

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

UNITE HERE! LOCAL 878

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

RESPONDENT'S ANSWERING BRIEF
TO THE CHARGING PARTY'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE

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Respondent CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage submits its answering brief to the Charging Party's Exceptions to the Administrative Law Judge's (ALJ's) March 4, 2020 decision ("ALJ Dec.") pursuant to Rule 102.46.

A. Introduction

The Charging Party challenges the ALJ's ruling that the General Counsel failed to show that Respondent violated Section 8(a)(1) and (5) of the Act by allegedly increasing the presence of managers and supervisors in the employee cafeteria during times when Union representatives were present. The Charging Party's Exceptions fail in every respect to show that the ALJ erred in his determinations regarding the presence of managers in the employee cafeteria.

The ALJ concluded that the General Counsel had not proven a Section 8(a)(5) violation because "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." ALJ Dec., p. 23. The ALJ also concluded that the General Counsel failed to establish that there had been an increased presence of managers in the employee cafeteria so as to create an impression of illegal surveillance:

Overall, based on the limited evidence presented, the General Counsel failed to establish that employees reasonably would believe that management was in the cafeteria for the purpose of surveilling their protected activity. As stated, members of management regularly visited the cafeteria before and after February 2017, and they did so for the same reasons as other employees, to eat lunch or to take a break. Like other employees, the managers and supervisors greeted and occasionally engaged in conversation with employees while there. Unlike in *Aladdin Gaming*, management did not stand by listening to the employees' protected conversations; nor did it make statements or offer opinions about their protected activity. Accordingly, I dismiss the Section 8(a)(1) unlawful surveillance allegation.

ALJ Dec., pp. 21-22.

The Charging Party has attacked the ALJ's ruling by claiming he disregarded evidence about the numbers of managers in the cafeteria and misapplied the law which, it claims,

establishes illegal surveillance as a matter of law. The Charging Party's arguments are especially unavailing as they rely on gross distortions of and material omissions from the record. For one thing, the Charging Party's brief supporting its exceptions grossly exaggerates the evidence of how many managers were in the cafeteria before and after February 7, 2017 by understating the former and overstating the latter. The Charging Party's "before and after" accounting of manager presence is defective, too, for its blindered reliance on its witnesses' testimony, some of which the ALJ found to be unreliable. At the same time, the Charging Party's brief completely ignores the unequivocal and unchallenged testimony of several management witnesses that they consistently took their meal breaks in the employee cafeteria while Union representatives were present and had done so for years before February 7, 2017.

Correctly told, the record supports the ALJ's determination that the General Counsel failed to show that employees would reasonably have believed that managers and supervisors were in the employee cafeteria for surveillance reasons. It also supports the ALJ's determination that the General Counsel failed to show that the Union had shown a binding past practice of being able to meet in the employee cafeteria outside the presence of Respondent's managers.

B. Statement of the Pertinent Facts

1. Background

The employee cafeteria, which is located in the basement of one of the several towers in the hotel complex, is available to all hotel employees including management. Tr. 69, 652, 677. Respondent provides free meals to all of its employees, including managers, from 10 a.m. to 1:00 p.m. and again starting at 5:00 p.m. Tr. 682-83. In the morning, hot food comes out at 10 a.m. Tr. 69; 767.

The cafeteria, seats 40 or so people in two separated rooms. Tr. 675, 682. As the bargaining unit fluctuates from 130 to 200 employees, Tr. 67, the cafeteria can only serve a small

fraction at any given time. It is noisy when crowded with employees and difficult to hear across the room. Tr. 190-91, 654, 679. During the lunch break, employee conversation in several different languages makes it difficult to hear from table to table. Tr. 657.

Union representatives go to the cafeteria four or five times each week, typically at 10 a.m., to talk to employees during their meal break, to check the food and to call the General Manager if the Union thinks it is unsatisfactory. Tr. 69, 84, 145. Because of the Union's complaints about the food, the General Manager or the Food and Beverage Manager had a practice of being in the cafeteria when the food came out at 10:00 a.m. "so that we've got an extra set of eyes on there." Tr. 767. And, as discussed below, several managers testified that they also routinely went to the cafeteria well before February 7, 2017 to take their meal breaks alongside members of the bargaining unit. The Charging Party's brief completely ignores that evidence and instead creates a false impression that few if any managers were ever in the employee cafeteria during the morning meal break.

2. The evidence does not support, and instead, controverts the Charging Party's claim that before February 7, 2017, "there is no evidence that any of the hotel's managers were regularly present in the cafeteria."

The Charging Party's arguments in exception to the ALJ's determination are tethered to its own witnesses' testimony regarding management presence in the employee cafeteria before February 7, 2017. However, this testimony was vague and unreliable and it did not support the Charging Party's deflated manager numbers before February 7 or its inflated numbers thereafter. Completely ignored in the Charging Party's brief is that several management witnesses provided unchallenged and unequivocal testimony about their consistent presence in the cafeteria dating back a number of years.

The ALJ concluded that the Charging Party's primary witness on the management presence claim, Local 878 vice president Daniel Esparza, was not a reliable witness on that topic:

Esparza genuinely struggled to independently recall and differentiate which managers and supervisors came to the cafeteria prior to February 2017. He explained the reason was that his focus was more on the members he was speaking to, and less on who else was there. He usually only noticed if he saw someone unfamiliar to him. (Tr. 164-165). Overall, I found his testimony on this topic to be vague, uncertain, and generally unreliable.

ALJ Dec., p. 6, n. 8. The ALJ's reliability conclusion is supported by the following exchange at the hearing between Esparza and Respondent's attorney Renea Saade:

Q - or the non-summer season, how many people on average do you usually see between 10 and 11?

A I usually see between 10 and -- 10 to 15 members.

Q I'm not asking about bargaining unit members. Just how many people, humans, are in that room between 10 and 11?

A Most of the people that I see in the bargain unit. It is what -- they are in the bargain unit in the breakroom around 10:00 to 10:30.

With exception of Daniel and Ivan,¹ the majority of the members that I -- the people I see in the breakroom is -- the majority are as part of my membership.

Q But there's been other people outside of the bargaining unit in the cafeteria prior to February 2017?

A I don't know because I concentrate on my members.

Q Okay, so it's possible that you've -- there's been managers and supervisors in there, and you just never paid attention?

A Don't remember if --

Q Okay.

A -- they were there or not.

Tr. 165:13 – 166:8. In addition to the foregoing, Esparza struggled with discrepancies in his prior sworn statements about managers' presence, (Tr. 167 – 172), including whether Front Desk

¹ Esparza is referring to Human Resources representative Daniel McClintock and Housekeeping Manager Ivan Tellis.

Manager Brandon Donnelly had been present in the cafeteria prior to February 7, 2017:²

Q Had you seen him prior to seeing him in the breakroom?

A I don't remember if I see him or not. Like I said before I just don't pay attention.

Q So he may have -- you may have seen him in the breakroom prior to February 2017 and you don't recall?

A Don't remember.

Tr. 170:22 – 171:2³

The Union witnesses' vague and uncertain testimony about the presence of managers in the cafeteria prior to February 2017 was contradicted by Donnelly and former manager Steve Rader; each had a consistent habit of taking their meals in the cafeteria, including at around 10 a.m., prior to February 7, 2017. Donnelly testified that while he was the Director of Rooms before January 2017, Tr. 653-54, he arrived in the cafeteria between 10:00 and 10:15 a.m. every day to check the food quality and to eat. Tr. 652. Rader, who had been in various management roles over eleven years, and had become the Assistant General Manager in January 2017, Tr. 764-65, had for the entirety of his career there gone into the cafeteria each day when the food came out at 10:00. Tr. 766.

The Charging Party claimed throughout its exceptions brief that only two managers were fairly regularly in the cafeteria at the same approximate time as the Union representatives. CP Brief, p. 4 (Daniel McClintock and Ivan Tellis “regularly ate lunch in the cafeteria while Mr. Esparza and Ms. Valades visited”), p. 8 (“only two managers ever visited the cafeteria before

² Donnelly was among managers the Charging Party claimed began appearing in the cafeteria *after* February 7, 2017. Tr. 393:19-20.

³ As discussed below, Union business agent, Dayra Valdes, who had accompanied Esparza on cafeteria visits for a brief period prior to February 7, 2017, was also an unreliable witness about manager presence.

February”), p. 13 (the Union “would come upon only two managers”). In addition to the two managers who are conceded by the Charging Party to have been in the cafeteria,⁴ the evidence shows there were at least four managers who regularly appeared in the cafeteria during the meal break.⁵

3. The Charging Party’s claim that manager presence increased in the cafeteria after February 7, 2017 relies on exaggerated and otherwise unreliable testimony.

The second part of the equation by which the Charging Party claims that management unlawfully stepped up its cafeteria presence suffers from the same unreliability problem as the first. Having failed to establish a standard for the regular presence of managers sharing the meal break with the bargaining unit before February 7, the Charging Party doubled down in its argument by attempting to portray an even higher management presence by exaggerating its unreliable testimony.⁶

In addition to Esparza, whose muddled testimony justified the ALJ’s lack of confidence in what he was saying, equally unconvincing testimony was provided by his colleague, business agent Dayra Valades. Cross examination revealed that she was unsure who was or was not a manager:

Q Okay. Well, if I understand your testimony though today, you’ve identified people who you don’t know their names but you believe they’re in management.

⁴ Despite repeatedly claiming in its brief that two managers had been in the cafeteria, the Charging Party also claims “there is no evidence that *any* of the hotel’s managers were regularly present in the cafeteria.” CP Brief, p. 8. The claim of two is belied by the evidence; the claim of none by the Charging Party’s statements in its brief.

⁵ Soham Bhattacharyya, who had been the General Manager since January 2017, Tr. 665, was also constantly in the cafeteria for meals and used to seeing the Union representatives while there. Tr. 677.

⁶ There was no evidence that managers were ever directed to step up their presence in the cafeteria. Bhattacharyya denied any manager had been directed to monitor the Union or to interfere with the Union’s communications with members. Tr. 678.

A Yes.

Q How do you know that they're in management and not Hotel guests?

A They will be -- they will be wearing nametags sometimes, or they will be talking with people that I recognized as managers before.

Q And so how often, in the three years that you've been going to the employee breakroom, have you seen someone without a nametag or a uniform in the employee breakroom?

A Since February 7th, 2017 I started seeing more people with no uniform but with nametags, or just no nametags but in the breakroom.

* * *

Q Isn't it fair to say that for the most part you're seeing employees or people you believe to be managers in that area?

A Yes.

Tr. 419:17 – 420:12.

With nothing more for support than the vague and unreliable testimony of Esparza and Valades, the Charging Party nonetheless argues that the ALJ should have recognized that after February 7, 2017, management presence in the cafeteria “tripled” to “six to seven managers.” CP Brief, p. 8. This exaggeration of management’s presence after February 7, 2017 was not supported by any evidence in the record.⁷ As the ALJ correctly recognized, the General Counsel failed to establish an evidentiary baseline which showed any cognizable increase in management’s presence.

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⁷ In fact, that the truth is much, much closer to the notion that management did not step up its presence at all from three or four managers generally being present in the cafeteria before February 7, 2017, can be seen from the Charging Party’s rough notes. CP Ex. 1; R. Ex. 7. These mostly show sporadic days when usually no more than three or four managers allegedly were present. One cannot even tell from these notes how long any one manager was there or whether they overlapped. *Id.*, Tr. 485-86.

4. The Charging Party's brief misrepresents the duration and purpose of manager activities in the cafeteria.

Not content with exaggerating the extent of management's presence, the Charging Party's brief paints a completely false picture of the nature and duration of management activity in the cafeteria while Union representatives were present. From a single kernel of actual fact, that being that management held a couple of "stand up" meetings in the cafeteria in early February 2017, Tr. 770, the Charging Party falsely claims in its brief that these meetings became a daily event in the cafeteria that went on for months: management "continued to meet in the cafeteria every weekday at 10:00 a.m.," managers "all began appearing for 25-30 minutes at a time," and they "would gather before Union representatives arrived, and were still in the room when representatives left roughly thirty minutes later." CP Brief pp. 5, 8 9.

The claim that "Management continued to *meet* in the cafeteria every weekday at 10 a.m." *Id.* p. 5 (emphasis added), is not supported by the transcript citations. For example, in Tr. 88:19-90:23, Esparza stated "there were no meetings, no meetings there." Tr. 89:1. He added that while several managers were in the room, they were sitting at separate tables. Tr. 393:5-15 likewise states only that the witness saw managers in the break room, but does not state they were conducting meetings.

Again, it is true that a couple of stand up meetings were held in the cafeteria. Tr. 770:10-14. Management stand up meetings are held "at the beginning of the day where we review any things operationally, the scores, our satisfaction scores of the guests, and go over information to help the operations for the day." Tr. 770:4-7. They were held in various locations around the hotel. Tr. 672, 770-71.

One of the meetings in the cafeteria was to discuss guest evaluation ("SALT") scores and to acknowledge employees' good work as reflected in those scores. Steve Rader explained:

[W]e were reviewing our -- the guest satisfaction cards, which are called guest satisfaction cards. And we had quite a few employees who were mentioned by name in the responses and we were going over some of those with the employees.

Tr. 770:16-20. He added:

Q Okay. Back to the discussion of SALT scores -- or guest satisfaction and SALT is the same thing; is that right?

A That's correct.

Q Okay. Did I understand your testimony correctly, that those were discussed with the employees?

A Yes.

Q And why would you do that?

A So SALT is satisfaction and loyalty tracking. And that is Hilton's way of scoring the -- allowing the guests to score the hotel. And they have multiple opportunities to type in what went well and what needed work on. And very frequently, we would have employees' names show up, that so-and-so did an amazing job or went above and beyond.

And we always shared -- we read them every day, every morning, and we would celebrate every time that any individual was mentioned in there.

Q You would let the employees know?

A Absolutely.

Q Okay. And that happened in at least one of the cafeteria meetings?

A Yes.

Tr. 771:15 – 772:71. In fact, Valades confirmed that scores and numbers were discussed at one of the cafeteria stand up meetings. Tr. 471. Esparza recalled that Bhattacharyya invited him to join the meeting, which he declined. Tr. 85.

The other stand up meeting concerned back room standards. Rader explained:

[T]he other time we met there, we were focused primarily on being attentive to back-of-the-house areas, to the break room specifically, and having management make sure that things are clean, things are neat, you know, that, you know, in general, we're not just going there an eating, but looking at things with a critical eye to make sure that we're improving the

back-of-the-house areas as well.

Q Had that happened in other parts of the hotel where you had a stand-up meeting for that reason?

A Yes, it has.

Q And what other areas do you recall having those kind of stand-up meetings?

A We had one in the lobby. We had one in the restaurant downstairs. We had one in the banquet space on the 15th floor. We had one, I believe, back of the house behind the banquet area. So there were -- there were multiple locations.

Tr. 770:21 - 771:11.

The Charging Party also claims that “managers also deliberately mingled with employees during times and in spaces they knew the Union typically used to interact with Union members.” CP Brief, p. 9. There is little if any evidence in the record that when managers were in the cafeteria at the same time as Union representatives, they did anything other than eat their meals and visit with colleagues. Tr. 653, 766. But again, they had always done so.

5. The Charging Party did not have an exclusive right to use the cafeteria for meetings.

The Charging Party did not dispute the right of managers to be in the cafeteria. Tr. 232, *see also* Tr. 677. In fact, the Charging Party acknowledged there was never an agreement that managers could not be in the cafeteria when the Union was present.⁸ Tr. 223. During the three year period in which Human Resources representative McClintock had his lunch in the cafeteria virtually every day, Esparza never once raised a concern or objection to McClintock’s presence. Tr. 150. Moreover, the Charging Party admitted to a lengthy past practice of talking to their members in the cafeteria in plain view of people like McClintock and Ivan Tellis, Esparza

⁸ In fact, it is common for managers to be in the breakrooms at other local unionized hotels. Tr. 462.

testified it also was not uncommon to talk to employees in the hotel lobby with supervisors nearby. Tr. 141.

Not only did the Charging Party not have an exclusive right to conduct meetings in the cafeteria outside the presence of managers, it had alternative means of communicating with employees at the Union hall, where employee meetings are held. Tr. 68, 457-58. The Union hall is approximately ten blocks from the hotel. Tr. 142. Union representatives also communicate with Respondent's employees by phone or text message. Tr. 143-44, 456.

C. Discussion

1. The ALJ correctly ruled that the General Counsel did not prove a Section 8(a)(1) unlawful surveillance violation.

The ALJ correctly determined that the General Counsel failed to prove that manager presence in the employee cafeteria between February 7 and late July 2017 amounted to unlawful surveillance. As he noted,

[M]embers of management regularly visited the cafeteria before and after February 2017, and they did so for the same reasons as other employees, to eat lunch or to take a break. Like other employees, the managers and supervisors greeted and occasionally engaged in conversation with employees while there. Unlike in *Aladdin Gaming*, management did not stand by listening to the employees' protected conversations; nor did it make statements or offer opinions about their protected activity.

ALJ Dec., pp. 22-23.

“A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance.” *Aladdin Gaming, LLC*, 345 NLRB 585, 585-86 (2005) *enf'd Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). Rather, to be unlawful, observation activity must be “‘out of the ordinary’ and thereby coercive.” *Id.* Observation activity becomes unlawful only if it “goes beyond casual and becomes unduly intrusive.” *Kenworth Truck Co., Inc.*, 327 NLRB 497, 501 (1999). Whether an

employer's observation activity rises to the level of "unlawful surveillance or whether it creates the impression of surveillance is an objective one [test]⁹ and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." *The Broadway*, 267 NLRB 385, 400 (1983). "Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Aladdin Gaming*, *supra* 345 NLRB at 586.

a. The ALJ properly rejected the contention that Respondent engaged in surveillance by virtue of an alleged increase in managers in the employee cafeteria.

Central to the arguments of the General Counsel and the Charging Party was their contention that Respondent increased the numbers of managers in the cafeteria beginning on February 7, 2017 and continuing daily thereafter. The ALJ concluded that GC did not establish that presence of managers in the cafeteria was out of the ordinary and therefore rejected their arguments that unlawful surveillance might established on a quantitative evaluation. The ALJ rejected this contention:

Here, unlike in *Sheraton Anchorage*, the evidence does not establish that management's presence significantly increased. As stated, Soham Bhattacharyya, Steve Rader, and Brandon Donnelly, along with McClintock and Tellis, regularly visited the cafeteria when the Union representatives were there, both before and

⁹ The Charging Party sought testimony from its own witnesses about how they perceived employees' reactions to managers' presence in the cafeteria. In responding to Respondent's objections to this kind of testimony, the ALJ advised that the test is objective and testimony about employee's subjective feelings likely is inappropriate. See Tr. 108-12; see also ALJ Dec., p. 21 ("Ultimately, the test is an objective one and involves a determination as to whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7. *Sage Dining Services Inc.*, 312 NLRB 845, 856 (1993); *Brown Transportation Corp.*, 294 NLRB 969, 971-972 (1989).") Despite this, the Charging Party persists in improperly referring in its brief to its witnesses' self-serving testimony about how employees allegedly were reacting to the managers. CP Brief p. 5.

after February 2017. The General Counsel asserts Bhattacharyya, Rader, and Donnelly could not have been in the cafeteria at that time because they attended the morning stand-up meetings, which, prior to January 2017, began at 10 a.m. However, those meetings lasted 25-30 minutes, which allowed managers enough time to get to the cafeteria to eat while the Union representatives were still there interacting with employees.

ALJ Dec., p. 22.

The Charging Party now seeks to overcome this result by embellishing the evidence about manager presence before and after February 7, 2017. As discussed at length in Sections B.2 and B.3 above, the record sustains the ALJ's conclusion that manager presence in the cafeteria during the meal period was not appreciably different after February 7, 2017 than it was before. The Charging Party nonetheless places heavy reliance on the ALJ's conclusion in *Sheraton Anchorage*, 363 NLRB No. 6 *1 (Sept. 15, 2015), that an increased number of supervisors in the employee cafeteria violated Section 8(a)(1). CP Brief, p. 8. This reliance is unmerited as that particular ruling in *Sheraton Anchorage* is not binding precedent,¹⁰ and the decision can otherwise be distinguished.

The Charging Party challenges the ALJ's refusal to apply the surveillance ruling in *Anchorage Sheraton* in the instant case by arguing that these cases are "nearly identical." CP Brief, p. 8. They are hardly that. The only similarities is that both cases involve Anchorage hotels, the same Union local, and one of that local's agents, Daniel Esparza, went into the employee cafeterias in both hotels and later testified about it in support of his Union's Section 8(a)(1) charges. The similarities end there.

The cases differ considerably in terms of the evidence related to management presence in the cafeterias. In *Sheraton Anchorage*, not only was there a demonstrated increase in manager

¹⁰ As ALJ Gollin noted in the instant case, the Respondent in *Anchorage Sheraton* did not file exceptions to ALJ's finding of unlawful surveillance, meaning that the ALJ's "decision only has persuasive value." ALJ Dec., p. 22, n. 26.

presence, the reason for it was abundantly clear. At the time of the stepped up manager presence allegations, the Sheraton's management had withdrawn recognition and a decertification petition was pending. The ALJ in that case saw these circumstances as tied to each other:

I find there is evidence to establish that Respondent's managers, including Emmsley, Rydin, and Canas, substantially increased their presence in the employee cafeteria in the period of early 2010 compared to their previous practice in late 2009, at a time when both the decertification petition and a rival pro-union petition were being circulated among Respondent's employees.

363 NLRB No. 6 *11. No similar facts exist in the instant case. Respondent had not (and has not) withdrawn recognition and in 2017, a decertification petition had not been filed.¹¹

Moreover, the General Counsel failed to establish an appreciable increase in management presence in the employee cafeteria.

Another critical difference in these cases is that while the Respondent's witnesses in *Sheraton Anchorage* were determined to lack credibility on the issue of manager presence, the ALJ in the instant case found that Esparza was an unreliable witness. An ALJ's credibility rulings normally are not overruled by the Board "unless the clear preponderance of all of the relevant evidence convinces us they are incorrect. *Sheraton Anchorage, supra*, 363 NLRB No. 6 *1. The Charging Party makes no effort at all in its brief to rehabilitate Esparza, and as noted above, does not even acknowledge the contradictory testimony of managers Bhattacharyya, Donnelly or Rader which establishes their congoing and consistent presence in the cafeteria before and after February 7, 2017.

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¹¹ A decertification petition, which was filed in July 2018, 19-RD-223516, is stayed pending resolution of certain of the unfair labor practice charges in this consolidated matter.

b. The ALJ correctly ruled that Respondent’s managers did nothing qualitatively out of the ordinary in the employee cafeteria.

Aladdin Gaming, LLC, supra, rejected unlawful surveillance charges in an employee cafeteria and, as the ALJ acknowledged, has particular application here. The Board held in *Aladdin* that, like the present case, the dining room was an open area where both managers and unit employees regularly dined, and the union activity was in the open. The managers’ presence and conduct there was held to be routine and not “out of the ordinary,” and they did not engage in coercive conduct. Rather, two supervisors watched for short time periods as employees solicited authorization cards in the employee cafeteria, The Board overturned the ALJ’s finding of unlawful surveillance with respect to two separate incidents. In one, a manager stood for two minutes by a table at which two off-duty employees were soliciting others. The manager then spoke for eight minutes about management’s perspective on unionization and then left the dining room. *Id.* at 585. A few days later, another manager observed another off-duty employee soliciting an employee to sign a card while in the dining room. He, too then told the employees how management viewed unionization. *Id.*

The ALJ’s decision is consistent with the result in *Aladdin* as well as in *Preferred Building Services, Inc.*, 366 NLRB No. 159 *22 (2018). In *Preferred Building Services*, the ALJ dismissed a Section 8(a)(1) surveillance charge where the Respondent’s owner, whose job required him to be in the area on a frequent basis, had observed employee picketing. The General Counsel claimed that the owner had engaged in extraordinary activity by having an “open, prolonged, conspicuous presence” in the area, “watching the demonstration, laughing and talking with people and appearing to take photos” by “holding a cell phone and extending his arm outward and moving it around as if taking pictures or video.” The ALJ suggested, citing *Saigon Gourmet*, 353 NLRB 1063, 1066 (2009) that such an action might well constitute illegal

surveillance, but rejected it for lack of reliable evidence. 366 NLRB No. 159 *22.

As the ALJ correctly concluded in this case, there is no evidence that Respondent's managers were in the cafeteria for any illicit purpose;¹² and they unquestionably had a long practice and right to be there to enjoy their meals. Like other Union hotels in Anchorage, managers were commonly in the cafeteria without any objection from the Union.¹³ Moreover, there is no evidence that the managers joined in, listened to¹⁴ or attempted to interfere in conversations between Union representatives and bargaining unit members. While there were several step up meetings in the cafeteria in early February 2017, the ALJ acknowledged the evidence that management legitimately was present at that time to discuss customer evaluations praising employees and to instruct managers on proper "backroom maintenance."¹⁵

The Charging Party's reliance on *Liberty House Nursing Homes*, 245 NLRB 1194 (1979) likewise is misplaced. In that case, supervisors moved from their own dining room and began taking their meal breaks and mingling with bargaining unit members in the employee dining area. In this case, managers have always taken their meals in the cafeteria alongside bargaining unit members; the Union and employees were used to their presence during meal breaks.

The General Counsel did not present the same kinds of additional facts that perhaps made for a closer case in *Aladdin*,¹⁶ or even try as in *Preferred Building Services* to point to any

¹² See footnote 6: no evidence that managers were directed to engage in surveillance activity in the cafeteria.

¹³ See footnote 8.

¹⁴ As discussed above in Section B.1, the noisy crowded condition in the cafeteria is yet another strong indicator that managers were not in the cafeteria to listen to the Union agents' conversations with employees.

¹⁵ See discussion of Steve Rader testimony about the step up meetings in Section B.4.

¹⁶ The Board distinguished the cafeteria encounters in *Aladdin* from prior surveillance cases where the Board has found unlawful surveillance including *Sands Hotel & Casino*, 306 NLRB 172 (1992), *enfd.*

evidence suggesting that managers were in the cafeteria intending to observe union activity. And in addition to other factors discussed above, the managers in *Sheraton Anchorage* engaged in activity that was highly suggestive of surveillance. One manager who had never been observed in the cafeteria before, began standing in there with “his arms folded for up to 15 minutes observing employees.” *Id.*, *10. Such activity, especially when the Union was confronting decertification and rival union challenges, can understandably be viewed as Section 7 interference. In contrast, no evidence credibly suggested surveillance activity in the instant case. There was vague testimony about one or two managers moving between the cafeteria rooms on several occasions, one carrying a plate of food. On another occasion, the General Manager was alleged to have asked if he might join union members for pizza. The ALJ understandably disregarded these allegations as too vague, brief and infrequent to sustain a surveillance charge as they did not evidence monitoring or coercion. ALJ Dec., p. 22.

There also is no direct or even circumstantial evidence that Respondent’s management directed managers to increase their presence in the cafeteria. General Manager Bhattacharyya denied that had happened and no evidence otherwise suggests that it had. The facts thus differ from cases like *Elano Corp.*, 216 NLRB 691 (1975), where management instituted a rule that supervisors be present when employees ate lunch, or *Oakwood Hospital*, 305 NLRB 680 (1991), *enf. denied*, 983 F.2d 698 (6th Cir.1993), which involved an elaborate plan requiring management team members to closely shadow a union representative while he met with employees in the cafeteria, and to take notes of who met with him and what they said.

S.J.R.R., Inc. v. NLRB, 993 F.2d 913 (DC Cir. 1993) (security guards posted near employee entrances viewed Section 7 activity through binoculars) and *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (company president watched employees’ protected activity from his car parked 15 feet away while speaking on his cell phone, and later called the police and verbally threatened employees who were hand billing).

2. The ALJ did not err in determining that there was no binding past practice that limited managers from being in the cafeteria.

The Charging Party's claim is unsustainable that Respondent unilaterally changed a past practice that limited management's presence in the cafeteria while Union representatives were there. The claim rises and falls in part on the same factual questions discussed above about whether the numbers of managers in the cafeteria appreciably increased after February 7, 2017. The ALJ properly concluded on the evidentiary record before him that the General Counsel not only had not carried its burden of proving that there had been such a change, it also had not shown that it had a right, based on past practice, of meeting employees in the cafeteria with little or no management presence.

D. Conclusion.

For all reasons stated herein, the Board is respectfully requested to affirm the ALJ's rulings that have been excepted to by the Charging Party. The Board should affirm that Respondent did not violate Sections 8(a)(1) or (5) of the Act due to presence of its managers in the employee cafeteria.

Dated: April 14, 2020.

Respectfully submitted,

/s/ Douglas S. Parker

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2020, I served a full, true and correct copy of the foregoing:

- By delivery via messenger, or otherwise by hand,
- By facsimile,
- By e-mail,
- By mailing same, postage paid,

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