

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RICHFIELD HOSPITALITY, AS
MANAGING AGENT FOR KAHLER
HOTELS, LLC

and

CASE 18-CA-151245

UNITE HERE INTERNATIONAL
UNION LOCAL 21

ANSWERING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD
ON BEHALF OF THE GENERAL COUNSEL

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INTRODUCTION

The Exceptions and Brief in Support of Exceptions (collectively, Exceptions) filed by Richfield Hospitality, as managing agent for Kahler Hotels, LLC (Respondent) provide a misleading—at best—portrait of the record evidence and relevant case law in this matter. In stark contrast to these Exceptions, Administrative Law Judge Sharon Steckler conducted a well-reasoned and thorough review of the evidence in her decision and properly applied the case law. As such, her decision should be wholly adopted by the National Labor Relations Board (“Board”), with the exception of the minor issues outlined in the limited Exceptions filed by Counsel for the General Counsel.

Given the attention to detail in ALJ Steckler’s decision, Counsel for the General Counsel will not provide a comprehensive recounting of the facts and caselaw supporting the violations in this case. Rather, this answering brief will specifically target each of the Exceptions filed by Respondent, and will show that each of the violations excepted to are amply supported by record evidence and well-established Board case law.¹

Answer to Exception #1: Respondent’s Wage Proposal Remains Inscrutable, Despite Respondent’s Late-Found Efforts to Clarify It (R. Br. at 6–20)²

As found by ALJ Steckler, Respondent’s wage proposals during the parties’ bargaining violated the Act. (ALJD at 17–21.)

¹ Respondent chose not to except to several violations found by ALJ Steckler related to Union access and posting rights, and also several 8(a)(1) threats made to employees. In the absence of exceptions on these issues, the General Counsel urges that the Board automatically adopt these portions of the Administrative Law Judge’s decision.

² References to the underlying decision of ALJ Steckler are denoted by “ALJD.” References to the transcript are denoted by “Tr.”; references to exhibits filed by the General Counsel are denoted as “GCX”; and references to exhibits filed by Respondent are denoted as “RX.” Finally, references to Respondent’s Exceptions are denoted as “R Br.”

Respondent's wage proposal for current employees was convoluted in a truly singular way. As found by the ALJ (ALJD at 21), Respondent's wage proposal consisted of thousands of pages of individualized pie charts for each employee. (GCX 29; RX 15.) As demonstrated at the hearing through General Counsel Exhibit 10, the pie charts showed that employees in the same classification received different, individualized wage increases, and in some cases, decreases. For example, General Counsel Exhibits 10(a)–(c) showed three lead cooks who were all proposed to be making different wage rates, and receiving different annual wage increases. Similarly, GCX 10(f)–(g) showed three different dishroom employees, all of whom would receive different wage increases in different years under Respondent's proposal. In addition, several of these employees actually received a decrease under the Respondent's offer, in years that other employees' wages were frozen or increased. These decreases were hidden in the thousands of pages of pie charts, and in fact were contrary to Respondent's representations at the bargaining table that no employees besides banquet servers would have their wages decreased.³ (Tr. 77.) The pie charts in General Counsel Exhibit 10 are only samples, indicative of the litany of inconsistencies that lie within Respondent's massive wage proposal. *See generally* GCX 29;

³ Respondent attempted to explain away these wage decreases by calling Leslie Hohman, the creator of these pie charts. According to Hohman, the reason that some employees experienced wage decreases was due to the fact that she added in a three percent increase in health insurance costs. (Tr. 485–86.) This explanation is nonsensical. First, the proposal, as encompassed by the pie charts, called for decreases in hourly *wages*, not just Respondent's "Total Real Wage" figure that encompassed healthcare costs. *See, e.g.*, GCX 10(k) at 12; GCX 10(i) at 5–6; GCX 10(j) at 4–5. Second, several of these decreases were far greater than three percent. *See, e.g.*, GCX 10(k) at 12; GCX 29 at 1715. Hohman's explanation of the difference between the "Base Pay and OT" figure in the pie charts versus the "Base Pay" figure in the individual wage charts also does not add up. *Compare* Tr. 482–83 *with, e.g.*, GCX 10(e) at 2.

see also GCX 29 at 582, 610, 617, 1130, 1383, 1403, 1692, 1698, 1713, 1728, 1752, 2200, and 2508 (various employees receiving different wage decreases in different years).⁴

Respondent's Exceptions virtually ignore these pie charts, despite their central role in bargaining. Rather than confronting the fundamental difficulty posed by these pie charts, Respondent now contends that its wage proposal for current employees is constituted by a spreadsheet that was presented at hearing as Respondent's Exhibit 3. (R. Br. at 9–12.) Given the ALJ's conclusions regarding the pie charts and the confusion surrounding Respondent's overall wage proposal, it is no wonder Respondent now attempts to claim that its proposal on wages was not based on the pie charts, but instead on a spreadsheet. In contrast to the pie charts, however, there is *no evidence* that Respondent ever intended this spreadsheet to serve as its wage proposal, nor that it ever informed the Union that the spreadsheet replaced the voluminous and confusing pie charts. In fact, the Union affirmatively rebutted this proposition, as Union negotiator Goff testified that it was the "pie charts," and not "wage charts," that encompassed the Respondent's wage proposal. (Tr. 231.)

Thus, contrary to Respondent's contentions, and as found by the ALJ, the pie charts did constitute Respondent's wage proposal during bargaining. This conclusion is further supported by the following four factors. First, while Respondent's bargaining notes are replete with references to the pie charts being presented at the bargaining table, they mention *nothing* of a wage spreadsheet. (*See* Rx 6 at 77–148.) Second, when Respondent spoke to employees about its final offer, it referenced pie charts—and again, mentioned nothing about a "wage spreadsheet." (GCX 9.) Third, Respondent's witnesses confirmed at hearing that these pie

⁴ Where specified in this brief, page number references are to the numbers added by the parties to the exhibit, and not any already listed page numbers within the document.

charts accurately reflected Respondent's wage proposal. (Tr. 117–18; *see also* Tr. 77–78, 81, 264.) Finally, even assuming that the spreadsheet was presented at some point during bargaining, the spreadsheet is inconsistent with the pie charts that *were* presented to the Union as Respondent's wage offer. (*Compare, e.g.,* RX 3 at 1 *with* GCX 10(i) and (j) (showing different wage rates in wage spreadsheet and wage pie charts). Accordingly, far from saving Respondent's wage proposal, this late-found wage spreadsheet only serves to introduce more confusion as to what, exactly, Respondent's wage proposal entailed.

That Respondent may have offered to “correct” the errors in the initial set of individual employee pie charts also does not affect the violation found by the ALJ. Good faith bargaining does not amount to knowingly offering a multi-thousand page wage proposal to the Union, and thereafter requesting that the Union point out each and every error in the charts. Even assuming that it did, the record evidence demonstrates that Respondent did not, in fact, correct every error in the pie charts. As testified to by Union negotiator Martin Goff and numerous employees, the second set of pie charts did not, in fact, correct the errors contained in the first set of pie charts. (Tr. 165–66, 264, 363.) Respondent did not—and indeed, realistically could not—rebut this evidence, as it *did not even retain copies of the pie charts that constituted its wage proposal*. (Tr. 82 and GCX 9.) Thus, the fact that the pie charts, including the corrected versions, were replete with errors serves to further support the ALJ's finding that Respondent bargained in bad faith by offering a confusing and incomprehensible wage proposal to the Union.

Respondent's Exceptions also mischaracterize the pie charts that are at issue in this case. The pie charts found unlawful by the ALJ are contained in GCX 29 and consist of individual pie

charts for *each current employee for each year of Respondent's proposed contract.*⁵

Respondent's Exceptions suggest that the pie charts at issue are in fact those found in Appendix A of its "last, best, and final" offer of March 24, 2015,⁶ referred to by Respondent as the "by-classification" pie charts. (RX Br. at 15–16.) As Respondent's own witness admitted, however, the pie charts in Appendix A applied only to *new* employees, and were organized by classification. (Tr. 160; GCX 6(g) at 69–123.) By contrast, the violations in this case center on the wage proposal for employees who were already working for Respondent—a wage proposal which consisted of individual pie charts for each employee for each year of the proposal, and one which is deficient in the ways listed above.

Given the difficulties created by these pie charts at the bargaining table, one would expect Respondent to have a good reason for presenting such a voluminous and confusing wage proposal. Respondent, however, *has presented no explanation for its conduct*—including at the bargaining table, during the hearing, in its post-hearing brief, and even in its Exceptions to the Board. In its filings and at the bargaining table, Respondent has offered numerous reasons for why it was generically seeking to control labor costs. However, Respondent has *never* explained why, exactly, its efforts to control labor costs have to take the form of the individual and

⁵ Respondent spends much of its brief attacking the ALJ's finding that the pie charts were a response to questions that the Union had regarding a merit wage proposal. This issue is a red herring. Regardless of whether the pie charts were intended to be an "answer" to the Union's questions about a potential merit wage proposal, the record evidence demonstrates two things: one, that the pie charts served as Respondent's wage proposal; and two, that the pie charts themselves were incomprehensible. The confusing nature of Respondent's wage proposal forms the basis of the violation here, in accordance with the Board's decision in *Billion Oldsmobile-Toyota*, 260 NLRB 745, 755–56 (1982), enforced, 700 F.2d 454 (8th Cir. 1983). This violation stands on its own merits, regardless of whether Respondent's pie charts are understood as being in response to Union questions about what, exactly, Respondent was proposing for wages.

⁶ All dates in 2015 unless otherwise indicated.

contradictory pie charts.⁷ It is the unexplained, and indeed inexplicable, form of these proposals that makes them unlawful, under the precedent cited by the Administrative Law Judge. *Billion Oldsmobile-Toyota*, 260 NLRB 745, 755–56 (1982), *enforced*, 700 F.2d 454 (8th Cir. 1983).

Finally, the complaint alleged that Respondent’s banquet server proposal was part and parcel of Respondent’s overall confusing and inexplicable wage proposal. While the ALJ concluded that Respondent’s banquet server proposal constituted an independent violation of the Act, that finding is supportive of, but not necessary to, the conclusion that Respondent’s overall wage proposal violated the Act, for the reasons detailed above. In this regard, the General Counsel alleged that the *entirety* of Respondent’s unexplained and inscrutable wage proposal violated the Act. *See* GCX 1(g) at 5–6. In considering the totality of this wage proposal, Respondent’s inability to even consistently establish whether and under what circumstances it would share a service fee with the banquet servers (as had been the past practice) is best understood as a particularly stark example of the confusion regarding Respondent’s proposal. (RX 6 at 89–90.). Further, this evidence is supportive of the conclusion that Respondent’s wage proposal and inability to explain it, constitutes a violation of the Act.

⁷ In its Third Exception (R. Br. at 23), which addresses the information requests in this case, Respondent suggests that its obscure wage proposal should be excused because of the Union’s failure to file an information request regarding this proposal. This suggestion should be firmly rejected by the Board, for the following reasons. As established in *Billion Oldsmobile-Toyota* and other cases cited by the ALJ, the duty to bargain in good faith requires that parties offer *intelligible* proposals. There is no suggestion in any of these cases that a formal information request is a required element in order to establish this type of violation. Further, it is difficult to imagine what sort of an information request the Union could have filed regarding the pie charts, as Respondent contended that the pie charts *were its proposal*. Finally, while the Union did not file a formal information request, it clearly and repeatedly objected to the use of the pie charts as the wage proposal at the bargaining table, as indicated in Respondent’s own bargaining notes. *See, e.g.*, RX 6 at 71, 144. Accordingly, the failure to file a formal information request does not affect the ALJ’s finding that Respondent’s wage proposal violated the Act.

That being said, Respondent never corrected the confusion over the banquet server fee. It could have easily clarified what it intended to do with the service charges—either in a written proposal, or in a clarifying statement at the bargaining table. The fact that Respondent never did so provides support for the ALJ’s finding that this confusion, in and of itself, constituted a violation of the Act.

Answer to Exception #2: Respondent Unlawfully Conditioned Bargaining, Based on Its Own Emails and Relevant Case Law (R. Br. at 20–23)

Respondent’s second Exception, that it did not violate the law by offering to only engage in “conditional bargaining” with the Union, ignores the record evidence and flies in the face of established law. Respondent’s own emails provide the evidentiary basis for its (unlawful) conditional bargaining. On the afternoon of October 19—only one day before scheduled negotiations on October 20, Respondent cancelled negotiations because the Union refused to “make changes to impact the fact that [Respondent’s properties] are the only union hotels” in Rochester. (GCX 11.) After the Union made several attempts to schedule another bargaining session, Respondent stated, again via email, that it was only “willing to meet with you and the rest of the team when you have given us a significant reason to do so . . . That is, presenting something different from what you have . . .” (GCX 14 at 1.) Contrary to Respondent’s tortured analysis of this evidence, these emails *clearly indicate that Respondent was conditioning further meetings on the Union presenting a new proposal*—as found by the ALJ.

In the absence of impasse, it is black letter labor law that parties are not allowed to condition meetings on the presentation of a new proposal. *Twin City Concrete, Inc.*, 317 NLRB 1313, 1313–14 (1995) (employer’s offer to meet with union “if appropriate” and only after evaluating union’s written proposal constituted unlawful refusal to bargain). Respondent attempts to justify its conduct by claiming that the parties were “calcified” in their positions, and

that, in light of this, there was no need to engage in “fruitless marathon discussions,” citing *Teamsters Local 122*, 334 NLRB 1190, 1251 (2001).⁸ Respondent, however, never formally declared that the parties were at impasse at the time that it was offering to “conditionally” meet with the Union, as would be required under *Twin City Concrete, Inc.* Further, as an affirmative defense, Respondent would be required to plead and present evidence in support of its position that the parties were at impasse—again, something that it failed to do. *See* GCX 1(i) and 1(n) (Respondent’s Answers to Complaint and Amended Complaint). Even assuming that a formal declaration of impasse had been made, and had been included in Respondent’s pleadings, the parties’ course of bargaining and Respondent’s other unfair labor practices both preclude any finding that the parties *were* at impasse as of November 2015. Accordingly, Respondent’s Exception on this point should be rejected by the Board.

Answer to Exception #3: Respondent’s Failure and Delay in Providing Requested Information Violated the Act (R. Br. at 23–30)

ALJ Steckler found, in agreement with Counsel for the General Counsel, that Respondent violated the Act with respect to two information requests: an April 2015 request for health insurance cost information; and a May 2015 request for information regarding the costs of vacation benefits.

As to the request for health insurance information, the record evidence demonstrates that the Union requested information regarding the cost of health insurance for *bargaining unit* employees on April 6. (GCX 20 at 1.) Respondent, as found by ALJ Steckler, never provided this information. (ALJD at 38:24–29.) In its Exceptions, Respondent belatedly contends that the

⁸ The proposition relied on by Respondent in *Teamsters Local 122*, 334 NLRB at 1251–523, involved allegations of overall surface bargaining—an issue not present in the instant case. Based on Counsel for the General Counsel’s review of this case, there is nothing in this case that even suggests that an employer can condition further bargaining sessions on a union making sufficient movement in its proposals (absent impasse).

figures that were sent to the Union prior to April 6 only included cost information for bargaining unit employees. (GCX 20 at 1.) This is a curious claim; given that Respondent’s HR manager Michael Henry explicitly stated that the cost information that was provided included “non-union members.” *Id.* Indeed, the Union clearly thought that information that had been received included non-bargaining unit members, as indicated by its April 6 email requesting cost information limited to bargaining unit members, and its follow-up request at the bargaining table on April 16 (RX 1 at 41–42 (bargaining notes from Union member Kelly Schroeder for April 16).)

The record demonstrates that Respondent never responded to the Union’s April 6 request, or otherwise clarified that the information that was provided was in fact limited to bargaining unit members. Respondent had ample opportunity—at the bargaining table and even at trial—to provide actual evidence in support of its claim that the health insurance information it did provide was limited to bargaining unit members, yet chose not to do so.

In a belated attempt to argue otherwise, Respondent points to a misleading portion of HR Manager Michael Henry’s testimony (R. Br. at 26.) Henry’s testimony, recounted in full, does not support Respondent’s newly-found position; rather, it demonstrates that the information that was provided *was not limited to bargaining unit employees*, as requested by the Union:

“I know that your union proposal only impacts the union staff members, but, from our perspective, it’s our responsibility to cover them both. ***If we did in fact, take that number out from non-union employees***, what would impact your costs would be greater to us if we removed that number from the numbers that we provided them.” (Tr. 568–69) (emphasis added).⁹

⁹ The bargaining notes entered by Respondent also do not support its current position. These notes indicate that although the Union raised issues with the information requests during the parties’ April bargaining sessions, Respondent never provided the supposed “clarification” that the health insurance information only covered bargaining unit employees. (See RX 1 at 41–42; RX 6 at 135–47.)

Thus to be clear, Henry, in his testimony, admitted that Respondent did not provide information limited to Union members.

As to the delay in providing the requested vacation cost information, ALJ Steckler's decision (ALJD at 41–42) ably addresses all of the arguments being raised by Respondent before the Board. Respondent's six-month delay in providing this relatively limited information was by no means *de minimis*, and under established Board precedent violated the Act.

Answer to Exception #4: Respondent's Unexplained Proposal to Cause Employees Who Took Union Leave to Risk Their Seniority Violated the Act (R. Br. at 30–32)

Respondent's Exception to the ALJ's finding regarding its union leave proposal rests on the assumption that adding a time limit to a leave proposal is somehow a minor change that could not violate the Act. This is false. In the expired contract, the Union leave proposal read as an *affirmative* preservation of seniority rights for employees who took union leave. By including a limit of three days in that proposal, Respondent turned this affirmative right into a threatened *loss* of seniority if employees took more than three days leave. *Compare* GCX 2 at 12 with GCX 6(g) at 29–30.

More importantly, Respondent ignores the basis of the ALJ's finding in its Exceptions. ALJ Steckler did not find that Respondent's proposal *per se* violated the Act because it apparently targeted employees who took leave for union activities. Rather, the fundamental issue with this proposal was (and is) Respondent's utter failure to provide a justification for it. (ALJD at 21–22.) Even in its Exceptions, Respondent has provided no explanation for why it was seeking this facially suspect proposal. As established by the precedent cited by the ALJ, this failure to explain a destructive proposal of this nature makes it unlawful.

Answer to Exception #5: ¹⁰ Respondent's Failure to Continue Paying "Step Increases" After the Expiration of the Parties' Expired CBA Violated the Act (R. Br. 32–33)

Respondent has filed no exception to the finding, nor does it dispute, that it has ceased paying the step increases under the expired contract. Rather, Respondent's Exception rests on the argument that it was *entitled* to cease these step increases under existing Board law. This Exception flies in the face of well-established precedent.

As noted by ALJ Steckler, an employer is, in most circumstances, required to continue to abide by the terms of an expired contract. (ALJD at 24-25.) Respondent does not refute this general proposition, but instead argues that the language in the expired contract—which provides dates that the step increases come into effect—amounts to a “waiver” of the obligation to continue to pay these increases. The only caselaw that Respondent cites to in support of its position is *the dissent* in *Finley Hospital*, 362 NLRB No. 102 (2015). As should be evident, the majority opinion in *Finley Hospital* does not support Respondent's position. Respondent provides no reason for overturning this well-established case law, and as such, the Board should adopt ALJ Steckler's order on this point.

Additionally, it should be noted that Respondent did not except to ALJ Steckler's finding that the failure to pay these wage increases also violated Section 8(a)(3) of the Act (ALJD at 30.). Accordingly, even if the Board finds that Respondent's arguments, discussed above, regarding the 8(a)(5) violation persuasive, because Respondent failed to except to this 8(a)(3) violation, General Counsel urges the Board to automatically adopt ALJ Steckler's finding on this point.

¹⁰ Although Respondent apparently mistitled this exception as being related to the information requests in this case, it is clear from the body of this exception that it addresses the violation regarding its failure to pay step increases to employees.

Answer to Exception #6: Respondent's Exceptions Regarding Some of the Section 8(a)(1) Threats Found By ALJ Steckler Should Be Disregarded By the Board (R. Br. 33–35)

Out of the numerous unlawful threats found by ALJ Steckler, Respondent excepts to only two: first, Chef Robert Ulrich's threats to kitchen employees Graham Brandon and Derek Kotvast regarding Respondent's failure to pay the step increases discussed above; and second, HR Managers Michael Henry and Mary Kay Costello's threats to an unknown employee regarding the Union's failure to accept Respondent's "reasonable" contract offer. Each of these Exceptions should be rejected by the Board.

As to the threats made by Ulrich, Respondent does not dispute that these statements were made. Rather, Respondent claims that these statements "plainly" do not amount to threats because Brandon did not feel threatened and because the statements accurately reflected Respondent's position regarding the step increases. These arguments are easily refuted. It is well-established that unlawful threats are judged under an *objective*, not a *subjective*, standard. *Multi-Aid Services*, 331 NLRB 1226, 1227–28 (2000), *enforced*, 255 F.3d 363 (7th Cir. 2001.) The fact that Brandon may not have personally felt threatened is irrelevant. The accuracy of the alleged threat also does not matter; the test of a threat is not whether it is objectively true or false, but whether it would have a coercive effect on employees. Based on well-established precedent, statements blaming a union for a failure to receive benefits (in this case, by not agreeing to a contract with Respondent) are coercive and violate the Act. *RTP Co.*, 334 NLRB 466, 468, 470-71 (2001), *enforced sub nom.*, *NLRB v. Miller Waste Mills*, 315 F.3d 951 (8th Cir. 2003).

Respondent's second Exception—regarding the threats made by HR Managers Henry and Costello to an unknown employee that were overheard by employee Kelly Schroeder—amounts to nothing more than a credibility challenge. Under well-established Board precedent, an ALJ's credibility determination should not be disturbed unless the clear preponderance of the evidence

is against the determination. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544–45 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). Here, ALJ Steckler conducted a reasoned analysis of the relevant testimony. (ALJD at 29.) The ALJ determined that Schroeder’s testimony should be credited because of her demeanor and because of the fact that Respondent did not call any witnesses to rebut her testimony (even though Henry testified regarding other topics). (ALJD at 29: 18–29.) As the clear preponderance of the evidence in fact *supports* the ALJ’s findings on this point, Schroeder’s testimony should be credited. And based on her credited testimony, Respondent’s statements to the employee that the Union was to blame for not accepting Respondent’s contract offer violated Section 8(a)(1), under the precedent discussed above.¹¹

Answer to Exception #7: Respondent’s Exception Fails to Resurrect Its Untimely Deferral Defense, and Even if Its Deferral Defense Were Timely, Deferral in these Circumstances Is Inappropriate (R. Br. 36–37)

Based on Counsel for the General Counsel’s reading of this Exception, Respondent is apparently arguing—belatedly—that the Board should defer to a grievance settlement reached regarding Union Steward Graham Brandon’s discipline. This exception should be rejected, as Respondent is attempting to resurrect an untimely affirmative defense.

As noted by ALJ Steckler, deferral is an affirmative defense that must be pled or, at the very least, raised at trial. *See, e.g., Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at *14 (2015). Despite pleading numerous affirmative defenses, Respondent’s Answer mentions nothing regarding deferral. (GCX 1(i) and 1(n.) And, indeed, even in its Brief to the ALJ and its Exceptions, Respondent cites no case law in favor of its belated deferral argument. Accordingly, as found by ALJ Steckler, Respondent has clearly waived any deferral arguments. (ALJD at 51–52.)

¹¹ Contrary to Respondent’s contention, the fact that Schroeder merely overheard these threats, as opposed to having them directed at her, does not affect the violation found by the ALJ. *Williams Motor Transfer, Inc.*, 284 NLRB 1496, 1496 (1987).

Further, even assuming that Respondent had raised a timely deferral argument, deferral is not appropriate in the instant circumstances. In determining whether to defer to a private settlement, the Board applies the familiar *Independent Stave* criteria. Under *Independent Stave*, 287 NLRB 740 (1987) the Board considers the four criteria in determining whether settlement is appropriate: 1) whether the charging party and respondent have agreed to bound by the settlement, and the position taken by the General Counsel regarding the settlement; 2) whether the settlement is reasonable in light of the nature of the violation alleged, the risks inherent in litigation, and the stage of the litigation; 3) whether there has been any fraud, coercion or duress in reaching the settlement; and 4) whether Respondent has engaged in a history of violations of the Act or breached prior settlement agreements. *Id.* at 743.

Weighing all of these factors reveals that deferral is not appropriate here. The General Counsel and the discriminatee (Tr. 287–88) both oppose this settlement. *Frontier Foundries, Inc.*, 312 NLRB 73, 74 (1993); *Clark Distribution Systems, Inc.*, 336 NLRB 747, 750 (2001). The settlement is not reasonable in light of the violations alleged, as it involved only a slight decrease in Brandon’s discipline level and, more importantly, provided no assurances to other employees that they would not be retaliated against for engaging in protected activities under the Act. *Flint Iceland Arenas*, 325 NLRB 318, 319 n.4 (1998). As evidenced in the record, Respondent engaged in duplicitous activity during the settlement process, as it attempted to rely on already expunged discipline and made-up attendance issue in justifying its discipline of Brandon. *Goya Foods, Inc.*, 358 NLRB No. 43, slip op. at 2 (May 17, 2012). Finally, while there is no record evidence of Respondent breaching settlement agreements in the past, the discipline (which apparently is not being challenged on its merits by Respondent) occurred as one part of a much larger campaign of unremedied unfair labor practices—something that further

weighs against deferral. *Goya Foods, Inc.*, 358 NLRB No. 43, slip op. at 3; *Flint Iceland Arenas*, 325 NLRB at 319.

Answer to Exception #8: Respondent's Exceptions Ignore the Fact that Respondent Also Unlawfully Denied Kelli Johnston Hours in the Housekeeping Department, and Do Not Address Much of the Evidence Relied Upon By ALJ Steckler in Her Findings Regarding the Bartending Hours Denied to Johnston (R. Br. 37–39)

ALJ Steckler found that Respondent violated Section 8(a)(3) of the Act by denying positions to Union Vice Kelli Johnston in two separate positions: as a bartender at the Crossings Bar, and as a housekeeper at the Marriott Hotel. As an initial matter, Respondent does not address, or apparently except to, its failure to hire Johnston in the Marriott housekeeping department. This portion of the violation, therefore, should be adopted by the Board, for the reasons discussed in ALJ Steckler's decision. (ALJD at 59–60.)

Further, Respondent's Exceptions as to the failure to hire Johnston in the bartending department are wholly without merit. In this regard, Respondent makes essentially two arguments as to why its denial of hours was not unlawful: first, that manager Erica Scrabeck relied on reasonable judgment in deciding not to hire Johnston; and second, that Scrabeck allegedly had no knowledge of Johnston's Union activities.

As to the first argument, ALJ Steckler's decision fully addresses Respondent's "reasoned judgment" argument. (ALJD at 58–59.) As the ALJ notes, Scrabeck had no knowledge of Johnston's bartending experience, admitted that Johnston had performed acceptably in her limited trial, and finally that she relied on a "nebulous" gut feeling in making the decision not to

hire Johnston. These factors all belie that Respondent had a legitimate motivation for its failure to hire Johnston.¹²

The second argument—that Scrabeck had no knowledge of Johnston’s Union activity—fares no better. Given her position on the negotiating committee (Tr. 314–15), Respondent clearly had knowledge of Johnston’s union activities. Even if one credits Scrabeck’s denial of knowledge of Johnston’s union activities, the Board has held that the General Counsel is not required to prove that a specific decision-maker has knowledge of union activity, when it can be shown that Respondent generally had knowledge of such activity.¹³ *See, e.g., State Plaza Hotel*, 347 NLRB 755, 756 (2006). Finally, HR Manager Michael Henry—who was involved in contract negotiations, and therefore had direct knowledge of Johnston’s union activity—was involved in the investigation of this incident and conducted a sham investigation of this denial of

¹² Respondent’s Exceptions also make note of the fact that while Johnston tried to text Scrabeck to follow up on the availability of bartending shifts, these texts apparently did not reach their intended recipient. This missed connection is ultimately irrelevant. There is no evidence that the employee who was chosen—Derek Shot—had to text Scrabeck to receive shifts in order to receive work. Moreover, as ALJ Steckler noted, Johnston followed up with another manager—Scrabeck’s boss, Tyler Kase—regarding her inability to receive bartending hours. Kase’s (unrebutted) response, that Johnston was unable to work evenings, was clearly pretextual, given Johnston’s evening work schedule. Thus, while Respondent may be correct that Johnston’s texts never reached their intended destination, Respondent incorrectly grants this issue dispositive weight. Further, the pretextual reason given for the denial of hours, (inability to work nights) supports the merit finding.

¹³ Respondent may attempt to argue that it refuted any implied knowledge of the decision-makers in this case because Scrabeck denied any specific knowledge. The Board has apparently adopted this as a potential affirmative defense to a claim of imputed knowledge. *See Vision of Elk River*, 359 NLRB No. 5, slip op. at *6 (2012). Even assuming that this is a valid affirmative defense Respondent did not include in its answer, and, perhaps more importantly, did not sufficiently prove it up at trial. Even if one credits Scrabeck’s denial, Respondent did not show that Scrabeck was the *sole* decisionmaker in choosing Shot over Johnston. That Johnston in fact discussed the position with another manager, Tyler Kase, suggests that Scrabeck was *not* the sole decisionmaker. Accordingly, Respondent’s affirmative defense on this front fails.

hours, as found by the ALJ. (ALJD at 59:6–11.) Accordingly, Respondent’s second attack on the ALJ’s analysis also fails.

CONCLUSION

For the reasons discussed above, Respondent’s Exceptions should be denied in full.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Answering Brief to the National Labor Relations Board on behalf of the General Counsel was filed via e-filing and served on August 5, 2016, by email on the parties whose names and addresses appear below.

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