

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CP ANCHORAGE HOTEL 2, LLC,
D/B/A HILTON ANCHORAGE

and

Cases 19-CA-193656
19-CA-193659
19-CA-203675
19-CA-212923
19-CA-212950
19-CA-218647
19-CA-228578

UNITE HERE! LOCAL 878, AFL-CIO

GENERAL COUNSEL'S LIMITED CROSS EXCEPTIONS AND SUPPORTING
BRIEF TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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While the Counsel for the General Counsel (“General Counsel”) generally joins the Exceptions filed by the Charging Party, UNITE HERE! Local 878, AFL-CIO (“Union”), pursuant to § 102.46(e) of the Board’s Rules and Regulations, the General Counsel hereby files these Limited Exceptions and Brief in Support to the findings and conclusions of the Administrative Law Judge Andrew S. Gollin (the “Judge”) relating to the conduct of CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage (“Respondent”), in its cafeteria. Specifically, while the Judge correctly found that the General Counsel presented sufficient evidence that Union Representatives had visited with employees in the cafeteria on a daily basis for years between 10 a.m. and 11 a.m., and that Respondent’s managers, in February 2017, started appearing in the cafeteria at that same time, he erroneously found that Respondent had not engaged in surveillance or unilaterally changed employees’ past practice with its presence. Counsel for the General Counsel respectfully requests that the Board reverse the Judge’s decisions on these two findings.

I. EXCEPTIONS

1. The Judge erred in his finding that the Union had a long-standing practice of regularly visiting the employee cafeteria between 10 a.m. and 11 a.m. that was not at the exclusion of management. (p.23, ll.25-26).

2. The Judge erred in finding there was no past practice or reasonable expectation that the Union would be able to meet with employees in the cafeteria at the exclusion of management. (p.23, ll.30-32).

3. The Judge erred in finding that the evidence does not establish that management’s presence in the cafeteria significantly increased. (p.22, ll.4-5).

4. The Judge erred in concluding that Respondent did not violate § 8(a)(1) of the Act by engaging in surveillance. (p.23, l. 3).

5. The Judge erred in failing to find that the Respondent violated §§ 8(a)(1) and (5) of the Act by unilaterally changing its past practice by increasing the number of managers in the cafeteria during times when it was aware employees were meeting with their Union representatives. (p 23 ll.30-32).

II. FACTS¹

Respondent's hotel has an employee cafeteria (the "cafeteria") in its basement consisting of two rooms; a large room with seven booths, seating 4-5 people each, and small room, which could not be accessed without entering the large room, with six booths each also seating 4-5 people. (ALJD 6:10-11; Tr. 69:24-70:2, 70:12-71:3, 71:21-72:12, 79:2-4; GCX 2, GCX 3). Respondent serves complementary meals for all employees starting at 10 a.m., and the record established that most employees took their lunch break at 10 a.m. (ALJD 6:15-16; Tr. 69:12-18, 383:5-12, 679:8-16, 727:4-728:5; JTX 1, ¶¶11 and 12). Employees' lunch breaks last half an hour, and if employees chose to eat the food served in the cafeteria, they were required to eat it in the cafeteria. (ALJD 6:16-17; Tr. 728:16, 729:24-730:2; JTX 10).

Union Representative Danny Esparza ("Esparza") has been visiting the cafeteria, at 10 a.m. just about every weekday since about 2010, pursuant to the access language in the terms and conditions of employment implemented by Respondent in 2009 (the "Implemented Agreement"). (ALJD 6:19-20; Tr. 69:24-70:2, 79:2-4; JTX 4, p.6). Esparza testified that he visited the cafeteria at 10 a.m. because that was when Respondent brought the employee meals to the cafeteria. (Tr. 69:15-18). Pursuant to the language in the Implemented Agreement, the cafeteria was the only place in Respondent's facility where Union Representatives were permitted to meet with employees. (Tr. 79:2-4; JTX 4, p.6). In the second half of 2016, Union Organizer Dayra Valades ("Valades") began accompanying Esparza on his visits to the cafeteria (Tr. 381:18-382:11). Esparza and Valades would arrive at the cafeteria at about 10 a.m., and

¹ References to the Judge's decision will be referred to as "ALJD" followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line numbers. References to the official transcript in this proceeding will be designated as (Tr.__:__). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GCX __); references to Joint Exhibits appear as (JTX__); and references to Respondent Exhibits appear as (RX __).

after checking the quality of the food being served, would talk with employees, usually leaving the cafeteria by 10:30 a.m., and sometimes by 11 a.m. (ALJD 6:23-34; Tr. 69:8-11; 227:1-3, 384:3-5). Respondent's then General Manager, Soham Bhattacharyya ("Bhattacharyya"), admitted to being aware that 95% of the time, the Union's Representatives would be at the Hotel between 10 a.m. and 11 a.m. (Tr. 690:20-691:5, 728:6-15).

Until the end of January 2017, Respondent's stand-up meetings, attended primarily by department heads, were held every weekday morning for 25-30 minutes starting at 10 a.m., and were mostly held in the General Manager's office when Bhattacharyya and his predecessor, Bill Tokman were the General Manager. (ALJD 7, n.10; Tr. 667:6-10, 668:4-11, 671:23-672:21). At the end of January 2017, Bhattacharyya changed the start time for the meetings to 9:30 a.m. so that managers would be free at 10 to 10:15 so they could go back on the floors and assist in operations (ALJD 7, n.10; Tr. 667:24-5, 668-17-669:1, 670:14-23). Notwithstanding this history with respect to stand-up meetings, and the undisputed history of the times the Union Representatives visited the cafeteria, the Judge also credited the general testimony of Bhattacharyya, then Assistant Manager, Steve Rader ("Rader"), and then-Director of Rooms, Brandon Donnelly ("Donnelly"), about having regularly eaten in the cafeteria when the Union Representatives were present, before and after February 2017. (ALJD 7, n.10; Tr. 652:4-654:6, 663:10-664:4, 667:2-668:16, 766:13-25, 797:25-798:25).

Prior to February 2017, Esparza and Valades would see Director, Ivan Tellis ("Tellis") in the cafeteria on occasion, and would see Daniel McClintock ("McClintock"), whose status as a manager was in dispute, in the cafeteria on a daily basis.² When Tellis was in the cafeteria, he would come into the room either looking to deliver a message to someone, and then leave, or he would eat his lunch. (Tr. 77:17-78:24, 385:24-386:9). McClintock would spend about 10-20 minutes in the cafeteria, and Tellis, on

² The Judge found (ALJD 6, fn. 7) that the General Counsel had failed to establish that Mr. McClintock was a statutory supervisor or an agent. The General Counsel is not excepting to this finding.

occasions when he ate his lunch, would be in the cafeteria for 10-15 minutes. (ALJD 6:28-30; Tr. 78:25-79:1, 386:16-23).

On February 7, 2017, Esparza and Valades went to the cafeteria at around 10 a.m., and saw, for the first time, Rader, Maintenance Manager Bob Best ("Best"),³ Tellis, Director of Food and Beverage Leonard Esquivel ("Esquivel"), McClintock, and Donnelly holding a "stand-up" meeting in the middle of the large room. (ALJD 7:4-7; Tr. 79:5-81:8, 387:3-25, 653:17-23, 663:9-12, 683:9-23, 764:22-765:12; GCX 4; JTX 1, ¶30). The following day, the managers held another meeting in the middle of the large room. (ALJD 7:11-12).

During the Union representatives' visits after February 8, both Esparza and Valades continued visiting the cafeteria just about every weekday, and would see three to six managers in the cafeteria during their visits. (ALJD 7:18-20, n.11; Tr. 88:19-90:23, 393:5-15). The managers they would see would vary, but those observed in the cafeteria after February 8, included Bhattacharyya, Tellis, Rader, McClintock, Donnelly, Esquivel, Director of Security Charles Seldon ("Seldon"), and Best. (Tr. 89:2-24, 90:13-24, 92:16-22, 393:10-394:8, 653:17-21, 653:24-654:12, 655:23-657:2; JTX 1, ¶30; RX 7). Those managers typically stayed in the cafeteria for 30 minutes or more and, according to Esparza, would eat lunch with one another or alone, and some would sit and try to talk to employees. (ALJD 7:18-21; Tr. 90:10-16, 226:23-227:3). Bhattacharyya, Rader and Donnelly claimed that they would greet employees, but would seldom engage them in conversation. (ALJD 7:26-28).

On about May 30, after Esparza and Valades spoke with some J-1 visa employees in the large room about an upcoming rally the Union was going to be holding, Esparza noticed that Bhattacharyya had been standing behind him. (ALJD 8:12-14; Tr. 97:23-99:5, 400:7-401:1). Bhattacharyya asked Esparza, in the presence of the J-1 visa employees, if he could come to the Union's rally. Esparza responded that he

³ In the eight year period Esparza had been visiting employees in the cafeteria prior to February 7, 2017, Esparza recalled seeing Best on only one or two occasions. (ALJD 6:31-32; Tr. 153:14-19).

could. (ALJD 8:13-14; Tr. 99:6-19, 192:22-193:5; RX 7, p.4). Esparza responded that Bhattacharyya could come to the rally if he wanted to and then Esparza proceeded to walk into the small room, where he saw three J-1 visa employees eating pizza that they brought from home. (ALJD 8:13-16; Tr. 99:13-100:6). Esparza introduced himself, handed out flyers for the Union's rally, and invited the employees to attend. (ALJD 8:16-17; Tr. 100:7-10). After he spoke with the employees about the rally, he heard Bhattacharyya behind him, asking the J-1 visa employees if he could have some of their pizza, and telling them that he didn't care if Esparza made fun of him. (ALJD 8:17-20; 100:11-101-3).

III. ARGUMENT IN SUPPORT OF LIMITED EXCEPTIONS

A. The Judge Erred by Concluding There Was No Past Practice or Reasonable Expectation that the Union Would Be Able to Meet with Employees in the Cafeteria Without Management Present (Exceptions 1 and 2)

Esparza testified that he has been visiting employees in the cafeteria on most weekday mornings since around 2010, starting at about 10 a.m., sometimes remaining until 11 a.m. Until the end of January 2017, Respondent's stand-up meetings were held every weekday morning for 25-30 minutes starting at 10 a.m., and were mostly held in the General Manager's office. (ALJD 4:23-25, 7 n.10; Tr. 667:6-10, 668:4-11, 671:23-672:21). Thus, the evidence established that, between 10 a.m. and 10:30 a.m., managers who attended stand-up meetings, such as Bhattacharyya, Rader, Donnelly, Best, Lucks, Esquivel and Seldon, could not possibly have been in the cafeteria until the start time of the stand-up meetings was changed.

The Judge rejected this argument in his decision, reasoning that the stand-up meetings lasted about 25-30 minutes and, therefore, this left enough time for managers to get to the cafeteria to eat while the Union representatives were still there interacting with employees. (ALJD 22:7-11) That management could possibly have been in the cafeteria after 10:30 a.m. however, is of no moment. As most employees took their lunch breaks at 10 a.m., and as those breaks were only for 30 minutes, most employees would not have been present when management arrived in the cafeteria. Thus, the conclusion that, for the

majority of Unit employees, a practice, whereby the Union would be able to meet with employees in the cafeteria without management present, is well supported.

B. The Judge Erred by Concluding the Evidence Did Not Establish that Management's Presence in the Cafeteria Significantly Increased (Exception 3)

As set forth above, until the end of January 2017 managers who attended stand-up meetings were always at those meetings from approximately 10 a.m. to 10:30 a.m., and away from the cafeteria. The only member of management Esparza and Valades regularly saw in the cafeteria before February 2017, and only on an occasional basis, was Ivan Tellis. Then, February 7, 2017, management began holding stand-up meetings in the cafeteria on consecutive days. This is undisputed. After that, both Esparza and Valades saw between 3 to 6 members of management in the cafeteria during their visits.

While the Judge questioned the accuracy of the testimony and evidence offered by Esparza and Valades as to which managers were witnessed in the cafeteria after February 8, 2017 (ALJD 7, n.11-12), there can be no dispute that, regardless of which managers were in the cafeteria from 10 a.m. to 10:30 a.m., there were more managers in the cafeteria then there were before because of the change in time and location for the stand-up meetings. As such, the evidence established that, at least by February 9, 2017, the number of managers present in the cafeteria between 10 a.m. and 10:30 increased from one, and only on occasion, to between three and six.

C. The Judge Erred in Concluding that Respondent Did Not Violate § 8(a)(1) of the Act by Engaging in Surveillance (Exception 4)

The Board has held that while an employer's mere observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance, engaging in observation in a manner that is "out of the ordinary" violates the Act, as it is inherently coercive. See *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2006) (a supervisor's mere presence at the facility on a Saturday, which was not ordinary, constituted unlawful surveillance); *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005); *Town & Country Supermarkets*, 340 NLRB 1410 (2004). Further, as established in *Remington*

Lodging & Hospitality, LLC d/b/a Sheraton Anchorage, 363 NLRB No. 6 (2015), the increased presence of management in the cafeteria amounted to unlawful surveillance where union representatives conducted meetings with employees on breaktime. In determining that Respondent's conduct did not violate § 8(a)(1), the Judge distinguished these cases cited by the General Counsel by erroneously having concluded that management's presence in the cafeteria had not increased significantly. As discussed above, this was clear error.

For years, the majority of Respondent's employees took their lunch from 10 a.m. to 10:30 a.m. They were able to speak with their Union representatives in the cafeteria in the absence of management during this time. However, that changed at the end of January 2017, when Bhattacharyya changed the time and place of his stand up managers' meetings such that managers were required to be in the cafeteria from 10 a.m. to 10:30 a.m. Thus, like in the *Sheraton Anchorage* case, this "significantly increased" presence of management was out of the ordinary, and thereby coercive in violation of § 8(a)(1).

In addition to these managers being present in the cafeteria, managers also began to sit and talk with Unit employees. See *Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1200 (1979) (violation found where supervisors departed from their practice of eating separately, and "deliberately mingled with employees in the dining areas utilized [...] during break and lunch periods"). Further infringing on its employees § 7 rights, Bhattacharyya not only interjected himself into the conversation Esparza was having with employees about an upcoming Union rally in the large room on May 30, 2017, but then followed him into the small room, and interfered with Esparza's conversation with a second set of employees. This was clearly unlawful. See *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 388 (1997), (management engaged in unlawful surveillance by interjecting itself into conversations being engaged in by union representatives and employees); *West Lawrence Care Center, Inc.*, 308 NLRB 1011, 1015 (1992) (unlawful surveillance found where management followed a union representative throughout hospital, and stood alongside her when she spoke with employees).

D. The Judge Erred in Concluding that Respondent Did Not Violate § 8(a)(5) of the Act by Unilaterally Changing Its Past Practice by Increasing the Number of Managers in Its Cafeteria during Times It was Aware Employees Were Meeting with their Union Representatives (Exception 5)

Section 8(a)(5) prohibits an employer from making changes to material terms or conditions of employment without giving the union prior notice and an opportunity to bargain regarding the change. *NLRB v. Katz*, 369 U.S. 736 (1962). "An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of union employees' employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). To qualify as a past practice over which a bargaining obligation attaches, "[a] past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis." *Id.*, citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-54 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

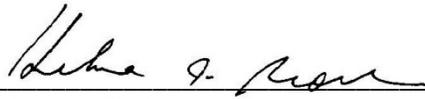
Here, the evidence established that since 2010, the Union's representatives had been visiting employees in Respondent's cafeteria from at least 10 a.m. to 10:30 on most weekdays. As a result of management's increased presence in the cafeteria during that half hour starting in February 2017, the Unit employees went from being able to freely interact with their Union representatives during their lunch breaks, to being able to talk with their Union representatives only in the presence of Respondent's management team. This represents a change in past practice, over which Respondent was required to bargain. While the Judge relied on the fact that Esparza was not aware of any sort of agreement between Respondent and the Union that management would refrain from entering the cafeteria when the Union representatives is irrelevant, as such an agreement, in light of the past practice, is not required.

IV. CONCLUSION

For all of the above reasons, the General Counsel respectfully requests that the Board grant the General Counsel's Limited Cross Exceptions to the Decision of the Administrative Law Judge.

DATED at Seattle, Washington, this 14th day of April, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Limited Cross Exceptions and Supporting Brief to the Decision of the Administrative Law Judge was served on the 14th day of April, 2020, on the following parties:

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