

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

UNITE HERE LOCAL 1,  
Respondent,

and

Cases 13-CB-217959  
13-CB220319  
13-CB-228165

HYATT REGENCY CHICAGO  
Charging Party.

**CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Dated: November 27, 2019

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## INTRODUCTION

On November 5, 2018, the Regional Director for Region 13, acting for and on behalf of the General Counsel for the National Labor Relations Board (“Board”), issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing (“Complaint”) alleging that UNITE HERE Local 1 (“Respondent” or “Union”) engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act. GC Ex. 1(j). In its Answer to the Complaint (“Answer”), Respondent generally denied the unfair labor practices allegations. GC Ex. 1(l). A hearing in the instant case was held before Administrative Law Judge Christine E. Dibble on January 28 and 29 and April 8 and 9, 2019, in Chicago, Illinois. On the record, Counsel for the General Counsel amended the Complaint by withdrawing paragraph (t) of Section VI and amending the language of paragraph (p) of Section VI as set forth on the record. Tr. 7-8.

On September 26, 2019, the Administrative Law Judge (“ALJ”) found that Respondent “illegally failed and refused to respond” to each of the nineteen information requests submitted by the Charging Party, Hyatt Regency Chicago (“Hyatt” or “Hotel”) that were at issue in the case. The information requests sought information about a variety of grievances filed by the Union concerning alleged contract violations. As part of her remedy, the ALJ found the traditional remedies were inappropriate and determined it was appropriate under the facts presented to impose extraordinary remedies including requiring mandatory in-person training sessions for all of Respondent representatives responsible for responding to or advising on information requests made by the Charging Party.

On October 24, 2019, Respondent filed exceptions to the ALJ's decision, and a brief in support. In its exceptions, Respondent concedes it “does not except to the finding of violations on the facts and evidence in the record.” Respondent’s Brief in Support of Exceptions

to ALJ Decision (“Exceptions Brief”), p. 10. Instead, Respondent only challenges the entry of the “extraordinary remedy” and the ALJ’s order that Respondent produce information about grievances that have been “completely resolved.”<sup>1</sup> *Id.* pp. 11. Although Respondent mischaracterizes its repeated misconduct in failing to respond to Hyatt’s information requests as “inadvertently leaving out *some fact* or other that it possessed *but overlooked*” (*id.* p. 2 (emphasis added)), the evidence and findings of the ALJ do not remotely support this mischaracterization of Respondent’s behavior. No evidence was offered to support Respondent’s claim that its conduct was inadvertent or overlooked. Rather, the evidence and findings of the ALJ demonstrates the Union’s failure and refusal to respond to the Hotel information requests were systemic and as one arbitrator found, was “by design.” Much of the information sought by the Hotel in its requests for information (“RFI”) was in the Union’s possession as early as when the grievants first filed a complaint shortly before the grievances were filed. Indeed, through much of the hearing, Union witnesses testified *under oath* that the Union had provided to the Hotel all the information it had in its possession regarding grievances. The falsity of this misrepresentation was only discovered when at the conclusion of the third day of the four-day hearing, after the General Counsel and Hotel had already presented their evidence in the case, the Union waived its privilege claim and produced to the Hotel and General Counsel for the first time the grievant intake forms for the nineteen grievances at issue. As the ALJ found, these forms disclosed an abundance of information that the Union had refused to previously provide to the Hotel. Nor did the Union disclose the underlying facts contained in the purportedly privileged documents, even

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<sup>1</sup> It is noteworthy that Respondent concedes in its Exceptions Brief that the Board should impose a “standard” remedy of “*an order that the information be provided* and that a remedial notice be posted.” Exceptions Brief p. 10 (emphasis added).

though the Hotel asked for the information. See, *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

Prior to the hearing, the Union entered into two separate settlement agreements with the Board settling similar Unfair Labor Practice (“ULP”) charges filed by the Hotel against the Union, both alleging the Union had unlawfully failed and refused to provide the Hotel with requested grievance information. In both settlement agreements, the Union promised to timely respond and provide information requested by the Hotel. However, in the second settlement agreement, the Union also admitted that its conduct violated the National Labor Relations Act (“Act”). Following the entry of these two settlement agreements, the Hotel filed the three underlying separate ULP charges alleging similar misconduct by the Union when responding to the Hotel’s RFIs.

The egregious misconduct of the Union was not limited to the nineteen grievances at issue. In addition to one arbitrator finding that the Union’s active concealment and delay in producing responsive information was “by design,” another arbitrator postponed a scheduled arbitration hearing because of the Union’s delay in responding to the Hotel’s information request until just days before the start of the arbitration. Many of the documents the Union failed to timely produce had been given to the Union many months before the Union first produced them to the Hotel. As the ALJ repeatedly found, the delay in producing this information interfered with the Hotel’s ability to properly analyze whether to resolve grievances or defend them at arbitration.

The remedy sought by the Union in this case (i.e., an order that the information be provided for pending grievances and that a remedial notice be posted) is essentially a request that it be allowed to simply police itself in responding to RFIs. This same remedy has already been

previously imposed twice and has been repeatedly ignored by the Union. By not contesting the “finding of violations” contained in the Decision of the ALJ, the Union concedes in *nineteen* other RFI’s following the entry of the two NLRB settlement agreements, it has again illegally refused to timely respond to the Hotel’s RFIs. The ALJ astutely determined that the “standard remedy” sought by the Union would be ineffective in curbing the Union’s systemic misconduct and appropriately found that an extraordinary remedy was warranted. Under Section 10(c) of the National Labor Relations Act, the Board is authorized “to take such affirmative action . . . as will effectuate the policies of this subchapter” including requiring the Union “to make reports from time to time showing the extent to which it has complied with the order.” 29 U.S.C §160(c). In order to demonstrate that the extraordinary relief is warranted, a factual explanation of Respondent’s misconduct must be presented.

## **STATEMENT OF FACTS**

### **A. Background.**

HRC is located in Chicago, Illinois and operates a hotel. Complaint; Answer ¶II(a). GC1(j) and (l). Since 1974, Respondent has been the exclusive collective bargaining representative for HRC’s culinary, food and beverage, bartenders, housekeeping, uniform service, banquet, and guest service employee. *Id.* ¶5 (a) and (b). HRC is the largest hotel in the City of Chicago and is the largest Hyatt hotel in the world with over 2,000 guest rooms, two towers, and meeting space of almost 300,000 square feet. T. 317. HRC employs approximately 1,200 employees, 800 of which are members of Respondent. T. 38.

### **B. Grievance Processing.**

Under the collective bargaining agreement (“CBA”) (GC 2a p. 38), the Union is obligated to file a grievance within fourteen days of its occurrence. T. 41-42. The employer then

has seven days to respond to the grievance. T. 42. Upon receipt of a grievance, the Hotel usually reaches out to the department involved and attempts to get an explanation. T. 43. The Hotel will then gather the information requested by the Union and serve the Union a formal response to the grievance that includes its own information requests usually seeking all facts and supporting evidence concerning the grievance and whether a discussion with management took place under Section 46A of the CBA. T. 43-45. HRC consistently provides timely responses to the Union's information requests within the seven-day period demanded. When it is unable to do so, HRC will advise the Union that it will follow-up with more information. T. 162. When HRC issues information requests, they are for genuine purposes and are never issued for the purpose of simply imposing work on the Union. T. 270.

Over the years, the number of grievances filed by the Union against the Hotel has steadily increased. In 2013, 22 grievances were filed by the Union against HRC. T. 154. By 2014, that number grew to 78, by 2015, 103 grievances were filed and in 2017, 173 grievances were filed. *Id.* As of January 2019, there were over 200 pending grievances. T. 275. As the number of grievance filings increased, HRC hired an additional person to assist in processing grievances and provide requested information. T. 338-39.

Grievance meetings are initiated with the Union contacting the Hotel. T. 274. During the hearing, the Union conceded it will not ask additional questions of the grievant concerning the grievance until it conducts a grievance meeting with the Hotel which is often scheduled six months to a year later. T. 607-08, 645, 835. The Union does not ask the grievant the same questions at or near the time the grievance is filed because “[i]ts a time management thing to some degree” and it doesn't “have time . . . .” T. 835-36. It is at the grievance meeting where the Union first explains why a discipline is unjust or why the Union believes the company violated

the contract. T. 605-06. On average, the Union conducts approximately one grievance meeting per month. T. 703. The agendas identifying the grievances to be discussed are set exclusively by the Union. HRC has no unilateral power to place a grievance on a grievance meeting agenda. T. 236-37, 303, 437. For the grievances at issue in this case, the Union has only held a grievance meeting with HRC on grievance number 20172598, Antonio Avila, which was held almost a year after the grievance was filed. T. 76-77, 157, 304.<sup>2</sup>

The type of information needed by the Hotel to assess the merits of the grievance depends on the nature of the grievance claim. In discipline grievances, understanding why the grievant claims the discipline is unjust will allow HRC to determine if the discipline was improperly issued. T. 350-51. In improper subcontracting grievances, disclosure of the duration of the incident is important because if it is continuing and deemed improper, the Hotel will want to stop it. The duration and the number of people involved will also allow HRC to assess its financial exposure. T. 356-57. In scheduling claims, the Hotel needs to know the number of grievants involved along with the type of pay issue being challenged to accurately assess HRC's financial exposure. T. 357-58. Without that information, HRC has no chance of settling the claim or correcting the issue early if it is first disclosed at a grievance meeting. T. 358. Moreover, the longer the Union goes without providing the requested information, the more financial exposure there is to the Hotel because the issue cannot be promptly corrected by the Hotel on its own. T. 469. In Section 56 claims,<sup>3</sup> HRC needs to know the number of claims, the time involved, and the

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<sup>2</sup> A grievance meeting took place on a termination grievance involving Jackie Kaiser but the Jackie Kaiser grievance at issue in the Complaint involved Ms. Kaiser's suspension, not her termination. T. 158-59, 223; GC Ex. 12A.

<sup>3</sup> Section 56 of the then applicable CBA provides "[s]upervisory personnel shall not perform work normally performed by bargaining unit employees except in the case of emergency." GA Ex. 2, p. 48.

people involved. T. 358-59. Having the underlying evidence that was recorded or documented by the grievant allows the Hotel to determine if a violation took place and if so, to pursue settlement. T. 363. Getting the information promptly also helps preserve witnesses' memories. The farther away from the event, the less likely a witness will remember the incident. T. 363-64, 468. If the Hotel can interview witnesses shortly after the alleged event, it can make a better determination of the merits of the claim and it will help preserve evidence HRC can use to defend itself. T. 364. Because of the factual nature of Section 6 (subcontracting) and 56 claims, some detail with respect to the Union's witnesses' memory of events is also required to assess the credibility of the Union witnesses. T. 364-65. Getting the information promptly also will allow the Hotel to review security video that can confirm or dispute the claim before it is deleted. T. 467.

The Union's use of grievance meetings to disclose information is inadequate delays resolution of grievances. When information is first disclosed to HRC at a grievance meeting, the Hotel must undertake additional investigation to confirm the disclosures. T. 345-47. As a result, the opportunity to resolve the grievance is delayed. T. 347. In addition, such long delays impair Hotel witnesses' ability to recall events. T. 351. If the claim involves a seemingly insignificant incident, such as a manager picking up a piece of paper off the floor, it is likely the manager will have no recollection of the incident a year later. T. 353-55. In some cases, managers are no longer employed by HRC and are not available to discuss the issue and security video is no longer available because it is not saved after four to eight weeks. T. 352-53. During some grievance meetings, the grievant is not in attendance which eliminates the opportunity to obtain answers to additional questions that may arise during the grievance meeting. T. 348. Timely understanding the nature of the grievance is important to promptly resolving the grievance. If

the Hotel finds that it has violated the contract, the Hotel has in the past implemented a remedy even without the benefit of a grievance meeting. T. 343-44.

### **C. ULP History.**

The underlying Complaint involves three ULP charges filed by the Hotel involving nineteen RFIs. GC Ex. 1(a), (c), and (e), Complaint ¶¶1 (a) through (c) and ¶¶VI (a) through (s), GC Ex. 1(j). Two similar prior ULP charge filings by the Hotel against the Union resulted in the Union's execution of two NLRB settlement agreements with the Union promising in both settlements to timely providing HRC with relevant requested information. Er. Exs. 5 and 6. In one of the agreements, the Union explicitly admitted that its conduct violated the Act. Er. Ex. 5.

### **D. The Union's Untimely Disclosures Are Purposeful.**

The evidence offered at the hearing shows that the Union's failure to timely provide requested information is purposeful. For example, one arbitrator postponed a scheduled arbitration hearing because of the Union's delay in responding to the Hotel's information request until just days before the start of the arbitration. T. 322. The grievance was filed in March 2016 and the arbitration was scheduled for August 2016. *Id.* The Union did not respond to HRC's multiple information requests until nine days before the scheduled arbitration hearing. *Id.*<sup>4</sup> Many of the documents disclosed nine days before the hearing were prepared and submitted to the Union many months before the scheduled arbitration. E.g. Er. Ex. 18. The Union offered no

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<sup>4</sup> The objection to the admission of the decision of the arbitrator postponing the arbitration was sustained subject to revisiting the issue later after her review of the transcript. T. 323-24, 326-27. However, the testimony explaining the delay was received without objection. T. 322. An offer of proof was made concerning other documents relevant to the arbitration (T. 459-61; Er. Exs. 12 – 21) and the ALJ admitted them into evidence Er. Ex. 18. GC Exs. 22a and b are relevant evidence showing the Union's delay in providing information is purposeful and warrants the entry of an extraordinary remedial order.

excuse at the hearing explaining why it waited until days before a scheduled arbitration to provide information it had in its possession months prior.

Another past arbitration involved over 200 Section 56, non-bargaining unit work, claims that grew from two grievance filings identifying just a single date. T. 359. Prior to the start of the arbitration hearing, the Union untimely provided spreadsheets which generally summarized each Section 56 claim it claimed was part of the two single grievances.<sup>5</sup> T. 556. However, the actual underlying evidence offered by the Union in support of each claim (emails documenting the incidents) was not tendered to the Hotel until the Union first introduced it at the hearing, even though the emails are dated up to six months before the hearing date. T. 359-63. In response to the Hotel's request for relief from the arbitrator, the arbitrator ruled that he was powerless to grant any because there was nothing in the CBA that gave him the authority to grant relief. T. 360. In his Award, the arbitrator found that the Union's lack of prearbitration hearing disclosures not providing detailed information about the claims was "by design." Er. Ex. 28 p. 13. This finding is supported by one Union email where the Union witness complained that there was a leak in the housekeeping department because the nature of the grievance claim was disclosed to Hotel management and cautioned the recipients of the email to not forward the documentation to anyone else ("keep this in this small circle"). Er. Ex. 11.<sup>6</sup>

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<sup>5</sup> HRC's information request was served July 10, 2015. Er. Ex. 7b, T. 455. The first spreadsheet describing the claims was submitted by the Union on September 18, 2015 and contained only 46 claims. Er. Ex. 8, T. 448-49. After HRC sent two emails to the Union requesting it to supplement the list, the Union tendered to the Hotel approximately 100 claims the afternoon of *the day before the Thanksgiving holiday*. Er. Exs. 9 and 28 p. 12, T. 456. Less than one week before the first scheduled hearing date of December 14, 2015, the Union sent HRC another spreadsheet identifying more than 200 claims. T. 362-63, 457, Er. Exs. 10 and 28 p. 13.

<sup>6</sup> Er. Ex. 11 was submitted to Sara Foran and the attorney on the same day it was created, May 20, 2015.

In three other arbitrations, arbitrators ruled that rather than dismissing grievances that lack an adequate explanation of the basis of the claim, the better alternative is to allow the grievance to proceed and the Hotel can seek additional information through information requests which the Union “*must*” supplement with the requested information. T. 368-72. Er. Exs. 4a, b, and c (emphasis added). Despite HRC’s multiple efforts to force the Union to comply with its information response obligations, the Union has ignored these arbitrator rulings and has continued to engage in a systemic refusal to timely provide the Hotel information. For example, as late as October 2018, the Union filed another Section 56 grievance (number 20182129) which simply alleged “non-Bargaining unit Work” on or about October 5, 2018 and ongoing and continuing. Er. Ex. 24c. In response to HRC’s information requests seeking all facts supporting the grievance, the Union information response disclosed simply “[g]rievant claims that on 10/05/18, ongoing and continuing, *management has been seen doing bargaining unit work.*” Er. Ex. 24d p. 2 (emphasis added). Because the disclosure “*management has been seen doing bargaining unit work*” provided no basis for the Hotel to understand and investigate the nature of the claims, HRC served a follow-up request for additional information (Er. Ex. 24d p. 1) which the Union ignored. T. 464. Despite not providing the Hotel the details forming the basis of the claim along with its supporting evidence, the Union moved the grievance to arbitration on December 11, 2018. T. 465, Er. Ex. 24f.

**E. The Union’s Waiver Of its Claim of Privilege Shows Its Assurances That It Provided The Hotel All The Information It Possessed Was A Repeated Misrepresentation.**

Both in its information responses and while testifying under oath, Union representatives repeatedly assured the Hotel the Union had provided the Hotel with all the information that was in the Union’s possession. E.g. T. 833-34, 842-44, 846-47. Not until the Union unconditionally

waived its assertion of an unfounded privilege<sup>7</sup> to the grievance intake forms (T. 849-50, 867) which documented the grievant's initial explanation for the basis of the claims did the Hotel and ALJ learn that these assurances were not true. In nearly every grievance, the intake forms contained important information the Union failed to disclose to the Hotel and the Union offered no explanation why it refused to disclose the information. As the following grievances demonstrate, the previously withheld information contained within the intake forms directly undermines Respondent's description of its misconduct as "inadvertently leaving out *some fact* or other that it possessed *but overlooked*" (*id.* p. 2 (emphasis added)). To grasp the ALJ's justification for imposing an extraordinary remedy, a comparison is presented showing what little information the Union actually disclosed and what information in the intake forms was withheld from disclosure by the Union.

#### 1. Complaint Grievances.

##### (a). Grievance Number 20172063:

In response to the Hotel's information request involving a scheduling grievance (number 20172063), the Union replied stating "... here is the information the Union has regarding the basis of the aforementioned grievance. Grievant claims that on 09/21/17 & 09/28/17 there was a conflict with the posting of the schedule." GC Ex. 3c pp. 3-4. The Union assured the Hotel that the information "response presented by the Union provided *all facts* known to the Union concerning this grievance." GC Ex. 3c p. 2 (emphasis added). The September 29, 2017 grievance intake form proves the Union's assertion of having provided all facts to be false. In the intake

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<sup>7</sup> The privilege was unfounded because the ALJ ruled Respondent "failed to present persuasive case law supporting a finding that the documents and materials are in fact privileged or protected under the work product doctrine." Decision p. 22. Respondent did not file exceptions to this ruling and therefore, does not dispute the ALJ's findings on this issue.

form, the grievant complains that changes in the schedule took place after the allotted time set forth in the CBA. U.3. “Furthermore, there is a long standing practice of posting the schedule on Thursday. This happened last week on 9/21/17 and this week 9/28/17.” *Id.* In addition, the intake form discloses the name of the grievant and reveals that the matter was discussed with management on September 28, 2017. *Id.*

Before producing the intake form, Union witness Rachel Brumleve testified under oath that the information the Union disclosed in the email was all the information the Union had at the time. T. 833-34. The intake form shows the Union had available to it a narrative explanation of the basis of the claim as early as September 29, 2017. The grievance only provided one date, did not provide specific names of the grievants and simply identified the grievant as CVS housemen, which has thirty to thirty-five housemen. T. 48-49. The grievance did not identify why the Union claimed a scheduling violation took place, why it claims the issue is “ongoing and continuing,” and does not identify the employees harmed or why they are harmed. T. 49. The Hotel’s investigation and records did not disclose there was any issue with scheduling. T. 54. The Union is prohibited from using a privilege to actively conceal the underlying facts contained in the communications. Those underlying facts are not privileged from disclosure. *Upjohn Co.*, 449 U.S. at 395. The Union offers no explanation why this information was not produced to the Hotel. The record shows that the failure to produce this information was purposeful and not an act of inadvertence.

(b). Grievance Number 20172102 and 20172103:

In response to a scheduling and increased workload grievance (GC Exs. 4a and d), the Union responded to the Hotel’s RFI on Grievance Number 20172102 stating “Grievant claims that on 10/03/17 his work load increased.” GC Ex. 4c (p. 4) and replied to Grievance Number

20172103 stating “Grievant claims that on 10/03/17 utility stewards are doing the job of the banquet stewards and the banquet stewards are not being scheduled.” GC Ex. 4f(i)(p. 2). In the October 5, 2017 grievance intake forms (U. 4 and 5), the grievant discloses that he discussed the issue with a manager on the same day he claims the grievance took place. U. 4 and 5. The intake form also discloses the identity of the grievant and discloses the names of three witnesses to the incident. *Id.* Despite Ms. Brumleve’s testimony under oath that the Union provided all the information that it has (T. 842-43), the Union’s own intake form shows it withheld available requested information concerning step one (meeting with supervisor) and the names of witnesses. The Union offers no explanation why this information was not produced to the Hotel.

(c). Grievance Number 20172111:<sup>8</sup>

In response to the Hotel’s RFI concerning the Union’s hostile work environment and unequal treatment grievance (GC 5a), the Union replied stating “Grievant claims that on 09/28/17 management created a *violent* and hostile environment and is not treating workers equally. This is an ongoing and continuing issue.” *Id.* pp. 3-4 (emphasis added). The October 5, 2017 grievance intake form (U. 6) identifies the name of the grievant (the grievance identifies the grievant only as Big Bar Bartenders), the manager’s name, and discloses the date the issue was discussed with a manager. Despite Ms. Brumleve’s testimony under oath that the Union provided all the information that it has (T. 844), the intake form demonstrates this testimony is not accurate. The Union failed to offer any evidence why the information on the intake form was not previously disclosed to the Hotel.

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<sup>8</sup> The grievance number on GC 5a is incorrectly listed. T. 66, 71-72; GC Ex. 5d.

(d). Grievance Number 20172598:

In response to the Hotel's RFI concerning the Union's "scheduling" grievance (GC Ex. 6a), the Union replied stating "Grievant claims that on or about December 1st he was denied the opportunity to work overtime from Chynna West. Overtime was instead given to an employee with less seniority and to an employee in another classification." GC Ex. 6c p. 3. The grievance intake form (U. 7) discloses that a discussion with a supervisor took place the day after the alleged incident, and discloses the name of a witness (Davoris James) (T. 992). After reviewing HRC's records, Ms. Bircanin concluded there was no indication HRC did anything wrong or out of the ordinary. T. 72, 74-75, 193-94. In November 2018, almost one year after HRC sent its information requests, HRC and the Union held a grievance meeting on this grievance. T. 77. During the grievance meeting, HRC learned for the first time that the Union was claiming that overtime was improperly given to the events setup supervisor, which is a bargaining unit position, and is not a violation of the CBA. T. 78, 393-94. The Union grievance mistakenly complained about the Hotel giving overtime to non-bargaining unit workers. T. 78. The Union failed to offer any evidence why the information on the intake form was not previously disclosed to the Hotel.

(e). Grievance Number 20172701:

In response to the Hotel's RFI concerning the Union's scheduling grievance (GC Ex. 7a), the Union disclosed "Grievant claims that on December 4th management asked over 20 housekeepers to do overtime. This was the result of a high number of housekeepers that were not scheduled or called in to work that day." GC Ex. 7c p. 3. In the December 18, 2017 grievance intake form (U. 8), the grievant is identified as Floyd Holland. At the time of serving its response to HRC's information request, the Union had available in the intake form the name of a witness

(who is not a housekeeper (T. 994)) and a blank response to the question whether a supervisor was contacted which strongly suggests that step one of the grievance process was not completed. Having the name of the grievant would have allowed HRC the opportunity to ask the grievant to describe the nature of his complaint and would have allowed the Hotel the opportunity to identify the manager involved. When discussing the grievance with managers, Ms. Bircanin learned there was some overtime given on the day in question, but the records did not disclose that the overtime was issued improperly. T. 82. The Union does not explain why it did not disclose to the Hotel the name of the witness and that there was no indication the complaint was reported to a manager.

(f). Grievance Number 20180153:

In response to the Hotel's RFI concerning the Union's improper pay grievance on behalf of banquet servers (GC Ex. 8a), the Union replied "Grievant claims that on 12/26/17 a manager authorized to take money from their checks in order to pay another coworker because of an error with the hours they worked." GC Ex. 8c p. 4. In the January 12, 2018 grievance intake form (U. 9), the grievant discloses three names that apparently are witnesses to the alleged claim and discloses that the grievance also involves scheduling issues. Attached to the intake form is a Spanish narrative, converted to English, which sets forth in particular detail an explanation describing the manner in which HRC was allegedly improperly paying the grievants along with four names of workers involved (the attached EO Report lists five names). The intake form for this grievance contains an abundance of information that was admittedly not disclosed to HRC by the Union. It claims that the grievance involves a scheduling dispute, which in the narrative explanation, the grievant explains involves management's decision to allow one worker to work overtime and send the other workers home. The written narrative also provides a detailed

explanation why the grievants believe a contract violation took place along with names of witnesses, the times of events and the shifts involved, and the amount of the pay dispute. Finally, it identifies the name of the grievant and the date the issue was discussed with management. T. 996-99. Clearly, the information provided by the Union on January 31, 2018 was not all the information the Union had available to it despite Ms. Brumleve's testimony under oath that it had provided the Hotel all the information it had. T. 846-47. The Union offers no explanation why the information contained in the intake form was not provided to the Hotel. Nothing in the record supports the Union's claim that the failure to disclose was inadvertent or overlooked.

(g). Grievance Number 20180538:

In response to the Hotel's RFI concerning the Union's Section 6 subcontracting grievance on the behalf of "[a]ll employees," the union replied with a one sentence response: "Grievant claims that on or about 03/05/18 United Maintenance was seen *polishing* the landing." GC Ex. 11d p. 1. Missing from the response was any of the specific subcontracting information requested by HRC, documentary evidence, and whether a supervisor was notified. *Id.* On March 23, 2018, HRC replied to the Union's response asserting the answer was insufficient and sought within seven days responses to the specific requests contained in HRC's initial information requests and a narrative explanation and production of evidence supporting the claim. GC Ex. 11c p. 3. Although the Union assured the Hotel that this response provided *all facts* known to the Union concerning this grievance" (GC Ex. 11c p. 2 (emphasis added)), the grievance intake form (U. 12) discloses both March 5 and 7, 2018 as the alleged incident dates. U. 12 p. 1. In addition, contained in the notes is a text message that specifically describes the floor (i.e. 31<sup>st</sup> floor), the area of the floor being worked on (i.e. service elevators), the work being done (i.e., polishing),

and the name of the contractor involved (i.e., United Maintenance) (U. 12 p. 3), all of which was missing from the Union's initial RFI response.

The Union had far more information available to it than what it initially disclosed to the Hotel and admittedly did not provide this text message or the information contained in it to the Hotel. T. 157-58, 1003. Even if the ALJ had sustained the Union's privilege, the screenshot of the text message is not a Union/member communication. It should have been produced. The Union's grievance intake form and documents also demonstrate that the Union's single sentence information response of March 22, 2018 did not include "*all facts* known to the Union concerning this grievance." In this grievance, the Union used an inappropriate claim of privilege to conceal from the Hotel evidence and the underlying facts contained in the communications, which the Union was obligated to disclose. *Upjohn Co.*, 449 U.S. at 395. The Union presented no evidence that would support its contention that its refusal to provide this evidence was inadvertent. Rather, the evidence shows the Union's failure to carry out its obligation to respond to the Hotel's RFI was purposeful and justifies the ALJ's entry of extraordinary relief.

(h). Grievance Number 20180662:

In response to the Hotel's RFI regarding the Union's unjust discipline grievance (GC Ex. 12a), the Union replied "Grievant claims that on 03/08/18 she was wrongfully suspended." GC Ex. 12c p. 4. In the March 15, 2018 grievance intake form (U. 13), the form discloses a witness, Dennis Esquivel, and more importantly, states "[s]ee attached statement" in response to the form question seeking an explanation of what happened. Included with the intake form is the HRC Coaching Form documenting the basis for the suspension along with the grievant's one page, typewritten narrative explaining her version of why the suspension was unjust with explicit details including quotations of persons involved in the incident.

The Hotel did not understand the Union's claim that this discipline was unjust. T. 107, 303. The Union admits it readily explains to HRC why it believes a discipline is unjust at the grievance meetings (T. 605-06) but fails to explain why it failed to carry out its lawful obligation to provide the same information in the time requested by the Hotel. The intake form shows it had this explanation before HRC served its information request. The Union's failure to provide the requested information it possessed shows that the Union has refused to comply not only with its lawful obligation to provide information and two Board settlement agreements, but also three arbitrators' rulings ordering that the Union "*must*" supplement its disclosures when the grievance fails to adequately advise the Hotel of the nature of the claim. The Hotel resolved the grievant's subsequent termination grievance by paying the grievant \$15,000.00 (T. 1043) without the benefit of this important information. The Union's blatant disregard of three arbitrators' orders commanding it *must* provide information requested by the Hotel justifies the ALJ's entry of extraordinary relief.

(i). Grievance Number 20180751:

On April 9, 2018, the Union filed Grievance No. 20180751 alleging an unjust discipline. GC Ex. 15a. The Hotel sent three RFIs to the Union seeking information concerning the grievance. GC Ex 15b, pp. 1-2. The Union failed to respond to any of the three requests for information which was still pending when the General Counsel presented its case-in-chief. T. 119. However, the April 5, 2018 grievance intake form (U. 16) contains a narrative explanation from the grievant claiming he was notified on March 6 that his mother was having surgery the next day and although he explained this to the assistant, he wrote the grievant up on March 14, 2018. U. 16 p. 3. The Union's intake form shows that it had an adequate amount of information

available to it to frame a response, but refused to do so. The Union offered no explanation why it refused to provide information concerning the grievance. The Union claims it notified the Hotel it closed the grievance by removing it from an open grievance list (T. 866) but it did not produce the list to support this testimony. T. 1050. Ignoring legitimate information requests from the Hotel supports the ALJ's entry of the extraordinary remedy imposed in this matter.

(j). Grievance Number 20180867:

The Hotel served upon the Union a RFI concerning the Union's grievance alleging improper "[s]cheduling" on April 13, 2018 on behalf of "Banquet *Employees*" (GC Ex. 16a (emphasis added), GC Ex. 16c p. 5-6). The Union responded to the information requests stating only that "[g]rievant claims that on 04/12/13 and 04/13/18 there was a violation in the Banquet Department. The agreement that was established in the contract regarding functions and job descriptions was broken." GC Ex. 16c p. 4 (emphasis added). It also attached to its response a document in Spanish signed by various employees. GC Ex. 16c. The grievance intake form (U. 18) describes the work as involving breakfast and box lunches (U. 18 p. 1). Further, the grievance fact sheet identifies the grievant as Rosa Hernandez who presumably is a witness to the event and identifies the grievance as involving 2,800 guests in American Craft. U. 18. The information sheet states the grievance includes both April 12 and 13, 2018 and involves function and tips and provides a narrative explanation of the claim that banquet workers worked a box lunch function in American Craft and were not paid. U. 18. None of this information was contained in the Union's April 27, 2018 information response (GC Ex. 16c pp. 3-4) and the Union fails to explain why.

(k). Grievance Number 20180794:

In response to the Hotel's RFI concerning the Union's grievance alleging an improper distribution of gratuities for American Craft Hostesses (GC Ex. 17a), the Union replied "Grievant claims that on or about 04/09/18 A/C Kitchen & Bar staff and all positions are included on the tips except for the hostesses even though they are required to work and serve their purpose as a greeter to the guests of the *party*." GC Ex. 17c p. 4 (emphasis added). The Hotel's records did not indicate a party being held at American Craft that day it requested the Union disclose the *party* it was referring to. GC Ex. 17c p. 3. The Union ignored the Hotel's request. *Id.* p. 1-2. The Union's grievance intake form (U. 19) discloses the grievants as Jaliesah Shannon and Marie Gilet. U 19. The intake form also sets forth a paragraph length narrative explanation of the basis for the grievance. *Id.* The Union offers no explanation why it did not disclose to the Hotel the intake form information including the names Jaliesah Shannon and Marie Gilet or that there was a buyout on Thursday and Friday. T. 1021-22.

(l). Grievance Number 20180822:

In response to the Hotel's RFI concerning the Union's grievance claiming management improperly sent the grievant home and is improperly scheduling (GC Ex. 18a), the Union replied "Grievant claims that on or about 04/07/18 she was terminated for not being able to handle the work load even though she had a doctor's note. Ann, from HR called her a liar and the employer yelled at her and told her 'never come back.'" GC Ex. 18c p. 4. The disclosure also states the issue was discussed with management on April 7, 2018. *Id.* In response to the disclosure, the Hotel requested the Union provide additional information missing from the Union's initial disclosure. *Id.* p. 3. The Union offers no explanation why it ignored the Hotel's request for additional information. T. 133. The grievance intake form (U. 20) provides a page and one-half

narrative explanation describing the basis of the grievance and most important, does not say the grievant was told she was terminated. Also included in the form is a letter from the Hotel dated April 10, 2018 acknowledging that she would be placed on a *medical leave of absence* and as new medical assessments are received, her work status would be reassessed. The Union does not explain why it refused to produce this information in response to the Hotel's RFI, why the grievant believes she was terminated, or why it withheld the letter from the Hotel on the basis of an unfounded privilege purporting to withhold only communications by members with the Union. According to HRC's records, the grievant remained an active employee and had not been terminated. T. 131, 425. The Union's intake form discloses that the grievant complained that a supervisor with the initial letter "D" yelled at her but the Union did not disclose this information. Further, the intake form contains a lengthy narrative explanation from the grievant detailing her actions concerning the incident and the reasons why she believed she was terminated. The Union's information response is only a single sentence long. The evidence demonstrates that these repeated refusals to disclose information in the Union's possession is purposeful and is not due to inadvertence.

(m). Grievance Number 20181183:

In response to the Hotel's RFI concerning the Union's grievance filed on behalf of two grievants alleging "[s]cheduling on or about 5/18/2018 and ongoing and continuing . . ." (GC Ex. 19a), the Union responded stating "[g]rievant claims that on or about 05/17/18 the grievant was improperly being scheduled." GC Ex. 19b p. 1. In the grievance intake forms (U. 22), the first form contains a narrative explanation in Chinese.<sup>9</sup> In the second intake form, the grievant

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<sup>9</sup> The Union's selective assertion of privilege to this intake form until after the start of its case-in-chief has prevented the Hotel from entering into the record the actual English translation of the

explains that he is only receiving four work days while others are receiving six and seven day workweeks, an explanation not provided to HRC. T. 1025. Neither the grievance nor the Union's information response adequately identified the basis or nature of the complaint. T. 426. "[T]here are multiple issues that can occur with the scheduling." T. 135. Scheduling issues could involve requested days off denied, overtime assignment, or start time disputes. T. 137. In this grievance, the Union had in its intake form a narrative explanation of the basis of the grievance as of May 31, 2018. When asked to describe the basis of the claim, the Union initially simply stated that the "[g]rievant claims that on or about 05/17/18 the grievant was improperly being scheduled." The Union did not indicate the date the issue was discussed with a supervisor or the intake form's disclosure of the May 29 date. T. 1023-25. In addition, the Union's testimony that "if there were details that were on the intake form that didn't make it to the actual grievance form, we will provide them with a summary of those details" (T. 600-01) is another false statement. This grievance should serve as a basis to support a finding that the Union purposely, not inadvertently, withheld requested relevant information from HRC.

(n). Grievance Number 20181209:

In response to the Hotel's RFI concerning the Union's grievance filed on behalf of Convention Services claiming HRC "ongoing and continuing" engaged in improper subcontracting(GC Ex. 21a), the Union responded stating "Grievant claims that on 05/30/18 an outside company was seen moving C.S. equipment. The issue was discussed with management on 06/01/18." GC Ex. 21b pp. 1-2. In the Union's June 1, 2018 grievance intake forms (U. 24),

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explanation. The Union never obtained a translation (T. 969) even though it may contain information responsive to HRC's information request.

the intake form lists a witness. Nowhere in the Union's disclosure is this witness identified. GC Ex. 21b, T. 1025.

#### **F. Response To Respondent's Statement of Facts.**

Respondent's characterization of its conduct as inadvertently leaving out some fact (Exceptions Brief p. 2) is directly undermined by the concealed grievance intake forms. The Union fails to offer a legitimate explanation why such important information was withheld from disclosure. Respondent asserts that "the ALJ found a violation of the Act because the Union should have engaged in accommodative bargaining about privilege and confidentiality issues." *Id.* The Hotel notes that the ALJ did not find that the Union should have engaged in accommodative bargaining about the privilege. Instead, the ALJ found Respondent "failed to present persuasive case law supporting a finding that the documents and materials are in fact privileged or protected under the work product doctrine." Decision p. 22. Respondent's privilege claim was unfounded. Since Respondent has not filed exceptions to this determination, it does not dispute the ALJ's ruling that the case law it cited to support the claim of privilege does not support a claim of privilege. The ALJ determined even if the Respondent could meet its burden by showing the intake forms were confidential, the Union could not simply refuse to furnish the information, but rather must engage in accommodative bargaining to seek a resolution that meets the needs of both parties. *Id.* Nowhere in this proceeding has the Union met its burden of showing these forms were confidential. There is no evidence the Union assured grievants the forms would remain confidential and the language on the grievance form (U 3) does not make any assurances the form will be kept confidential.

Nor can Respondent claim its positions were "good faith attempts to process grievances." Exceptions Brief p. 2. Even if the privilege assertion could be characterized as a mistaken

assertion, the law is clear that the underlying facts must still be disclosed by the Union. *Upjohn Co.*, 449 U.S. at 395. As the ALJ found, and Respondent does not dispute, “[t]he Respondent does not provide a persuasive argument or point to Board precedent to support a finding that the facts included or attached to the intake forms are privileged or protected under the work product doctrine.” Decision p. 32.

Respondent asserts that it does not have enough staff to do an in-person interview when the grievance is filed. Exceptions Brief p. 3. This contention offers an excuse for Respondent’s noncompliance and the ALJ’s finding of liability. Since Respondent explicitly does not dispute the ALJ’s liability determinations (*id.* p. 10), it may not offer an excuse for its conduct. Moreover, it’s a contention not supported by the evidence. The ALJ found “the Respondent has other option (*sic*) for obtaining the information e.g., assign a staff person to conduct intake interview with grievants, . . . .” Decision p. 29. The Union has in place a contract enforcement team that is responsible for processing and responding to grievance information requests. T. 582. However, the Union itself bars the contract enforcement member accepting the grievance intake form from asking the grievant any questions. Instead, the Union only allows one member of the contract enforcement team to seek additional information from the grievant. T. 662-63. The team is not short staffed. It consists of a full-time staff member, another experienced person on a leave of absence from a hotel (“LOA”), three newer LOA’s, and three employees responsible for administrative duties (eight total). T. 586-88. Yet, none of the eight team members are assigned to interview grievants and obtain information when the intake form is submitted. T. 595. By the Union’s own choice, the first time the Union meets the grievant to ask the grievant questions about the grievance is just prior to the start of the grievance meeting. T. 814-15. Finally, the Union’s contention of not having enough staff to interview grievants is a red herring. The

information is often already contained in the grievance intake forms. As the ALJ found, there is nothing to stop the Union from warning grievants that their failure to provide a complete narrative of the complaint and supporting documents may result in the delay or dismissal of their grievance. Decision p. 29. Further, there is also nothing preventing the Union from interviewing the grievant when a grievance is first filed as opposed to waiting almost a year when the grievance meeting is scheduled.<sup>10</sup>

Respondent's contentions set forth in the second heading of its Statement of Facts (Exceptions Brief pp. 5 – 6)(escalation of information requests) should be stricken as irrelevant to the exceptions filed. In this portion of its brief, Respondent is attempting to justify its purposeful delay in responding to the Hotel's grievances. Respondent admittedly "does not except to the finding of violations on the facts and evidence in the record." *Id.* p. 10. As shown in footnote 10, *supra*, the reason Mr. King was unable to settle grievances at the grievance meeting is because the Union was disclosing information for the first time at the meeting and he needed to corroborate the information tendered.

As to Respondent's suggestion that the filing of the ULP was somehow an act of retaliation (Exceptions Brief p. 6), Respondent entered into settlement agreements on both prior ULP's filed by the Hotel. In neither agreement does the Union assert they were filed in retaliation. In fact, in the last agreement, the Union admits it violated the Act. Er. Ex. 5. The ALJ rejected any claim that the RFI's were retaliatory. "Despite the Respondent's contention to the contrary, I find the record is devoid of evidence proving that the Charging Party submitted the

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<sup>10</sup> Respondent contends as if it were an established fact that grievances are "often" able to be resolved at grievance meetings. Exceptions Brief p. 4. The Union did not offer any evidence rebutting the Hotel's evidence that the Union's first production of information at the grievance meeting actually delays, not facilitates settlement. The Hotel must undertake additional investigations to confirm the disclosures. T. 345-47.

RFIs in retaliation for the Respondent filing unfair labor practice (ULP) charges.” Decision, p. 24. As the ALJ found, the RFIs were relevant and Respondent never claimed in its response to the RFIs that they were retaliatory. Regardless, Respondent does not dispute the requests were relevant as the ALJ found. Under Board law, so long as one of the reasons for serving the RFI is justified, the RFI will be considered based on good faith. *AK Steel Corp.*, 324 N.L.R.B. 173, 184 (1997).

Respondent suggests that the Hotel’s requests involved “detailed, discovery-type” requests citing to GC Ex. 9c as an example. Exceptions Brief p. 6. Again, Respondent does not contest the ALJ’s finding that this request was relevant and the finding that Respondent’s failure to respond to the request was unlawful. Most of the requests at issue simply asked the Union for all facts supporting the claim. E.g. GC 3c p. 4. GC Ex. 9c was an exceptional request because the Hotel required the missing information in order to investigate the grievance and adequately understand the claims. T. 96. Bargaining unit work claims are factually intensive. In order for the Hotel to decide whether to resolve Section 56 claims, it must have available to it on a timely basis *all* the facts supporting the claims to assess the credibility of the evidence and analyze the likelihood of success if the matter is moved to arbitration. Information HRC sought but remained missing included confirmation of the names of managers that were involved, the dates, specific explanations of the alleged violations, and clarification of the specific locations of the alleged violations and what bargaining unit work the Union claims has been done. T. 97.<sup>11</sup>

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<sup>11</sup> In its third section of the Statement of Facts (Exceptions Brief p. 6), the Union asserts “[w]hen Hyatt began its retaliatory practice of propounding onerous information requests in response to every grievance, the Union did not know how to respond to the sheer volume of requests.” Neither factual claim has a specific page citation to the record in violation of Rule 102.46(a)(2)(iii) and should be stricken. In addition, Respondent’s concession to the ALJ’s finding of liability should bar it from proffering excuses for its unlawful conduct.

Respondent asserts without any reference to the record that “[t]he Union established a policy that tried to balance several concerns: the Union’s duty to provide information to the Employer, the Union’s duty to represent employees, and the Union’s significant staffing and resource constraints.” Exceptions Brief p. 7. It likewise claims “that the Union has continued to work with Hyatt to improve the efficiency of the grievance handling process . . . .” *Id.* Because there is no citation to the record for these factual claim, it should be stricken for failure to comply with Rule 102.46(a)(2)(iii). Further, Respondent concedes to the unlawfulness of its behavior. Respondent’s additional claim that it provides to the Hotel all the information in its possession (Exceptions Brief p. 7) is thoroughly undermined by the grievance intake forms. There is simply no factual basis for this utterly unfounded claim. Respondent’s contention that it has a new streamline grievance process (Exceptions Brief p. 7) again fails to show any allegedly “new” procedure has worked. Since no evidence was introduced by Respondent to support this claim, the likely inference is that the new process has had no impact on Respondent’s compliance efforts.

Respondent next cites to grievance number 20180538 as an example of its “inadvertent failures” claiming it “neglected” to identify the employee as a witness and failed to turn over a “photograph.” Exceptions Brief p. 8. As shown above, what Respondent calls a photograph was a picture of a text message containing a series of details regarding the nature of the claim that Respondent failed to disclose in its information response. U 12. Respondent fails to recognize its most egregious misconduct regarding this claim. The text message was a communication *between* members. Respondent’s privilege claim was only for “communications by grievants directly to the Union.” Exceptions Brief p. 2. This document was not even within the scope of the privilege claimed. Rather than serve as an example of the Union’s “inadvertent failures,”

Respondent's conduct in processing grievance number 20180538 demonstrates Respondent's utter failure to carry out its legal obligations to respond to the Hotel's information requests.<sup>12</sup>

The Union also asserts its failure to provide "bits" of information regarding Grievance Number 20180794 is another example of its "inadvertent failures." Exceptions Brief p. 9. As demonstrated above, the Union failed to provide the Hotel a whole narrative explanation provided by the grievant in the intake form and the identity of two witnesses. U. 19. The Hotel advised the Union its records did not indicate a party being held at American Craft that day and it requested the Union disclose the *party* the Union was referring to (GC Ex. 17c p. 3). Rather than look into the request, the Union held onto the information for itself. Nothing was inadvertent in the Union's refusal to provide the information and resulted in the Hotel going on a "wild goose chase" to attempt to figure out the complaint made.

The Union's assertion the "ALJ did not definitively reject the Union's claim that the documents were privileged and confidential . . ." (Exceptions Brief p. 9) is simply wrong. The ALJ found Respondent "failed to present persuasive case law supporting a finding that the documents and materials are in fact privileged or protected under the work product doctrine." Decision p. 22.

Lastly, the Union contends that the ALJ's ruling regarding her findings concerning paragraph VI(r) of the Complaint was in error because the Union did not have the information and only conducts a follow-up interview to get more information near the grievance meeting, which hadn't taken place. Exceptions Brief p. 10. However, Respondent cites to no law that it is entitled to respond to the Hotel's RFI at its own leisure. The Union concedes to the ALJ's

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<sup>12</sup> This Union's conduct in processing this RFI response undermines the Union assertion during the hearing that "if the grievant brings in any paperwork or any evidence of the violation, the union turns that over." T. 29.

findings of violations. Her findings in this regard are in accordance with the law. The Union is obligated to obtain requested information that it has in its control or has *access to*, not just information in its possession. *Fireman & Oilers (IBFO) Local 288 (DiversityWyandotte Corp.)*, 302 NLRB 1008, 1009, 137 LRRM 1153 (1991).

## **ARGUMENT**

The facts within this proceeding show a Union that with absolutely no desire to carry out its duty to provide readily available information when asked by the Hotel. The Union's failures cannot be even remotely characterized as "mistakes or good-faith assertions of privilege." Exceptions Brief p. 10. The Union presumably reviewed the intake forms in preparation for the hearing and still did not supplement its inadequate responses until the third day of the hearing when it unconditionally waived its privilege claim. The first two hearing dates were in January 2019 and the next two were in April, 2019. Respondent offers no reason why not a single grievance response was not updated before April 2019. Respondent likewise failed to carry out two NLRB settlement agreements which obligated Respondent to timely respond to information requests and repeatedly ignored three arbitration awards requiring it to provide the Hotel information when the grievances were deficient. An "extraordinary" remedy was warranted because Respondent's violations were systemic and egregious as the recited facts above show.

### **1. Extraordinary Relief Is Warranted And Appropriate.**

Respondent asserts the standard remedy for an unlawful failure to disclose information is to order the information be provided citing to *NTN Bower Corp.*, 356 NLRB 1072 (2011). Nothing in *NTN* stands for the proposition that the standard remedy for failing to provide information is an order to provide it. It just so happened to be the relief ordered under those facts. Section 10(c) of the Act authorizes the Board "to take such affirmative action . . . as will

effectuate the policies of this subchapter” including requiring the Union “to make reports from time to time showing the extent to which it has complied with the order.” 29 U.S.C §160(c). “The task of the NLRB in applying § 10(c) is ‘to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.’” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976). The broad scope of the Board’s remedial powers was demonstrated by the Court in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203(1964) which approved a Board order that awarded back pay on the basis of a contract that was no longer in effect. The Court determined Congress could not “define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Respondent concedes that cases have entered broad remedial orders where a respondent has shown a proclivity to violate the Act and a repeated disregard to provide requested information. *Pan Am Grain Co.* 346 N.L.R.B. 193 (2005) (order commanding respondent to cease and desist with interfering with its employees' exercise of Section 7 rights “in any other manner.”) Here, the ALJ’s cease and desist order was limited to Respondent’s refusal to provide the Hotel with requested information. The training ordered was only two training sessions that are to be verified in writing when they have been completed. As Respondent recognizes, “a broad cease-and-desist order is warranted ‘when a respondent is shown to have a proclivity to violate the Act . . . .’ A proclivity to violate the Act is typically found where a respondent has a history of violations based on similar unlawful conduct.” *United States Postal Serv.*, 339 N.L.R.B. 1162, 1163 (2003). As the three arbitration rulings and two Board settlement

agreements demonstrate, the Union has a history of violations based on similar unlawful conduct which justifies a broad remedial order. Its repeatedly false assurances that it has provided all information demonstrates Respondent's attempt to deceive the Hotel regarding Respondent's actual compliance with the RFIs. But for Respondent's decision to waive the privilege at the hearing, the Board and the Hotel might never have discovered the extent of Respondent's deception. Contrary to Respondent's contentions, the intake forms show Respondent withheld an abundance of useful and requested information and there is no evidence Respondent has improved its internal process to respond to the requests. Exceptions Brief p. 12.

**A. There Has Been No Showing Of Good Faith By Respondent.**

Respondent claims its conduct was not egregious (*id.*) but Respondent was found to have violated the Act for all nineteen claims at issue. Not a single claim was rejected by the ALJ and Respondent does not dispute the ALJ's findings that the Act was violated in each claim. Repeatedly characterizing its unlawful conduct as "inadvertent" or in "good-faith" does not support the labels Respondent attaches to its behavior. There is not a single finding by the ALJ that Respondent's conduct was "inadvertent" or in "good-faith." For the reasons the Hotel has already stated, Respondent cannot fairly call its systemic unlawfulness as "inadvertent" or in "good-faith." One arbitrator appropriately characterized the Union's conduct as being done "by design." The Union's own witnesses testified before the claim of privilege was waived that it had provided the Hotel with all requested information in its possession. It made similar claims when responding to the information requests. Yet the intake forms completely undermine these claims and Respondent, even in its Exceptions Brief, fails to recognize the severity and falsity of the Union witnesses' claims.

**B. Respondent Has Not Complied With The Settlement Agreements.**

Respondent claims it has complied with the terms of both NLRB settlement agreements. Exceptions Brief p. 13. That claim is not correct.<sup>13</sup> Both agreements require Respondent to post notices that promise it will not unreasonably delay providing the Hotel relevant requested information. Er. Exs. 5 and 6. The settlement agreement terms include a provision where Respondent promises to comply with “*all* the terms and provisions of said Notice” The second agreement was signed in March 2018, the same time period covering the underlying RFIs. See e.g. GC 14b p. 1. It is without question that the findings of the ALJ in this case establish that Respondent has breached the settlement agreement’s promise to not unreasonably delay providing the Hotel relevant requested information.

**C. Respondent Has Offered No Evidence It Has Improved Dealing With RFIs.**

Respondent claims it has made improvements to the Hotel’s “detailed, burdensome information requests.” Exceptions Brief p. 13. This factual assertion contains no record citation and should be stricken pursuant to Rule 102.46(a)(2)(iii). Nowhere has Respondent identified evidence showing Respondent has made improvements in responding to the Hotel’s RFIs. Indeed, the Union fails to cite to a single RFI which purports to show this alleged improvement response. As recently as October 2018, Respondent was submitting deficient information responses. Er. Exs. 24c and 24d p. 2. The ALJ found the Union failed to timely respond to each of the nineteen RFI at issue in the case (a zero percent compliance rate). Further, the Union should be barred from arguing the RFIs were “detailed, burdensome information requests.” The ALJ ruled the requests were relevant and necessary and found the Union failed in its burden of

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<sup>13</sup> Respondent cites to U 2 to support the proposition that the Region found the Union had not breached the March 2018 settlement agreement. Exceptions Brief p. 13. However, the ALJ did not admit U. 2. T. 623-24.

showing the RFIs were burdensome. Decision pp. 24 – 26. If Respondent is challenging this factual determination, it is obligated to point to portions of the record to support this factual assertion.

**2. The Training Sessions Ordered By The ALJ Are Appropriate And Necessary.**

The Union complains the ALJ's order commanding the Union to engage in two mandatory training sessions is unprecedented and inappropriate and "would not likely result in greater future compliance" than a standard order. Exceptions Brief p. 14. Frankly, the Union's prediction of failure and doom in complying with the remedial portion of the Decision suggests that an even greater monitoring remedy is warranted. Standard remedial measures have been imposed by the two Board settlement agreements and neither has reduced the Union's proclivity to violate the Act. Nor does the Union offer any rationale why its suggestion that one training session as opposed to two would suffice to curb the Union's violations of its obligations to timely respond to the Hotel's RFIs. Two training sessions reinforces the importance of complying with the Hotel's RFIs and allow the participants to address any questions that may arise following the first session.

**A. Section 10(c) Of The Act Authorizes The Relief Imposed.**

Respondent argues that the order requiring training sessions is unprecedented. Exceptions Brief p. 14. Respondent fails to cite to any cases where a Union has demonstrated a history of failing to respond to RFIs as the Union has done in this case. The Union's historical behavior and utter disregard of its obligations to timely respond to the RFIs explains the lack of precedent imposing the remedial relief imposed in this case. This Union is not above the law. The Region twice gave the Union opportunities to police itself and comply with the terms of the settlement agreements. This case shows the Union took no meaningful steps to correct its proclivity to

violate the law. The two mandatory training sessions will reinforce to those responsible for compliance that the duty to comply with the Hotel's RFIs is not a draft order subject to being revised on the whim and discretion of the Union. The training sessions will reinforce to those responsible the Union's legal obligations to timely respond to the Hotel's RFIs.

**B. The Union Offers No Evidentiary Support For Its Claim That Training Is Not Necessary.**

The Union contends there is no evidence to *suggest* that training is necessary. Exceptions Brief p. 14. The nineteen sustained claims in the proceeding, the two Region settlement agreements the Union has failed to comply with, and three arbitration awards ordering the Union to respond to the Hotel's RFI is an abundance of evidence that strongly suggests training is required. Again, the Union cites to no portion of the record that supports its claim that the Union has been "improving" its response process. *Id.* The same objection holds for the Union's claim that it hired administrative personnel. There is not a single shred of evidence identified from the record to support the Union's contention that it "already engaged in improving its own process and procedure" for responding to the Hotel's RFIs. Exceptions Brief p. 15. Under Rule 102.46(a)(2)(iii), these contentions should be stricken. The fact that all the claims contained in the Complaint were sustained strongly suggests there has been no improvement by the Union.

In addition, the Union's Complaint about the relief imposed by the ALJ has never before been objected to by the Union. The Hotel in its opening statement requested that extraordinary relief in the form of training be imposed. T. 21. Neither in the Union's opening statement (T. 21 – 32) nor in its post-hearing brief did the Union object to the entry of this requested relief. The Board should deem the argument waived due to the Union's failure to object to the request for entry of the relief. Compare, *NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir.

1974) (objections to administrative procedures must be timely made with the agency)(citation omitted).

**C. The Staff Assigned To Respond To RFI's Have Demonstrated A Pattern Of Inability To Respond Making Two Training Sessions Appropriate.**

In this section of its brief, Respondent claims only three staff members are assigned responsibility for replying to the Hotel's RFI. Exceptions Brief p. 15. The Union testimony at the hearing was there was only one person (i.e. contract enforcement representative) who was authorized to contact a grievant and obtain information. T. 662-63. As the Hotel pointed out already, there are eight members on the contract enforcement team. T. 586-88. The demonstrated pattern of neglecting to timely respond to the Hotel's RFI by the single contract enforcement representative shows that the member has a fundamentally flawed understanding of the importance of responding timely to the Hotel's RFIs. If Respondent's unsupported claim that there are now two new, additional persons responsible for responding to RFIs, then their lack of experience warrants their undergoing at least two training sessions.

Further, Respondent's lengthy objections to the remedy requiring it to conduct two training sessions suggests that the Union continues to fail to understand the importance of its obligations to timely respond to the Hotel's RFIs. A second training session can only augment the first by answering any additional questions that may develop after implementing the training experience derived from the first session. In light of the Union's claim that two new persons have now been added as being authorized to gather information in response to RFI's, the second session may be particularly useful to answering additional questions that may likely arise due to their inexperience. The second session will also reinforce the Union's response legal obligations and help to reduce Respondent's proclivity to violate the Act.

### **3. The Signature Of Attendees Verifies Current And Future Compliance With The Relief Ordered.**

Respondent complains that requiring it to sign an acknowledgment of attendance is unprecedented, unjustified and an intrusion into the Union's relationship with its employees. Exceptions Brief p. 16. As stated, the Union's past conduct is unprecedented and the ALJ appropriately determined extraordinary relief was warranted to curb Respondent's unlawfulness. There is nothing intrusive with the Union certifying in writing it has complied with the order. Respondents are often asked to verify compliance with Board settlement agreements. Ordering the same certification in this matter is appropriate.

The pledge is particularly appropriate in light of the Union's repeated assurances, both while testifying and in response to the RFIs, that it has provided the Hotel all the information it possessed. As was learned in the hearing, these representations were false. The intake forms contained far more information that the Union had not disclosed to the Hotel. In addition, the Union's refusal to comply with its lawful obligations extends to its members. Er. Ex. 11 is an email from one of the members to Union official Sara Foran complaining that documentation of a possible contract violation had been leaked to the Hotel and cautioned the recipients to "keep this in this small circle." The promise demanded by the order will provide assurances that Union officials will promptly act to curtail the type of evidence suppression as is depicted in Er. Ex. 11 and directly commits those responsible for compliance to promise they will carry out the Union's legal obligations.

As a Respondent's misconduct increases, more extensive remedies are warranted. Courts and the Board have long recognized that in order to offset the effects caused by extensive unfair labor practices, more extensive remedies are at times needed. *USW v. NLRB*, 646 F.2d 616, 635

(D.C. Cir. 1981). The NLRB's Casehandling Manual § 10132.4(d) and (e) calls for the reading of settlement notices to employees and members and in "unusual circumstances," requires notice to be published in a newspaper. As Respondent notes, the public reading of a notice was required in *S. E. Nichols, Inc.*, 284 N.L.R.B. 556, 560 enfd. as modified 862 F.2d 952 (2d Cir. 1988). The Board and courts do not consider these unusual remedies as an outrageous intrusion into the relationship between a union or employer and their employees. In fact, both serve as an example of the latitude the Board has in strengthening its remedies when the conduct of the charged party has demonstrated a regular pattern of disregard of the law as the Union has done here.

Respondent attempts to distinguish a notice reading as having less intrusion than the pledge since the former requires notice to be read once while the latter requires a promise of vigilant compliance. Exceptions Brief p. 17. The Hotel suggests that the assurances of compliance demanded by the pledge is an absolute necessity given the many hollow and false promises the Union provided the Hotel over the years that it had provided all the information in its possession. A false promise to the Board will deservedly so have far greater consequences and by design, will likely limit the need of the Hotel to seek additional assistance from the Board in the future.

Nor is the pledge ordered unjustified as Respondent suggests. Exceptions Brief p. 18. Respondent's reliance on public readings of notices by managers cases is misplaced. Public readings of notices by managers have been ordered by the Board when such a remedy is justified. *Jackson Tile Mfg. Co.*, 122 N.L.R.B. 764, 768 enfd 272 F.2d 181, 181 (5th Cir. 1959) (manager discouraged employees to refrain from reading the notices). Here, requiring the promise of the Union officials is not done to have the Board intrude into the lives of Union officials. It is done because of the so many false assurances of compliance the Union gave to the

Hotel in the past. The Board order requiring assurances of compliance will ensure that the Union's assurances of compliance are now true and accurate. Without this relief, future violations would likely be defended by the Union with its repeated "good faith, inadvertent neglect" defense. An affirmative promise to comply and not to condone others to violate the Act ensures that those responsible for responding to RFIs have undertaken an affirmative promise to remedy the type of activity that was condoned in Er. Ex. 11. Since Union officials have condoned this type of behavior and actively concealed information in the intake forms from being disclosed to the Hotel, it is entirely justifiable that those responsible for supplying information affirm their intent to comply with the Act.

#### **4. The Reference In The Order To A "Settlement Agreement" Is A Clerical Error.**

The portion of the relief imposing training references "settlement agreement" in subparagraph (b) of the Order. Decision p. 37. The ALJ likely authored this portion of the award by taking the language from the General Counsel's Brief to the Administrative Law Judge where on the last two pages of the brief, the General Counsel proposes the same training language containing the "settlement agreement" references. The Hotel has no objection to the Board correcting the clerical error.

#### **5. It Is Appropriate And Necessary That The Union Provide Information Even For Resolved Grievances.**

For its final argument, the Union contends it should not be ordered to produce information for grievances that have been resolved. The Union claims the "uncontroverted evidence showed that a number of the grievances have been resolved" but it only references five

of the nineteen claims as being settled. Exceptions Brief pp. 19-20.<sup>14</sup> As noted earlier, Respondent's earlier position asking the Board to impose a "standard" remedy of "*an order that the information be provided and that a remedial notice be posted*" (*id.* 10 (emphasis added)) does not qualify its request to unresolved grievances. Even if it did, the order should not be limited to the Union providing information only for open grievances. Obtaining information for resolved grievances will allow the Hotel to address contract issues and complaints with its managers. As shown through the evidence presented in this case, very little information is provided in the grievances or in the Union's RFI responses. Not until these responses are supplemented by the Union (usually at grievance meetings, often a year later) does the Hotel have enough information to gain an understanding of the employee complaint. Having that information will allow the Hotel to address the nature of the complaint with its managers and supervisors and if needed, to provide remedial counseling and training to help ensure the issue is not repeated. In addition, if information is provided that shows there was no material contract violation, the Hotel will have this information available if the same issue is raised in a subsequent grievance. The information will be useful in determining the position the Hotel will take in the future.

Finally, the Union should not be rewarded for purposely delaying the production of requested information and after months of legal entanglement within this Board proceeding, be permitted to evade the force of the order by withdrawing or resolving the very grievances at

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<sup>14</sup> The Union argues Grievance Number 20171930 was never filed but was "mistakenly" included in an email to the Hotel. Exceptions Brief p. 20. The Hotel made multiple requests for the Union to provide the grievance since it had no record of it and the Union was making contract settlement proposals on the grievance. GC. Ex. 10a p.1, GC Ex. 10(b)(ii), GC EX. 10c. The ALJ found that the Respondent knew that grievance number 20171930 was never filed with the Charging Party. Decision p. 31. Not until the NLRB hearing did the Union first disclose to the Hotel there was never a grievance filed by the Union. T. 859. It is this type of callous behavior that supports the entry of the relief awarded in this case. It should not take the filing of an NLRB administrative proceeding to get a response to such a simple request.

issue. Allowing the Union to do so would provide the Union the opportunity to evade its lawful obligations to timely provide the Hotel with information. If similar conduct takes place in the future, the Union could evade being held accountable by settling or simply withdrawing grievances.

### **CONCLUSION**

Respondent does not dispute the ALJ's liability findings based on a demonstrated, long-standing pattern of the Union failing to timely respond to HRC's relevant grievance information requests. In many cases, the Union has improperly withheld responsive information based on a rejected claim of privilege, including documents that are not even Union/member communications. In light of the Union's demonstrated pattern of violating the Act despite documented efforts to gain compliance, the ALJ's recommended relief is appropriate.

Respectfully submitted,  
**HYATT REGENCY CHICAGO**

By: /s/Bradley Wartman  
One of its attorneys.

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