include . . . personnel file information . . . [and] labor relations [information]" The Board has repeatedly held that similarly worded confidentiality rules are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such

organizations."); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). Finally, Chairman Pearce would find that the rule prohibiting employees from "publicly embarrass[ing] the hotel" is overbroad because it would reasonably be construed by employees to prohibit protected communications that are critical of the Respondent's treatment of employees. *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (rule prohibiting communications that "damage the Company" overbroad).

⁸ In deciding this issue, we note that the Respondent erroneously relies on *Crowne Plaza Hotel*, 352 NLRB 382 (2009), a decision that was issued by two Board Members. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010); *Hospital Pavia Perea*, 355 NLRB 1314 fn. 2 (2010) (recognizing that two Board members "lacked authority to issue an order"). For the same reason, we do not rely on the judge's citation to *Crowne Plaza* in affirming his finding, discussed below, that the Respondent's rule governing employee communications with the media is facially overbroad.

as union representatives—an activity protected by Section 7 of the Act. See, e.g., *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012) (finding unlawful a rule that prohibited disclosure of confidential information, including “personnel information and documents” among other examples); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011) (finding unlawful a rule that prohibited “[a]ny unauthorized disclosure from an employee’s personnel file”). Applying that reasoning, we find the Respondent’s confidentiality rule unlawful.

Additionally, we adopt the judge’s finding that the Respondent’s rule governing employee communications with the media is facially overbroad. Under that rule, employees must “agree not to give any information to the news media regarding the Hotel, its guests, or associates [i.e., employees], without prior authorization from the General Manager and to direct such inquiries to his attention.” Employees enjoy a Section 7 right to publicize a labor dispute, which includes communicating terms and conditions of employment to the media for dissemination to the public at large. The Respondent’s rule, which bars employees from communicating “any information” regarding themselves to the media, plainly restrains such protected activity. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004) (finding unlawful a “press relations” rule prohibiting disclosure of “any confidential or sensitive information concerning the Company or any of its employees to any nonemployee without approval from [management]”), *enfd.* 414 F.3d 1249 (10th Cir. 2005), *cert. denied* 546 U.S. 1170 (2006).

4. Withdrawal of recognition

We adopt the judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union. In doing so, we rely on *SFO Good-Nite Inn, LLC*, 357 NLRB 79, 79 (2011), *enfd.* 700 F.3d 1 (D.C. Cir. 2012). As explained in that decision, the Board conclusively presumes “that an employer’s commission of unfair labor practices assisting, supporting, encouraging, or otherwise directly advancing an employee decertification effort taints a resulting petition.” *Id.*, *slip op.* at 3. Here, the Respondent unlawfully assisted the decertification campaign when its supervisors successfully solicited the signatures of employees Dexter Wray, Jose Lantigua, and Esusebio Bristol on a decertification petition. Additionally, Chief Engineer Ed Emmsley, a supervisor, unlawfully threatened Wray with an increased likelihood of discharge if he did not sign the petition and promised him beneficial treatment if he did sign. Under *SFO Good-Nite Inn*, this unlawful interference gives rise to an irrebuttable presumption that the petition does not reflect the uncoerced sentiment of a majority of unit employees. Consequently, the Respond-

ent is unable to rely on the tainted petition, and its withdrawal of recognition was unlawful.

5. Unilateral implementation of a guest satisfaction incentive plan

Contrary to the judge, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing an incentive plan for its housekeepers. On March 18, 2010, the Respondent posted a memo from General Manager Artiles to the housekeeping employees announcing and detailing a new incentive plan. The Respondent did not notify or bargain with the Union before doing so. The March 18 memo, which was posted on the door of each floor’s supply closet, stated in part:

In an ongoing effort to drive our Guest Satisfaction Scores up, I am putting a new incentive into place. If we as a hotel, receive a 9.0 or better on Cleanliness of Hotel **AND** Cleanliness of Room and Bath for the month then I will minus a room for **ALL** Housekeepers for the following month.

The memo further stated that each housekeeper would receive a \$25 gift card if the hotel reached its goal of 9.0 or better, and an individual housekeeper would receive a \$25 gift card if her name was mentioned positively in an online survey. Shortly after the memo was posted, the Respondent’s director of operations, Eduardo Canes, explained the new plan to groups of employees.

Around this time, several housekeepers received incentives, but those incentives did not correspond to the terms of the newly announced plan. Specifically, two housekeepers had their room quotas reduced by one room for 1 day because guests had mentioned them positively on guest comment cards.

The judge dismissed this allegation, reasoning that the Respondent’s unilateral action here was *de minimis*. He based that conclusion on his subsidiary findings that “[t]he plan was never fully implemented, and apparently was in effect for only 24 hours, and at most it benefited two housekeepers for one day only.” However, as the Acting General Counsel points out, there is no evidence to support the judge’s finding that the incentive plan was rescinded 24 hours after being rolled out to employees on March 18. In fact, there is no evidence that the Respondent ever informed employees that the incentive plan had been rescinded. As far as the record reveals, the housekeepers labored for a month or more under the impression that stepping up their work efforts would result in tangible employment benefits. On this record, we cannot excuse the Respondent’s unilateral conduct as *de minimis*.

6. Unilateral subcontracting of the bellmen's driving duties

We adopt the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) by unilaterally subcontracting the bellmen's driving duties. In doing so, we note the limited nature of the Acting General Counsel's exception. The Acting General Counsel does not challenge the judge's finding that the collective-bargaining agreement's subcontracting clause "clear[ly] and unambiguous[ly]" eliminates notice and bargaining obligations when subcontracting is not reasonably expected to result in the layoff of unit employees. Rather, in a targeted exception, the Acting General Counsel argues that the Respondent failed "to prove the explicit legal predicate required by that contractual provision." Specifically, he contends that the record fails to establish that, when the Respondent decided to subcontract the driving duties, it did not reasonably expect any bellmen would be displaced. We disagree. Based on evidence that no bellman was in fact laid off as a result of the subcontracting, we infer that the Respondent reasonably expected to retain all of its bellmen when making its subcontracting decision. Consequently, the Union clearly and unmistakably waived its right to bargain over the subcontracting of driving duties under these particular circumstances. In acting unilaterally in this regard, the Respondent acted lawfully.

AMENDED REMEDY

We adopt the administrative law judge's remedy with the following modifications.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a guest satisfaction incentive plan, we shall order the Respondent to cease and desist from unilaterally changing unit employees' terms and conditions of employment and, upon request by the Union, to rescind the plan and restore the status quo ante.

Further, we amend the judge's remedy for the Respondent's unlawful failure to provide at least 30 days' notice to the FMCS before making unilateral changes to terms and conditions of employment in October 2009. After making those changes, the Respondent belatedly filed notice with the FMCS on February 3, 2010. Consistent with *Mar-Len Cabinets*, 243 NLRB at 538-539, we shall toll the Respondent's backpay liability for this violation as of March 5, 2010, i.e., 30 days after the Respondent filed its late notice. We shall delete the portion of the recommended Order that would have required the

Respondent to rescind those changes and restore the status quo ante. *Id.*⁹

Finally, we correct the judge's inadvertent omission from the Order of a paragraph reflecting his recommendation that a high-ranking management official or, at the Respondent's option, a Board agent in the presence of such an official, read aloud the notice to employees in both English and Spanish. In his decision, the judge found that such a remedy was warranted by the Respondent's numerous, severe, and widespread unfair labor practices. No party has excepted to the judge's recommendation, and we agree with the judge that such a remedy is warranted.

ORDER¹⁰

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage, Anchorage, Alaska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(c) Unilaterally changing the terms and conditions of employment of its unit employees.

(d) Refusing to bargain collectively with the Union by unilaterally implementing collective-bargaining proposals covering terms and conditions of employment of unit employees without fully complying with the requirements of Section 8(d)(3) of the Act at a time when the Union retains the right to be recognized as the exclu-

⁹ Chairman Pearce would give the parties an opportunity at the compliance stage to show that the lawful impasse would have been broken prior to the expiration of the Respondent's belated 30-day notice.

¹⁰ Regarding the rule violations, we shall modify the judge's recommended Order to conform with *Guardsmark*, 344 NLRB at 811-812. Pursuant to that decision, the Respondent may comply with the Order by rescinding the unlawful rules and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the old and unlawfully broad rules until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees. *Id.* at 812 fn. 8.

sive collective-bargaining representative of the unit employees.

(e) Issuing disciplinary warnings to or suspending employees because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity.

(f) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization or for engaging in other protected concerted activity.

(g) Maintaining and/or enforcing a rule in its employee handbook that employees “agree not to return to the hotel before or after [their] working hours without authorization from [their] manager.”

(h) Maintaining and/or enforcing a rule in its employee handbook that employees “must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head.”

(i) Maintaining and/or enforcing a rule in its employee handbook that “distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate.”

(j) Maintaining and/or enforcing a rule in its employee handbook that employees are prohibited from disclosing confidential information, including “personnel file information” and “labor relations” information, and further providing that when disclosure is required “by judicial or administrative process or order or by other requirements of law,” employees must “give ten days’ written notice to [Respondent’s] legal department prior to disclosure.”

(k) Maintaining and/or enforcing a rule in its employee handbook that employees may not “give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention.”

(l) Maintaining and/or enforcing a rule in its employee handbook that a “conflict of interest with the hotel or company is not permitted.”

(m) Maintaining and/or enforcing a rule in its employee handbook that prohibits “behavior which violates common decency or morality or publicly embarrasses the hotel or company.”

(n) Maintaining and/or enforcing a rule in its employee handbook that prohibits “insubordination or failure to carry out a job assignment or job request of management.”

(o) Confiscating union buttons worn or carried by employees.

(p) Soliciting or otherwise coercing employees to sign a petition seeking to decertify the Union as the collective-bargaining representative of the unit employees.

(q) Promising employees favorable treatment if they sign a decertification petition.

(r) Threatening to discharge employees if they refuse to sign a decertification petition.

(s) Coercively interrogating employees regarding their support for the Union.

(t) Denigrating the Union in the eyes of the unit employees by informing them that the Respondent intends to unilaterally implement changes in their terms and conditions of employment without the parties having first reached a good-faith collective-bargaining impasse.

(u) Prematurely declaring an impasse in collective-bargaining negotiations with the Union.

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

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Guest Service Agents, Communication Agents, Guest Service Agent Supervisors, Bell Captains, Bell Persons, Reservation Sales Agents, Door Persons/Drivers, Room Attendants, Inspectors/Floor Supervisors, Linen Room Attendants, Laundry Seamstresses, Maintenance employees, Porters, Storeroom Clerks, Lead Storeroom Clerks, Receiving Clerks, Maitre D’s, Captains, Hosts/Hostesses, Restaurant Cashiers, Bus help, Coat Checkers, Banquet Waithelp, Banquet Housepersons, Banquet Bartenders, Room Service/Restaurant Waiters, Persons, Lead Stewards, Chief Stewards, Stewards, Bartenders/Service, Bartenders Tipped, Bar Backs, Cocktail Waithelp, Sous Chefs, Breakfast/Lunch Cooks, Dinner/Banquet Cooks, Prep Cooks, Pantry Cooks, Pastry Chefs, Lead Bakers, Bakers Helpers, Cafeteria Servers, and Health Club Attendants employed at the Respondent’s Sheraton Anchorage facility, excluding all managers, supervisors, and confidential employees, as defined by the Act.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-stated bargaining unit.

(c) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on March 18, 2010, regarding a guest satisfaction incentive plan, and on May 1, 2010, regarding the unit employees' health insurance plan.

(d) Make whole its employees for any losses incurred as a result of its unilateral changes made in the terms and conditions of their employment, including out-of-pocket medical expenses that employees were required to pay themselves as a result of no longer being covered by the medical insurance plan provided for in the expired collective-bargaining agreement, plus interest as provided for in the remedy section of the judge's decision, and, as to the October 2009 unilateral changes, as limited in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order, offer Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(f) Within 14 days from the date of this Order, rescind the suspensions and/or written disciplines issued to Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher.

(g) Make Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(h) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges, suspensions, and/or written disciplines of Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Janita Bourgeois, and Joey Pitcher, and within 3 days thereafter, inform them in writing that this has been done and that the discharges, suspensions, and/or written disciplines will not be used against them in any way.

(i) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

cial 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.

(k) Within 14 days from the date of this Order, rescind or revise the overly broad confidentiality rule to remove any language that prohibits or may be read to prohibit employees from discussing wages or other terms and conditions of employment.

(l) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager."

(m) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head."

(n) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein "distribution of any literature, pamphlets, or other material in a guest or work area is prohibited. . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate."

(o) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees are prohibited from disclosing confidential information, including "personnel file information" and "labor relations" information, and further providing that when disclosure is required "by judicial or administrative process or order or by other requirements of law," employees must give 10 days' written notice to [Respondent's] legal department prior to disclosure."

(p) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees may not "give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention."

(q) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein a "conflict of interest with the hotel or company is not permitted."

(r) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein "behavior which violates common decency or morality or publicly embarrasses the hotel or company" is prohibited.

(s) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein “in-subordination or failure to carry out a job assignment or job request of management” is prohibited.

(t) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

(u) Within 14 days after service by the Region, post at its hotel in Anchorage, Alaska, copies of the attached notice marked “Appendix”¹¹ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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 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 July of 2009.

(v) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees in both English and Spanish by a high-ranking management official or, at the Respondent’s option, by a Board agent in the presence of such an official.

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

¹¹ 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.”

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to recognize and bargain with UNITE HERE!, Local 878, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT withdraw recognition from the Union and fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally implementing and giving effect to collective-bargaining proposals covering terms and conditions of employment of unit employees without fully complying with the requirements of Section 8(d)(3) of the Act at a time when the Union retains the right to be recognized as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT issue disciplinary warnings or suspend you because of your support for and activities on behalf of the Union or for engaging in other protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization or for engaging in other protected concerted activity.

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees “agree not to return to the hotel before or after [their] working hours without authorization from [their] manager.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees “must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the proper-

ty at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that “distribution of any literature, pamphlets, or other material in a guest or work area is prohibited Solicitation of guests by associates at anytime for any purpose is also inappropriate.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees are prohibited from disclosing confidential information, including “personnel file information” and “labor relations” information, and further providing that when disclosure is required “by judicial or administrative process or order or by other requirements of law,” employees must “give ten days’ written notice to [our] legal department prior to disclosure.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees may not “give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that a “conflict of interest with the hotel or company is not permitted.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that prohibits “behavior which violates common decency or morality or publicly embarrasses the hotel or company.”

WE WILL NOT maintain and/or enforce a rule in our employee handbook that prohibits “insubordination or failure to carry out a job assignment or job request of management.”

WE WILL NOT confiscate union buttons worn or carried by you.

WE WILL NOT solicit or otherwise coerce you to sign a petition seeking to decertify the Union as your collective-bargaining representative.

WE WILL NOT promise you favorable treatment if you sign a decertification petition.

WE WILL NOT threaten to discharge you for refusing to sign a decertification petition.

WE WILL NOT coercively interrogate you regarding your support for the Union.

WE WILL NOT denigrate the Union by informing you that we intend to unilaterally implement changes in unit employees’ terms and conditions of employment without having first reached a good-faith collective-bargaining impasse with the Union.

WE WILL NOT prematurely declare an impasse in collective-bargaining negotiations with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Guest Service Agents, Communication Agents, Guest Service Agent Supervisors, Bell Captains, Bell Persons, Reservation Sales Agents, Door Persons/Drivers, Room Attendants, Inspectors/Floor Supervisors, Linen Room Attendants, Laundry Seamstresses, Maintenance employees, Porters, Storeroom Clerks, Lead Storeroom Clerks, Receiving Clerks, Maitre D’s, Captains, Hosts/Hostesses, Restaurant Cashiers, Bus help, Coat Checkers, Banquet Waithelp, Banquet Housepersons, Banquet Bartenders, Room Service/Restaurant Waiters, Persons, Lead Stewards, Chief Stewards, Stewards, Bartenders/Service, Bartenders Tipped, Bar Backs, Cocktail Waithelp, Sous Chefs, Breakfast/Lunch Cooks, Dinner/Banquet Cooks, Prep Cooks, Pantry Cooks, Pastry Chefs, Lead Bakers, Bakers Helpers, Cafeteria Servers, and Health Club Attendants employed at the Respondent’s Sheraton Anchorage facility, excluding all managers, supervisors, and confidential employees, as defined by the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment of our unit employees that we unilaterally implemented on March 18, 2010, regarding a guest satisfaction incentive plan and on May 1, 2010, regarding the unit employees’ health insurance plan.

WE WILL make whole employees for any losses incurred as a result of the unilateral changes we unlawfully made in the terms and conditions of your employment, including out-of-pocket medical expenses that employees were required to pay as a result of no longer being covered by the medical insurance plan provided for in the expired collective-bargaining agreement.

WE WILL, within 14 days from the date of the Board’s Order, offer Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, rescind the suspensions and/or written disciplines issued to Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher.

WE WILL make Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher whole for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges, suspensions, and/or written disciplines of Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher, and WE WILL, within 3 days thereafter, inform them in writing that this has been done, and that the discharges, suspensions, and/or written disciplines will not be used against them in any way.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the overly broad confidentiality rule to remove any language that prohibits or may be read to prohibit employees from discussing wages or other terms and conditions of employment.

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein "distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees are prohibited from disclosing

confidential information, including "personnel file information" and "labor relations" information, and further providing that when disclosure is required "by judicial or administrative process or order or by other requirements of law," employees must give ten days' written notice to [Respondent's] legal department prior to disclosure."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees may not "give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein a "conflict of interest with the hotel or company is not permitted."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein "behavior which violates common decency or morality or publicly embarrasses the hotel or company" is prohibited.

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein "insubordination or failure to carry out a job assignment or job request of management" is prohibited.

WE WILL furnish all current employees with inserts for the current edition of the employee handbook that (1) advise that the unlawful rules, above, have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful provisions, or (2) provides the language of lawful rules.

REMINGTON LODGING & HOSPITALITY, LLC,
D/B/A THE SHERATON ANCHORAGE

Mara-Louise Anzalone, for the General Counsel.
Arch Y. Stokes, Esq., *Karl M. Terrell, Esq.*, and *Peter G. Fisher, Esq.*, of Atlanta, Georgia, for the Respondent.
Dmitri Iglitzin, Esq., of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Anchorage, Alaska, on 40 dates between August 17, 2010, and January 28, 2011. This case was tried following the issuance of an order consolidating cases, consolidated complaint, and notice of hearing (the first complaint) by the Regional Director for Region 19 of the National Labor Relations Board (the Board) on May 28, 2010, and subsequently following the issuance of an order consolidating cases, consolidated complaint and notice of hearing (the second complaint) by the Regional Director for Region 19 on August

17, 2010. (Hereinafter, both consolidated complaints will be referred to collectively as the complaint.) The complaint was based on a number of original and amended unfair labor practice charges, as captioned above,¹ filed by UNITE HERE!, Local 878, AFL–CIO (the Union, Local 878, or the Charging Party). It alleges that Remington Lodging & Hospitality, LLC, d/b/a the Sheraton Anchorage (the Respondent, the Employer, Remington, the Sheraton, or the hotel)² violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers to the complaint denying the commission of the alleged unfair labor practices.³

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally, and file briefs.

The briefs in this case were due to be filed with the Division of Judges in San Francisco, California, on April 11, 2011. The Board’s “e-filing” procedures, found on the Board’s Internet Website, specifically advise parties that the Agency will accept electronic filings up to 11:59 p.m. in the local time zone of the receiving office on the due date. However, I will take administrative notice that the e-filing system at the Division of Judges in San Francisco recorded the time as 12:21 a.m., on April 12, 2011, when the Respondent’s brief was finally received. Further, I will take administrative notice that absent from that brief was any signatory page and a certificate of service. At my instruction, counsel for the Respondent’s office was informed that the brief had arrived late, and was missing the signatory page and certificate of service. Sometime later on April 12, 2011, the Respondent’s counsel emailed the Division of Judges a second brief, containing both a signatory page and a certificate of service, and also containing some apparently superficial changes to the text of the original brief.

Counsel for the General Counsel has filed a motion to strike as late filed both the original brief and the second brief filed by counsel for the Respondent. In reply, counsel for the Respondent has filed a motion for acceptance of brief filed [18] minutes after deadline, and withdrawal of second brief. In his motion, counsel for the Respondent explains that he began to upload the brief from the firm’s computer system into the Agency’s e-filing system in a timely fashion, but that he encountered unforeseen technical problems, which caused the brief to not be finally received at the Division of Judges until some 18 minutes after the brief was due. (As noted, the records from the Division of Judges show the brief was actually received 21 minutes late.) Counsel is very apologetic in his motion, withdraws the second brief submitted later on April 12, and explains it as

¹ During the course of the hearing, the Respondent stipulated to and admitted the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

² The parties stipulated at the hearing to the correct name of the Respondent as is reflected above.

³ All pleadings reflect the complaint and answers thereto (collectively the answer) as those documents were finally amended at the hearing. Certain amendments to the complaint offered by counsel for the General Counsel during the hearing were permitted by me over the objection of counsel for the Respondent.

merely a misunderstanding on his part and not an effort to deceive. He cites Section 102.111(c) of the Board’s Rules and Regulations, which provides for the acceptance of late filed briefs upon good cause shown, and a showing of excusable neglect and undue prejudice, and asks that the original brief be accepted.

In my view, to reject the Respondent’s original brief filed 21 minutes late would be to elevate form over substance. This case took 40 days to try and the record consists of over 7000 pages, with hundreds of exhibits. To deny the Respondent the ability to argue its position in such a massive case in a posthearing brief would be unnecessarily harsh. Counsel has offered a plausible explanation for the late filing of the original brief, and I have no reason to doubt his assertions. Further, I conclude that counsel for the General Counsel was not prejudiced by the filing of the Respondent’s brief a mere 21 minutes late. Accordingly, I hereby deny counsel for the General Counsel’s motion to strike and accept the Respondent’s original brief as received at the Division of Judges at 12:21 a.m. on April 12, 2011. As counsel for the Respondent has withdrawn the second brief submitted later on that date, the issue is now moot.

Based on the record, in consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,⁴ I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the evidence establishes that the Respondent, a Florida corporation, is engaged in the business of providing hotel management services, with a place of business at 401 East 6th Avenue, Anchorage, Alaska, where it operates and manages the Sheraton Anchorage Hotel. The parties stipulated at the hearing that the Respondent, during the 12 months preceding the issuance of the first complaint, in conducting its business operations, derived gross revenues in excess of \$500,000, and also purchased and received at its Anchorage facility goods valued in excess of \$50,000 directly from points located outside the State of Alaska.

Accordingly, the parties stipulated and I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges that the Union is a labor organization. The Respondent’s answer denies that allegation. However, the evidence provided at the hearing through the testimony of nu-

⁴ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

merous witnesses establishes that Local 878 negotiates collective-bargaining agreements on behalf of employees with various employers in the State of Alaska, the terms of which agreements provide for the wages, hours, and working conditions of the represented employees. Further, the evidence establishes that Local 878 engages in the processing of grievances under the terms of those collective-bargaining agreements on behalf of said employees, and that employees fully participate in the operation of the Union and in the collective-bargaining process.

Accordingly, I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Historical Overview

The Sheraton Anchorage is a 370 room hotel located in downtown Anchorage, Alaska. The Union has represented a unit of employees at the hotel for approximately 30 years. There are approximately 180 employees in that unit, which, for the most part, is a “wall to wall” unit of employees. In December 2006, the hotel property was purchased by Ashford TRS Nickle, LLC (Ashford). Remington, as agent for the new owner, assumed management of the hotel and hired all of the existing employees. At the time the hotel was purchased, a collective-bargaining agreement was in effect between Interstate Hotels and Resorts, Inc. d/b/a Sheraton Anchorage Hotel (Interstate), the previous operator of the hotel, and the Union. Under the terms of that agreement, its provisions were in effect from March 1, 2005, to February 28, 2009.

The parties have stipulated that Remington is a successor to Interstate with respect to the operation of the hotel. (GC Exh. 5.) Further, they stipulated that the Union was the exclusive collective-bargaining representative of the employees in the hotel unit, which unit constituted an appropriate bargaining unit within the meaning of Section 9(a) of the Act. The parties agreed that Interstate recognized the Union as such in successive collective-bargaining agreements, until the hotel was sold in December 2006. The most recent of those agreements is referred to as the expired CBA, and, as noted, was in effect from March 1, 2005, to February 28, 2009. Remington acknowledges that it recognized the Union as its employees' collective-bargaining representative and it assumed the collective-bargaining agreement when it commenced operating the hotel in December 2006. It admits to being a successor employer within the meaning of the Act. Finally, the parties stipulated that the represented unit at the hotel consisted of all employees, with the exception of guards, supervisors, managerial employees, clerical employees, and confidential employees.⁵

⁵ There were, however, two categories of employees that the parties could not agree were included in the represented unit, specifically laundry workers and spa workers. While the General Counsel and the Union contend that these employees are included in the unit, the Respondent denies that assertion.

B. The Dispute

The central issue between the parties revolves around the efforts of the Union and the Respondent to reach an agreement over the terms and conditions of a new collective-bargaining agreement. The last contract between the Union and the Respondent, set to expire on February 28, 2009, would by its terms continue from year to year “unless either party elects to terminate or proposes changes in the terms of the agreement.” Further, notice to terminate was required to be given in writing “not less than sixty (60) days before the 31st day of January 2009. . . . [and] the parties must commence negotiation forty-five (45) days prior to January 31, 2009.” (GC Exh. 5.)

It is the position of the General Counsel that the Respondent was not interested in reaching an agreement with the Union over the terms of a new contract, and that the actions of the Respondent were intended to frustrate the bargaining process making it impossible to negotiate a new contract. According to the General Counsel, the actions of the Respondent’s negotiators at the bargaining table constituted surface and bad faith bargaining, while its managers and supervisors committed numerous and pervasive unfair labor practices away from the bargaining table intended to destroy the Union’s majority support among the unit employees. It is the contention of the General Counsel that the Respondent, after months of surface bargaining, declared an impasse in negotiations, at a time when no good-faith impasse existed, and then prematurely and unilaterally implemented certain of its proposals made at the bargaining table. Away from the bargaining table, the Respondent is alleged to have harassed and discriminatorily disciplined union supporters, disparaged the Union, threatened union supporters with adverse action, and supported an effort to decertify the Union. All these efforts, the General Counsel contends, were undertaken as part of a well orchestrated campaign to create a union free environment at the hotel.

Not surprisingly, the Respondent views the events in question from a totally different prism. It argues that the economic conditions in the hospitality industry were so severely depressed at the time of the events in question that economic concessions on the part of the Union were a necessity, if a viable contract were to be achieved. The Respondent argues that despite putting forth its best and considerable efforts to get the Union to “see the light” and agree to concessions that the Union adamantly refused to do so. It is the Respondent’s theory that the Union’s intransience was part of a national strategy implemented by its International Union (UNITE HERE!, International Union) for all its constituent local unions to encourage them to resist any concessionary or “give back” agreements during this period of economic depression in the hospitality industry. The national strategy was simply to have the local unions delay and procrastinate at the bargaining table so as to protract the negotiating process until such time as the economic conditions improved. The Respondent insists that as this national campaign was practiced by the Union in Anchorage, it was the Union, rather than the Respondent, which was engaged in surface and bad-faith bargaining. Under these circumstances, the Respondent contends that a genuine impasse was reached in bargaining, after which it lawfully implemented certain provisions of its last, firm, and final offer.

As to matters occurring away from the bargaining table, the Respondent argues that it engaged in no disparate or discriminatory conduct towards union supporters, did not disparage the Union, made no unlawful unilateral changes in the terms and conditions of employment of its employees, and certainly did not support any effort to decertify the Union. Rather, the Respondent contends that the decertification petition filed against the Union was the result of the genuine manifestation of the employees' dissatisfaction and unhappiness with the quality and cost of their Union's representation. Allegedly, those decertification efforts were independently initiated by the employees, and were not assisted in any material way by the Respondent's supervisors or agents.

C. The Principal Negotiators

As the central issue in this case involves the content and the character of the collective-bargaining negotiations between the Union and the Employer, it is necessary to spend some time discussing my impressions of the principal negotiators. While some individuals came and went during the course of negotiations, certain negotiators remained relatively constant.

Beyond question, the Respondent's lead spokesperson and principal negotiator was Arch Stokes, who also served as one of the Respondent's lead counsels during the course of this unfair labor practice trial. He participated and was in attendance at each and every one of the parties' collective-bargaining sessions. Another management participant at some of the bargaining sessions was Mary Villareal. She had previously served as the Respondent's senior vice president of human resources during the period that the Respondent assumed operation of the hotel. Thereafter, she returned to work for the Respondent as a "consultant." Todd Stoller, the Respondent's vice president of development, was another regular attendee during negotiations. Finally, it is worth noting that the Respondent's president and chief operating officer is Mark Sharkey. While Sharkey was the final authority on those issues relating to the negotiations, he did not personally attend any of the bargaining sessions. However, certain of his management team, based in Texas, did attend selective negotiations, including Don Denzin, senior vice president of human resources, Keith Wolling, division vice president, and Ann Binns, executive vice president of human resources.

On the Union side, the principal negotiator and spokesperson was Rick Sawyer, a UNITE HERE!, International Union vice president and Northwest Regional Director. He attended each and every bargaining session, with the exception of the first two meetings between the parties occurring in October of 2008.⁶ Also present for almost all the negotiation sessions was Jessica Lawson, an organizer with the UNITE HERE!, International Union, and Marvin Jones, the Union's President. Daniel Esparza, the Union's business representative, attended some meetings, along with certain employee members of the union bargaining committee.

During the hearing, the Union and the General Counsel were

⁶ The Union and the General Counsel do not characterize these two meetings as negotiation sessions, which issue I will address later in this decision.

highly critical of the actions and conduct of Arch Stokes at the negotiation table and during the course of those negotiations. Counsel for the General Counsel continued with that criticism in her posthearing brief. Similarly, during the hearing and in its brief, the Respondent was highly critical of Rick Sawyer and the alleged influence of the International Union in the course of negotiations. Accordingly, I believe it to be necessary and appropriate for me to make some preliminary comments regarding my observation of these two men and my understanding of their conduct during negotiations. These comments and observations are based on my presence in the hearing room with Arch Stokes for approximately 40 days of hearing, and with Rick Sawyer for an extended, but somewhat shorter period of time. I was able during this time to observe their personalities at work and their demeanor, as each testified for a significant period.

In her posthearing brief, counsel for the General Counsel cites to and quotes from a specific Board and court of appeals decision where Stokes had been the lead negotiator for his client, and subsequently was counsel at the hearing where that client, now a respondent, was charged with bad-faith bargaining. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enf. 987 F.2d 1376 (8th Cir. 1993). In that case, the Board agreed with the administrative law judge and found that the respondent violated the Act by engaging in surface bargaining throughout the parties' negotiations. Specifically, the Board noted "the penchant of the [r]espondent's chief negotiator, Stokes, for consuming time during the 11 negotiating sessions with extensive perambulations on such topics as changes in tax laws, a former HEW Secretary's book on health care, union corruption, and his anger at adverse union publicity concerning the [r]espondent."

In the ALJ's decision in that case, he commented at length about Stokes, who while counsel for the respondent in that trial, did not testify regarding his role as negotiator. Therefore, while the judge could make no findings based upon Stokes' demeanor or his credibility, he felt "entitled to draw certain conclusions on [Stokes] personality, his ways of doing things, and his conduct," after having spent "the best part of 4 days" observing Stokes at trial. (307 NLRB at 101.)

The judge commented that he "found Stokes to be a highly intelligent person, having a remarkable memory, and a broad, cultivated, and cosmopolitan mind." The judge considered whether these qualities could explain Stokes' "discussions and digressions" during negotiations, or whether this conduct constituted "a sham, designed to dazzle, to distract and delay the collective bargaining process." *Id.* Ultimately, the judge decided that certain bargaining proposals put forth on behalf of the respondent by Stokes, who the judge characterized as "an able and experienced labor relations attorney, through eleven bargaining sessions over an 8-month period, 'are clearly designed to frustrate agreement on a collective bargaining contract.'" *Id.* at 115, citing *Reichhold Chemicals*, 288 NLRB 69 (1988).

I spent approximately 40 days with Stokes, who functioned in the case at hand as both lead counsel and a prominent, critical witness. Accordingly, I believe that I am every bit as qualified to comment on and discuss Stokes' personality and de-

meanor as my colleague in the earlier case, who spent much less time with Stokes than I. My impression of Stokes is somewhat different than my colleague's impression.

I also find Stokes to be a highly intelligent person, having a superior memory, and with a broad, cultivated depth of worldly knowledge. Stokes loves to talk. Even more than that, he loves to "hold court" and be the center of attention. I do not believe that he does it by design, rather, it is simply who he is. It is part of his persona. I observed him doing such in casual off the record conversations, while on the record examining and cross-examining witnesses, when arguing motions, and while testifying himself as a witness. I do not believe that he does it intentionally to impress others, as once again, I believe this is simply who he is. He frequently demonstrated the capacity to talk for extensive periods of time, and to repeat himself over the course of a conversation and the days and weeks that follow. On one occasion early in the trial, I told Stokes on the record that he was certainly no "shrinking violet." This I can now say was an understatement.

As the person conducting the trial, I found Stokes to be a courteous, polite, gentleman, with appropriate court room etiquette. However, as an advocate for his client he could be forceful, direct, and sarcastic when he believed that the situation called for it, but never gratuitously nasty. Having watched him behave so at trial in his dual roles as both a lawyer and witness, I am of the view that he behaved this way as well during negotiations. On the whole, I found Stokes to be a rather personable fellow. But, I can see how others might not, especially those who sat opposite him at the negotiating table. He has the tendency of rambling on about certain favorite subjects such as a contract that he negotiated years ago, referred to as the Colonial Williamsburg contract, which he believes was fair to all and could be used as a guide for the type of contract the Respondent and the Union might agree to. He is certainly extremely knowledgeable in the field of collective bargaining in the hospitality industry, having negotiated numerous contracts, and having written a book on the subject,⁷ which he brings up in conversation repeatedly. Having heard him raise these subjects many times during the course of the trial in this case, I have no doubt, as testified to by union witnesses Lawson and Sawyer, that Stokes raised them repeatedly during negotiations.

At times Stokes raises subjects that seem only distantly related to the matters at hand. He did so repeatedly at trial, and, as testified to by various union witnesses, similarly did so during negotiation sessions. As an example, early on in these negotiations, Stokes spoke at length about Mayan culture and how the participants at the bargaining session should properly be addressed. My view is that Stokes has a very active mind and is knowledgeable on a wide variety of subjects. He enjoys "educating" people, and will look for reasons to do so. His "lectures" do frequently have some connection with the topic being discussed, even if only tangentially. Where there is no obvious connection, I believe the subject is raised by Stokes not to be an obstructionist, but because he genuinely finds the subject interesting.

⁷ *"The Collective Bargaining Handbook for Hotels, Restaurants & Institutions,"* by Arch Stokes. (R. Exh. 28.)

Certainly Stokes' manner could be frustrating for the union negotiators who wanted to keep the discussion on track. Never the less, after observing Stokes through the course of this long trial, I do not believe that his manner of presentation at the bargaining table was intended to protract or frustrate the bargaining process. He "was," who he "is." While others may not like his method of presenting or addressing a subject for discussion at negotiations, I do not find his conduct egregious, and I do not believe that it was intended to subvert the bargaining process. I conclude that Stokes' manner of negotiation does not constitute surface or bad-faith bargaining. However, there is clearly much more involved in the General Counsel's allegation of bad-faith bargaining on the part of the Respondent than simply Stokes' manner of presentation. These other issues will be discussed at length later in this decision.

The other principal negotiator was Rick Sawyer on behalf of the Union. I believe it to be safe to say that his personal conduct at the negotiation sessions was much less complex and controversial than Stokes'. After observing Sawyer testify in this proceeding, I am of the view that he is a direct, to the point, "no nonsense" type of person and negotiator. He testified about the frustrations he felt in having to negotiate across the bargaining table from Stokes, in particular Stokes' habit of getting off topic, or lecturing the assembled group about such matters as the Colonial Williamsburg contract, Stokes' book on collective bargaining in the hospitality industry, or his various theories on related and unrelated subjects. While the Respondent has raised a strong concern about Sawyer's alleged adherence to a national policy of the International Union regarding concessionary contracts, which issue will be addressed at length below, there has really been no effort on the part of the Respondent to offer evidence critical of Sawyer's manner of bargaining at the table. Again, his manner of presentation is much less an issue than that of Stokes.

D. The Economic Climate

The Respondent argues vociferously that the economic conditions in effect in the nation as a whole and in Alaska in particular, with specific emphasis on the hospitality industry, had a direct and critical impact on the negotiations between the parties. I believe that there is some truth to that contention, and, so, an analysis of that economic climate must be considered.

It is the Respondent's position that because of the severe recession in the nation, with even worse conditions in the hospitality industry in Alaska, that the Respondent was forced to propose significant economic concessions from the Union. From the beginning of the negotiation process until its conclusion with the declaration of impasse from the Respondent, Stokes insisted that the Union make major economic concessions. In the Respondent's posthearing brief, counsel asks that I take administrative notice that "the negotiations for a new contract at the Sheraton Anchorage began and continued during the worst, and most prolonged, bad economy the world has seen since the Great Depression of the 1930s." Counsel then cites certain economic measurements, such as the Dow Jones Industrial Average, to support its contention as to the seriousness of the economic decline. Without quantifying the precise depth of the recent economic recession, I certainly can and will

take administrative notice that during the approximate time period the parties were bargaining over the terms of a new contract, from about October 2008, through March 2010, the nation was in a prolonged and severe economic recession.

In an effort to establish the severity of the recession on the Alaskan hospitality industry, the Respondent called several witnesses, whose testimony was never seriously challenged. Dr. Pershing J. Hill, who holds a Ph.D. in economics, and taught economics at the University of Alaska from 1975 to 2008,⁸ described the impact of the recession on Alaska's hospitality industry. Hill testified in detail as to the specifics of the decline in the industry from the peak economy in 2007 into 2010. According to his testimony and a paper on the subject that was admitted into evidence (R. Exh. 133), the hotel industry in Alaska, as measured by a "bed tax," declined by 17 percent from the peak year through 2009. Although it improved minimally, the decline from the peak year into 2010 was still approximately 14 percent.

Also testifying on behalf of the Respondent was the hotel controller, David Jones. Introduced into evidence through his testimony were the hotel's profit and loss statements showing that the revenue for the hotel fell from \$19.14 million at year end 2007 to \$18.28 million at yearend 2008, and, thereafter, sharply down to \$14.86 million by yearend 2009. This represents a total decline in revenue from 2007 to 2009 of 22.36 percent. Further, while actual revenues made a slight recovery in 2010, in 2009 the hotel had projected and, accordingly, needed to budget for a drop in revenue to \$13.70 million for 2010. (R. Exhs. 126, 127.) For the most part, Jones' figures are supported by Dr. Hill's study, and I accept them as accurate.

It is, of course, the Respondent's position that this deep recession in the hospitality industry, and specifically the sharp decline in the hotel's revenue, was the catalyst that motivated the Respondent to propose significant economic concessions from the Union. Economic concessions remained the Respondent's "mantra" throughout the period of negotiations. Concomitantly, counsel for the Respondent argues that this resulted in hard bargaining on the Respondent's part, but not bad-faith bargaining. These issues will be discussed more fully later in this decision.

E. Hotel Workers Rising

There is no unfair labor practice charge before me alleging that the Union bargaining in bad faith during these negotiations. Never the less, this is the Respondent's contention and its defense. It claims that the actions of the Union in refusing to accept economic concessions in the face of the recession in the hospitality industry was part of a national strategy instituted by the International Union. This strategy allegedly called for each of the constituent local unions to resist entering into a concessionary contract by delaying the negotiations until such time as the economy improved and a more favorable contract could be

⁸ I conclude that Dr. Hill is qualified to testify as an expert witness under Rule 702 of the Federal Rules of Evidence. He possesses the necessary education, knowledge, training, skill, and experience in order to form an opinion that may assist me in understanding this specialized, technical area of expertise. (R. Exh. 132.)

obtained. According to the Respondent, such conduct by the Union, as part of a concerted campaign with other local unions, was the reason why the Union unlawfully refused to bargain in good faith.

Over the strenuous and repeated objections of counsel for the Union and counsel for the General Counsel, I permitted the Respondent the opportunity to offer evidence to support this theory as a defense to the charges brought against it. During the hearing, I said numerous times on the record that as I could not conclude that this defense was "frivolous," that the Respondent would be permitted an opportunity to offer testimony and other relevant evidence in support of its contention. Thereafter, much time was spent by the Respondent in attempting to offer such evidence. It is now necessary to consider the merits of the Respondent's contention.

According to the Respondent, the genesis of this campaign was an organization known as "Hotel Workers Rising" (HWR). (R. Exh. 116.) The Internet contains a website by that name, and during the course of the trial the Respondent offered into evidence pages from that website, as well as pages from other websites linked to the HWR site. On its website, the HWR organization explains the purpose of the organization under the heading, "2010 HWR Contract Campaign." Regarding the recent recession, the HWR contends that, "[N]ationwide, the hotel industry is rebounding faster and stronger than expected, but leaders in the industry. . . are proposing long term concessionary contracts that aim to make the recession permanent for thousands of hotel workers. Proposals in several cities would result in the elimination of quality health care for thousands of low-wage workers." It goes on to say that, "[E]mployers are using the economy as an excuse to slash jobs in the hotel industry, leaving many unemployed and creating burdensome working conditions for those who remain. . . . As big hotel companies stand poised for a major rebound, thousands of hotel workers are organizing to ensure that jobs return to this important service industry and workers share in future prosperity of the hotels." (R. Exh. 116, p.1.)

The quoted article goes on to name a number of "Hot Spots," cities where the HWR has labor issues with the hotel industry. One of the cities listed is Anchorage. Several pages later, the website article presents a "Boycott List." Readers are asked to avoid staying at certain hotels nationwide, which have ongoing labor disputes or the risk of disputes. It is important to note that two Anchorage hotel properties are on this boycott list, the Anchorage Hilton and the Sheraton Anchorage. (R. Exhs. 116, pp. 1-7.) Clearly this is a call to arms by the HWR, and it is claimed in the first paragraph of the article, "[T]hat's why thousands of workers bargaining for contracts across North America are joining together in 2010."

Also offered by the Respondent as evidence of this national campaign, is an article by Paul Abowd in "Labor Notes," a union publication. In this article, the author reports on the UNITE HERE!, International Union's coordinated campaign, known as Hotel Worker Rising, to obtain good contracts in certain targeted select cities, specifically Chicago, San Francisco, Los Angeles, and Boston. According to the article, the campaign finds itself at a "moment of truth . . . [as] the hotel giants are making unprecedented attempts to cut health and

benefits and up workloads in the recession, while the union is opening new organizing fronts that highlight stark contrasts between union and non-union working conditions.” (R. Exh. 22.) However, the article does not mention the negotiations in Anchorage.

Throughout the course of the hearing, the Respondent’s counsel attempted to link the lack of progress at the bargaining table in Anchorage with the HWR campaign. Counsel questioned Union President Jones, International Union Vice President Sawyer, and Anne Marie Strassel, International Union communications coordinator. Strassel is responsible for the HWR website on behalf of the International Union. Although counsel vigorously questioned these witnesses regarding an alleged connection between the HWR national campaign and the Union’s strategy at the bargaining table in Anchorage, he was not able to get an admission that there was such a connection. The witnesses denied any link between the events in Anchorage and the HWR’s national campaign.

Not able to establish direct evidence of such a connection, counsel tried to show that there was strong circumstantial evidence. Called as a witness by the Respondent was William Mede, who was the attorney representing the Anchorage Hilton in negotiations during 2008 and 2009 with the Union for a successor collective-bargaining agreement. At the time that he testified, the Hilton and the Union had been negotiating for some time without success, and the employees of that hotel were working without a contract. In questioning Mede, counsel for the Respondent was obviously trying to show that there was a pattern in the conduct of negotiations by the Union, which pattern was allegedly tied to the HWR campaign. Based on Mede’s testimony, there were some similarities between the Hilton and the Sheraton negotiations. As with the Respondent, the Hilton had proposed economic concessions to the Union. In the case of the Hilton, this consisted of a proposal to have employees make premium contributions for their health insurance, and a proposal to increase the number of rooms the attendants cleaned. According to Mede, the Union refused any such concessions and proposed economic increases in the form of wage increases over the term of the contract. Mede had no evidence of a direct link with the HWR campaign, and seemed to offer no probative evidence of similarities between the bargaining at the Hilton and Sheraton, except what would be expected of a union attempting to negotiate contracts at approximately the same time at two similar hotel properties, which competed with each other in the same hospitality market.

As further evidence of the alleged impact of the HWR campaign on the negotiations at the Sheraton Anchorage, the Respondent offered into evidence a list prepared by the International Union pursuant to subpoena from the Respondent indicating the status of all collective-bargaining negotiations between the International Union’s affiliated locals and hotels in ten selected cites as of August 17, 2010. (R. Exh. 121.) In his posthearing brief at “Tab B,” counsel for the Respondent numbers this list of hotels by property for ease of reference. The list shows the collective-bargaining status of 173 hotels. Of that number, only 36 hotels are designated by the Union as being “under contract.” As counsel notes in his brief, there are 21 hotels designated as being “in negotiations,” but with expi-

ration dates that as of August 17, 2010, had not yet been reached. Assuming the possibility that those 21 hotels did eventually reach agreement by their respective contract expiration dates, that would show that as of August 17, 2010, there were at a minimum a total of 114 hotels out of 171,⁹ approximately 67 percent, where the negotiations had not resulted in a contract as of the respective expiration dates. In fact, many of these contracts had expired nearly a year before August 17, 2010.

However, I am not convinced that this list shows what counsel for the Respondent argues that it does, namely that the events at the bargaining table in Anchorage were tied to the negotiating pattern established under the HWR campaign. Obviously, some similarities in all these negotiations are clear. They all occurred during a time of severe national economic recession, with an especially bad economic impact in the hospitality industry, which was largely dependent on discretionary spending. In an industry suffering financially, many hotels attempted to negotiate concessionary contracts with those unions representing their employees. As would be expected, the unions resisted making such concessions, resulting in protracted and difficult negotiations at many properties.

The Respondent has offered circumstantial evidence, speculation, supposition, and innuendo to try and prove its theory. However, in my view, this evidence is far from convincing and is only superficially probative. It does not rebut the testimony of Jones and Sawyer that the actions of the HWR campaign did not govern, control, dictate, or influence the conduct of the union negotiators at the Sheraton negotiations. Common sense would, of course, support the conclusion that the Union was trying to avoid making any more concessions than it had to in order to obtain a contract during tough economic times in the hotel industry. But hard bargaining does not necessarily make bad-faith bargaining. In my view, the evidence is insufficient to establish that the Union’s actions demonstrated that it was intentionally procrastinating, obstructing, or attempting to prolong the negotiations in order to wait out the Employer and the economic climate. Therefore, I do not conclude that, as argued by the Respondent, the Union was engaged in bad-faith bargaining.

F. Background Facts and Resolution of Disputed Facts

The record evidence is undisputed that immediately following its December 2006 takeover of the hotel operation, the Respondent distributed to its employees the “Remington Associate Handbook,” containing its workplace rules. (GC Exh. 7.) Employees acknowledged receipt of the handbooks. This Remington handbook replaced the handbook of the previous hotel operator, Interstate Hotels Corporation. It is very important to note that although the new handbook made certain workplace changes, including changes in many of the job classification titles, there was no evidence that the Union raised any objection or grievance to these changes. While it does not appear that the Respondent formally notified the Union or sought to bargain

⁹ The number 171 is used rather than 173 since there are two hotels with no expiration dates shown, likely meaning that these hotels are in first contract negotiations.

over these changes, it is equally clear that the bargaining unit members all learned of the changes through the dissemination of the new handbook.

The new handbook contained “Associate Rules and Regulations” and other information and definitions, some of which the General Counsel contends were unlawful on their face, and/or as enforced. Violation of these rules could result in discipline, up to and including discharge. (GC Exh. 7.) While the Respondent denies the alleged illegalities of these rules, it does not deny the existence of this language in the employee handbook. The alleged unlawful rules are enumerated below, and are numbered for ease of reference and correspond to the paragraphs in the first complaint as listed below:

Rule 1: employees “agree not to return to the hotel before or after [their] working hours without authorization from [their] manager,” (par. 11(a), first complaint);

Rule 2: “distribution of any literature, pamphlets, or other materials in a guest or work area is prohibited. . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate,” (par. 11 (c), first complaint);

Rule 3: “Insubordination or failure to carry out a job assignment or job request of management is prohibited,” (par. 11(h), first complaint);

Rule 4: employees “must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head,” (par. 11(b), first complaint);

Rule 5: “conflict of interest with the hotel or company is not permitted,” (par. 11(f), first complaint);

Rule 6: “Behavior which violates common decency or morality or publicly embarrasses the Hotel or Company” is prohibited, (par. 11(g), first complaint);

Rule 7: employees are prohibited from disclosing confidential information, including “personnel file information” and “labor relations” information. But when disclosure is required “by judicial or administrative process or order or by other requirements of law,” employees must “give ten days’ written notice to [the Respondent’s] legal department prior to disclosure,” (par. 11(d), first complaint); and

Rule 8: employees may not “give any information to the news media regarding the Hotel, its guests, or associates, without prior authorization from the General Manager and to direct such inquiries to his attention,” (par. 11(e), first complaint).

During the course of the trial, the parties made much of their dispute over when negotiations for a new collective-bargaining agreement actually began. This controversy surrounds the first two meetings between Stokes and Mary Villareal on the one hand and Marvin Jones and Daniel Esparza on the other. The Respondent takes the position that these meetings, which occurred on October 27 and 28, 2008, constituted negotiation sessions, and demonstrate the Respondent’s desire to meet early and begin the negotiation process with the expectation of reaching an agreement on a new contract before the existing contract even expired on February 28, 2009. However, according to the Union, these two meetings were nothing more than “get acquainted” sessions and did not constitute bargaining.

On October 23, 2008, Arch Stokes’ assistant, Rebecca Hubbard, called Esparza and left a voice message that Stokes was in Africa and wanted to stop in Anchorage and meet with him. According to Hubbard, this call was merely a confirmation of a letter from Stokes faxed that same day saying that he and Villareal would be in Anchorage the following week and wished to meet with the Union’s representatives for the purpose of collective bargaining regarding the Sheraton Anchorage contract. (GC Exh. 6(a).) Esparza had never heard of Stokes and he and Jones, who also had never heard of Stokes, called Hubbard back. While the substance of this conversation is in some dispute, all agree that the conversation concluded with Hubbard convincing Jones and Esparza to meet the following week with Stokes, who would be returning to the States from a trip to Africa.

As arranged, on October 27, 2008, Stokes and Villareal met with Jones and Esparza for the first time. Counsel for the Respondent, in his posthearing brief, acknowledges that the initial meeting had a “get acquainted” aspect to it, and that Stokes engaged “loquaciously” over a variety of conversational topics. That was certainly true, as Stokes spent considerable time discussing Mayan culture, how people liked to be addressed, and various other topics not readily apparent to be connected to the hotel contract. A second meeting was held the following day, October 28, for a total of 8 hours spent in 2 days of meetings. It should be noted that in attendance during part of the sessions were Susan DiMaggio, the Respondent’s general manager until early 2009, and Jamie Fullenkamp, the hotel’s human resources director.

While it is certain that there was a good deal of time spent discussing tangential subjects, clearly some topics related to the collective-bargaining process were discussed. Stokes spoke about Remington’s desire to reduce “paid non-work time,” its desire to eliminate the 30-minute paid meal break, the existing health and welfare plan, and the alleged unfunded liability of the pension fund, the sick leave policy, gratuities for banquet servers, renumbering paragraphs in the contract, bringing it into conformity with “current law,” the use of “plain language” in the contract, the classification of “passive member,” and a subject near and dear to Stokes’ heart, the Colonial Williamsburg contract, which he believed could serve as a model for the Sheraton contract.

Jones testified that going into these meetings he had no intention of engaging in collective bargaining and attended them merely as a courtesy to Stokes, whom he was meeting for the first time. At some point he became concerned that Stokes could put him in a “bad position” because of something that he said or did at the meetings. Stokes asked Jones to get him some information regarding the alleged unfunded liability of the pension plan and Jones agreed to do so. The second meeting apparently ended when Jones indicated that he was mired down with other negotiations, but expected to have those wrapped by the end of the year.

As noted, the parties disagree as to whether these two meetings in October 2008 constituted bargaining sessions. Following the meetings, Hubbard forward to Esparza a copy of the Colonial Williamsburg contract. (Jt. Exh. 2–005.) On November 4, 2008, Stokes sent a confirmation letter recapping the

information requests that he had made during the meetings, including the pension plan information. (Jt. Exh. 2-006.) Getting no response from the Union, Stokes sent a followup letter dated December 11, 2008, complaining that he had received none of the requested information, and indicating that it was the Respondent's desire that the parties reach an agreement on the terms of a new contract prior to the expiration of the current agreement. (Jt. Exh. 2-009.) In response, on December 17, 2008, Jones sent an email saying that he would need until January 20, 2009, to gather the information that Stokes had requested, and further that, "For the record, I would like it to be noted that in no way did Local 878 engage in any negotiations with you on October 27 & 28, which I specifically stated on two occasions. You acknowledged that we were not negotiating but meeting to get acquainted." (Jt. Exh. 2-0011.) Stokes responded by email the following morning saying, "Whatever you call it, we call the time we met at the Sheraton Anchorage our 1st session of collective bargaining negotiations. It was both a get-acquainted session, as well as an opportunity to discuss substantive contract issues, grievances, and information requests. We did this . . . [We] do not want the CBA to expire before we have had ample time to negotiate in good faith. So, we continue to stand ready, willing, and able to meet with you and your team, either in person or telephonically, further to negotiate a renewal." (Jt. Exh. 2-0011.)

I am of the view that the meetings of October 27 and 28, 2008, did constitute two bargaining sessions. I am reminded of that old adage that, "If it walks like a duck, quacks like a duck, and looks like a duck, it must be a duck." So, despite lots of collateral conversation and much "holding of court" by Stokes, the parties did discuss the existing collective-bargaining agreement at the hotel, and certain changes that the Respondent wanted to make in the existing contract, and certain contact issues and questions that Stokes wanted Jones to answer. The Respondent clearly meant for these meetings to constitute bargaining sessions. While the Union may not have so intended, Jones did not sit mute at the meetings, but, rather, responded appropriately to Stokes' comments and questions, and never stood up and said emphatically that he was not negotiating and proceeded to leave the meeting. Regardless of the Union's subjective intent, it participated in what became two bargaining sessions. However, while I conclude that these two meetings in October 2008 constituted bargaining sessions, I do not place any special importance on them. They were simply the first of two meetings between the parties in what was to become a long, drawn out process of further meetings and a voluminous exchange of correspondence.

To some extent, both parties appeared to be talking past each other, a problem that continued to exist throughout the course of negotiations. On December 16, 2008, Jones sent a standard "reopener" letter to the hotel's human resource director, Fullenkamp. (Jt. Exh. 2-0010.) However, I find this rather odd, as Jones well knew that Stokes was representing the Respondent for purposes of negotiations, and since Stokes and indicated 2 months earlier the Respondent's interest in making significant changes in the existing contract. In any event, it was about this time that the Union arranged for International Union Vice President Sawyer to become involved in these negotiations.

On December 23, 2008, Stokes sent Jones a letter offering to "continue negotiations in earnest," and suggesting the dates of January 2 and 7, 2009. Further, he gave specific times when these negotiations could be conducted and indicated the difference in the time zones. (Jt. Exh. 2-0013.) Counsel for the General Counsel contends that this demonstrates Stokes' intent to negotiate by telephone. This may well be true, as there would be no other reason to list the parties' respective time zones. However, the letter certainly contains no demand or insistence that negotiations be conducted exclusively by telephone.

It should be noted that as part of her argument that the Respondent was bargaining in bad faith, counsel for the General Counsel contends that throughout the course of negotiations, the Respondent made demands that the parties negotiate by telephone, as opposed to in person negotiations. While I will deal with each of these instances as they occurred, I will state preliminarily now that I do not believe this to be the case. Although it is accurate that the Respondent's counsel often suggested telephone meetings, or video conference meetings, as an alternative to face to face meetings, these were never demands, but, rather, simply suggestions. As someone who made eight trips to Anchorage in the course of hearing this case, I can take administrative notice that flying from the lower 48 States to Alaska is a long and expensive process.

As Stokes heard nothing back from the Union, he sent Jones an email on January 8, 2009, expressing frustration with the Union's failure to furnish him with the information that he had requested, and with the Union's failure to respond to his suggested dates for negotiations. Stokes even suggests that the Union's failure to respond constitutes bad-faith bargaining and demands the information requested and a response to the Respondent's meeting inquiry by January 13, 2009, or legal action will be pursued. (Jt. Exh. 2-0015.) While this may constitute "puffing" on the part of Stokes, I do sense, both from his testimony at trial and this email, a sense of frustration on the part of the Respondent. Stokes stated in the email, as he did many times early in the negotiations, that it was the Respondent's "sincere desire to reach agreement with the Union by February 28, 2008, the expiration of the collective bargaining agreement."

This email did finally get a response from Jones, who responded by email on January 21, 2009, to say simply that, "Rick Sawyer, International Regional Vice President will now be the Lead Negotiator," and all correspondence should be sent to him. Jones added that he would remain an "intricate member" during the "upcoming negotiations." (Jt. Exh. 2-0017.) Thereafter, on February 6, 2009, Sawyer and Stokes had a conference call in which they introduced themselves and discussed the status of negotiations.

By email letter to Sawyer dated February 17, 2009, Stokes recapped the chronology of the parties' dealings to date, and requested "telephonic sessions of collective bargaining negotiations . . . as soon as possible," as well as a response to the information request. He gave Sawyer a number of proposed dates for bargaining in mid to late February. (Jt. Exh. 2-0018.) While certainly this letter was self-serving, since Stokes recited his view of the chronology of events, never the less, it does

once again offer some insight into his frustration with not being able to get more accomplished. Sawyer responded in a lengthy email dated February 22. In that response, he questioned why the Respondent was requesting certain information about the Health and Welfare Trust Plan, when the information could easily be obtained from Susan DiMaggio, the hotel's director, who was an employer trustee of the plan and had access to such information. Further, he responded that the Union wanted to conduct negotiations in person at the hotel, in order to allow the participation of the employee negotiating committee, as well as its wider union membership. Finally, he asked Stokes to propose dates where the parties could meet and negotiate in Anchorage. (Jt. Exh. 2-0021.)

Counsel for the General Counsel continues to argue that the Respondent was only willing to negotiate by telephone. However, there is no evidence to support this assertion. As is confirmed in an email from Hubbard to Sawyer, dated February 26, 2009, the parties did agree to have a telephone conference on the following day, February 27, on the status of the negotiations, but I see no indication that Stokes was insisting on only telephone negotiations. (Jt. Exh. 2-0025.) It is obvious that as the existing contract was by its terms set to expire as of 12:01 a.m. on March 1, 2009, that time was of the essence, and at that late date a telephone conference would certainly seem to make the most sense. That telephone conference call was apparently successful in that the parties agreed to extend the existing contract for 30 days. In an email letter from Stokes to Sawyer dated March 2, 2009, Stokes confirmed the agreement to extend the contract to March 30, 2009, and he remarked that as the delay in finalizing a new contract was through no fault of the Employer, that "any possible issue of retroactivity is an open subject for collective bargaining negotiations." Further, Stokes confirmed his offer of the following proposed negotiation dates, "for any form of negotiations with which the parties can agree, either telephonically or in person: . . . March 9, 10, 12, 26, afternoon of 27th, April 2, afternoon of 3rd, 8, 9, afternoon of 10th, 13, 14, 21, 22, 23, afternoon of 24th, 30." (Jt. Exh. 2-0026.) Sawyer, thereafter, agreed to the April dates.

In an email addressed to Sawyer dated March 16, 2009, Hubbard made another pitch for negotiations by "teleconference or videoconference, [as] saving time and money for everyone, including yourself!" (Jt. Exh. 2-0027.) However, there was no insistence on such a method of negotiating. While Sawyer responded by email on March 26 and indicated that he was "look[ing] forward to meeting [with the Respondent] in Anchorage," it is unclear to me just what specific dates he believed the parties intended to meet. (Jt. Exh. 2-0027.) Further, it does appear that he was expecting to receive a written proposal from the Respondent prior to this meeting, which expectation was similarly shared by the Respondent's counsel who believed a union proposal was forthcoming. (Jt. Exhs. 2-0027 and 2-0030.)

It may have been April 3, 2009, that was originally the date the parties had agreed to meet in Anchorage, as that is what Theodore Lu said in an email to Sawyer dated March 30, 2009. Lu was an attorney in Stokes' firm working on the Sheraton negotiations. Obviously the plans had changed, as in that communication Lu specifically states that, "I am writing to

confirm that we will not be in Anchorage on Friday, April 3, 2009, to negotiate." Further, he complains that, "We have yet to receive a complete proposal from you, despite our continuing requests for one since meeting with Marvin Jones and Daniel Esparza on October 27, 2008, in Anchorage. Even if we received a complete proposal from you today, we would not have enough time to quantify the proposal for an April 3rd negotiation." He indicated that the Respondent was prepared to negotiate in Anchorage on April 8-9, 2009, "IF we receive a complete proposal from you with sufficient time for us to quantify the proposal." (Emphasis as in original.) In this email, Lu raised a concern that the Respondent had over a schism that existed between the two component parts of the International Union, "UNITE and HERE," and whether the Respondent was negotiating with "the legal entity representing the employees of the Sheraton Anchorage." (Jt. Exh. 2-0030.)

In a detailed letter response dated April 2, 2009, Sawyer addressed Stokes' concerns about the so called schism. He assured Stokes that the Respondent's collective-bargaining relationship remained with Union Local 878, which was an affiliate of the UNITE HERE!, International Union. It was that Local Union that continued to be the "collective bargaining representative of workers employed by the Anchorage Sheraton Hotel." Sawyer suggested that any further questions that Stokes had on this subject should be addressed to the International Union president, John Wilhelm. (Jt. Exh. 2-0039.) While Stokes did continue to raise this issue from time to time during negotiations, I do not believe that it served as a basis to protract, distract, or delay the negotiations, which largely went forward despite Stokes' stated concerns. Also, this was not some frivolous matter merely fabricated by Stokes. I can clearly take administrative notice of the seriousness of this national schism that developed between the two components of the UNITE HERE!, International Union. Before the two components ultimately "divorced" and went their separate ways, much money and time was spent with the two components litigating against each other in court and on the pages of the national and union press in what commentators referred to as a "Civil War."

It should be noted that working with the Union in Anchorage was organizer Jessica Lawson, an employee of the International Union. She had prior experience assisting with other negotiations. Lawson, along with Jones and Esparza, recruited members of the Union to serve on the employee negotiating committee. It became her practice to meet with hotel employees during their lunchtimes to discuss their concerns and ideas for the new contract.

On April 1, 2009, Sawyer sent the Respondent the Union's first proposal. The proposal was three pages in length and included: a 3-percent annual wage increase for tipped employees; annual wage increases for nontipped employees starting at 4 percent in the first year of the contract and declining to 2 percent by the last year; increased health and welfare and pension contributions; increased sick leave pay; and raising the tipped employees' tip guarantee from 13 to 15 percent. It also contained new language related to the free meal, for which the existing contract already provided. The new language read: "The Employer will provide a hot and wholesome meal." The union proposal contained a 4-year term. (Jt. Exhs. 31-35.)

Stokes replied that the Respondent would “consider and begin quantifying it.” (Jt. Exh. 31.)

The Union, apparently believing that negotiations would commence on April 8, made plans for those negotiations. Lawson got commitments from various members of the employee bargaining committee and she distributed flyers at the hotel announcing that negotiations were scheduled to begin. However, that did not happen.

Two days before negotiations were scheduled to begin, Stokes emailed Sawyer to say that the Respondent “had not completed [its] detailed quantification” of the Union’s proposal, and that, therefore, it would not be “productive nor fiscally responsible” for the parties to meet. According to this April 6 email from Stokes, the Respondent was “unable” to meet with the Union until it had quantified the union proposal in detail and “sent [its] counter proposal.” Stokes proposed that the parties schedule 3 full days for negotiations “after” each side has had an opportunity “to review, quantify and prepare negotiation positions on the proposals presented.” Further, he once again raised the issue of the union schism and requested proof that the Union, Local 878, “has not changed, split or in any way failed to be the same legal entity” that was the representative of the hotel employees. Finally, he offered to extend the existing collective-bargaining agreement through April 28, 2009. (Jt. Exhs. 2–0041–0042.)

On April 9, 2009, the Respondent sent the Union its first written proposal. (GC Exh. 31.) This was a rewritten, reformatted document with an “Arabic” numeral style, which Stokes had previously indicated was his preference since it was allegedly easier for the employees to understand than the old “Roman” numeral style. Counsel for the General Counsel makes much of the fact that the Respondent had not indicated and highlighted what changes, deletions, and additions the Respondent was proposing to the existing contract. According to the testimony of Jessica Lawson, as a result she had to spend over 50 hours creating a document that reflected the changes made to the old contract. (GC Exh. 32.) Counsel for the General Counsel is highly critical of this alleged unusual way in which the Respondent had presented its proposed contract. Frankly, I do not see that it was a major problem for the Union, and it was certainly not unlawful. If the Employer preferred to present its proposal as a new document, which did not specifically note the changes from the old agreement, that was its right. While the Union may have been somewhat frustrated by this approach, and it may have caused Lawson to do extra work so that the Union would be able to clearly and easily see each and every change made by the Respondent, this certainly does not rise to the level of an unfair labor practice.

The Respondent’s proposal did not contain a specific wage or benefit package, but merely indicated “To Be Negotiated.” The proposal eliminated the employees’ paid lunchbreak, which under the existing contract required the hotel to provide the employees with a meal and a paid 30-minute period in which to eat it. The Respondent’s proposal increased the number of rooms that the hotel’s housekeepers were expected to clean in a day from 15 to 18. It eliminated sick pay for part-time employees, reduced holidays from 9 to 7, increased new employees’ probationary period from 90 to 120 days, and re-

duced from 3 to 2 days the number of days of unapproved absences that would cause an employee to lose seniority. Further, the proposal deleted and/or changed some of the job classifications as listed in the current contract and replaced them with the job titles that the Respondent had been using since it assumed operation of the hotel in December 2006. (GC Exh. 31 & 32.)

In her posthearing brief, counsel for the General Counsel characterizes certain of the Respondent’s proposals, as they affected the Union’s representational abilities, to be “draconian.” Some of these included: reducing the number of shop stewards from four to two per shift; compressing the time in which to file a step two grievance from 7 days to 24 hours; limiting employees’ remedies to final and binding arbitrations, as opposed to recourse to Federal agencies; requiring the Respondent’s prior approval before union representatives were allowed access to the hotel; banning union buttons, unless approved by the Respondent; and with dues checkoff “To Be Negotiated.” (GC Exh. 32.)

According to counsel for the Respondent in his posthearing brief, “More than any other factor, the bad economy shaped the positions taken by Remington in its April 9 proposal, and shaped the positions taken thereafter by both parties at the bargaining table over the ten (10) subsequent face to face bargaining sessions, from June 2009 through March 2010.”¹⁰ Don Denzin, the Respondent’s former senior vice president of human resources, testified that any contract must realistically reflect the economics of the times. Regarding the Respondent’s proposals, he testified that the Employer “understood that there were some takeaways associated with [its] position.”

Based on Stokes’ schedule, Lu proposed having the parties meet in Anchorage on May 18 and 19. The parties already had an arbitration scheduled for the first of those dates, but Lu suggested that they forgo the arbitration as “our time in Anchorage would be better served if we met to discuss the collective bargaining agreement. . . . It is simply our stance that we can accomplish more by meeting to negotiate rather than arbitrate.” (Jt. Exh. 2–0044.) Although Lu attempted to obtain Sawyer’s agreement to postpone the arbitration and to meet in Anchorage and bargain on those two dates, confusion reigned between the parties and ultimately Sawyer informed Lu that he was not available on those dates, but he agreed to some dates in June. The Respondent wished to have the negotiations conducted in Seattle to save the expense of flying all the way to Anchorage, however, the Union was adamant that only face-to-face negotiations in Anchorage would suffice. Ultimately, the Respondent acquiesced and agreed to meet in Anchorage for negotiations on June 9–12, 2009. (Jt. Exhs. 2–0042, 0049, 0050–0051, 0054, 0055, 0056, 0057, 0058, 0060, 0061, 0064, 0065, 0066, and 0067.) Finally, although not entirely clear to me, at some point the parties agreed to extend the contract until the end of May. Subsequently, they agreed to further extend the current agreement through July 2009.

On May 22, 2009, Lu sent Sawyer an email in anticipation of their June negotiations in Anchorage, asking that the Union

¹⁰ It should be noted that as I compute the total number of face-to-face bargaining sessions between the parties, there were a total of 10, including the two sessions in October 2008.

advise the Employer as soon as possible of any “information, demands, or positions” they intended to take. Further, Lu said, “This will help us fully prepare for the face to face negotiations. We do not want to be Hilton¹¹ and would like to negotiate as efficiently as possible.” (Jt. Exh. 2–0068.)

The union bargaining team for the June negotiations was comprised of Sawyer, Lawson, Jones, Esparza, and various members of the employee negotiating committee. On the Employer’s side of the bargaining table were Stokes, Stoller, Denzin, and Wolling. With the exception of Attorney Stokes, whose firm was in Atlanta, the other members of the Employer’s team were corporate officials from Dallas. Counsel for the General Counsel suggests in her brief that this was somehow suspect as for the most part the local hotel officials did not participate. However, I fail to see anything sinister or unusual about this, as the principal issues that separated the parties were economic, and, therefore, the officials from Dallas were just as capable, if not more so, of holding and protecting the economic “bottom-line” than were the hotel managers. Further, counsel believes that it was highly unusual for an employer bargaining team not to designate someone to take detailed notes of the meetings. Once again, I fail to see anything suspect about this approach. Negotiators have different approaches to the art of bargaining, and there is no right or wrong way to engage in bargaining, and certainly there is nothing unlawful about a party failing to take detailed notes.

In any event, very detailed notes were taken on behalf of the Union by Lawson, who testified about them at length. After observing the lengthy examination and cross-examination of Lawson, as well as her almost constant presence in the hearing room over approximately 40 days of trial, I conclude that she was a generally credible witness. Further, I believe that for the most part her notes were accurate, or at least as accurate as she was able to make them. That having been said, I am mindful of the fact that Lawson was employed by the International Union, that her job in Anchorage was to attempt to help the Union obtain a favorable contract for the employees from the Employer, and that she had a very strong prounion bias. Obviously, this could to some extent color her reflections and testimony. Still, this intelligent, articulate, self-confident young woman struck me as someone who would not deliberately and knowingly fabricate her testimony.

The parties met in Anchorage for 7 hours on June 9. As was to be expected, Stokes and Sawyer were the principal speakers on behalf of their respective sides. The parties began the process of reviewing the Respondent’s proposal. Counsel for the General Counsel characterizes the progress as “slow,” which seems to be accurate. However, her contention in her posthearing brief that Stokes “voraciously consumed valuable bargaining time” as he “soliloquized” over his own personal philosophy of contract negotiations was simply the opinion of counsel. For the reasons that I mentioned earlier in detail, I did not find Stokes’ style of negotiating and his method of presenting proposals or positions to constitute obstructive behavior or an effort on his part to prolong or frustrate the bargaining process.

¹¹ This reference was to the Hilton Anchorage hotel where the negotiations between the Union and the Hilton had broken down.

From her testimony it was clear that Jessica Lawson felt otherwise, but her view in this regard is that of an advocate.

Stokes spent time discussing the Colonial Williamsburg contract, which he argued was highly “readable,” and could be used as a guide for the negotiations at hand, and further spoke about the simple numbering system that the Respondent had used in its contract proposal. Stokes talked about a number of subjects, which although somewhat removed from the specifics of the Respondent’s contract proposal were at least tangentially connected. These included the history of hiring halls, the plight of immigrant workers, and the practice, which he considered unjust, of limiting the banquet tip pool only to banquet servers. Once again, although counsel for the General Counsel accuses Stokes of engaging in a “filibuster,” I do not view it that way.

Counsel for the General Counsel correctly points out in her brief that there were no discussions of wages and benefits during this bargaining session, as the Respondent’s proposal was silent as to these subjects. Stokes merely said that the Respondent would be presenting a package proposal of wages and benefits in the future. Two areas where the parties did make some limited progress were on the Respondent’s proposal to eliminate a contractual provision requiring the Respondent to notify and consult with the Union before subcontracting unit work, and to pay affected employees in lieu of such notice. Sawyer informed Stokes that he was opposed to eliminating that language, and Stokes agreed that the Union had the right to this information. Also, Stokes agreed to reconsider the Respondent’s proposal to reduce the number of absences that would result in a loss of union seniority. However, these were clearly not major items.

It is important to note that, as stressed in the Respondent’s posthearing brief, the key economic issues raised in Remington’s proposal were clear and unambiguous. The proposal called for: the elimination of the paid 30-minute meal break, and adding the requirement that employees pay \$1 for any meal provided by the Employer; a reduction in the number of paid sick days; an increase in the housekeepers’ room quota, from 15 to 18 (ultimately reduced to 17); a withdrawal from the union health insurance plan (medical coverage), and replacement by an Employer health insurance plan, which would permit the Employer to shop annually for a better plan; and paid holidays reduced to eight (8).

On June 10, the parties met again. They discussed the Respondent’s proposal to eliminate the 30 minute paid lunch-break, which the Employer had been providing. This was an important matter to the Respondent as part of its effort to lower costs in that difficult economic climate. Stokes explained repeatedly throughout negotiations that it had long been the Respondent’s policy at its various hotel properties that it did not pay for time not spent working. Sawyer’s position was that the paid lunch period was part of the unit employees’ total remuneration, and that if eliminated, the employees would expect something to make up for its loss. Further, Sawyer mentioned that in Anchorage, the majority of the downtown hotels did, in fact, pay for their employees’ meal breaks. Stokes responded that it was his understanding that many employees actually took longer than their permitted 30 minutes for lunch. This statement, not surprisingly, resulted in the employees in the negoti-

ating committee and some employee observes becoming rather upset.

In the Respondent's proposal, the language previously providing for health and welfare benefits had been deleted, which Stokes said meant that this provision would need to be negotiated. Stokes suggested that the new contract actually contain the specifics of the medical coverage so that employees could use the contract to reference such information as: deductibles, conditions covered, employee copays, and plan maximums. Stokes informed all that this was the way that the Colonial Williamsburg agreement handled the issue. However, Sawyer was not keen on the idea, telling Stokes that such information would be readily available in the standard medical plan booklet, and, as benefits changed, it made no sense to put specific information in the contract that could soon be out of date.

The parties also discussed the pension benefit provisions, as the Respondent had stricken the old pension language from its proposed agreement. Stokes did not make a specific proposal regarding a replacement for the existing pension, but did say that he felt the new agreement should specifically list the defined benefit amounts for retirees. As he had reacted with Stokes' medical insurance proposal, Sawyer was negatively inclined to the offer of having specific pension amounts listed in the contract, since pension trust booklets and quarterly reports were already available for the employees to review.

Another issue discussed was whether employee payroll checks could include more detail regarding deductions as requested by the Union, and whether those checks could reflect the Respondent's contribution to workers' pension and health plans as requested by Stokes. There was also considerable discussion about the Respondent's proposal containing new job titles, which were apparently those titles that Remington had been using since it started operating the hotel in December 2006. Stokes took the position that the new job titles simply reflected what kind of work the employees actually performed. Sawyer requested that Stokes provide copies of the job descriptions that were envisioned by its new job titles, and Stokes promised to do so.

Near the end of the day's negotiations, Sawyer for the first time alerted the Respondent's bargaining team that he had just learned that the actuary for the existing pension fund had erred in calculating the cost of the Respondent's pension contribution for 2009. He provided the revised figures, which were significantly higher. The hotel human resource director was in the room at the time and confirmed that these revised pension contribution numbers had only just been released. As they recessed for the day, the parties agreed that having been through the Employer's proposal, that they would review the Union's proposal the following day.

On June 11, Sawyer went through the Union's proposal. Counsel for the General Counsel argues in her brief that this task was made easier because, unlike the Respondent's proposal, the Union's proposal contained "bolding" to indicate a change from, or addition to, the existing contract, and that language proposed to be removed was simply struck out. In any event, the parties discussed various language changes in the Union's proposal, for example the addition of the words "hot

and wholesome" to describe the type of lunch that the Employer was required to provide to the employee. Jones mentioned that in the past there had been problems with the quality of the food, as the reason why the language was added. Further, the parties discussed the Union's request that the amount of sick pay be raised. Sawyer argued that sick pay had not been increased significantly in the past 5 years, and he request that Stokes provide figures on the amount of sick pay that had actually been paid out during the last year. Stokes agreed to do so.

The parties discussed the Union's wage proposal, with Stokes questioning whether the 2 to 1 ratio on proposed wage increases for the nontipped vs. tipped employees was a change from the past practice. Jones indicated that it was not. Apparently there was no further discussion on the Union's wage proposal. However, the parties once again discussed the issue of job classifications. Stokes provided a list of job classifications, some of which were jobs no longer performed at the hotel. Sawyer indicated that the union negotiators needed to review the list, and the parties agreed to caucus to discuss their respective proposals. Although the hope was expressed that the parties would resume negotiations that day, in fact, they recessed at about 10 a.m. and did not reconvene until the following day.

When the bargaining reconvened on June 12, Human Resource Director Fullenkamp joined the management team. The parties discussed drug testing, sick leave, and vacations. At some point, Stokes asked Sawyer to step outside, and when the two were alone accused the housekeeping staff of stealing company time by standing around the timeclock for extended periods of time before clocking out at the end of their shifts. Once back at the bargaining table, Stokes raised this issue for all to hear. Stokes also accused employees of taking longer lunchbreaks than permitted as they were not timed. Sawyer reminded Stokes that it was the industry practice in Anchorage for the hotels to pay their employees for meal breaks, and he defended the unit employees against Stokes' accusations. Further, Sawyer mentioned that some employees combined their lunch and breaktimes, and so it might appear to management that they were extending their lunchtime. Later, there was some discussion about employee uniforms, and the parties then recessed.

In July 2009, the Respondent appointed a new hotel general manager, Dennis Artiles, to replace Susan DiMaggio. Artiles then hired Eduardo Canes as the hotel director of operations. It is counsel for the General Counsel's contention that the Respondent hired Artiles and Canes because they were antiunion and in an effort to clean house and remove the Union from the property. At least one witness did refer to Artiles as a "cleaning GM," meaning that he made the hotel's problems go away. This, the General Counsel contends, included the Union. Just as with DiMaggio, Artiles was not directly involved in the collective-bargaining negotiations.

On July 17, 2009, the Respondent presented the Union with a revised contract proposal. (GC Exh. 38.) It appears that the major change reflected in this proposal was the withdrawal from the Taft-Hartley Health and Welfare Plan, as well as from the Pension Plan and Legal Fund Plan. In place of the Pension Plan, the Respondent proposed a stand-alone 401(k) plan with 100-percent Employer matching of employee contributions up

to 3 percent, and 50-percent matching of employee contributions between 3 and 5 percent. The pension proposal provided no guarantee beyond a single year's coverage and accruals under the plan, with the Employer having the unilateral right to change the plan's benefits each year. Further, the Respondent's new proposal called for replacing the unit employees' jointly administered health and welfare trust fund with its corporate-wide CIGNA preferred-provider type plan, which also gave the Employer the right to unilaterally change plans every year at its sole discretion. (GC Exh. 38, pp. 29–30, art. 31–32.)

The new contract proposal from the Respondent also contained a counterproposal to the Union's wage increase proposal. In his posthearing brief, counsel for the Respondent indicated this was a wage freeze for the first year of the contract. But, counsel for the General Counsel in her posthearing brief refers to this proposal as a 2-percent increase. Both counsels cite to the same exhibit, a wage rate attachment to the Respondent's July 17, 2009 proposal, to support their contentions. (GC Exh. 38, at Exh. 1.) While the document does appear to provide for a 2-percent wage rate increase, based on the respective positions of the parties as they proceeded to negotiate, I believe the Respondent's counterproposal was actually a wage freeze.

Significantly, the Respondent's proposal of July 17 required that room attendants clean 17 rooms per 8 hour shift. (GC Exh. 38, art. 9, sec. 51.) This was obviously more than the 15 rooms as provided for in the existing contract, but 1 less than the 18 rooms that the Respondent had originally been proposing. The proposal also contained a subcontracting provision, which did not require notice to the Union before doing so.

The July 17 proposal was accompanied by an email from Lu to Sawyer confirming that the parties would meet in Anchorage on July 28 and 29, 2009. (Jt. Exh. 2–0076.) However, thereafter, Lu and Sawyer got into a heated exchange of emails regarding Sawyer's unavailability to meet on one of those dates. (Jt. Exhs. 2–0080–0085.) Soon after, both Sawyer and Stokes happened to be in Denver on other business at the same time and they decided to meet. While Sawyer apparently had hoped that the meeting might result in a breakthrough in negotiations, it turned out to be primarily a social gathering. In any event, following the meeting in Denver, Sawyer agreed to meet in Anchorage for negotiations on both dates later in July. (Jt. Exh. 2–0085.)

For the July negotiations, the Union's regular team was present. However, only Stokes appeared on behalf of the Respondent. Sawyer testified that it was his goal to reach tentative agreements (TAs) on as many items as possible. The parties met on July 28 and Stokes agreed to Sawyer's suggestion that a part of each day be devoted to labeling as tentatively agreed upon those items where the parties were able to agree. They went through the Respondent's latest proposal, but an effort was made to put aside the more contentious issues, such as subcontracting, the ban on wearing union buttons, and economic issues such as the number of rooms to be cleaned by the housekeepers. The hope was that they could reach tentative agreements on less contentious issues. Interestingly, Stokes made references to discussing the original Taft Hartley Pension Plan, which the Respondent's July contact offer had proposed eliminating entirely and replacing it with a 401(k) plan. The

parties delayed discussing that as well. However, they did discuss the Respondent's health and welfare proposal, with Sawyer relaying concern over the unit employees' ability to pay the health insurance premiums as provided for under the Respondent's proposed health benefits.

Apparently Stokes, as was his habit, spoke at length on a number of subjects, including the need for a final and binding arbitration clause to the exclusion of other remedies, simplifying the contract with use of the Arabic numbering system, and a suggestion that hotel guests be provided with a breakdown of how much of a gratuity charge goes to the hotel as opposed to the employees. Sawyer was not impressed with this use of time by Stokes and asked him to "move on." However, counsel for the General Counsel concedes that there was "some progress" made that day with the Union agreeing to lower the amount of sick pay as proposed by the Respondent, and with Stokes agreeing to protect employee seniority and reinstatement rights.

The parties met the following day, July 29. The Union made a counterproposal on drug testing, and Stokes promised to get the Union certain information regarding the Employer's proposed CIGNA health plan. Unfortunately, Stokes took 1–1/2 conference call, which reduced the parties negotiating time. They did not have time to summarize their tentative agreements, which they had hoped to do. Stokes offered to draft a document that would show the respective position of the parties regarding various contractual issues, and would show those areas where they had reached tentative agreement. Just before recessing, the parties agreed to a 1 month extension of the current contract, until August 31.

On August 21, 2009, the Respondent sent the Union its "final proposal." The cover letter accompanying the proposal stated, "Please understand that this is the employer's final position. Considering the current economic climate, any further concessions by the employer would be financially untenable." Further, the letter indicated that enclosed were two drafts, one showing the tracked changes made to the July 29 proposal, and a "clean" version capable of execution.¹² It is important to note that even though the letter stated that this was the Respondent's final proposal, Stokes, the signed author of the letter, said that the Respondent was "open to discussing the proposal . . . via phone, email, text message, teleconference, video conference, Skype, or through any other medium [the Union would] choose." (R. Exh. 58.)

Both the "clean" version (R. Exh. 69) and the "annotated" version (R. Exh. 81) of the Respondent's final proposal are in the record.

There is some disagreement regarding whether Sawyer ever received a copy of the cover letter (R. Exh. 58), along with the Respondent's final proposal. Sawyer says he did not receive the cover letter. However, I am more inclined to accept the testimony of Lu that he did send it to Sawyer. I accept Lu's testimony in this regard as being more accurate because it was highly detailed. He testified that he placed in a FedEx envelope

¹² Although the cover letter makes reference to a July 29 proposal, I assume that Stokes made a mistake and had intended to refer to the Respondent's proposal of July 17. The date of July 29 was noteworthy only because the parties had negotiated on that day.

addressed to Sawyer the two copies of the final proposal, plus two copies of the cover letter. Lu was the actual typist and preparer of the cover letter, which was signed by Stokes and prepared at his direction. He described in minute detail how he prepared and sent the various documents by FedEx, including the cover letter, to Sawyer. (R. Exh. 80.) As Sawyer could have easily forgotten the cover letter, since it was accompanied by the more important final proposal, I conclude that he did in fact receive the cover letter.¹³

It should be noted that the August 21 final proposal from the Respondent dropped the Respondent's previous proposal to switch from the Traft-Hartley Pension Trust to a stand-alone 401(k) plan. In his testimony, Stokes characterized this change as being a "major concession." The Respondent had "looked at the numbers" and realized that withdrawing from the Taft-Hartley Pension Trust would cost the Respondent more than a 401(k) plan would save.

On August 28, 2009, Stokes and Sawyer had a "brief telephone conversation," as characterized by Sawyer in a letter of September 11. In that letter, Sawyer was answering Stokes' earlier request that the Union respond to the Employer's final proposal before any additional face-to-face negotiation sessions were scheduled for Anchorage. Sawyer agreed to do so as to "minor matters," but only if the Respondent would agree to a contract extension, and would agree to future bargaining dates in Anchorage in October 2009. (Jt. Exh. 2-0092.) The last contract extension had expired on August 31.

In a letter dated September 16, Stokes advised Sawyer that the contract had expired as no extension had been agreed upon. Further, he advised Sawyer that he could not commit to negotiation dates in October, as he had a trial coming up, but as soon as the trial dates were set, that he would advise Sawyer of his "availability to bargain in October." (Jt. Exh. 2-0094.) It is very important to note that even though the Respondent had been referring to its proposal of August 21, 2009, as its "final proposal," the Respondent still seemed willing to bargain further.

In a letter dated September 21, 2009, Stokes complains to Sawyer that the Union still had not reviewed the Respondent's last offer and stated the Union's position to it. He once again tells Sawyer that he cannot presently commit to negotiation dates for Anchorage in October, but that he would be available to discuss any issues telephonically or by teleconference. (Jt. Exh. 2-0096.) In response, Sawyer sends an undated letter that makes no mention whatsoever of the request for phone communication. Rather, he complains that the Respondent is "apparently unable or unwilling at this time to commit to agree to meet with [the Union] to engage in face to face collective bargaining any time in October." Further, the letter states that, "we will respond to your last document once the committee has had ample opportunity to review it." (Jt. Exh. 2-0098.)

Upon reading and analyzing the various communications sent during this period of time, I am in agreement with counsel for the Respondent who stated in his posthearing brief that the

Respondent never said it was "unwilling" to engage in face-to-face negotiations, merely that Stokes was unavailable to meet in October. Simply offering the Union an opportunity to bargain by other means, such as by telephone, teleconference, or videoconference did not mean the Respondent was refusing to meet face to face in Anchorage. (In fact, subsequently the Respondent did further bargain in Anchorage.) I find Sawyer's statements to the contrary to be inaccurate and self-serving.

Away from the bargaining table there were events occurring that also must be discussed. The Respondent employs engineers at the hotel who are responsible for maintenance and mechanical issues. Prior to July 2009, the Respondent also employed security guards who worked at the hotel. The guards assisted guests to their rooms, ensured the safety of the hotel, and dealt with homeless people on the property. During emergencies all employees were expected to assist security. However, beginning in July 2009, the Respondent, without notice to or bargaining with the Union, began to reduce its security guards' hours and assigned the duties that had been performed by the guards to its engineers. This change was announced by the chief of engineering, Ed Emmsley Jr., who told the engineers that when there were no security guards on a particular shift that they would have to perform that duty. In September 2009, the entire security force was laid off and the security function in its entirety was performed by the engineers, in addition to performing their regular engineering duties. However, the engineers were never given any training in security work.

In any event, this new system did not last long as in mid-October a serious incident occurred at the hotel that involved an intruder with a gun. The Respondent then proceeded to bring back trained security guards. There is no indication that the Respondent ever raised the issue of security guards or attempted to bargain with the Union over the transfer of security guard duties to the engineers.

The Respondent's hotel bellmen carry guest luggage, deliver faxes, valet park cars, and provide various concierge services. Prior to August 2009, they also drove the hotel's courtesy van. The van functioned as a hotel shuttle, operating within approximately 1 mile of the hotel, primarily in the downtown area of Anchorage. Depending on the season, van driving duty comprised a significant portion of the workday for the bellmen. The busy season for the bellmen was the tourist season, which in Alaska lasts from mid-May through mid-September.

Driving the courtesy van was considered a perk, since it permitted the bellmen to get off their feet, take a break, and be away from the confines of the hotel lobby. However, its principal benefit was that it constituted an excellent source of tips. Bellman Troy Prichacham testified that his tips per day from driving in the winter months would be between \$18 and \$25 and in the summer months between \$40 and \$45.

On August 17, 2009, the Respondent's sales director, Libbrecht, ordered the bellmen to stop driving the van. The Respondent had subcontracted the van driving duties to a company called Valentino Limousine Service (VLS). Subsequently, VLS established a desk inside the hotel lobby, and the bellmen were ordered to promote VLS services to the hotel guests, and to keep the hotel entryway clear for VLS vehicles. On occasion, when the bellmen are very busy, VLS drivers arriving

¹³ As with the Postal Service, I will assume that a letter properly placed with FedEx for delivery will be received at its intended destination.

with hotel guests have been observed loading up the luggage carts and transferring luggage to the guests' rooms. Some bellmen have been working for VLS as drivers, when not on duty with the hotel.

It is undisputed that the Respondent never raised the issue with the Union of subcontracting the bellmen's van driving duties. The Union was provided no notice by the Respondent at any time of the transfer of the work to VLS. However, in defense of its action, the Respondent relies on the terms of the then existing collective-bargaining agreement, which the parties extended through August 31, 2009. Article IX, section 8 of that contract provides that where "contracting out is reasonably expected to result in a reduction in cost, increase efficiency in the delivery of services to the public, or otherwise benefit the Employer, and it is reasonably expected to result in the displacement of any regular employees, the Employer shall first notify the Union in writing of the proposed action." Further, the clause goes on to state that the "Union will be invited and encouraged to meet and confer with the Employer at reasonable times regarding the proposed action, and no final action shall be taken by the Employer within thirty (30) day of its notice." (GC Exh. 5.)

The Respondent argues that under the terms of the above clause, it was only obligated to notify and bargain with the Union regarding the subcontracting of driving duties if the subcontracting would result in the displacement of any of the bellmen. The Respondent contends that as no bellmen were displaced, there was no duty to notify or bargain with the Union. The testimony of bellmen Troy Prichacharn is relied on by counsel for the Respondent to support his contentions. Prichacharn testified as to the number of bellmen employed by the hotel from May 2009 through November 2009. Although that testimony is somewhat confusing, it does appear that there was no diminution in the number of bellmen employed by the hotel from August, when the subcontracting to VLS went into effect, through November 2009. (Also see R. Exh. 12, which memorialized Prichacharn's testimony.)

Returning to the history of the collective-bargaining negotiations, there was apparently a telephone conference call between Sawyer, Stokes, and Lu in early October. According to Sawyer's testimony, he asked for further bargaining dates, but Stokes replied that future bargaining dates would be a waste of time. Stokes essentially admits saying so to Sawyer, although in his testimony he adds that he advised Sawyer that he would agree to further bargaining if the Union offered a "proposal that shows movement." In an internal email from Lu to various members of the Respondent's negotiating group dated October 2, 2009, Lu informs them about the recent conversation that he and Stokes had with Sawyer, during which Stokes said that "it would be a waste of time and money to meet if nothing would be accomplished." Further, Lu reported that Stokes told Sawyer that the Respondent had "not received anything from the Union showing progress and there was no point in meeting [if nothing was forthcoming]." The substance of Lu's email makes it clear that Sawyer was in possession of the Respondent's "final offer," which was the topic of the conversation between Stokes and Sawyer. (R. Exh. 68, p. 588.)

On October 6, Stokes sent Sawyer a long letter informing

him that in the Respondent's opinion, the parties "have reached bargaining impasse in the negotiations." Further, Stokes went on to state that, "[t]he parties' respective positions on key issues have not changed throughout the course of negotiations and it [is] apparent that further bargaining would be futile." Stokes then went into great detail as to his view of the parties bargaining history. He set forth the "Key Impasse Issues." Those issues were: (1) The Health and Welfare Plan, where the Respondent had proposed eliminating the Union's Taft-Hartley Medical Trust with its own corporate medical insurance plan; (2) the meal periods, where the Respondent had proposed eliminating the employer paid 30-minute meal break; (3) arbitration, where the Respondent had proposed a grievance and arbitration procedure that ended in final and binding arbitration; and (4) room attendant requirements, where the Respondent had proposed increasing the minimum room attendant cleaning requirement from 15 rooms to 17 rooms (the Respondent having lessened its original proposal of 18 rooms). (Jt. Exhs. 2-00104-00110.)

In this letter, Stokes also set forth areas where he believed the Respondent had made concessions. He listed the Union's Taft-Harley Pension Fund, which the Respondent had in its July 17, 2009 proposal sought to replace with its own corporate 401(k) pension plan, but had in its proposal of August 21 "reinserted the Union's Pension Fund as the provider of retirement benefits." As other examples of alleged concessions made by the Respondent from its original proposal to the August 21 proposal, Stokes listed the raised numbers of sick days employees could receive, the number of shop stewards it would allow, and the number of rooms attendants were required to clean.

Stokes concluded the letter by stating that the Respondent's "final offer, presented on August 21, 2009, remains open The Employer is ready, willing and able to discuss the merits of its final proposal with the Union. However, the proposal stands as the Employer's final offer. Thus, unless the Union indicates it is willing to accept the August 21, 2009 proposal, in its entirety, the parties have reached impasse." (Jt. Exhs. 2-00104-00110.)

By letter dated October 9, Sawyer replied that the Union "strongly disagree[s] with [Stokes'] assertion that the parties are at impasse in bargaining. To the contrary, [the Union] believe[s] that there is a great deal of room for further progress in our negotiations." Sawyer once again asked Stokes to agree to meet in Anchorage in October for further bargaining. (Jt. Exh. 2-00111.)

As had become their habit, the parties went back and forth, "Tit for Tat." Stokes responded by letter dated October 9 that "negotiations between [the Union] and [the Employer] are at impasse and have been for several weeks. The Employer's final proposal was sent to the Union on August 21, 2009, approximately 7 weeks ago. To date, the Union has not accepted or responded in any way with a counter proposal. Indeed, the Union has not presented the Employer with a proposal since April 1, 2009." Further, Stokes advised Sawyer that the Respondent "desires to maintain its relationship with [the Union] and will continue to recognize [the Union] as the bargaining representative of its employees. However, [as the parties were at impasse]. . . . [the Respondent] will implement the provisions

of its final offer [as of] October 17, 2009.” (Jt. Exh. 2–00112.)

Sawyer sent Stokes a 7 page letter dated October 12, 2009, which I frankly find very confusing. In the letter, Sawyer is highly critical of the Respondent’s manner of presenting its contract proposals. It accuses Stokes of making proposals in an “incomplete, incorrect and potentially deceptive” manner. Over the course of four pages it lists articles and sections of various proposals where the parties have allegedly reached tentative agreements. The letter states Sawyer contention, which was later repeated by Sawyer and Lawson when testifying at trial, that the Respondent’s method of making written proposals required the Union to perform extra work to determine specifically what changes the Respondent was proposing in the existing contract. Finally, it made certain demands upon Stokes and gave him certain time periods in which to respond. It concluded with the Union’s continual request for more face-to-face negotiations. (Jt. Exhs. 2–00114–0020.)

Stokes also sent a letter dated October 12, 2009, to Sawyer, but this was apparently in response to Sawyer’s letter of October 9. In his letter, Stokes continues to insist that the parties are at impasse, and there is no indication that further bargaining will resolve any of the remaining issues between the parties. Stokes repeats the history of face to face bargaining between the parties, having met four times over the past 11 months, for 4 full days. Further, he denies any total refusal to have further face to face meetings, but, rather, acknowledges a refusal to do so unless the Union presents an updated proposal to the Employer. He argues that the Union has failed to present an offer since April 1, 2009, while the parties have met face to face three times since that event, and with the Employer having presented the Union with three complete offers. Stokes denies ever insisting on only bargaining through “technology-assisted” means, but, rather, that the Respondent only suggested such methods as an addition to face to face bargaining, a more costly process. He again insists that impasse has been reached, and that the Union has taken no action to change that situation. (Jt. Exhs. 2–00121–00122.)

Having declared an impasse, the Respondent proceeded in mid-October to implement certain provisions of its last proposal, that of August 21, 2009. The evidence is uncontested that before implementing changes to the expired collective-bargaining agreement, the Respondent did not provide the Federal Mediation and Conciliation Service (FMCS) with 30 days’ written notice of the existence of a contract dispute with the Union, as required under Section 8(d)(3) of the Act. As stipulated to by the parties during trial, the Respondent did not provide the FMCS with such notice until February 3, 2010.¹⁴ (Jt. Exh. 1, notice from the Respondent to the FMCS of a dispute with the Union.)

Linda Mankoff, the Respondent’s former director of cater-

¹⁴ While in its answer to par. 10(d) of the first complaint the Respondent denied failing to give written notice to the FMCS prior to October 17, 2009, it clearly amended that answer by entering into the stipulation that such notice was given on February 3, 2010. Further, it should be noted that par. 10(e) of the first complaint, which involved the Alaska Labor Relations Agency, was withdrawn by counsel for the General Counsel.

ing, testified as a witness on behalf of the General Counsel. According to Mankoff, she attended a managers’ meeting called by the hotel general manager, Artiles, in October 2009. Jamie Fullenkamp, the hotel director of human resources, conducted the meeting and began by informing the managers that the Union and the Respondent were at impasse in their collective-bargaining negotiations. Mankoff testified that Fullenkamp said they could “toss” the old contract and replace it with the document that she was passing out. Fullenkamp called the document the new contract, and she proceeded to go through it item by item.

It is undisputed that the Respondent held two meetings for the unit employees at the hotel’s Josephine’s Restaurant on October 17 and 18, 2009. The meetings were conducted by Artiles and Fullenkamp. During these meetings the managers informed the employees of certain changes that would take place immediately. Among those changes were the requirements that housekeepers clean 17 rooms per shift, that employees clock in and out for lunch, and that employees who eat the food provided by the cafeteria pay \$1 for the meal. Jones and Esparza were present for these meetings, having been invited by the Respondent.

Further, it should be noted that in an internal Employer email communication dated October 7, 2009, from Donald Denzin to Mark Sharkey, Denzin noted the Respondent’s intention to implement the following changes: “1. Require employees to clock out and back in at lunchtime; 2. Sign up for Remington’s CIGNA plan in place of the union’s plan; 3. Require 17 rooms per housekeeping shift; 4. Charge \$1 per employee cafeteria lunch; 5. Require advance approval for union reps to visit (and meet only in non-work areas during non-work times); 6. Change holidays to eight (we must figure out exactly how to implement this since we said to union, ‘you choose.’); 7. Change sick leave to max 5 days, pay \$51 per day beginning on 2nd day of disability; and 8. Announce a 2% raise to non-tipped employees effective one year after new contract is ratified.” (R. Exh. 104.) However, in his posthearing brief, counsel for the Respondent represents that the CIGNA plan mentioned in the email was never actually implemented,¹⁵ no pay increase was given, and, except for those changes enumerated by Denzin, no other provisions of the August 21 final proposal were implemented. I will accept that representation as there is no evidence to establish otherwise.

Despite having implemented certain provisions from its August 21 final proposal, the Respondent was apparently still willing to discuss its final proposal. In a letter from Stokes to Sawyer dated October 23, 2009, Stokes states that the Employer is willing to “meet face to face to discuss and clarify the finality of its August 21, 2009 [proposal]. However, the Employer needs to receive an updated or revised union proposal before dates for such a meeting can be discussed.” (Jt. Exhs. 2–00127(a)–(b).) While Stokes’ offer does appear somewhat inconsistent in that he continues to refer to the August 21 proposal as “final,” and, yet, mentions a willingness to meet to clarify, if the Union submits an updated or revised union pro-

¹⁵ The Respondent did not implement a medical insurance plan until after the March 2010 bargaining sessions.

posal, the Union could have understood Stokes' letter to mean that all was not lost if the Union were willing to further compromise. In fact, that is what ultimately happened as the parties did engage in further negotiations. Although Stokes did not use these words in his letter, it seems to me that what he was really doing was suggesting to the Union a way in which the impasse could be broken.

Once again, events were occurring away from the bargaining table, which need to be mentioned. In November 2009, the unit employees voted to authorize a boycott of the hotel in protest of the Respondent's alleged failure to bargain in good faith and implementation of changes to their working conditions. There was a kickoff rally for the boycott outside the hotel on November 17. It was decided that a number of employees would present the hotel general manager, Dennis Artiles, with a copy of a petition calling for a boycott of the hotel, which petition was allegedly signed by 84 percent of the unit employees. To that end, certain of the employee members of the union negotiation team, Joann Littau, Lucy Dudek, Troy Prichacharn, Maria Hernandez, Ann Rodriguez, Gina Tubman, and Su Ran Pak, plus two other employees not on the negotiation team, Joey Pitcher and Juanita Bourgeois, were enlisted to present a copy of the petition to Artiles.

The union rally was taking place outside the 6th Avenue entrance to the hotel around 4 p.m. on November 17. At about 4:20 p.m., with the rally well formed, the delegation of presenters broke off and entered the lobby of the hotel. They were all on their own time. The presenters asked to speak with Artiles, who appeared about 5 minutes later. According to the employee witnesses, Prichacharn handed Artiles a copy of the petition (GC Exh. 8), while Dudek introduced the group and said, "Mr. Artiles, we are here to present you our boycott petitions and we want to show you our support for the boycott." Littau motioned outside, saying, "All of these people outside are members of the community who are supporting us in our boycott." Artiles took the petition and replied only, "Thank you for bringing this to my attention." The delegation then left the hotel lobby and joined the rally in progress. After a few minutes, the rally ended as the temperature outside was frigid.

The rally lasted a total of about 35 minutes, and the delegation's presentation of the petition to Artiles took around 5 minutes. The members of the delegation who testified at trial all indicated that they did not engage in chanting, noise making, or other celebration—type sounds in connection with the presentation of the petition to Artiles. Contrary to the assertions made by Artiles, all the employees who testified about the petition presentation rejected any accusation that they were rude or disrespectful to Artiles or anyone else.

The Respondent acknowledges that none of the employees in the delegation were on duty at the time they entered the lobby, and, further, stresses that they did not receive permission before entering the hotel. The Respondent is apparently relying on the alleged violation of the rules of conduct in the associate handbook to justify certain disciplinary actions taken by management against members of the delegation. On page 16 of the associate handbook under the heading "Working Hours/Overtime," it reads: "Return to property after work is not permitted. At the conclusion of the shift, you should leave the

hotel premises. If you desire to use any of the hotel facilities after hours or on your day off, you MUST receive prior permission from the General Manager." Further, under the heading "Associate Rules and Regulations," page 33 it says: "I agree not to return to the hotel before or after my working hours without authorization from my manger." (GC Exh. 7.) Counsel for the Respondent emphasized in his brief that all employees of the hotel received a copy of the associate handbook, which had been in effect since the Respondent assumed operation of the hotel in December 2006.

Artiles testified that the employee delegates did not block anyone or prevent anyone from entering the hotel. Still, he testified that he was concerned with their "body language," which he thought created a very "negative impression," in that they were belligerently and rudely insisting on the right to engage in their activity. Further, Artiles testified that, while he was surprised and "very concerned" by the employees' conduct, he was not physically afraid. However, he clearly thought that they were discourteous and that they were out of place confronting him in the hotel lobby, as "there is a time and place for everything."

On or about November 19, 2009, the Respondent disciplined Tubman, Littau, Rodriguez, Hernandez, Dudek, Pak, Prichacharn, Bourgeois, and Pitcher for having presented Artiles with the boycott petition 2 days' earlier. The disciplinary notice issued to each of the employees stated as follows: "On 11/17/2009 around 5:45 PM you and a group of associates entered the hotel on your time off. You all approached the General Manager in an [sic] disorderly conduct, verbal harassment making threats and very intimidating to him about what he was doing wrong with the union negotiations." There then followed four associate handbook rules that the employees had allegedly violated, with the notice concluding, "This will not be tolerated." The four handbook rules that the employees were accused of having violated were: the no loitering on the property rule, the being only in assigned work areas rule, the common decency and public embarrassment rule, and the conflict of interest rule. (GC Exhs. 13, 16, 18, 20, etc.)

In addition to the disciplinary notices issued to the nine employee members of the delegation, Tubman, Prichacharn, and Littau were initially suspended, but then, according to Fullenkamp, she and Artiles consulted with members of the Respondent's executive team in Texas and it was determined not to suspend them, but just issue each of them a written warning. However, it does appear that Bourgeois and Dudek were actually suspended. Allegedly, no employee lost any pay as a result of this discipline.

In connection with the boycott, an issue has arisen regarding whether, as alleged by the General Counsel, the Respondent "Cooked the Books" to make it seem as if the boycott was having a greater economic impact than was accurate. Allegedly, this scheme was intended to frighten the employees into believing that because of the adverse economic conditions created by the boycott that they might be laid off or their hours reduced, so as to cause them to become disenchanted with the Union.

The evidence of such a plan comes exclusively from the testimony of Linda Mankoff, the Respondent's former director of

catering, who testified as a witness on behalf of the General Counsel. According to Mankoff, shortly after the boycott began, Artiles suggested to her and Libbrecht, the director of sales, that the figures concerning the cancellation of hotel business due to the boycott needed to be inflated. She gave the example of an event sponsored by the International Brotherhood of Electrical Workers that had been canceled because of the boycott, where Artiles was unhappy with the reported amount of loss suffered by the hotel. Mankoff testified that Artiles told her and Libbrecht to “go back and look at the number again. [He] thought it would be higher.” Libbrecht rechecked the numbers, determined they were accurate, and so informed Artiles. Still being unhappy, Artiles announced that from now on he was taking control of executing the banquet contracts, work previously performed only by Mankoff and Libbrecht. He instructed them to take a third look at the cancelled contract, and specifically said, “I need this number to be higher so it can have an impact when I say we made a loss because of the union boycott.”

Mankoff testified that she understood what Artiles was doing was instructing her to fabricate numbers. Thereafter, she and Libbrecht “padded” the loss figures and instructed their sales team to do the same. The system they devised was simply to inflate the loss figures by 10 percent. They made it seem as if a mathematical error was the cause of the discrepancy, so, if discovered, the discrepancy would appear to be nothing more than an error in calculation.

In fact, Mankoff testified that instead of losing money, the sales/catering operation was making money, and was leading the region in sales.

As further evidence of the Respondent’s alleged unfair labor practices, the General Counsel contends that the Respondent installed and operated surveillance cameras at the hotel in November 2009 without first bargaining with the Union. The General Counsel claims that these cameras were intended to monitor elevators and hallways at the hotel where employees could be observed.

The evidence shows that surveillance and security cameras have been in place at the hotel since approximately 1980. They are stationed at the two main entrances to the hotel on Fifth and Sixth Avenues. The cameras monitor the ingress and egress to the hotel and the hotel parking lots.¹⁶ The evidence further establishes that these cameras have been routinely replaced and upgraded numerous times over the years as the available technology has improved. No evidence was offered to show that the cameras have been moved from their fixed locations. Witness testimony was that due to vandalism in the fall of 2009, that the broken cameras were replaced. No evidence was offered that employee work areas of the hotel were monitored.

It is the Respondent’s position that installing and maintaining security cameras is part of the hotel’s essential duties of

¹⁶ During the course of the trial, all parties agreed that it would be advantageous for the undersigned to view the hotel property. To that end, I received a short tour of the hotel in the company of counsel for the General Counsel, counsel for the Respondent, Jessica Lawson on behalf of the Union, and Denis Artiles, the hotel general manager. During that tour, the security cameras were pointed out for all to see.

keeping the property safe for guests. While there is no dispute that the Respondent did not notify and bargain with the Union regarding the repair and upgrading of the hotel cameras, the Respondent argues that it was not required to do so, as this is an area essential to the hotel’s business operations, and, as such, not subject to negotiations with the Union.

In early December 2009, an incident allegedly occurred regarding an employee wearing a union button. According to Housekeeper Elda Buezo, she was in the hotel elevator on the morning of December 8 when she ran into the director of operations, Eduardo Canes. At the time she was wearing a silver dollar sized button containing the words, “for a fair contract [in English and Spanish] UNITE-HERE!” (GC Exh. 21.) She was carrying several more such buttons in her hand.

Buezo testified that Canes asked her to take the button off and give it to him. He also asked for the buttons she was carrying in her hand. Buezo did as she was directed and removed the button that she was wearing and handed it and the other buttons to Canes. According to Buezo, she had intended to give the extra buttons to her coworkers.

Buezo further testified that until that time, it had not been unusual for employees to wear union buttons at work, and she had done so herself in the presence of Canes and other managers. This was the first time that she had been asked to remove her button.

Although Canes testified at the trial, he did not deny that the incident happened. Buezo seemed a very credible witness, and I have no reason to think that she fabricated, exaggerated, or embellished the incident. According, I conclude that the incident occurred as Buezo testified.

During December 2009, there was again some bargaining between the parties.¹⁷ However, there are some disparities between the Union and the Respondent as to just what occurred during these sessions, and I am unable to totally resolve that confusion. It should be noted that in an effort to resolve these issues, I have looked to the notes taken at these sessions by Lawson. (GC Exh. 46.)

Apparently at the Respondent’s request, on December 7, Sawyer and Jones, accompanied by Lawson and employee-committee members Littau, Tubman, and Gavin, met with Stokes and Villareal in a restaurant at the hotel. Sawyer was interested in trying to get consensus of what specific contract provisions had been agreed to by the parties. However, Stokes responded that he was frustrated by the Union’s alleged failure to come forward with a complete proposal, which he had been asking for during the entire period of the parties’ negotiations.

Sawyer attempted to engage Stokes on substantive issues separating the parties, but Stokes had a number of points that he wanted to make, some of which had been raised by Stokes repeatedly at earlier sessions. He went into a discourse on the value of final and binding arbitration, and the need for the Country to have a “Travel Ambassador,” as a stimulus for the hospitality industry. According to Sawyer’s testimony, he and Stokes had a sidebar conference, during which Stokes said that

¹⁷ While there is some confusion in the record as to the specific two dates in December when the parties met, these meetings occurred sometime between December 7 and 12.

he did not want to jeopardize the Respondent's "legal position," but that he would be willing to discuss certain of these matters in sidebar conferences. They did so the following day.¹⁸

On December 8, Stokes seemed intent on discussing the Taft-Hartley Pension Trust, and in particular the allegation that the pension monies had been moved from a financially sound local Alaska fund to an unsound National Fund. This issue had been repeatedly raised by Stokes during the course of negotiations and had been the subject of several information requests from Stokes to the Union. Sawyer was upset with Stokes' habit of continually raising this issue, and he reminded Stokes that he had referred him to the trust administrator a year earlier.

Apparently, the parties then held the sidebar conference that had been alluded to the previous day. During this sidebar, Sawyer "floated" a hypothetical offer to Stokes whereby the housekeepers would clean 16 rooms, and the Respondent's health and welfare trust contributions would be pegged to those of the leading union hotel in Anchorage. Stokes replied that he would rather pay what the Hilton Hotel paid.¹⁹ Stokes and Villareal continued to express disappointment that the Union had not put together a comprehensive contract proposal.

The incident that followed appears to me to be rather unusual. Villareal testified that the Union actually put a proposal in writing, and slide it under her hotel door that evening. (R. Exh. 47.) The document was headed, "CONFIDENTIAL INTERNAL UNION DOCUMENT [.] Committee Discussion Non Proposal." It is apparent to me that this was intended as a sidebar document that the Union was not formally offering to the Respondent as a contract proposal, but, rather, merely as an informal trial balloon, to see if the Respondent had sufficient interest in it to then make counter proposals of its own.

This "Non Proposal" from the Union showed a wage freeze for the first year of the contract, followed by increases of 2 percent for each of the next 3 years, or the minimum wage increase, if greater. For medical insurance it basically showed the rate of contribution being the same as that paid at the Captain Cook Hotel.²⁰ Regarding room attendants, the document provided that attendants would clean 16 rooms the 1st and 2d years of the contract, and 15 rooms in the 3d and 4th years of the contract. On the issue of job classifications, the document appeared to largely accept the Respondent's classifications as it stated: "Can agree to employer classifications except for laundry room attendant and seamstress with understanding from management that there is no intent to combine work currently done or change job duties as a result of job title change." Finally, this nonproposal indicated that tentative agreements (TAs) should be confirmed, and that absent other changes by the parties, the language in the expired agreement should be maintained.

Events again occurred away from the bargaining table, which

¹⁸ By "legal position," I assume that Stokes meant the Respondent's position that the parties had already reached impasse.

¹⁹ The Hilton and the Union had been engaged in lengthy, unsuccessful contract negotiations, and the Hilton had recently implemented its own health care plan.

²⁰ The Captain Cook Hotel is a major hotel in downtown Anchorage whose employees are currently covered by a collective-bargaining agreement with the Union.

require some attention. On February 2, 2010, at about 3 p.m., a number of union supporters were distributing flyers outside the hotel's front and back entrances. These flyers announced the Union's boycott of the hotel to guests and others who might be entering or exiting the hotel. The flyer requested that the public not patronize the hotel because of the labor dispute with the employees. The two entrances to the hotel are under overhangs where cars and cabs drop off or pick up riders having business with the hotel. There are private sidewalks adjacent to the entrances, but the public sidewalks are some distance away, past the parking area. At the time of the incident in question, those employees handing out flyers were clearly on the hotel's private property. There is no contention, nor any evidence, that they were in any way trying to physically impede the ingress or egress of individuals who were coming to or going from the hotel. Employees Dudek and Tubman were at the front entrance, while employees Littau and Prichacham were at the back entrance. These employees were situated between 4 to 6 feet from the entry doors. They were not working at the time, and had not asked permission of hotel management to be on the property when off duty. While they were passing out flyers, fellow employees were picketing the hotel from the public sidewalk.

A short time after the four employees began to pass out the flyers, Artiles, Fullenkamp, and another manager came out of the hotel and approached Prichacham and Littau. Fullenkamp announced that the employees were on private property, were off the clock, and, therefore, had to move to the public sidewalk, or she would call the police. Union Agent Esparza, who was present, approached Fullenkamp and asked if she was going to discipline these employees or was calling the police. She told him that the police had already been called. At that point Prichacham and Littau left the property.

Turning her attention to the other side of the hotel, Fullenkamp confronted Dudek and Tubman. She asked them whether they were off duty, to which they responded yes. Fullenkamp replied, "Well, you're not supposed to be here, you're trespassing." Dudek and Tubman defended themselves, saying that they had a right to be there, and handed Fullenkamp a paper listing certain NLRB cases with case summaries indicating they had a right to be on the property to communicate with customers regarding their labor dispute. (GC Exh. 11.) Fullenkamp looked at the paper, but was apparently not very impressed, as she again repeated that they had no right to be on the property. Further, she told them, "You need to look at your handbook. It's in your handbook that you're trespassing." The two employees remained while Fullenkamp went back into the hotel. Upon shortly returning, she told them if they still remained that she would have the security guards escort them off the property. Not dissuaded, the employees steadfastly remained. Once again Fullenkamp went back into the hotel, returning shortly to tell the two employees that the police had been called, they were on their way, and that the employees must leave now. Finally, Dudek and Tubman had had enough, and they left the hotel property.

The following day, the four employees were suspended pending an investigation. A week later, on February 8, 2010, the four employees were called back to the hotel so they could

meet with Artiles that tell him their side of the story. Subsequently, Artiles recommended they all be terminated, which recommendation was concurred in by Villareal, the final decision maker. On February 17, the four employees were again called back to the hotel where they met individually with Artiles who informed them that they were being terminated for violating hotel policy.

The disciplinary notices received by the four discharged employees were identical. (GC Exhs. 12, 15, 17, 19.) They were drafted by Fullenkamp. The employees' misconduct was identified as "passing out flyers to our hotel guests on your time off," as well as refusing to leave the property when instructed to do so. Fullenkamp also referenced the November 17, 2009 incident when they were warned about being on hotel property while off duty without permission.²¹ In the discharge notice, Fullenkamp stated: "When I asked you to leave the property, you refused at least two times by turning away from me and kept handing out the flyers. You then tried to argue with me about this by telling me you had the right to be there." Further, the notice stated, "your behavior was rude and disrespectful to me and other managers," and later stated that, "as a shop steward you know that you do the request and grieve it later." All four discharged employees were union shop stewards.

In the body of the discharge notice the Respondent refers to various sections of its Associate Handbook including the rules on off-duty access, antidistribution, and insubordination. Finally, the notice also makes reference to the "no strike/no lockout" provision in the expired collective-bargaining agreement.

It appears that these discharges were reported extensively by the local press in Anchorage, with a number of the employees interviewed on a local television station. The Union held a press conference in front of the Board's Anchorage office to publicize the terminations, and the bargaining unit employees were undoubtedly aware of what had transpired. However, as represented by counsel for the Respondent, in the weeks preceding the hearing in this case, all four employees received an unconditional offer to return to work, and all four did so with full back pay and seniority. No evidence was offered to dispute this representation.

At about the same time as the flyer incident, specifically on February 3, 2010, Stokes, on behalf of the Respondent, gave notice to the Federal Mediation and Conciliation Service (FMCS) of its proposed termination or modification of the expired contract with the Union. (Jt. Exh. 1.) As no evidence was offered of any earlier notice, it is undisputed that this was the first such notice given by the Respondent in connection with the expired contract.

Despite the fact that Stokes had taken the position since early October 2009 that the parties were at impasse, and the Respondent had implemented certain of its proposals as contained in its "final" contract offer of August 21, 2009, the Respondent asked the Union for bargaining dates in March of 2010. (Jt. Exh. 2-00136(d).) Thereafter, the parties met in Anchorage on March 10 and 11, 2010.

The Respondent's bargaining team was comprised of Stokes,

²¹ This was the incident where these four employees and others had presented Artiles with the boycott petition.

Fullenkamp, Artiles, Villareal, and Alicia Ernenwein, a contract human resource director for the Respondent. During these March meetings, Ernenwein was responsible for taking notes for the Respondent. The Union was represented at these negotiations by Sawyer, Jones, Lawson, and various members of the employee bargaining committee. As usual, Lawson took notes for the Union.

The March 10 meeting began with Stokes raising the issue of the union pension trust fund. It should be noted that the Respondent had previously acquiesced and agreed to continue making contributions to this fund despite Stokes' stated reservations about its financial viability. In any event, Stokes indicated that he had spoken with the trustee who was the head of the trust's financial committee, and who had said that the 2008 merger of the Alaska trust fund into the National UNITE HERE! trust fund was a "bad move." Stokes mentioned that the U.S. Department of Labor was going to conduct an investigation of the merger because it considered it unusual that such a large "transfer of cash" had taken place. Further, Stokes mentioned that the beneficiaries of the trust, which included employee-members of the bargaining committee, might file a class action ERISA suit against the trustees for agreeing to the merger. Several of these trustees were members of the union bargaining team, including Jones. According to Stokes, the National Fund had an enormous amount of unfunded liability.

After some acrimony between Sawyer and Stokes over this trust fund issue, Sawyer presented a written proposal, which appears to incorporate many of the provisions from the Union's "Non Proposal," which, as mentioned above, had been slipped under Villareal's hotel door on the evening of December 8, 2009. This written proposal was entitled, "Union's Package Proposal 3/10/10." (GC Exh. 56.) While it is very similar to the Union's "Non Proposal," it is worthwhile to set forth its provisions.

Below the heading appears the following: "The Union offers this proposal in its entirety. Should any part of the sum be rejected, the proposal and all of its parts are to be considered withdrawn and the Union's prior position prevails." For "Room Attendant Workload," the proposal called for room attendants to clean a maximum of 16 rooms in the 1st and 2d years of the agreement and a maximum of 15 rooms in the 3d and 4th years. Under medical insurance, the Union proposed the same rates as contained in its contract with the Captain Cook Hotel. Those contribution rates were then set forth in the proposal. As to yearly wage increases, the Union offered a wage freeze in the first year of the contract, followed by a 2-percent increase in each of the remaining 3 years of the contract. Finally, the proposal provided that the language in the expired contract be maintained, unless the parties agreed to changes. (GC Exh. 56.)

The parties next begin to confirm where they had previously reached tentative agreements (TAs). This became a long protracted process, and there continued to be disagreement over job classifications and other issues. However, at some point the parties reached the issue of medical insurance. The Union was continuing to propose the Taft-Hartley health and welfare plan as provided for under the terms of the expired contract. However, the Respondent offered a new independent medical plan,

which was substantially different from the CIGNA plan that the Respondent had proposed in its “final proposal” of August 21, 2009.

The Respondent’s new medical insurance proposal was an AETNA health plan. Mary Villareal made an approximately 90-minute presentation on the specifics of this plan. Further, she provided the Union with a comparison chart, showing the differences between the medical insurance provided for in the expired contract, and that provided for in the AETNA plan. (GC Exh. 53.) Stokes noted that the Respondent had “shopped around” since the August 21, 2009 proposal, and that this AETNA plan was the best medical insurance available for the money. The parties discussed the fact that the rates for the AETNA insurance would only be guaranteed for 1 year, which the Respondent contended was no different than the rates under the expired contract. The Union disagreed, arguing that those rates were guaranteed for the term of the contract. Sawyer indicated that the Union would discuss the Respondent’s medical insurance proposal, and, upon his request, the Respondent promised to connect him with its insurance broker so that Sawyer could have more detailed questions answered.

The parties discussed the specifics of a dental and vision plan, offered by CIGNA, which had been proposed by the Respondent in earlier negotiations. There was some further discussion on job classifications and the pension fund. Also, Stokes was critical of what he considered to be the failure by the Union to ever present a full and complete contract proposal, which was suitable for execution. He insisted this is what the Respondent had done, and the Union should have too. Sawyer countered that the Union’s proposal was sufficient, and it was not required to bargain in the manner preferred by Stokes. Further, Sawyer requested that the four terminated employees be reinstated, and Stokes told him to put that request in his proposal. The parties ended the session with the understanding that they would resume bargaining the following day.

On March 11, 2010, the parties met for what would turn out to be their last bargaining session. Initially there was some movement, with the Union agreeing to accept the Respondent’s proposed contribution amount for employee pensions. Further, as noted earlier, the Union had made some concessions regarding maximum room cleaning for housekeepers and as to wage rates. These concessions were contained in the most recent union proposal dated March 10, 2010. (GC Exh. 56.)

However, matters quickly soured when the parties began to discuss how the Respondent’s proposed job titles would impact on the individual job duties of the unit employees. The disputes appear to be over the actual duties the reclassified employees would perform. It was the Respondent’s position that the unit employees had actually been working under these “new job titles” since it had assumed management of the hotel in December 2006. Never the less, the Union wanted to discuss each of these job titles in connection with the work that the respective employees would actually be performing. Sawyer turned the issue over to Lawson, who began raising questions about the particular job titles and the work associated with them. Both Artiles and Fullenkamp were present, and they were attempting to reply to Lawson’s inquiries.

From Ernenwein’s notes of that day, it appears that Stokes

suddenly blurted out, “We are at impasse on this issue.” That was followed by Sawyer saying, “No we aren’t. You try to warp and shape facts to suit your purpose. Is the employer going to allow us to? [sic] Alright, we’re done Arch. Sorry you don’t want to listen.” To which Stokes replied, “You’re the one walking out.” This ended with Sawyer saying, “I’m not listening to you.” (R. Exh. 25, p. 4 of notes on meeting held on March 11.)

The testimony of Sawyer is not markedly different, although he claims that after Stokes said the parties were at impasse and he disagreed, that Stokes again brought up the Colonial Williamsburg contract and how well he allegedly got along with the top International union officials. According to Sawyer, in frustration he replied, “Arch, this is not the 70’s and I’m not wearing a tri-cornered hat.” Sawyer testified that he had heard about the Colonial Williamsburg contract one too many times. According to Sawyer, he swore at Stokes, who accused him of having an early plane to catch. Sawyer replied that he was in Anchorage all day, and “if you want to sit down and start really talking negotiations, you got my number.” Sawyer then led the Union bargaining committee out of the room.

In his posthearing brief, counsel for the Respondent contends that Stokes was simply frustrated with the Union’s endless discussion about the Employer’s job classifications, especially since most of these classification issues had already been resolved. Counsel does not mention Stokes use of the term “impasse,” but only Stokes’ “expression of frustration.” Further, counsel places the blame for the premature end of the meeting on Sawyer, who counsel says, “exploded and terminated the meeting-walking out and taking his committee with him.”

Away from the bargaining table, the Respondent took certain action that the General Counsel contends was unlawful. On March 18, 2010, the Respondent implemented an incentive bonus plan. A memo to the housekeeping department from Artiles was posted on that date in the department, as well as on the door of each floor’s housekeeping supply closet. Under the heading “GSI Incentives,” the memo stated the following: “In an ongoing effort to drive our Guest Satisfaction Scores up, I am putting a new incentive into place. If we, as a hotel, receive a 9.0 or better on Cleanliness of Hotel **AND** Cleanliness of Room and Bath for the month then I will minus a room for **ALL** Housekeepers for the following month. Meaning you will only be responsible for 16 rooms for the following month.” (Emphasis as in original.) The memo also promised that each housekeeper would receive a \$25 gift card if the overall goal for the hotel was met, and that if an individual housekeeper’s name was mentioned positively in an online guest survey, that housekeeper would receive a \$25 gift card. (GC Exh. 96.)

Also, based on the testimony of housekeepers Ana Rodriguez and Elda Buezo, the memo was further explained to assembled groups of housekeepers by Eduardo Canes, the director of operations, around the time that it was posted. In his remarks, Canes mentioned that some people would “not be in agreement with the [new] plan,” but it was now in effect.

In her posthearing brief, counsel for the General Counsel acknowledges that the “Respondent’s actual implementation of the plan was spotty,” but that Canes did lower the room cleaning requirement to 16 rooms for several employees who had

received positive comment cards from guests. Counsel for the Respondent, in his brief, argues that this program was never fully implemented, and the impact of this partial implementation was de minimis. Mary Villarreal testified that after consultation with the corporate office, Artiles decided not to implement the plan, and she confirmed that decision in conversations with Artiles and Fullenkamp.

The testimony of the employee witnesses regarding this matter was very weak. Housekeeper Elda Buezo testified that for 1 day only all the housekeepers were permitted to clean one less room. She thought that it was around the date that Canes talked to the housekeepers about the new plan, but she did not seem very clear as to the reason this happened. Housekeeper Ana Rodriguez testified that two other housekeepers, Dolores Cuelar and Rajit Aguglia, for 1 day only had their room cleaning quota reduced by 1 room, to 16 rooms, because the hotel had received good comment cards about them filled out by guests.

Counsel for the Respondent argues in his brief that the program was only in effect for a very limited period of time, and was discontinued after consultation with the corporate office. He contends that the impact of the program on the bargaining unit was de minimis, at best, and should not be considered as a refusal to bargain in good faith. Obviously, counsel for the General Counsel disagrees.

Following their meetings of March 10 and 11, Stokes sent a long letter to Sawyer dated March 19, 2010. (Jt. Exhs. 2-00137-00140.) In that letter Stokes summarizes what he contends occurred during those meetings. He prefaces the letter by stating that despite "the receipt of two offers from the Union...showing some movement . . . the Hotel has not changed its position from its August 21 final offer, except as discussed below, and the parties remain at impasse on many issues."

Stokes sets forth a number of contentions in eight (8) numbered paragraphs. In paragraph one he states that the parties went through the history of their negotiations and noted a number of items as tentatively agreed upon (TAs). In paragraph two Stokes says that while the Respondent listened to various union proposals, it "continues to adhere to its position as expressed in the final offer made on August 21, 2009. The only exception is that we have now substituted a proposed health care plan from AETNA for the one proposed on August 21 from CIGNA. As you know, the Hotel did not implement the CIGNA plan, but has continued to contribute to the Union's health and welfare fund up to now: that will soon be changing."

In paragraph 3 of the letter Stokes gives the Respondent's reasons for switching from the union health and welfare plan to AETNA, primarily cost. Stokes characterizes the union plan as "unreasonably expensive" and the AETNA plan as "financially responsible." He references the presentation by Mary Villarreal of the specifics of the plan at the bargaining sessions in March, as well as the summary of benefits chart comparing the union plan with the AETNA plan. Stokes reminds Sawyer that the Respondent provided him with the contact information for the Respondent's insurance broker so that Sawyer might direct any questions he had about the plan to the broker.

Stokes continues to discuss the medical insurance issue in paragraph 5 of his letter. He contends that the Union has opposed the Respondent's use of any medical insurance plan,

except the union plan. He restates the Respondent's position that the only fiscally responsible action for it to take is to obtain the flexibility to change plans every year, but the Union has continued to challenge this flexibility by insisting on only the union medical plan. Stokes ends this paragraph by saying, "The parties are at impasse on this issue and have remained there since the outset of negotiations."

Stokes changes topics in paragraph 6 of the letter, discussing the Union Pension Fund. However, rather than a review of what the parties discussed during their March negotiations, this paragraph seems to be nothing more than a recap of Stokes' concern over the financial integrity of the National Union Pension Fund into which the Alaska Pension Fund was merged. He complains about how difficult it has been for the Respondent to obtain necessary information from the trustees of the National Union Pension Fund, and claims to have turned the matter of his concerns over to the Employment Benefit Services Administration in Seattle for investigation.

Again, in paragraph 7 of the letter, Stokes does not discuss the matters raised during the March negotiations, but, rather, uses it as an opportunity to restate the Respondent's opposition to contributing to the Legal Fund, as provided for in the expired contract.

Paragraph 8 of the letter is more instructive, as it states Stokes' position regarding those issues over which the Respondent contends the parties are at impasse. They include the following: a. holidays; b. the number of rooms a housekeeper must clean; c. the unpaid 30-minute meal period; d. sick leave; e. funeral leave; f. jury duty; g. the grievance procedure; h. the pension fund; i. wages; j. the health and welfare fund; and k. the legal trust.

In his letter, Stokes goes on to reprimand Sawyer for "walk[ing] out of the March 11 session while we were discussing our list of job classification names." Further, he says that "the Hotel's representatives were willing to remain and continue to negotiate when you elected to leave the room." Stokes claims that it is "apparent from the Union's own conduct . . . that the parties are at impasse." In his final paragraph, Stokes reiterates his contention that the parties have remained at impasse since August 21, 2009. Therefore, he notifies Sawyer, that the Respondent is "implementing anew, its August 21 offer, except that as of May 1, 2010, the AETNA plan will be implemented in place of the union health and welfare plan that is currently in effect." (Jt. Exhs. 2-00137-00140.)

In my opinion, this letter from Stokes was extremely self serving, and was intended primarily to be used in litigation, and as a defense to unfair labor practice charges. However, that does not necessarily mean that the substance of the letter was inaccurate or incorrect. I will have much more to say about these matters in the analysis section of this decision.

In response to Stokes' letter, Sawyer answered with his own letter dated April 1, 2010. (Jt. Exhs. 2-00141-00143.) Not unexpectedly, Sawyer vigorously denied that the parties were at impasse. He accused Stokes of attempting to artificially create and declare impasse. According to Sawyer, the parties were still bargaining with there being no overall impasse reached.

In particular, he mentions the Respondent's AETNA medical insurance proposal, which was only raised by the Respondent

for the first time during the March negotiations. Regarding the AETNA proposal, Sawyer states that “the Union has at no time articulated its position regarding the [proposal], nor have you to date asked us to do so. Nor are we ready or able to offer a response at this time, since there are many questions that the Union must pursue to adequately address your idea to again charge [sic] plans [T]he Union began at our last session to explore all of the differences between the current plan and the Employer’s newly proposed plan.” Further, Sawyer argues that the Respondent needs to make information available to the Union “that will enable us to understand and assess the Employer’s brand new proposal on this complicated subject.”

While Sawyer does not deny that he “walked out” of the bargaining session on March 11, he criticizes Stokes for allegedly wasting time talking about the Colonial Williamsburg agreement, his relationship with other UNITE HERE! officials, other irrelevant subjects, and refusing to answer questions on the job classification issue. He claims that, “We saw no benefit in continuing a discussion that did not seek to earnestly pursue a full and complete discussion of proposals in an attempt to reach agreement.” Sawyer states a willingness to “continue meaningful discussions and offer proposals in an attempt to reach agreement.” (Jt. Exh. 2–00141–00143.)

I believe that Sawyer, as did Stokes, wrote this letter with an eye towards possible litigation. However, the letter strikes me as not quite as self serving as the one written by Stokes. Clearly, the Union was interested in getting back to the bargaining table. But not so the Respondent, resting on its claim that impasse had been reached.

As noted earlier, in his letter of March 19, 2010, Stokes advised Sawyer that as of May 1, 2010, the Respondent would implement the AETNA medical insurance plan in place of the union health and welfare plan that was still in effect and was provided for in the expired collective-bargaining agreement. (Jt. Exhs. 2–00137–00140.) According to the Respondent, this led to a series of small group “meet and greets,” between the hotel managers and unit employees where the new medical insurance plan could be explained to the employees and any questions answered. These meetings occurred in the Jade Restaurant, which is located in the hotel lobby. There were approximately five such meetings held during the period around March 22 to 25, 2010. The meetings were held during the employees’ lunch period, lasting approximately 30 minutes. Lunch was paid for by the Respondent and provided through the Jade Restaurant, with the employees being permitted to order off of the menu.

It is counsel for the General Counsel’s contention that during these meetings Artiles and other managers made disparaging and denigrating remarks about the Union and made other statements that violated the Act. Numerous employees testified about these events, as well as a number of managers who were in attendance. Preliminarily I will note that I found the evidence regarding these events to be very confusing, contradictory, inconsistent, and hard to evaluate. In many instances the employees testified in a cryptic, truncated manner regarding these events, and even when responding to leading questions from counsel were hard pressed to recall the specifics of the events in question. In some instances this problem was com-

pounded by a language barrier, as the managers, who were alleged to have made the unlawful statements, principally Artiles, were reported to have spoken in either Spanish, English, or both, and the employee witnesses were primarily speakers of a language other than English, most commonly Spanish.

Both Artiles and Fullenkamp testified that the original idea to hold these meetings was their own. Artiles requested that meetings of groups of 10 employees be arranged. Fullenkamp scheduled various departments and cross-sections of employees to attend. The principal topic of conversation at these meetings was the new health insurance plan, although it appears that the meetings were somewhat unstructured and ranged over a number of topics, which varied from meeting to meeting. Typically, employee questions covered multiple areas of concerns. Fullenkamp apparently created a spreadsheet that showed the respective information on the AETNA plan and the union medical plan that was being replaced. Further, Fullenkamp made it clear from her testimony, as did Artiles, that they used the opportunity to inform the employees that it was the Respondent that paid for the employees’ medical insurance, whether under the union plan or the AETNA plan.

Of the employees who attended the Jade Restaurant meetings, approximately 30 testified.²² It is very hard to know exactly what was said by management at those meetings as all the witnesses seem to recall different and partial versions of what was discussed. Out of these 30 employees, 8 appear to testify that Artiles disparaged the Union in some way or made threatening statements regarding the Union. These eight employees are Yanira Medrano, Dexter Wray, Elda Buezo, Maria Bautista, Maria Hernandez, Ana Rodriguez, Susannah Bautista, and Luz Maria Zavala.

One or more of these eight employees testified that Artiles said that: they would take the benefit package that he offered or they would get nothing; that he was the boss and “wore the pants” in the hotel and could fire anyone he wanted to; that he wanted the Union out; that the union dues were used by the union officials to “buy new cars with”; regarding the four discharged employees, he asked, “have you seen them around here, have they come around here, have they been back?”; regarding seniority, that he would continue it, but if he wanted to, he would take it away; that he could return the 15-room standard for housekeepers, but that he didn’t want to “bother” or “molest” the Union; that it was his hotel and he would run it the way he wanted to; and that there would be “consequences” from the boycott, and that he would start “cutting people’s hours” and engaging in “layoffs.”

The remaining approximately 22 employee witnesses who testified as to attending the meetings at the Jade Restaurant did not indicate that managers said anything disparaging or threatening about the Union. Of course, Artiles and Fullenkamp denied making such statements, and they are supported in their denials by Ms. Ernenwine, who attended at least some of the meetings. They deny any discussion of the four terminated

²² It is difficult to give a precise number of the employee witnesses who testified about the meetings at the Jade Restaurant, as a number of these witnesses use several surnames and may use one or the other at different times.

employees, or any discussion about whether the Union was necessary, unnecessary, useful, or obsolete. They claim that the meetings were called to compare the AETNA insurance plan with the Union's insurance plan, and that they also answered employee questions and tried to dispel rumors. Artiles does acknowledge that the subject of the employees' union dues was raised by some employees. In answering the question, Artiles claims that he merely indicated that union dues did not pay for the employee benefits provided for under the terms of the contract, such as medical insurance, but, rather, that the Respondent provided that benefit by paying a certain amount per employee per hour for the coverage. It appears that at that meeting, or another, union supporter Dexter Wray, whose name was raised in connection with this issue, said that the union dues were used for representation and also for "health benefits."

I found Artiles, who testified on four or five separate occasions, to be a straight, no nonsense kind of manager. He clearly took great pride in his ability to operate a large hotel with many employees. It was suggested by a number of witnesses that he had a reputation as a "cleaner," one who cleans up problems. This may in fact be so, as he seems very competent, and based on his testimony, very hard working. Further, I found him to be circumspect and careful with his words, and somewhat gruff in voice and manner. I will have more to say about this in the analysis section of this decision.

On March 26, 2010, the Respondent announced the implementation, effective May 1, 2010, of the AETNA medical plan, a standalone health care plan for the unit employees. (GC Exh. 94, p. 3.) This plan was only available to unit employees who worked a minimum of 30 hours per week. It should be noted that under the Taft-Hartley Trust Fund medical insurance plan, as provided for under the expired collective-bargaining agreement, unit employees who worked part time might still be able to participate in the plan by pooling their hours from other union jobs where they were also covered by the same Taft-Hartley Trust Fund. This "pooling of hours" would not be available to the employees under the AETNA plan.

As these events were occurring, there was an ongoing effort by a number of unit employees to decertify the Union as the collective-bargaining representative of the hotel's employees. It is the General Counsel's contention that the Respondent's managers were directly involved in obtaining signatures on the decertification petition. Further, counsel alleges that the Respondent took action that ensured that decertification was inevitable, including: implementing unilateral changes, which demonstrated the Union's impotence; and by accusing the Union of corruption.

As has been mentioned above, Stokes repeatedly raised the issue during bargaining sessions of the transfer of pension money from the Local Union's Alaska Pension Fund, which was financially secure, to the National Union's Pension Fund, which was apparently not financially secure. This issue was repeatedly raised with the employees by the Respondent in the form of posted flyers and notices. The Respondent claimed that the unfunded vested liability of the National Pension Fund was \$47,400,000 while the amount of money that had been imprudently transferred to the National Fund from the Alaska Fund was \$174 million. (GC Exh. 94, pp. 4-5.) It is the contention

of counsel for the General Counsel as set forth in her brief that the Respondent continually repeated these assertions in an effort to disparage the Union, causing the employees to become disenchanted with the Union, and, thereby, willing to sign the decertification petition.

Of course, the Respondent strongly disagrees, contending that management had nothing to do with the circulation or signing of the petition. Counsel argues that the management of the hotel had a duty to alert its employees of the financial jeopardy their pension moneys were in, having been transferred to the National Union Pension Fund. Further, the Respondent argues that during contract negotiations, Stokes was raising legitimate issues and concerns about the pension fund and those contributions to the fund from the Respondent required under the collective bargaining agreement. The Respondent contends that the decertification petition was simply an uncoerced, genuine manifestation of the employees' discontent with the Union. In an effort to establish this at trial, counsel for the Respondent attempted to call as witnesses literally every person who had signed the decertification petition. While not every such person was available, a great deal of time and effort was spent in questioning those persons who were available as to their individual specific reasons for signing the petition, and whether they were in any way pressured or coerced by agents of management into so doing.

Ed Emmsley is an admitted supervisor and the hotel's chief engineer. Dexter Wray is an engineer in that department. Wray testified on behalf of the General Counsel that in mid-May 2010 he was called away from a job that he was working on and back to the engineering shop office. Emmsley wanted to see him and asked, "Are you going to sign?" Wray replied, "Sign what?" To which Emmsley said, "The petition." Apparently Wray knew what petition Emmsley was referring to, and he declined to sign.

According to the testimony of Wray, over the course of the next 4 days, Emmsley tried on a number of occasions to get him to sign the decertification petition. Wray claims that Emmsley went so far as to solicit Wray's friend, bellman Joel Encabo, to convince him to sign the petition, but in each instance Wray declined to do so. Thereafter, on May 18, Emmsley sent Wray a "text" message that said, "Just sign it. I will never put you on the spot. You know I'll always cover your black ass." Wray testified that following the text message, Emmsley told him that if he did not sign the petition that he would "be one of the first ones to be let loose." Finally being worn down, Wray then signed the petition.

Admitted into evidence were several photographs of the front screen of a cell phone that Wray identified as his personal cell phone. The photographs showed that the message was from "Ed," and the screens showed in sequence, "Just sign it I will never put u on the spot you" and next, "know I'll always cover your black ass." (GC Exh. 23.) Wray testified that this was the copy of the text message that he received from Emmsley.

Emmsley denies asking Wray to sign the petition, and denies that he ever sent Wray such a text message. Emmsley admits discussing the advantages and disadvantages of supporting the Union in the context of the health care benefits issue, but he

denies asking or suggesting to employees, including Wray, that they sign the decertification petition. In denying that he sent Wray such a text message, Emmsley testified that never uses such language as “bad ass” in his everyday conversations. Counsel for the Respondent refers to Emmsley in his brief as a “devout, conservative man.” Further, counsel called Emmsley’s wife, Janet E. Emmsley, to testify, and she denied ever hearing her husband of 25 years use such language. Another employee witness called by counsel for the Respondent, Joel Encabo, also testified that the term “black ass” is out of character for Emmsley, who would allegedly never use such language.

I closely observed the demeanor of both Ed Emmsley and Dexter Wray while testifying. Wray held up well under extremely vigorous cross-examination from counsel for the Respondent. He adhered to his story of Emmsley’s efforts to get him to sign the decertification petition, and about the text message that he received from Emmsley. He indicated that it was not unusual for Emmsley to send him text messages during the course of the work day, in addition to calls that he might receive from Emmsley on the radios that they both carried. Wray’s testimony had the “ring of authenticity” to it.

Contrary to counsel for the Respondent’s strongly argued views, I believe that the photographs of the text message allegedly received from Emmsley constituted highly reliable, probative evidence. I do not subscribe to counsel’s various conspiracy theories of how Emmsley phone could have been clandestinely used to send the text message to Wray’s phone, or that the “chain of custody” was so improperly maintained as to allow Wray’s phone to be tampered with. Further, I did not view Emmsley denial as convincing. It seemed tepid at best. I certainly would not dispute counsel’s characterization of Ed Emmsley as a devote, conservative man, or Emmsley’s wife’s statement that the use of profane language was not something that he did. However, it is obvious that anyone on occasion may do something totally out of character. Additionally, I conclude that Wray’s testimony was credible.²³ As such, I believe that Emmsley did persistently attempt to convince Wray to sign the decertification petition, going so far as to send the text message in evidence, as testified to by Wray.

Some mention should be made of Emmsley’s three children, Janet, Jannice, and Ed Junior, who are employed at the hotel. Janet and Jannice, who are PBS operators, were very active in getting employees to sign the decertification petition. Ed Junior is a security guard and not in the bargaining unit. It is generally known that Janet and Jannice are Ed’s daughters. However, there was no probative evidence offered to establish that any employee signed the petition when asked to do so by the Emmsley children because of that family relationship and the knowledge that Ed Emmsley senior was allegedly in favor of the decertification effort.

Counsel for the General Counsel offered the testimony of a

²³ Special consideration should be given to current employees who testify contrary to the interests of their employer. Their testimony may be considered credible since to so testify involves certain inherent risks of future antagonism from their employer. See *Classic Sofa, Inc.*, 346 NLRB 219, 219, 223 fn. 2 (2006).

number of employee witnesses who testified as to efforts allegedly made by management to get them to sign the decertification petition. Yanira Medrano is a housekeeper at the hotel, who when testifying had been employed there for 6 years. Lupita Mejia is Medrano’s landlady. Mejia is employed as the hotel’s morning employee cafeteria attendant whose chief duties include preparing and serving employees’ food and keeping the employee cafeteria clean. She moves back and forth between the main kitchen and the employee cafeteria throughout the course of the day. In May, Medrano got a call from Mejia. According to Medrano, Mejia told her that Artilles had said that people who didn’t support him and those who had not signed the petition were going to be fired. Mejia also allegedly said that Maria Hernandez, Elda Buezo, and Anna Rodriguez were all going to be fired right away. The three named employees were all well know union supporters.

Regarding this alleged statement by Mejia, I am of the view that it constitutes inadmissible hearsay. It seems to be offered for the truth of the matter asserted. Further, it does not constitute an admission against interest of a party opponent, as I conclude that Mejia is not a supervisor or agent of the Respondent. There is no evidence of record as would establish that Mejia exercises any of the indicia of supervisory authority. She plainly does not hire, fire, discipline, review, or manage any other employees. Counsel for the General Counsel has failed to offer any probative evidence in order to sustain her burden of proving that Mejia is a supervisor or agent under the Act.

After speaking with Mejia, Medrano allegedly confronted Artilles in his office. She testified that they spoke for over an hour. According to Medrano, she asked him directly whether he had said that those employees who did not support him and failed to sign the petition would be fired. Supposedly Artilles responded in the affirmative. At her request, Artilles allegedly explained what the petition was all about. He then questioned why she supported the Union, and whether it had done anything for her. She contends that he stated there would be no more Union at the hotel, people who supported the Union would be fired, and that he specifically mentioned three who would be fired, Anna Rodriguez, Elda Buezo, and Maria Hernandez. Later, she reviewed the petition and signed it.

Artilles denied any knowledge of the decertification petition prior to the time that it was presented to management by the employees, and denied any effort to get employees to sign such a petition. Earlier in this decision I stated my view of Artilles who testified extensively as a straight, no nonsense kind of manager who was circumspect and careful with his words. I do not believe that he spoke the words attributed to him by Medrano. Her story does not ring true, and I do not find her credible in this regard. Artilles is not a verbose individual. I simply cannot envision an hour conversation where this busy hotel general manager would take time from his schedule to threaten a housekeeper with termination for not signing the petition, and make threatening statements towards other employees, who he allegedly named. This would be totally out of character for the man who testified before me on four or five different occasions. I do not believe that the conversation occurred as testified to by Medrano.

In her posthearing brief, counsel for the General Counsel ar-

gues that Chef Glynn Rydin forced several employees into signing the petition. Rydin is an admitted statutory supervisor, and based on the testimony of a number of witnesses, has expressed antiunion views. Jose Lantigua was hired as a dishwasher by the Respondent on May 17, 2010. Before he actually started working for the Respondent, he had a conversation with Chef Rydin. According to Lantigua, the day before his employment began, during this conversation with Rydin, the chef said, "I'm going to need you to sign over here because the Union only takes money and you do not receive benefits." Lantigua signed the petition and was then sent to the human resources department where he filled out an application, the new hire paperwork, and was hired. He reported to work the following day. Lantigua testified in an open and simple way, seemed candid, and did not appear to exaggerate or embellish his testimony. His recollection of events seemed good. Accordingly, I believe him to be credible and accept his version of the events that led to his signing of the decertification petition.

I do not believe the testimony of Cindy Mathers, hotel banquet captain, who claims that Lantigua signed the petition in her presence, not in the presence of the chef. The Respondent uses Mathers as the "ubiquitous witnesses," with the "outstanding memory" that counsel for the Respondent trots out at every opportunity to testify about some matter in dispute. I find her testimony in general suspect, and her demonstrative enthusiasm about repeatedly testifying peculiar and much less than credible. I will have more to say about her later in this decision.

A second employee witness, Esusebio Bristol, who is a breakfast cook at the hotel, testified that he was called into Rydin's office and asked to sign a paper. Bristol's primary language is Tagalog, and he testified that he had no idea what he was signing, or what it would mean. He signed the document simply because the chef asked him to do so. The document that he signed turned out to be the decertification petition. Bristol seemed genuine in his testimony, was certain of the incident, appeared relatively calm when testifying, and showed no sign of stating anything other than the truth. Accordingly, I find him credible and accept his version of these events.

Regarding Chef Rydin, I do not believe that he testified credibly regarding these events. Rydin testified that he had nothing to do with the decertification petition, was unaware of its existence, did not discuss it with employees of the hotel, and made no effort to get employees to sign the petition. To the extent that his testimony is contradicted by other witnesses, I discredit Rydin. He testified in a rather sullen, arrogant manner, leaving me with the clear impression that he thought the proceedings to be a waste of his time. His testimony, although not extensive, appeared designed to simply refute any allegations that involved him. He seemed tense, more so than would seem reasonable for a person of his achievements, and his demeanor and testimony left me with the impression that his recollection was less than genuine.

Counsel for the General Counsel consistently argues that the Respondent's supervisors were instrumental in circulating the decertification petition and/or in coercing employees into signing the petition. While there are some isolated incidents where this did occur, as in the case of Chef Rydin and Ed Emmsley

Sr., for the most part counsel has failed to make this connection, principally because she has failed to show that the petition circulators were in fact supervisors. Cindy Mathers was one of the main petition circulators. She was also a favorite witness of the Respondent, used repeatedly in an effort to refute any damaging testimony or evidence regarding the circumstances of the petition circulation. While I have noted my finding that in general she was not particularly credible, I do not dispute her testimony concerning her work duties and responsibilities. I do not find her to be a supervisor during the time the petition was being circulated.

Mathers started work at the hotel as a banquet server, moved to the position of banquet captain, and remained at that position until September 2010 when she was promoted to banquet manager. Banquet captains at the hotel are responsible for setting up and servicing banquet events according to the guests' banquet orders. This responsibility includes assigning banquet servers, who were scheduled for work that shift, to perform standard banquet tasks such as polishing silverware and glassware, setting dining tables, and setting buffet tables. These are routine tasks required of all servers from time to time, and for which there is no monetary distinction. It is the responsibility of the banquet captain to check on the readiness of the food, and to confirm that guests receive the correct food ordered. Banquet captains do not hire, fire, promote, discipline, conduct performance reviews, schedule servers, or attend management meetings. Counsel for the General Counsel failed to meet her burden of establishing that the banquet captain exercises any of the indicia of supervisory authority. The banquet captains report to the banquet manager who holds the supervisory authority in the department. Although there was a period of time when the hotel was without a banquet manager, the chef assumed that role with help from the captains, including Mathers. As Mathers held the nonsupervisory position of banquet captain at the time that she helped circulate the petition, her participation in that effort did not taint the petition.

Another principal petition circulator was Margerita Lucero. She is designated as a housekeeping supervisor. Lucero reports to Eduardo Canes, director of operations, who oversees the housekeeping, front desk, and PBX departments. Canes is an acknowledged statutory supervisor. Lucero is one of three housekeeping supervisors, the most junior of the three. According to Canes, Lucero, and presumably the other two housekeeping supervisors, acts as his "liaison" with the department's employees because she relays his instructions to them. He has "made it clear to the housekeepers" that Lucero speaks for him. Lucero does not clean rooms herself, but monitors the work of the housekeepers, and assigns them rooms to clean in accordance with the hotel's computer system program. She also inspects the rooms, and if she is dissatisfied with a housekeepers' work, she orders them to correct it. Lucero submits a daily report of her inspection results to Canes and reports to him regularly on the housekeepers' performance. Canes does not regularly check rooms himself, but, rather, relies on the housekeeping supervisors. When he drafts the housekeepers' annual appraisals, Canes relies on the housekeeping supervisors' reports.

Lucero does not have the ability to assign the order in which

rooms are cleaned or the priority that those rooms must receive because that is determined automatically by the hotel computer system, which bases the determination on hotel reservations and room vacancies. The housekeeping supervisors have no input into scheduling work for the housekeepers, which decisions are made by Canes alone. The housekeeping supervisors do assign the housekeepers to those individual rooms that the computer has shown need to be cleaned, but the room cleaning assignments make no real difference as the rooms are all basically the same from floor to floor.

The housekeeping supervisors inspect the cleaned rooms according to a checklist provided by Canes. Lucero has been counseled by Canes for not properly inspecting the rooms. The housekeeping supervisors and Canes carry radios and that is how they keep in contact. Lucero testified that she does not hire, fire, discipline, schedule, layoff, attend managers' meetings, or have any input into employee job reviews. Despite what it says on her written job description, she testified that she does not assemble the housekeeping schedule and does not monitor the lunch period taken by employees.

The question of whether Lucero is a statutory supervisor is a close one. Certainly, the fact that her job title refers to her as a housekeeping "Supervisor" is not dispositive of this issue. In the final analysis, she does not appear to exercise any of the indicia of supervisory authority. Her assignment of rooms to the housekeepers is simply routine, lacking any real independent judgment, and her inspection of those rooms for cleanliness merely requires that she follow a check list prepared by Canes, the true supervisor of the department.

Counsel for the Respondent correctly analogizes Lucero's position to that of a "housekeeping inspector," over which the Board has repeatedly found those individuals not to be supervisors. See *Lodgian, Inc.*, 332 NLRB 1246, 1247 (2000). Where the "inspector" is clearly under the supervision of the "head housekeeper," as is the case with Lucero and Canes, the Board has ruled that the "inspector" is not a supervisor. *LaRonde Bar & Restaurant*, 145 NLRB 270, 272 (1963). Further, the Board has held that the authority to inspect the cleanliness of a guestroom and direct the correction of errors is not equivalent to the authority to discipline. Such individuals function as "leadmen," rather than supervisors. *Marin Operating, Inc.*, 279 NLRB 481, 491-492 (1986). According to the Board, such inspectresses were not supervisors as they "did not exercise any independent judgment in disciplining room cleaners for their deficiencies or that they otherwise exercise any supervisory authority specified in Section 2 (11) of the Act." (Id. at 492 fn. 14.) Based on the above, I conclude that counsel for the General Counsel has failed to meet her burden of establishing that Lucero is a statutory supervisor. Therefore, her participation in the circulation of the decertification petition did not taint that petition.

Of all the General Counsel's arguments that the decertification petition was tainted by Employer participation, the one that makes the least sense to me is that involving the family of Ed Emmsley Senior. As I noted earlier, in addition to Ed Emmsley Sr., the hotel also employs his daughters, Janet and Jannice, as PBX operators, and his son, Ed Emmsley Jr., as a security guard.

From their testimony, it is clear that the Emmsley family is close. After all, the family, including the adult children, all live under one roof. Both Emmsley daughters were very active in circulating the petition. I have already concluded that Ed Emmsley Sr. was aware of the existence of the petition while it was being circulated and attempted to coerce Dexter Wray into signing the petition. In so doing, I discredited Emmsley's denials and found that he knew the petition was being circulated and was pressuring employees to sign it. However, the two Emmsley daughters deny telling their father about the petition, and, while I am highly skeptical of their contention that the family does not discuss hotel matters at home, there is no specific evidence to establish that Ed Emmsley Sr. learned of the existence of the petition through them.

Even though Ed Emmsley Jr., as a security guard, was not a bargaining unit employee, he agreed to help his sisters, and, to that end, he suggested to a number of unit members who worked the graveyard shift that they sign the petition. Further, I am willing to find, as appears obvious from the record, that many unit employees knew of the connection between the various members of the family. However, I am at a loss to understand what all this is supposed to mean. Counsel for the General Counsel is apparently contending that members of the unit who knew of the family connection signed the petition when asked to do so by one of the Emmsley children because they were afraid to offend the children of Ed. Emmsley Sr., a statutory supervisor. The problem for the General Counsel is that there is absolutely no evidence of such fear, no apparent basis for such fear, and, frankly, no logical reason why any employee would have such fear. Accordingly, I conclude that this theory on the part of the General Counsel has no merit, and certainly does not establish that the petition was tainted by management conduct.

The Respondent's managers and supervisors all deny any knowledge that the decertification petition was being circulated. As they claim that they were unaware of its existence and circulation, the managers and supervisors contend that they were unable to stop its circulation from occurring during working time. I would, however, note that if it was a secret, it was not a very well kept one. The principal employee petition circulators, Mathers, Lucero, Mejia, and the Emmsley sisters obtained the signatures of employees while at work, and were often observed by other employees carrying copies of the petition around from place to place. Further, at least several employees testified about seeing a copy of the petition hanging on the PBX room wall where the Emmsley sisters worked.

In any event, on May 20, 2010, the principal petition circulators all went to the Respondent's human resource office and presented their decertification petition to Mary Villareal. According to her testimony, the employees handed her a 6-page petition and told her that they believed it had been signed by a majority of the unit employees, and that there were "probably more signatures coming." Villareal testified as to her surprise at being presented with the petition. She gave Ariles the petition later that same day. Subsequently, on June 2 and 14, two additional pages of employee signatures on the decertification petition were turned into management. This brought the total number of employee signatures on the petition to 110.

Of course, it is the position of the Respondent that the petition was a manifestation of the employees' unhappiness with the Union. Counsel for the Respondent argues that this unhappiness was the result of the Union's failure to bargain in good faith and obtain a new contract; of the Union's boycott, which was hurting the unit employees financially; of the questionable financial condition of the National Union Pension Fund, into which unit employees' pension contributions had been transferred; and of the employees' unhappiness with the medical insurance provided for under the terms of the expired collective-bargaining agreement when compared to the medical plans that the Respondent was proposing. Additionally, the Respondent contends that many employees had personal reasons for signing the petition to decertify the Union. These reasons ranged from a dislike for the way in which the union representatives were conducted themselves, to an interest in using the money that went to pay union dues on other things. In any event, the Respondent vigorously denies that it committed any unfair labor practices that led employees to become dissatisfied with the Union, that it coerced employees into signing the petition, or that its managers and supervisors in any way supported or encouraged the decertification effort.

The Respondent called approximately 68 petition signers as witnesses. Counsel's intent was obviously to show that the petition signers each had their own reasons for signing the petition, and were uninfluenced and unaffected by the conduct of the Respondent, its managers, and supervisors. For many of those witnesses, and for some petition signers who were unavailable to testify, the Respondent introduced into evidence, over the objection of counsel for the General Counsel, a sworn declaration setting forth the employees' individual reasons for signing the decertification petition. These declarations were taken by management sometime between the time the employee signed the petition and the trial. The declarations contain what is generally referred to as a "*Johnnie's Poultry*"²⁴ statement. It is counsel's contention that these declarations were offered to the petition signers by management as a way of memorializing the reasons why they individually signed the petition.²⁵

Of course, counsel for the General Counsel takes the position that the decertification petition was tainted by the Respondent's unfair labor practices, including its alleged bad-faith bargaining, unlawful discharge, and discipline of union supporters, unlawful statements made to employees, and coercion of and unlawful assistance to petition signers. I will have much more to say about these matters in the analysis section of this decision.

According to the Respondent, it made a good-faith analysis of the signatures on the decertification petition, and came to the conclusion that they were authentic, and represented a genuine desire on the part of more than a majority of the unit employees to be rid of the Union. Thereafter, in a letter dated July 3,

²⁴ See *Johnnie's Poultry Co.*, 146 NLRB 770 (1964).

²⁵ Much time was taken up at the hearing with the questioning of the employee witnesses who signed the decertification petition and arguing over the admissibility of the employee declarations. As will be apparent in the analysis section of this decision, in my view, it is unnecessary to set forth and discuss the individual reasons given by the petition signers for their decision to sign the decertification petition.

2010,²⁶ from Denis Artiles to Marvin Jones, the Respondent informed the Union that it was withdrawing its recognition of the Union as the exclusive collective-bargaining agent of the hotel's employees. In this letter Artiles makes reference to the receipt of a decertification petition from over 50 percent of the employees in the bargaining unit. The letter also makes reference to an earlier letter sent from one of the Respondent's attorneys apparently to Jones dated July 2, 2010, withdrawing recognition.

In his letter, Artiles advises Jones that he can no longer communicate with Jones in Jones' "now-extinguished capacity as a representative of the employees." Further, he informs Jones that representatives of the Union will no longer be permitted on the hotel's property "for any purposes related to the representative capacity [the Union] no longer possess." The majority of the letter consists of Artiles' attempt to set forth the history of the recent collective bargaining between the parties, and what Artiles perceives to be the reasons why the unit employees sought to decertify the Union. He closes the letter by referencing an incident the previous day in the employee cafeteria when allegedly Jones made some threatening statements to employees. (R. Exh. 112.)

The incident referenced in Artiles' letter apparently related to a request from Artiles to Jones and Lawson on July 2 in the employee cafeteria that they leave the property. Jones protested, making certain statements that Artiles contends constituted threats. Further, it should be noted that since July 2, 2010, the Respondent has failed to honor employees' dues deduction agreements, presumably on the basis that the Respondent contends the Union is no longer the bargaining agent for any of its employees.

During the hearing in this case, I permitted counsel for the General Counsel to amend the complaint to add an allegation that the Respondent, through Artiles, on or about July 31, 2010, in the Jade Restaurant, denigrated the Union in the eyes of its employees by telling employees that there had been no union at the facility for several months, by telling employees that the Respondent had to take the Union to court, and by threatening the employees with discharge if they continued to support the Union. (GC Exh. 62.) I permitted this amendment over the vigorous objections of counsel for the Respondent on the basis that the allegations raised in the amendment were substantively closely related to those allegations in the original complaint and subsequent amendments, were reasonably close in time to the other events in question, and because the Respondent would not be prejudiced as it would have ample time to defend against the allegations raised in the amendment.

The Respondent raises a number of defenses to this allegation, not the least of which is that no such meeting in the Jade Restaurant was ever held. Artiles did not recall a meeting with employees in July 2010 in the Jade Restaurant, but, rather only those meetings discussed earlier that occurred in March 2010.

²⁶ While some evidence and testimony indicates that recognition was withdrawn on July 2, the letter itself is dated July 3, 2010. (R. Exh. 112.) It does appear that a letter withdrawing recognition was also sent the day before, on July 2, from counsel for the Respondent. However, I cannot locate a copy of that letter in the evidentiary record.

Fullenkamp testified that no more small-group meetings with Artiles occurred after March 2010. Further, the evidence that such a meeting did in fact occur at or near the date alleged is very questionable.

The first employee to testify about such a meeting was Luz Maria Zavala. Initially she testified that such a meeting was held in the Jade Restaurant on July 30, 2009. She was able to make this statement about the date, specifically the year 2009, after being given permission to consult a type of diary that she kept. Despite having access to her diary, when it became clear under examination that such a date made no sense, she changed her testimony to reflect the following year, 2010. In fact, during cross-examination, when counsel for the Respondent had access to the witness' diary, he got the witness to admit that there was no year recorded in her diary next to the notation July 30, and, in fact, the closest year to that reference was the date September 30, 2009. In my view, Zavala's testimony is hopelessly confused, and I must find that in this regard, it is entitled to no weight.

Following Zavala's testimony, employee Audelia Hernandez testified about a meeting held in the Jade Restaurant with Artiles making a presentation and a number of employees in attendance. She testified that Artiles, speaking in Spanish, said that he and the hotel were antiunion, and that it had been two months since there had been a union at the hotel. Allegedly, Artiles then switched to speaking in English and said that if the employees wanted a union, the door was open for them to leave. According to Hernandez, Artiles changed back again to Spanish and said that there were "ignorant people" spreading the word that there was still a union at the hotel, but that was not true. Finally, he allegedly said that the hotel had taken the Union to court, and the hearing was going to start in 2 weeks. Several other employees, Ana Rodriguez, Maria Hernandez, and Elda Buezo also seemed to testify regarding this alleged July 30 meeting, but their testimony only offered snippets of the meeting, as testified to by Audelia Hernandez, and they seemed to be confusing the alleged July meeting with those that occurred in March 2010.

In fact, there really would have been no reason for Artiles to have conducted such a July meeting. The new medical insurance went into effect as of May 1, certain provisions of the Respondent's "final proposal" had been in effect for some period of time, and as of July 2, the Respondent was no longer recognizing the Union as its employees' collective-bargaining representative. Also, it makes no sense that Artiles would hold only one such meeting in July for a small group of employees, when in March he had held approximately five meetings for most of the unit employees. Accordingly, I conclude that counsel for the Respondent's argument has merit, and believe that it is unlikely that such a meeting occurred in July 2010. Further, I believe that the employees are likely confused, and the meeting that they actually recall is one of those approximately five meetings held between March 22 and 25, 2010.

To the extent that such a meeting was held in July or March 2010, I reiterate those comments that I made earlier in this decision regarding the meetings held in March, and my characterization of Artiles. Of course, if in fact the alleged meeting was held separately in July, then even assuming Artiles made cer-

tain of the comments attributed to him, some of those comments would be harmless. For example, telling the employees that there was no longer a union at the hotel would be arguably correct. The Respondent had ceased recognizing the Union based on the decertification petition, which had been filed several months earlier. Of course, whether the Respondent had the legal right to do so, remains to be seen, but that was at least the Respondent's position. Characterizing those who believed otherwise as being ignorant was, in my view, simply an opinion on the part of Artiles. Also, telling employees that the Respondent was taking the Union to court, could have been a reference to the Board hearing, which was scheduled to begin in August, approximately 1 month later.

In any event, whether the July meeting took place at all, or was really just remembrances by the employees of the subjects discussed during the March 2010 meetings, I will have more to say in the analysis section of this decision about the alleged statements made by Artiles at these meetings.

IV. ANALYSIS AND CONCLUSIONS

As finally amended by the General Counsel, a number of pleadings set forth the alleged violations of the Act. Those include: the first complaint (GC Exh. 1(ee), dated May 28, 2010); the first notice of intent to amend the complaint (GC Exh. 2, dated August 17, 2010); the second complaint (GC Exh. 3, dated August 17, 2010); and the second notice of intent to amend the complaint (GC Exh. 62, dated September 27, 2010). The Respondent timely answered all of the allegations in the various pleadings of the General Counsel, denying the commission of any of the alleged unfair labor practices. I will be addressing in turn all of the allegations of the General Counsel in her various pleadings.

A. Surface Bargaining/Impasse

The gravamen of this case is the General Counsel's allegation that the Respondent engaged in surface bargaining with the Union with no genuine intent to reach agreement on the terms of a successor collective-bargaining agreement; and, further, that the Respondent implemented certain unilateral changes in its employees' terms and conditions of employment without having reached a good-faith impasse in bargaining with the Union.

1. Duty to bargain in good faith

Section 8(d) of the National Labor Relations Act provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Under Section 8(a)(5) it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 9(a)."

Longstanding Board precedent holds that the parties must negotiate with the purpose of trying to reach an agreement. *California Girl, Inc.*, 129 NLRB 209, 218-219 (1960) (citing *NLRB v. American National Insurance Co.*, 343 U.S. 395

(1952)). In the cited case, the Supreme Court held that both the employer and the union have a duty to negotiate with a “sincere purpose to find a basis of agreement,” but that the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position. The employer is, however, obligated to make some reasonable effort to compose his differences with the union. See *U.S. Ecology Corp.*, 331 NLRB 223, 224–225 (2000) (citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)).

To fulfill the duty to bargain in good faith, the parties should demonstrate “an open mind and a sincere desire to reach an agreement . . . as well as a sincere effort to reach common ground.” *Montgomery Ward*, 133 F.2d 676, 686 (9th Cir. 1943). Therefore, “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enf. sub. nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)).

The determination of whether a party has complied with the duty to bargain in good faith is a fact specific analysis and per se standards have not been promulgated by the Board. Moreover, bad-faith bargaining typically must be inferred from a party’s conduct at or away from the bargaining table because intent to frustrate the agreement is rarely articulated. “In order to determine whether a party has bargained in good faith, it is necessary to examine its overall conduct, both at the bargaining table and away from it.” *U.S. Ecology Corp.*, 331 NLRB at 225 (citing *Atlanta Hilton & Tower*, 271 NLRB at 1603; *Overnight Transportation Co.*, 296 NLRB 669, 671 (1989), enf. 938 F.2d 815 (7th Cir. 1991)).

It is necessary to analyze the Respondent’s “entire course of conduct” to determine “whether it is lawfully engaged in hard bargaining in an attempt to reach a contract it considers desirable, or whether it merely went through the motions of collective bargaining without any intention of entering into a collective bargaining agreement.” *U.S. Ecology Corp.*, 331 NLRB at 225 (citing *Texas Coca-Cola Bottling Co.*, 146 NLRB 420, 429 (1964), enf. 365 F.2d 321 (5th Cir. 1966)). The critical determination is whether the Respondent was engaging in “hard bargaining” as opposed to “surface” or bad-faith bargaining.

In *Tomco Communications* the Board stated: “The nature of an employer’s proposal on . . . terms and conditions of a collective bargaining agreement are material factors in assessing the employer’s motivations in the course of collective bargaining. Rigid adherence to proposals which are predictably unacceptable to the union may indicate a predetermination not to reach an agreement, or a desire to produce a stalemate in order to frustrate bargaining and undermine the statutory representative.” *Tomco Communications*, 220 NLRB 636, 636 (1975) (citing *Stuart Radiator Core Mfg. Co.*, 173 NLRB 125 (1968)); *Continental Insurance Co. v. NLRB*, 495 F.2d 44 (2d Cir. 1974). Further, the Board ruled that the employer had engaged in bad-faith bargaining when it insisted on a broad management-rights clause, a broad zipper clause, a no-strike provision, and a number of other proposals that were unfavorable to the union. The Board promulgated a “self respecting union test,” which stated: “It is difficult to believe that the Company with a straight face

and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.” *Tomco*, supra at 637 (citing *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). The Board found that by demanding these provisions, the “last, best, and final offer” was nothing more than a demand that the union abdicate virtually every right it would normally possess to effectively represent the employees. (Id. at 637.)

However, the Ninth Circuit rejected this test under *Tomco*, and held that the standard “comes perilously close to determining what the employer should give by looking at what the employees want.” *Tomco*, 567 F.2d 871, 883 (9th Cir. 1978). Moreover, the Ninth Circuit concluded that the case demonstrated “hard bargaining between two parties who were possessed of disparate economic power: a relatively weak union and a relatively strong company.” 567 F.2d 871 (9th Cir. 1978), denying enf. of 220 NLRB 636 (1975).

In any event, in the case before me, even under the “self-respecting union test,” the General Counsel’s claim of surface bargaining would fail. The Respondent proposed numerous substantive revisions to the expired collective-bargaining agreement. Throughout negotiations, the Respondent reiterated that these proposed changes were based on two principles, namely an effort to make the hotel financially viable and profitable, and to bring the Sheraton into conformity with the other hotel properties managed and operated by the Respondent. While many of the proposed changes including sick days, vacation days, jury duty leave, the paid meal period, a new medical insurance plan, and the number of rooms housekeepers must claim were not as favorable to the unit employees and/or the Union as they had been in the previous contract, the Respondent did not propose unreasonable changes. Unlike in *Tomco*, the Respondent did not propose contract changes that would require the Union to “abdicate virtually every right” it would normally possess. Instead, the Respondent throughout negotiations clearly enunciated the reasons for its proposed changes, namely the poor state of the economy and conformity with the Respondent’s other properties.

Since the Ninth Circuit’s decision in *Tomco*, the Board has adopted several factors to determine whether a party is engaged in surface bargaining. Although there is not a bright line rule as to whether a party is engaged in surface bargaining, the Board has enumerated these factors to consider in analyzing whether a party has engaged in unlawful surface bargaining or lawful hard bargaining. Evidence of surface bargaining “include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.” *Regency Service Carts, Inc.*, 345 NLRB 671 (2005) (citing *Atlanta Hilton & Tower*, 271 NLRB at 1603).

Under Section 8(d) of the Act, the duty to bargain in good-faith imposes an obligation to confer at reasonable times.

While the Board has not developed a hard and fast rule with regard to the number, frequency, and duration of meetings between the parties, it looks to the parties' conduct to determine if there was a subjective willingness to reach an agreement. *Insulating Fabricators*, 144 NLRB 1325 (1963), enfd. 338 F.2d 1002 (4th Cir. 1964). Unlawful delaying tactics can include a delay in scheduling meetings²⁷ and refusal to bargain beyond a certain date.²⁸ However, even where an employer tried to limit the size of the union's negotiating committee, recorded bargaining sessions, cancelled several meetings, and imposed a 4-hour limit to negotiating sessions, the Board did not find a violation of the Act as to those matters. *Inter-Polymer Industries*, 196 NLRB 729 (1972), petition for review denied 480 F.2d 631 (9th Cir. 1973). Also, in a case where the employer refused to meet outside normal business hours due to his wife's illness, even though he did not tell the union about the illness, the Board did not find a violation. *Transit Lines*, 300 NLRB 177 (1990), enfd. 937 F.2d 598 (3d Cir. 1991). However, the Board has found bad-faith bargaining where an employer engaged in a lengthy pattern of delaying tactics including the failure to make an economic proposal after a year of bargaining. *United Technologies*, 296 NLRB 571 (1989).

In the case before me, much of counsel for the General Counsel's contention that the Respondent engaged in surface bargaining is premised on her argument that the Respondent engaged in dilatory tactics in the scheduling of bargaining sessions, did not wish to meet in person, but, rather, by telephone or video conference, and proposed some meetings be held in Seattle, rather than Anchorage where the hotel was located. For the most part, I disagree, as the evidence shows otherwise.

The evidence tends to show that the Respondent did not engage in any unreasonable delaying tactics, and certainly no more so than the Union. The Respondent was the first party to initiate contact, in an effort to conclude bargaining with the Union before the contract expired. As I noted earlier in this decision, I conclude that Stokes' meetings with Jones and Esparza on October 27 and 28, 2008, initiated by the Respondent, constituted two bargaining sessions. While the Union likely did not intend it to be so, Stokes turned these two sessions into bargaining negotiations. Further, I believe that the Respondent was genuine in Stokes' stated intention of negotiating a successor contract before the existing collective-bargaining agreement expired on February 28, 2009. The Union seemed to have no interest in doing this.

During the following months, the Respondent continued to try to confer with the Union for collective-bargaining purposes. However, Stokes' entreaties were mostly met with nonresponses. For all practical purposes, Jones engaged in "stonewalling," and, in fact, it was not until January 21, 2009, that Stokes learned for the first time from Jones that Sawyer would be the Union's principal negotiator.

Throughout negotiations, the Respondent consistently proposed negotiation dates for in person negotiations. Stokes has a

busy law practice, and it is accurate to say that he was in many instances unavailable to meet on dates suggested by the Union. However, no more so than Sawyer, a busy International Union representative, who was on many instances unavailable to meet on dates suggest by the Respondent. In any event, it is important to note that despite their busy schedules, the negotiators were able to meet in person in Anchorage for bargaining purposes on 10 separate dates: October 27 and 28, 2008; June 9, 10, 11, and 12, 2009; December 7 and 8, 2009; and March 10 and 11, 2010.

The evidence establishes that the Respondent did frequently suggest to the Union that negotiations could also be conducted by phone, video conference equipment, or in person in Seattle, where Sawyer was located. Stokes made it clear that these suggestions were offered as a way the parties could negotiate more frequently and at a considerable cost savings to the parties. As someone who made eight trips to Anchorage during the course of this trial, I will take administrative notice of the fact that plane travel to Anchorage from the lower 48 States is time consuming and expensive. In any event, at no time did the Respondent indicate that it would only bargain by some method other than face-to-face in Anchorage. These other means of negotiating were offered by the Respondent in an effort to supplement face to face negotiations in Anchorage, and were not offered on a "take it or leave it" basis.

The Union remained steadfast in its position that it wanted to negotiate only in person and in Anchorage. While the Respondent urged the Union to conduct negotiations in a cheaper and easier way, the Union refused to do so, and the Respondent acceded to the Union's request to meet in Alaska. Although at one point the Respondent suggested that it would extend the contract in exchange for bargaining in a more accessible location, the Respondent withdrew its quid pro quo offer shortly thereafter and ultimately extended the bargaining agreement and flew to Alaska for purposes of collective bargaining. In fact, the terms of the existing contract were extended a number of times from the expiration date of February 28 through August 31, 2009, a period of 6 months.

When a party demands that negotiations occur at a certain location, the Board will assess whether the location is unreasonable, burdensome, or designed to frustrate bargaining and whether the proponent has been intransigent. *Sumerville Mills*, 308 NLRB 425 (1992), enfd. 19 F.3d 1433 (6th Cir. 1994). Of course, the Union wanted to hold the negotiations in Anchorage where the employee members of the bargaining committee lived. This was reasonable and understandable. The Respondent's desire to hold negotiations by some means other than face to face in Anchorage and, thus, save money and time was also understandable and reasonable, especially in light of the Respondent's willingness to meet in Anchorage when the Union would not alter its position. Once again, it should be recalled that over the course of their bargaining history, the parties did meet in Anchorage on ten separate dates. Accordingly, I do not believe that the Respondent's suggestion to the Union that they might negotiate by some means other than face to face in Anchorage constitutes evidence of surface bargaining.

Counsel for the General Counsel argued at trial and in her posthearing brief that the Respondent's conduct was dilatory,

²⁷ *Torrington Extend-A-Care Employment Assn. v. NLRB*, 17 F.2d 580 (2d Cir. 1994).

²⁸ *Kuna Meat Co.*, 304 NLRB 1005 (1991), enfd. 966 F.2d 428 (8th Cir. 1992).

especially as it involved the conduct of Arch Stokes. In my view, if there were dilatory tactics, both sides were equally at fault, in which event the Board has held there may be no foundation for a finding of bad faith. *Dunn Packing Co.*, 143 NLRB 1149 (1963). As I indicated, the Union did not seem interested in starting negotiations until just before the existing contract expired, unlike the Respondent, which sent Stokes to Anchorage to negotiate in October 2008, 4 months prior to the expiration of the contract. Also, both Stokes and Sawyer had very busy schedules, and both seemed equally conflicted with other duties and had difficulty adjusting their respective schedules so as to be able to meet in Anchorage.

Further, counsel for the General Counsel has taken up the Union's "mantra" and argues that Stokes' manner of negotiating was to pontificate at great length about unrelated or only marginally related subjects so as to waste precious bargaining time and "eat up the clock," making it progressively more unlikely that the parties would have time to reach an agreement.

I spoke to this issue at great length earlier in this decision. Stokes has a lot to say, and he likes to talk. He often repeats himself. This is who he is. However, in doing so I do not believe that he is being intentionally dilatory. While Sawyer, Lawson, Jones, and the other union negotiators may have been exasperated with repeatedly hearing about the Colonial Williamsburg contract, the union schism, the alleged fraud in the National Union Pension Trust Fund, or other favorite topics of Stokes, these matters were, in my view, sufficiently related to the issues under discussion in negotiations so as to be relevant, even if in some cases only marginally so. Negotiators have different styles, as in "different strokes for different folks." Stokes' style of bargaining may not have pleased everyone, but that was not his responsibility. In any event, I do not find his style of negotiating deliberately dilatory, and conclude it does not constitute evidence of surface bargaining or contribute to that allegation.

While the Act does not require either party to come to an agreement, the employer is obligated to make some reasonable effort in some direction to compromise its differences with the union. *Reed & Prince Mfg. Co.*, 96 NLRB 850 (1951), *enfd.* 205 F.2d 131 (1st Cir. 1953), *cert. denied* 346 U.S. 887 (1953). Surface bargaining may be found where the employer will only reach an agreement on its own terms and none other. *Pease Co.*, 237 NLRB 1069, 1070 (1978). See *National Management Consultants*, 313 NLRB 405 (1993) (employer engaged in bad-faith bargaining where it gave no reason for rejecting union's proposed collective-bargaining agreement, made no counter-proposals, and made no attempt to schedule any bargaining). Similarly, surface bargaining has been found where an employer rejected a union's proposal, tendered its own, and did not try to reconcile the differences. *Neon Sign Corp.*, 229 NLRB 861 (1977). See *General Electric Co.*, 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970) (lead case on duty to bargain in good faith where employer violated the Act by presenting the union with a take it or leave it proposal among other bad-faith actions).

However, "adamant insistence" on a bargaining position is not by itself a refusal to bargain in good faith. *Atlanta Hilton & Tower*, 371 NLRB 1600 (1984) (citing *Neon Sign Corp. v.*

NLRB, 602 F.2d 1203 (5th Cir. 1979)). "A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton* citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973). The Board has even held that an employer's take it or leave it position is not bad faith where the union refuses to compromise on any of its demands or pursue effective negotiations. *Romo Paper Products Corp.*, 208 NLRB 644 (1974).

On the other hand, if an employer proposes a contract that is predictably unacceptable, and evidences an inflexible attitude on major issues and offers no reasonable alternatives, the Board has found a violation of the good-faith obligation. *Brownsboro Hills Nursing Home*, 422 NLRB 269 (1979); *NLRB v. Wright Motors*, 603 F.2d 604 (7th Cir. 1979). The Board has emphasized that simply because the union finds the proposal to be undesirable, the employer has not necessarily violated the Act; instead, the Board measures whether the proposals nullify the union's ability to act as the employees' representative. *Reichhold (II)*, 288 NLRB 69 (1988), *review denied* in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), *cert. denied* 498 U.S. 1053 (1991), supplementing 227 NLRB 639 (1995) (*Reichhold (I)*). The Board has found surface bargaining where the employer's proposal "would have left the union and the employees with substantially fewer rights and protections than they would have had without any contract at all." *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005). Still, the General Counsel's burden is high in proving that the Respondent's proposals were so unfavorable or unreasonably regressive as to strip the Union of its representational capacity.

In the matter before me, from the beginning of negotiations and throughout the process, the Respondent informed the Union that it intended to pursue a contract that was fiscally responsible and that would bring the hotel into compliance with the Respondent's policies. In fact, the Respondent proposed a contract that was similar to the previous contract, except that it proposed a number of items intended to either save money, in what was clearly a very difficult financial climate, and/or to conform its practices with the other hotels that the Respondent operated.

One of the most contentious issues separating the parties was the number of rooms the housekeepers were required to clean each work shift. Under the terms of the expired collective-bargaining agreement, housekeepers were required to clean 15 rooms per shift. However, Stokes made it clear from early in the negotiations that the Respondent proposed increasing this number to one more in line with the requirements at the Respondent's other properties, and as cost savings measure. At the outset of negotiations, the Respondent proposed that the housekeepers clean 18 rooms, but, subsequently, in its July 17, 2009 proposal, the Respondent deducted a room and amended its proposal to 17 rooms. (GC Exh. 38, art. 9, sec. 51.) This "concession" on the part of the Respondent was more than the Union was willing to do. The Union remained adamant that the number of rooms stay at 15, as provided for in the expired contract. It was not until December 8, 2009, in its written "Non-Proposal" that the Union amended its position to offer 16

rooms cleaned the 1st and 2d years of the contract, reverting back to 15 rooms cleaned in the 3d and 4th years of the contract. (R. Exh. 47.) Although this issue was discussed at length, the parties never came to an agreement, nor was there ever any indication that they would come to an agreement.

Another contentious issue concerned the employees' meal periods. Under the expired contract, the employees were paid for their half-hour lunchbreak, and they were provided lunch by the Employer free of charge. Consistent with its stated desire to reduce costs and enter into a financially viable contract, the Respondent proposed that the 30-minute meal period be unpaid and that the employees pay some amount, although nominal, for the food provided at lunch. However, the Union remained steadfast that the meal period be paid, and that the food be provided free of charge. The parties were deadlocked on this issue and remained so, as neither party changed its position.

A further issue of contention between the parties was that of the Taft-Hartley Pension Plan as provided for in the expired contract. As I have noted, this was a matter of great concern to Stokes, who spoke about it frequently. He repeatedly stated the Respondent's concern that the plan was no longer financially viable, since the Local Union's Alaska Pension Plan Fund had been merged into the National Union's Pension Plan Fund. On July 17, 2009, the Respondent proposed that the Taft-Harley Pension Plan be replaced with a stand-alone 401(k) plan with 100-percent employer matching of employee contributions up to 3 percent, and 50-percent matching of employee contributions between 3 and 5 percent. (GC Exh. 38.) However, the Respondent subsequently dropped its proposal for a stand-alone plan, when in its August 21, 2009 "final proposal" it acquiesced in the Union's insistence that the existing Taft-Hartley Pension Plan remain in effect. (R. Exh. 69.) Although Stokes conceded that the Respondent had "looked at the numbers" and realized withdrawing from the Taft-Harley Trust would cost the Respondent more than a 401(k) plan would save, it does seem to have been a major concession on the part of the Respondent, in light of the Union's insistence on retaining the Taft-Harley Pension. However, it should be noted that despite the Respondent's "concession" on this issue, Stokes continued to voice concerns about the financial viability of the Taft-Hartley Pension Plan, and as late as the negotiation sessions on March 10, 2010, was threatening to file an ERISA action against the plan trustees.

Regarding the issue of the Taft-Hartley Health and Welfare Plan (the medical insurance plan), the parties were in serious conflict. The Union proposed retention of the existing plan, but the Respondent was insistent that a less expensive medical insurance plan be obtained. In its August 21, 2009 "final proposal," the Respondent had proposed a CIGNA plan. However, on March 10, 2010, the Respondent proposed for the first time an AETNA plan, which Stokes argued was the best medical insurance available for the money, and which he represented the Respondent had only been able to locate since its August 21, 2009 "final proposal." In any event, the Union never agreed to any medical insurance plan other than the Taft-Hartley Plan, as existed in the expired collective-bargaining agreement.

There were also significant disagreements between the par-

ties over employee leave issues. Under the expired collective-bargaining agreement, employees received time and a half for working on nine holidays and the employee's birthday. Additionally, if the holiday and birthday fell on the same day, the employee would be paid twice his or her rate of pay. The Respondent sought to change this policy by eliminating two of the enumerated holidays as well as the birthday. Subsequently, on July 17, 2009, the Respondent improved its offer by adding 1 additional day off, and having the Union select the individual 8 days off. However, the Union remained steadfast in keeping the provisions consistent with the expired agreement and did not change its position throughout negotiations.

Under the expired collective-bargaining agreement, employees received up to 12 days per year of paid sick time. Employees received \$42 per day of sick leave under the expired contract. Consistent with their position to cut costs, the Respondent proposed fewer sick days. The Union proposed an increase in the rate paid per sick day to \$55. The parties ultimately agreed on a rate of \$51 per sick day.

The Respondent also proposed reductions in funeral and jury duty leave. Under the expired contract, employees received 4 days of paid funeral leave, which the Respondent sought to reduce to 3 days. The Union proposed that the provision from the expired collective-bargaining agreement be adopted in full. The expired collective-bargaining agreement also allowed for 20 days of paid jury duty leave, which the Respondent proposed be reduced to 5 days of paid leave. The Union proposed that no changes be made to the provision. Although the parties negotiated over these provisions, they never came to an agreement.

Regarding wages, it is interesting to note that the parties spent relatively little time negotiating over this issue. The consensus of opinion seemed to be that this issue would not present a problem, once the more contentious issues were resolved. While there is some confusion in the record, it appears that the Respondent's position for most of the period during negotiations and certainly through the final bargaining sessions was to have a wage freeze through the term of the contract. The Union's proposal, in its "Non-Proposal" of December 8, 2009, was for a wage freeze only during the first year of the contract, to be followed by increases of 2 percent in each of the next 3 years, or the statutory minimum wage increase if greater. (R. Exh. 47.) While one might anticipate that wages would be a contentious issue, this apparently was not so, as both parties understood the dire financial situation in the hotel industry during this period.

As the case law makes clear, there is a fine line between hard bargaining and bad-faith or surface bargaining. In my view, both parties were engaged in hard bargaining. The Respondent and the Union were simply unable to come to an agreement on a number of contractual issues. These issues were extensively discussed over an extended period of time. In the course of 10 negotiation sessions held face to face in Anchorage, Alaska, they remained intractable. Yet, I do not get the sense that the Respondent was any more adamant in its negotiating positions than was the Union. The Respondent did not seek through the negotiation process to subvert the Union's ability to effectively represent the unit employees. While these proposals by the

Respondent were not as favorable to the Union and unit employees as those contained in the prior contract, they were certainly not so regressive as to strip the Union of its representational duties, nor to make the Union's acceptance of them seem unconscionable. It is worth noting that none of the Respondent's proposals included a restrictive management-rights clause or the like, which would tend to limit the Union's ability to represent the unit employees.

The Respondent continuously cited its intent to create a fiscally responsible contract, and that the provisions of the expired contract levied too many costs on the Employer. Throughout negotiations the Respondent carefully cost valued the individual contract proposals to determine their long-term economic impact, which was entirely consistent with their position to obtain a fiscally responsible contract. Rather than giving the Union one proposal and refusing to accept any other terms, the Respondent altered its position, principally in regard to the number of rooms to be cleaned by the housekeepers and the retention of the Taft-Hartley Pension Plan, without any significant reciprocal movement by the Union. The Respondent never adopted a "take it or leave it attitude," until it seemed that no further movement on significant issues was a reasonable possibility.

It is important to note that the Respondent agreed to the Union's request that the contract be extended, which was done a number of times through August 2009. This was accomplished despite the Respondent's contention that it needed economic relief from the terms of the existing agreement. I am of the view that the Respondent agreed to these extensions with the genuine expectation that given more time, the parties would in fact reach agreement on the terms of a new contract. Further, the parties did meet a total of ten times in Anchorage and engaged in lengthy contract negotiations. I reject the General Counsel's contention that the Respondent insisted on negotiating in other ways such as by video conference equipment or by telephone, or in locations other than Anchorage. The evidence shows that these were suggestions, not demands, and when rejected by the Union, the Respondent acquiesced. I also reject the General Counsel's contention that the Respondent withdrew previously agreed upon "tentative agreements" (TAs). The Union and the Respondent merely used different methods of tracking such TAs. While this resulted in some confusion as to which items had been tentatively agreed upon, I see no evidence that the Respondent was acting in bad faith.

Accordingly, I am of the view that the Respondent, during the course of negotiations in this case, did not engage in surface bargaining. Although the Respondent was firm in its positions, it had every right to be so, and the Union took a similar position. This constitutes hard bargaining. The Act cannot compel the parties to reach an agreement, but only to bargain in good faith, which, I believe, is precisely what the Respondent did, at least initially.

Therefore, I hereby recommend the dismissal of paragraphs 7(b)(i), (ii), and (iii) as alleged in the first complaint. Further, I conclude that the Respondent did not unlawfully insist that the parties bargain telephonically or by way of videoconference or like electronic media; or insist that the Union provide a proposal before bargaining face to face; or insist that before bar-

gaining the Union prove that it was the legitimate collective-bargaining representative of the unit employees. Therefore, I also hereby recommend the dismissal of paragraphs 8(a)(i), (ii), (iii), 8(b), (c), and (d) as alleged in the first complaint.

2. Impasse/unilateral changes

According to the Board, the test for impasse is "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. 'Both parties must believe that they are at the end of their rope.'" *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995). Impasse is determined by assessing the totality of the circumstances. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), enf. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001).²⁹

In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), the Board enumerated some factors for considering whether impasse has occurred: "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding to the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." As impasse is a matter of fact, the Board has also enumerated additional factors to be considered including: whether there has been a strike or discussion about one,³⁰ the fluidity of the parties' positions,³¹ continuation of bargaining,³² union animus,³³ nature and importance of issues and the extent of differences,³⁴ bargaining history,³⁵ willingness to consider the issue further,³⁶ duration of break between negotiation sessions,³⁷ number and duration of

²⁹ In that case, the Board found that the parties were not at impasse when the employer asserted impasse after four sessions and the union had not offered concessions yet and expressed its intent to be flexible. See also *PRC Recording Co.*, 280 NLRB 615, 635 (1986) ("The determination of whether impasse has been reached, a determination of the mental state of the parties and thus, a highly subjective inquiry is a strictly factual judgment, and bargaining devices or scare words such as 'impasse or deadlock' used by parties are legal conclusions not binding on the Board.")

³⁰ *Marriott In-Flite Services*, 258 NLRB 755, 766 (1981).

³¹ *Duane Reade, Inc.*, 342 NLRB 1016, 1033 (2004) (no impasse where parties were still making consistent movement to come to an agreement).

³² *Northwest Graphics*, 343 NLRB 84 (2004).

³³ *CJC Holdings*, 320 NLRB 1041 (1996).

³⁴ *Calmat Co.*, 331 NLRB 1084, 1097 fn. 49 (2000) (when a single issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations there may be overall impasse).

³⁵ *A.M.F. Bowling Co.*, 314 NLRB 969.

³⁶ *Marriott In-Flite Services*, 258 NLRB 755 at 765.

³⁷ *Presto Casting*, 262 NLRB 346 (1982), enf. in part 708 F.2d 495 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983) (impasse after two meetings); *J.D. Lunsford Plumbing, Heating & Air Conditioning*, 254 NLRB 1360 (1981), affd. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982) (impasse after three meetings within 1 month in the face of no movement by union). But see *Marriott In-Flite Services*, 258 NLRB 755 (no impasse after 37 meetings but neither party had discussed wages and 26 items were still open and had not been discussed).

bargaining sessions,³⁸ and any other actions inconsistent with impasse.³⁹

When impasse is reached, the duty to bargain does not terminate, but, rather, is suspended.⁴⁰ The employer may not take any action which subverts the bargaining process,⁴¹ but upon impasse the employer may make unilateral changes in working conditions.⁴² However, if unilateral changes are made before a legitimate impasse, the Board will find a violation of the Act.⁴³ Additionally, any unilateral changes cannot be “substantially different or greater than any [offers] which the employer . . . proposed during the negotiations.”⁴⁴ Nor can an employer implement changes with regard to subjects that have not been bargained over.⁴⁵ Additionally, although employers may implement their final offer upon impasse, the employer may not implement a proposal granting it total control precluding any participation by the union.⁴⁶ An overall impasse must be reached before implementation of any changes.⁴⁷ Similarly, if provisions have been tentatively agreed upon, the employer may not implement any changes that are inconsistent with the agreements.⁴⁸

As is reflected earlier in this decision, on August 21, 2009, the Respondent sent the Union its “final proposal.” The cover letter accompanying the proposal stated, “Please understand that this is the employer’s final position. Considering the current economic climate, any further concessions by the employer would be financially untenable.” It is important to note that even though the letter stated that this was the Respondent’s final proposal, Stokes, the signed author of the letter, said that the Respondent was “open to discussing the proposal via phone, email, text message, teleconference, video conference, Skype, or through any other medium [the Union would] choose.” (R. Exh. 58.)

Following the receipt of the Respondent’s final proposal, there were exchanges of communications between the parties, but no substantive negotiations for months. On October 6, 2009, Stokes sent Sawyer a long letter informing him that in the Respondent’s opinion, the parties “have reached bargaining

impasse in the negotiations.” Further, Stokes went on to state that, “[t]he parties’ respective positions on key issues have not changed throughout the course of negotiations and it [is] apparent that further bargaining would be futile.” Stokes then went into great detail as to his view of the parties bargaining history. He set forth the “Key Impasse Issues.” Those issues were: (1) The Health and Welfare Plan, where the Respondent had proposed eliminating the Union’s Taft-Hartley Trust and replacing it with its own corporate medical insurance CIGNA plan; (2) the meal periods, where the Respondent had proposed eliminating the employer paid 30-minute meal period; (3) arbitration, where the Respondent had proposed a grievance and arbitration procedure that ended in final and binding arbitration; and (4) room attendant requirements, where the Respondent had proposed increasing the minimum room attendant cleaning requirement from 15 to 17 rooms (the Respondent having lessened its original proposal of 18 rooms).

Stokes concluded the letter by stating that the Respondent’s “final offer, presented on August 21, 2009, remains open. . . . The Employer is ready, willing and able to discuss the merits of its final proposal with the Union. However, the proposal stands as the Employer’s final offer. Thus, unless the Union indicates it is willing to accept the August 21, 2009 proposal, in its entirety, the parties have reached impasse.” (Jt. Exhs. 2–00104–00110.)

By letter dated October 9, Sawyer replied that the Union “strongly disagree[s] with [Stokes’] assertion that the parties are at impasse in bargaining. To the contrary, [the Union] believe[s] that there is a great deal of room for further progress in our negotiations.” (Jt. Exh. 2–00111.)

As had become their habit, the parties communicated back and forth, “Tit for Tat,” regarding which party was responsible for the lack of progress in negotiations. By letter dated October 9, Stokes advised Sawyer that “negotiations between [the Union] and [the Employer] are at impasse and have been for several weeks.” Further, he said that the Respondent “desires to maintain its relationship with [the Union] and will continue to recognize [the Union] as the bargaining representative of its employees. However, [as the parties were at impasse] . . . [the Respondent] will implement the provisions of its final offer . . . [as of] October 17, 2009.” (Jt. Exh. 2–00112.)

Stokes also sent a letter dated October 12, 2009, to Sawyer in which he continues to insist that the parties are at impasse, and there is no indication that further bargaining will resolve any of the remaining issues separating the parties. Stokes repeats the history of the face-to-face negotiations between the parties and acknowledges a refusal on the part of the Respondent to engage in any further face-to-face negotiations unless the Union presents an updated proposal to the Employer.

I believe that at this point the parties had in fact reached a genuine impasse in negotiations. They had been bargaining for approximately 1 year, and had meet on six separate dates (October 27 and 28, 2008, and June 9, 10, 11, and 12, 2009) for face-to-face negotiations in Anchorage. To date, there had been only limited movement in their respective positions, with the Respondent no longer insisting that the contributions to the Taft-Hartley Pension Plan be discontinued and lowering its room cleaning minimum from 18 to 17 rooms. However, the

³⁸ *American Automatic Sprinkler Systems*, 323 NLRB 920 (1997) (no impasse after three meetings where employer misled the union).

³⁹ *Airflow Research & Mfg. Corp.*, 320 NLRB 861 (1996).

⁴⁰ *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enforcement denied, 63 F.3d 1293 (4th Cir. 1995).

⁴¹ *Central Metallic Casket Co.*, 91 NLRB 572, 573 (1950) (impasse does not absolve the employer of the duty to take no action which may be interpreted as disparagement of the collective-bargaining process or which amounts to withdrawal of recognition).

⁴² *A.M.F. Bowling Co.*, supra.

⁴³ Id.

⁴⁴ *PRC Recording Co.*, 280 NLRB 615, 635 (1986) (citing *Taft Broadcasting Co.*, 163 NLRB at 478).

⁴⁵ *Lou’s Produce*, 308 NLRB 1194, 1195 (1992), enf’d. 21 F.3d 1114 (9th Cir. 1994) (unilateral implementation of a health insurance policy that had not previously been bargained for found to be a violation).

⁴⁶ *McClatchy Newspapers*, 321 NLRB 1386 (1996), enf’d. 131 F.3d 1026 (D.C. Cir. 1997); *KSM Industries*, 336 NLRB 133 (2001), modified 337 NLRB 987 (2002).

⁴⁷ *Bottom Line Enterprises*, 302 NLRB 373 (1991), enf’d. 15 F.3d 1087 (9th Cir. 1994).

⁴⁸ *Lou’s Produce*, supra.

Respondent remained adamant that the room attendant minimum be raised from 15 to 17 rooms, that the Employer no longer be required to provide a paid 30-minute lunch period for the employees, insisting that free lunches be eliminated, and that the Taft-Hartley Medical Insurance Plan be replaced with a corporate CIGNA medical insurance plan. The Union was equally adamant in opposing all of these proposals from the Respondent.

The parties had discussed and bargained over these issues at length and had been unable to come to an agreement. They were essentially at deadlock. Since its “final offer” of August 21, the Respondent had made it clear to the Union in various communications that its stance was firm. Stokes repeatedly invited the Union to make a compromise proposal, but the Union had not done so. Stokes made it clear to Sawyer in these communications that the Respondent needed to see some movement or proposal by the Union before meeting again, because he felt that further meetings would be pointless if they would not result in progress. Still, the Union made no offers or proposals, merely stating its position that the parties were not at impasse and should continue to negotiate.

Having declared an impasse, the Respondent proceeded in mid-October to implement certain provisions of its last proposal, that of August 21, 2009. The evidence is uncontested that before implementing changes to the expired collective-bargaining agreement, the Respondent, as the “initiating party,” did not provide the Federal Mediation and Conciliation Service (FMCS) with 30 days’ written notice of its intention to do so and/or of the existence of a dispute with the Union, as required under Section 8(d)(3) of the Act. It is well established Board law that: “Failure of a party desiring to terminate or modify a collective-bargaining agreement to give appropriate notice [to the FMCS] under Section 8(d)(3) precludes it from altering terms or conditions of the collective-bargaining agreement or engaging in a strike or lockout to enforce its proposed changes. This proscription exists notwithstanding that the expiration date of the agreement has passed.” *Petroleum Maintenance Co.*, 290 NLRB 462 (1988), citing *Weathercraft Co. of Topeka*, 276 NLRB 452, 453 (1985), enf.d. 832 F.2d 1229 (10th Cir. 1987).

By implementing in mid-October certain provisions of its last proposal, that of August 21, 2009, the Respondent violated Section 8(d)(3) of the Act in failing to notify the FMCS prior to implementation. Also, by unilaterally changing those terms and conditions of the collective-bargaining agreement without giving the requisite notice to the FMCS, the Respondent violated Section 8(a)(1) and (5) of the Act. *Days Hotel of Southfield*, 306 NLRB 949 (1992).

Therefore, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the FMCS with the requisite 30 days notice, as alleged in paragraphs 7(b)(v), (c), 10(a)(i), (ii), (iii), and (d), and 18 of the first complaint.⁴⁹ *Whitesell Corp.*, 355 NLRB 649 (2010), confirming 352 NLRB 1196 (2008), enf.d. 638 F.3d 883 (8th Cir. 2011).

On October 17 and 18, 2009, the Respondent held two meet-

⁴⁹ During the hearing, counsel for the General Counsel withdrew all references in the first complaint to the “Alaska Labor Relations Agency.”

ings for the unit employees during which managers informed the employees of certain changes that would take place immediately. Among those changes were the requirements that housekeepers clean 17 rooms per shift, that employees clock in and out for lunch, and that employees who eat the food prepared in the cafeteria pay \$1 for the meal.⁵⁰ However, it is important to note that certain other proposals as contained in the Respondent’s “final proposal” of August 21, including the CIGNA medical plan, were not implemented.

In reality, these unilateral changes were the result of the parties being at an impasse in negotiations. The parties had bargained extensively over these issues. The Respondent had taken a consistent position that it required economic relief, and its proposals were designed to achieve that relief. The Respondent made it clear to the Union that it had no intention of moving from its proposal of August 21. The Respondent was refusing to engage in further bargaining unless the Union made some movement on these economic issues, as any such bargaining would be futile. The Union made it clear that the economic concessions that the Respondent was demanding were unacceptable, and the Union made no movement to compromise. As of October 2009, there was no evidence that would suggest that either party was going to budge from its bargaining position, nor did they exhibit any flexibility whatsoever. Accordingly, I find that the parties were at a collective-bargaining impasse in negotiations, under which the Respondent would have had the legal right to put into effect certain of those proposals that it had been advocating for some time, but for the fact that it had failed to give the FMCS the requisite notice required under Section 8(d)(3) of the Act. Since the Respondent did not provide the FMCS with the required notice, it could not lawfully implement those proposals over which the parties had otherwise reached impasse.

Therefore, I find that by unilaterally implementing on about October 17, 2009,⁵¹ certain provisions of its last proposal, the Respondent was engaged in a refusal to bargain with the Union under Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 7(a), (b)(ix), (c), and 10(a)(i), (ii), and (iii) of the first complaint. However, as I have also concluded that the Respondent did not engage in surface bargaining prior to implementing the unilateral changes in question, and that the parties were in fact at impasse, which, but for the Respondent’s failure to properly notify the FMCS, would have permitted the implementation of these changes, I shall recommend to the Board that paragraph 7(b)(i) of the first complaint be dismissed.

Of course, the “saga” does not end here. Upon impasse, the duty to bargain is only suspended. *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995); *Philip Carey Mfg. Co.*, 140 NLRB 1103 (1963). Legal impasse may end suddenly. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1398–1399 (5th Cir. 1983). Despite the fact that on Oc-

⁵⁰ The evidence is insufficient to establish, as alleged in subpar. 10(a)(iv) of the first complaint, that the Respondent implemented a unilateral change requiring employees to get advance written permission in order to use hotel facilities.

⁵¹ While the complaint also mentions the date of March 19, 2010, there is no evidence in the record of any unilateral changes being made by the Respondent on that date.

tober 17, 2009, the Respondent implemented certain proposals from its final offer, the parties returned to the bargaining table. Although not entirely clear to me, it appears that at the Respondent's request the parties met face to face in Anchorage on December 7 and 8, 2009. Stokes made it clear that he did not want to jeopardize the Respondent's "legal position" on impasse, but would be willing to discuss certain of the substantive differences between the parties in "sidebar conferences." Further, he expressed disappointment that the Union had not put together a new comprehensive contract proposal.

In my view, nothing that happened at these December meetings served to break the impasse. However, an unusual event occurred on the evening of December 8. A written document prepared by the Union was slipped under Mary Villareal's hotel room door. As is discussed earlier in this decision, the document was entitled, "CONFIDENTIAL INTERNAL UNION DOCUMENT [.] Committee Discussion Non Proposal." (R. Exh. 47.) It appears to me that this was intended as a sidebar document that the Union was not formally offering to the Respondent as a contract proposal, but, rather, merely as an informal trial balloon, to see if the Respondent had sufficient interest in it to then make counter proposals of its own.

As I conclude that this document was not an actual proposal, and was not intended by the Union to be any more than a trial balloon, I do not believe that it could constitute a break in the impasse that had existed between the parties since the Respondent made its "last proposal" on August 21. In my view, it is unfortunate that the Union did not actually make a proposal to the Respondent along the lines of its "Non Proposal," as it contained what otherwise would have been significant movement on the part of the Union regarding wages and room attendant cleaning requirements.

In any event, the impasse between the parties continued, and on February 3, 2010, Stokes, on behalf of the Respondent, gave notice to the FMCS of its proposed termination or modification of the expired contract with the Union. (Jt. Exh. 1.) This was the first such notice given by the Respondent in connection with the expired contract.

Despite the fact that Stokes had taken the position since early October 2009 that the parties were at impasse, and the Respondent had implemented certain of its proposals as contained in its "final" contract offer of August 21, 2009, the Respondent asked the Union for bargaining dates in March 2010. (Jt. Exh. 2-001136(d).) Thereafter, the parties met in Anchorage on March 10 and 11, 2010.

These two bargaining sessions were highly acrimonious. However, despite the acrimony, there was obvious negotiating movement by the parties as new proposals were exchanged. On March 10, Sawyer presented a written proposal, which appears to incorporate many of the clauses from the Union's "Non Proposal," which, as mentioned above, had been slipped under Villareal's hotel room door on the evening of December 8, 2009. This written proposal was entitled, "Union's Package Proposal 3/10/10." (GC Exh. 56.)

Below the heading appears the following: "The Union offers this proposal in its entirety. Should any part of the sum be rejected, the proposal and all of its parts are to be considered withdrawn and the Union's prior position prevails." For

"Room Attendant Workload," the proposal called for room attendants to clean 16 rooms a shift in the 1st and 2d years of the agreement and 15 rooms a shift in the 3d and 4th years. Under medical insurance, the Union proposed the same rates as contained in its contract with the Captain Cook Hotel. Those contribution rates were then set forth in the proposal. As to yearly wage increases, the Union offered a wage freeze in the first year of the contract, followed by a 2-percent increase in each of the remaining 3 years of the contract. Finally, the proposal provided that the language in the expired contract be maintained, unless the parties agreed to changes. (GC Exh. 56.)

In addition to the Union's new proposals, the Respondent made one of its own. While the Union had continued to propose that the parties leave in place the Taft-Hartley Medical Insurance Plan, as provided for under the terms of the expired contract, the Respondent for the very first time offered an independent medical insurance plan from AETNA. The Respondent had previously proposed an independent CIGNA medical insurance plan to replace the Taft-Hartley plan. However, when the Respondent implemented certain provisions of its "final offer" on about October 17, 2009, it had not implemented the CIGNA plan, leaving in place the Taft-Hartley Medical Plan as contained in the expired contract.

The AETNA plan was significantly different than the CIGNA plan. So much so, that Mary Villareal made an approximately 90 minute presentation on the specifics of this plan. Further, she provided the Union with a comparison chart, showing the differences between the medical insurance provided for in the expired contract and that provided for in the AETNA plan. (GC Exh. 53.) Stokes noted that the Respondent had "shopped around" since the August 21, 2009 proposal, and that this AETNA plan was the best medical insurance available for the money. Sawyer indicated that the Union would discuss the Respondent's medical insurance proposal, and, upon, his request, the Respondent promised to connect him with its insurance broker so that Sawyer could have more detailed questions answered.

I believe that the proposals made by the Union in its Package Proposal of March 10, and by the Respondent in its proposed AETNA medical insurance plan made that same day were significant changes in the positions that the parties had previously taken in contract negotiations, and served to break the impasse that had previously existed in bargaining between the parties.

On March 11, 2010, the parties met for what would turn out to be their last bargaining session. Initially there was some movement, with the Union agreeing to accept the Respondent's proposed contribution amount for employee pensions. Further, as noted earlier, the Union had made concessions regarding room cleaning requirements for housekeepers and as to wage rates. These concessions were contained in the most recent union proposal dated March 10, 2010. (GC Exh. 56.)

However, matters quickly soured when the parties began to discuss how the Respondent's proposed job titles would impact on the individual job duties of the unit employees. It was during these discussions on job titles that Stokes suddenly blurted out, "We are at impasse on this issue." Sawyer responded by saying, "No we aren't," after which there is disagreement on

exactly what was said. There were clearly some heated words exchanged between Stokes and Sawyer, and Sawyer led the union bargaining team out of the room. The Respondent blames Sawyer for the premature end of the meeting, while Sawyer blames Stokes for saying that the parties were at impasse and for rambling on about irrelevant matters. In any event, this ended the negotiations.

Following their meetings of March 10 and 11, Stokes sent a long letter to Sawyer dated March 19, 2010. (Jt. Exhs. 2–00137–00140.) In that letter, Stokes summarizes what he contends occurred during those meetings. He prefaces the letter by stating that despite “the receipt of two offers from the Union . . . showing some movement . . . the Hotel has not changed its position from its August 21 final offer, except as discussed below, and the parties remain at impasse on many issues.” The full content of this letter is discussed in detail earlier in this decision. As I previously noted, I believe that this letter was drafted by Stokes primarily to be used in litigation, and as a defense to unfair labor practice charges. It is extremely self-serving.

In the letter, Stokes acknowledges proposing a change from the Respondent’s August 21, 2009 “final offer,” that being the replacement of the CIGNA insurance plan with the AETNA plan. He notes that the Employer never implemented the CIGNA plan, but, rather, continued to adhere to the Taft-Harley Medical Insurance Plan as provided for in the expired contract. Stokes defends the AETNA plan as “financially responsible,” and references the presentation by Mary Villarreal of the specifics of the plan at the bargaining sessions in March, as well as the summary of benefits chart comparing the union plan with the AETNA plan. According to Stokes, “The parties are at impasse on this issue and have remained there since the outset of negotiations.”

Later in the letter, Stokes reprimands Sawyer for walking out of the negotiating session on March 11, which conduct Stokes contends is further evidence that the parties are at impasse. He continues to insist that the parties have remained at impasse since August 21, 2009. Finally, he notifies Sawyer that the Respondent is “implementing anew, its August 21 offer, except that as of May 1, 2010, the AETNA plan will be implemented in place of the union health and welfare plan that is currently in effect.” (Jt. Exhs. 2–00137–00140.)

Sawyer responded to Stokes’ letter with his own dated April 1, 2010. (Jt. Exhs. 2–00141–00143.) Not unexpectedly, Sawyer vigorously denied that the parties were at impasse. He accused Stokes of attempting to artificially create and declare impasse. According to Sawyer, the parties were still bargaining with there being no overall impasse reached.

In particular, he mentions the Respondent’s AETNA medical insurance proposal, which was only raised by the Respondent for the first time during the March negotiations. Regarding the AETNA proposal, Sawyer states that “the Union has at no time articulated its position regarding the [proposal], nor have you to date asked us to do so. Nor are we ready or able to offer a response at this time, since there are many questions that the Union must pursue to adequately address your idea to again charge [sic] plans. . . . [T]he Union began at our last session to explore all of the differences between the current plan and the

Employer’s newly proposed plan.” Further, Sawyer argues that the Respondent needs to make information available to the Union “that will enable us to understand and assess the Employer’s brand new proposal on this complicated subject.”

While Sawyer does not deny that he “walked out” of the bargaining session on March 11, he criticizes Stokes for allegedly wasting time talking about irrelevant subjects. He states a willingness to “continue meaningful discussions and offer proposals in an attempt to reach agreement.” (Jt. Exhs. 2–00141–00143.)

I believe that Sawyer, as did Stokes, wrote this letter with an eye towards possible litigation. However, the letter strikes me as not quite as self-serving as the one written by Stokes. Clearly, the Union was interested in getting back to the bargaining table. But not so the Respondent, resting on its claim that impasse had been reached.

On March 26, 2010, the Respondent announced the implementation, effective May 1, 2010, of the AETNA medical plan, a stand alone health care plan for the unit employees. (GC Exh. 94, p. 3.) This plan was only available to unit employees who worked a minimum of 30 hours per week. It should be noted that under the Taft-Hartley Trust Fund Medical Insurance Plan, as provided for under the expired collective-bargaining agreement, unit employees who worked part time might still be able to participate in the plan by pooling their hours from other union jobs where they were also covered by the same Taft-Hartley Trust Fund. This “pooling of hours” would not be available to the employees under the AETNA plan.

I conclude that the proposals made by the Union and the Respondent on March 10, 2010, broke the impasse, which had been in effect since the Respondent made its “final proposal” on August 21, 2009. Both the Union’s proposal entitled “Union’s Package Proposal of 3/10/10,” and the Respondent’s proposal to replace the existing Taft-Hartley Medical Insurance Plan with the AETNA medical insurance plan were significant departures from the prior positions of the parties and came during what was scheduled to be 2 days of negotiations.

In its new proposal, the Union moved closer to the Respondent’s position on the required numbers of rooms per shift to be cleaned by the room attendants. The Respondent had been most recently proposing 17 rooms per shift, and the Union had now moved from 15 rooms, as provided for under the expired contract, to 16 rooms a shift during the 1st and 2d year of the contract, reverting back to 15 rooms a shift during the 3d and 4th year of the contract. The proposal also contained an offer to freeze wages in the first year of the contract, followed by a 2-percent increase in each of the remaining 3 years of the contract. While wages had not really been a contentious subject during the negotiations, and, in fact, had only been discussed minimally,⁵² the number of rooms that attendants were required to clean had been a major dispute separating the parties.

On the Respondent’s side, the proposal to substitute the independent AETNA plan, for the CIGNA plan that had previously been proposed, but never implemented, was a significant departure from the existing Taft-Hartley Medical Insurance

⁵² It appears that the parties did not believe that wages would be a significant issue, assuming all other matters could be resolved.

Plan under the expired contract. It was, in fact, a significant enough departure that the Respondent thought it advisable to have Mary Villareal make a 90-minute presentation to the plan's specifics to the members of the union bargaining committee. Further, the name of the Respondent's insurance broker was furnished to Sawyer so that he could have detailed questions answered. As Sawyer pointed out in his letter of April 1, 2010, the Union had not yet had an opportunity to respond to the Respondent's AETNA medical insurance proposal, and the Respondent had not formally asked for such a response. Medical insurance proposals have been found by the Board to constitute "core" issues in negotiations. *Majestic Towers, Inc.*, 353 NLRB 304 (2008) (when a union has not yet received information requested by it from an employer, which is crucial to its analysis of the employer's proposals, it is simply not possible for an impasse to exist), cites *Caldwell Mfg. Co.*, 346 NLRB 1159, 1170 (2006).

I believe that these proposals from the Union and the Respondent were certainly significant enough to warrant further negotiation between the parties. Further, it is clear that the Union's premature departure from the bargaining table on March 11 was not intended to serve as an end to negotiations. It was an obvious response to Stokes' statement that the parties were at impasse, which statement seemed to be out of context, and was certainly unrelated to the significant new proposals that each side had brought to the bargaining table. Sawyer's decision to leave the bargaining table seemed nothing more than a momentary strategy intended to demonstrate the Union's displeasure and frustration with Stokes' tactics. Sawyer's letter of April 1, 2010, certainly expressed a willingness to "continue meaningful discussions and offer proposals in an attempt to reach agreement." (Jt. Exhs. 2-00141-00143.)

Stokes was way too anxious to use the Union's departure from the negotiating table as an indication that the parties remained at impasse. To the contrary, I believe the totality of the evidence establishes that the impasse that the parties had reached following the presentation of the Respondent's "final offer" of August 21, 2009, was broken by the events of March 10 and 11, 2010. Impasse is not a permanent state of being. The new proposals made by both the Union and the Respondent warranted serious consideration and further negotiations by the parties. That did not happen because the Employer prematurely declared impasse and implemented at least one unilateral change, that being the AETNA medical plan on May 1, 2010. This conduct constituted a failure to bargain in good faith in violation of Section 8(a)(5) of the Act. See *CJC Holdings, Inc.*, 320 NLRB 1041, 1044-1046 (1996); *Whitesell Corp.*, 352 NLRB 1196 (2008) (no impasse where employer sought substantial changes, but put artificial deadline on negotiations, and where parties had exchanged proposals day before employer declared impasse).

Accordingly, I conclude that the Respondent implemented the AETNA medical plan on May 1, 2010, without affording the Union an opportunity to bargain with the Respondent over this issue, and also unilaterally stopped making payments to the extant Taft-Hartley Medical Insurance Plan under the terms of the expired contract, as alleged in paragraphs 9(e), (f), and (g) of the first complaint. By unilaterally implementing the

AETNA plan and discontinuing the extant plan without reaching a good-faith bargaining impasse, the Respondent was in violation of Section 8(a)(5) of the Act. Concomitantly, the Respondent's refusal to return to the bargaining table following the last negotiation session on March 11, 2010, constitutes a continuing refusal to bargain in good faith in violation of Section 8(a)(5) of the Act.

B. Suspensions/Discharges

Paragraph 12 of the first complaint alleges that the Respondent issued suspensions and/or written disciplines to nine employees because they engaged in union and/or protected concerted activity by presenting a boycott petition to the Respondent's general manager, and because they were in violation of an unlawful work rule. The nine employees involved are: Gina Tubman, Joana Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacham, Juanita Bourgeois, and Joey Pitcher. This conduct is alleged to violate Section 8(a)(1) and (3) of the Act.

Paragraph 14 of the first complaint alleges that the Respondent discharged four employees because they engaged in union and/or protected concerted activity by distributing flyers outside the front and back entrances of the hotel, and because they were in violation of an unlawful work rule. The four employees involved are: Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacham. This conduct is alleged to violate Section 8(a)(1) and (3) of the Act.

These events are covered in detail in the fact section of this decision. However, a brief review is necessary.

In November 2009, the unit employees voted to authorize a boycott of the hotel in protest of the Respondent's alleged failure to bargain in good faith and implementation of changes to their working conditions. There was a kickoff rally for the boycott outside the hotel on November 17. It was decided that a number of employees would present the hotel general manager, Dennis Artiles, with a copy of a petition calling for a boycott of the hotel, which petition was allegedly signed by 84 percent of the unit employees. To that end, certain of the employee members of the union negotiation team, Joann Littau, Lucy Dudek, Troy Prichacham, Maria Hernandez, Ann Rodriguez, Gina Tubman, and Su Ran Pak, plus two other employees not on the negotiation team, Joey Pitcher and Juanita Bourgeois, were enlisted to present a copy of the petition to Artiles.

While the rally was in progress, the delegation of presenters broke off and entered the lobby of the hotel. They were on their own time. The presenters asked to speak with Artiles, who appeared about 5 minutes later. According to the employee witnesses, Prichacham handed Artiles a copy of the petition (GC Exh. 8), while Dudek introduced the group and said, "Mr. Artiles, we are here to present you our boycott petitions and we want to show you our support for the boycott." Littau motioned outside, saying, "All of these people outside are members of the community who are supporting us in our boycott." Artiles took the petition and replied only, "Thank you for bringing this to my attention." The delegation then left the hotel lobby and rejoined the rally in progress. After a few minutes, the rally ended as the temperatures outside were frigid. The delegation's presentation of the petition to Artiles lasted around

5 minutes.

The members of the delegation who testified at trial all indicated that they did not engage in chanting, noise making, or other celebration type sounds in connection with the presentation to Artiles. Contrary to the assertions made by Artiles, all the employees who testified about the rally rejected any accusation that they were rude or disrespectful to Artiles or anyone else.

Artiles testified that the employee delegates did not block anyone or prevent anyone from entering the hotel. He testified that he was concerned with their “body language,” which he thought created a very “negative impression,” in that they were belligerently and rudely insisting on the right to engage in their activity. Further, Artiles testified that, while he was surprised and “very concerned” by the employees’ conduct, he was not physically afraid. However, he clearly thought that they were discourteous, and that they were out of line by confronting him in the hotel lobby, as “there is a time and place for everything.”

It is axiomatic that in presenting their petition for a boycott of the hotel to the general manager, the nine employees were engaging in the most basic form of union and protected concerted activity. I have no reason to doubt those employees who testified that they were not rude or disrespectful to Artiles or anyone else. Artiles himself did not really challenge this testimony by the petition presenters. While he characterized their conduct as being belligerent and rude, he gave no specific examples of such conduct. Simply because Artiles was “surprised” and “very concerned” by the presentation of the petition, and felt that there was a better “time and place” for such activity, does not establish that there was anything improper about the conduct of the presenters. Neither the Respondent nor Artiles has the right to decide when employees can engage in legitimate union activity. Nothing about the conduct of the petition presenters was improper, or in any respect rises to the level of impropriety that would remove their actions in presenting the petition from the protection said actions are entitled to under the Act as legitimate union and protected concerted activity.

The Respondent acknowledges that none of the employees in the delegation were on duty at the time they entered the lobby. Further, the Respondent emphasizes that these off duty employees did not receive permission before entering the hotel with their petition. The Respondent is relying on the alleged violation of the rules of conduct in the association handbook to justify certain disciplinary actions taken by management against members of the delegation. As is noted in the associate handbook under the heading “Working Hours/Overtime,” page 16: “Return to property after work is not permitted. At the conclusion of the shift, you should leave the hotel premises. If you desire to use any of the hotel facilities after hours or on your day off, you MUST receive prior permission from the General Manager.” Further, under the heading “Associate Rules and Regulations,” page 33 it says: “I agree not to return to the hotel before or after my working hours without authorization from my manager.” (GC Exh. 7.) Counsel for the Respondent emphasized in his brief that all employees of the hotel received a copy of the association handbook, which had been in effect since the Respondent assumed operation of the hotel in

December 2006.

On about November 19, 2009, the Respondent disciplined Tubman, Littau, Rodriguez, Hernandez, Dudek, Pak, Prichacharn, Bourgeois, and Pitcher for having presented Artiles with the boycott petition 2 days’ earlier. The disciplinary notice issued to each of the employees stated as follows: “On 11/17/ 2009 around 5:45 PM you and a group of associates entered the hotel on your time off. You all approached the General Manager in an [sic] disorderly conduct, verbal harassment making threats and very intimidating to him about what he was doing wrong with the union negotiations.” There then followed four association handbook rules that the employees had allegedly violated, with the notice concluding, “This will not be tolerated.” The four handbook rules that the employees were accused of having violated were: the no loitering on the property rule, the being only in assigned work areas rule, the common decency and public embarrassment rule, and the conflict of interest rule. (GC Exhs. 13, 16, 18, 20, etc.)

In addition to the disciplinary notices issued to the nine employee members of the delegation, Tubman, Prichacharn, and Littau were initially suspended, but then, according to Fullenkamp, she and Artiles consulted with members of the Respondent’s executive team in Texas and it was determined not to suspend them, but just issue each of them a written warning. However, it does appear that Bourgeois and Dudek were actually suspended. Allegedly, no employee lost any pay as a result of this discipline.

The standard used by the Board to determine in “dual motivation” cases whether an employee has been disciplined because he engaged in union or protected concerted activity, or for good cause is well established and enunciated in *Wright Line*, and its progeny. However, I am of the view that the issue before me is not one of dual motivation, and, therefore, the *Wright Line* framework is not appropriate for determining whether the nine petition presenters were disciplined unlawfully. The Respondent takes the position that the petition presenters were disciplined for violating the hotel’s rules and code of conduct regarding access to the hotel by off-duty employees. It was in the course of presenting the petition to Artiles that the employees were on hotel property. Under such circumstances, the proper analytical framework is that found in *Burnup & Sims*, 379 U.S. 21 (1964). In that case, the Supreme Court affirmed the Board’s determination that an employer violates Section 8(a)(1) of the Act by discharging or disciplining an employee based on its good faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. *Id.* at 23–24; also *La-Z-Boy Midwest*, 340 NLRB 80 (2003).

It is beyond question that the petition presenters were engaged in union and protected concerted activity when they left the boycott rally going on outside the hotel, and, while on their own time, entered the hotel and proceeded to present the petition to the hotel general manager. The boycott of the hotel was a strategy devised by the Union as a means of bringing economic pressure to bear on the Respondent in an effort to force the Respondent to submit to the Union’s demands at the bargaining table. The petition presenters were acting as the representatives of the 84 percent of the unit employee who signed

the petition when they sought to present it to Artiles. Frankly, one would be hard pressed to find a more basic form of union and protected concerted activity.

These employees were disciplined by the Respondent because while they were off duty, and without first securing permission from management, they entered the hotel, which was a violation of the hotel rules and code of conduct as found in the associates handbook. Of course, the purpose for their being on hotel property while off work was so that they could present Artiles with the petition, clearly constituting union and protected concerted activity. Indeed, to the extent that the conduct for which employees are disciplined is “intertwined with protected concerted activity,” as in the matter at hand, the Board’s *Wright Line* analysis does not apply, and a violation will be found based on this causal link alone. See *Felix Industries*, 331 NLRB 144, 146 (2000); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000).

While the employees were allegedly disciplined for violating the hotel rules and code of conduct regarding off-duty access to the hotel, the very existence and/or enforcement of those rules constituted a violation of the Act. I will have more to say about those rules later in this decision, and need not discuss them further now, as since the employees were clearly engaged in union and protected concerted activity when “violating the rules,” the issue really becomes whether anything about their actions removes their conduct from the protection of the Act.

Where an employee is punished for being part of a group that presents to management a petition protesting their working conditions, “[t]he General Counsel easily establishes the elements of a violation.” *Superior Travel Service, Inc.*, 342 NLRB 570, 574 (2004) (where the Board held that these types of group approaches to an employer are concerted and protected by the Act). As noted, the petition presenters’ union and protected concerted activity was “intertwined” with the alleged violations of the Respondent’s hotel rules and code of conduct found in the associate handbook. In fact, the only way that the petition presenters could have lost the protection of the Act was if their conduct in presenting the petition to Artiles was opprobrious.

In *Atlantic Steel Co.*, 245 NLRB 814 (1979), the Board set forth the four elements looked at in determining whether union or concerted conduct loses the protection of the Act: (1) the place the conduct occurred; (2) the subject matter of the conduct; (3) the nature of the conduct; and (4) whether the conduct was provoked by the employers’ unfair labor practices. In the case at hand, the conduct occurred in the lobby of the hotel, an area where the guests gathered and hotel business was conducted. The subject matter of the conduct was the boycott petition, and the nature of the conduct was the presentation of the employee boycott petition to the hotel general manager, which clearly constituted union and protected concerted activity. There was no inappropriate outburst, use of profanity, rude, disrespectful, or obnoxious behavior on the part of the employees.⁵³ Artiles could not specifically point to any such conduct.

⁵³ An employee’s protected concerted activity does not lose the protection of the Act unless he engages in misconduct that is so violent, outrageous, or disruptive as to render the employee unfit for service.

He merely did not like the attitude of the petition presenters and felt that there was a better place and time to present such a petition. As I stated earlier, that simply does not matter, since the Respondent does not have the legal authority to dictate when and under what circumstances its employees will exercise their right to engage in protected Section 7 activity, and to the extent that its rules and code of conduct attempt to do so, they are unlawful. Nothing in the conduct of the petition presenters caused them to lose the protection of the Act.

Accordingly, I conclude that by suspending and/or issuing written disciplinary warning notices to the nine petition presenters, the Respondent was in violation of the Act. Specifically, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in paragraphs 12(a), (b), (c), (d), and (e) of the first complaint.

Paragraph 14 of the first complaint alleges that on February 17, 2010, the Respondent unlawfully discharged four employees because of their union and protected concerted activity in distributing handbills in front of the hotel, which handbills called for a boycott of the hotel, and for violating certain unlawful work rules. The four employees involved are: Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn. This conduct is alleged as a violation of Section 8(a)(1) and (3) of the Act.

These events are discussed in detail in the fact section of this decision. However, a brief recital of those facts is necessary. It should also be noted that these four handbillers were among the nine employees who were previously disciplined for presenting the boycott petition to the hotel general manager.

On February 2, 2010, at about 3 p.m., a number of union supporters were distributing flyers outside the hotel’s front and back entrances. These flyers announced the Union’s boycott of the hotel to guests and others who might be entering or exiting the hotel. The flyers requested that the public not patronize the hotel because of the labor dispute with the employees. The two entrances to the hotel are under overhangs where cars and cabs drop off or pick up riders having business with the hotel. There are private sidewalks adjacent to the entrances, but the public sidewalks are some distance away, past the parking area. At the time of the incident in question, those employees handing out flyers were clearly on the hotel’s private property. There is no contention, nor any evidence, that they were in any way trying to physically impede the ingress or egress of individuals who were coming to or going from the hotel. Employees Dudek and Tubman were at the front entrance, while employees Littau and Prichacharn were at the back entrance. These employees were situated between 4 to 6 feet from the entry doors. They were not working at the time, and had not asked permission of the hotel managers to be on the property when off duty. While they were passing out flyers, fellow employees were picketing the hotel from the public sidewalk.

A short time after the four employees began to pass out the flyers, Artiles, Fullenkamp, and another manager came out of the hotel and approached Prichacharn and Littau. Fullenkamp announced that the employees were on private property, were

Wolkerstorfer Co., 305 NLRB 592 (1991); *Hawthorne Mazda*, 251 NLRB 313, 316 (1980), enfd. 659 F.2d 1089 (9th Cir. 1981).

off the clock, and, therefore, had to move to the public sidewalk, or she would call the police. Union Agent Esparza, who was present, approached Fullenkamp and asked if she was going to discipline these employees or was calling the police. She told him that the police had already been called. At that point Prichacharn and Littau left the property.

Turning her attention to the other side of the hotel, Fullenkamp confronted Dudek and Tubman. She asked them whether they were off duty, to which they responded yes. Fullenkamp replied, "Well, you're not supposed to be here, you're trespassing." Dudek and Tubman defended themselves, saying that they had a right to be there, and handed Fullenkamp a paper listing certain NLRB cases with case summaries indicating they had a right to be on the property to communicate with customers regarding their labor dispute. (GC Exh. 11.) Fullenkamp looked at the paper, but was apparently not very impressed, as she again repeated that they had no right to be on the property. Further, she told them, "You need to look at your handbook. It's in your handbook that you're trespassing." The two employees remained while Fullenkamp went back into the hotel. Upon shortly returning, she told them if they still remained that she would have the security guards escort them off the property. Not dissuaded, the employees steadfastly remained. Once again Fullenkamp went back into the hotel, returning shortly to tell the two employees that the police had been called, they were on their way, and that the employees must leave now. Finally, Dudek and Tubman had had enough, and they left the hotel property.

The following day, the four employees were suspended pending an investigation. A week later, on February 8, 2010, the four employees were called back to the hotel so they could meet with Artiles and tell him their side of the story. Subsequently, Artiles recommended they all be terminated, which recommendation was concurred in by Villareal, the final decisionmaker. On February 17, the four employees were again called back to the hotel where they met individually with Artiles who informed them that they were being terminated for violating hotel policy.

The disciplinary notices received by the four discharged employees were identical. (GC Exhs. 12, 15, 17, 19.) They were drafted by Fullenkamp. The employees' misconduct was identified as "passing out flyers to our hotel guests on your time off," as well as refusing to leave the property when instructed to do so. Fullenkamp also referenced the November 17, 2009 incident when they were warned about being on hotel property while off duty without permission. In the discharge notice, Fullenkamp stated: "When I asked you to leave the property, you refused at least two times by turning away from me and kept handing out the flyers. You then tried to argue with me about this by telling me you had the right to be there." Further, the notice stated, "your behavior was rude and disrespectful to me and other managers," and later stated that, "as a shop steward you know that you do the request and grieve it later." All four discharged employees were union shop stewards.

In the body of the discharge notice the Respondent refers to various sections of its associate handbook including the rules of off-duty access, antidistribution, and insubordination. Finally, the notice also makes reference to the "no strike/no lockout"

provision in the expired collective-bargaining agreement.

As represented by counsel for the Respondent, in the weeks preceding the hearing in this case, all four employees received an unconditional offer to return to work, and all four did so with full back pay and seniority. No evidence was offered to dispute this representation.

For the same reasons as were expressed earlier regarding the disciplining of the employees who presented the boycott petition to Artiles, the discharge of the four handbillers is not a "dual motivation" case, and would not appropriately be decided under the Wright Line framework. The Respondent takes the position that the handbillers were disciplined for violating the hotel's rules and code of conduct regarding access to the hotel by off-duty employees, for trespassing, and for insubordination for refusing to immediately obey Fullenkamp's order to leave the property. It was in the course of handbilling in support of the Union's boycott of the hotel that the four employees were on company property. Under such circumstances, the proper analytical framework is that found in *Burnup & Sims*, supra; and *La-Z-Boy Midwest*, supra.

It is beyond question that the four employee handbillers were engaged in legitimate union and protected concerted activity when, while off duty,⁵⁴ they went from the public sidewalk to the immediate vicinity of the hotel's entrances, admittedly on hotel property, and began to offer handbills to persons entering and exiting the hotel. Obviously, the handbilling was intended to persuade persons not to conduct business with the hotel, and was in furtherance of the Union's boycott of the hotel. It is axiomatic that such conduct constitutes both union and protected concerted activity. Further, there is no contention, and no evidence, that the handbillers in any way attempted to impede those persons who sought to enter or exit the hotel.

The case law is clear that activities such as security, maintenance, and valet parking, which typically occur at the entrances to the Respondent's facility, are "incidental" to a hotel's primary function, and are, thus, insufficient to transform a hotel's front entrance area into a "work area" where the Employer could lawfully ban employee distributions. *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000) (finding that respondent hotel-casino violated Sec. 8(a)(1) by enforcing its no-distribution/no-solicitation rule to prohibit its off-duty employees from distributing literature at the main entrances to its facility).

The Respondent contends that these employees were engaged in various forms of misconduct, including violating the hotel's rules and code of conduct regarding off-duty access to the hotel. However, the maintenance and/or enforcement of those rules themselves constitute a violation of the Act, about which I will have more to say later in this decision. As the employees were clearly engaged in union and protected concerted activity when "violating those rules," their discharges are "intertwined with the union and the protected concerted activity," and a violation may be found based on this causal link

⁵⁴ See *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), which distinguished an off-duty employee on company property, who was "a stranger neither to the property nor to the employees working there," from a nonemployee. Such an off-duty employee is not viewed as a trespasser.

alone. *Felix Industries*, supra; and *Nor-Cal Beverage Co.*, supra. The only issue that remains to be decided is whether the four employees did anything improper while engaged in the handbilling that would cause them to lose the protection of the Act.

The Respondent did not contend that the handbillers engaged in violence or threatening conduct towards any actual or prospective hotel guests during the brief period of their leafleting, nor was it alleged that they attempted to impede the progress of any such guest, or that they disparaged or defamed the hotel in any way. Further, there is absolutely no evidence to indicate that any such conduct occurred. However, it is the Respondent's contention that the four employees engaged in insubordination by refusing to cease their handbilling activity once ordered by Fullenkamp to do so.

Each handbiller's termination paperwork reflects the Respondent's position that they had no right to remain on the property continuing their leafleting activity once Fullenkamp ordered them to leave. According to the Respondent, as is reflected in the discharge papers, the employees were expected to obey their manager's order and leave the property, and then, if they so desired, to file a grievance, the so called "do the request and grieve it later plan." Additionally, the disciplinary notices indicate Fullenkamp's feeling that the handbillers were "rude and disrespectful" to her and other managers by "turning away" when asked to leave, by continuing to hand out the flyers, and by arguing about their "right to be there." (GC Exhs. 12, 15, 17, 19.)

The Respondent's directive, as made by Fullenkamp, amounted to an order that the handbillers cease their protected conduct and "grieve it later." In such circumstances where the employees suffer adverse consequences for their peaceful refusal to obey such an unlawful order, the Board has found a violation of the Act. See, e.g., *Air Contact Transport, Inc.*, 340 NLRB 688 (2004); *Kolkka Tables & Finnish-American Saunas*, 355 NLRB 844 (2001).

The Board found in *Kolkka Tables* that an employee's refusal to remove union stickers from the employee's toolbox did not warrant his suspension. While the employee's refusal to comply with the unlawful order put him in direct conflict with a supervisor, the Board decided that the suspension of the employee for insubordination was unlawful, since there was no evidence that the employee made any threatening comments or gestures against the supervisor, nor did the employee use any profanity or make any other remarks demeaning the supervisor. 335 NLRB at 849. Similarly, in the case at hand, while Fullenkamp opined in the discharge notices that the employees' "behavior was rude and disrespectful," in fact, they had done nothing of the kind, but merely refused to immediately follow an unlawful order.

In *Air Conduct*, an employee had repeatedly refused to sign a memo reprimanding him for the "animated" way in which he had presented the grievances of his fellow employees. As an appointed spokesman, the employee had been engaged in protected concerted activity. The employer discharged the employee for insubordination in refusing to comply with what the Board concluded was an unlawful order to sign the unlawful memo. Such conduct the Board concluded was not insubordi-

nation, and the employee's discharge for refusing to sign the memo violated Section 8(a)(1) of the Act. Again, the Board relied on the employee "not making any threatening remarks or gestures, nor did he direct any profanity towards the supervisors. He also did not make any other remarks demeaning them." 340 NLRB at 691.

In the matter before me, none of the four handbillers engaged in any misconduct that would remove their leafleting from the protection of the Act. In refusing to follow Fullenkamp's unlawful order to cease handbilling and immediately leave the property, they were not engaged in insubordination. Their actions were neither rude nor disrespectful. They did nothing as would warrant their terminations.

The Respondent contends that it "remedied" these four discharges by reinstating the four employees in July 2010, apparently with full backpay and no loss of seniority. In "certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct." *Passavant Memorial Hospital*, 237 NLRB 138, 138 (1978). In order to be effective, the "repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.'" Id. (citing *Douglas Division, The Scott & Fetzer Co.*, 228 NLRB 1016 (1977), and cases cited therein at 1024). "Furthermore, there must be adequate publication of the repudiation to employees involved." *Passavant Memorial*, 237 NLRB at 138 (emphasis added). "And finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." Id. at 138-139 (emphasis added).

In *Passavant*, the employer published a statement in its employee newsletter to clarify unlawful threats it made to employees. (Id. at 138.) The Board noted several reasons why the employer's newsletter publication "was ineffective to relieve [it] of liability and to obviate the need for further remedial action, including: (1) the attempted disavowal appeared only once in an employee newsletter; (2) It was uncertain that all employees were adequately informed of the retraction; and (3) the employer failed to show it made any additional efforts to communicate its disavowal." Further, the Board emphasized that the employer did not admit any wrongdoing. Finally, the Board noted that "most importantly, [the] statement did not assure employees that in the future [the employer] would not interfere with the exercise of their Section 7 rights by such coercive conduct." (Id. at 138-139.)

In the matter at hand, the Respondent reinstated its discharged employees with backpay. However, the discharges occurred in February 2010, and, while it is not entirely clear exactly when the reinstatements occurred,⁵⁵ there is no evidence to suggest that they were made in a timely fashion. See *Pride Ambulance Co.*, 356 NLRB 1249, 1256 (2011) (finding employer failed to cure illegal discharge allegations where it failed to act timely, admit wrongdoing, and assure employees that it would not interfere with their Sec. 7 rights in the future).

⁵⁵ There is some reference in the record to the reinstatements occurring in July 2010, some 4 months after the terminations.

Even assuming the reinstatement was timely, there is no contention on the part of the Respondent that a disavowal of the terminations was posted or announced to employees even once in any form, written, oral, or by intranet. Apparently, such repudiation of the terminations was never published in any form by the Respondent. Concomitantly, the Respondent never gave assurances to employees that in the future it would not interfere with the exercise of employee Section 7 rights, nor did it admit to any wrongdoing by its termination of the four handbillers.

The Respondent has fallen far short of meeting its burden of establishing effective repudiation of its unlawful discharges of the four handbillers under *Passavant Memorial*. Supra at 138–139. Accordingly, I conclude that the Respondent’s action in terminating Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn for handbilling in front of the hotel entrances, and for disregarding the Respondent’s rules and code of conduct prohibiting such protected activity was in violation of the Act. Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging the four handbillers, as alleged in paragraphs 14(a), (b), (c), (d), (e), and (f) of the first complaint.

C. Rules of Conduct

Paragraph 11(a) through (h) of the first complaint alleges that eight rules of conduct found in the Respondent’s associate handbook are unlawful.⁵⁶ It is the position of the General Counsel that since November 1, 2009, the mere existence of these rules has violated the Act. There is no dispute that the rules, as set forth in paragraph 11 of the first complaint, are found in the Respondent’s “Remington Associate Handbook” (GC Exh. 1(ee), the handbook attachment), and that employees are provided with a copy of the handbook and are expected to read it and acknowledge its receipt. (R. Exhs. 1 and 2.) The Respondent acknowledges the existence of these rules, but denies that the language is unlawful. Therefore, it is necessary to determine whether the language as set forth in those rules is unlawful on its face.

The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer’s right to implement certain legitimate rules of conduct in order to maintain a level of discipline at work, with the right of employees to engage in Section 7 activity. There exists a natural dichotomy between the two. I am mindful of this dichotomy, and in reviewing the Respondent’s rules, an effort has been made not to look at the questionable statements in isolation, but, rather, to view them in the context in which they were written.

In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, the Board has held that, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998),

⁵⁶ In the fact section of this decision, for ease of reference, I numbered these rules as 1 through 8. They correspond to the allegations in the first complaint as follows: rule 1 = par.11(a); 2 = par.11(c); 3 = par. 11(h); 4 = par. 11(b); 5 = par. 11(f); 6 = par. 11(g); 7 = par. 11(d); and 8 = par. 11(e).

enfd. 203 F.3d 52 (D.C. Cir. 1999). Further, where the rules are likely to have a chilling effect on Section 7 rights, “the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” Id. See also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The Board has further refined the above standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is clearly unlawful. If the rule does not, it will nonetheless violate the Act upon a showing that: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” Id. at 647; see *North-eastern Land Services*, 352 NLRB 744 (2009) (applying the Board’s standard in *Lutheran Heritage Village*, supra at 647).

Similarly, the Board has held that “confidentiality” rules, which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment, restrain and coerce employees in violation of Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated, or even enforced. See *Lutheran Heritage Village-Livonia*, supra; *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (handbook provision a violation on its face where confidential information is defined as “wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations [and] salary information”); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291 (1999) (handbook provision prohibiting employees from disclosing “confidential information regarding . . . fellow employees” a violation).

Further, a rule that prohibits, among other things, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 4, 294 (1999) (rule prohibiting “false, vicious, profane, or malicious statements unlawful because it prohibits statements that are “merely false” and might include union propaganda). Also, if a combination of an employer’s rules could be understood by employees to prohibit them from engaging in protected conduct, the Act is violated. *Pace, Inc.*, 167 NLRB 1089, 1098 (1967).

The Board has also held that “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003). Thus, the test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 rights, but, rather, that any reasonable interpretation is sufficient to sustain a violation. Further, to the extent rules may be subject to competing interpretations, lawful and unlawful, the Board has held that any ambiguities must be construed against the promulgator of the rule. See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828; *Norris/O’ Bannon*, 307 NLRB 1236, 1245 (1992); *Ark Las Vegas Restaurant*, 343 NLRB 1281, 1282

(2004).

Turning now to the individual handbook rules in question, it appears that six out of the eight rules listed in the complaint were utilized by the Respondent as a basis to discipline the employees who presented the boycott petition to Artiles and/or those employees who handbilled at the hotel entrances. Those six rules are listed in the first complaint in paragraph 11 as subparagraphs: (a), (b), (c), (f), (g), and (h). Since the Respondent relied upon these rules in disciplining and/or discharging employees for engaging in protected Section 7 conduct, they fail the third prong of the Board's test and are illegal for that reason alone. See *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. "[H]andbook provisions violate the Act if they prohibit employees from engaging in forms of activity that are protected by the Act." *Superior Travel Service, Inc.*, 342 NLRB at 574 (citing *Koronis Parts*, 324 NLRB 675, 686, 694 (1997)). Therefore, I find that rules (a), (b), (c), (f), (g), and (h)⁵⁷ violate the Act. I will now discuss each of the rules in turn.

Regarding those rules as are reflected in the first complaint subparagraphs 11(a), (b), and (c): (a) employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager" (complaint app. p. 33); (b) employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head" (complaint app. pp. 34–35); and (c) "distribution of any literature, pamphlets, or other materials in a guest or work area is prohibited. . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate" (complaint app. p. 27), those rules collectively deal with access, antisolicitation/distribution, and antiloitering issues.

It is long settled court and Board law that, absent special circumstances, the Act guarantees employees the right to distribute union literature on their employer's premises during non-work time in nonwork areas. *Republic Aviation Co. v. NLRB*, 324 U.S. 793, 803–804 (1945); *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110–111 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). A rule, which, on its face or by application, interferes with the exercise of these protected employee rights is presumptively invalid, in the absence of special circumstances that make the rule necessary in order to maintain production or discipline. *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943); see also *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1259–1260 (1944). The Board has held that "a rule denying off-duty employees access to parking lots, and gates, and other outside non-working areas is invalid unless sufficiently justified by business reasons." *Tele Tech Holdings*, 333 NLRB 1281, 1282 (2004). Certainly, rule (a), which requires employees to secure permission from the Respondent's managers as a precondition to engaging in union or concerted activity on the employee's off-duty hours and in a nonwork area,

⁵⁷ I find that rule (h), which relates to insubordination, is unlawful only as it was applied by the Respondent to discipline the handbillers who were engaged in lawful union activity at the time they were directed to leave the Respondent's facility.

would be presumptively unlawful. See *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *Norris/O'Bannon*, 307 NLRB at 1245. Accordingly, I find that rule (a) is unlawful.

Rule (b) is in essence an antiloitering rule intended to confine the employees to their immediate work areas and to prevent them from "roaming" the property. Such rules have been found illegal by the Board. *Palms Hotel & Casino*, 344 NLRB 1363, 1363, 1391–1392 (2005); *Lutheran Heritage Village-Livonia*, supra at 649 fn. 6; *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *Palms Hotel & Casino*, the Board found that rule prohibiting employees from "loitering in company premises before and after working hours" violated Section 8(a)(1), because the terms "loitering" and "premises" could lead off-duty employees to conclude they could not engage in protected activities with other employees in nonworking areas of the respondent's property. (344 NLRB at 1363 fn. 3.) Any ambiguity in a no loitering rule "must be construed against the [employer] as the promulgator of the rules." *Ark Las Vegas Restaurant*, 343 NLRB 1281, 1282 (2004). See also *Lutheran Heritage Village-Livonia*, 343 NLRB at 649 fn. 16, 655 (finding facially invalid rule against "[l]oitering on company property (the premises) without permission from the Administrator").

Most egregious, rules (b) and (c) when read together, create what amounts to a total prohibition on all solicitation and distribution by the unit employees at the hotel. As has been noted, when, as in the matter before me, a combination of the employer's rules could be reasonably understood by employees to prohibit them from engaging in all union solicitation and distribution in nonwork areas of the company property during non-work time, the Act has been violated. *Pace, Inc.*, 167 NLRB at 1098; *Care Initiatives, Inc.*, 326 NLRB 144, 156 (1996) (rule prohibiting distribution of literature "any time in the facility, even when you are off-duty" unlawful). Accordingly, I conclude that rules (b) and (c) are unlawful.

Rules (f) and (g) could reasonably be interpreted by employees to prohibit them from discussing among themselves and others the terms and conditions of their employment, where such discussion may "publicly embarrass" the Respondent, conflict with its interest, or violate "common decency or morality." Employees who have the right under the Act to engage in union activity or other protected activity, which may certainly lead to criticism of the Respondent, or whose activities may potentially conflict with the Respondent, should not have to fear running afoul of the rules of conduct and being subject to discipline. Even employee conduct disparaging management officials or the Employer's business may be protected activity if the remarks or conduct relate to employee interests or working conditions and are not egregious in nature. See *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *American Golf Corp.*, 330 NLRB 1238 (2000); *Allied Aviation Service Co., of New Jersey*, 248 NLRB 229 (1980); *Community Hospital of Roanoke Valley, Inc.*, 220 NLRB 217 (1975).

Further, regarding the Respondent's ban on indecent or immoral behavior, there are no specific examples in the rules to define these terms. Therefore, employees might reasonably be uncertain as to what constitutes prohibited speech. They might think that using the term "scab" in the course of union activity,

which is certainly “uncivil,” “insulting,” and “contemptuous,” would result in discipline, even though such language is clearly protected under the Act. See, e.g., *Letter Carriers v. Austin*, 418 U.S. 264, 268, 277–278 (1974), citing *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 60–61 (1966). The employees should not have to decipher such language at their own peril. Clearly, the language in these rules is overly broad and ambiguous, and would serve to chill the Section 7 rights of the unit employees. As such, I find that rules (f) and (g) are unlawful.

Regarding rules (d) and (e), they are illegal as they would reasonably be interpreted by employees to prohibit them from discussing their terms and conditions of employment with each other and with the press. Rule (d) explicitly limits employees’ Section 7 activities and is illegal on its face. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; *Double Eagle Hotel & Casino*, 341 NLRB at 114 (rule prohibiting employee disclosure of “personnel problems” explicitly restricts protected activity). The prohibition in rule (e) regarding contact with the media is equally unlawful as restricting concerted activity. See, e.g., *Crowne Plaza Hotel*, 352 NLRB 382, 386 (2008) (media policy prohibiting employees from commenting on “any incident” unlawful where not restricted to when media seeks the employer’s “official comments”).

These rules are overly broad and would have a chilling effect on the right of employees to discuss their wages, hours, and working conditions with each other, with the Union, with governmental agencies, with the press, and with other concerned individuals and organizations. *University Medical Center*, 335 NLRB 1318, 1322 (2001) (rule prohibiting disclosure of information about employees “is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages”); *Waco, Inc.*, 273 NLRB 746, 748 (1984) (rule prohibiting employees from discussing their wages violates the Act). See also *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171 (1990) (finding that the Act protects employees publicizing their working conditions whether directed to the other employees, news reporters, the public in general, or the employer’s customers, advertisers, or parent company); *Leather Center, Inc.*, 312 NLRB 521, 528 (1993) (finding that the Act protects employees who notify the media and others about their complaints or grievances against management in an effort to secure favorable coverage or aid). Accordingly, I find that rules (d) and (e) are unlawful.

Based on the above, I have concluded that the Respondent violated Section 8(a)(1) of the Act by maintaining and/or enforcing those rules in its “Associate Handbook,” as set forth in paragraphs 11(a) through (h) of the first complaint.

D. Subcontracting Unit Work

Paragraph 7(b)(viii) of the first complaint alleges that on about August 17, 2009, without first bargaining with the Union, the Respondent unlawfully subcontracted bargaining unit work. It is the General Counsel’s theory that the Respondent unlawfully removed from the bellmen’s duties the responsibility for driving the hotel courtesy van, which driving had constituted a significant portion of those duties, and a large amount of remuneration

that the bellmen received in tips from the guests for driving the van. On the other hand, the Respondent takes the position that the expired contract did not require that the Employer bargain with the Union where subcontracting of unit work did not displace bargaining unit employees. As discussed in detail in the fact section of this decision, the Respondent admits hiring Valentino Limousine Service (VLS) to provide shuttle services for hotel guests, which services were previously performed by the bellmen, but it argues that no bargaining with the Union was necessary under the terms of the expired contract as no bellmen were laid off pursuant to the subcontracting.

The contract provision in question is article IX, section 8 of the expired collective-bargaining agreement. (GC Exh. 5.) The pertinent part reads as follows: “If analysis of its operation by the Employer indicates contracting out is reasonably expected to result in a reduction in cost, increased efficiency in the delivery of services to the public, or otherwise benefit the employer, and it is *reasonably expected to result in the displacement of any regular employee*, the Employer shall first notify the Union in writing of the proposed action.” (Emphasis added by me.)

As noted earlier, from the testimony of bellman Troy Prichacharn, it does appear that there was no diminution in the number of bellmen employed by the hotel from August 2009, when the subcontracting to VLS went into effect, through November 2009. (R. Exh. 12.) However, it is clear that driving the courtesy van was considered a perk by the bellmen, since it permitted them to get off their feet, take a break, and be away from the confines of the hotel lobby. Its principal benefit was that it constituted an excellent source of tips. Prichacharn testified that his tips from driving the van in the winter months would be between \$18 and \$25 a day, and in the summer months between \$40 and \$45 a day.

It is undisputed that the Respondent did not notify the Union before contracting with VLS. The Respondent defends its action under the terms of the expired contract, as no bargaining unit employees were laid off as a result of the subcontracting. In this instance, I agree with the Respondent. The language in the expired contract is clear and unambiguous. The Respondent is not required to notify the Union, and implicitly bargain with the Union, unless the subcontracting would reasonably result in the displacement of bellmen. It did not.

Of course, I realize that the loss of the courtesy van driving duties resulted in a significant loss of income for the bellmen in the form of tips, and also the elimination of those duties that they considered pleasurable. However, the provision in question in the expired contract did not make an exception for such losses in income or pleasure. Under the terms of that contract, and based on the situation at hand, the Respondent was not required to notify or bargain with the Union prior to subcontracting unit work.

Accordingly, I conclude that the Respondent did not violate the Act when on about August 17, 2009, it contracted with VLS to provide shuttle van services to hotel guests, and concomitantly removed the responsibility of driving the hotel courtesy van from the duties of the hotel bellmen. Therefore, I shall recommend that paragraph 7(b)(viii) of the first complaint be dismissed.

E. Guest Satisfaction Incentive Plan

Paragraph 9(d) of the first complaint alleges that on about March 18, 2010, the Respondent implemented a “Guest Satisfaction Incentive” plan, without bargaining with the Union, in violation of Section 8(a)(5) of the Act. This was an incentive bonus plan under which the room attendants could receive cash like awards and other benefits for achieving a high cleanliness rating for the hotel, and for positive comments made about them individually by hotel guests. The General Counsel alleges that this was an unlawful unilateral change made by the Respondent without consultation with the Union, and unrelated to the issues that separated the parties at the bargaining table, and that allegedly had led the Respondent to declare impasse. The Respondent’s defense is that this incentive program was simply an idea from the hotel general manager, which was never fully implemented as the Respondent’s corporate executives vetoed the plan. According to counsel for the Respondent, the plan was in effect for at most 24 hours, had almost no impact on the bargaining unit, and was, at most, *de minimis*.

As I noted in the fact section of this decision, on March 18, 2010, a memo to the housekeeping department from Artilles was posted in the department, as well as on the door of each floor’s housekeeping supply closet. The memo is set forth in detail earlier in this decision. In summary, it provided that if the hotel collectively received a high cleanliness rating for a month, each housekeeper would be permitted to clean one less room per shift for the entire following month, meaning only 16 rooms cleaned, rather than 17. Further, housekeepers could earn a \$25 gift card if the overall monthly goal for the hotel was met, and if the individual housekeeper’s name was mentioned positively in an online guest survey.

The memo was explained to groups of housekeepers by Eduardo Canes, the director of operations, shortly after it was posted. The testimony of employee witnesses regarding the implementation of this plan was very weak. Housekeeper Elda Buezo testified that for 1 day only all the housekeepers were permitted to clean one less room. She thought that it was around the date that Canes talked to the housekeepers about the new plan, but she did not seem very clear as to the reason this happened. Housekeeper Ana Rodriguez testified that two other housekeepers, Dolores Cuellar and Rajit Aguglia, for 1 day only had their room cleaning quota reduced by one room, to 16 rooms, because the hotel had received good comment cards about them filled out by guests.

In her posthearing brief, counsel for the General Counsel acknowledges that the “Respondent’s actual implementation of the plan was spotty.” Counsel for the Respondent in his posthearing brief argues that the incentive plan was never fully implemented, and that any partial implementation was very brief and *de minimis* in its impact on the bargaining unit. Counsel cites some cases, which he acknowledges are for analogy purposes only, as they deal with certain minor unilateral wage increases established by past company policy found by the courts not to constitute a failure to bargain in good faith.⁵⁸

⁵⁸ *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1185 (5th Cir. 1982); *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214, 217–218 (5th Cir. 1964); *White v. NLRB*, 255 F.2d 564, 565 (5th Cir. 1958), cited with

These cases are of only marginal value as they deal with wage increases based on business necessity, or automatic increases as part of established company policy, or custom and practice, or where the increase was held to be very insignificant. Never the less, I agree with counsel for the Respondent that the impact of the limited implementation of the plan was *de minimis*.

The plan was never fully implemented, and apparently was in effect for only 24 hours, and at most it benefited two housekeepers for 1 day only. The plan was withdrawn before it could have any kind of a significant impact on the bargaining unit. Had it been fully implemented it would have certainly constituted a unilateral change and a failure to bargain in good faith. However, based on the evidence before me, I find the incident *de minimis*, and not rising to the level of an unfair labor practice. Accordingly, I shall recommend that paragraph 9(d) of the first complaint be dismissed.

F. Engineers Assigned Security Guard Duties

It is alleged in paragraphs 9(a) and (g) of the first complaint that from about July through September 2009, the Respondent unilaterally assigned nonunit security guard duties to its bargaining unit engineers, without first notifying and negotiating with the Union. In an effort to substantiate this allegation, counsel for the General Counsel relies on the testimony of engineer Dexter Wray. However, counsel for the Respondent argues that the evidence offered by the General Counsel is insufficient to support this allegation, and that the testimony of Wray is incredible.

Earlier in this decision, I considered the testimony of Dexter Wray in direct contradiction to that of his Supervisor Ed Emmsley Jr., the chief of engineering. For the reasons that I expressed earlier, I found Wray to be credible, and Emmsley not to be so. For purposes of the issue now before me, I continue to find Wray credible. I find Wray to be a plain spoken individual with no interest in verbal semantics. He says what is on his mind directly, without hesitation, exaggeration, or embellishment. He is a current employee who testified against the interests of his employer, and who held up well under vigorous cross-examination. I am unconcerned about his recalling the events in question as having occurred in 2008, when clearly they took place in 2009. I consider this nothing more than a common memory lapse, and, in fact, I find that otherwise his memory for detail is excellent. Accordingly, I credit his testimony regarding this issue.

The hotel engineers are responsible for maintenance and mechanical issues. Prior to July 2009, the Respondent also employed security guards who worked at the hotel.⁵⁹ The guards assisted guests to their rooms, ensured the safety of the hotel, and dealt with homeless people on the property. During emergencies all employees were expected to assist security. However, beginning in July 2009, the Respondent without notice or bargaining with the Union, began to reduce its security guards’

approval in *NLRB v. Katz*, 369 U.S. 736, 747 fn. 14 (1962). See also *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 267–268 (2d Cir. 1963).

⁵⁹ While it is unclear whether the security guards were employees of the Respondent or employed by a security company with which the Respondent had a contract, it is undisputed that they are not bargaining unit employees.

hours and assigned the duties that had been performed by the guards to its engineers. According to Wray, this change was announced by Chief of Engineering Ed Emmsley Jr., who told the engineers that when there were no security guards on a particular shift that they would have to perform that duty. In September 2009, the entire security force was laid off and the security function in its entirety was performed by the engineers, in addition to performing their regular engineering duties. Wray testified that the engineers were never given any training in security work.

In any event, this new arrangement did not last long, as in mid-October a serious incident occurred at the hotel that involved an intruder with a gun. The Respondent then proceeded to bring back trained security guards. The evidence is undisputed that the Respondent never raised the issue of security guards or attempted to bargain with the Union over the transfer of security guard duties to the engineers.

As established by the Board and the courts, it is beyond question that an employer must notify and consult with the union representing its employees before imposing unilateral changes in wages, hours, and terms and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (unilateral changes “must of necessity obstruct bargaining, contrary to the congressional policy”). To be found unlawful, the unilateral change imposed must be “material, substantial, and significant,” and impact the employees or their working conditions. *Toledo Blade Co.*, 343 NLRB 385 (2004). Further, a unilateral change in represented employees’ terms and conditions of employment is a mandatory subject of bargaining and is unlawful if the change is “material, substantial, and significant.” *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). These include changes to employees’ job duties. See, e.g., *Five Star Mfg.*, 1301, 1301 fn. 4 (2008) (unilateral change in employee work assignments a violation); *California Gas Transport, Inc.*, 347 NLRB 1314, 1359–1360 (2006) (unilateral change in route assignments which inherently affected pay constitute a violation), enf’d, 507 F.3d 847 (5th Cir. 2007).

In the matter before me, the Respondent, without notifying and bargaining with the Union, unilaterally increased the job duties of the engineers by making them responsible for security functions previously performed by the guards. Obviously, security duties are very different than those duties normally performed by the engineers. Any previous sporadic and temporary assignment of security duties to the engineers was not comparable to the assumption of all security duties by the engineers for an extended period of time. Such a transfer of all security duties to the engineers was material, substantial, and significant. Therefore, I find that the Respondent’s failure to notify and bargain with the Union prior to transferring these duties to the bargaining unit engineers was a unilateral change in violation of the Act. Accordingly, I find that the Respondent’s conduct, as alleged in paragraphs 9(a) and (g) of the first complaint, constitutes a violation of Section 8(a)(1) and (5) of the Act.

G. Surveillance Cameras

Paragraphs 9(c) and (g) of the first complaint allege that on about November 2009, the Respondent installed and, since

then, has continued to operate surveillance cameras in the hotel, without prior notice to the Union or affording the Union an opportunity to bargain over this matter, in violation of Section 8(a)(5) of the Act. Counsel for the General Counsel also seems to be suggesting that the cameras were intended to monitor elevators and hallways at the hotel where employees could be observed, but there is no specific allegation of unlawful surveillance. In any event, counsel for the General Counsel offered very little evidence during the hearing to support these allegations, and her posthearing brief is, for the most part, silent regarding these claims.

The facts are undisputed that surveillance and security cameras have been in place at the hotel since approximately 1980. They are stationed at the two main entrances to the hotel on Fifth and Sixth Avenues. The cameras monitor the ingress and egress to the hotel and the hotel parking lots. The evidence further establishes that these cameras have been routinely replaced and upgraded numerous times over the years as the available technology has improved. No evidence was offered to show that the cameras have been moved from their fixed locations. Witness testimony was that due to vandalism in the fall of 2009, that the broken cameras were replaced. No evidence was offered that employee work areas of the hotel were monitored.

It is the Respondent’s position that installing and maintaining security cameras is part of the hotel’s essential duties of keeping the property safe for guests. Counsel argues that as the security of the hotel is essential to its business operations, its security practices and equipment should not be subject to negotiations with the Union. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981) (“[I]n view of an employer’s need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”).

From the limited evidence offered as to this issue, it appears that all the Respondent did was to repair and upgrade the hotel’s surveillance cameras, which had been in place for years. There is absolutely no evidence that this repair and upgrading was in any way intended to surveil the unit employees. The expired collective-bargaining agreement was silent regarding security cameras, and, as far as I am aware, there has never been any bargaining between the parties on this issue.

I believe that the situation at hand is markedly different than those cases where an employer installs hidden cameras with the intent of surreptitiously watching its employees. To the contrary, the Respondent’s security cameras were of long standing and were intended to provide security for the hotel guests, as well as for the employees. The camera locations were well known to the unit employees.

Under the circumstances before me, I am of the view that the Respondent was not obligated to bargain with the Union over what amounted only to the upgrading and repair of existing cameras. Accordingly, I shall recommend that paragraph 9(c) of the first complaint be dismissed.

H. Seizing Union Buttons

It is alleged in paragraphs 13(a) and 16 of the first complaint that the Respondent violated Section 8(a)(1) the Act on December 8, 2009, when the director of operations, Eduardo Canes, seized union buttons from employees. Employee housekeeper Elda Buezo credibly testified that on the morning of December 8, 2009, she was in the hotel elevator wearing a pronoun button when she ran into Canes. The button read as follows: “for a fair contract [in English and Spanish] UNITE HERE!” (GC Exh. 21.) She was also carrying several more such buttons in her hand.

Buezo testified that Canes asked her to take the button off and give it to him. He also asked for the buttons she was carrying in her hand. Buezo did as she was directed and removed the button that she was wearing and handed it and the other buttons to Canes. According to Buezo, she had intended to give the extra buttons to her coworkers.

Buezo further testified that until that time, it had not been unusual for employees to wear union buttons at work, and she had done so herself in the presence of Canes and other managers. This was the first time that she had been asked to remove her button.

Although Canes testified at trial, he did not deny that the incident happened. Buezo seemed a very credible witness, and I have no reason to think that she fabricated, exaggerated, or embellished the incident. Accordingly, I conclude that the incident occurred as Buezo testified.

In his posthearing brief, counsel for the Respondent attacks Buezo’s credibility and questions whether the incident with Canes occurred at all. However, counsel never explains why Canes, who testified at the hearing on behalf of the Respondent, did not deny that the incident occurred as Buezo claimed. I draw an adverse inference from Canes’ silence about this matter, and conclude that had he testified regarding the incident, he would have supported Buezo’s version of the events.

Counsel for the Respondent argues that even if the incident happened, the allegation should be dismissed as it had no apparent impact on Buezo’s continued support for the Union. Counsel points out that Buezo acquired another union button only a few hours later, during her mid-morning break, which she wore throughout the hotel. Further, he notes from her testimony that while she was deprived of her supply of union buttons, there were plenty of buttons to go around in the employee cafeteria. However, I find this not to be the correct standard. What the Board looks for is whether an employer’s action could reasonably chill the employees’ Section 7 activity, not whether it in fact did so. In this instance, I find that it did reasonably have that potential.

Employees generally have a protected right under Section 7 of the Act not only to possess, but to display union material at their place of work, absent evidence that the employer restricted employee possession of other personal items or that possession of union materials interfered with production or discipline. *Brooklyn Hospital-Caledonian Hospital*, 302 NLRB 785, 785 fn. 3 (1991) (citing *Dillingham Marine & Mfg. Co.*, 239 NLRB 904 (1978), *enfd.* 610 F.2d 319 (5th Cir. 1980)). An employer violates the Act by instructing employees not to wear union buttons, or to remove union buttons. *Wayneview Care Center*,

352 NLRB 1089, 1115 (2008). In addition, an employer violates the Act by confiscating union literature and materials from employees. *Brooklyn Hospital-Caledonian Hospital*, *supra*. Clearly, based on this standard as enunciated by the Board, Canes’ confiscation of union buttons from Buezo constituted a violation of the Act.

Accordingly, I conclude that the Respondent’s action in seizing union buttons from Buezo on December 8, 2009, violated Section (a)(1) of the Act as alleged in paragraphs 13 (a) and 16 of the first complaint.

I. Denigrating the Union

The first complaint, paragraphs 15(a) through (e), alleges that the Respondent violated the Act when on about March 22, 2010, Artiles, while in the Jade Restaurant, denigrated the Union in the eyes of its employees. Allegedly, the denigration took the form of (a) implementing provisions of its bargaining proposal; (b) telling the employees the implemented proposal was meant to “screw” the Union; (c) telling employees that the Union has not been able to return four terminated employees; (d) telling employees their union dues are not used by the Union to represent unit employees, but, instead, are used to buy cars; and (e) telling employees that Artiles alone has the power to return unit employee work rules and benefits, which were changed by the implemented proposals.

As noted in detail in the fact section of this decision, between March 22 and 25, 2010, a series of approximately five meetings for bargaining unit employee were held by management in the lobby of the hotel, in the Jade Restaurant. These meetings were conducted during the employees’ 30-minute lunch period, and the employees were permitted to order lunch off the menu, with the Respondent paying for the meals. The purpose of these “meet and greet” meetings between management and the unit employees was to have someone make a presentation to the employees on the specifics of the new medical insurance plan, the AETNA plan, which as Stokes had advised Sawyer in March, the Respondent intended on implementing May 1, 2010, and to answer any questions that the employees might have. As I have already noted, this AETNA plan constituted an unlawful unilateral change from the existing Taft-Hartley Health and Welfare Plan as provided for in the expired contract. Earlier I found that an existing impasse was broken on March 10, when among other new proposals exchanged, the Respondent offered for the first time this AETNA plan.

In any event, it is counsel for the General Counsel’s contention that Artiles made certain statements at the Jade Restaurant meetings, which violated the Act. It is the Respondent’s position that these meetings, conducted by Artiles and Fullenkamp, were called merely to explain the AETNA plan to the employees, and that there simply were no unlawful statements made by any managers.

In the fact section of this decision, I set forth in considerable detail my analysis of what transpired during these meetings. It would serve no useful purpose to repeat that analysis here. Instead, the reader is advised to refer back to that section. In any event, I previously indicated that I found the evidence offered by the General Counsel in support of these allegations

very confusing, contradictory, inconsistent, and hard to evaluate. Of the employees who attended the Jade Restaurant meetings, approximately 30 testified. It is really difficult to know precisely what was said by management at those meetings as all the witnesses seem to recall different and partial versions of what was discussed. Out of these 30 employees, 8 appear to testify that Artiles disparaged the Union in some way or made threatening statements regarding the Union.⁶⁰

One or more of these eight employees testified that Artiles said that: they would take the benefit package that he offered or they would get nothing; that he was the boss and “wore the pants” in the hotel and could fire anyone he wanted to; that he wanted the Union out; that the union dues were used by the union officials to “buy new cars with”; regarding the four discharged employees, he asked, “have you seen them around here, have they come around here, have they been back?”; regarding seniority, that he would continue it, but if he wanted to, he would take it away; that he could return the 15-room standard for housekeepers, but that he didn’t want to “bother” or “molest” the Union; that it was his hotel and he would run it the way he wanted to; and that there would be “consequences” from the boycott, and that he would start “cutting people’s hours” and engaging in “layoffs.”

The remaining approximately 22 employee witnesses who testified as to attending the meetings at the Jade Restaurant did not indicate that managers said anything disparaging or threatening about the Union. Of course, Artiles and Fullenkamp denied making such statements, and they are supported in their denials by Ernenwine, who attended at least some of the meetings. They claim that the great majority of time was spent discussing the AETNA plan, answering employee questions about the new medical insurance, and trying to dispel rumors. The only subject under examination that Artiles admits discussing was that of the employees’ union dues, which was allegedly raised by an employee. In answering the question, Artiles claims that he merely indicated that union dues did not pay for the employee benefits provided for under the terms of the contract, such as medical insurance, but that the Respondent provided that benefit by paying a certain amount per employee per hour for coverage. It appears that at that meeting, or another, union supporter Dexter Wray, whose name was raised in connection with this issue, said that the union dues were used for representation and also for “health benefits.”

Of course, Artiles, Fullenkamp, Ernenwine and all 30 employee witnesses all acknowledge that Artiles and Fullenkamp notified the assembled employees that there was a new medical insurance plan, the AETNA plan, which would be replacing the existing Taft-Harley Medical Plan as contained in the expired collective-bargaining agreement. Fullenkamp explained the specifics of this plan to the employees. I have already determined that after March 10, the parties were no longer at impasse, since impasse was broken by the proposals exchanged on that date, including the AETNA plan. As the implementation of the AETNA plan on May 1, 2010, constituted an unlawful unilateral change in working conditions, informing the employees of the terms of that plan and of the Respondent’s intent to

implement it constituted a violation of Section 8(a)(1) of the Act. Accordingly, I find that the Respondent violated the Act, as alleged in paragraph 15(a) of the first complaint. However, the other subparagraphs, 15(b) through (e), must be viewed separately.

Regarding the eight employees who testified that Artiles made certain disparaging or threatening statements about the Union, I found that for the most part they testified in a cryptic, truncated manner regarding these events, and even when responding to leading questions from counsel they were hard pressed to recall the specifics of the events in question. The other 22 employees who testified that they could not recall any such statements by Artiles were really no better witnesses. In some instances the problems with these witnesses’ testimony may be compounded by a language barrier, as the managers who were alleged to have made the unlawful statements, principally Artiles, were reported to have spoken in either Spanish, English, or both, and the employee witnesses were primarily speakers of a language other than English, most commonly Spanish, but in some cases Korean, Thai, Tagalog, Samoan, Ilocano, or Cambodian. The use of numerous foreign language interpreters at the hearing may also have compounded the language problem.

As I noted earlier, I found Artiles to be circumspect and careful with his words, and somewhat gruff in voice and manner. He appears to be a straight, no nonsense kind of manager, who obviously takes great pride in his ability to operate a large hotel with many employees. He did seem to have a rather “territorial” attitude about the hotel, and clearly thought of himself as “the boss.” For the most part, I found him to be credible, and he testified without apparent exaggeration or embellishment. I also found Fullenkamp and Ernenwine, whose testimony supported Artiles, to be reasonably credible. While I have found that in other incidents Fullenkamp made statements that constituted unfair labor practices, she did not deny making those statements.

It is very difficult to evaluate the testimony of the 8 employee witnesses who testified that Artiles made disparaging or threatening statements about the Union, or for that matter the testimony of those 22 employee witnesses who said that no such statements were made. There is no reason to believe that any of these 30 witnesses were intentionally lying. To the contrary, I believe that they were all doing their best to recall events that took place at least 6 months earlier, and statements that may well have been delivered in a language foreign to them.

Certainly, the weight of the evidence, in terms of numbers of witnesses, favors the Respondent. Also, and most obvious, the burden of proof to establish the alleged violations rests with the General Counsel. Based on the evidence presented, I must conclude that the General Counsel has failed to meet her burden of proof. The evidence is insufficient to establish that Artiles made the threatening and disparaging statements on about March 22, 2010, that are attributed to him, specifically as alleged in paragraphs 15(b) through (e) of the first complaint. I will credit his denials. Accordingly, I shall recommend that complaint paragraphs 15(b) through (e) be dismissed.

During the hearing, and over counsel for the Respondent’s

⁶⁰ The eight employees are listed in the fact section of this decision.

objection, I permitted counsel for the General Counsel to amend the first complaint as is reflected in the first notice of intent to amend the complaint (GC Exh. 2, dated August 17, 2010) to add new paragraphs 16 (a) through (d) to the first complaint. The only significant, substantive change made in this amendment was to add an allegation that on about March 24, 2010, Artiles, in the Jade Restaurant, denigrated the Union in the eyes of the employees.⁶¹ I permitted this amendment as it was very closely related in time and substance to the allegations made in paragraph 15 of the first complaint, and because the Respondent was not prejudiced by the amendment, having months thereafter to prepare its defense.

The allegations in the new paragraphs 16(a) through (d) simply repeat some of the allegations in paragraphs 15(a) through (e), with the only significant difference being the claim that these denigrating and threatening statements by Artiles took place in the Jade Restaurant on March 24, rather than March 22, 2010. The same evidence offered by the General Counsel in support of complaint paragraph 15 would also cover the allegations in paragraph 16. There is nothing new or different regarding these allegations that would require any further analysis.

Accordingly, for the reasons that I previously expressed, I find that subparagraph 16(a) has merit, in that Artiles indicated to the assembled employees that the Respondent intended to implement the new AETNA medical insurance plan, which constituted an unlawful unilateral change, as the parties were no longer at impasse. Therefore, I conclude that the Respondent violated Section 8(a)(1) of the Act, as alleged in amended paragraph 16(a) of the first complaint.⁶² Further, I shall recommend, for the reasons that I previously expressed, that amended paragraphs 16(b) through (d) of the first complaint be dismissed.

It should be mentioned that paragraph 7(b)(iv) of the first complaint also makes reference to the Respondent allegedly having “denigrated” the Union in the eyes of the employees, but during contract negotiations from April 2009 through March 11, 2010. While this alleged denigration is apparently different than the denigration that allegedly occurred at the Jade Restaurant around March 22 and 24, it is unclear to me precisely what the General Counsel is contending. To the extent that the General Counsel is contending that the Respondent’s actions at the bargaining table and surrounding the negotiations were somehow intended to denigrate the Union, I disagree. I have already concluded, and set forth in great detail, why the Respondent did not engage in surface bargaining during the lengthy period of these negotiations. Having concluded that the Respondent did not engage in surface bargaining, I now further conclude that the Respondent’s actions as they related to the bargaining process did not denigrate the Union. Therefore, I shall recommend that complaint paragraph 7(b)(iv) be dis-

missed.

Still another alleged meeting at the Jade Restaurant must be discussed. During the hearing in this case, I permitted counsel for the General Counsel to again amend the complaint to add an allegation that the Respondent, through Artiles, on or about July 31, 2010, in the Jade Restaurant, denigrated the Union in the eyes of its employees by telling employees that there had been no union at the facility for several months, by telling employees that the Respondent had to take the Union to court, and by threatening the employees with discharge if they continued to support the Union. (GC Exh. 62, notice of intent to amend complaint dated September 27, 2010.) I permitted this amendment over the vigorous objections of counsel for the Respondent on the basis that the allegations raised in the amendment were substantively closely related to those allegations in the first complaint and subsequent amendments, were reasonably close in time to the other events in question, and because the Respondent would have ample time to defend against the allegations raised in amendment.

The Respondent raises a number of defenses to this allegation, not the least of which is that no such meeting in the Jade Restaurant was ever held. Artiles testified that he did not recall a meeting with employees in July 2010 in the Jade Restaurant, but, rather, only those meetings discussed above that occurred in March 2010. Fullenkamp testified that no more small-group meetings with Artiles occurred after March 2010. Further, the evidence that such a meeting did in fact occur at or near the date alleged is very questionable.

The first employee to testify about such a meeting was Luz Maria Zavala. Initially she testified that such a meeting was held in the Jade Restaurant on July 30, 2009. She was able to make this statement about the date, specifically the year 2009, after being given permission to consult a type of diary that she kept. Despite having access to her diary, when it became clear under examination that such a date made no sense, she changed her testimony to the following year 2010. In fact, during cross-examination, when counsel for the Respondent had access to the diary used by the witness, he got her to admit that there was no year recorded in her diary next to the notation July 30, and, in fact, the closest year to that reference was the date September 30, 2009. In my view, Zavala’s testimony is hopelessly confused, and I must find that in this regard, it is entitled to no weight.

Following Zavala’s testimony, employee Audelia Hernandez testified about a meeting held in the Jade Restaurant with Artiles making a presentation and a number of employees in attendance. She testified that Artiles, speaking in Spanish, said that he and the hotel were antiunion, and that it had been 2 months since there had been a union at the hotel. Allegedly, Artiles then switched to speaking in English and said that if the employees wanted a union, the door was open for them to leave. According to Hernandez, Artiles changed back again to Spanish and said that there were “ignorant people” spreading the word that there was still a union at the hotel, but that was not true. Finally, he allegedly said that the hotel had taken the Union to court, and the hearing was going to start in 2 weeks. Several other employees, Ana Rodriguez, Maria Hernandez, and Elda Buezo also seemed to testify regarding this alleged

⁶¹ The only other nonministerial change made by this amendment was to delete any reference to the “Alaska Labor Relations Agency” from the complaint.

⁶² Complaint pars. 15(a) and 16(a) constitute basically the same allegation. I have found the same violation of the Act, with the difference in the dates of the violation (2 days) being of no consequence.

July 30 meeting, but their testimony only offered snippets of the meeting, as testified to by Audelia Hernandez, and they seemed to be confusing the alleged July meeting with those that occurred in March 2010.

In fact, there really would have been no reason for Artiles to have conducted such a July meeting. The AETNA medical insurance had been placed in effect as of May 1, 2010, certain provisions of the Respondent's "final proposal" of August 21, 2009, had been in effect for some time, and as of July 2, 2010, the Respondent was no longer recognizing the Union as its employees' collective-bargaining representative. Also, it makes no sense that Artiles would hold only one such meeting in July for a small group of employees, when in March he had held approximately five meetings for all the unit employees. Accordingly, I conclude that counsel for the Respondent's argument has merit, and believe that it is unlikely that such a meeting occurred in July 2010. Further, I believe that the employees are likely confused, and the meeting that they actually recall is one of those approximately five meetings held between March 22 and 25, 2010.

To the extent that such a meeting was held in July or March 2010, I reiterate those comments that I made earlier in this decision regarding the meetings held in March, and my characterization of Artiles, of course, if in fact the alleged meeting was held separately in July, then even assuming Artiles made certain of the comments attributed to him, some of those comments would be harmless. For example, telling the employees that there was no longer a union at the hotel would be arguably correct. The Respondent had ceased recognizing the Union based on the decertification petition, which had been filed several months earlier. Of course, whether the Respondent had the legal right to do so, remains to be seen, but that was at least the Respondent's position. Characterizing those who believed otherwise as being ignorant was, in my view, simply an opinion on the part of Artiles. Also, telling employees that the Respondent was taking the Union to court, could have been a reference to the Board hearing, which was scheduled to begin in August, approximately 1 month later.

While this issue is far from certain, I believe the weight of the evidence is with the Respondent, and that, in fact, this July meeting never happened. As noted, both Artiles and Fullenkamp denied that any such meeting for a group of employees was ever held. In this regard, I find them both credible. Fullenkamp testified that no small group meetings with Artiles occurred after March 2010. This seems logical, as the meetings were held in March to inform the employees about the new AETNA insurance plan set to go into effect on May 1. In order to give all the bargaining unit employees specific information about the AETNA plan, the Respondent needed to schedule five such meetings. It is simply illogical that in July, after the AETNA plan went into effect, management decided to hold one meeting only for a small group of employees. I must ask, to what end and for what purpose? Counsel for the General Counsel never adequately explained why these few employees were selected to allegedly meet with Artiles in July.

I believe that it makes more sense to conclude that the employees who testified about this July meeting were confused and were recalling matters that they believe had been raised

during the March meetings. Earlier I discussed in detail my conclusions regarding the March meetings. I continue to adhere to my conclusion that Artiles did not make the unlawful statements in March attributed to him by certain employees. The reasons that I gave for reaching that conclusion about the March meetings would also include those additional statements that the General Counsel contends were made in July. In any event, I credit Artiles' denial that he made any such statements. Accordingly, I shall recommend that the complaint allegations that Artiles denigrated the Union in the eyes of its employees and threatened them with discharge on about July 31, 2010, as found in the second notice of intent to amend the complaint (GC Exh. 62), be dismissed.

J. The Decertification Petition/Withdrawal of Recognition

It is alleged in paragraphs 9(a) through 9(c) of the second complaint that Chief Engineer Ed Emmsley, on behalf of the Respondent, took certain action to unlawfully assist employees in the circulation of a petition to decertify the Union as the collective-bargaining representative of the hotel employees. Emmsley is an admitted supervisor. The General Counsel contends that this was only one part of a concerted effort by the Respondent to encourage, coerce, and influence employees to sign the decertification petition. On the other hand, the Respondent denies being in any way involved in the decertification effort of certain of its employees. The Respondent contends that these employees, many of whom testified about this matter, were merely expressing their individual, uncoerced decision to decertify the Union, which they felt, for various individual reasons, was no longer adequately representing their interests.

On May 20, 2010, a number of employees presented management with a petition to decertify the Union. (GC Exh. 61.) This petition had been circulating for some time among the hotel employees. As is set forth in detail in the fact section of this decision, a number of the Respondent's employees were very active in circulating the petition. These employees included: Janet and Jannice Emmsley, the daughters of Ed Emmsley Senior, who were PBS operators; Ed Emmsley Jr., a security guard, nonunit employee, and son of Ed Emmsley Senior; Cindy Mathers, banquet captain; Margerita Lucero, housekeeping supervisor, and Lupita Mejia, morning employee cafeteria attendant.

In the fact section of this decision, I discussed at length the efforts that Ed Emmsley Senior made to get employees to sign the decertification petition. I will repeat those facts here, only to the extent that it is necessary for this discussion. As I noted earlier, Dexter Wray is an engineer, working under the direct supervision of Ed Emmsley. Wray testified that in a conversation with Emmsley in mid-May 2010 he was asked, "Are you going to sign?" Wray replied, "Sign What?" To which Emmsley said, "The petition." Wray knew what petition Emmsley was referring to, and he declined to sign.

According to the testimony of Wray, over the course of the next 4 days, Emmsley tried on a number of occasions to get him to sign the decertification petition. On May 18, Emmsley sent Wray a "text" message that said, "Just sign it. I will never put you on the spot. You know I'll always cover your black

ass.” Wray testified that following the text message, Emmsley told him that if he did not sign the petition that he would “be one of the first ones to be let loose.” Finally being worn down, Wray then signed the petition.

Emmsley testified and denied that he ever asked Wray to sign the petition, and denied that he ever sent Wray such a text message. Further, Emmsley’s wife, Janet E. Emmsley, and employee Joel Encabo testified that Emmsley did not use such language as “black ass,” and it would have been out of character for him to have done so.

In the fact section of this decision, I spent considerable time analyzing the respective testimony of Emmsley and Wray. I also analyzed and discussed the photographs of the screens from Wray’s cell phone, which purport to show the text message that Wray received from Emmsley. For the reasons that I stated in detail earlier, I credit the testimony of Dexter Wray, and I discredit the testimony of Ed Emmsley Senior. I conclude that Emmsley made the oral and text message statements attributed to him by Wray.

Accordingly, I conclude that, as alleged in paragraph 9(a) of the second complaint, Emmsley solicited employees to sign a decertification petition; as alleged in paragraph 9(b), Emmsley implied to employees that they would receive favorable treatment if they signed the petition; and as alleged in paragraphs 9(c), (i), and (ii), Emmsley interrogated employees regarding their support for the Union, and told employees that the Respondent would terminate the employment of those employees who refused to sign the petition. Therefore, I find that by those actions the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

However, regarding the allegations in subparagraphs 9(c)(iii), (iv), and (v) of the second complaint: that Emmsley told employees that it was futile to support the Union; that after the Union “was gone” they would receive a one dollar an hour raise; and that employees who signed the petition would have references to discipline expunged from their files, I find no evidence to support those allegations. Therefore, I shall recommend to the Board that those subparagraphs be dismissed.

The second complaint alleges in paragraphs 7(a) and (b) and paragraphs 12 and 13 that the Respondent violated the Act by withdrawing recognition from the Union as the collective-bargaining representative of its employees. It is, of course, the General Counsel’s position that the Respondent’s actions “tainted” the decertification petition that the employees signed and presented to management, upon which the Respondent allegedly based its decision to withdraw recognition. In addition to Ed Emmsley, counsel for the General Counsel contends that other supervisors were actively involved in getting employees to sign the decertification petition.

In her posthearing brief, counsel for the General Counsel argues that Chef Glynn Rydin forced several employees into signing the petition. Rydin is an admitted statutory supervisor, and based on the testimony of a number of witnesses, has expressed antiunion views. Jose Lantigua was hired as a dishwasher by the Respondent on May 17, 2010. Before he actually started working for the Respondent, he had a conversation with Chef Rydin. According to Lantigua, the day before his

employment began, during this conversation with Rydin, the chef said, “I’m going to need you to sign over here because the Union only takes money and you do not receive benefits.” Lantigua signed the petition and was then sent to the human resources department where he filled out an application, the new hire paperwork, and was hired. He reported to work the following day. Lantigua testified in an open and simple way, seemed candid, and did not appear to exaggerate or embellish his testimony. His recollection of events seemed good. Accordingly, I believe him to be credible and accept his version of the events that led to his signing of the decertification petition.

I do not believe the testimony of Cindy Mathers, hotel banquet captain, who claims that Lantigua signed the petition in her presence, not in the presence of the chef. The Respondent uses Mathers as the “ubiquitous witness,” with the “outstanding memory” that counsel for the Respondent trots out at every opportunity to testify about some matter in dispute. I find her testimony in general suspect, and much less than credible.

A second employee witness, Esusebio Bristol, who is a breakfast cook at the hotel, testified that he was called into Rydin’s office and asked to sign a paper. Bristol’s primary language in Tagalog, and he testified that he had no idea what he was signing, or what it would mean. He signed the document simply because the chef asked him to do so. The document that he signed turned out to be the decertification petition. Bristol seemed genuine in his testimony, was certain of the incident, appeared relatively calm when testifying, and showed no sign of stating anything other than the truth. Accordingly, I find him credible and accept his version of these events.

Regarding Chef Rydin, I do not believe that he testified credibly concerning these events. Rydin testified that he had nothing to do with the decertification petition, was unaware of its existence, did not discuss it with employees of the hotel, and made no effort to get employees to sign the petition. To the extent that his testimony is contradicted by other witnesses, I discredit Rydin. He testified in a rather sullen, arrogant manner, leaving me with the clear impression that he thought the proceedings to be a waste of his time, his testimony, although not extensive, appeared designed to simply refute any allegation that involved him. He seemed tense, more so than would seem reasonable for a person of his achievements, and his demeanor and testimony left me with the impression that his recollection was less than genuine.

Based on the above, I conclude that Ed Emmsley Sr. and Chef Glenn Rydin, both statutory supervisors, engaged in conduct designed to coerce employees into signing the decertification petition. However, regarding the other alleged supervisors who circulated the petition or solicited employee signatures, I find that counsel for the General Counsel has failed to connect them with the Respondent’s withdrawal of recognition, principally because she has failed to show that the petition circulators were in fact supervisors.

In the fact section of this decision, I discussed at length the duties and responsibilities of Cindy Mathers, banquet captain, and Margerita Lucero, housekeeping supervisor, both of whom were principal petition circulators. The reader is directed to that discussion. For the reasons that I stated therein, I do not find that either Lucero or Mathers exercised any of the indicia

of supervisory authority enumerated in the Act. One other principal petition circulator, Lupita Mejia, the morning employee cafeteria attendant, was clearly not a supervisor. She was responsible for preparing food for the employees who took their meal break in the morning in the employee cafeteria. No evidence was offered to establish any supervisory authority for Mejia.

Counsel for the General Counsel also argues that the involvement of the Emmsley family children in the petition circulation tainted the petition because of Ed Emmsley Senior's supervisory status. This argument I find to be without merit. As I noted above, Ed Emmsley Senior's actions in attempting to get Dexter Wray to sign the petition were unlawful. Further, it was common knowledge that Janet and Jannice were Ed Senior's daughters, and Ed Junior was his son. However, there is absolutely no evidence to establish that any employee signed the petition because of fear or a belief that turning down one of the Emmsley children might make Ed Emmsley Senior angry. That is simply "a leap of faith" too great to make. I find no connection between Ed Emmsley Senior's supervisory authority and the signing of the petition by those employees solicited by the Emmsley children.

As part of its theory that the decertification petition was tainted, the General Counsel alleges in paragraphs 10(a), (b), and (c) of the second complaint that on about May 21, 2010, Artiles told employee that the petition was a show of support for the Respondent and for him, and he would terminate any employees who did not sign the petition; that he denigrated the Union by telling employees that the Union was "stealing" from them; and directed employees to find other unit employees who were willing to sign the decertification petition, and to arrange a meeting for employees where he could convince them to sign the petition. In support of this allegation, counsel for the General Counsel offered the testimony of Yanira Medrano.

Medrano is a housekeeper at the hotel, who when testifying had been employed there for 6 years. Lupita Mejia is Medrano's landlady. As I noted above, Mejia is employed as the hotel's morning employee cafeteria attendant whose chief duties include preparing and serving employees' food and keeping the employee cafeteria clean. She moves back and forth between the main kitchen and the employee cafeteria throughout the course of the day. In May, Medrano got a call from Mejia. According to Medrano, Mejia told her that Artiles had said that people who didn't support him and those who had not signed the petition were going to be fired. Mejia also allegedly said that Maria Hernandez, Elda Buezo, and Anna Rodriguez were all going to be fired right away. The three-named employees were all well known union supporters.

Regarding this alleged statement by Mejia, as I previously concluded, it constitutes inadmissible hearsay. It seems to be offered for the truth of the matter asserted. Further, it does not constitute an admission against interest of a party opponent, as I found that Mejia is not a supervisor or agent of the Respondent. There is no evidence of record as would establish that Mejia exercises any of the indicia of supervisory authority. She plainly does not hire, fire, discipline, review, or manage any other employees. Counsel for the General Counsel has failed to offer any probative evidence in order to sustain her burden of prov-

ing that Mejia is a supervisor or agent under the Act.

After speaking with Mejia, Medrano allegedly confronted Artiles in his office. She testified that they spoke for over an hour. According to Medrano, she asked him directly whether he had said that those employees who did not support him and failed to sign the petition would be fired. Supposedly, Artiles responded in the affirmative. At her request, Artiles allegedly explained what the petition was all about. He then questioned why she supported the Union, and whether it had done anything for her. She contends that he stated there would be no more Union at the hotel, people who supported the Union would be fired, and that he specifically mentioned three that would be fired, Anna Rodriguez, Elda Buezo, and Maria Hernandez. Allegedly, Artiles suggested to Medrano that she gather her coworkers at her home and inform them of what was happening with the petition. Sometime later she reviewed the petition and signed it in the presence of Mejia.

Artiles denied any knowledge of the decertification petition prior to the time that it was presented to management by the employees, and denied any effort to get employees to sign such a petition. Earlier in this decision I stated my view of Artiles who testified extensively as a straight, no nonsense kind of manager who was circumspect and careful with his words. While at some point he probably did have knowledge of the petition being circulated by the employees, as clearly his supervisors Ed Emmsley and Chef Rydin did, I seriously doubt that he spoke the words attributed to him by Medrano. Her story does not ring true, and I do not find her credible in this regard. Artiles is not a verbose individual. I simply cannot envision an hour conversation where this busy hotel general manager would take time from his schedule to threaten a housekeeper with termination for not signing the petition, and make threatening statements towards other employees, who he allegedly named. This would be totally out of character for the man who testified before me on four or five different occasions. I do not believe that the conversation occurred as testified to by Medrano.

Based on the above-credibility determinations, I conclude that the General Counsel has failed to establish that Artiles made the statements on about May 21, 2010, attributed to him by Medrano. Accordingly, I shall recommend to the Board that paragraphs 10(a), (b), and (c) of the second complaint be dismissed.

In an effort to support the contention set forth in paragraphs 7(a) and (b) and paragraphs 12 and 13 of the second complaint that the Respondent's actions tainted the decertification petition, resulting in an unlawful refusal to recognize and to bargain collectively with the Union, counsel for the General Counsel argues in her posthearing brief that the Respondent's cumulative conduct must be considered. By this conduct she is referring not only to the unlawful actions of Ed Emmsley Senior and Chef Rydin in coercing employees to sign the petition, but to the additional unlawful conduct of the Respondent, as found by, specifically: in issuing suspensions and/or written disciplines to nine employees on about November 19, 2009; in discharging four employees on about February 17, 2010; in refusing to further bargain with the Union since March 11, 2010; in failing to timely notify the Federal Mediation and Conciliation Service of the existence of a dispute with the Union prior to making

changes to the expired contract, which changes it made unilaterally in mid-October 2009 by increasing the number of rooms its housekeepers are required to clean, by ceasing to pay for meal breaks, by imposing a fee on employee purchases in the cafeteria; in unilaterally implementing a new AETNA medical insurance plan and ceasing payments to the extant plan on about May 1, 2010; and in unilaterally assigning non-bargaining unit security work to unit engineers.

In order to support a withdrawal of recognition challenged by an incumbent bargaining representative, an employer must “prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.” *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001). An employer’s withdrawal of recognition must occur in a context free of unfair labor practices. *Radisson Plaza Minneapolis*, 307 NLRB 94, 96 (1992), *enfd.* 987 F.2d 1376 (8th Cir. 1993). The Board has held that any question of representative status, “. . . must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself.” *Lee Lumber*, 322 NLRB 175, 176–177 (1996).

In the matter before me, the Respondent relies entirely on the decertification petition as objective proof of the Union’s actual loss of majority support. In order to buttress its argument, the Respondent during the trial produced as witnesses a substantial number of the employees who signed the petition, all in an effort to establish that they did so of their own free will and for reasons mostly involving their dissatisfaction with the Union. However, I am of the view that these subjective reasons on the part of the individual employees are largely immaterial in the face of evidence of numerous and serious unremedied unfair labor practices committed by the Respondent, especially involving the negotiation process, the denial of Section 7 rights, and misconduct regarding the circulation of the petition itself. Such objective evidence establishes unfair labor practices by the Respondent of the kind that would inevitably tend to dissipate support for the Union among bargaining unit employees.

It is well established that an employer may not lawfully withdraw recognition from a union in the context of unremedied unfair labor practices of a nature likely to cause disaffection with the union among employees. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). The Board has held that prior unremedied unfair labor practices “remove as a lawful basis for an employer’s withdrawal of recognition the existence of a decertification petition . . . which, in other circumstances, might be considered as providing objective considerations demonstrating a free and voluntary choice on the part of employees to withdraw their support for the labor organization.” *Pittsburgh & New England Trucking Co.*, 249 NLRB 833, 836 (1980).

Still, the unfair labor practices must be of a character as to either affect the union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself. *Master Slack*, *supra*, citing *Guerdon Industries*, 218 NLRB 658, 659–661 (1975). Therefore, in the matter before me, the Respondent’s unfair labor practices must have caused the employees’ disaffection or at least had a “meaningful impact” in bringing about that disaffection. *Deblin Mfg. Corp.*, 208 NLRB 392

(1974). There must be a causal relationship between the unlawful conduct and the decertification petition presented to the Respondent on May 20, 2010. *Olson Bodies, Inc.*, 206 NLRB 779 (1973).

I am of the view, that the Respondent’s pervasive unfair labor practices, both at the bargaining table and away from it, tainted the employee decertification petition. The Board has made it clear that it will dismiss a decertification petition where there are concurrent unfair labor practices that interfere with the employee free choice, and are “inherently inconsistent” with the petition itself. *Overnite Transportation Co.*, 333 NLRB 1392, 1393 (2001) (conduct that taints an incumbent union’s subsequent loss of majority support is inconsistent with the petition).

In the matter before me, a short review of those unfair labor practices committed by the Respondent is necessary to determine their connection to the decertification petition. To begin with, I have concluded that the Respondent committed serious violations of Section 8(a)(1) and (3) of the Act when on about November 19, 2009, it suspended and/or issued written disciplinary warnings to nine union supporters who presented General Manager Articles with the Union’s boycott petition; and when on about February 3 and 17, 2010, it suspended and then terminated four union supporters who had distributed handbills outside the hotel calling on potential customers to boycott the hotel. Collectively, these employees were some of the most vocal and ardent union supporters in the bargaining unit. They were engaged in the most basic forms of collective and union activity, for which they were unlawfully disciplined by the Respondent. In so doing, the Respondent likely chilled the willingness of employees to engage in Section 7 activity, at a time when the Union was still actively engaged in collective-bargaining negotiations with the Respondent. One wonders how such serious misconduct by the Respondent, which strikes at the very heart of employees’ Section 7 rights, could not have dramatically demoralized the unit employees, resulting in a diminution of support for the Union. Similarly, the Respondent’s unlawful unilateral assignment of security duties to bargaining unit engineers around July through September 2009 would have likely undermined the Union’s status as bargaining representative, diminishing its support among the unit employees. Such actions away from the bargaining table, but while bargaining was actively occurring, are of the type that “would improperly affect the bargaining relationship so as to negate the legality of the later withdrawal of recognition.” *Rock-Tenn Co.*, 319 NLRB 1139, 1146 (1995), *enfd.* 101 F.3d 1441 (D.C. 1996).

Obviously, the Respondent’s conduct at the bargaining table was directly tied to the way the unit employees felt about their Union. I have found that the Respondent violated the Act when in mid-October 2009 it unilaterally implement changes in the terms and conditions of the expired collective-bargaining agreement, without having first given notice to the FMCS under Section 8(d)(3) of the Act. These changes were substantial and included: increasing the number of rooms attendants were expected to clean from 15 to 17; ceasing to pay for meal breaks; and imposing a fee on employee purchases in the cafeteria. Later, on March 11, 2010, the Respondent prematurely

declared an impasse in negotiations, and violated the Act on May 1, 2010, by unilaterally implemented a new medical insurance plan (the AETNA Plan), and by ceasing payments to the extant medical insurance plan (the Taft-Hartley Plan). Further, since March 11, 2010, the Respondent has unlawfully failed and refused to continue negotiating with the Union. Such conduct would have naturally left employees with the impression that the Union was impotent and unable to stop the Respondent from unilaterally changing their terms and conditions of employment. Of course, this lack of progress at the negotiating table would likely have caused the unit employees to question their need for such a “powerless” bargaining representative.

Where an employer’s bad-faith bargaining creates the conditions under which employees believe that “no real prospect of an agreement [is] in sight,” and the employer continues to “operate the hotel as if employees had no bargaining representative,” the Board has disregarded the decertification petition signed by such employees and found the employer’s withdrawal of recognition illegal. *Radisson Plaza Minneapolis*, supra at 96–97, 115 (employer’s away from the table conduct, together with its bad-faith tactics at the table, tainted employee disaffection). See also *NLRB v. Powell Electrical Mfg. Co.*, 906 F.2d 1007, 1015 (5th Cir. 1990) (finding majority supported, anti-union petition tainted where employer unilaterally implemented final bargaining offer soon after employees began strike, but before parties were at a good faith impasse).

In the matter at hand, I have no doubt that the Respondent’s unremedied unfair labor practices committed both at the bargaining table and away from it were more than enough incentive for employees to decide that as the Union was not able to prevent the Respondent from essentially acting unilaterally in determining their terms and conditions of employment, that there was no reason to maintain the Union as their collective-bargaining representative. In any event, as if those were not sufficient reasons for the unit employees to question the viability of the Union, Supervisors Ed Emmsley Senior and Chef Rydin, on behalf of the Respondent, unlawfully assisted those employees circulating the petition. As I found earlier, Emmsley violated the Act when he coerced Dexter Wray into signing the petition. Similarly, Rydin coerced employees Jose Lantigua and Eusebio Bristo into signing the petition.

The Board has made it clear that an employer may not “initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures.” *Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004), quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). Plainly expressed, the Board has stated that “when an employer engages in conduct designed to undermine support for the union and to impermissibly assist a decertification effort, the decertification petition will be found tainted and will not provide the employer with a basis for withdrawing recognition.” *Narricot Industries, L.P.*, 353 NLRB 775 (2009) (citing *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 270–271 (2008)).

Clearly, the Respondent provided more than minimal or “ministerial” support when its supervisors, Emmsley and Rydin, coerced three employees into signing the decertification petition. Further, when added to that coercive conduct is the

Respondent’s cumulative actions in committing unremedied unfair labor practices both at the bargaining table and away from it, but while negotiations were still in progress, there can be little doubt that the petition did not represent a true and unencumbered measurement of the employees’ feelings about the Union.

Accordingly, I conclude that by the actions of Emmsley and Rydin, the Respondent has unlawfully assisted employees in the solicitation of signatures to decertify the Union in violation of Section 8(a)(1) of the Act. Further, I conclude that based on that conduct, plus as a result of the Respondent’s unremedied unfair labor practices, the decertification petition presented to the Respondent by employees on about May 20, 2010, was tainted and cannot represent objective proof of the Union’s actual loss of majority status. Therefore, I find that by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the bargaining unit on July 2, 2010, and by refusing since that date to recognize and bargain with the Union, the Respondent is in violation of Section 8(a)(5) and (1) of the Act, as alleged in paragraphs 7(a), (b), 12, and 13 of the second complaint.

K. Dues Checkoff

Paragraphs 8(a), (b), (c), (d), 12, and 13 of the second complaint allege that since July 2, 2010, the Respondent has unilaterally failed and refused to honor its employees’ union dues-checkoff authorization, and to collect and remit those funds to the Union in violation of Section 8(a)(5) the Act. It is undisputed that since July 2, 2010, the Respondent has not honored employees’ dues deduction agreements, nor to remit those funds to the Union, based apparently on the Respondent’s contention that the Union no longer represented the employees in the bargaining unit, and because the contract with its dues-checkoff provisions had expired.

As counsel for the General Counsel did not specifically argue her theory as to this complaint allegation, I am at a loss to understand exactly what she is claiming. The facts in this case establish that after a number of agreements between the parties to extend the terms of the last collective-bargaining agreement, on August 31, 2009, the contract finally expired without an agreement on any further extensions.

The Board has held that an employer does not violate Section 8(a)(5) of the Act by unilaterally ceasing a checkoff arrangement after contract expiration, as the checkoff arrangement ends when the contract creating the checkoff expires. *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000). More recently, the Board has continued to so hold, with a refinement to consider the requirements of Section 8(d)(3) of the Act. In *Whitesell Corp.*, 352 NLRB 1196, 1198 (2008), the Board held that an employer violated Section 8(a)(5) by unilaterally discontinuing dues checkoff prior to providing the FMCS with the appropriate 8(d)(3) contract termination notice. In reaching its decision, the Board cited to *Petroleum Maintenance Co.*, 290 NLRB 462, 463 (1988), and said that under that extant precedent, “although the dues-check provision expired when the parties’ existing agreement terminated . . . , Section 8(d)(3) required the [r]espondent to maintain dues checkoff until . . . 30 days after it provided the requisite notice to the

FMCS.”

In the matter before me, while the contract between the parties expired on about August 31, 2010, it is uncontested that the Respondent did not give written notice to the FMCS of a dispute with the Union and of its intention to change the terms of the contract until February 3, 2010. Thus, the Respondent was not privileged to cease honoring the dues-checkoff provisions until March 5, 2010. However, the Respondent did not cease collecting the union dues pursuant to the checkoff provision of the expired contract until July 2, 2010, well after the required 30 day period for notice to the FMCS. Accordingly, as of July 2, the Respondent was neither legally obligated to collect these dues, nor to remit such monies to the Union. Therefore, I shall recommend to the Board that paragraphs 8(a), (b), and (c) of the second complaint be dismissed.

L. Summary of Findings

In an effort to help the reader understand what is admittedly a long, complicated decision, I have drafted this summary of findings as an overview on my conclusions, which are set forth in detail above. I have concluded that the Respondent and the Union bargained over the terms of a successor collective-bargaining agreement for an extended period of time, from October 27, 2008, through March 11, 2010. During that period, the parties met face to face in Anchorage, Alaska, on 10 separate dates. The parties held highly diverse views on those contract items separating them, and, at times, the negotiations were fairly acrimonious. These negotiations were conducted during a period of high economic distress in the hospitality industry in general, and, in particular, for the hotel industry in Anchorage, Alaska. Throughout negotiations it was the Respondent’s stated intent to achieve a contract that was fiscally responsible, meaning an agreement that improved the hotel’s financial situation by limiting costs to the extent possible. Conversely, the Union was intent on maintaining those wages, benefits, and working conditions that the unit employees had achieved over years of contract negotiations with prior managers of the property, and, if possible, to improve on them.

There is no doubt that both parties engaged in very hard bargaining. However, I am convinced that in that context, the Respondent did not engage in surface bargaining. The proposals offered by the Respondent, its position taken at the bargaining table, the extensive written communication between the parties, the statements made by its principal negotiator, Arch Stokes, and its efforts to justify its proposals and counter proposals lead me to the conclusion that the Respondent initially intended in good faith to reach a contract agreement with the Union, as long as that could be done while at the same time achieving its goal of financial responsibility. In the final analysis, that did not happen, but not because the Respondent set out initially to frustrate the bargaining process. While the principal union negotiator, Rick Sawyer, did not approve of the way Stokes conducted negotiations on behalf of the Respondent, I do not believe that it was Stokes’ intent to frustrate the process so as to inevitably reach impasse. While ultimately certain of the Respondent’s actions caused there to be a breakdown in negotiations, and while I found these actions to constitute bad faith bargaining, I do not believe that it was the Respondent’s

original plan to cause such an event. Never the less, the Respondent is responsible for its ultimate conduct, and for the unfair labor practices that resulted from that conduct.

The parties remained “at loggerheads” throughout most of the negotiations. That initial inability to reach agreement or even make any significant movement towards agreement resulted in the parties being at a bargaining impasse as of August 21, 2009, when the Respondent presented the Union with its “firm and final offer.” However, the Respondent, as the “initiating” party, failed to notify the Federal Mediation and Conciliation Service of the existence of a contract dispute, as it was required to do prior to making changes to the expired contract. While the Respondent made significant changes to the terms and conditions of employment of its unit employees in mid-October 2009, it never gave the requisite notice to the FMCS until February 3, 2010. Accordingly, by imposing those unilateral changes that the Respondent instituted as of mid-October, specifically increasing the number of rooms housekeepers were required to clean in a shift from 15 to 17, ceasing to pay for employee meal breaks, and imposing a fee on employee purchases in the cafeteria, it was engaged in bad-faith bargaining and in a failure and refusal to negotiate with the Union in violation of Section 8(a)(5) of the Act.

Despite having reached impasse, the parties continued to bargain, and progress was finally made. On March 10, 2010, the Union made a new proposal to the Respondent, which included significant compromises in the areas of room attendant cleaning requirements, contribution rates for medical insurance, and wages. The Respondent also offered a significant change, proposing an AETNA medical insurance plan in place of a CIGNA medical insurance plan that had previously been offered. These changes were sufficiently significant to break any impasse that had existed since August 21, 2009. However, rather than wait for the Union to have a reasonable period of time in which it could consider and respond to the new AETNA proposal, and without fully negotiating those changes that the Union had proposed, the Respondent declared impasse the very next day, March 11, 2010. Further, despite being invited back to the bargaining table, the Respondent refused to return. The Respondent’s action in declaring impasse was premature and constituted bad-faith bargaining and a failure and refusal to bargain in good faith in violation of Section 8(a)(5) of the Act. Concomitantly, the unilateral implementation by the Respondent of the AETNA medical insurance plan on about May 1, 2010, and the discontinuation of payments to the medical insurance carrier under the plan as provided for in the expired contract constituted a unilateral change in violation of Section 8(a)(5) of the Act. Finally, the Respondent’s failure and refusal to return to the bargaining table also constituted a violation of Section 8(a)(5) of the Act.

In addition to those unfair labor practices committed at the bargaining table, the Respondent also violated the Act away from the table during this same period of time. In mid-November 2009, the Respondent suspended and/or issued written disciplinary warnings to nine employees who while on their own time peacefully presented a boycott petition to the hotel general manager. Further, during February 2010, the Respondent suspended and subsequently terminated four employees

who while on their own time engaged in peacefully distributing handbills to members of the public in front of the hotel, seeking to have them boycott the hotel. The Respondent's conduct constituted a violation of Section 8(a)(1) and (3) of the Act, as it was in response to the those employees' Section 7 activity. The Respondent's behavior was clearly intended to discourage any further union activity by its employees.

Other assorted unfair labor practices were also committed by the Respondent. During the summer of 2009, it unilaterally assigned to the unit engineers certain nonunit security duties, without notice to or bargaining with the Union, in violation of Section 8(a)(1) and (5) of the Act. Further, its supervisor confiscated union buttons on about December 8, 2009, and since November 1, 2009, it has maintained and enforced unlawful rules of conduct in its employee handbook, all in violation of Section 8(a)(1) of the Act.

On July 2, 2010, the Respondent withdrew recognition from the Union, basing its action on a decertification petition presented to it by employees. However, I have concluded that the petition was tainted by the Respondent's unfair labor practices and could not constitute objective evidence of a loss of majority status by the Union. Several supervisors had unlawfully solicited employees to sign the decertification petition in violation of Section 8(a)(1) of the Act. Further, the Respondent's actions at the bargaining table undermined support for the Union among the bargaining unit members. Those actions included twice declaring impasse, once prematurely, failing to timely notify the FMCS of the existence of a contract dispute, and unilaterally instituting changes in the terms and conditions of the employment of its employees. Also, the cumulative conduct of the Respondent, including its actions away from the bargaining table, had the effect of diminishing the Union in the eyes of the unit members. Actions that strike at the heart of Section 7 activity, such as disciplining employees for distributing handbills and presenting petitions to management are of the kind that would especially undercut support for the Union. Having found that the petition was tainted by the Respondent's unfair labor practices, I have concluded that the Respondent's withdrawal of recognition from the Union and its refusal to continue to negotiate constituted violations of Section 8(a) (1) and (5) of the Act.

To the extent that certain complaint allegations are not supported by the evidence of record, I have recommended to the Board that said allegations be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage, Anchorage, Alaska, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, UNITE HERE! Local 878, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of all the employees employed at the Sheraton Anchorage hotel, with the exception of guards, supervisors, managerial employees, clerical employees, and confidential employees, which unit is appropriate for the purposes of collective

bargaining within the meaning of Section 9(b) of the Act.⁶³

4. At all times since at least December 2006, the Union, based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the unit employees.

5. At no time since at least December 2006, has the Union lost its majority status in the bargaining unit.

6. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (5) of the Act.

(a) Making unilateral changes in its employees' terms and conditions of employment on or about mid-October 2009, without having notified the Federal Mediation and Conciliation Service of a contract dispute, which changes included increasing the number of rooms its employees are expected to clean, ceasing to pay for meal breaks, and imposing a fee on employee purchases in the cafeteria.

(b) Prematurely declaring an impasse in collective bargaining on or about March 11, 2010.

(c) Making unilateral changes in its employees' terms and conditions of employment on or about May 1, 2009, by instituting a new AETNA medical insurance plan for its employees, and by ceasing to make payments to the medical insurance carrier under the plan as provided for in the expired collective-bargaining agreement.

(d) Failing to notify the Federal Mediation and Conciliation Service of the existence of a contract dispute with the Union and provide 30 days notice as required under Section 8(d)(3) of the Act prior to making certain unilateral changes in the terms and conditions of its employees' employment on about mid-October 2009.

(e) Failing and refusing to continue negotiating with the Union since March 11, 2010, after prematurely declaring an impasse in bargaining.

(f) Unilaterally assigning bargaining unit engineers nonunit security duties during the summer of 2009, without notifying and bargaining with the Union.

(g) Since July 2, 2009, withdrawing recognition from the Union, without possessing untainted objective evidence of loss of the Union's majority status.

7. By the following acts and conduct, the Respondent has violated Section 8(a)(1) and (3) of the Act.

(a) Issuing suspensions and/or written disciplines to employees Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez; Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher on or about November 19, 2009, because they engaged in union and protected concerted activity when they peacefully presented a boycott petition to the Respondent's general manager.

(b) Suspending and subsequently terminating employees Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn, on or about February 3 to 17, 2010, because they engaged in

⁶³ As noted earlier, laundry workers and spa workers are two categories of employees that the parties could not agree were included in the represented unit. While the General Counsel and the Union contend that these employees are included in the unit, the Respondent denies that assertion. Except for these employees, the parties stipulated to the inclusion and exclusion of the employees in the unit set forth above. I hereby make no finding regarding the inclusion or exclusion of laundry and spa workers in the represented unit.

union and protected concerted activity when they peacefully distributed handbills to members of the public in front of the hotel in an effort to get such members of the public to boycott the hotel.

8. By the following acts and conduct, the Respondent has violated Section 8(a)(1) of the Act.

(a) Since on or about November 1, 2009, maintaining and/or enforcing the following eight rules in its employee handbook (Remington associate handbook):⁶⁴

First rule: employees “agree not to return to the hotel before or after [their] working hours without authorization from [their] manager;”

Second rule: employees “must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head;”

Third rule: “distribution of any literature, pamphlets, or other material in a guest or work area is prohibited. . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate;”

Fourth rule: employees are prohibited from disclosing confidential information, including “personnel file information” and “labor relations” information; when disclosure is required “by judicial or administrative process or order or by other requirements of law,” employees must “give ten days’ written notice to [Respondent’s] legal department prior to disclosure;”

Fifth rule: employees may not “give any information to the news media regarding the Hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention;”

Sixth rule: “conflict of interest with the hotel or company is not permitted;”

Seventh rule: “Behavior which violates common decency or morality or publicly embarrasses the Hotel or Company” is prohibited; and

Eighth rule: “Insubordination or failure to carry out a job assignment or job request of management” is prohibited.

(b) Confiscating prounion buttons being worn and carried by employees.

(c) Coercing and soliciting employees into signing a petition seeking to decertify the Union as the collective-bargaining representative of the unit employees.

(d) Telling employees that they would receive favorable treatment from the Respondent if they signed the decertification petition.

(e) Threatening employees that they would be terminated if they refused to sign the decertification petition.

(f) Interrogating employees regarding their support for the Union.

(g) Denigrating the Union in the eyes of the unit employees by informing them that the Respondent intended to unilaterally implement certain changes in their terms and conditions of employment, specifically in their medical insurance benefits, without the parties having first reached a good-faith collective-

bargaining impasse.

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

10. The Respondent has not violated the Act except as set forth above.

REMEDY

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

The evidence having established that the Respondent discharged its employees Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn, and also previously suspended and/or issued written disciplinary warnings to its employees Gina Tubman, Joanna Littau, Ana Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher, my recommended order requires the Respondent to make them whole. While the evidence of record indicates that all disciplined employees were previously reinstated with backpay, to the extent that they have in some respects not been made whole, my recommended order requires the Respondent to offer them immediate reinstatement to their former positions, displacing if necessary any replacements, or if their positions no longer exist, to substantially equivalent positions, without loss of seniority and other privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. My recommended order further requires that backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The recommended order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful discharges, suspensions, and written warnings issued to the above-named employees, and to notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make any reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against them in any other way.

Also, having found various provisions in the Respondent’s employee handbook unlawful, the recommended order requires that the Respondent revise or rescind the unlawful rules, and advise its employees in writing that said rules have been so revised or rescinded.

Having found that the Respondent violated the Act by bargaining in bad faith in failing to timely notify the FMCS of the existence of a labor dispute, in prematurely declaring an impasse, and in subsequently withdrawing recognition from the Union, I shall recommend that the Respondent, on request of the Union, bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees, and, if an understanding is reached, to embody it in

⁶⁴ These rules are listed in pars. 11 (a) through (h) of the first complaint.

a signed agreement. In light of the Respondent's unlawful withdrawal of recognition from the Union, I will order the Respondent, on the resumption of bargaining, to reinstate all tentative agreements reached by the parties during their contract negotiations. See *Health Care Services Group*, 331 NLRB 333 (2000).

Further, as I found that the Respondent made certain unlawful unilateral changes in the terms and conditions of employment of the unit employees, I shall recommend that the Respondent be ordered to, at the request of the Union, rescind any and all of those changes. These include the requirement that attendants clean 17 rooms per shift, that employees no longer receive a paid 30-minute meal break, and that the employees are required pay for those meals that they receive from the employee cafeteria. Regarding the Respondent's unilateral implementation of the AETNA medical insurance plan on about May 1, 2010, I shall order the Respondent to, at the Union's request, restore to bargaining unit employees the health insurance coverage that they enjoyed before the Respondent unlawfully changed such coverage. The Respondent shall be required to make whole bargaining unit employees for all losses they suffered as a result of the Respondent's unlawful unilateral changes, plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra. This includes any and all out of pocket medical expenses that unit employees were required to pay themselves as a result of no longer being covered by the medical insurance plan in existence prior to the Respondent's implementation of the AETNA plan on or about May 1, 2010.⁶⁵

⁶⁵ When remedying an unlawful unilateral change in terms or conditions of employment, the Board typically orders a respondent to cease and desist from making unilateral changes and to rescind the unlawful change, thus restoring the status quo ante. See, e.g., *Bohemian Club*, 351 NLRB 1065, 1068 (2007); *Benteler Industries*, 322 NLRB 715, 721 (1996), enfd. mem. 149 F.3d 1184 (6th Cir. 1998). However, when the unlawful change may have benefitted unit employees, the Board orders a respondent to rescind the change only upon the union's request. See, e.g., *AK Steel Corp.*, 324 NLRB 173, 186 (1997); *Hospital San Rafael, Inc.*, 308 NLRB 605, 609 (1992), enfd. 42 F.3d 45 (1st Cir. 1994); *Vibra-Screw, Inc.*, 301 NLRB 371, 371 fn. 2 (1991); *San Antonio Portland Cement Co.*, 277 NLRB 309, 317 (1985). "[T]he Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change." *Grand Rapids Press*, 325 NLRB 915, 916 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000); see also *Trim Corp. of America*, 349 NLRB 608, 609-610 (2007).

In similar fashion, the Board has remedied unlawful unilateral changes in benefit plans by ordering the respondent to rescind the bene-

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.⁶⁶ In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁶⁷

In her posthearing brief, counsel for the General Counsel requests that the notice be read to assembled employees in English and Spanish by either a responsible management official of the Respondent, or by an agent of the NLRB in the presence of a responsible management official of the Respondent. In the circumstances of this case, I believe that such notice reading is an appropriate remedy. The Respondent's violations of the Act are sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion.⁶⁸ Accordingly, I shall recommend that the Respondent be ordered to have the notice publicly read, in both English and Spanish, by a responsible corporate executive in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of a responsible corporate executive.

[Recommended order omitted from publication.]

fit plan changes upon the union's request and to make whole any employee who suffered losses as a result of the changes. In these cases, the Board does not condition make-whole relief on the union having requested rescission of the benefit plan changes. *Goya Foods of Florida*, 356 NLRB 1461 (2011) (specifically overruling *Brooklyn Hospital Center*, 344 NLRB 40 (2005)); *Scott Brothers Dairy*, 332 NLRB 1542, 1544 (2000); *Scepter Ingot Castings, Inc.*, 331 NLRB 1509, 1510, 1517 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002); *St. Vincent Hospital*, 320 NLRB 42, 51 (1995); *Mount Hope Trucking Co.*, 313 NLRB 262, 263 (1993); *Metro Medical Group*, 307 NLRB 1184, 1193 (1992).

⁶⁶ As the Respondent has a large number of employees whose primary language is Spanish, the Respondent shall be required to post the paper notice in both English and Spanish. A significant number of the Respondent's employees speak neither English nor Spanish as their primary language. However, it would be impractical to translate the notice into each of the many native languages spoken by each and every employee. Further, from my observation of the many employees who testified using interpreters, I am of the belief that they understand sufficient English and/or Spanish to comprehend the notice, especially in light of my order that it be read to assembled employees.

⁶⁷ *J. Picini Flooring*, 356 NLRB 6 (2010).

⁶⁸ *HTH Corp.*, 356 NLRB 1397 (2011); *Homer D. Bronson Co.*, 349 NLRB 512, 515-516 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).