

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

AQUA-ASTON HOSPITALITY, LLC, D/B/A
ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW

And

Case 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517

UNITE HERE! LOCAL 5

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I. INTRODUCTION¹

On May 31, 2016, Administrative Law Judge Mara-Louise Anzalone issued her Decision and Order² in the above-captioned matter in which she found that Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (“Respondent”) violated section 8(a)(3) and (1) of the Act by issuing employees Edgardo Guzman (“Guzman”) and Santos “Sonny” Ragunjan (“Ragunjan”) written discipline for engaging in union and/or protected activity. The ALJ also found that Respondent, through statements made by then Vice-President Gary Ettinger (“Ettinger”), violated section 8(a)(1) of the Act by threatening employees with discharge for engaging in union and/or protected activity, by ordering employees to cease engaging in union and/or protected activities, and by soliciting employees to disclose their union sympathies. Respondent also violated Section 8(a)(1) of the Act when its agent, Security Supervisor Andrew Smith (“Smith”) ordered employees Jonathan Ching (“Ching”) and Lakai Wolfgramm (“Wolfgramm”) to cease handbilling in non-work areas, during non-work time.

Respondent now excepts to the ALJ’s factual and legal conclusions. Respondent’s Exceptions reveal that it is simply unhappy with the ALJ’s well-supported summary of the evidence and her characterization of Respondent’s witnesses’ testimony. Respondent is further displeased with the ALJ’s proper credibility resolutions. This culminates in Respondent’s disagreement with the ALJ’s apt application of the law and findings that Respondent violated the Act. Respondent presents 119 Exceptions, many without any analysis of how each Exception would alter the ALJ’s findings that Respondent violated the Act. Counsel for the General

¹ The Administrative Law Judge is referred to herein as “ALJ.” References to the ALJ’s Decision and Order are noted as “ALJD” followed by the page number and line(s). References to the transcript are noted by “Tr.” followed by the page number. References to the General Counsel’s exhibits are noted by “GC Ex.” followed by the exhibit number. References to Respondent’s exhibits are noted by “Res. Ex.” followed by the exhibit number. Respondent’s Brief In Support Of Exceptions are noted as “Res. Brief in Support” followed by the page number.

² Judge Anzalone issued an Errata on June 7, 2016, making several non-substantive modifications to her Decision and Order.

Counsel (“GC”) submits that the record as a whole and the relevant case law fully supports the ALJ’s factual and legal conclusions, and recommended order regarding the above issues and urges the Board to adopt the Judge’s decision in its entirety. Accordingly, GC now submits its Answering Brief to the Respondent’s Exceptions.

II. FACTS

Respondent manages and operates two adjacent hotels in Waikiki, Hawai`i – the Aston Waikiki Beach Hotel and Hotel Renew.³ In February 2015, Unite Here! Local 5 (“Union”) began a campaign among employees at the Aston Waikiki Beach Hotel and Hotel Renew to achieve a fair process for employees to decide Union representation.⁴

A. Respondent’s Executive Vice-President Made Unlawful Statements to Employees

Beginning in February 2015, pro-Union Hotel employees began holding early morning rallies outside the Hotel during which they chanted and banged pots and pans.⁵ In response, Respondent began holding meetings with employees to address the Union’s campaign.⁶

On May 19, 2015, Respondent held two employee meetings at the Aston Waikiki Beach Hotel attended by 30-35 employees of both of Respondent’s hotels.⁷ Respondent’s Executive Vice-President Ettinger spoke at both meetings.⁸ Ettinger spoke in English at the meeting,

³ Tr. 624:24-625:4; ALJD 2:31-32.

⁴ GC Ex. 7; Tr. 628:1; ALJD 2:39-40.

⁵ Tr. 509:16-18; 628:1,9-11; 739:5-8; ALJD 10:24-25.

⁶ Tr. 629:12-22; ALJD 10:26-27.

⁷ Tr. 216:14-18; 264:15-16; 507:1-4; 688:15-16; ALJD 10:34-35.

⁸ Tr. 638:8-9; ALJD 10:34-35.

without the use of a translator.⁹ Two-thirds of the employees attending the meeting did not speak English as a primary language.¹⁰

Ettinger told the employees, among other things, that guests were complaining about noise from the rallies, and that, going into the Hotel's busy season, he was concerned that this conduct would drive away business and reduce work opportunities.¹¹ Ettinger told the employees that certain employees had complained about being bothered at home and at work by pro-Union employees.¹² Ettinger told the employees that they had the right to decide who could enter their homes and if the Union supporters refused to leave, the employees could contact the police.¹³ Ettinger told the employees to stop banging pots and pans and to stop bothering your co-workers at home.¹⁴ Ettinger told the employees that the Union "should call for a vote, not do things via pots, pans and harassment."¹⁵

Ettinger concluded the meeting by telling the employees, after mentioning that other hotels were cutting back staff, that Respondent's employees were lucky to have jobs.¹⁶ Ettinger told the employees that if they wanted, they could stop by his office and apologize to him.¹⁷

B. Respondent Issued Written Warnings In Violation Of The Act

On May 22, 2015, Utility Housekeeper Dany Pajinag ("Pajinag") complained to his supervisor, Executive Housekeeper Marissa Cacacho ("Cacacho"), that Utility Housekeeper Ragunjan approached him the day before while he was working and invited him to have his

⁹ Tr. 638:12-13; 744:15-17; 311:19-21; ALJD 11:1-2.

¹⁰ Tr. 744:23-25, 745:1-11.

¹¹ Res. Ex. 16, 17; ALJD 11:5-7.

¹² Tr. 318:10; 640:8; 644:8-10; 689:7-9; 747:5; 749:5; 794:2-3; ALJD 11:9-11.

¹³ Tr. 307:3-4; 645:2; 796:5-7; ALJD 11:12-14.

¹⁴ Tr. 223:25; 237:23-25; 239:20-23; 266:15 errata; 306:17-19; ALJD 11:19-20.

¹⁵ Tr. 794:21-24; Res. Ex. 18, 19; ALJD 12:3-5.

¹⁶ Tr. 224:3, 238:1-3; 265:13-14; 308:6; ALJD 12:6-7.

¹⁷ Tr. 274:7-8, 11; 309:24; 310:19; ALJD 12:8-9.

picture taken and sign a union authorization card.¹⁸ On June 9, 2015, Pajinag complained to Cacacho that on June 5 and June 9 Maintenance Engineer Guzman had solicited him to sign a Union authorization card and to have his picture taken.¹⁹

On June 10, 2015, Respondent's General Manager Mark DeMello ("DeMello") and Rooms Division Manager Janine Webster ("Webster") interviewed Guzman and asked him if he had ever asked someone to take a picture for any non-work related purposes during work hours and work time.²⁰ Guzman denied doing so.²¹ DeMello and Webster refused to identify to Guzman who made the complaints against him.²²

On June 15, 2015, Pajinag complained to Cacacho that Rangunjan had earlier²³ threatened Pajinag in Ilocano, their native language, with what Cacacho described as a "death threat."²⁴ That same day DeMello and Webster interviewed Pajinag. Pajinag described to DeMello and Webster his interactions with Guzman and his May 21 interaction with Rangunjan.²⁵ During the June 15 meeting, DeMello and Webster did not discuss Rangunjan's alleged threat.²⁶

On June 19, 2015, DeMello and Webster briefly re-interviewed Guzman and, for the first time, interviewed Rangunjan.²⁷ DeMello and Webster again refused to identify Guzman's accuser.²⁸ At DeMello and Webster's request, Guzman provided a written statement

¹⁸ Tr. 546:14; Res. Ex. 13; ALJD 4:7-10.

¹⁹ Tr. 560:1; 340:3,12; 345:4; 353:4; 356:5; ALJD 4:12-14.

²⁰ Tr. 482:6; 482:11-13; 811:22-23; ALJD 5:1-6.

²¹ Tr. 482:13; 811:24; ALJD 5:6

²² Tr. 357:22-23; 358:1; ALJD 5:6-7.

²³ The exact date of the alleged threat is in dispute. During his testimony Pajinag could not remember the date the alleged threat was made. Tr. 590:9-24; ALJD 5:34, 6:1-2; 6:4-10.

²⁴ Tr. 538:20-22; 603:23-24; 604:12-14; ALJD 5:14-19.

²⁵ Tr. 433:22; ALJD 5:23-31.

²⁶ Tr. 812:6-12; ALJD 5:33-34

²⁷ Tr. 443:19; 443:14; ALJD 6:14-15.

²⁸ Tr. 445:22-25; ALJD 6:16-17.

summarizing what DeMello and Webster asked of him on June 10 and stated that his response denying the allegations had not changed.²⁹

DeMello and Webster asked Ragunjan whether he had ever asked anyone to take a picture for a non-work related purpose during work time.³⁰ Ragunjan denied doing so.³¹ DeMello and Webster did not ask Ragunjan about the alleged threat made against Pajinag.³²

On June 30, 2015, Respondent disciplined Guzman and Ragunjan for engaging in union activity.³³ Guzman and Ragunjan were each issued a written warning for their conduct in soliciting Pajinag to sign a Union authorization card and requesting him to have his picture taken for a Union flyer.³⁴ Ragunjan's written warning also mentioned the alleged threat he made against Pajinag.³⁵

C. Respondent Unlawfully Threatened Trespass

On August 10, 2015, Webster learned the Ching was planning, on August 11, to pass out pro-Union flyers in the lower lobby of the Aston Waikiki Beach Hotel.³⁶ Webster and DeMello met with Security Supervisor Smith and instructed him to order Ching to leave the Hotel property and inform Ching that if he refused to leave he would be trespassed from the Hotel.³⁷ Webster instructed Smith to trespass Ching if he failed to leave the Hotel property.³⁸

²⁹ Tr. 360:7; ALJD 6:17-20.

³⁰ Tr. 484:17-18; 812:8-9; ALJD 6:23-24.

³¹ Tr. 484:20; ALJD 6:24.

³² Tr. 812:6-12; ALJD 6:27-33.

³³ GC Ex. 10, 11; ALJD 3:6-8.

³⁴ GC Ex. 10, 11; ALJD 3:8-11.

³⁵ GC Ex. 11; ALJD 7:17-18.

³⁶ Tr. 671:22; 821:18-21; ALJD 16:16-17.

³⁷ Tr. 44:18; 49:17,20-21; 62:12-16; ALJD 16:19-21. "Trespassing" means barring an unwanted person from the Hotel property for a year with the threat that, should they return within that year, they would risk arrest. Tr. 64:16-25, 65:1-14; ALJD 16:21-23.

³⁸ Tr. 50:12-14; ALJD 16:24-25.

On August 11, 2015, Ching and Wolfgramm stationed themselves in the lobby's entrance area, each in front of a red pillar facing the lower lobby/porte-cochère driveway, and prepared to hand out pro-Union flyers.³⁹ Smith, together with an additional Security Guard and Respondent's Front Office Manager Adam Miyasato ("Miyasato"), approached Ching and Wolfgramm.⁴⁰ Smith gave Ching a verbal warning that he was not allowed to pass out pamphlets on Hotel property.⁴¹ Smith told Ching that if they refused to leave Ching and Wolfgramm would be "trespassed".⁴² Ching asserted their right to remain. Smith replied that Ching and Wolfgramm could not be there and asked them to leave.⁴³

Ching asked Miyasato if someone, other than an outside contractor (referring to Smith), could give them direction. Miyasato gestured to Smith and told Ching that Smith will do.⁴⁴ Smith told Ching that he represents management and speaks on their behalf.⁴⁵ Smith again told Ching and Wolfgramm that he would trespass them if they did not stop handbilling and leave the property.⁴⁶ Ching and Wolfgramm complied and left the Hotel property.⁴⁷

III. APPENDIX A OF RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS SHOULD BE STRICKEN

Pursuant to Section 102.46 of the Board's Rules and Regulations GC moves to strike "Appendix A" of Respondent's Brief in Support of its Exceptions to the ALJD. Respondent's Brief in Support does not comply with the page limit in Section 102.46(j). Section 102.46(j) sets a limit of 50 pages for briefs, including Respondent's Brief in Support. Respondent attempts to

³⁹ Tr. 68:1-3; 68:23-69:5; 157:18-19; 195:1-12; GC Ex. 5, 9, 15:Camera 11; ALJD 16:28-31.

⁴⁰ Tr. 51:2,17; 52:10-11; 71:11; GC Ex. 15:Camera 10; ALJD 16:31.

⁴¹ Tr. 52:13-15; 20-23; ALJD 16:33-34.

⁴² Tr. 52:13-15; 52:21-25, 53:1; 72:1-2; 106:8-10; ALJD 16:34-35.

⁴³ Tr. 76:4-5, 12-13; ALJD 16:36-37.

⁴⁴ Tr. 73:4; ALJD 16:40-41.

⁴⁵ Tr. 74:9-10; ALJD 16:41-42.

⁴⁶ Tr. 52:13-15; 52:21-25, 53:1; 72:1-2; 106:8-10; ALJD 17:1-2.

⁴⁷ Tr. 164:9-13; GC Ex. 15:Camera 10, 11.

evade Section 102.46(j) by adding the 6-page “Appendix A” to its 48 page Brief in Support. Under Section 102.46(j) a subject index, table of cases, and other authorities cited are not subject to the 50-page limitation. Respondent’s “Appendix A” to its Brief in Support is neither of these exceptions. Further, Respondent has not received permission, by way of a motion to the Board, as required in Section 102.46(j), to exceed the 50-page limit. Because Respondent’s Brief in Support does not comply with the requirements of Section 102.46(j) of the Board’s Rules and Regulations, GC respectfully requests that the Board strike “Appendix A” from Respondent’s Brief in Support.

IV. ARGUMENT

Respondent makes 119 exceptions to the ALJ’s Decision and Order. Despite the voluminous number of exceptions, Respondent fails to provide any analysis on how its exceptions affect the ALJ’s Decision and Order. Respondent simply fails to make any arguments on how or why its exceptions would alter the ALJ’s finding that Respondent violated the Act. For this reason, and for all of the reasons provided in this Answering Brief, Respondent’s Exceptions should be rejected in total.

A. The ALJ Properly Credited and Discredited Witness Testimony

Respondent excepts to several of the ALJ’s credibility determinations. Respondent’s exceptions 8, 17, 23, 30-35, 64, 68-75, and 77 specifically except to the ALJ’s credibility findings. The Board cannot reverse the ALJ’s Decision and Order in this case without reversing the vast majority of the ALJ’s credibility determinations. These findings were well-supported and based on the ALJ’s perception of the demeanor of witnesses and her analysis of corroborating facts and evidence.

In addition to taking exception to credibility findings, a large number of Respondent's exceptions (noted below) are based on the ALJ's findings of fact, which were also fully supported by the record and involved credibility determinations. "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *D & F Industries, Inc.*, 339 NLRB 618, fn.1 (2003) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)). Accordingly, Respondent's exceptions 8, 17, 23, 30-35, 64, 68-75, and 77 should be dismissed.

B. ALJ Properly Summarized The Record

Respondent's Exceptions 3, 6, 9-16, 18, 19, 22, 25, 36, 55, 57-63, 65, 66, 76, 88, 99-101, 103, 105, 106, and 108-116 allege that the ALJ, in her ALJD, misstated the record. Respondent's Exceptions 2, 4, 5, 7, 18, 20, 22, 43, 47, 48, 56, 93, and 94 allege that the ALJ, in her ALJD, mischaracterized the testimony of witnesses and evidence in the record. Respondent's Exceptions 1, 3, 17, 18, 21, 37, 39, 42, 43, 48-50, 52, 67, 86, 87, 90, 93, 102, 104, 107, 109, 112, 116, and 117 except to the ALJ findings of fact. Contrary to Respondent's assertions, the ALJ properly characterized and summarized the facts as presented in the record.

1. The ALJD Accurately Reflected the Record Evidence

In Exceptions 3, 6, 9-16, 18, 19, 22, 25, 36, 55, 57-63, 65, 66, 76, 88, 99, 100, 101, 103, 105, 106, and 108-116 Respondent, generally, simply disagrees with the ALJ's summary of the record. Many of the ALJ's recounting of the facts on the record involves the ALJ's credibility determinations and her interpretation of often disjointed and confusing testimony by Respondent's witnesses. For example, in Exception 25, Respondent argues that the ALJ

misstated the record when she stated in the ALJD that “[Webster] made no mention of confronting Ragunjan with the alleged threat [against Pajinag] but instead testified that [Ragunjan] was simply asked...whether he had ever requested that someone take a picture for a non-work related purpose.”⁴⁸ Respondent argues that the ALJ’s reading of the record is wrong. Respondent argues that Webster asked Ragunjan about the alleged threat made to Pajinag.⁴⁹

The record supports the ALJ finding that Webster only asked Ragunjan about the picture-taking allegation. When Webster testified directly about what was discussed at the June 19 meeting, she does not mention asking Ragunjan about the alleged threat.⁵⁰ During the hearing, Respondent’s counsel, perhaps in an attempt to rehabilitate Webster’s earlier testimony, asked Webster with a leading question, if she, “later on,” asked Ragunjan about Cacacho’s June 15 written statement.⁵¹ There is no indication in the record when this “later on” questioning of Ragunjan occurred. It is not clear if Ragunjan was asked at the June 19 meeting about the alleged threat or at some “later on” date. The ALJ’s summary of the facts is consistent with Webster’s testimony about the June 19 meeting between Webster, DeMello and Ragunjan. Respondent’s Exception 25, and Respondent’s other similarly reasoned Exceptions to the ALJ’s alleged misstatements of the record should be denied.

Within this identified group of Exceptions, Respondent also excepts to the ALJ’s summary of the facts by alleging that the summary of the facts in the ALJD are not exact quotes of the witnesses testimony. For example, in Exception 63, Respondent argues that the ALJ misstated the record that “[Employees Faustino Fabro (“Fabro”)] and [Cecile Daniels

⁴⁸ ALJD 6:28-30. Webster and DeMello conducted an investigatory meeting with Ragunjan on June 19, 2015.

⁴⁹ Res. Brief in Support 18.

⁵⁰ Tr. 812:6-12.

⁵¹ Tr. 813:16-17. Respondent argues that Ragunjan’s alleged threat to Pajinag is mentioned Cacacho’s June 15 written statement. Res. Brief in Support 18.

(“Daniels”)] testified that Ettinger told the employees...to stop bothering their coworkers at home.”⁵² Respondent argues that “stop bothering their coworkers at home” was not the exact phrase used by Fabro and Daniels.⁵³ Respondent incredibly argues that Fabro testified that Ettinger told the employees to stop bothering their coworkers “when they are working.”⁵⁴ Respondent deceptively and inaccurately quotes Fabro’s testimony. The record reflects that Fabro testified that Ettinger told the employees at the May 19 meeting to “stop bothering workers at their home when they are working.” Clearly, Fabro’s testimony supports the ALJ’s finding that Ettinger told employees to stop bothering their coworkers at home.

Further, Respondent argues that Daniels did not say the exact phrase, “stop bothering your coworkers at home”, but instead Daniels testified that Ettinger told the employees to “stop badgering your coworker[s]” at home.⁵⁵ Respondent’s exception regarding Daniels’ testimony is a distinction without a difference. Daniels’ testimony that Ettinger told employees to stop “badgering” coworkers at home supports the ALJ’s finding that Ettinger told the employees to stop “bothering” their co-workers at home.

In Exception 65, Respondent alleges that the ALJ misstated the record that Ettinger told the employees that they “were lucky to have jobs.” Respondent argues that Fabro testified that Ettinger told the employees they were “lucky to have work.”⁵⁶ Respondent’s Exception 65 is another example of a distinction without a difference. Fabro’s testimony supports the ALJ’s finding that Ettinger told employees they were lucky to have jobs. Additionally, both Daniels

⁵² ALJD 11:19-20.

⁵³ Res. Brief in Support 22-23.

⁵⁴ Res. Brief in Support 23.

⁵⁵ Res. Brief in Support 23.

⁵⁶ Tr. 265:13-14, 22; Res. Brief in Support 23.

and employee Lotuseini Kava (“Kava”) testified that Ettinger told the employees that they were lucky to have jobs, further supporting the ALJ’s finding.⁵⁷

In Exception 66, Respondent argues that the ALJ misstated the record when she found that Fabro and Daniels testified that Ettinger told employees at the May 19 meeting that they could “stop by his office and apologize to him.”⁵⁸ Respondent argues that Fabro testified initially that Ettinger told employees they could “stop by his office and apology.”⁵⁹ Respondent argues that Daniels testified that Ettinger told employees they could stop by his office and “say sorry.”⁶⁰ Respondent’s Exception 66 is yet another example of a distinction without a difference. Both Fabro and Daniels’ testimony supports the ALJ’s finding that Ettinger told employees they could stop by his office and apologize to him. Respondent’s Exceptions 63, 65, 66 and Respondent’s other similarly reasoned Exceptions to the ALJ’s alleged misstatements of the record enumerated in this section should be denied.

Respondent, in excepting to the ALJ’s alleged misstatements of the record, also simply ignores testimony that is contrary to its assertions. For example, in Exception 76, Respondent argues that the ALJ misstates the record that Respondent’s then Vice President of Human Resources Haines (“Haines”) claimed to have later typed her notes of Ettinger’s May 19 meeting based on her contemporaneous handwritten notes. Respondent ignores Haines testimony that she took handwritten notes of the May 19 meeting and that after the meeting she typed out her handwritten notes.⁶¹ Contrary to Respondent’s assertions, the ALJ accurately reflected Haines’

⁵⁷ Tr. 224:3-4; 308:6.

⁵⁸ ALJD 12:8-9.

⁵⁹ Res. Brief in Support 23. Respondent admits that later in Fabro’s testimony he used the word apologize.

⁶⁰ Res. Brief in Support 23.

⁶¹ Tr. 694:5-13.

testimony. Respondent's Exception 76, and Respondent's other similarly reasoned Exceptions to the ALJ's alleged misstatements of the record cited in this grouping should be denied.

For the foregoing reasons, Respondent's Exceptions 3, 6, 9-16, 18, 19, 22, 25, 36, 55, 57-63, 65, 66, 76, 88, 99, 100, 101, 103, 105, 106, and 108-116 that allege that the ALJ misstated the record in the ALJD should be denied.

2. The ALJ Properly Portrayed the Record Evidence

Respondent's Exceptions 2, 4, 5, 7, 18, 20, 22, 43, 47, 48, 56, 93, and 94 allege that the ALJ mischaracterized the testimony of witnesses and evidence in the record. The ALJ properly synthesizes much of the disjointed and confusing testimony elicited by Respondent's witnesses. Respondent merely disagrees with the ALJ's summary and characterization of the testimony of Respondent's witnesses. For example, in Exception 18, Respondent alleges that the ALJ mischaracterized Pajinag's testimony when she found that Pajinag did not mention the alleged death threat during his interview with Webster and DeMello.⁶² Respondent references 8 pages of Pajinag's testimony where Respondent's counsel attempted to elicit Pajinag's account of his meeting with Webster and DeMello. Respondent argues, "[t]here is nothing in the record that indicates that Pajinag did *not* mention the death threat incident with Rangunjan to Webster and DeMello."⁶³ Respondent appears to argue that because Pajinag did not specifically deny telling Webster and DeMello about the alleged death threat, the ALJ erred in drawing the conclusion that Pajinag did not discuss the death threat. Respondent's flawed argument fails. The ALJ properly found, based on the evidence and her credibility determinations, that Pajinag did not discuss with Webster and DeMello the alleged death threat made by Rangunjan based on

⁶² Res. Brief in Support 17.

⁶³ Res. Brief in Support 17. Emphasis in the original.

Pajinag's testimony that "[t]hat's all that I told them", as well as what his testimony did not contain.⁶⁴ The ALJ properly characterized the testimony of the witnesses and evidence in the record, and therefore, Respondent's exception 2, 4, 5, 7, 18, 20, 22, 43, 47, 48, 56, 93, and 94 should be denied.

3. The ALJ Made Proper Findings of Fact

Respondent's Exceptions 1, 3, 17, 18, 21, 37, 39, 42, 43, 48-50, 52, 67, 86, 87, 90, 93, 102, 104, 107, 109, 112, 116, and 117 except to the ALJ findings of fact. The ALJ properly relied on the record evidence and her credibility determinations to draw accurate factual findings. In this group of Exceptions, Respondent relies on testimony that has been discredited by the ALJ and unfounded factual assertions as the basis for its Exceptions to the ALJ's findings of fact. For example, in Exception 50, Respondent excepts to the ALJ's finding that DeMello and Webster failed to confront Ragunjan about his alleged threat to Pajinag. Respondent argues that DeMello and Webster questioned Ragunjan about the alleged threat.⁶⁵ (Supra Section IV.B.1). Respondent simply argues that its version of the facts, and not those found by the ALJ, should be credited. Here, Respondent clearly believes that the testimony of DeMello and Webster should be credited. Without more, this type of argument supporting an Exception must be rejected.

Likewise, in Exception 48, Respondent excepts to the ALJ's finding that Respondent's response to Pajinag's complaint of an alleged threat was not consistent with the action of a concerned employer responding to such a serious allegation. Respondent argues that it did take the complaint seriously and conducted an interview with Ragunjan, issued a written warning to

⁶⁴ ALJD 5:28-31; Tr. 608:1-2.

⁶⁵ Res. Brief in Support 20.

Ragunjan, and told Cacacho to “monitor” Pajinag.⁶⁶ Respondent ignores the employer’s workplace violence policy, mentioned by the ALJ, that states that Respondent could suspend employees accused of workplace violence or threats of violence.⁶⁷ Respondent ignores DeMello’s testimony that Respondent did not alter Pajinag’s schedule to minimize interactions with Ragunjan.⁶⁸ The record evidence supports the ALJ’s finding, even if the narrow, cherry-picked version of the facts, as stated by the Respondent, may not.

The ALJ properly relied on the entire record and her credibility determinations to conclude the factual finding in this case. Because Respondent relied on discredited testimony and unfounded factual assertions as the basis for its exceptions to the ALJ’s findings of fact, Respondent’s exceptions 1, 3, 17, 18, 21, 37, 39, 42, 43, 48-50, 52, 67, 86, 87, 90, 93, 102, 104, 107, 109, 112, 116, and 117 should be denied.

4. Respondent Draws No Nexus Between its Factual Exceptions and the ALJ’s Conclusion That Respondent Violated the Act.

Respondent failed to present any argument explaining how many of its exceptions to the ALJ’s summary of the facts in the record would alter the ALJ’s findings that Respondent violated the Act. Respondent appears to simply point out every instance in the ALJD with which it disagrees, without providing any analysis of how each Exception, if granted, would alter the finding that Respondent violated the Act. Because Respondent failed to draw any nexus between each alleged error and the ALJ’s finding that it violated the Act, Respondent’s exceptions 1-7, 9-22, 25, 36, 37, 39, 42, 43, 47-50, 52, 55-63, 65-67, 76, 86-88, 90, 93, 94, and 99-117 should be denied.

⁶⁶ Res. Brief in Support 20.

⁶⁷ Tr. 729:17-25, 730:1-3; Res. Ex. 50.

⁶⁸ Tr. 466:19-21.

C. ALJ Properly Found That Respondent Violated The Act

Respondent's Exceptions 1, 24, 26-29, 38, 40, 41, 44-46, 51, 53, 54, 78-85, 89, 90, 91, 92, 94-98, and 117-119 except to the ALJ's legal findings, application of law, and remedies in her Decision and Order. Because the ALJ relied on her proper factual findings and credibility determinations, and her appropriate application of the law to draw her legal conclusions, Respondent's Exceptions 1, 24, 26-29, 38, 40, 41, 44-46, 51, 53, 54, 78-85, 89, 90, 91, 92, 94-98, and 117-119 should be denied.

1. The ALJ Correctly Refused to Draw Adverse Inferences

Respondent argues in Exceptions 24, 45, and 98 that the ALJ erred by not drawing adverse inferences against GC. In Exception 24, Respondent excepts to the ALJ's failure to draw an adverse inference based on Ragunjan not testifying at hearing. In Exception 45, Respondent excepts to the ALJ's failure to draw an adverse inference against the GC for failing to call a housekeeper Vilma to testify at hearing. In Exception 98, Respondent excepts to the ALJ's failure draw an adverse inference against the GC for failing to admit into evidence Daniels written notes of Ettinger's May 19 employee meeting. For several reasons, the Board should not draw any such adverse inference and Respondent's Exceptions 24, 45, and 98 should be denied.

Under the principles set forth in *Burnup & Sims*, 379 U.S. 21 (1964), when the evidence establishes that an employee was disciplined based on alleged misconduct occurring in the course of protected activity, the burden shifts to the respondent to show that "it had an honest or good-faith belief that the employee engaged in the misconduct." *Alta Bates Summit Medical Center*, 357 NLRB No. 31, slip op. at 1-2 (2011) *enf. denied* on other grounds 687 F.3d 424 (DC Cir. 2012); see also *Roadway Express*, 355 NLRB 197, 1015 (2010), *enfd.* 427 Fed. Appx. 838

(11th Cir. 2011). It is undisputed that Guzman and Ragunjan separately interacted with their coworker Dany Pajinag to engage in Section 7 activity. Respondent cites their protected activity on each of their written discipline.⁶⁹ The burden thereafter shifts to Respondent to show that it had an honest or good-faith belief that Ragunjan and Guzman engaged in the misconduct. Ragunjan and Guzman would have had to engage in conduct in the course of protected activity so “egregious or offensive to lose its protection under the Act” in order for the ALJ to find that they had engaged in misconduct. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) *enfd.* 263 F.3d 345 (4th Cir. 2001).

The Board has refused to draw adverse inferences against the General Counsel when the testimony that would have been adduced supports a respondent’s defense rather than the General Counsel’s affirmative case-in-chief. *See M & M Automotive Group, Inc. d/b/a Broadway Volkswagen*, 342 NLRB 1244, 1246 n. 11 (2004). Such a principle applies here where the alleged testimonies of Ragunjan and Vilma go to Respondent’s burden to prove that it had a good-faith or honest belief that Guzman or Ragunjan engaged in egregious or serious misconduct that lost protection under the Act. To the extent that an adverse inference is available against the party who is relying on the statements of an uncalled witness,⁷⁰ it is Respondent and not GC who is seeking to rely upon Ragunjan and Vilma to justify the discipline in question. Because Respondent would have relied on Ragunjan and Vilma’s testimony to bolster its defense that it had a good-faith or honest belief that Guzman or Ragunjan engaged in egregious or serious misconduct that lost protection under the Act, Respondent’s Exceptions 24 and 45 should be denied.

⁶⁹ GC Ex. 10, 11.

⁷⁰ *Desert Pines Golf Club*, 334 NLRB 265, 267 (2001); *KBMS, Inc.*, 278 NLRB 826 (1986).

Respondent also had the opportunity and failed to subpoena Ragunjan and Vilma to testify in Respondent's defense, and to issue a subpoena to Daniels to produce the written notes of Ettinger's May 19 employee meeting. Respondent failed to subpoena the witnesses, and the alleged evidence in question, and now seeks to correct its error by demanding an adverse inference. Respondent's late efforts to correct its failure to subpoena the witnesses and evidence necessary to its defense should be rejected.

Finally, even if Respondent could somehow overcome the above-noted substantive and procedural defects, it remains the case that the drawing of adverse inferences remains within the discretion of the trier of fact. A party has no obligation to call every witness at its disposal to prove its case.⁷¹ While adverse inferences may be drawn this is not to say that adverse inferences must be drawn or that there is any conclusive presumption against the party that opts not to call a particular witness.⁷² The ALJ, within her discretion as trier of fact, refused to draw an adverse inference regarding the evidence in question. Further, as with its other exceptions, Respondent failed to argue how or why the ALJ's failure to draw the adverse inferences would affect the ALJ's finding that Respondent violated the act. For the foregoing reasons, Respondent's Exceptions 24, 45, and 98 should be rejected.

2. The ALJ Properly Applied the Law

Respondent's Exceptions 26-28, 38, 40, 44, 46, 51, 78-82, 91, 92, and 95 allege that the ALJ misapplied or misstated the case law cited in the ALJD.⁷³ Respondent's Brief makes clear

⁷¹ *International Business Systems*, 258 NLRB 181, 192 (1981).

⁷² See *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1030 (2006); *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("the words 'may be drawn' are key. The decision to draw an adverse inference lies within the sound discretion of the trier of fact. We have never suggested that the NLRB is required to draw an adverse inference against a party that fails to call a certain witness").

⁷³ Respondent did not except to any case law cited by the ALJ in support of her findings regarding Respondent's employees hand billing in Respondent's lower lobby.

the fact that in these Exceptions, Respondent either simply disagrees with the ALJ's application or interpretation of the cases cited or that Respondent disagrees with the ALJ's findings of fact and therefore disagrees with the ALJ's application of the law to her factual determinations. In nearly every instance, Respondent provides no legal argument or case law to support its position. Respondent also provides no arguments as to how or why each Exception, if sustained, would alter the ALJ's conclusion that Respondent violated the Act.

- a. Respondent cites no cases nor makes any reasonable legal arguments to support Exceptions 26, 38, 44, 46, 81, and 82.

In Exception 26, Respondent argues that the ALJ misstates *Burnup & Sims* in her assertion that, under the *Burnup & Sims* framework, the employer must show that it had a good-faith, or honest belief, that the accused employees engaged in "serious misconduct" in order to avoid a finding of a violation where an employer disciplines an employee for engaging in protected concerted activity.⁷⁴ As discussed above (Supra Section IV.C.1), under *Consolidated Diesel Co.* and *Burnup & Sims*, it is Respondent's burden to show it had a good-faith, or honest belief, that Ragunjan and Guzman engaged in serious or egregious misconduct while engaged in Section 7 activity, that would cause their activity to lose protection of the Act. Respondent provides no legal argument or case law to support its assertion that the ALJ erred in her analysis of the *Burnup & Sims* framework and its application to the present case. Respondent simply cites its exception and moves on the next issue. For this reason, Respondent's Exception 26 should be denied.

⁷⁴ Resp. Brief in Support 38.

Similarly, in Exceptions 81 and 82, Respondent argues that the ALJ's application of *Labriola Baking*⁷⁵ is inappropriate because in that case, despite being factually similar to the present case, the Board found the employer's conduct warranted a new election, not the finding of a violation of 8(a)(1) of the Act.⁷⁶ Respondent offers no case law or other legal argument as to why the Board's reasoning in *Labriola Baking* should not apply to the present case. Respondent further argues, in Exception 82, that the ALJ also erred by relying on *Cream of the Crop*⁷⁷ as a "see also" case citation. The Board held in *Cream of the Crop* that when an employer's representative effectively commissions an interpreter to interpret their remarks, the employer is bound by the translated version of the remarks in a language the speaker does not understand, even where the speaker's statements prior to translation were not unlawful.⁷⁸ Respondent makes no argument why the ALJ's "see also" citation to *Cream of the Crop* is improper other than the factual distinction that Ettinger did not commission an interpreter during the May 19 employee meetings. Respondent simply cites its exception and moves on to the next issue. Because it offers little or no basis for its Exceptions, Respondent's Exceptions 81 and 82 should be denied.

In Exception 38, Respondent argues that the ALJ improperly distinguished *BJ's Wholesale Club*⁷⁹ from the present case. Respondent argues that *BJ's Wholesale Club* stands for the notion that an employee loses the protection of the Act if an employee engages in repeated Section 7 activity during any indeterminate time frame.⁸⁰ The ALJ properly distinguished *BJ's*

⁷⁵ 361 NLRB No. 41 (2014). In *Labriola Baking*, the Employer's representative, similar to the facts in the present case, made a speech in English at an employee meeting where the employees were mainly non-native or non-English speakers. The Board held that an employer is responsible for the interpretation of the prepared remarks.

⁷⁶ Res. Brief in Support 44.

⁷⁷ 300 NLRB 914 (1990).

⁷⁸ 300 NLRB at 917.

⁷⁹ 318 NLRB 684 (1995).

⁸⁰ Res. Brief in Support 40-41.

Wholesale Club from the present case. In *BJ's Wholesale Club* the Board affirmed the administrative law judge's finding that the employer did not impinge on the protected activities of an employee where the employer disciplined the employee for meeting with a co-worker three times in a single day in an effort to get that co-worker to sign a union authorization card. In the present case, Pajinag could only recall two interactions with Guzman that happened four days apart. Meeting, at most, once every four days clearly distinguishes the facts in the instant case from those in *BJ's Wholesale Club*. Respondent makes no legal argument and cites to no additional cases to support its position that "repeated" interactions with a fellow employee, by itself, would cause an employee to lose protection of the Act. Respondent's Exception 38 should be denied.

In Exception 44, Respondent argues that the ALJ misapplies *Arkema, Inc.*, and *Trailmobile Trailer, LLC*,⁸¹ when analyzing what constitutes a proper investigation.⁸² Respondent cites to *Sutter E. Bay Hosps v. NLRB*,⁸³ and *Healthcare Management Corp.*,⁸⁴ stating that an employer is not required to investigate in any particular manner.⁸⁵ Respondent does not offer any arguments to distinguish the cases cited by the ALJ from the cases cited in Respondent's Brief in Support. Respondent only identifies cases which it finds at odds with the more recent cases cited by the ALJ without any analysis of the cases cited. For this reason, Respondent's Exception 44 should be denied.

Similarly, in Exceptions 46, Respondent argues that the ALJ inappropriately applied *Arkema, Inc.* when concluding that Respondent did not hold an honest or good-faith belief that

⁸¹ 343 NLRB 95 (2004).

⁸² Res. Brief in Support 43.

⁸³ 687 F.3d 424 (D.C. Cir 2012).

⁸⁴ 295 NLRB 1144 (1989).

⁸⁵ Res. Brief in Support 43.

Ragunjan engaged in misconduct.⁸⁶ Respondent offers this argument only with regard to Ragunjan's actions. Respondent argues that it would have been inappropriate to reveal Pajinag's identity as the accuser to Ragunjan because of the alleged death threat. Respondent does not cite to any cases to support this exception. Further, Respondent had written policies in place to protect Pajinag from further alleged harassment but chose to ignore its own workplace violence prevention and investigation policies. (See Supra Section IV.B.3). If Respondent sincerely perceived Ragunjan to be an actual threat to Pajinag, it could have suspended Ragunjan during the course of the investigation. Respondent did not. Respondent could have rearranged Pajinag's or Ragunjan's shifts to avoid confrontation. It did not. Respondent could have called the police if it perceived Ragunjan to be a threat to Pajinag. It did not. Respondent's languid and tepid response to Pajinag's complaint belies its argument in Exception 46 that identifying Ragunjan's accuser would have endangered Pajinag. Respondent's Exception 46 should be denied.

- b. Respondent's Exceptions 27, 28, 38, 40, and 51 to the ALJ's application of the law rely on discredited testimony or simply disagree with the ALJ's factual finding and should be denied.

In Exceptions 27, 28, 38, and 40, Respondent argues that the ALJ misapplied the cases cited because Ragunjan and Guzman's Section 7 interactions with Pajinag prevented Pajinag from performing his work duties.⁸⁷ The ALJ properly discredited Respondent's management witnesses who testified that they were "chiefly concerned" about Ragunjan and Guzman interfering with Pajinag's ability to perform his work duties.⁸⁸ The record evidence supports the ALJ's finding that Respondent did not have an honest belief that Guzman or Ragunjan's interactions interrupted Pajinag in the performance of his work duties. The ALJ found credible

⁸⁶ 357 NLRB 1248 (2011). Res. Brief in Support 41.

⁸⁷ Res. Brief in Support 40-41.

⁸⁸ ALD 9:5-27.

Pajinag's testimony denying that he complained about Ragunjan and Guzman interfering performing his work duties.⁸⁹ The ALJ also found credible Pajinag's testimony that he just wanted his co-workers to stop bothering him about the Union.⁹⁰

Respondent presented no credible evidence that it had an honest or good-faith belief that Guzman interfered with Pajinag's work performance. There is no documentary evidence showing that Pajinag's work performance suffered during the dates in question. The GC issued a trial subpoena covering "documents reflecting all discipline issued to Danny Pajinag from June 1 to July 31."⁹¹ The subpoena request covers the dates in question in Guzman's June 30 corrective action. Respondent stated in response to General Counsel's request for Pajinag's disciplinary records that "no documents exist".⁹² DeMello testified that he was not aware of any discipline issued to Pajinag, by the Hotel, during the month of June 2015.⁹³ DeMello was also not aware of any reports that Pajinag was not completing his job duties.⁹⁴ In June 2015, Pajinag was not spoken to, warned, or otherwise disciplined for failing to fulfill his job duties.⁹⁵ Pajinag denied that he complained to Executive Housekeeper Cacacho that Ragunjan or Guzman's interaction affected his work or ability to perform his work duties.⁹⁶ Respondent does not offer any alternative argument to justify Exceptions 27, 28, 38, and 40 and the Exceptions should be denied.

⁸⁹ ALJD 9:5-8; Tr. 605:18-25, 606:1-2.

⁹⁰ ALJD 9:8-9; Tr. 588:6-22.

⁹¹ GC Ex. 2.

⁹² GC Ex. 2.

⁹³ Tr. 449:11.

⁹⁴ Tr. 449:15.

⁹⁵ Tr. 449:19

⁹⁶ Tr. 605:18-25, 606:1-2.

In Exception 51, Respondent argues that the ALJ misapplied *Remington Lodging & Hospitality, LLC (Sheraton Anchorage)*⁹⁷ and *K & M Electronics*⁹⁸ because Webster and DeMello had confronted Ragunjan on June 19, 2015, regarding the alleged loading dock incident with Pajinag.⁹⁹ As discussed above (Supra Section IV.B.1), the ALJ properly found, contrary to Respondent's assertions, that Webster and DeMello did not question Ragunjan regarding the alleged threat to Pajinag at the loading dock. Respondent failed to justify the Exceptions to the ALJ's findings of fact regarding Webster and DeMello's interview with Ragunjan and therefore, Respondent's Exception 51 should be denied.

c. Respondent's Exceptions 80, 91, and 92 are based on Respondent's misperception of the ALJ's factual findings and should be denied

In Exception 80, Respondent argues that the ALJ misapplied *Brandenburg Tel. Co.*¹⁰⁰ because, according to Respondent, there is no evidence that Ettinger, in the May 19 employee meetings, used language that implied "threats or reprisals or force or promise of benefits."¹⁰¹ Respondent ignores the ALJ factual findings crediting the employee witness who testified that Ettinger told employees to "stop the rallies or you will lose work...stop bothering your coworkers about the Union or the police will be involved" and that the employees were "lucky to have jobs" and were welcome to come to Ettinger's office to apologize to him.¹⁰² The ALJ found "that a reasonable employee attending Ettinger's meetings, while perhaps confused by certain of his phrases, would have reasonably understood that the Hotel's highest level of management [Ettinger] was fed up and angry with their union organizing and noisy protests and was telling

⁹⁷ 363 NLRB No. 6 (2015)

⁹⁸ 283 NLRB 279 (1987)

⁹⁹ Res. Brief in Support 43.

¹⁰⁰ 164 NLRB 825 (1967).

¹⁰¹ Res. Brief in Support 44.

¹⁰² ALJD 14:19-21, 23-24.

them to stop.”¹⁰³ The ALJ also found that “that a reasonable employee ordered by top management [Ettinger] to cease pro-union conduct would reasonably feel his job security threatened when informed that he was lucky to have a job, especially considering that Ettinger had earlier suggested that local union hotels were losing money and not able to keep people employed”¹⁰⁴ Respondent’s Exception 80 has no basis in fact, offers no justification for finding that the ALJ’s factual and legal conclusions are flawed, and should be denied.

In Exceptions 91 and 92, Respondent argues that the ALJ misapplied the law cited because there is no evidence that Ettinger told employees to stop participating in Unite Here! Local 5 (“Union”) rallies.¹⁰⁵ Respondent’s assertion simply feigns ignorance of the meaning of Ettinger’s statements. Beginning in February 2015, the Union held weekly rallies on the sidewalk just outside Respondent’s property.¹⁰⁶ The Union’s morning rallies started at around 6:00 or 6:30 am.¹⁰⁷ At these morning rallies, Respondent’s employees banged pots and pans.¹⁰⁸ Nearly every witness to the May 19 employee meetings testified that Ettinger discussed the practice of employees banging pots and pans at early morning Union rallies held just outside the Hotel.¹⁰⁹ The ALJ credited employee witnesses who testified that Ettinger told the employees at the May 19 employee meetings to stop banging pots and pans.¹¹⁰ Respondent’s witness, Hotel Rooms Division Manager Webster, noted that Ettinger stated at the May 19 employee meetings that the Union should call for a vote and “not do things via pots, pans”.¹¹¹ The ALJ properly found that “that a reasonable employee attending Ettinger’s meetings, while perhaps confused by

¹⁰³ ALJD 14:27-30.

¹⁰⁴ ALJD 14:35-39.

¹⁰⁵ Res. Brief in Support 46.

¹⁰⁶ Tr. 270:10; 509:16-20, 739:8.

¹⁰⁷ Tr. 268:1, 509:4

¹⁰⁸ Tr. 526:9-11, 640:9-11; 641:15; 740:17.

¹⁰⁹ Tr. 223:19-20; 237:22; 267:12, 15; 268:1; 306:17; 640:10; 641:6-7; 645:13; 691:6-8; 794:23.

¹¹⁰ Tr. 223:25; 237:23-25; 239:20-23; 266:15 errata; 306:17-19; ALJD 12:16.

¹¹¹ Resp. Ex. 18, 19; Tr. 794:21-24.

certain of his phrases, would have reasonably understood that the Hotel's highest level of management was fed up and angry with their union organizing and **noisy protests** and was telling them to stop."¹¹² Ettinger, by telling employees to stop banging pots and pans, instructed employees to stop participating in Union rallies, in violation of the Act. Respondent's Exceptions 91 and 92 ignore the credited testimony of the employee witnesses and Manager Webster's written recollection of Ettinger's statements. Respondent's Exceptions 91 and 92 should be denied.

d. Respondent's Exceptions 78, 79, and 95 should be denied

In Exception 78, Respondent argues that the ALJ misapplies the test of whether a statement is unlawful as found in *Double D Construction Group*.¹¹³ The Board in *Double D* held that "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."¹¹⁴ Respondent cites *NLRB v. Gissel Packing Co.*¹¹⁵ and emphasizes *Greater Omaha Packing Co., Inc. v. NLRB*, quoting that "not all displeased communications from an employer to an employee are coercive ... to violate Section 8(a)(1), a statement must contain a threat of reprisal or force or promise of benefit."¹¹⁶ In this Exception, Respondent points out, yet again, a distinction without a difference. *Greater Omaha* correctly defines a coercive communication as one that contains a threat of reprisal or force or promise of benefit. This is no different that the test held by the Board in *Double D*. Respondent does not make any other argument to distinguish the *Double D* test quoted by the ALJ. For this reason, Respondent's Exception 78 should be denied.

¹¹² ALJD 14:27-30 (emphasis added).

¹¹³ 339 NLRB 303 (2003).

¹¹⁴ 339 NLRB at 303, citing *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995).

¹¹⁵ 395 US 575 (1969).

¹¹⁶ 790 F.3d 816, 822 (8th Cir. 2015).

In Exception 79, Respondent argues that the ALJ misapplies the *Gissel* case because Chief Justice Warren’s holding, quoted by the ALJ, does not support the ALJ’s assertion that an employer will be held accountable for misleading or confusing statements that would tend to chill an employee’s protected activity.¹¹⁷ It appears that Respondent is confused as to the meaning of the quoted section of Chief Justice Warren’s decision and the ALJ’s finding.¹¹⁸ The ALJ quotes Chief Justice Warren as follows:

[a]n employer, who has control over [the employment] relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in “brinkmanship” when it becomes all too easy to “overstep and tumble [over] the brink.”¹¹⁹

During the hearing, Respondent’s General Manager DeMello testified that only one-third of employees who attended the May 19 employee meetings spoke English as their primary language.¹²⁰ In discussing the complications and responsibilities of communications in a multilingual workplace in the ALJD, the ALJ made clear that “where the employer fails to take reasonable steps to ensure that its antiunion message is accurately understood by its multilingual workforce, it engages in the very “brinkmanship” Justice Warren cautioned against, and should be held accountable for the results.”¹²¹ Expounding on the idea of brinkmanship and Respondent’s ability to “overstep and tumble over the brink,” the ALJ found that “a reasonable employee ordered by top management to cease pro-union conduct would reasonably feel his job security threatened when then informed that he was lucky to have a job, especially considering that Ettinger had earlier suggested that local union hotels were losing money and not able to keep people employed.” By Ettinger’s statement during the May 19 employee meetings Respondent

¹¹⁷ Res. Brief in Support 38-39; ALJD 13:22-30.

¹¹⁸ Perhaps Respondent misunderstands the term “brinkmanship”.

¹¹⁹ ALJD 13:26-30; *NLRB v. Gissel Packing Co.*, 395 U.S. at 620 (1969) (citing *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967)).

¹²⁰ Tr. 744:23-25, 745:1-11.

¹²¹ ALJD 14:11-14.

was engaged in brinkmanship with its employees of the kind referenced by Chief Justice Warren, and Respondent's Exception 79 should be denied.

In Exception 95, Respondent inexplicably excepts to the ALJ's reliance on *Children's Services Int'l*¹²² to support her finding Ettinger's remark, that Respondent's employees were "lucky to have jobs," constituted a threat of reprisal for engaging in protected activity.¹²³ Respondent simply misconstrues the ALJ's citation to *Children's Services Int'l*. The ALJ's use of the "Cf." abbreviation and the contextual discussion of footnote 30 clearly indicate that the ALJ was properly distinguishing *Children's Services Int'l*. from the present case and not relying on that case to support her findings. Respondent's Exception 95 should be denied.

3. Respondent's Exceptions To The ALJ's Conclusions of Law Should Be Rejected

Respondent's Exceptions 1, 29, 41, 53, 54, 83-85, 89, 90, 94, 96, 97, and 117-119 except to the ALJ's conclusions of law and to the remedies recommended by the ALJ. Respondent relies on the discredited testimony of Respondent's witnesses and ignores the ALJ's proper factual findings to support these exceptions and should be denied.

In Exception 1, Respondent argues that the ALJ does not cite to any portion of the record in support of her finding that Respondent violated the Act because it did not have an honest or good-faith belief that Guzman or Ragunjan engaged in serious misconduct under the *Burnup & Sims* framework.¹²⁴ Respondent curiously omitted the ALJ's voluminous citations to the record on pages 3 through 10 of the ALJD laying out the ALJ's legal theory and factual basis for her

¹²² 347 NLRB 67 (2006).

¹²³ Res. Brief in Support 47.

¹²⁴ Res. Brief in Support 36.

conclusion that Respondent violated the Act when it issued the June 30, 2015, written warning to Guzman and Ragunjan.¹²⁵ Respondent's Exception 1 lacks veracity and should be denied.

In Exceptions 29, 41, and 53 Respondent relies on discredited testimony and the rejection of the ALJ's factual findings regarding Pajinag's ability to perform his work duties as discussed above and should be denied. (Supra Section IV.C.2.b). In Exceptions 54 and 85, regarding Ettinger's statements at the May 19, 2015, employee meetings, Respondent relies on its other exceptions to the ALJ's factual finding (Supra Section IV.B.1), application of the law (Supra Section IV.C.2.a, c, d), and the ALJ's refusal to draw an adverse inference (Supra Section IV.C.1) to support the Exceptions. Because the foundation for this house of cards has been floored, Respondent's Exceptions 54 and 85 should be denied.

In Exceptions 83 and 84, Respondent argues that the ALJ failed to apply the "reasonable employee" standard when evaluating Ettinger's unlawful statements to employees at the May 19 meetings. Respondent argues that under Respondent's reasonable employee standard, the reasonable employee "understands English" and "understands all the words uttered by Ettinger." Unsurprisingly, Respondent does not cite any case law to support its assertion that the "reasonable employee" not only should understand English, but also would understand "all the words" Ettinger speaks. Respondent's knowledge that two-thirds of the employees at the May 19 employee meetings did not speak English as their primary language further belies Respondent's justification of its curious reasonable employee standard proposal. Respondent's self-created reasonable employee standard, and Exceptions 83 and 84, should be rejected.

¹²⁵ GC identified over 30 citation to the transcript or exhibits in the record by the ALJ in support of her finding of the 8(a)(3) and (1) violations.

In Exception 90, Respondent excepts to the ALJ's aside in footnote 29 of the ALJD¹²⁶ that even if the ALJ mentally edited out Ettinger's "antiquated verbiage" she would still come to the same conclusion that Ettinger's remarks at the employee meeting were unlawful.¹²⁷ The ALJ's discussion in footnote 29 does not factor into the ALJ's conclusion that Ettinger's statements to employees at the May 19 meetings violated the Act. Because Respondent does not state how or why excepting to the ALJ's aside in footnote 29 would alter the ALJ's finding that Respondent violated the Act. Respondent's Exception 90 should be denied.

Respondent's Exception 94 excepts to the ALJ's conclusion that Ettinger's statement that Respondent's employees were lucky to have jobs did not refer to their skill level, distinguishing Respondent's employees from the employees in *Children's Services Int'l*. (Supra Section IV.C.2.d). The employer in *Children's Services Int'l* remarked to its employees that they were lucky to have jobs. The Board found that the employer's statement referenced the employees' skill levels and the job market and that the employer's statement did not state, or imply, that the employees' jobs would come to an end.¹²⁸ In the present case, Ettinger clearly implied that the Union's efforts at the Hotel have placed the employees' jobs in peril. In the context of Ettinger's other statements at the May 19 meeting, the ALJ properly concluded that Ettinger's statement that the employees' were lucky to have jobs would reasonably tend to coerce an employee's Section 7 right to join or support the Union. Respondent's Exception 94 should be denied.

In Exception 89, 96 and 97, Respondent argues that the ALJ did not specifically explain how Ettinger's unlawful statements to Respondent's employees at the May 19 meetings violated the Act. Respondent specifically excepts to the ALJ's alleged failure to explain how Ettinger's

¹²⁶ ALJD 14:fn. 29.

¹²⁷ Res. Brief in Support 45.

¹²⁸ 347 NLRB at 68.

statements to Respondent's employees to "stop bothering your coworkers at home," and Ettinger's invitation to employees to "apologize" to him, violate the Act. The ALJ clearly stated in her ALJD:

...a reasonable employee ordered by top management [Ettinger] to cease pro-union conduct [including visiting co-workers at their homes] would reasonably feel his job security threatened when then informed that he was lucky to have a job, especially considering that Ettinger had earlier suggested that local union hotels were losing money and not able to keep people employed.¹²⁹

The ALJ also clearly found:

...Ettinger's invitation to employees to "apologize" to him constitutes an unlawful solicitation that they disclose their Union sentiments. Having been informed that some employees had already complained to management about the Union, a reasonable employee would feel pressured by Ettinger's invitation to disclose her union sentiments, one way or the other. The Board has found such solicitations to violate the Act. See, e.g., *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995) (asking employees to make an "observable choice" regarding their union sentiments violates the Act); *Capitol Records, Inc.*, 232 NLRB 228, 228 (1977) (soliciting employees to disclose their sentiments regarding the union violates the Act).¹³⁰

Respondent's Exceptions 89, 96, and 97 ignore the plain language of the ALJD and should be denied.

Respondent's Exception 117 and 118 except to the ALJ's finding that the area Ching and Wolfgramm handbilled at is a non-work area.¹³¹ The ALJ's determination is well supported by the ALJ's factual findings, and the record¹³²; and Respondent's Exceptions 117 and 118 should be denied.

¹²⁹ ALJD 14:35-38.

¹³⁰ ALJD 15:1-9.

¹³¹ Res. Brief in Support 28, 37.

¹³² Tr. 768:25-769:1; 117:1213; 116:9-15 (The lower lobby of the Hotel is open to the public); Tr. 117:24-118:15 (The restaurants and businesses in the lower lobby do not offer food service to Hotel guests seated in the lounge seats in the lower lobby); Tr. 60:3-4 (The Hotel does not offer regular guest check-in in the lower lobby); Tr. 756:8-14,17-19; 765:20-21 (The Hotel gets anywhere from zero to five large groups check-ins a month in the lower lobby, mainly in the spring and fall); Tr. 60:15 (The lower lobby does not have a concierge desk); Tr. 68:15; (The bell and valet departments operate a single combined desk in the lower lobby); Tr. 68:15 (The Hotel assigns one housekeeper

Respondent's Exception 119 excepts to the ALJ finding that even if the area Ching and Wolfgramm were handbilling were a work area, Respondent's agent Smith violated the Act when he instructed Ching and Wolfgramm that they could not hand bill in any area of Respondent's property.¹³³ Respondent excepted, alleging that the ALJ incorrectly found that Smith told Ching and Wolfgramm that they could not handbill on any area of the property.¹³⁴ Smith testified multiple times, that he told Ching that he was not allowed to pass out pamphlets on Respondent's property.¹³⁵ Respondent's Exception 119 lacks a factual basis and should be dismissed.

Respondent excepts to the remedy recommended in the ALJD. Respondent's only argument excepting to the remedy is Respondent's stated exceptions to the ALJD. Respondent offers no case law or additional legal arguments to support its assertion that the recommended remedies should be denied. For this reason Respondent's exceptions to the remedies in the ALJD should also be denied.

lobby attendant to the lower lobby); Tr. 754:20-22 (The lower-lobby acts as the main entrance to the Hotel); Tr. 758:7-8 (There are no doors to the lower-lobby of the Hotel); Tr. 758:9-12 (Guests arrive at the Hotel by car or by foot through the covered driveway, or porte-cochere, adjacent to the lower-lobby); GC Ex. 5, Res. Ex. 3 (lower-lobby an open air design with a covered driveway adjacent to a curb, tiled area, and pillars); Tr. 78:12-15 (There are no chairs in the area between the columns and the driveway curb, where Ching and Wolfgramm stood handbilling).

¹³³ Res. Brief in Support 28-29.

¹³⁴ Res. Brief in Support 29.

¹³⁵ Tr. 52:13-15; 52:21-25, 53:1; 72:1-2; 106:8-10.

V. **CONCLUSION**

For the reasons set forth above, Counsel for the General Counsel submits that Respondent's Exceptions should be rejected in their entirety and that the ALJ's findings and conclusions should be affirmed, and her recommended Order be adopted.

DATED AT Honolulu, Hawaii, this 12th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the General Counsel's Answering Brief has this day been electronically filed with the National Labor Relations Board and a copy served upon the following persons by e-mail pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations:

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