

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

RICHFIELD HOSPITALITY, INC.,
AS MANAGING AGENT FOR KAHLER
HOTELS, LLC,

Respondent,

Case 18-CA-151245

and

UNITE HERE INTERNATIONAL UNION
LOCAL 21

Charging Party.

**RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION**

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**Overview of Facts, Wage Proposals,
and Proceedings Before the Administrative Law Judge**

INTRODUCTION

UNITE-HERE Local 21 (the “Union” or “Local 21”) represents a bargaining unit covering most of the hourly-wage job classifications in a group of four hotels in Rochester, Minnesota, all of which are located near the Mayo Clinic. The four hotels are the Kahler Grand, the Kahler Inns & Suites, the Marriott at Mayo Clinic, and the Residence Inn (the “Hotels”). At some point in 2013, the four hotels – then owned by Sunstone Hotel Properties – were sold to Kahler Hotels. Respondent Richfield Hospitality (as managing agent for Kahler) was retained to operate the Hotels and to employ the employees. Tr. 49-50.

Sunstone had entered previously into a collective bargaining agreement with Local 21, dated October 1, 2011, with a term that was to run until August 31, 2014 (**Exhibit GC-2**).¹ Richfield, upon taking on the duties of operator and employer in 2013, assumed the terms of the Sunstone collective bargaining agreement. Tr. 49.

Shortly thereafter, in early 2014, representatives of Richfield and Kahler held several meetings with the Union’s leadership. The primary purpose of these meetings, from the perspective of Richfield and Kahler, was to identify certain goals the new owner desired for the upcoming collective bargaining for a new contract to replace the Sunstone contract. Tr. 132-33; 178-80. These goals, some of which were presented in written form, turned primarily on the labor costs of the Hotels’ operations. *See*, **Exhibit GC-3** (referred to by the Union as the owner’s “wish list” – Tr. 133).

¹ This CBA also covered the employees of a large, separately managed laundry facility in Rochester, Textile Care Services (“TCS”), which had been sold by Sunstone along with the Hotels to Kahler. Richfield filed a unit clarification petition with Region 18, seeking a separate bargaining unit for the TCS employees. The petition was granted April 14, 2015. Exhibit R-15 (18-UC-145757). Thereafter, TCS and Local 21 pursued separate negotiations. A collective bargaining agreement was reached and signed in the summer of 2015. Tr. 210.

Formal negotiations, however, did not get underway until early 2015. The parties agreed to extend the term of the contract from August 31, 2014 to February 28, 2015. ALJD – 3, lines 18-19, and the first meeting was held on January 20, 2015. **Joint Exhibit 1** (stipulation of facts). A total of 11 formal days of bargaining took place over the dates of January 20 through September 24, 2015. **Id.**

WAGES

The most contentious issue in the bargaining was a proposed reduction in the compensation paid to the Hotels' banquet staff. Historically, under many previous labor agreements, these employees received a straight wage rate, plus a share of a "service charge." The service charge, which is paid by the banquet-group customer (similar to a tip, but covering also administrative and operating costs), is imposed (*dissimilar* to a tip) by the agreements the Hotels enter into with its banquet-group customers. It is calculated as a percentage of the cost of the food & beverage. Given rising costs over the many years of this arrangement, the price-demands for hosting a food & beverage event had risen commensurately. Along with this, the percentage-based *share* of the service charge paid to the banquet staff had risen also. This share of the service charge taken by banquet staff has been a traditionally bargained subject, both at the industry-wide level (nationally) and at the Respondent's hotels.

Richfield proposed, in the 2015 negotiations, to raise the wage rate and eliminate the service-charge share. The net effect was a substantial reduction in overall compensation. This proposal, which Richfield acknowledged as difficult, was deemed nonetheless necessary due to

competitive concerns. The Hotels' competition ², all non-union, were already paying their servers on a wage-only basis.

In short, the competition created the dilemma that drove Richfield's proposal, inasmuch as the competition – given its low labor-cost advantage – was able to underbid the Hotels.

The Union was made well aware of this dilemma. Tr. 168 and 178-80 (testimony of Union negotiator Martin Goff, who admitted that these competitive factors, as well as “food and beverage costs,” were discussed with the Union as early as the three meetings held in the first half of 2014, as well as in the 2015 formal bargaining sessions; Goff admitted the Union was told the Hotels “were struggling to compete with these other competitors . . . [and] needed to make changes in its labor costs”).

With regard to wages as a whole, across all classifications in the four hotels, Richfield conducted a wage survey of the Rochester hotel market. TR 505-06 (testimony of Michael Henry, the company's executive director of human resources). The survey results, presented to the Union, TR 507, established that the current employees of the Hotels were “significantly above market.” *Id.* At the same time, (a) the Rochester employment market was “very tight,” with “at the time probably about 2 percent unemployment,” and (b) the competition was increasing wages. TR 506. In designing the wage proposal for the current employees, Mr. Henry testified that while the percentage increases “may seem minimal . . . [w]e wanted to make sure that those folks” would receive “at least at market or just a little bit above market, so that we can say that we're truly more competitive than are other properties . . . And that was explained

² Referenced in the record as Canadian Honker, operated by an individual named Joe Powers, and another hotel in Rochester operated by an individual whose name appears in the record, Gus Chafoulas. See, e.g., TR-168).

during the bargaining process.” TR 507-08 (testifying, also, that Union negotiators and employees “had a significant amount of questions”). This strategy, of simultaneously holding down increases on above-market wages while also protecting retention, was explained in the hearing by way of an example. Pointing to the company’s cooks, currently making “probably about \$22.00 an hour,” along with other classifications paying well above the Rochester market, Mr. Henry testified that while these persons would receive only small increases, still, they would not be able to earn at the levels enjoyed with the company if they jumped ship as a starting employee elsewhere in Rochester. TR 507-08.

In addition, to aid the recruitment of new employees in Rochester’s low-unemployment environment, the Hotel proposed to eliminate the incremental, or “step,” increases under the old contract during the first five years of an employee’s tenure. See Appendix A to the former contract, **Exhibit GC-2** (at pages 28 through 32 of 52; showing service-point step increases at months 12, 24, 42 & 60, which overlapped with annual across-the-board increases). In its place, Richfield proposed a single new-hire starting wage for each classification (*i.e.*, no incremental service-point increases, just annual across-the-board increases). The result was notably higher starting wages. See also, TR-159-60 (testimony of Union negotiator Goff: “The employer was proposing to *increase* the start rate . . . [and] to do away with what we call the ‘steps – the 12-month, 24-month, the 36-month [sic] – and simply have wage increases based on the contract years, 2014, 2015, 2016, whatever” [emphasis added]).

This part of the proposal appears in Appendix A to the company’s proposal, discussed next.

RICHFIELD'S "LAST BEST & FINAL" PROPOSAL

On the eighth day of bargaining, March 24, 2015, Richfield made a "last, best & final" offer, in the form of a complete contract-document proposal. **Exhibit GC-6(g)**. The proposal contained the wage-only proposal for banquet staff described above, as well as the proposals for current and new-hire employees.

Two additional meetings were held in April, followed by a five-month hiatus in bargaining. The last meeting at issue in this case – September 24 – was requested by Richfield. ALJD – 13, line 1. However, as will be shown in more detail below, the Union made no new substantive moves, and Richfield didn't budge off its March 24 'last, best & final' offer.

THE ALJ PROCEEDINGS

The hearing before the ALJ was held on December 15, 16 and 17, preceded by complaint issuance on September 3 (amended November 25). **Exhibit GC-1(g) & (l)**. As of the dates of the December hearing: (a) no agreement had been reached by the parties; (b) Richfield had refrained from declaring a formal impasse; and (c) had not implemented any part of its March 24 last, best & final proposal.³

The Complaint, as amended, did not accuse Richfield of surface bargaining (confirmed several times by counsel for the General Counsel during the hearing, at Tr. 396, 440 and 462, and confirmed by the ALJ, at Tr. 527). Instead, four discrete bad-faith-bargaining charges were aimed at Richfield:

1. That its representatives often "showed up late and/or left early" to/from the bargaining sessions.

³ The parties have continued bargaining, in 2016. The Regional Office is aware of this, related to a subsequent investigation by that Office in 2016.

2. By making an “obscure and contradictory wage proposal” that gave Richfield “unilateral control over wages,” and that would be “impossible for the Union to administer,” and by also “refus[ing] to answer questions concerning” this proposal.
3. By making a proposal that “employees who take leave to attend a union convention risked losing their seniority,” unlike other types of leave.
4. That Richfield “failed and refused to bargain with the Union” after November 11, 2015, “by conditioning further meetings on the Union presenting an acceptable proposal.”

The ALJ rejected the first of these four charges, finding that the occurrences of ‘arriving late and leaving early’ were “not as extreme as the Union presented.” ALJD – 16, line 12. The ALJ also rejected parts of the General Counsel’s theory related to the wage proposal, as will be shown in the first Exception, below. However, the ALJ erred in her recommended findings of merit with respect to the charges enumerated above as 2, 3 and 4.

Additional facts necessary to an understanding of the issues in this case will be presented below.

EXCEPTION NO. 1 – The ALJ Errs in Recommending this Board Find the Employer’s Wage Proposal to Have Been Made in Bad Faith.

With respect to Richfield’s wage proposal, the administrative law judge recommended a finding that “Richfield’s use of pie charts and contradictory proposals on banquet servers’ pay failed to meet the requirements of good faith bargaining.” ALJD – p. 20, lines 32-33 (opening sentence of a four-paragraph Analysis).

Respondent Richfield will first identify the three key aspects of its wage proposal, and then illustrate the findings sought by General Counsel that the ALJ did *not* reach. As for the findings that were reached, Richfield will show the ALJ misunderstood the evidence and misapplied the law.

A. Richfield's Wage Proposal, and the Findings Not Reached by the ALJ.

There were three key aspects to Richfield's wage proposal (also discussed, above, in the section on "WAGES"):

- (i) A comprehensive set of starting wages for new-hire employees, with increases over a proposed six-year term, set forth in an Appendix to the proposal;
- (ii) A complete list of wage increases for current employees, over the proposed six-year term, in a spreadsheet that listed each employee by name, position and hotel (described in more detail below); and
- (iii) The wage-only proposal for banquet-department employees, both for new hires (in the Appendix) and for current employees (in the spreadsheet).

When introducing the wage-proposal topic, the ALJ stated: "Two portions of wage negotiations are at issue – the current employees and the banquet employees." ALJD – 18, lines 7-8. Consistent with this identification of only two issues, the ALJ did not include the Respondent's starting-wage proposal – (i), above – in her finding that Respondent "failed to meet the requirements of good faith bargaining." The above-quoted statement of findings, at ALJD – 20, lines 32-33, referred to only "Richfield's use of pie charts" (a reference to the current-employee proposal, as explained below) and to Richfield's "proposals on banquet servers' pay."

Moreover, a cursory review of Richfield’s new-hire/starting-wage proposal is the very model of straightforward simplicity. In no manner is it confusing or unusual. *See*, Appendix A to Richfield’s written contract proposal, presented on March 24, 2015, as part of its “last, best & final” proposal ⁴, at **Exhibit GC-6(g)** (pages 51-54 of 150). Appendix A sets forth the new-hire wages, showing each classification for each of the hotels – Kahler Grand, Kahler Inns & Suites, and Marriott ⁵ – for each year of the proposed six-year term.

In addition, concerning the findings *not* made by the ALJ, only *one* theory or argument advanced by the General Counsel was clearly identified as a finding by the ALJ in the Analysis section of the recommended decision. The General Counsel had advanced *four* such theories or arguments, summarized by the ALJ at page 17 (line 46) to page 18 (line 5) of the recommended decision: (i) the wage proposal was “obscure and contradictory” (the ALJ, as shown below, uses primarily the term “confusing”); (ii) the proposal would “allow Richfield to have unilateral control over the wages”; (iii) that Richfield “refused to answer questions about the proposal”; and (iv) that “the proposal [would be] impossible for the union to enforce.”

Of these, only the first – “obscure and contradictory,” or “confusing” – was adopted and found by the ALJ. The ALJ states: “I find that Richfield presented confusing pay proposals for currently employed employees,” and states that Richfield “further muddied the negotiation waters” by its use of “pie charts.” ALJD – p. 21, lines 4-5 & 9-10. Thus, as shown by the findings in the ALJ’s Analysis, at pages 20-21:

⁴ *See*, stipulation at **Joint Exhibit 1**, and the Introduction above.

⁵ Although not clear in the record, the wages applicable to the fourth hotel, the Residence Inn, are included in the Marriot section of Appendix “A.” The Residence Inn is a Marriott-branded hotel property.

- No mention is made related to an alleged retention of unilateral control by Richfield over the wages of the current employees (though, this does come up relative to a disputed sub-issue tied to the banquet proposal; discussed below);
- No mention is made concerning a refusal to answer questions (in fact, elsewhere in the decision, the ALJ shows the record reflects considerable dialogue over this issue at the table; particularly over the five bargaining sessions from February 27 to April 28; ALJD-8-12); and
- No mention is made of the proposal being “impossible for the union to enforce.”

B. The Current-Employee Wage Proposal.

The Board’s attention is directed first to the spreadsheet that was used in presenting Richfield’s current-employee wage proposal. **Exhibit R-3.** The spreadsheet was prepared by the chief financial officer of the Hotels, Leslie Hohmann, whose testimony concerning the creation and use of this spreadsheet appears at Tr. 468-72 (direct), and 474-77 (voir dire). The spreadsheet was presented to the Union in the seventh bargaining session held on March 16. *See*, entry at the top right corner of **Exhibit R-3**, reading: “Meeting date: 3/16/2015”; *and see*, Tr. 472, lines 17-21.⁶ This bargaining session preceded the employer’s last best & final offer, made during the March 24 bargaining session. *See*, **Joint Exhibit 1.**

The spreadsheet, though containing a lot of information – including, as mentioned above, rows for each of the then-current employees – is straightforward and easy to follow. The rows of employees are grouped by job classification. Ms. Hohmann, at Tr. 470-72, walked the ALJ and

⁶ The transcript, where this testimony was elicited, refers to this entry on the spread sheet as indicating “a meeting date [of] ‘3-6-15,’” rather than (accurately) “3-16-2015.” Either counsel misstated the date – **Exhibit R-3** plainly shows “3-16-2015” – or the court reporter transcribed the wrong date. In either event, it is undisputed this meeting occurred on March 16, 2016, as reflected in the stipulation at **Joint Exhibit 1.**

the parties through each column of the spreadsheet. These columns, reading left to right, identify the following: (i) the hotel (under the heading “Pay Group,” with codes in the rows below indicating in which of the four hotels the employee worked); (ii) employee name; (iii) the current wage rate (as of March 1, when “pulled” from the payroll); (iv) job classification; (v) original date of hire; (vi) months of service (“trigger[ing] the eligibility for different benefit tiers”); (vii) six columns showing the proposed wage rate for *each* of the six years of the proposed term (shown as “Rate-15, Rate-16,” etc.); (viii) six columns showing the percentage increase over the preceding year; and (vix) a final column with comments placed by Hohmann relevant to the various circumstances impacting the data to the left.⁷

Ms. Hohmann affirmed, without contradiction, that she participated in the March 16 meeting and personally “presented” and described this spreadsheet to the Union. Tr. 470 (“Martin [Goff] and Brian [Brandt] and Nancy [Goldman] were in the room,” she testified, identifying the three Union leaders).

Ms. Hohmann also created the pie charts, to which reference above has been made. There were *two* types of pie charts:

- The first set was by *job classification*. These pie charts were attached to the March 24 ‘last, best & final’ proposal. **Exhibit GC-6(g)** (pages 83 to 146 of 150). These charts were intended to illustrate the hourly equivalent of the *total* cost incurred by Richfield in employing the employees (labeled “TRW,” for “The Real Wage”), by showing – reduced to an hourly-pay equivalent – all of the cost components, including the hourly cash wage and the benefit costs, as well as all other incurred costs such as taxes, workers’ compensation, uniform costs, etc.

⁷ In addition, absent from the text above, was a column headed “MW,” which Ms. Hohmann described as a “tool” related to “the mathematical” in the spreadsheet. Tr. 471 and 476-77.

- The second set was by *individual employee*. These pie charts served the same purpose, and included the same cost components. A set of five pie charts for each employee in the bargaining unit was created. The five charts illustrated the year-to-year increases to take place under Richfield's five-year proposal.

See, Hohmann's testimony at Tr. 472-74.

The role played by the pie charts in the negotiations cannot be separated from the role played by the afore-described spreadsheet, at **Exhibit R-3**. The spreadsheet and the pie charts presented and contained the *same* five-year wage proposal data.

The spreadsheet – though perhaps an imposing document at first glance to some, given the volume of data it contained – was nonetheless, as explained above, straightforward and easy to follow. There is no testimony in the record that any of the three union leaders who sat through Hohmann's March 16 presentation (Goldman, Goff and Brandt) did not understand the information contained therein. Moreover, this Board, upon its own review of the **Exhibit R-3** spreadsheet, will readily conclude that it effectively communicates exactly what the company intended to propose in terms of wage increases for current employees.

Bottom line: There is no confusion within the spreadsheet proposal, nor can anything therein be regarded as “obscure” or “contradictory.”

The genesis of the ALJ's error lies in the failure to recognize the spreadsheet as the primary document, efficaciously presenting Richfield's current-employee wage proposal. Compounding this error, the ALJ focused improperly on the mere fact that some of the by-individual pie charts contained errors, which caused momentary confusion. See, **Exhibit GC-10(a)** through **(I)**, and see, generally, testimony at TR-79-98. There is no evidence, however, of

errors in the *by-classification* pie charts attached to the March 24 ‘last best & final’ proposal, at **Exhibit GC-6(g)**.

In consequence, the ALJ is simply wrong in stating: “I find that Richfield presented confusing pay proposals for currently employed employees,” and “further muddied the negotiation waters” by its use of “pie charts.” ALJD– 21, lines 4-5 & 9-10. Not only does this finding ignore the role of the easy-to-understand spreadsheet, it overlooks the fact that the errors in the by-individual pie charts – when pointed out – were corrected. TR-164-65 (Union negotiator Goff), and TR-517-18 (company negotiator Henry).

The pie charts, it should be observed further, contained more information than just wages; they included, as well, the hourly equivalent cost of the various benefits and other costs incurred in providing employment. As such, there may have been some experiencing difficulties in understanding the pie-chart documents, or who might have found the added information a distraction.

None of this, however, changes the fact that the *wage proposal itself* – set forth plainly in the spreadsheet – was clear and understandable. There was never any misunderstanding as to the wages that Richfield proposed for the current employees. The ALJ is wrong in concluding otherwise.

* * * * *

The following finding by the ALJ deserves close analysis, as it demonstrates how poorly the ALJ understood the evidence on this critical issue:

Richfield seized upon Goff’s request for clarification of the “top and bottom” to present a more confusing answer—even more pie charts. Pie charts are not a floor and ceiling answer. Instead of clarifying or simplifying the response, Richfield heaped 10 more pie charts upon the Union and further muddied the negotiating waters.

ALJD-21, lines 7-10. This finding doesn't square with the evidence, including the referenced testimony by Union negotiator Goff.

First, the ALJ, while focusing on the phrase "floor and ceiling" (alternately, "top and bottom"), fails to provide the context in which this phrase came up in negotiations, or to even explain what it meant (which, nonetheless, didn't stop the ALJ from offering a meaningless conclusory statement, that "[p]ie charts are not a floor and ceiling answer").

The testimony that related to a "floor and ceiling" arose in a completely separate context from any issue having to do with the *efficacy*, or clarity, of the pie charts. It arose, instead, in the context of an earlier discussion at the table, on either "February 13th or possibly February 26th," TR-161 (Goff), in response to a suggested proposal by the employer of instituting a merit-pay increase model. That proposal – abandoned shortly thereafter, as shown next – raised predictable objections from the Union, including concerns over the criteria for merit pay, subjectivity, fairness and procedure. It raised, also, the following question by Goff – the "floor and ceiling" question. Goff testified to stating the following to the company's negotiators, on February 13 or 26, regarding how merit pay would be structured:

Is there a floor to this, and is there a ceiling? If it is going to be done on merit, how does that look to *our present members*? We know what you are offering for prospective new members, but we are very unclear about what the *present workers* would get.

Id., (emphasis added).

Goff went on to testify, at TR-163, that the employer at the next meeting – after either the February 13 or 26 meeting – brought in the pie charts ("the pie charts came in, after this merit increase [proposal] was discussed"). This would have been the February 27 meeting. See, ALJD-8 (summarizing that session, and the introduction of the first pie charts), and see also,

Joint Exhibit 1 (stipulation). Goff’s initial impression, in that February 27 meeting, was that the “pie charts were brought in . . . as a way to answer our questions about the floor and the ceiling.” TR-163-64 (emphasis added). He quickly learned, though, this was not the case. The ALJ then completely missed the significance of the testimony Goff gave next:

The pie charts quickly turned from an answer about a question [regarding merit pay], how [merit pay] would affect our members, to the *actual wage proposal* by management, and *we never heard about the merit increases again*.

TR-164 (emphasis added). The record as a whole affirms that the merit-pay proposal was dropped. It is not included in the company’s March 24 ‘last best & final’ proposal, and the only testimony concerning merit pay is that which has been summarized above. Hence, the February 13/26 “floor and ceiling” question was no longer a relevant issue to the parties at the table. The pie charts had nothing to with the merit-pay proposal.

The pie charts were simply pictorial tools, used to illustrate the five yearly wage increases set forth in the spreadsheet (as well as the additional information, noted above, from other sources). This fundamental fact was overlooked by the ALJ, who also largely overlooked the fact that Richfield did not provide *only* the pie charts during this part of the bargaining – Richfield provided the spreadsheet as well (on March 16, discussed above and again below). This spreadsheet provided, in a single document, “the actual wage proposal by management” (quoting again Goff, though he was referring, at TR-164, to the pie charts provided at the meeting that *preceded* March 16 – the February 27 meeting). The spreadsheet, in short, *was* the proposal. The wage data from the spreadsheet fed into the pie charts, along with data from other sources for the other information provided in the pie charts.

The ALJ correctly noted that the pie charts were first presented at the February 27 bargaining session, ALJD-8, and she correctly noted that “Goff asked, *on February 27*, about the

wages for those already employed.” ALJD-20, line 43 to -21, line 1 (emphasis added). “As a result,” the ALJ continued, “[Michael Henry] and [Leslie] Hohmann prepared the pie charts for the five years of the proposed contract.” *Id.* This finding refers to the March 16 meeting; *i.e.*, the meeting that *followed* the February 27 meeting. See, **Joint Exhibit 1** (stipulation). March 16, as discussed and shown above, is the meeting in which Leslie Hohmann presented – not just the “pie charts for the five years” – but also the spreadsheet.

The foregoing shows, first, that the ALJ’s concern over the “floor and ceiling” question was, quite simply, misplaced. This led to the ALJ’s meaningless conclusory statement, quoted above, that “[p]ie charts are not a floor and ceiling answer.” ALJD-21, lines 8-9.

The foregoing shows, second, that the following statement by the ALJ, also quoted above, and at ALJD-21, lines 9-10, was *also* substantially incorrect: “Instead of clarifying or simplifying the response, Richfield heaped 10 more pie charts upon the Union and further muddied the negotiating waters.” In fact, this is largely reversed, and ignores critical facts in the record.

Specifically, again, the first pie charts were presented on February 27, and the spreadsheet was presented on March 16. The pie charts presented on February 27, though, were not the *by-classification* charts later attached to the March 24 ‘last best & final’ proposal. Instead, as Goff testified: “the initial pie charts that were brought into negotiations . . . were pie charts specific to the people who were in the room, meaning the Union worker committee.” TR-164. This was then followed, as noted above, and at ALJD-20, line 43 to -21, line 1, by the March 16 “pie charts for the five years of the proposed contract” that Hohmann and Henry prepared, *along with the spreadsheet that Hohmann presented* – on March 16.

Bottom line: Yes, “more pie charts” were presented on March 16, but these were *different* pie charts – by-classification, rather than by-individual. Far from ‘muddying the negotiating waters,’ the opposite occurred. The by-individual charts containing errors were corrected, TR-164-65 (Goff); TR-517-18 (Henry), and the spreadsheet was provided and described by Hohmann. The negotiating waters, in fact, were clear. Corrections were made, and the Union was plainly able to understand – using both the spreadsheet and the by-classification charts – exactly what Richfield was proposing for the current employees.

C. The Banquet Pay Proposal.

The banquet pay proposal, both for new hires and current employees, was also presented in a straightforward and simple manner. The new-hire banquet servers would receive a starting wage of \$13/hour (rising in increments over the next five years). See, **Exhibit GC-6(g)** (page 53 of 150). The current banquet employees would receive a fixed \$15/hour wage (leads, \$15.60). See, **Exhibit R-3** (first page, top 29 rows, listing the 29 servers by name).

As discussed above, at pages 2-3, Richfield’s banquet-pay proposal was the most contentious issue. Traditionally and under prior contracts, a share of the service charge paid by banquet-group customers – *i.e.*, the percentage-based imposed “gratuity,” tacked onto the cost of the food & beverage – was paid to the servers along with a cash wage. The proposal by Richfield eliminated the service charge share, but increased the cash wage. The net effect, however, called for substantially reduced compensation to the servers.

However, this proposal was deemed necessary, as also discussed above, because the Hotels faced severe competition from low-wage competitors, who were paying wages only in the \$11 to \$12 range, TR-511, and who had caused a substantial loss of business to the Hotels by

under-bidding. Richfield's proposal exceeded this, as noted above, with wages at \$13 for new-hires and \$15 for current employees. Further, as shown above at pages 2-3, the needs and reasons for this proposal were discussed at length with the Union, both in 2014 and during the formal negotiations in 2015.

The ALJ, in the only "Analysis" paragraph finding an 8(a)(5) violation with respect to the banquet-pay proposal, began with the following:

Regarding the pay for the banquet servers, Richfield *apparently* never clarified what it was offering. It claimed it would keep the service charge and then [Bill] Bunce [a manager] said it would pay when it felt like it. (emphasis added).

ALJD-21, lines 12-13. This particularly finding forms the *entire* premise for the ALJ's recommendation of a violation. The ALJ was referring to – and grossly overstating the meaning of – an isolated exchange in a *single* meeting, on March 16, between lead company negotiator Arch Stokes and a manager named Bill Bunce, who attended only two of the 11 meetings – February 26 and March 16, per the ALJ's findings; ALJD-7 & 8. The only testimony concerning what happened and was said at the March 16 meeting was by union negotiator Martin Goff. He testified:

A. The [banquet] proposal was to do away with the service charge, except that the Company keeps the service charge.

Q. And who was proposing that? Who was talking about that?

A. Arch Stokes, and I believe Bill Bunce was part of this conversation. But at one particular time, when Arch was speaking about that was their proposal and that's how they intended to do it, Bill Bunce chimed in and said that – that the Company, at times, would decide if part of the service charge was attributed to workers. And my recollection is Art [sic] Stokes looked a little befuddled by that. They had a little

discussion between them, and Bill Bunce reiterated that the employer may, at times, give a portion of the service charge to workers. That was **not** their proposal, but that is what they said at the table. (emphasis added).

TR-169.

Returning to the ALJ's one-paragraph analysis, she next states: "The bargaining notes do not reflect when Richfield would do so [*i.e.*, pay a share of the service charge]." The reason for this is simple: This was merely an isolated, and perhaps odd exchange ("Stokes looked a little befuddled"), and was never mentioned again. It was not a proposal. Goff certainly saw it this way, as quoted above: "That was not their proposal."

The ALJ's next statement shows even she didn't fully accept the premise of her recommended violation; she writes: "This *shifting* proposal *indicates* Richfield intended to exercise complete control over the banquet servers' pay" (emphasis added). First, she chooses an exceedingly weak verb – "indicating" – to express her understanding of what she claims to think Richfield "intended." Her thoughts on that aside, the ALJ is to analyze the hard evidence and make actual findings. In doing so, the ALJ must look to the entire record, and not simply extrapolate from a bare snippet of testimony, such as that provided in the above quote by Goff. Second, her use of the word "shifting" suggests an issue or proposition that goes back and forth, leaving others uncertain as to where one stands. Such was not the case, viewed over the entire record. This was a mere one-off display of an ambiguity or misunderstanding between two company representatives. The fact remains there was never a proposal made in this regard, nor is any such proposal reflected in the March 24 'last best & final.' **Exhibit 6(g)**. In addition, again, Martin Goff understood implicitly "[t]hat was not their proposal."

Finally, in the last sentence of the ALJ’s “Analysis,” she writes: “However, in many respects, charging a service charge and not paying it to the employees who earned it does not demonstrate how Richfield intended to make it more competitive.” It’s hard to say where to begin with this, as the statement appears to fundamentally misunderstand how businesses operate. To state simply the obvious, though: Richfield was seeking to reduce its labor costs to enable it to charge lower prices and compete for banquet events. How Richfield would choose to set the price and charge its customers is purely a matter of contract between Richfield and its customers. This is easily accomplished, even in states like Massachusetts which impose regulatory requirements on how money paid, designated as a “service charge,” is to be handled or divided. Where such regulations exist, the problem is avoided by, simply, *not* calling it a “service charge” or suggesting that it goes to the servers, and by calling it instead an “administrative charge,” or something similar, and making it clear in the contract that the money doesn’t go to the server – or, by simply setting a flat price with no designation at all.

The ALJ thoroughly mishandled this finding, and it should be rejected.

D. The Authority Relied Upon by the ALJ is Distinguishable.

The present case is plainly distinguishable from the two cases relied upon by the ALJ. *Billion Oldsmobile-Toyota*, 260 NLRB 745, 755-56 (1982), *enfd* 700 F.2d 454 (8th Cir. 1983), and *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1219, 1220 (2001), *affd* 50 Fed. Appx. 444 (DC Cir. 2002). Both cases stand, basically, for the following proposition, quoting *Billion Oldsmobile*, 260 NLRB at 755:

[I]f one party to a collective-bargaining agreement is proposing to the other a fundamental change in a critical area such as wages, the party proposing the change has a duty both to state clearly and with adequate documentation the reason and rationale for the change, and to explain in detail what the change is and how it is expected to affect the other party.

Richfield respectfully submits that the facts in this case – sorely misunderstood by the ALJ – do not fall within the proscription of these two cases. The wage proposal was indeed “state[d] clearly . . . with adequate documentation,” the “reason and rationale” were provided, and it was “explain[ed] in detail,” showing “how it [would] affect the other party.”

This Board should reject the ALJ’s finding of a violation.

EXCEPTION NO. 2 – The ALJ Errs in Recommending this Board Find a Violation Concerning Richfield’s Position, in View of the Union’s Lack of Movement, to Meet with The Union After November 11.

It is a fundamental tenet of Board Law, and often quoted, that the duty to bargain does not demand that a party “engage in fruitless marathon discussions,” after it has become apparent that the positions of the parties have calcified. *Teamsters Local 122*, 334 NLRB No. 137, at *114 (2001) citing to *NLRB v. North American National Insurance Co.*, 343 US 395, 402, 404 (1952). This principle applies fully to the facts in this case.

It must be noted, first, as Mr. Goff acknowledged, that there were only a handful of issues over which the parties were negotiating – primarily, wages and the change in the compensation method for banquet servers. TR-185. Mr. Goff, in fact, admitted that “the vast majority of the old contract was not in dispute in any way.” TR-231. Respondent acknowledges that the banquet-server proposal would result in a material reduction in their pay. Nonetheless, Respondent patiently presented its case to the Union for its need to do so, tied to the competition it faces for banquet services in the Rochester area. TR-178-180 (Goff: acknowledging the three 2014 meetings held prior to the formal 2015 bargaining, in which these facts were presented to the Union, together with the so-called “wish list”).

Second, the parties held numerous bargaining sessions. As just noted, there were three meaningful meetings in 2014, followed by the 11 bargaining sessions in 2015. *See*, stipulation, Joint Exhibit 1.

Third, over the course of this extensive bargaining, the parties thoroughly reviewed the entirety of their respective proposals. *See, e.g.*, TR-191 (Goff: admitting that “several times during the course of that bargaining [the parties] went through every single provision . . . in the proposal by the employer”). Further, the employer’s March 24 last, best and final proposal was discussed in the sessions that followed March 24 – on April 16 and April 28 – and the Union’s April 16 proposal was discussed in these last two sessions as well. In addition, as discussed further below, there was another session after that, on September 24. Both parties well understood each other’s positions.

To sum up, the parties met on an ample number of occasions, and at the same time had only a modest number of issues to negotiate.

In the context of the above, the General Counsel alleged in the Complaint, at paragraph 12(m), that Respondent, since November 11, “failed and refused to bargain with the Union by conditioning further meetings on the Union presenting an acceptable proposal to Respondent.” The evidence, including the facts cited above, simply do not support this allegation.⁸

The Union’s last *actual* proposal was made on April 16. **Exhibit GC-23(e)**. That proposal was presented early in the session. TR-232-33. The bargaining notes reflect that this proposal was discussed in the morning, and then reviewed in detail in the afternoon, **Exhibit R-6**, pp. 135-140, and was discussed again on April 28. *Id.*, pp. 142-47.

⁸ As noted earlier, in footnote 3, the parties have continued bargaining, in 2016. The Regional Office is aware of this, related to a subsequent investigation by that Office in 2016.

After the April 28 meeting, the parties did not meet again until September 24. In that interim period (during which the Textile Care Services contract was successfully negotiated; see footnote 1, page 1), the Union did not ask to meet, and the September 24 meeting was held at the Company's request. TR-210(Goff) and TR-539 (Henry).

At the September 24 meeting, the Union presented a so-called "counterproposal." **Exhibit GC-23(f)**⁹. As the cross examination of Marin Goff plainly established, the Union made no material moves whatsoever between its April 16 and its September 24 proposals. TR-197-210).

The General Counsel introduced in evidence a series of emails between the parties, which followed the September 24 meeting. *See, Exhibits GC-11, 12, 13 & 14*. These emails were offered in support of the allegation of the Respondent's alleged "conditioning" of a meeting "on the Union presenting an acceptable proposal." Complaint, ¶ 12(m). These emails fail utterly in supporting this charge.

In the November 11 email, **Exhibit GC-14**, Mr. Henry referred to the history of the bargaining, summarized above, and pointed to his responses in writing to the Union's September 24 so-called "counter-proposal." He also attached and referenced his October 19 written response, in italics, to that proposal (in the record as **Exhibit GC-23(f)**, and also attached as part of **GC-14**, which includes Henry's October 19 email to Goldman; that email is also in the record as **GC-11**). As noted above, the testimony of Martin Goff, at TR-197-210 establishes that the Union made no material moves between its April 16 and its September 24 proposals. In this context, Mr. Henry stated in his November 11 email, **Exhibit GC-14**, the following:

⁹ Again, note that Exhibit GC-23(f) also contains Mr. Henry's responses, in italics, sent on October 19. The parties stipulated that this Exhibit – ignoring Henry's italicized responses – constitutes the Union's so-called "proposal" made on September 24.

As indicated in the final paragraph of [his October 19] email. [,] We [sic] are willing to meet with you and the rest of the team when you have given us a significant reason to do so.

Mr. Henry then referenced, in his next sentence, the fact there had been no movement since April 16, by stating: “That is, presenting something different from what you have.” While this phrasing could have been stated differently, there is no doubt – in the context of what both parties understood – that the Union knew exactly to what Mr. Henry was referring. He stated also, in this same vein, and making his point even clearer: “you are not presenting anything further or different that would encourage or force us to change our position.” He then reminded the Union of Respondent’s oft-stated reasoning which lies behind the positions it has taken in bargaining, coupled with another invitation to meet:

If there are changes you would like to present that will assist us in tightening up the effective operation of the hotels and will contribute to the hotels being more competitive in the Rochester market. [, then] We look forward to discussing them.

Respondent respectfully submits, based upon the forgoing, that it had no obligation as of November 11 (and none since) to engage in any further “fruitless marathon discussions” with the charging-party Union, absent a demonstrated willingness, indicated in a meaningful way, that it is prepared to bargain. As it was (and remains), the Union has been fixed in its positions.

EXCEPTION NO. 3 – The ALJ Errs in Recommending this Board Find a Violation Tied to Two Information Requests by the Union.

It is first notable that General Counsel only asserted two information-request ULPs, neither of which relate to Richfield’s wage proposal (addressed in Exception no. 1). This further underscores, as shown in Exception 1, that there was ample discussion concerning that proposal, that the Union plainly understood the wage proposal, and that questions and requests for information did not go unanswered.

* * * * *

An information request may be enforced if the information is reasonably needed by a union in fulfilling its statutory duty as bargaining agent. *Chesapeake & Potomac Tel. Co.*, 687 F.2d 633 (2d Cir. 1982). On separate grounds, a request can be enforced related to a union's role in administering the CBA once in place. Here, we deal with only the former – the Union's need for information related to bargaining. The employer's obligation to provide such information is mandated by its duty to bargain in good faith. In a 1956 Supreme Court decision addressing this duty, the Court did "not hold" that the information requested "automatically follows" the request. The inquiry is "whether or not *under the circumstances* . . . the statutory obligation to bargain in good faith has been met." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) (*emphasis added*).

Respondent acknowledges that the scope of relevance applicable to information requests is generally broad. Nonetheless, as *Truitt Mfg. Co.* instructs, the facts and circumstances surrounding the request must be closely considered on a case by case basis. The question in this present case is the following: Did the charging-party union in fact receive the information it reasonably needed under the circumstances, and in the context of the bargaining at issue?

Further, there is no authority for the proposition that an employer must provide precisely what the union has asked for, nor authority for the proposition that a union can demand that the employer perform calculations, or dig for information, particularly when such information is equally available or already accessible to the union. In short, a union may not compel an employer 'do its work for them.' Instead, it is well established, for example, that where an employer allows the union access to its records and cooperates in answering questions, "it need not furnish information in a more organized form than that which it keeps its own records." *The Developing Labor Law* (6th ed.) CH 13.IV.B.4, citing to, *inter alia*, *Tex-Tan*, 318 F.2d 472).

Similarly, relevant information must be furnished, “although not necessarily in the form requested by the union.” *Id.*, citing to, *inter alia*, *Cincinnati Steel Casing*, 86 NLRB 592 (1949).

A. The healthcare information request.

The key exhibit is **Exhibit GC-20**, a chain of emails between the Union’s Nancy Goldman and the Respondent’s Michael Henry, all carrying the subject line: “Local 17 and Union National Plan B Health Insurance Proposal.” The Union’s proposal was made in the context of the status quo that Respondent, historically, and under the expired CBA, provided a third-party plan (as opposed to a union Taft-Hartley plan), with terms that gave Respondent exceptionally wide latitude in determining costs and benefits levels. *See*, **Exhibit GC-2** (Article 11, p. 19 of 52), and TR-186-88.

In the initial email in this chain, on March 20,¹⁰ Mr. Henry advised that the employer had “researched [the Union’s] alternate proposal for healthcare presented at the negotiations 3/16/15,” and had concluded it “would increase our costs greater than a million dollars.” On this basis, the proposal was rejected. Five days later, Ms. Goldman sought clarification concerning which of the two proposals he was referencing, and whether the million-plus cost was “for 1 year or for the proposed 5 years.” Mr. Henry responded six days later, stating: “Yes, the Plan B and Local 17 plan is greater than a million dollar for over the life of the proposed contract.” Given the brevity of this response, Ms. Goldman may have been within her rights to have asked a number of questions at that point, in seeking clarity – though, more than likely she didn’t need to, based on other information at her disposal. And thus, as **Exhibit GC-20** shows, she limited her information request to only the following: “Please send me your calculation for each year for each of the plans that the union proposed.” She followed up with another email, on April 4.

¹⁰ All dates are 2015, unless otherwise noted.

However, the scope of her request did not change – she simply sought: “The quantification and calculation for each of the Plans that the union proposed on March 16.” Mr. Henry responded a little over an hour later, with the calculations that appear on pages 1 and 2 of **GC-20**. These calculations showed, in summary:

- The “Local 17” plan would cost \$2,306,860.74. The cost difference, above the “Actual” paid by the employer under its existing third-party plan (\$939,058.80), amounted to \$1,325,859.02.
- The “Plan B” plan would cost \$2,426,105.40. The cost difference, above the “Actual” paid by the employer under its existing third-party plan (\$939,058.80), amounted to \$1,487,046.60.

Ms. Goldman’s final response, on April 6, at page 1 of **Exhibit GC-20**, did not challenge or further question – with one exception – any of the calculations provided by Mr. Henry on April 4. *She raised only a single point*: “neither of our proposed Plans allow for non-union participation so your figures are somewhat skewed.”

However, as Mr. Henry indicated in his testimony, he explained at the bargaining table that the calculations were not skewed in the manner suggested by Ms. Goldman. TR-568 (“I shared with them [in the bargaining; presumably on April 16 and/or April 28], I said, ‘I understand that. I know your union proposal only impacts the union staff members.’”). And, most importantly, the calculation provided on April 4, in **GC-20**, is clear on its face – and was clear to the Union – that the calculation presented as to the projected costs of the union plan *did not* include contributions to *non-union* employees. Please note the following, concerning his April 4 email:

- First, immediately above the calculations, Mr. Henry wrote: “The information for the *employers 2015 costs* includes non-union members as well.” (emphasis added). The reference in this April 2015 email to the “employers 2015 costs” was plainly a reference to the company’s then-current costs (\$939,058.80) under *its own plan*.
- Second, and making it clear that this is what Mr. Henry was referring to, in that sentence, he showed the number of the employees used in the “Plan B” calculation. The number used in that calculation was limited to the number of employees in the bargaining unit; specifically:

# Emp. Only	228
# Emp. + One	21
# Emp. Family	38

These three numbers equal 287, consistent with the number of the bargaining-unit employees working in the four hotels. TR-42 (Henry: in response to the question, “How many employees in total are in the bargaining unit,” replied: “Probably about close to 300”), and TR-80 (Henry: affirming there are “a little under 300 employees in the bargaining unit”). This number is, of course, well known to the union, based on its collection of dues income. The Union would easily have deduced, upon studying this calculation, that the cost of the Union proposal did not include contributions for non-union employees.

Accordingly, Mr. Henry’s calculations were *not* skewed. He did not inflate the calculated cost of the Union plan by improperly including contributions for non-union employees, and he explained this to the Union. As Mr. Henry testified, he “shared with them” his understanding in that regard, testifying that “[he] said, “I understand . . . your union proposal only impacts the union staff members.” TR-568.

Summing up, Ms. Goldman raised only a single point in her April 6 email. The information she sought, supposedly for clarification, was already available to her. Mr. Henry made the Union aware (“shared with them,” and “said” to them) that he did not include contributions for non-union employees in his calculation of the cost of the Union proposal. The calculation provided was clear in showing this.

B. Vacation information request

The company made a vacation-benefit proposal early in the negotiations that was “more generous” than the previous contract, tied to Richfield’s goal of aiding recruitment and retention in Rochester’s low-unemployment environment. TR-232. The union requested a quantification of the added cost of this proposal. Union leader Martin Goff, in his testimony, admitted that the company did not ignore this request, and in addition admitted that Respondent, concomitantly, pointed to the difficulty in making such a quantification, based on the fact one is “dealing with future unknown variables.” TR-227. Mr. Goff admitted he did “understand the conundrum,” of making such a quantification, after the following was posed to him: “because in the future, you . . . cannot know how many employees will be at what level of vacation entitlement at any given point in the future.” TR-228. He admitted, further, that the inherent problem in providing this quantification was expressed, directly, and “in response to [the Union’s] request for quantification.” *Id.* (although hedging that he couldn’t recall if this had been stated “at the table,” he nonetheless acknowledged “it was said at some point in some fashion”).

And indeed, such a quantification is remarkably difficult to make, particularly considering the fact that the four hotels have historically experienced significant, as well as varying, turnover. TR-501 (Hohmann: “The [four] hotels have different turnover rates. Some hotels turn at fifty percent or more per year”). Consider the following:

Under the company's proposal, employees would receive 2 weeks after 3 years, 3 weeks after 5 years, and 4 weeks after 10 years. Among the current population of employees, tenures range from 'just-hired' to 'ten-plus years'. While one can *estimate* a cost for this non-productive compensable time, as of today, over the coming year by using the current workforce, the making of this same calculation one year from now – and even more so, five years from now – is impossible. The employer doesn't know (a) how many of the current just-under 300 employees will still be here, and doesn't know (b) of the ones who stay, how many at that point will be at the 3 year/2 week point, or the 5 year/3 week point, or the 10 year/4 week point. In addition, (c) the fortunes of the four hotels could go up or go down, resulting in either new hires or layoffs. And finally, (d) an employer's very purpose in agreeing to enhance the vacation benefit, as proposed here, is to enhance employee retention (*i.e.*, all else being equal, employees have an incentive to remain as their vacation entitlement grows). That said, it is impossible to predict how well this intended incentive will work.

The ALJ erred in finding a violation. The request was not ignored, and Respondent pointed, reasonably, to the difficulties in making the calculation. In addition, the Union was in an equal position to *attempt* a calculation. The Union has all the employee-census information it needs to do this – *i.e.*, quite simply, it knows the numbers of its members, and it has their 'seniority' dates. As shown above, an employer's duty to furnish information is met, even though it may "not necessarily [be] in the form requested by the union." *The Developing Labor Law*, citing to *Cincinnati Steel Casing, supra*.

Nonetheless, though, Respondent did in fact ultimately provide an estimate, as admitted by Mr. Goff, who acknowledged its nature as a “ballpark estimate.” TR-172-74, and see, **Exhibit GC-23(f)** (Henry’s response, in italics, to the Union’s September 24 proposal, which also appears cut & pasted into Goldman’s October 20 email, at **Exhibit GC-22**, to which Henry responded). The charging party did not point to any material prejudice to its ability to fulfill its bargaining duty based on Respondent’s *de minimis* delay in providing this ballpark estimate.

EXCEPTION NO. 4 – The ALJ Errs in Recommending this Board Find a Violation Related to a Proposal Concerning Union Leaves

The Complaint alleged that “Respondent proposed that employees who take leave to attend a union convention risk losing their seniority, but did not similarly propose that employees who took other types of leave also risked losing their seniority.”

This allegation is fundamentally and factually false. Respondent proposed no word changes to the existing section of the expired CBA concerning union leaves – it simply proposed a limit on an agreed number of days’ leave would be allowed. The existing language reads in its entirety:

The Employer agrees to grant necessary time off without pay or loss of seniority rights to any employee designated by the union to attend a labor convention or serve in any capacity in any official union business. The union agrees to give in writing *two (2) weeks* notice to the Employer. It is agreed that there shall be no disruption in the Employer’s operation.

Exhibit GC-2, at p. 12 of 52 (¶ 2).

The company's proposal simply inserted – with no other changes to the above language – the following words after “necessary time off” in the first line: “...limited to *three (3)* working days...” **Exhibit GC-6(g)** (§ 54).

The verbiage “or loss of seniority” was already in the contract. The placement of that phrase, as it appears in the expired contract – negotiated by the charging party union and the respondent's predecessor – is at best awkward. Nonetheless, it is hard to conceive of a rational employer and an intelligent, self-respecting union agreeing to an interpretation that this phrase – once a limit on the number of days is added – is to the effect that an employee, upon returning late from a relatively short leave, would lose his or her seniority rights. Does that mean the individual returns to work with the status of a new-hire? Nonetheless, that appears to have been the General Counsel's allegation: The Complaint asserts that Respondent took the position that such employees would “risk losing their seniority.” This was never intended by Respondent, nor has the General Counsel presented any evidence showing this. Again, all Respondent proposed was an agreement on the number of days. The Union was free to counter-propose.

Finally, both the old CBA and Respondent's proposal contain the following provision, which is applicable to all leaves of absence: “Seniority shall accumulate during the period of leave of absence.” **Exhibit GC-2**, p. 12 of 52 (¶ 6), and **Exhibit GC-6(g)** (§58). The retained inclusion in Respondent's proposal of this provision, as §58, disproves the Complaint allegation that Respondent was discriminatory in its proposal. Section 58 in the proposal is a general-application provision, and thus applies – absent some other narrow-application provision – to all leave provisions. The Respondent did not propose, separately, a loss of seniority accumulation in § 54. It sought only to set a limit on the number of days, and was open to a counter on that number

The ALJ erred in recommending a finding of violation.

EXCEPTION NO. 5 – The ALJ Errs in Recommending this Board Find a Violation Tied to Two Information Requests by the Union.

The ALJ's recommended finding of a violation related to Respondent's discontinuance of the anniversary-date increases (or "step" or "service-point" increases), contained in Appendix A to the expired CBA (**Exhibit GC-2**), along with the annual increases, should be rejected. Respondent, upon the expiration of the labor agreement, on February 28, 2015, ceased all increases set forth in Appendix A. Following the status quo rule, under *Katz*, the wages then in effect became fixed and frozen.

At page 23 of the expired CBA, addressing "Duration," the Agreement states plainly that the wage increases in "Appendix A" – both the annual and the anniversary-date – were to be in effect only during the term of that Agreement: "This Agreement shall be effective as of October 1, 2011 and continue in full force and effect to and including the 31st day of August, 2014. In addition:

- Nowhere in the Agreement is there any language reflecting any understanding or agreement that the anniversary-date increases would continue *after* August 31, 2014;
- There is, also, nothing in Appendix A itself that suggests the anniversary-date increases continue after the increases shown for the third year of the contract;
- The anniversary-date increases in Appendix A, in fact, are expressed in fixed dollar amounts – not percentage amounts – and therefore cannot be construed as so-called 'step increases;' and
- The anniversary-date increases were continued during the extended term of the CBA, through February 28, 2015, and there is nothing in the record to suggest the existence of any agreement to continue the increases past the expiration.

In *Finley Hospital*, 362 NLRB No. 102 (2015), the contract at issue had a one-year term with set wage rates. That contract provided also that “during the term of this Agreement,” the employees would receive, on their anniversary date, a “3% increase.” Board member Johnson, writing in dissent, was plainly correct in stating:

The meaning of 'during the term of this Agreement' is clear. Once the [employees'] pay has been adjusted, there is neither a contractual nor a statutory duty to keep making further post-expiration adjustments. The status of pay is not dynamic. It has moved from one fixed point to another and stays there upon contract expiration. In fact, it would be unlawful for the [employer] to make additional raises unilaterally.

See also, Finley Hospital, 359 NLRB No. 9 (2012); vacated by *NLRB v Noel Canning* (dissenting opinion). The reasoning and application of law by the two dissenting opinions apply with even greater force in the present case.

EXCEPTION NO. 6 – The ALJ Errs in Recommending this Board Find a Violation Related to Two Alleged Threats.

The Complaint made two identical 8(a)(1) allegations, one involving Chef Ulrich in Complaint ¶5(d), and the other allegation in ¶5(f) involving Michael Henry. Both paragraphs allege, with identical wording, that Chef Ulrich and Mr. Henry, on two separate occasions, “threatened an employee by stating that Respondent was not giving wage increases because the Union had not accepted Respondent’s contract offer.”

Complaint paragraph 5(d).

Regarding the allegation related to Chef Ulrich, Graham Brandon testified to a discussion with an employee by the name of Derek Kotvask, who had reached his anniversary date after the expiration of the contract on February 28. On May 1, Kotvask told Brandon a “rumor” he had heard, to the effect that the so-called step increases would not be given out. TR-299-300.

Brandon then spoke with Chef Ulrich about the matter. Nowhere in Mr. Brandon's testimony concerning this issue, at TR-299 through 304, does he describe or identify any conversations between Ulrich and Kotvask. He described, instead, several separate conversations with Ulrich, and one, possibly more, separate conversations with Kotvask.

Brandon is a shop steward, and also spoke with Union president Brian Brandt concerning this issue. Brandt expressed to Brandon the Union's view that "the step increases still had to . . . go into effect," post-expiration. TR. 300. Brandon characterized his conversations with both Kotvask *and* Ulrich as in the nature of the two of them coming to him for "advice," about "how to get the raise" (stating further, that Ulrich was desirous of Kotvask getting the raise). TR- 302.

In the first of the separate conversations with Chef Ulrich, Brandon testified the latter said the following: "You know, HR is saying that they cannot give [Kotvask] a raise because of we're not under contract," and that Ulrich then asked him: "what do you know of this." TR-300. Based on what he said knew from speaking with Brandt, Brandon told Ulrich that this "was not the case," and that he proceeded to "reassure [both] Derek [Kotvask] and Chef Ulrich that he would get his raise." TR-300-01. In the several other conversations he had with Ulrich, he admitted (in response to the judge's questioning) that there "never came a point when Chef Ulrich said anything different." TR-302. He indicated further, in these conversations, that he would state back: "And I would say, 'Well, the Union is saying that he can.'" Id.

Plainly, none of this reveals an 8(a)(1) violation. There was no threat whatsoever, and certainly Brandon did not feel threatened, based on his testimony of his replies to the Chef. The Chef merely stated, more or less accurately, the company's position taken.

Complaint paragraph 5(f).

With respect to the allegation concerning Michael Henry, the only testimony offered was that of Kelly Schroder, at TR-351-55, a barista in the Kahler Grand Hotel. She testified that on June 19, she was present just outside the human resources office, and that she purposefully eavesdropped – while standing in the hallway, for fifteen minutes, outside a closed door – on a conversation between Mr. Henry and another human resources manager, Mary Kay Costello, which they were having with an unnamed housekeeping employee from the Marriott Hotel. Ms. Schroeder testified the employee was speaking with Mr. Henry and Ms. Costello related to a “concern that she had not received her wage increase yet, her step increase ...” TR-353.

Schroeder testified she heard Michael Henry make the following statement to the unidentified housekeeper: “We don’t have a contract right now,” consistent with the statement by the Chef, described above. Schroeder then embellished the story of what she heard, stating that Mr. Henry then said: “the Union will not agree to this offer that’s a very fair offer, you know, you really need to call Brian [Brandt, Union president] and tell him he needs to accept everything,” and that Henry then extolled the company’s proposal as “great” and “really competitive.” *Id.*

Even if one can accept this embellishment – made, as it was, by a plainly unreliable witness with an agenda, and who hovers in hallways listening in on private conversations – it does not rise to the level of an 8(a)(1) violation. There is nothing inherent in what Schroeder described that approaches the level of a threat.

EXCEPTION NO. 7 – The ALJ Errs in Recommending this Board Find a Violation Related to Discipline Involving Graham Brandon.

The Complaint at paragraph 6(a) asserts that in February, “Respondent first disciplined, then reduced the discipline, of its employee Graham Brandon.” Mr. Brandon, as noted above, was a shop steward at the time.

At issue is an attendance violation, stemming from an episode of heat exhaustion, which Brandon described in his testimony. TR-266-292. He testified to working in a kitchen that had somehow mysteriously and seriously overheated, and then testified in rather lurid detail concerning its effects on him, which included vomiting, a fever and coma-like sleep. Curiously, and calling into question his credibility, Brandon did not file a worker’ compensation claim following this incident. TR-310. A written discipline was then issued, related to his failure to call in, when not showing up for work the next day. **Exhibit GC-27**. Mr. Brandon does not dispute that he failed to call in. *Id.*, and TR-273. It is also undisputed that Mr. Brandon has a history of attendance disciplines. See **Exhibits GC-40 and 41**.

The Union grieved the February write-up. A binding agreement with the Union was reached concerning that discipline. Brandon’s union president, Brian Brandt, met with Michael Henry, and an agreement to reduce the discipline from a “2nd written warning” to a “1st written warning” was reached. TR-555 (Henry: testifying that everyone, including Mr. Brandon, agreed to this resolution of the grievance, which is shown on the face of **Exhibit GC-27**). Brandon disputes that he agreed to the grievance resolution, though he admitted his union president settled it for him on this basis. TR-287. Since Mr. Brandt, the Union president, was not called by the General Counsel to testify, Mr. Henry’s testimony was undisputed, and an adverse inference to Brandon should be taken on the question of his agreement to the resolution.

The grievance procedure under the then-current CBA (in February) was invoked, and it worked successfully. This grievance resolution addressed the very same factual dispute and issues in contention in this case – *i.e.*, Brandon’s culpability in failing to call in, and the weight to be given his prior record of attendance violations and disciplines – and it should be deemed as binding in this proceeding. There is no credible evidence in the record that Michael Henry, or anyone else in management, was motivated by anti-union animus in the handling of this discipline. The ALJ erred in recommending a finding of violation.

EXCEPTION NO. 8 – The ALJ Errs in Recommending this Board Find a Violation Related to an Alleged Denial of Hours to Kelli Johnston.

Paragraph 6(b) alleges that employee Kelli Johnston, a banquet server and sometimes-bartender (in banquets), was “denied work hours” by Respondent. Ms. Johnston is active in the Union, having participated in negotiations and having held office.

She testified at TR-313-37 to the fact that work was slow in the banquet department in January and February, and that she wanted to pick up hours elsewhere in one of the hotels. She spoke to her manager, Katie Uuland, concerning this, and was subsequently informed that the Crossings bar, managed by Ericka Scrabeck, was in need of someone on a temporary basis. Ms. Scrabeck testified that an opening had developed due to a regular bartender, Nick Miller, going on vacation at the end of February. TR-589-90. Importantly, as will be addressed below in greater detail, Ms. Johnston did not know Ms. Scrabeck, Tr-316, 330, and Ms. Scrabeck did not know Ms. Johnston, when they met to discuss work in Crossings. TR-587-88.

Ms. Johnston worked one shift. She had past experience working in a full bar (as opposed to a banquet department bar, which Ms. Johnston acknowledges carries a less wide range of drinks; TR-320-30). The shift that she worked, Johnston acknowledged, was a training and trial

shift. TR-331-32; see also, TR-593-95 (Scabeck). Although her performance was acceptable, the shift she worked was on a Monday daytime, she worked only a short period of time, and there was very little customer activity. TR-593.

Ms. Johnston was not the only employee from banquets seeking extra hours. Ms. Uuland also referred Derek Shot to her. TR-596-97. He was also given a training and trial shift. He performed very well, according to Ms. Scabeck, working a full, nighttime, busier shift. Id.

After Ms. Johnston's shift, Ms. Scabeck never heard back from Ms. Johnston. TR-597, and she never worked any further shifts in Crossings. Mr. Shot was ultimately given between three and five shifts, covering for Miller, the regular bartender on vacation. TR-596-97. Ms. Johnston testified to sending two text messages to Ms. Scabeck. A copy of the screenshot of the text messages was entered in evidence as **Exhibit GC-26**. Unfortunately, the number she had stored in her phone, and used when attempting to text her, was an incorrect number – the correct number is 507-202-1256; Ms. Johnston used 507-202-2156, with the last two digits transposed. TR-334-35 (Johnston) and TR-597-99 (Scabeck).

Ms. Scabeck was asked by the judge, in the context of not having been contacted by Ms. Johnston, why she did not, on her own volition, “call her back for a bigger trial.” TR-608. Ms. Scabeck testified credibly to simply a “gut feeling” about her as a person, Id., while also, as noted above, having received a contrariwise positive feeling concerning Shot's performance. She referred also to the fact that while Shot had been given a demanding trial – by working a busy, full night shift, and working it successfully – whereas Johnston's shift was cut short by the fact that, on the day she worked, “she couldn't stay late enough to work longer.” TR-608.

Accordingly, the explanation for why Shot got the extra shifts, and Johnston did not, was tied simply to circumstances described above. The reasons given at trial were legitimate and non-discriminatory.

Most importantly, with respect to the 8(a)(3) issue at stake, the evidence is further undisputed that not only did Ms. Scarbeck not know Ms. Johnston (nor Johnston her), Ms. Scarbeck had absolutely no knowledge – at every critical point in time – that Johnston was an active union activist, leader and participant. See, TR-588, 591-92, and 597.

The ALJ erred in recommending a finding of violation.

CONCLUSION.

For the reasons stated above, the Respondent prays this Board reject all recommended findings of violations.

This 22nd day of July, 2016.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE RICHFIELD HOSPITALITY, INC.,
AS MANAGING AGENT FOR KAHLER
HOTELS, LLC,

Cases: 18-CA-151245

Respondent,

and

UNITE HERE INTERNATIONAL UNION
LOCAL 21

Charging Party.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Objections to the Administrative Law Judge's Recommended Decision was electronically filed with Region 18 using the NLRB's filing system at www.nlr.gov and was sent to the following via email and regular mail as follows:

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This 22nd day of July, 2016

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