UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

REMINGTON LODGING & HOSPITALITY, LLC

and

REMINGTON LODGING & HOSPITALITY, LLC
LLC, and HOSPITALITY STAFFING SOLUTIONS, joint employers,

Charge No. 29-CA-093850
29-CA-095876

Respondent,

and

LOCAL 947, UNITED SERVICE WORKERS UNION, INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES.

Charging Party

RESPONDENT'S EXCEPTIONS BRIEF

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1. **The Administrative Law Judge Erred in Deciding that the General Counsel Proved a Prima Facie Case that the June 28, 2012 Decision to Outsource the Staffing of the Housekeeping Department Violated Section 8(a)(3) of the Act.**

To establish a prima facie case in proving an 8(a)(3) violation, the General Counsel must prove three elements: "[1] the employee's union activity, [2] the employer's knowledge of that activity, and [3] employer animus against employee's protected conduct." Evenflow Transp. 358 NLRB No. 82 (July 3, 2012). Respondent does not challenge the General Counsel's proof related to the first element: Beginning in late April 2012 [1], union organizer Jose Vega made weekly visits to the hotel. The evidence of "employer knowledge of that activity," however, is exceedingly weak and compromised. This evidence – highly unreliable testimony by two witnesses – supports at most only a tentative conclusion that the employer *might have* known of the existence of organizing activity. The General Counsel then failed to present any evidence, and the ALJ cited none in his decision, linking this scintilla of questionable evidence as probative of an anti-union animus that motivated the decision to outsource the staffing of the Hotel's housekeeping department. This constituted error on the ALJ's part. "[The ALJ] decision shall contain findings of fact, conclusions, and the reasons or basis therefore, upon all material issues of fact, law or discretion presented in the record." NLRB Rule 102.45(a).

The ALJ appears to have instead simply *assumed* the presence of animus as the motivator. Without a specific finding of anti-union animus, conduct that is otherwise lawful – an outsourcing of the staffing of a hotel housekeeping department – cannot be rendered unlawful. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895-96 (1984) (reporting undocumented status of employee is not unlawful in the absence of a specific finding of anti-union animus); Valmont Indus., Inc. v. NLRB, 244 F.3d 454, 470 (5th Cir. 2001) (where ALJ "made no specific findings

[1] All dates, unless otherwise noted, occurred in 2012.

or analysis of the factors that might show antiunion animus," the Board's finding that the employee's discharge was motivated by anti-union hostility in violation of section 8(a)(3) was unsupportable).

The CGC only attempted to prove animus through alleged incidents of unlawful interrogation. Notably, however, with one single exception, all of the alleged incidents were alleged to have occurred *after* the June 28 decision to outsource – indeed, well after. *See*, paragraphs 14 through 18 in the Amended Complaint. Specifically, paragraphs 16, 17 and 18 allege incidents in August and September. Paragraph 15 concerns an alleged interrogation by an "unnamed Remington representative . . . in late July," however, the General Counsel put on no evidence in support of this allegation. Only in paragraph 14 did the General Counsel allege that an incident of unlawful interrogation occurred prior to June 28 – a single incident by then-housekeeping director Andrew Arpino, in "mid-June."

The witness placed on the stand to testify to this alleged mid-June incident was Veronica Flores. Her testimony, however, was hopelessly confused and inconsistent, especially as to timing, and she also claimed – for the first time – to remember a second incident of interrogation by Arpino. This sudden recall of a second incident flies in the face of the two affidavits she gave to the Region's investigators – on September 7 and December 20 [2] – in which she testified to only *one* incident (consistent with paragraph 14 of the Amended Complaint) [Tr., pp. 137-138]. In addition, in her first affidavit -- dated September 7, far closer in time than either the December 20 affidavit or her March 6, 2013 hearing testimony – she stated that the *single* incident with Arpino occurred in *mid-July*. [Tr., pp. 136-138 and 155-156]. In the second affidavit given in

[2] Initially in the record these affidavits were referred to as dated August 28 and December 12. It was subsequently pointed out these affidavits were actually dated September 7 and December 20. [Tr., pp. 142-144].

late December, she inexplicably changed the *timing* of the incident to mid-June, but was still claiming only a single incident. [Tr., p. 159].

The single incident described in the two affidavits referred to Arpino showing her a picture on a computer screen, and asking if it was a picture of union organizer Vega. [Tr., pp. 155-156]. Not until the hearing did Flores testify for the first time to a prior incident with Arpino. And, at that point, her recall as to the timing of the incidents was all over the place. Initially, she stated the first incident occurred "between the first week and middle of June." [Tr., p. 124]. However, she then contradicted herself, placing this conversation "[a]bout a week" after her first meeting with Vega, which she said had "occurred in late April." [Tr., pp. 127-128]. However, at another point, she stated "she first start[ed] talking to Jose Vega . . . in June, the first week of June," [Tr., p. 168]. This would, therefore, place the suddenly remembered first incident in mid-June. If so, then when did the second incident (involving the picture of Vega) occur? Again, she originally testified (on September 7) that this incident occurred in mid-July. [Tr., pp. 137-38]. She said also that the two incidents were separated in time by "[a]bout a week, a week and a half." [Tr., p. 141]. If that is true, then the first incident – assuming it even actually occurred – would have happened in early July … and not before the June 28 decision in Dallas to outsource the staffing of the housekeeping department.

The ALJ in his decision acknowledged that, "Flores was not at all that certain as to when [the first meeting with Arpino] occurred." He went to state, however, that "from the context of her testimony it most likely occurred shortly before June 10." [ALJ D, p. 4, lines 29-30]. The ALJ failed, however, to explain how or why he concluded this to be the case, apart from the bare remark referencing "the context." Quite to the contrary, though, there is in fact little reason to believe this to be the case. First and foremost, the affidavit Flores gave closest in time to the

events in question (September 7), described only a single incident, and she testified under oath this incident occurred in mid-July. This placement in mid-July is far more consistent with the fact that every other alleged interrogation incident occurred in August and September. For the ALJ to conclude that the first meeting with Arpino – a meeting not even mentioned in her two affidavits – occurred "before June 10th" is extraordinary in light of the uncertainty and contradictions noted above. Even more extraordinary, and constituting error, is this ALJ's reliance on this shaky foundation for his conclusion that the General Counsel proved a prima facie case; *i.e.*, proved that the Respondent's management in Dallas, when making the decision to outsource the staffing of the housekeeping department on June 28, had "knowledge" of organizing activity, and had developed and was motivated by anti-union animus.

There is no other testimony or evidence supporting this extraordinarily unsupported conclusion. As noted above, all other incidents of alleged unlawful interrogation occurred much later, in August and September. The ALJ, however, did point to the testimony of Ninfa Palacios, which was so far off the beaten path pursued by the General Counsel that it wasn't even alleged. This testimony was even weaker than that of Flores. Ms. Palacios testified to a conversation with Housekeeping supervisor, Percida Rosero. She testified Rosero, "only asked whether I was asked to participate in a meeting . . . about the Union." [Tr., p. 231]. Ms. Palacio testified "she knew nothing" about it, and testified further this was "the first time [she] learned about the union." [Tr., p. 232].

When asked when this conversation with Rosero occurred, Palacios responded, "more or less on the first days of May." When then asked for the basis of how she recalled this, she responded: "Because I was preoccupied with my son's graduation and I had to attend to it the *next day*." [Tr., p. 230 (*emphasis added*)]. She then stated the son's graduation occurred on June

2. The ALJ picked up on the inconsistency that the "first days of May" was not the "next day" prior to June 2, and by his comments explaining the inconsistency clearly pointed it out to the witness. This had the obvious effect of 'coaching' the witness to fix her story. [Tr., p. 231, lines 1 - 8]. Palacios picked up on the problem, and did an immediate about-face. In direct reply to the ALJ's comment – "So, I'm wondering whether or not this conversation took place a month before or at a different time" – the witness changed her story with lightning speed, stating, "Yes, a month prior." [Tr., p. 231, line 9].

Deference to the ALJ's credibility assessment should not be given here. In view of the fact that the alleged unlawful interrogations did not begin until August (and actually most were in September; *see,* Amended Complaint, paragraphs 14 – 18), and in view of the utter unreliability of Flores's testimony that interrogation occurred in June, there is no reason to credit this witness's testimony of interrogation occurring in early May. Observance of demeanor is not needed to conclude this witness was either lying, or just completely confused regarding the date. *See,* Standard Dry Wall, 91 NLRB 544 (1950) (in the context of the Board's *de novo* review of the record, the "policy" of attaching great weight to the Trial Examiner's credibility findings is applicable only "insofar as they are based on demeanor"); *and see,* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 and 496 (Board findings, though "entitled to respect," must "nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of testimony or its informed judgment on matters within its special competence or both. . . . The findings of the examiner are to be considered along with the consistency and inherent probability of testimony").

One simply does not, consistent with the mission of telling the truth, make a statement that places an incident a 'day before' another significant incident (the son's graduation), and then turn on a dime, suddenly changing the timing of the incident to a "month before."

The foregoing testimony and evidence should be examined in the context of the very low-key, minimalist nature of the Union's organizing effort in the late spring and first-half of the summer of 2012. Organizer Jose Vega testified that he began, *after* mid-April, to make visits to the hotel on an approximately weekly basis. [Tr., pp. 102 and 109]. He would walk into the hotel, posing as a guest, and attempt to speak with employees, particularly housekeepers cleaning rooms on the guest floors. [Tr., p.110]. He was careful not to disclose his true purpose, and succeeded in this regard. There were no confrontations with any managers or supervisor on any of these visits, and on no occasion did he "even [come] face-to- face with any manager, who from [Vega's] prospective, knew who [he was] or what [he was] doing." [Tr. p. 110]. He admitted the stealth he practiced was "by design," [*Id.*], as he "didn't want management to know that [he was] inside the hotel trying to organize." [*Id.*] During these visits he handed out business cards. However, no one responded by calling him until "May or June 2012," according to Vega. [Tr., p. 103]. A meeting was scheduled for some point in June, but was cancelled. The first meeting was not held until July 4, and no cards were signed until that day. [Tr., p. 107].

Moreover, against the contextual background of this low-key organizing, the record reflects an absolute vacuum of evidence showing any causal connection between, on the one hand, the scant, unreliable testimony of employer awareness and, on the other hand, the June 28 decision made by executives based in Dallas to outsource the staffing of the housekeeping department. Indeed, there is no evidence anywhere in the record of any communication to – or

awareness on the part of – the executives in Dallas, including witness Evan Studer (whose role is described below), before making this decision, that an organizing effort was under way.

The decision to outsource staffing was made on June 28, as reflected by the exchange of emails quoted by the ALJ, at pages 5 and 6 of his decision, between company President Mark Sharkey (based in Dallas) and a Divisional Vice President over the Hyatt hotel on Long Island, Sileshi Mengiste (based in Jacksonville, Florida). However, as shown in greater detail in the next Exception below, there was discussion preceding that decision between Mr. Mengiste and Executive Vice President of Operations, Evan Studer (Mr. Mengiste's superior, and second in command to Mr. Sharkey). As explained also below, Mr. Studer – a witness – discussed and approved this decision. The ALJ appropriately found "the record is not clear as to exactly when the Respondent commenced the process" that lead to the decision to outsource the staffing of the housekeeping department. [ALJD, p. 5, line 12]. However, he stated further that "a decision to *explore* the possibility of contracting out this work was initiated sometime in mid to late June …" [ALJD, p.4, line 5 (*emphasis added*)]. While that precise date is not found in the record, it is clear the decision nonetheless preceded – by at least some number of days – the exchange of emails on June 28 between Sharkey and Mengiste.

The evidence presented by the General Counsel fails to make the case that Sharkey, Studer and Mengiste had any awareness of the organizing effort. Despite the production of over 800 pages of email and other documents in response to the General Counsel's subpoena, the General Counsel was unable to prove anything other than what Respondent has said all along – that the decision to outsource the staffing of the housekeeping department was due only to two realities: The hotel's demonstrated inability to effectively staff this department on its own, and

because the hotel's all-important guest-satisfaction scores were in the cellar. The evidence presented in the hearing in support of these two facts will be examined in the next Exception.

2. The Administrative Law Judge Erred in Deciding that the Decision to Outsource Staffing was Motivated by Respondent's Desire to Avoid Future Recognition of the Union, Because Respondent Intended to Remain an Employer (as a Joint Employer with HSS).

It is important to note that Respondent did not outsource the entire housekeeping department. Respondent only outsourced the *staffing* of the housekeeping department to Hospitality Staffing Solutions ("HSS"). The employees were placed on the HSS payroll, and HSS had direct control over wages and benefits, although not complete discretion in that regard, given that the negotiated fee paid to HSS by Respondent was tied directly to the wage rates. However, In addition, Respondent retained all management and supervisory functions over the department. Specifically, the hotel's Director of Housekeeping, Blanca Dunleavy – who reports directly to the hotel General Manager – held this function before and after HSS's arrival on August 21, and retained this function and title after August 21. Similarly, there were two Housekeeping Supervisors – Percida Rosero and Yohena Borrero – who performed their same functions (primarily, room inspections for quality control, work and location assignments, and other more administrative duties) in the same manner both before and after August 21.

This case is, therefore, dissimilar to cases in which an entire and distinct operation or sub-unit of a business – such as a stand-alone restaurant in a hotel, or the transportation arm of a manufacturing plant – is subcontracted to a truly independent operator. In such cases, where the entire operation inclusive of the whole of the employer's set of responsibilities is outsourced to another business, the argument that the outsourcer did so (assuming awareness that organizing efforts are afoot), in order to avoid unionization, would be an easy argument to make. Inasmuch

as the new business would become the sole employer, the duties to recognize and bargain with a lawfully certified union would be shifted completely. And indeed, this is the theory pursued by the General Counsel and accepted by the ALJ: "The General Counsel contends that the decision to subcontract out the work of the housekeeping employees was so that Remington could avoid being their employer and therefore having to bargain with a union." [ALJD, p. 8, line 25].

That is not what happened here, however. Respondent retained substantial day-to-day control over the terms and conditions of the work performed in the housekeeping department, as well as *de facto* control over the wages and benefits (by virtue of the negotiated fee paid to HSS tied to wage rates). It was clear, as the ALJ concluded (in footnote 9), that Respondent and HSS were functioning as joint employers, and the law so provides. *See*, case law authority cited by the ALJ in the footnote. *See also*, U.S. Pipe & Foundry Co., 247 NLRB 139, 140 (1980) (unionized company, Winfrey, provided drivers to USP, which had the right to reject the referral, but once employed the driver was under USP's control and supervision, but USP had input into Winfrey's labor negotiations; held: the two companies were joint employers, subject to the collective bargaining relationship); Syufy Enterprises, 220 NLRB 738, 739 (1975) (theater company utilized, via a staffing company, janitors over whom it exercised supervision; held: joint employers); Sinclair & Valentine Co., Inc., 238 NLRB 754 (1978) (one company paid the employee's wages and administered the collective bargaining relationship, the other company directed and controlled the employee's activities; held: joint employers).

Because the Respondent and HSS were joint employers of the housekeeping employees, the ALJ's conclusion that the Respondent outsourced the housekeeping services for the purpose of avoiding the union campaign fails. The ALJ relied on no statement of anti-union animus or other express indication that the purpose of the outsourcing was to avoid the union, but only

inferred it from his own speculative doubts as to the Respondent's business judgment. *See, e.g.*, ALJD, p. 7, n.7, and p. 8, lines 14-23.

The ALJ's conclusion that the outsourcing was for the purpose of avoiding the union should therefore be reversed.

3. The Administrative Law Judge Erred in Applying the *Wright Line* Standard to the Facts, as Respondent Met Its Burden of Proving that the Decision to Outsource the Staffing of the Housekeeping Department Was Driven by Legitimate Business Needs, and Would Have Taken Place Even in the Absence of the Protected Conduct.

The Hyatt Regency Long Island Hotel, in the year 2012, had fallen into a deep hole of low "guest satisfaction" scores. The hotel ranked near the very bottom of all Hyatt-branded properties in the United States. Witness Jeff Rostek, the hotel's General Manager since July 15, 2012 – testifying from memory on the first day of trial – said the hotel ranked 142nd out of 144 Hyatt hotels. [Tr., p. 78, lines 11-13; *and see*, Rostek's testimony from the *last* day of trial, pp. 759-768, introducing Hyatt's actual ranking data – Exhibit R-27 – which showed his recollection of "142 out of 144" was very close [3]].

This was a serious and severe problem. The president of Hospitality Staffing Solutions ("HSS"), Rick Holliday, testifying to his own 20-year experience as a hotel manager, stated: "We lived and died by them." [Tr., p. 461]. Explaining this, he testified: "[W]hen you're a franchisee like Remington . . . if you don't hit certain benchmarks you could be in jeopardy of losing your flag [i.e., the Hyatt brand designation] . . . [It is] [c]ommon sense, if you don't take

[3] Among other facts, Exhibit R-27 shows that for the eight quarters ending March of 2013 – "because the past was so bad," as Rostek stated at p. 760 – that the hotel's "accumulated ranking" was 139 out of 142.

care of the customer, they're not happy, they're not coming back . . . so you lose that repeat business." [Tr., pp. 460-461].

When Remington first assumed the management of the hotel in December 2011, HSS was providing supplemental staffing in the housekeeping department. Remington decided, after takeover, to assume full control of the housekeeping department and bring all the employees under Remington as the sole employer.

Unfortunately, the guest-satisfaction scores did not rise. And specifically, the component score for "Guest rooms" – which is the primary indicator for the operational effectiveness of the housekeeping department [Tr., p. 84 (Rostek)] – remained in the cellar throughout the rest of 2012: in March, with a score of 20.4, against the brand-average benchmark of 50.0; April at 6.0; May at 6.3; June at 1.1; July at 9.9; and August at 4.3. [*See*, Exhibit GC-3].

Witness Evan Studer holds the position of Executive Vice President of Operations with Remington. In this capacity, he handles large responsibilities over a broad scale. He oversees all 70 hotels in Remington's portfolio, which employ 6-7,000 persons. [Tr., p. 597]. Six divisional vice presidents of operations report up to him (each overseeing 3 to 15 hotels), in addition to dotted-line responsibility for divisional vice presidents of sales. [Tr., pp. 596-597]. The scope of the operations he oversees is 'hotel-wide,' including "the sales effort, revenue management, [and] the actual daily operating of the hotels," which includes food & beverage, housekeeping, front desk, and all other guest services. [Tr., p. 596].

Understandably, as he stated, "there's a lot of daily detail that I don't see." [Tr., p. 598]. He relies on his divisional vice presidents of operations to bring to him "[a]nything that they feel that I need to be aware of or involved in." [Id.]. One such item he was made aware of, and became involved in, was fixing the serious problem in the housekeeping department at the Hyatt

Regency. Mr. Studer also tracks the guest-satisfaction scores of all 70 hotels, along with multiple other data, in a set of reports he referred to as the "monthly roll-ups." [Tr., pp. 604-613 and p. 491]. Through this process, and through regular reports from Sileshi Mengiste – the divisional vice president over the Hyatt Regency Long Island [4] – Mr. Studer became aware of the need to address the problem of the hotel's abysmal scores: "It was not to our expectations at all." [Tr., p. 612]. The problem was particularly serious, given that this was Remington's first and only *Hyatt* hotel, a prestigious, high-end brand which Remington quite naturally wishes to manage in greater numbers. This hotel, as Mr. Studer stated, was therefore "very important to us." [Tr., p. 609, lines 11-14 and p. 610, line 21 to p. 611, line 4]. As noted by HSS's Rick Holliday, above, when a management company, as franchisee, fails to hit the performance benchmarks expected by the franchisor – thereby failing to maintain the quality and integrity of the franchisor's fiercely protected brand – the management company lies in serious "jeopardy of losing [the brand] flag." [Tr., p. 460].

Losing the rights to the brand is a matter of serious economic consequence, inasmuch as not only is the power of the brand to attract customers lost, the reservation system and frequent-guest programs which drive customers into the hotel are lost as well. The ALJ missed the significance of the threat Respondent faced concerning the potential loss of the brand, as reflected in this comment: " . . . more significantly, there was no evidence of any communications between Remington, Hyatt or the hotel's owners indicating that either Hyatt or the owners were worried or had any concerns about the scores after Remington had taken over." [ALJD, p. 8, line 18]. This observation carries no weight in the total context of the facts presented in the record. Although there was no communicated threat of an *imminent* risk to take

[4] Mr. Mengiste is the divisional vice president over the "luxury division," a group of four hotels. Operationally, luxury hotels are "definitely more complex" to operate. [Tr., pp. 609-610].

the Hyatt 'flag' away, it must be remembered that Remington – as of June, when the decision discussed below was being made – was still in its first half-year of managing the hotel. Given the hotel's cellar-dwelling status at approximately 142 out of 144, and given the failure to improve scores over the first six months of 2012, the hotel was faced with a serious problem that deserved serious attention, and serious action. It does not require a speculative leap to understand that if Remington failed to do what was necessary to turn this sinking ship around, Remington would lose the Hyatt franchise relationship.

On June 28, 2012, Divisional Vice President Mengiste delivered a memo to the company's president, Mark Sharkey, copied to Mr. Studer, proposing to outsource the housekeeping department to a third party [Exhibit GC-20]. This memo arose out of discussions Mr. Mengiste had with Mr. Studer, in which they addressed the "extreme concern about where we were in the overall improvement of guest satisfaction scores." [Tr., p. 630]. Mr. Studer did not recall a specific conversation leading to this specific memo, but he testified: "I know [Mengiste] would have asked me if we could go in this type of direction," referring to the proposal to outsource housekeeping. [Tr., p. 629 and 476-478; *see also*, p. 676 (underscoring the large volume of information Mr. Studer tracks daily, he testified to receiving between 150 to 200 emails every day)].

The memo, GC-20, referred in its opening to the need to "create better operational procedures." In more colloquial terms: *We need to find a better way to run housekeeping.* The goal of any operational improvement in a for-profit business, of course, is to please the customer. When Mr. Studer was asked on cross what the phrase "better operational procedures" means, he placed the focus precisely on this goal: "That's what I referred to before, is being able to drive better guest satisfaction scores … As well as … being able to get a labor pool to be able to

perform the duties we need day in, day out to be able to drive guest satisfaction scores." [Tr., p. 481; *cf.*, testimony by Holliday at p. 460 ("the whole point of [his] company's performance is . . . to improve guest scores for the hotels" HSS services)]. Company President Sharkey, in his reply to Mr. Mengiste's memo, focused in the same manner on the guest-satisfaction scores: "We cannot allow service scores to be this low or to continue to suffer from staffing problems. This has gone on too long and we must make a change immediately." [Exhibit GC-20].

Mr. Mengiste's memo refers also, in its beginning paragraph, to "improv[ing]" the "financial position." One aspect of that, as referenced further down in the memo, is "overtime." Mr. Studer testified: "If we have the adequate amount of staffing, we can minimize the amount of overtime which absolutely . . . helps us from a financial perspective." [Tr., p. 483]. The financial aspect is governed also by the negotiated rate that would be paid to the outsource company, and governed also by managing the shift in employment costs to the outsource company (including insurance and other benefits, and workers compensation, as referenced in the memo at GC-20). Built into the rate paid to the outsource company is, of course, that company's profit margin. [Tr., p. 632]. Although subcontracting is indeed "usually more expensive," as Mr. Studer acknowledged, [Tr., p. 613], it is nonetheless a cost worth paying, when faced with the kind of problems found at the Hyatt Regency. Mr. Studer testified:

> . . . there are a couple of different reasons [to subcontract, despite the added cost], but one of the predominate reasons, is if we are having a difficult time recruiting associates to join us at that particular hotel. We may have limited resources to the employee pool . . . [or,] if we're having challenges like we were in this case, with guest satisfaction levels and just the overall, you know, just how the operation is performing.

[Tr., p. 614].

Staffing was indeed a difficult problem at the Hyatt Regency. The executive housekeeping manager, Blanca Dunleavy, testified that she "didn't have enough staff to cover

the rooms," and that consequently room attendants had to clean more rooms per shift. The standard is "fifteen credits a day, for eight hours work," with one credit for cleaning checkout rooms and a half-credit for cleaning "stay-overs." [Tr., pp. 688-689]. The room attendants were, instead, being asked to clean rooms up to an equivalent of sixteen and seventeen credits. [Tr., p. 688]. In addition, "they were doing more hours, so they would stay late. We overworked them." [Tr., p. 689]. Further, the hotel was forced to utilize employees whose normal duties were to clean the hotel's public spaces, which in turn reduced the number available to maintain those spaces: "Instead of having two people cleaning [the public spaces] . . . I was having just one person running around doing [those areas]." Consequently, "the quality of the public areas was in shame." [Tr., p. 690].

A *sense* of urgency was conveyed in Mr. Sharkey's email response to Mengiste's June 28 memo: "We must make a change immediately … Ps get this done before the weekend." The ALJ, apparently seeing this and not analyzing the facts any further, dismissively characterizes Respondent as having engaged in a "sudden quest to contract out the housekeeping department." [ALJD, p. 7, line 30]. The ALJ is simply wrong in this regard. First, as previously noted, the ALJ elsewhere found correctly that "a decision to *explore* the possibility of contracting out this work was initiated sometime in mid to late June …" [ALJD, p .4, line 5 (*emphasis added*)]. Second, while the decision by company President Sharkey was made on June 28, that was just the beginning of a protracted search, review and analysis process, which included negotiations with HSS and other staffing companies, over a *55 day* period, between June 28 and the day HSS begin its work in the hotel, on August 21. During that time, Remington also shopped around for other outsource providers, including Jani-King, which made a written

proposal, [Exhibit R-12], as well as two other providers based in Pennsylvania and in Chicago. [Tr., pp. 650-651]. The contract with HSS was not signed until August 16. [ALJD, p. 7, line 8].

Among the issues negotiated was the rate to be paid to HSS. The rate was determined by an hourly wage that was negotiated between Remington and HSS, with a 40% premium on top to cover benefits and other costs, as well as HSS's profit margin. [Tr., pp. 631-632]. The parties also negotiated the penalty to be paid by Remington, in the event it breached the no-solicitation clause in the contract (discussed below).

The ALJ is also simply wrong, in his comments in footnote 7 of his decision, where he engages in speculative, unsupported doubt concerning the earnestness of Mengiste's June 28 email, declaring that, "[s]ome of the considerations cited in favor of contracting out . . . strike me as being somewhat bogus." What the ALJ failed to appreciate and see, however, is that this memo constituted nothing more than an initial analysis of the financial considerations, uninformed by the information that was later received during the 55-day period, in which Remington negotiated with HSS, Jani-King, and two other staffing companies, as explained above. Thus, for example, Mengiste's June 28 memo made reference to the rate of $12.60 per hour [5] which had apparently been previously in place in 2011 and possibly earlier, when HSS was providing supplemental staffing to Remington's predecessor. Mengiste expressed simply the hope (and nothing more) that it might be possible to obtain a lower rate. However, as the testimony of Studer and Holliday reflects, when the companies got down to brass tacks in the negotiation over HSS's fee, the business realities of the situation mandated a notably higher rate, at $14.84. Mr. Studer did testify that Remington "tried to negotiate for a lower rate," and

[5] The record does not show how the $12.60 rate was agreed upon, or what cost components were built into that rate. That rate had been agreed to by the hotel's previous management company, before Remington's arrival in late 2011.

recalled that Mr. Holliday "adjusted" the rate "down slightly from where we started in a verbal conversation." [Tr., p. 633]. He went on to testify, though:

> But the reason we were willing, in this case, to pay more was, as I mentioned yesterday, to have access to a larger pool of associates, ones that we were very, I'm going to use the word hopeful, very hopeful that they were going to be able to improve our satisfaction level to get it to that top fifty percent and top twenty-five percent of the brand that we were looking for.

[Tr., p. 633, line 21 to p. 634, line 1; *see also*, p. 604 (the company's goal was to be in the top 50%, if not higher, within the brands it managed")]. He stated further, in explaining his 'hopefulness' they would obtain qualified, capable employees, that Mr. Holliday had advised HSS would need to "pay a certain rate to get the best, the right type of individual," [Tr., p. 632], as well as to obtain "more employees" . . . [and a] more consistent pool of [employees]." [Tr., p. 634, lines 2-12].

With respect to the penalty for "non-solicitation," at section 9 in the contract Remington eventually signed with HSS, [Exhibit R-13], Remington was barred by that provision from hiring any of HSS's employees. As ultimately agreed, an uncured violation of this bar would result in liability equal to, essentially, six months (1040 hours) of HSS's billing rate, per employee hired away from HSS. Mr. Studer testified HSS originally wanted "2080 hours, a full year of pay," to which Remington countered with "90 days," before reaching the six-month (1040 hours) compromise. [Tr., p. 659]. This provision will be discussed again, in Exception 4, below.

4. The Administrative Law Judge Erred in Deciding that Respondent Violated the Act in Choosing Not to Hire the Employees on HSS's Payroll on October 19.

As shown under Exception 3, above, Remington was motivated solely by legitimate, non-discriminatory business reasons in deciding to outsource the housekeeping department on August 21 to HSS. The reasoning and undisputed facts that led to this decision did not in any manner

change following August 21, or following September 19 when HSS gave its 30-day notice to terminate its contract. Remington remained vitally interested after August 21 in doing everything within its power to improve the hotel's housekeeping functions, as this was essential to moving the guest-satisfaction scores to the range where it needed to be (at least in the upper 50% of the higher brand).

Unfortunately, the decision to bring HSS in to run the hotel was not successful. Mr. Rostek testified "we had a lot of issues" with HSS's performance. [Tr., p 74]. HSS required all of the employees who were carried over on August 21 from Remington to undergo an E-Verify check, a drug test, and a criminal check. As a consequence of this, a certain significant number – possibly as many as 15 – were not retained by HSS. [Tr., p. 73]. HSS then failed, contrary to their promises and reputation, to bring on board a sufficient number of replacements. On September 3, 2011, the housekeeping department needed 17 new housekeeping employees – 10 room attendants, four for public space, two floor housemen and one supervisor. [Exhibit R-33 (Blanca Dunleavy email)]. Over a week later, the situation was virtually unchanged. On September 11, Osiris Arango complained in an email to HSS's representative that the housekeeping department was still short ten room attendants, three public space attendants and two floor housemen. [Tr., pp. 768-769; Exhibit R-28]. During this time, the hotel was busy and not only short-handed, but having to train the new-hires which HSS had brought aboard. [Id.]. HSS had promised to provide a trainer, but as of September 11, that had not happened yet. [Id.].

Other problems were happening that made the employees very unhappy, including HSS's failure to issue paychecks in the correct amounts. This prompted General Manager Jeff Rostek on September 13 to communicate with HSS by email, stating: "Did you ever identify why so many people were paid incorrectly? That cannot continue; how are you making sure it doesn't

and how can we help to do our part to make certain each associate gets paid properly from HSS?" [Exhibit R-29; Tr., pp. 770-771; *see also,* Exhibit R-30 (September 14 email: "EVERYONE needs to be paid correctly this pay period").

Another recurring problem was the appearance of new-hires in the hotel, with no one present from HSS to process their paperwork and start them to work. See, September 17 emails between Arango and Subbock with HSS. [Exhibit R-34; *See also,* Tr., pp. 776-77]. Yet another problem was the appearance of new-hires "who showed up and left." These persons, Rostek testified, "basically told us [they] didn't know . . . this was a housekeeping job and left." [Tr. p. 776; Exhibit R-33].

By September 12, HSS finally agreed to provide a trainer at Respondent's expense to start on September 17. The trainer, whose name was Mustafa, did show up on the 17th. However, a week later, Rosteck testified, HSS informed him "Mustafa needs to leave tomorrow." [Tr., p. 773].

On September 20, Divisional Vice President Mengiste reported by email to Evan Studer the status of HSS's performance at the Hotel. See, Exhibit R-14. His e-mail reports the problems identified above. "As of today," he reported – one month into the contract – HSS had still not provided the supervisor that had been promised. Consequently, the employees were "going to the hotel Executive Housekeeper [Blanca Dunleavy] asking questions as there is no one from HSS to attend the associates' needs." He concluded, by stating:

> One of the reasons we brought HSS to the property was to help us improve our guest satisfaction scores. Since HSS took over the number of guests *dissatisfied* with our housekeeping service continued to rise." (*emphasis added*).

Mr. Mengiste presented the numbers in this email, at Exhibit R-14, showing the rise in *dissatisfaction*, from August 20 to September 20: An increase from 26.2% to 42.1% complaining

"bathroom not clean"; an increase from 21.4% to 31.6% complaining "mold and mildew present"; an increase from 9.5% to 10.5% complaining that room "not clean[ed] daily"; and an increase from 47.4% to 71.4% complaining "carpet not cleaned."

The questions eliciting these narrowly specific responses were from the Hyatt survey. [Tr., p. 658]. Mr. Studer testified, concerning his receipt of this report from Mr. Mengiste: "Basically, what it tells me is, as [Mengiste] said, the guests are not happy. The percentage of the amount of people that had completed the survey that felt that way went up pretty dramatically from August 20 to September 20." [Tr., p. 658]. For her part, Executive Housekeeper Blanca Dunleavy testified as follows, concerning the dysfunction in the housekeeping department:

> Q: What impact, if any, did [HSS's failure to provide a promised supervisor] have on the operation of the housekeeping department?
>
> A: Well, we have to take care of that
>
> Q: When you say we, who are you referring to?
>
> A: Me and my two supervisors. So between the three of us, we will have to take care of the sign-in sheet, the payroll, and the whole staffing. And instead of doing inspecting rooms or making sure the quality of the rooms, pay attention to the girls, you know, seeing everything else, we were paying more attention — we're spending time doing this job that was supposed to be done by the HSS Supervisor.

[Tr., pp. 690-91]. The "dissatisfaction" numbers in the memo from Mr. Mengiste discussed above, [Exhibit R-14], reflected narrow, break-down numbers from the broader "guest rooms" category in the more general Satisfaction Table. [Exhibit GC-3]. Nonetheless, these were telling numbers describing the specifics of the actual poor performance of the housekeeping department at that time. At the more 'macro' level, as reflected in the Satisfaction Tables, there was actually a degree of improvement in the months of September and October. The "guest rooms" number in Exhibit GC-3 went

from 4.3 in August to 39.9 in September and 32.6 in October. While an improvement, it was nonetheless still below the "50.0" benchmark (shown in the next-to-last column in the "guest rooms" row, this is the average score for all full-service Hyatt hotels in a category). [Tr., pp. 76-77]. It wasn't until January 2013, with a score of 51.6 for the month – after Remington had taken over and been in control for ten to 14 weeks – that the hotel's number for guest rooms exceeded the 50.0 benchmark. [Exhibit GC-3; Tr., pp. 641-642].

Regarding the rise in the number for September, followed by a decline in October, Mr. Studer testified, "We weren't satisfied . . . that had not gotten us . . . to our goals and objectives of being in the top 50 percent or the top 25 percent of the brand." [Tr., p. 641]. What *was* satisfying, though, was finally breaking the benchmark barrier in January. On the last day of the hearing, March 20, 2013, General Manager Rostek provided an updated Satisfaction Table, current through that date. It showed month-to-date for March that the hotel was continuing its upward trend at 54.9 (compared to the previous high-water mark of 51.6 in January). [Exhibit R-24; Tr., pp. 752-53, and see, more general discussion regarding the Satisfaction Table at pp. 746-52].

The bottom line is that any one month is too isolated to draw a conclusion. One must look at the trend. While September did see a jump, it was not a large jump. And then, the number dropped in October. November and December can be seen as recovery, transitional months, related to the new staff that had been brought in. However, January through March 20, finally saw the department moving in the right direction, and for the first time above the 50.0 benchmark for two out of three months. As Ms. Dunleavy testified:

> A … I never received the scores that high before. The rooms are really clean, they are really clean through and everything. So it is a big impact in the hotel.
>
> Q Do you have happy employees?
>
> A I do have employees that I am very proud of my whole department.

By contrast, Ms. Dunlevy testified the crew in the hotel *prior* to October 19 was not happy:

> . . . you can tell they were not really that happy, I know, so they weren't really that receptive, when we was trying to give the feedback with the rooms. They weren't really taking any advice or any, from inspections, from the supervisor's point, they weren't really taking any.

[Tr., p. 693]. Ms. Dunleavy did not play a role in the decision to hire a new crew. [Tr., p. 693, lines 1-2]. However, when asked if she "support[ed] that decision once it was made," she testified: "About bringing a new staff, yes, I did. Yes, I completely support the decision." [Tr., p. 693, lines 4-5]. Part of her reasoning for this, she explained, was that the hotel was "making sure that we have the right staff." [Tr., p. 693, lines 11-12].

Mr. Studer participated in discussions that led to the ultimate decision to replace the staff, [Tr., p. 638, line 6], and testified: "We had lost a lot of confidence in what was taking place with HSS and the proper staffing and oversight management, the filling of positions that were open. And so it was just, you know, a lot of confidence in general that was lost with them and the associates that were working for them." [Tr., p. 498]. This loss of confidence in the associates themselves is certainly understandable in view of the above. [See also, Tr., p. 507 ("We had lost a great deal of confidence in HSS and their staff that was there . . . [we had] to make sure that our business functioned the way it needs to function"].

An additional deep concern, as stated by Mr. Studer: "[We] didn't have the confidence level that we were going to have a staff or employee pool there on the transition date." [Tr., p. 510]. There was "a genuine concern as to were we going to have anybody there the day that we

took over." [Tr., p. 526; see also p.534 (as Mr. Rostek stated, this would be a general manager's "worst nightmare."]. This concern was driven by the obvious fact the current staff was unhappy and, as Ms. Dunleavy testified, unwilling to take direction and accept feedback.

A serious concern existed also that HSS would take employees with them. First, in this regard, HSS's business model is built on having multiple hotels in a geographic area it can service and move employees around in. [Tr., p. 635 (Studer)]. Second, although the no-solicitation clause in the contract (discussed at the end of section 3, above) had been waived, there was absolutely nothing else in the contract, or anywhere, to prevent HSS from taking employees with them to another hotel. Further, the waiver, which was of substantial value to HSS (as reflected by the negotiations described in section 3), was unsupported by any consideration from Remington. HSS could have taken the waiver back at any time.

HSS previously had one of its 70 or so field offices on Long Island. Mr. Studer, when negotiating with Mr. Holiday, "discussed the fact that one of HSS's "objective[s] [was] to set up an office there to handle us and potentially pick up other accounts out on the island." [Tr., p. 636]. It was also a well-known fact, acknowledged by Holliday, that HSS was actively going after other hotels on the island, including the nearby Marriott. [Tr., p.458-59 (Holliday)].

As October 19 approached, and as decisions had to be made, it was completely unknown whether HSS would have other properties or not, and whether they would therefore solicit their employees to another hotel, or withdraw the waiver. Mr. Studer testified:

> Q Did [Holliday] ever, at any point, indicate to you whether that plan that you just described to open an office and go after more hotels, did he ever indicate to you at any time that he was abandoning that plan or changing that plan?
>
> A I don't recall that he did. I mean he didn't, I guess is the best way to summarize it, or I didn't hear that from him.
>
> Q Did you hear it from anybody else?

A That he was abandoning that plan?

Q Yes

A No.

[Tr., p. 637]. This concern was held by all of management at the hotel, including Housekeeping Director Blanca Dunleavy, who testified as to the following *additional* reason why she "completed support[ed] the decision" to bring in a whole new crew: "We heard that HSS was having a contact with Marriot across the street so we thought that they might take the whole staff with them to work with Marriott. So we worried once the contract end, we was going to have no staff." [Tr., p. 693].

For all of the foregoing reasons and based upon the afore-stated clear and convincing facts, the 8(a)(3) charge related to the decision not to hire HSS's employees on October 19 must be rejected. The company had no choice. It had to save the hotel from a failing situation with dire consequences, as outlined above. In addition, the General Counsel failed to present adequate evidence of union animus. The following in this regard should be considered:

- According to the testimony by Estella Cabrera (housekeeping employee), on or about September 5 – after she had returned from a long vacation, during which time HSS had come aboard – she told Ms. Arango: "I said, yes, the union is good because I had worked previously in a factory for the union, and the union was good." [Tr., p. 215, lines 6-8]. Notwithstanding this clear statement of union support, Ms. Arango proceeded that day to assist Ms. Cabrera in getting a job with HSS. [Tr., pp. 221-222]. General Manager Jeff Rostek went specifically to bat for Ms. Cabrera in getting her on board with HSS. [Tr., pp. 774-75; and *see* Exhibit R-32**]**

- Approximately a week following HSS's October 19 departure, Ms. Arango made a "phone call to [Ms. Cabrera] to see if she was interested in employment." [Tr., p. 717]. Unable to reach her by phone, she asked Maria Amaya – to whom the hotel had extended a simultaneous offer of employment – to contact Ms. Cabrera, so that the offer could be conveyed. "I knew they were friends," she testified. [Tr., p. 718]. Ms. Cabrera admitted Ms. Amaya passed along Ms. Arango's message regarding a job offer. [Tr., pp. 219].
- Maria Amaya, one of the alleged discriminatees listed in the complaint, was also offered a job at this time, as noted above, which she accepted. It is evident the General Counsel harbored a theory Ms. Amaya is anti-union, and that this was the only reason she was offered a job. The General Counsel failed to prove this theory. Further, as Mr. Rostek testified, he had no idea concerning Ms. Amaya's union sentiments. [Tr., pp. 538-39]. Moreover, as noted above, Ms. Amaya was "friends" outside the workplace with union-supporter Cabrera. It would therefore have been more likely to assume that she was *pro*-union.
- When asked why Cabrera and Amaya were offered job, Ms. Arango responded: "Well, they were good employees and they had been in the hotel for many years." [Tr., p. 718].
- In addition, on December 6, the hotel sent letters and application forms to all of the former housekeeping employees for whom the hotel had contact information, inviting them to apply. [See, Tr., pp. 780-86 (Rostek); and *see*, Exhibits R-1 through R-4 and R-37 and R-38].
- On March 18, 2013, letters were sent to all employees on the list of discriminatees, *excluding* Amaya, who had already become reemployed, and one other employee whose name appears mistakenly on the list. The March 18 letter, [Exhibits R-39 through R-42], reads in material part:

> Please accept this letter today as my unconditional offer of employment to a housekeeping position at the Hyatt Regency Long Island. The hotel

> currently has a position available. Additional positions will become available in the future. These positions will be filled on a 'first come - first serve basis.

- Mr. Rostek testified the offers were unconditional, and that "if there's a position available they have the job." He stated further he will not hire "from any other source" until the offers have been made – "everyone who applies, we're going to go one by one." [Tr., pp. 794-95].
- As of June 17, 2013, a total of 24 unconditional offers have been made, and at least 13 additional offers will be made in the future, as spelled out in Remington's status report to the United States District Court for the Eastern District of New York in the 10(j) case filed by Regional Director Paulsen. Paulsen v. Remington Lodging & Hospitality, LLC, case no. 13-CV-2539 (the status report is online on PACER; Dkt. No. 20). The unconditional offers, as noted above, began on March 18, prior to the filing of the 10(j) case. Judge Bianco denied the Regional Director's Petition for 10(j) relief. [Dkt. No. 18].
- Mr. Rostek testified also, with regard to each of the individuals on the list of discriminatees in the amended complaint at paragraph 20, that he has no idea how any of them think with respect to the union, pro or con. [Tr. pp. 798-99].

This final point shows an obvious weak element in the General Counsel's case: No evidence of union animus aimed at individual alleged discriminatee in the record of this case. In fact, as shown, Respondent is actively hiring back all of these individuals who wish to return.

5. The Administrative Law Judge Erred in Finding 8(a)(1) Violations of Threats and Interrogation.

The ALJ erred in finding 8(a)(1) violations of unlawful interrogations and threats.

In his decision, the ALJ cited only a single case in his decision relating to these charges, Rossmore House, 269 NLRB 1176 (1984). In that decision, however, the Board held that simply

inquiring into union sympathies, without more, does not violate the Act. "Accordingly, we overrule *PPG* and similar cases to the extent they find that an employer's questioning open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act." Rossmore, 269 NLRB at 1177-78. Rossmore relied upon a Third Circuit case that went into more detail regarding the balancing of employee rights to organize versus employer rights of free speech:

> It is well established that it is not necessarily improper for an employer to inquire into an employee's sentiments toward the union. What section 8(a)(1) of the Act proscribes is interrogation tending to restrain or coerce the employees in the exercise of their right to organize. An employer's questioning becomes coercive and runs afoul of section 8(a)(1) when it "suggests to the employees that the employer may take action against them because of their pro-Union sympathies."

Graham Architectural Products Corp. v. N.L.R.B., 697 F.2d 534, 537-38 (3d Cir. 1983) (emphasis added). This Court further stated the following, which applies to the alleged interrogations by housekeeping supervisor Percida Rosero, who works alongside the housekeeping room attendants in the cleaning of rooms:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover, as the United States Supreme Court recognized in NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the First Amendment permits employers to communicate with their employees concerning an ongoing union organizing campaign "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *Id.* at 618, 89 S.Ct. at 1942. This right is recognized in section 8(c) of the Act.

697 F. 2d at 541; a*nd see*, Hunter Douglas, Inc., 277 NLRB 1179, 1186 (1985) (" … the two met casually near the restrooms at which time Santalla asked Nunez whether 'it was true we were trying to get the Union back in the place.' Under the totality of the circumstances, I find that Santalla's questioning of Nunez was not coercive."); A & E Stores, 272 NLRB 737, 745 (1984) (supervisor inquiring of employee whether she thought people on her floor were going to vote for or against the union was not unlawful . . . The requisite element of coercion is altogether lacking."); Howard Aero, Inc., 119 NLRB 1531 (1958) (conversations regarding the pros and cons of unions was not coercive and therefore not unlawful).

Many of the questions and comments the ALJ points to as unlawful fall clearly into the category of "innocuous" questions, and are therefore not unlawful. *See. e.g.*, Pelton Casteel, 627 F.2d 23 (7th Cir. 1982); Madison Kipp Co., 240 NLRB 879 (1979); and Sandy's Stores, 163 NLRB 728 (1967) *enf*. denied on other grounds, 398 F.2d 268 (1st Cir. 1968).

Many of the other comments found unlawful fell well within the free speech protection of section 8(c) of the Act. *See e.g.*, NLRB v. TRW-Semiconductors, 385 F.2d 753 (9th Cir. 1967) (it "must first be found that the challenged material [or statements] contains a threat of force or reprisal or promise of benefit," and if none are found, section 8(c) determines the outer limit of free speech"); Exxel/Atmos, Inc. v. NLRB, 147 F.3d 972 (DC Cir. 1998), *cert denied* 525 U.S. 1067 (1998) (employer informed employees it was obligated to bargain with the union unless it was decertified, and telling them how to decertify; held, no threat or coercion was found, and the speech was protected by 8(c)); and Curwood Inc., 339 NLRB 1137, 1151 (2003), *aff'd in part*, 397 F.3d 548 (7th Cir. 2005) (employees told that "being unionized" was "viewed negatively by our customers… [because of] potential work stoppages and product interruptions"; the Board held these statements were not threating or coercive, and were protected by section 8(c)).

Still other comments found unlawful by the ALJ were too vague to establish unlawful interrogation. *See, e.g.,* Burns Motor Freight, Inc., 250 NLRB 276, 280 (1980) ("Kimberlin would 'hound' [Toth] and ask 'do you think your union buddies are going to help you on this?' . . . Kimberlin did not testify. I regard Toth's testimony as too vague and generalized to establish the coercive interrogation alleged."); Freehold AMC-Jeep Corp., 230 NLRB 903, 906 (1977) ("Frystock indicated that 'he wanted to know what was all this about the Union,' and went on to state 'if you guys wanted something you should have come to me.' … I find nothing unlawful in Frystock's rhetorical comment . . . The credible evidence is simply too vague"); Walgreen Co., 221 NLRB 1096, 1099 (1975) ("Munoa asked Alexander what 'bad thing' was happening in the store and assured her that she could trust him; that she informed him the employees were seeking union representation; . . . I further find that Munoa's question 'What bad thing is happening in the store' is too vague . . . and conclude it was not violative of the Act."); *and*, Storkline Corp., 141 NLRB 899, 905 (1963) (supervisor told employee who was a longtime friend that the union was trying to get in, and asked what he thought about the union; held, no violation).

A. Evidence Directed to Osiris Arango

Osiris Arango is the hotel's director of human resources, with 18 years of professional human resources experience in the hotel industry. [Tr., pp. 710-713]. She has worked in both union and non-union hotels, and has had involvement in prior union organizing campaigns. In addition to this first-hand experience, she testified to training on how management must conduct itself in the face of union organizing, and testified to her familiarity with the Board's processes governing RC petitions and elections. In short, she is well aware of the fundamentals of conduct prohibited by section 8(a)(1).

The following witnesses testified to comments by Ms. Arango.

(i) *Witness Norris Gutierrez*

This witness testified to a conversation in the human resources office in which she claims Arango asked: "Whether I knew anyone talking about the union." She testified to saying nothing in response. [Tr., p. 175, lines 5-8]. As with almost all of the 8(a)(1) witnesses who were called, there were no third-party witnesses to the conversation. [Tr., p. 177]. The ALJ found, with virtually no explanation or analysis, that this question by Arango "constitutes unlawful interrogation." [ALJD, p. 11 – NOTE: The entirety of the ALJ's discussion concerning the 8(a)(1) witnesses is confined to the bottom of page 10 through the top of page 12, plus a brief discussion spanning pages 4 and 5. With regard to all these witnesses, consistent with his discussion regarding the testimony of witness Gutierrez, he gave virtually no explanation or analysis, and as noted also above, cited only a single case].

There is no indication in the record that Arango was asking Gutierrez to identify specific individuals, and certainly no indication at all that Arango was forcefully or coercively seeking such information, or threating Gutierrez in any way. The question, as expressed by Gutierrez, was generalized and open-ended, and somewhat ambiguous. Standing on its own, the question inquired only if "anyone" was talking about the union, to which a complete answer would be a simple "yes" or "no." Given the absence of any testimony from Gutierrez describing a follow-up 'who' or 'what-was-said' question by Arango, this conclusion is the only reasonable one that can be taken. The testimony must also be viewed in its context. Ms. Gutierrez gave no testimony in this regard. Ms. Arango, however, credibly testified she was aware of the inappropriateness of interrogations concerning union sympathy or support, and specifically denied asking Gutierrez "any questions about the union." [Tr., p. 714]. She testified further: "Norris came in my office. She had questions about the union. She told me, Osiris, I've heard rumors about union, but I

know nothing about it; can you explain to me how that works and what is this about?" Arango testified further that she, "told her what a union was and how it worked in the United States. I told her that she had to make whatever decision, it was based on her and her family. And I gave her some of my personal experiences working in a union environment. . . . [specifically] I told her that when employees wanted third-party representation, that they needed to sign a document so that the hotel can by petitioned. Thereafter, there will an election and everyone would vote. It would be a secret ballot. I told her that after the comes in, that they will be represented no longer by us, the managers, but by a business agent, or a steward, or a shop steward, and that that's how business will be conducted going forward." [Tr., pp. 714-15].

Based on the foregoing, the ALJ erred in finding a violation.

(ii) *Witness Estella Cabrera:*

When HSS arrived on August 21, housekeeper Estella Cabrera was on vacation. She had been away from the hotel over thirty days, from August 1 to August 30, and was scheduled to return on September 2. [Tr., pp. 213 and 214]. She recalled being told by coworkers that they "had been transferred to an agency [HSS]." [Tr., p. 214]. Shortly after that, she met with Ms. Arango in the human resources office. When asked on direct to "tell us about that conversation," Ms. Cabrera testified:

> A. She said that there had been many changes, and that we no longer are working for Hyatt but for the Agency [HSS], that it would be up to me whether I grabbed or whether I maintained the – whether I kept hold of the employment or not, it was my decision.

[Tr., p. 214, lines 19-23]. The record reflects Ms. Cabrera paused after stating the above. ALJ Green spoke next, stating: "Okay. And?" Ms. Cabrera then testified, as if in afterthought: "And whether I knew anything about the Union. I told her that I didn't know anything about the Union, because I was, I was vacationing." [Tr., p. 214, line 25 to p. 215, line 2].

The foregoing is the only testimony in which Cabrera describes anything in the nature of interrogation. The ALJ erred in finding the foregoing unlawful. The specific question, as described – "And whether I knew anything about the Union" – is plainly innocuous. *See, e.g.*, Pelton Casteel, *supra.* There is nothing in the mere asking of this question to suggest unlawful interrogation, nor coercion or threats of reprisals. Although Ms. Arango does not recall the topic of the union coming up in this conversation – and explicitly denies therefore asking Cabrera any questions regarding the union, [Tr., p. 716] – it would not seem out of the ordinary for the topic to have come up. Ms. Cabrera, after all, had been away from the hotel over 30 days, during which the RC petition had been filed. In any event, it is at least conceivable the topic came up, and if it did – and if Ms. Arango posed the question attributed to her by Cabrera – the question, as described, would amount to nothing more than a simple inquiry as to whether she was aware of the news concerning the petition. There is no other testimony suggesting interrogation seeking to ascertain Cabrera's thoughts about the Union, or intelligence concerning the Union.

When the General Counsel asked if anything else was said, the witness replied only that Arango, "said to me the Union is not good." [Tr., p. 215]. This statement, though, "contains [no] threat of force or reprisal" – particularly given the context, described below – and is, therefore, a statement of opinion protected under section 8(c). TRW-Semiconductors, *supra*. The ALJ ruled otherwise, in error.

Finally, it is critical to note that Cabrera was an open supporter of the Union. She testified she told Arango, "I said, yes, the Union is good because I had worked previously . . . in a factory and for the Union, and the Union was good." [Id., lines 6-8]. This testimony, reflecting an obvious ease and comfort in speaking freely with Arango concerning her positive union leanings, [*see also*, Tr., pp. 221-22], further illustrates that these discussions were not tainted by

threats or coercion. Accordingly, Rossmore House, *supra* and Graham Arch. Products, *supra* apply, and no violation may be found. In addition, as described above at page 24, after Ms. Cabrera made these pro-union comments, both Arango and General Manager Rostek went out of their way to ensure Ms. Cabrera was hired by HSS (an issue at the time, due to her vacation-related absence on the August 21 takeover day), and also made one of the first unconditional offers of employment to her, in October 2012.

(iii) *Witness Reina Trejo*

Ms. Trejo had worked for Remington prior to HSS, and was employed by HSS on its last day, October 19. Ms. Arango recalls being on a guest room floor, during HSS's tenure in the hotel: "[Ms. Trejo] called me in the room and said, Osiris, I want to talk to you." [Tr., p. 722, lines 14-17]. Trejo proceeded to ask about benefits: "She was very specific about her questions. She wanted to find out about the benefits that we offer. She wanted to find out actually about HSS, what they offer as far as benefits, hourly rate, opportunities, seniority, and things of that nature." [Tr., p. 723, lines 3-7].

While Ms. Arango, as shown above, was precise and clear in testifying that this conversation was initiated by Trejo, and related to benefits, it appeared from Trejo's manner and choice of words in testifying that she had been coached to suggest the conversation was initiated by Arango. The words Trejo used belie the fact that it was she who was interested in, and had questions about, benefits. Note the following, in which she started to describe a question posed by Arango, but shifted gears mid-sentence – toward the truth – showing that it was *she* who had the questions: "Well, she asked me if – well, about benefits and then I asked her what about – what happened to the benefits?" [Tr., p. 296, lines 8-9 (*emphasis added*)]. It is evident from her brief bit of testimony, considered in tandem with Ms. Arango's more complete testimony, that

the two of them were speaking at some length and in detail about benefits. This conclusion is supported by the fact that both agreed, in their respective testimony, that there was a trainee-employee in the room whom Arango asked to step out, so that they could converse in private, which is a customary practice for a human resource professional to follow. Ms. Arango testified: "She told me she wanted to talk about benefits. . . . I don't recall who the new hire was, but I had asked the new hire to step out for a minute because she wanted to talk to me." [Tr., pp. 722-23].

It is also evident that Trejo was coached, in testifying, to emphasize and tie everything back to "the union." Illustrating this, Trejo testified: "I told her if the union gave me better benefits, then I would go with the union. And if the hotel gave me better benefits, then I would go with the hotel." [Tr., p. 296, lines 14-16]. It seems plainly evident, though, that the conversation didn't revolve around the details of so-called union benefits versus company benefits – there was no union in the hotel offering benefits at that time to which comparisons could be made. Instead, it is evident they were talking about the "specific questions" Trejo had regarding the benefits that Remington had, versus the benefits that *HSS* had (as reflected in the above quoted testimony by Arango). *See, especially*, Arango's testimony at Tr., pp. 723-24.

Trejo admits, as noted above, that she asked Arango: "What happened to the benefits?" [Tr., p. 296, line 9]. This question referred obviously to HSS, *not* the union, as this conversation took place shortly after the HSS takeover of the department. In the very next breath, though, after being asked, "*And what was said next,*" Trejo claims as follows: "Well, then she said that if I -- if the union came in, would I go with the union or stay with the hotel?" [Id., lines 11-12]. This Board, pursuant to *de novo* review, can and should refuse to accept the ALJ's crediting of this forced, false-ringing testimony. The two were talking about HSS's benefits, not the union. This testimony reflects only that the witness was coached, as noted above, to emphasize and tie

everything back to the union, and to make it appear that Arango was interrogating her about union support. Ms. Arango knows better than to do that.

Trejo gave testimony, credited by the ALJ, that Arango told her, "that the union was two-faced and that the union takes out a percentage of what we earn." The very next question to Trejo was, "Was anything else said," to which she replied, "No, that was it." [Tr., p. 296]. These statements, given the utter absence of coercion, are protected by section 8(c).

(iv) *Witness Josefina Jurado Portillo*

This witness was one of the employees terminated by HSS, shortly after August 21, for failure to pass E-Verify. [Tr., pp. 380 and 726]. Ms. Portillo testified to a conversation with Ms. Arango on the day she was let go, in the employee cafeteria. No one was present when they spoke. [Tr., p. 380 at lines 24-25]. Ms. Portillo initiated the conversation: "I asked for my medical card . . . [and] asked her what was going to happen to my insurance card if they let us go." [Tr., p. 381]. She testified Arango told her to come by her office to discuss the medical insurance issue, which she did. [Tr., p. 381]. Portillo was asked the following question: "So, tell us what happened when you arrived to her office, please?

> A She said, pretty girl, what do you know about the union? I said I didn't know anything.
>
> Q Was anything else said next?
>
> A She said that she was making a call to find out about my card, my insurance card, and that was it.
>
> Q Anything else occur?
>
> A Just that

[Tr., p. 381]. Ms. Arango, for her part, testified that Portillo was "very very very sad that she had to leave," and asked if there was anything that could be done "for her to stay on." [Tr., p.

726]. Of course, there wasn't anything Ms. Arango could do, as HSS was in control of hiring and terminations. Ms. Arango squarely and believably denied asking the question that Portillo claimed she asked. Ms. Arango said there was no discussion at all related to the union, as "she was concerned about staying on." [Tr., p. 726]. Portillo's testimony is particularly lacking in credibility, in that Ms. Arango was very firm in stating that she has never and would not use the term "pretty girl" when addressing one of her employees. [Tr., p. 726]. Given the entire context and setting of the testimony, the finding of a violation by the ALJ should be rejected.

B. Comments Attributed to Housekeeping Supervisor Percida Rosero

Percida Rosero is a low-level supervisor. She works alongside the room attendants and occasionally cleans rooms. [Tr. p. 195]. Although her primary job duty is to inspect rooms, she doesn't discipline. As one witness admitted, she has "never seen her hire or fire anyone." [Id.]. For this reason alone, any statement she is alleged to have made cannot be taken in any manner as a threat.

The comments alleged to have been made by Rosero were nothing more than her personal opinions. Ms. Rosero in fact made it clear to the ladies she spoke with – according to *their* versions of the conversations – that she was not speaking on authority, but merely stating "rumors" she had heard. [Tr., p. 184]. Not only that, Rosero also stated – according to Ms. Gutierrez – "I don't know what is going to happen." [Tr. p. 205]. Gutierrez admitted further that the statements or predictions she claimed Rosero uttered were not based on anything told to her by management, including Jeff Rostek. [Tr., p. 184]. Rosero was simply reporting a "rumor that she heard." [Id.].

The testimony by Ninfa Palacios and Ana Salgado, who testified Ms. Rosero inquired about a meeting she'd heard about, is more in the nature of over-the-fence gossip between neighbors or co-workers. There is no indication in any of this testimony, or any indication anywhere in the record, to suggest in any way that her inquiries were tinged with threat, coercion or reprisal. None of these witnesses claimed in any manner to a concern by Rosero in asking these idle questions. Graham Arch. Products, *supra*, discussed and quoted at length above, fully applies here.

The testimony by Maria Torrez is particularly inconsequential. She quotes Rosero as saying simply that it was, "because of the union these things were happening," and that "other things" would happen, but she "didn't say anything else about that." [Tr., p. 275]. The cases cited above regarding vague and innocuous remarks apply fully here. *See, e.g.,* Burns Motor Freight, Inc., *supra.* and additional cases cited above.

Finally, with respect to the testimony of Ana Salgado, the ALJ based his finding solely on the ground that Rosero did not testify: "Rosero was not called to testify [6] and I therefore conclude that these remarks [by Salgado, addressed above] constitute unlawful interrogation." This is improper. NLRB Rule 102.45(a) requires the ALJ to make "findings of fact, conclusions, and the reasons or basis therefore, upon all material issues of fact," and it is axiomatic that he is required to make specific findings of credibility. There is no authority for the proposition that an *ipso facto* finding of credibility can be based *solely* on the absence of an opposing witness.

[6] Nor was she subpoenaed.

6. In Violation of Respondent's Due Process Rights, the Administrative Law Judge Allowed General Counsel to Amend the Complaint Close to the Last Day of the Hearing, Adding a New Charge Regarding a Completely Separate Issue.

The hearing in this case was held on seven days between March 5 and March 20, 2013. The complaint alleged various violations of sections 8(a)(1) and 8(a)(3) based on the outsourcing of the housekeeping functions by the Hotel to HSS. Nowhere in the complaint was any mention of improper campaign materials issued in January of 2013, even though the complaint was filed near the end of January, 2013, and even amended on the first day of the hearing, pursuant to the General Counsel's request. [Tr., p. 7]. Nor was any unfair labor practice charge ever filed with respect to the campaign materials.

Nevertheless, on Monday, March 18, when the hearing was nearly complete, the General Counsel sought to introduce evidence regarding the campaign materials. When counsel for the Respondent objected, the ALJ indicated his view that the materials did not appear to be a violation of the Act, and said to the General Counsel, "[D]on't do this to me orally at the end of your case, all right? This is not appropriate. Make a formal motion to amend the complaint and I'll rule on it and I'll receive the documents in connection with that. And I'm going to dismiss it, those amendments." [Tr., p. 529, l. 15-19]. Despite the ALJ's admonition that the General Counsel should file a written motion to amend, he simply submitted a proposed amendment, without an accompanying motion. [Exhibit GC 24].

Nonetheless, the ALJ granted the amendment over the objections of Respondent's counsel, indicating, "I'm going to grant it, because I don't have much choice about it." [Tr., p. 576, l. 23-24]. When Respondent's counsel objected on due process grounds because the Respondent had not been given an opportunity to prepare a defense, the ALJ stated in conclusory fashion that it was unnecessary to give the Respondent an opportunity to prepare a defense.

"Look, I'm going to grant the motion to amend. … There is no litigation that's really foreseeable with respect to those pieces of paper, because the papers say what they say. They are either a violation of the Act or they are not. My opinion, they are not." [Tr., p. 587, l. 9-18].

Without discussion of the due process issue, without noting the fact that the General Counsel made a late amendment that gave the Respondent no opportunity to respond, the ALJ found that campaign material identified as Fact #2, [Exhibit GC 22], was a threat comprising a violation of the Act. [ALJD, p. 13].

The Board's Rules and Regulations, section 102.17, permit the General Counsel to amend, but only if to do so is "just." *See also*, NLRB Bench Manual, section 3-320 ("Generally, amendments are permitted *when they are sufficiently related to existing allegations* and *no undue prejudice* would be visited on the respondent . . . If the motion is granted, the judge should be liberal in granting the respondent sufficient time to submit evidence in response to the amendments") (*emphasis added*).

In determining whether allowance of an amendment is appropriate, the Board evaluates three factors: "(1) whether there was surprise or lack of notice; (2) whether the General Counsel offered a valid excuse for its delay in moving to amend; and (3) whether the matter was fully litigated." Stagehands Referral Serv., LLC, 347 NLRB 1167, 1171-72 (2006). In Stagehands, the Board criticized the General Counsel for waiting until the end of the hearing to seek amendment to add additional alleged discriminates to those described in the complaint. "While the General Counsel offered the Respondents additional time to put on additional evidence, such an opportunity does not necessarily cure the problem, and the reasons proffered for the delay do not justify waiting until the very end of the hearing."

Similarly, in Consol. Printers, Inc. & Graphic Commc'ns Union, Local No. 583, Graphic Comm. Int'l Union, AFL-CIO, 305 NLRB 1061, 1063-64 (1992), the Board held that the failure to notify the Respondent and give it the opportunity to shape the hearing record based on the additional charges was fatal to the attempted amendment:

> Respondent at the very least was entitled to know of the General Counsel's intentions at the soonest possible opportunity. I find that this did not occur. It may not be glibly assumed that Respondent counsel's handling of Respondent's case would have been unchanged had he been aware of the potential new allegations.
>
> Nor may it fairly be assumed that the provision of an opportunity to defend against the allegation by simply granting the amendment at the conclusion of the record and giving Respondent additional time to prepare and thereafter to submit evidence to meet the new allegations would suffice. A trial record, like life itself, proceeds in one direction only. One may regret but cannot change what is past. An evidentiary record may be augmented but augmentation is an addition to and not a substitution for what has gone before.

In other words, "[w]here no or an insufficient explanation is made to explain a prosecutorial delay in proposing an amendment to the complaint or in informing Respondent that such an amendment will be proposed, the motion to amend the complaint should be denied." *Id.*, 305 NLRB at 1064. *See also* New York Post Corp., 283 NLRB 430 (1987) (reversing an ALJ's decision to permit a last-day amendment where the General Counsel had no legitimate explanation for waiting until the last minute to add the allegation).

The materials that are at issue were, by definition, widely disseminated materials that the Union and the General Counsel should have known about long before the amendment was orally requested on March 18. Indeed, if there was a problem with the materials, an Unfair Labor Practice charge should have been filed, and the Respondent would have had the opportunity to defend against that charge so that the Regional Director could determine whether it was even

appropriate to be included in a complaint.[7] The General Counsel's excuse that the materials had only been received the previous week is therefore disingenuous and does not justify his waiting until almost the end of the hearing to seek amendment. Notably, the General Counsel failed to submit a formal motion to amend, as the ALJ requested, and the Respondent thus had no opportunity to respond formally.

Moreover, the issues raised in the amendment, the content of certain campaign materials, were completely different from the issues raised in the rest of the complaint and in the hearing, which centered on the outsourcing of housekeeping functions to HSS. The Respondent therefore had neither notice that the campaign materials would be at issue nor opportunity to prepare a defense. *Cf.* NLRB Bench Manual, Section 3-320 (emphasis added) ("Generally, amendments are permitted *when they are sufficiently related to existing allegations* and *no undue prejudice* would be visited on the respondent."). *Cf.* In Re Empire State Weeklies, Inc., 354 NLRB No. 91 (Oct. 5, 2009) (the original and amended allegations involved the same individuals and the same conversation, and alleged a violation of the same section of the Act, so that the Respondent had the opportunity to fully litigate the issue).

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[7] *Cf.* Leeward Nursing Home, 278 NLRB 1058, 1059 (1986) (criticizing the General Counsel's submission of "background" materials that were never alleged in an unfair labor practice charge or complaint: "This by-now-familiar argument made in connection with the recurring phenomenon of attempts by agents of the General Counsel to litigate nonalleged violations falling within the 10(b) period deserves digressive comment. Such recurring practices are often fundamentally unfair — even "unjust" within the meaning of the Board's recent decision in Seaward International, 270 NLRB 1034 (1984). It is not enough for the General Counsel simply to make a disclaimer that the evidence sought to be introduced is merely for 'background.' Such a disclaimer does not lessen the burden on a respondent who, without prior notice that such conduct is being called into question, must necessarily defend against the nonalleged matter or risk a finding that it was guilty of such wrongful conduct — a finding which may well influence heavily the judgment to be made on the ultimate question whether the respondent has committed the violations which *were* specifically pleaded in the complaint."). (emphasis in original)

Finally, the ALJ then compounded the problem by admitting the materials without giving Respondent the opportunity to submit a defense. Indeed, as the Respondent's representative pointed out, the materials were drafted by lead counsel for the Respondent, and a conflict-of-interest issue therefore arose in connection with the Respondent's ability to put on evidence regarding the new allegations; the ALJ simply avoided that issue by precluding the Respondent from submitting any responsive evidence whatsoever. Transcript at 580, l. 17-25 – 581, l. 1-3; 586, l. 5-11.

The allowance of the amendment was not "just" and should be reversed.

7. The Administrative Law Judge Erred in Deciding that the Campaign Item Identified as 'Fact # 2' Violated Section 8(a)(1) of the Act, and Erred in Failing to Recognize its Protection Under Section 8(c) of the Act.

The campaign material the ALJ ultimately found objectionable -- Fact # 2 [8] – does nothing more than state a *'fact of industrial life*.' As this Board has explained, the Act is not violated when an employer communicates the factual reality that when a collective bargaining agreement is negotiated, the parties must adhere to the rules set forth therein, and that relationships within the workplace may be changed thereby:

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[8] Fact # 2 reads as follows:

Question: Would the enforcement of work rules change if the Union is voted in?
Answer: YES! The rules would be applied and enforced more strictly. Right now, managers have a lot of flexibility and room to be fair. We believe in 'extra chances' (except for very serious violations). In a Union hotel, that would go away. The rules would have to be enforced *very* rigidly. That's just the way it is in 'union' companies – employers are *afraid* of 'doing favors'; *afraid* of being flexible.
Why is that? Because 'union' companies worry that when they give an otherwise good employee an 'extra chance', the union will use it against them later on – by a grievance filing – when the same violation is committed by an employee who really does deserve to be fired. *This is a bad thing for good employees.*"

> There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before. This is especially so, as implied in the Employer's statement here, where a collective-bargaining agreement is negotiated. Section 9(a) thus contemplates a change in the manner in which employer and employee deal with each other.
>
> For an employer to tell its employees about this change during the course of an election campaign cannot be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct. As the Ninth Circuit has observed, "[I]t is a 'fact of industrial life' that when a union represents employees they will deal with the employer indirectly, through a shop steward." NLRB v. Sacramento Clinical Laboratory, 623 F.2d 110, 112 (9th Cir. 1980).

Tri-Cast, Inc., 274 NLRB 377 (1985). This Board has further stated: "An employer does not violate the Act by informing employees that unionization will bring about 'a change in the manner in which employer and employee deal with each other.' To the contrary, truthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)." United Rentals, Inc. & Int'l Union of Operating Engineers, Local 12, Afl-Cio, 349 NLRB 190, 191 (2007). *See also* Dish Network Corp. & Commc'ns Workers of Am. Local 6171, 358 NLRB No. 29 (Apr. 11, 2012) (the following statement held permissible: "If a workplace is Union, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company's attention, not you. He controls your fate, not you"); Ben Venue Laboratories, Inc., 317 NLRB 900 (1995) (statement that Respondent's "open-door policy" would no longer exist if the employees voted to unionize was not unlawful); United Artists Theatre, 277 NLRB 115 (1985) (reversing ALJ finding that the following statements violated the Act: "The handbill stated that, if the Union won the election, "we will be obligated by law to discuss grievances only with the Union, not with you, AND THEREFORE YOUR RIGHTS DEPEND SOLELY ON WHETHER OR NOT THE UNION DECIDES TO PURSUE THEM

ON YOUR BEHALF". The letter stated: You have always had the right to deal directly with the management of our Company. Should this union get in, you will have voted away that right and you will have placed a group of outsiders who know nothing about our business between yourself and your company."); FGI Fibers, 280 NLRB 473 (1986) (the following campaign statements held to be protected by section 8(c): "Placing a union in between management and employees will formalize the structure to the point where both the company and the employees will find it much more difficult to work and communicate effectively," and that dealing with employees through a shop steward would result in the loss of "personal relationships"); N.L.R.B. v. Hovey Elec., Inc., 964 F.2d 543, 547 (6th Cir. 1992) (employer statement that a union would result in less flexibility in scheduling were not unlawful); Int'l Union, United Auto, Aerospace & Agr. Implement Workers of Am., (UAW) v. N.L.R.B., 834 F.2d 816, 821 (9th Cir. 1987) ("The prediction about the adverse economic impact of compliance with the union's standard job classifications was based on objective circumstance beyond the company's control. . . . Furthermore, the employer has the right under section 8(c) to comment on the reasonably expected adverse consequences of compliance with standard union contracts.").

The Board should reject the finding of the ALJ that this document violated the Act.

8. The ALJ Erred in Recommending the Board Find and Hold that Respondent Violated Section 8(a)(3) of the Act in Discharging Margaret Loiacono.

Margaret Loiacono was hired on September 18, 2012, [Exhibit R-19], as a "lobby ambassador." The basic function of her job, as the name implies, was to greet guests on arrival in the lobby, and to wish them well in the lobby upon departure. In addition, she was to function as a traditional hotel concierge, offering assistance with regard to guest needs or information they might require. The job is in fact a critical one for a high-end hotel like the Hyatt Regency,

and was particularly critical to this hotel given its dismally low guest-satisfaction scores, as discussed elsewhere in this brief. By delivering a personal touch or an act of kindness and helpfulness – that is, by "wowing" the guests, as both she and hotel General Manager Jeff Rostek testified [Tr. p. 357 (Loiacono); p. 809 (Rostek)] – an effective lobby ambassador can make the difference between an otherwise mediocre stay, and one that delivers a return guest.

But … a lobby ambassador has to be in the lobby in order to perform this function. She cannot be in the basement of the hotel engaged in a 10 to 15 minute conversation with another employee concerning matters unrelated to her duties – particularly at 11:30 on Sunday morning, which is a "peak departure" time for weekend/social guests. [*see*, Tr., p. 811 (Rostek: Sunday morning is a peak departure time); *and see*, Exhibit R-5 (job description, under the heading "Service Standards," which states: "Must be visible in the lobby during peak periods of arrival and departure activity")].

It was for this reason – her absence from the lobby that Sunday morning at 11:30 am on December 30, 2012, as spelled out in the disciplinary documentation [Exhibit GC-8] – that Margaret Loiacono was discharged. The facts concerning this discharge are undisputed. [Tr., p. 353-55 (Loiacono), and p. 734-36 (Rostek)]. Ms. Loiacono traveled downstairs to the housekeeping office to find out whether a requested refrigerator had been delivered to a guest (claiming she was unable to reach the supervisor on the hotel's radio). She was seeking, therefore, a simple 'yes or no' answer, and admitted she was told – without delay – that, yes, the refrigerator had already been delivered and so, therefore, 'problem solved.' She then engaged in a discussion which she admitted lasted "ten minutes or so," [Tr., p. 355], related to an informational pie chart which had been distributed to employees in connection with the then-ongoing RC election campaign.

The facts are also undisputed that Ms. Loiacono was not a union supporter, and never presented herself as one. When testifying, she admitted that in a conversation with hotel General Manager Jeff Rostek and other employees, she "made comments to indicate . . . that [she was] on his side" with respect to the "opinions that he was expressing about the union," and that she further stated in this conversation that, (i) "it would have to be a big union to get benefits," and (ii) she was "not for the union or against the union, but that [she] would probably be non-union." [Tr., p. 375].

Loiacono was terminated within her 120-day probationary period, on January 2, 2013 (106 days since her September 18 hiring); *see*, Exhibit GC-8; *see also*, Exhibit R-7 (employee handbook provision describing the 120-day "Orientation Period"). Loiacono admitted her awareness, understanding and the applicability of this probationary rule. [Tr., p. 376-77 (admitting, as provided in the handbook, that the 120-day period was an "opportunity to get to know the hotel, [her] job and [her] supervisor," during which time her work performance would be monitored, and admitting she received the "benefit of going through most of that [120-day] orientation period")].

Loiacono had also been previously reprimanded for displaying a negative attitude, and she admitted this reprimand was "legitimate." [Tr., p. 369]. This was a matter of no small consequence given the nature of her position. *See*, Exhibit R-5 (job description, in the opening two paragraphs refers to the lobby ambassador's role as the hotel's "lead cheerleader," and states that "it is envisioned that you will enjoy interactions with our guests").

Loiacono's discharge was consistent with other discipline recently handed out in the hotel, a fact ignored in total by the ALJ. Mr. Rostek testified to disciplines given to two other employees – Ryan Schipf and Robert Keenan – who committed a similar infraction (ignoring

guests in the lobby, while engaged in a sports discussion). [Tr., pp. 737-46]. Mr. Schipf, who was in his 120-day probationary period, was terminated. Mr. Keenan, a longer-term employee, was given a written warning but not discharged.

The ALJ correctly found that "Loiacono did not join the union or assist it in any other way and she did not, in my opinion, engage in what can be described as concerted activity within the meaning of Section 7 of the Act." [ALJD, p. 13]. The ALJ goes on, however, to identify in the next sentence the following issue:

> The issue therefore is whether the evidence would support the contention that notwithstanding the above, the Respondent discharged this employee (before her probation period had ended) because it <u>believed</u> that she engaged in such activities. And if that is the case, then the General Counsel would prevail. [<u>Id</u>.; (*emphasis added*)].

The ALJ cites no authority for the proposition that an 8(a)(3) violation can be based on a supposed subjective intent to violate section 7 rights in the absence of any evidence of an actual violation of such rights. Nonetheless, the ALJ proceeded to examine and discuss the evidence related to the December 30 incident pertaining to the conversation Loiacono had with the housekeeping supervisor about the pie chart. He noted that he regarded it as "peculiar" that a third-party report by a manager, setting forth what the manager had been told by the housekeeping supervisor concerning the discussion with Loiacono on December 30, was "different" and "far more emphatic and colorful" than the "rather bland description" Loiacono testified to in the hearing. In any event, citations of authority should not be necessary for this Board to accept that Loiacono's in-court testimony concerning what was said in the December 30 conversation is controlling – as to the 'truth of the matter asserted' with respect to what was actually said by Loiacono in that conversation – over the double-hearsay contained in the manager's report of what was said by Loiacono. While the manager's report may be admissible

to explain subsequent conduct by Respondent, the fact remains, as the ALJ found, that the manager's report does not reflect that Loiacono was engaged in protected concerted activity. Therefore, regardless of what Respondent may have *believed* and acted upon after its receipt of the manager's report is immaterial to a determination of 8(a)(3) liability.

There is also nothing in Loiacono's testimony, as the ALJ correctly found, supportive of the conclusion that she was engaged in protected and concerted activity related to her conversation about the pie chart on December 30. Loiacono also testified to a separate conversation that day with General Manager Rostek concerning the pie chart. Mr. Rostek testified that Loiacono's communication concerning an error in the pie charts – the same issue discussed with the housekeeping supervisor – was delivered as constructive, "helpful" criticism, which he was happy to receive. [Tr., p. 736]. Loiacono, for her part, acknowledged the same. [Tr., pp. 371-372].

The ALJ nonetheless stated he "cannot escape the conclusion that it is more probable than not, that the Respondent's management viewed her as a potential obstacle in relation to their own election campaign propaganda." [ALJD, p. 16]. There is, simply put, nothing in the record supporting this extraordinary conclusion, and the ALJ offers no analysis or reasoning in support of this extraordinary conclusion, except for the following: "In the circumstances, it seems to me that the Respondent's view of Loiacono's reported extravagant reaction to the pie charts could likely have lead management to view her as a potential thorn in the side when it came to other campaign literature that it intended to issue as the election drew nearer." The ALJ is engaging here in rank, wholly unwarranted speculation. The bottom line is that Loiacono did not engage in protected concerted activity, was not supportive of the union, and her comments concerning

the pie chart, as described in her own testimony – in both the discussion with the housekeeping supervisor and General Manager Rostek – was in the nature of helpful, constructive criticism.

The ALJ cites no authority for the proposition that he can base an 8(a)(3) violation on facts, such as presented here; *i.e.,* where it is admitted the employee was not supportive of the union nor engaged in concerted protected actively, and based instead only on a thin rationale of 'beliefs' attributed to management. To the contrary, as this Board has held: "Mere suspicions of unlawful motivation are not sufficient to constitute substantial evidence." Berry Sch. v. N.L.R.B., 653 F.2d 966, 971-72 (5th Cir. 1981) (citation omitted) (denying enforcement of unlawful discharge finding where there was no evidence that the discharge was motivated by unlawful animus). *See also,* Hanlon & Wilson Co. v. N.L.R.B., 738 F.2d 606, 612 (3d Cir. 1984) (denying enforcement of unlawful discharge finding where there was no evidence that the employee participated in any protected activity); E.I. Du Pont De Nemours & Co. v. N.L.R.B., 707 F.2d 1076, 1079 (9th Cir. 1983) (denying enforcement of unlawful discharge finding where the employee acted alone, and stating: "The possibility of concerted activity – that this might be incipient group activity – is wholly speculative."); Enloe Med. Ctr. v. N.L.R.B., 433 F.3d 834, 840 (D.C. Cir. 2005) (finding that employer's correction of employees for negative attitudes could not support the "sheer speculation" engaged in by the ALJ, that the statements "must" have been directed at protected activity issues).

This 8(a)(3) charge should be dismissed, for the reasons stated above.

Respectfully submitted, this 19th day of June, 2013.

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UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

REMINGTON LODGING & HOSPITALITY, LLC

and

REMINGTON LODGING & HOSPITALITY, LLC
LLC, and HOSPITALITY STAFFING SOLUTIONS, joint employers,

Charge No. 29-CA-093850
29-CA-095876

Respondent,

and

LOCAL 947, UNITED SERVICE WORKERS UNION, INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES.

Charging Party

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Exceptions Brief was electronically filed with the Executive Secretary's Office via the NLRB website and copies emailed to the counsel of record listed below:

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