

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

**CP ANCHORAGE HOTEL 2, LLC d/b/a
HILTON ANCHORAGE**

and

Case 19-CA-241411

UNITE HERE! LOCAL 878

**ACTING GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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The Board has long defined unilateral changes to working conditions to include all material and substantial changes to terms and conditions of employment. Plainly put, CP Anchorage Hotel 2, LLC d/b/a Hilton Anchorage (“Respondent”) substantially changed the working conditions of its represented housekeepers when it remodeled approximately half of all its rooms. The fact that Respondent had the right to remodel its rooms does not change the fact that, as a result of its remodeling, its housekeepers were now assigned to a fairly radically different series of tasks. These tasks resulted from, *inter alia*, the installation of large glass sided shower enclosures where shower curtains once had been, sofa beds in a large number of rooms that previously had no sofa, heavier and different furniture, and larger and harder to stuff pillows. In fact, the magnitude of changes required the issuance of all new tools for employees to use, as well as instruction in new methods to clean the rooms.

Given the extensive renovation, the Unite Here! 878 (“Union”) had told Respondent to agree to a time and motion study and confer over the changes before employees were assigned work. That did not happen. Rather, Respondent avoided the question and implemented the new assignments anyway; assignments that took as much as 15 additional minutes per room.

Respondent’s only real defense to the primary allegations in this case is unsupportable – that the changes resulted only in *de minimis* changes cannot be reasonably fathomed. For example, in the old rooms, employees who cleaned a tub/shower combination did not have to clean or scrub the shower curtains, but instead had the established practice of having another employee – a “houseman” – take down the curtain and replace it with a clean one. Now, with the new rooms, employees had to

squeegee and clean the outside and inside of large, floor-to-ceiling glass panels. No houseman could intervene and save them. In addition, the new showers caused much more muscle strain and effort to clean, especially for shorter and older housekeepers.

Some housekeepers begged off and requested to clean rooms on floors with the old shower setups. Others coped by trying to work faster to squeeze in their already-burdensome 17 room quota before the end of their 8-hour shifts. Apart from the clear cost to their bodies and energy levels, the housekeepers were suffering an invisible financial penalty. With older rooms that were easier or faster to clean, employees who finished their assigned rooms early could choose to clean additional rooms and receive a \$4.95 bonus per room. However, based on the additional time required to clean the remodeled rooms, employees assigned new rooms lost out on additional opportunities to clean bonus rooms.

In addition, while Respondent touts a decrease in the number of furniture pieces in the rooms, its witnesses testified inconsistently about which rooms received different furniture layouts. The reality is that the new furniture is heavier and harder to move, which poses yet more physical challenges for the employees. Respondent's high-level managers essentially acknowledged this at hearing, having attempted to paper over it by stating that they were merely giving employees time to adjust their habits and "muscle memory" – an adjustment process that it clearly recognized would take months. In real time, however, Respondent functionally recognized the issue and, as a result, forced its employees to sign a memo on February 28, 2019 pledging that they would complete their quota of 17 rooms or else potentially face discipline. The reason it had to threaten employees with discipline, just to complete a room quota they had done without threats

for years before is obvious: the new rooms were making it much harder for them to complete their work.

Respondent also argues that, despite employees' pleas and the pure physics of the difficulty in cleaning the new shower enclosures, the sum total of the changes to the remodeled rooms was actually a benefit for its employees. Even if this were remotely factually plausible, it is well established that even a change in a term of employment that is beneficial to employees is unlawful if the employer makes the change unilaterally. *Carrier Corp.*, 319 NLRB 184, 193 (1995). The unavoidable facts are that: the argument is not only preposterous on its face; but also, Respondent imposed these new working conditions and tasks on its Unionized housekeepers without first bargaining with the Union, much less bargaining to impasse.

Finally, Respondent failed to fully or adequately respond to the Union's requests for information about the remodeling and the impacts the remodeling would have on the represented employees' working conditions. Although Respondent claims that the charge underlying this case is partially or wholly barred by § 10(b), its affirmative defense is based on its own wrongdoing, for is Respondent's own failure to timely update the Union on the status of renovations, or to promptly respond to information requests, that caused the passage of time. As such, it must fail.

Accordingly, Counsel for the Acting General Counsel¹ requests that Respondent be found to have violated §§ 8(a)(1) and (5) of the National Labor Relations Act (the "Act") as alleged and be ordered to bargain over these substantial changes to working

¹ Between the time of the hearing and filing of this brief, the General Counsel was removed by the President and an Acting General Counsel appointed. For the purposes of this brief, the terms are used interchangeably.

conditions and pay employees for any lost room bonuses they could have received were these onerous new working conditions not imposed.

I. PROCEDURAL HISTORY AND CONTESTED ALLEGATIONS

This matter is before Administrative Law Judge Eleanor Laws (“ALJ”) after a hearing conducted on December 1 to 7, 2019, via Zoom videoconference. It is before the ALJ on the September 20, 2019 Complaint (“Complaint”), and October 4, 2019 Amendment to Complaint, alleging that Respondent violated §§ 8(a)(1) and (5) of the Act. The Union filed the original charge in this case on May 10, 2019, alleging that Respondent refused and failed to provide relevant information, and that Respondent committed unilateral changes to employees terms and conditions of employment “that require greater time and effort to clean that thereby increase workload.” (GCX 1(a), (b)). The Amended Charge, which the Union filed on July 29, 2019, added two additional allegations, including an allegation that Respondent threatened employees with discipline on February 28, 2019. (GCX 1(c), (d)). The above-referenced allegations were also included in the Complaint. (GCX 1(e)).

In its Corrected Answer (GCX 1(j)), Respondent admitted to:

- The procedural allegation of the complaint (GCX 1(e), (h)), establishing the filing of service of the charges and amended charges (GCX 1(a) through 1(f)).²
- The Board’s jurisdiction over Respondent in paragraphs 2(b) through 2(d). (GCX 1(e), (j)).
- At the opening of hearing, the General Counsel amended Complaint paragraph 2(a) to read: “at all material times, Respondent has been a State of Delaware corporation, with a place of business at the Hilton Hotel in Anchorage, Alaska, the facility, and has been engaged in the business of providing food and lodging to

² References to the Transcript of the proceedings before the Administrative Law Judge (“ALJ”) are noted as (Tr. :), which shows the Transcript page and line, respectively. References to Joint exhibits will be made as (JX). References to General Counsel’s exhibits will be made as (GCX). References to Respondent’s exhibits will be made as (RX).

the public.” (Tr. 21). Respondent admitted to amended paragraph 2(a), as read into the record. (Tr. 21).

- The Union’s status as a labor organization in paragraph 3. (GCX 1(e), (j))
- The names, positions, and supervisory status of the individuals named in paragraph 4 (GCX 1(e), (j)).
- The composition of the bargaining Unit, Respondent’s recognition of that Unit since December 28, 2005, and the Union’s continuing exclusive representation of the Unit, as specified in paragraph 5. (GCX 1(e), (j)).
- Paragraph 7(a), including subparagraphs, admitting that Union made each of the information requests alleged in the Consolidated Complaint. (GCX 1(e), (j)).

As a result of the Formal Papers, Respondent’s Answer, and stipulations reached at the hearing, the only allegations of the Complaint that remain in question at the time of this brief are paragraphs 6, 7(b) and 7(c), 8(a) through 8(c), 9, 10, 11, and General Counsel’s remedial relief request. (GCX 1(e), (h), (j)).

II. STATEMENT OF FACTS

A. Respondent’s Operations

Respondent is a Delaware corporation, whose place of business is Anchorage, Alaska. (Tr. 19:5-20). Respondent operates the Anchorage Hilton (the “Hotel”), which provides food and lodging to the public. (Tr. 19:5-20). The Hotel has approximately 606 rooms, located in two towers—the Anchorage Tower and West Tower—connected by a main lobby. (Tr. 28:11-17, 411:10-12, 523:14-15). The West Tower contains two sections—the Old West Tower and the New West Tower—which are connected. (RX 26, Tr. 80:21-24).

Respondent admits that it is an employer engaged in commerce within the meaning within the meaning of §§ 2(2), (6), and (7) of the Act. (GCX 1(g); GCX 1(j)). Further, Respondent admits that at all material times Steve Rader (“Rader”) was the

General Manager and Mike Just (“Just”) was the Housekeeping Director. (GCX 1(g); GCX 1(j)). Both are admitted supervisors of Respondent within the meaning of § 2(11) of the Act and/or agents of Respondent within the meaning of § 2(13) of the Act. (GCX 1(g); GCX 1(j)).

B. Respondent’s Relationship with the Union

The Union represents, among several other job classifications, all full-time and part-time housekeepers, housekeeping inspectors, and housemen at the Hotel (the “Unit”). (GCX 1(g); GCX 1(j)). The Hotel was previously owned by the Hilton Corporation. (JX2). The Hilton Corporation and the Union entered into a collective-bargaining agreement, with effective dates of September 1, 2004 to August 31, 2008, which was in effect when the Hotel was purchased by the Columbia Sussex Corporation on December 28, 2005. (JX2; GCX 1(g); GCX 1(j); Tr. 308:1-5). Respondent is owned by Columbia Sussex. (JX 1; JX 3:JX 15:3; *CP Anchorage Hotel 2, LLC*, JD-07-20, 2020 WL 1061592, slip op. at 5 (Mar. 4, 2020); *CP Anchorage Hotel 2, LLC d/b/a Anchorage Hilton*, JD(SF)-39-19; 2019 WL 6112852, n.1 (Nov. 14, 2019).

At all material times, since about December 28, 2005, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Union. (GCX 1(g); GCX 1(j)). This recognition has been embodied in its adoption of the collective-bargaining agreement, which was in effect until August 31, 2008, as noted above. (GCX 1(g); GCX 1(j)).

Since the collective-bargaining agreement expired, the Union and Respondent have not entered into a successor agreement. On April 13, 2009, Respondent unilaterally implemented its Last Best and Final Offer. (JX3; JX4). On March 11, 2016, Respondent

unilaterally implemented an updated version of the Last Best and Final Offer; that updated version now governs the terms and conditions applicable to the Unit (the “unilaterally implemented terms”). (JX 15). The unilaterally implemented terms bear the name of Respondent’s owner, Columbia Sussex. (JX 15:6).

In terms of meetings, when the Union’s Business Representatives would visit the Hotel, they would regularly run into General Manager Rader, but their discussions were informal and restricted to small issues, such as the food in the cafeteria. (Tr. 486:18-487:4). In addition, when Union business representatives visited the Hotel, their visits were to the break room, which was in the basement, without access to the guest rooms. (Tr. 329:4-15). If the Union representative wanted to inspect a guest room, the Union would have needed to send a letter to the Respondent requesting access. (Tr. 329:22-25).

C. Respondent’s Unilaterally Implemented Terms

The updated, unilaterally implemented terms applicable to the Unit employees contains the following Management Rights clause that governs, in relevant part:

B. The methods, process and means of performing any and all work, the control of the property and composition, assignment, direction and determination of the size of it working forces.

C. The right to change or introduce a new or improved operations, methods, means or facilities, the Employer will send a courtesy notification to the Union seven (7) working days prior to such change.

[...]

E. The right to control the nature and specification of all materials used in its operations, and specifications of the products and services it offers to its guests, and to change, add to or eliminate such specifications in whole or in part.

[...]

G. The right to transfer employees between jobs, shifts and departments, and to determine or change the duties of jobs.

H. The right to modify or abolish any past practice not in this Agreement.

[...]

J. These rights are limited only to the extent that this Agreement specifically so provides and may be exercised without prior consultation with the Union. However, whenever a decision to cease operations (wholly or partially), or to transfer work elsewhere, will result in the layoff of employees covered by this Agreement, the Employer will notify the Union in advance of the decision, and will, upon request, discuss the effects of the decision with the Union.

(JX 15:2).

Article XXXVI, titled "Job Description," of the updated, unilaterally implemented terms outlines the duties of several classifications³ of employees, including:

5. Housekeeper/Inspector: Assists in the supervision, direction and training of Housekeeping personnel. Is primarily responsible for the general inspection of all work performed by Housekeeping personnel assigned to his/her area of responsibility. Prepares all required incidental reports and may be required to do rooms on a need only basis. May assist in laundry once all seniority options have been exhausted. May assign rooms.

8. Room Attendant: Makes beds, vacuums and/or sweeps rooms, dusts. Cleans private baths and all room fixtures, and wipes down woodwork and doors. Heavy cleaning of guest doors will be done by housemen. However, wiping of doors will be done by Room Attendants. Cleans inside window of smudges, fingerprints, etc. Vacuums immediate threshold area in front of guest room door. No cleaning of halls, hoppers, public baths or overhead work may be required of Attendants.

9. Houseperson: Helps Room Attendants perform heavy lifting duties required in the housekeeping details or guest rooms; loads

³ The parties have stipulated that a Housekeeper/Inspector is referred to as a Housekeeping Inspector, a Room Attendant is referred to as a Housekeeper, and a Houseperson is referred to as a Houseman.

and/or unloads supply and linen carts/closets which may be required by Room Attendants; shampoos carpets and upholstered furniture, cleans woodwork in rooms, washing windows, changes light bulbs in guest rooms, hangs curtains and draperies. Sweeps and mops all employee corridors and hallways. Changes TV remote batteries. Cleans black scuff marks of hallway walls. Vacuums hallways and corridors.

(JX 15:21-22).

Article XXV, Section 16, titled “Housekeeping Room Attendants” of the updated, unilaterally implemented terms details the limitations on Housekeepers’ work in the form of a room quota:

A. The Hotel agrees to a room limitation of seventeen (17) rooms for Room Attendants.

B. In the event that an employee voluntarily cleans more than seventeen (17) rooms, the employee shall receive an additional four dollars and ninety-five cents (\$4.95).

D. Day shift Room Attendants who work on three (3) or more floors or travel to both towers shall receive a one (1) room reduction.

E. Where a Room Attendant is required to clean twelve (12) or more Checkouts in a day the number of rooms assigned shall be reduced by one (1). Each room of a suite shall count as a separate room for this purpose.

(JX 15:18) (emphasis added).

As outlined above, housekeepers are eligible for a \$4.95 bonus per room if they clean more than 17 rooms within their 8-hour shift. (Tr. 463:7-12). Housekeepers cannot volunteer for these bonus rooms; they must have them assigned after completing 17 rooms during their shift. (Tr. 252:7-17).

Room bonus opportunities are also dependent on the Hotel’s occupancy, which is largely seasonal. For example, due to the climate of Anchorage, Alaska, the facility is more occupied from mid-May to mid-September, than at other times of the year. (Tr.

455:8-13). There can additionally be variance in occupancy due to the booking of cruise ship guests or the timing of conventions. (Tr. 455:16-19, 456:15-17).

The unilaterally implemented terms do not include a grievance and arbitration process. (JX 3; JX 15:4). As to the resolution of issues between the parties, Article XXVIII: Availability, states that “The parties agree that an obligation exists to meet and confer expeditiously concern [sic] to the Employer and the Union.” (JX 15:29). This section outlines the availability to request a meeting within seven days in order “to provide a forum for a continuing dialogue between the parties, which will facilitate the administration of this contract, solve problems of mutual concern to the parties and promote harmonious relations between the Employer and the Union.” (JX 15:29).

D. Housekeepers’ Working Conditions Prior to Renovations

Housekeepers have been held to the room quota requirement as outlined above in the unilaterally implemented terms and conditions. Thus, housekeepers typically are required to clean 17 rooms during their 8-hour shift. (JX 15; Tr. 47:10-15). If a housekeeper’s room assignment contains 12 or more checkouts,⁴ this quota is reduced by 1, giving them 16 rooms. (JX 15; Tr. 49:10-14). Further, if a housekeeper’s room assignment has 12 or more checkouts on 3 or more floors, the assignment is reduced by another 1, for a total of 15 required rooms on that shift. (JX 15; Tr. 52:20-22).

The guest rooms prior to the renovation were outfitted with different furniture than afterwards. (Tr. 604:3-4). The previous furniture was from the Hotel’s previous renovations in around 2000 and 2009. (Tr. 493:6-9). The furniture included a model of

⁴ A checkout involves cleaning a guest room on the guest’s last day of their stay at the Hotel. Checkouts take housekeepers longer because they change out all of the linens and perform a deeper cleaning of the bathrooms and living spaces. (Tr. 51:6-10).

bed that was not affixed to the wall and had a bed skirt concealing the space underneath. (RX 8:11; Tr. 598:23-24). Housekeepers were expected both to search for lost items underneath and behind the bed, as well as vacuum. (Tr. 599:5-8). However, housekeepers were not expected to reach lost items that they did not have access to; it was the supervisors' responsibility. (Tr. 274:17-21). Each double bed included only three pillows. (Tr. 678:2).

Housekeepers were also required to clean and dust a number of other pieces of furniture, including granite topped desks and nightstands, an office chair, an entertainment system, a box television, standing lamps with lampshades, and standalone full-length mirrors. (RX 8, 11; Tr. 266:12-24, 267:18-23, 281:9-14, 493:8-14, 606:22-25, 623:19-24).

Pre-renovation bathrooms were outfitted with a standard bathtub. (RX 8:10; Tr. 236:9-11). The walls of the bathtub area were lined with tile, which reached the ceiling. (Tr. 280:4-9). To clean the tub itself, housekeepers would spray the tub with a chemical and wash it down with water from the faucet. (Tr. 240:22-24). There was also a shower rod with a shower curtain. (Tr. 78:4-8). Housekeepers cleaned the shower curtain rod by wiping it down with a wet towel without cleaner. (Tr. 264:24, 265:10-13). Though the shower curtain rod can be tall, shorter housekeepers could stand on the edge of the bathtub to reach it. (Tr. 265:3-7).

The shower curtains in "bath" rooms had and have two pieces, an exterior curtain and an inner lining. (Tr. 263:23-24). The inner lining is the piece that often gets wet. (Tr. 263:24-25). If the inner lining is not dirty, housekeepers would shake the water from it and leave it. (Tr. 264:1-2). However, if the lining is dirty, then housekeepers roll both

pieces of the shower curtain into a knot for the housemen to take away for cleaning, after which the curtain would be returned to the shower. (Tr. 264:2-4). It is not the housekeepers' practice to spray the shower curtain with a cleaning product. (Tr. 264:10-13).

Housekeeper Amy Dingle⁵ ("Dingle") concurred that it was not her practice to clean the shower curtains; she would tell a housekeeping inspector that the curtain was dirty, and that person would call a houseman to take the curtain to the laundry and replace it. (Tr. 139:1-12). Housekeeper Mai Lee ("Lee") specifically learned this practice from Housekeeping Inspector Zanetta. (Tr. 247: 11). Although Director of Housekeeping Mike Just ("Just") testified that it was his expectation that housekeepers clean the inside liner of the shower curtains, he admitted that he never conveyed that expectation to the housekeepers.⁶ (Tr. 120:18-25; Tr. 121:1-2).

E. Respondent Determines to Renovate the Hotel

Between the years of 2001 and 2017, Respondent had not made any major renovations to the Hotel's guest rooms. (Tr. 311:1-4). During those years, Respondent did make some minor changes, including painting the rooms and replacing amenities that had broken.⁷ (Tr.311:9-12). At the end of 2017, Respondent determined that it would massively renovate the Hotel. (Tr. 470:10-15).

⁵ Respondent questioned a housekeeping inspector, Zenaida Depilar, concerning text messages that she had provided to Human Resources Director Christine Talley. Depilar explained that these text messages about Amy Dingle were sent to her from Union President Marvin Jones. (Tr. 771:19-772:6; RX 28).

⁶ Respondent also provided a sample Hotel Job Safety Analysis from 2016 which indicated that housekeepers were expected to spray showers and tubs with disinfectant but contains no mention or expectation that employees clean the shower liners or curtains. (RX 30).

⁷ Respondent questioned Union Representative Danny Esparza as to why the Union did not send information requests about minor changes in the guest rooms, such as painting and replacement of amenities. (Tr.348:6-20).

Respondent first announced and shared information about the 2018 renovation at staff and manager stand-up meetings, which the Union was not invited to attend. (Tr. 479:21- 480:2, 702:20-703:4). Respondent testified that it took 60 rooms out of commission at the end of December 2017. (Tr. 481:2-6). Respondent took these rooms out of service so items such as mattresses, linens, pillows, coffee makers, and waste bins—which would return to the rooms after renovation—could be removed prior to actual construction. (Tr. 488:6-17). Then, around mid-January 2018, Respondent began calling renovation team members to examine the rooms and begin planning. (Tr. 481:3-5).

Renovations actually began at the Hotel on February 26, 2018, starting with the West Tower. (JX 6:1, Tr. 421:5-6). Renovations were completed floor by floor. (Tr. 660:1-4). Respondent testified that in May 2018, around 4 months into renovations, it had completed renovations in some floors of the New West Tower. (Tr. 566:17-21). Further, around May 2018, the entire Anchorage Tower was untouched, and guests were primarily staying in that section of the Hotel due to the construction elsewhere. (Tr. 566:20-23).

Respondent testified that in the summer of 2018 not many rooms had been finished. (Tr. 410: 7-8). Respondent wrote to the Union on July 3, 2018 that the renovations timeline was still being determined for the Anchorage Tower. (JX 8:1). Further, Respondent stated that at that time, it was still undetermined which rooms would receive the new, glass showers. (JX 8:1).

According to Respondent, the renovation timeline changed significantly throughout the project. (Tr. 409:17-19). Respondent's construction team found that there was a lot of variance in the configuration of each room from floor to floor. (Tr. 506:16-19). During

the course of the renovation Respondent had to make modifications to which furniture would be placed in each room due to sizing concerns. (Tr. 506:21-24). Respondent explained that these sizing and layout concerns caused the uncertainty about which rooms would be converted into bathrooms with glass showers. (Tr. 507:2-5). Additionally, during walkthroughs of the rooms with the construction team, Respondent often found that rooms that were checked-off as done actually needed more work. (Tr. 502: 13-20). This caused the timing of the renovation to be a moving target, with deadlines being altered on a weekly basis. (Tr. 502:13-23).

Respondent indicated that the renovation being complete in a room did not mean that construction was done or that the rooms were being put into service for guest rentals. (Tr. 430: 15-17). Respondent emphasized that this was especially the case after November 30, 2018, when there was a 7.2 magnitude earthquake in Anchorage, Alaska that delayed the renovation schedule. (Tr. 430:18-431:2, 687:16-24). According to Respondent, even though the renovations on the West Tower were near completion, the earthquake both caused several construction workers to quit the project, as well as left many of the newly renovated rooms damaged and halted construction for a short period of time. (Tr. 6-20).

Respondent's progress slowed after the earthquake due to a need to repair previously finished rooms and continued aftershock for several months that caused further damage to the Hotel. (Tr. 507:21- 508:6). On December 6, 2018, 2½ months after starting, Respondent notified the Union that it had begun construction on the

Anchorage Tower on September 24, 2018.⁸ (GCX 12; Tr. 424:4-13). However, the Union did not know how, or if it was progressing. As Union Representative Esparza explained, although Respondent blocked off the elevators to the Anchorage Tower in the lobby, he did not understand this as a signal that renovations had progressed; indeed, when he came to the Hotel over the years, seeing the elevator and other areas of the lobby blocked was a normal occurrence.⁹ (Tr. 345:19-13).

F. Union Information Requests Concerning Respondent's Renovations

1. The Union's February 28, 2018 Information Request

On February 28, 2018, Danny Esparza ("Esparza"), the Union's Business Representative and Vice President, sent an information request by email and hand-delivery to GM Rader. (JX 5; Tr. 310:17-20). Esparza sent this request due to reports from Unit employees that Respondent planned to renovate 8 guest rooms at the Hotel. (Tr. 310:21-25). During Esparza's prior 17 years' tenure with the Union, major renovations had not been undertaken for the guest rooms at the Hotel, and the Union believed that the renovations might affect the workload and safety of the Unit. (Tr. 311:1-4, 311:13-20, 315:5-10). Esparza's information request included, among the 13 total call items, the following:

- (1) Identify the tower/floors of the hotel that have been/will be subject to renovation and provide a description of all work that has/will be performed." And "Will there be a change in any work requirement for bargaining unit members as a result of the renovations? For example, will housekeepers have additional

⁸ Respondent also informed the Union on December 6, 2018, that renovations in the Old West Tower had been completed on November 5, 2018. (GCX 12; Tr. 424:4-13).

⁹ Respondent questioned Union Representative Danny Esparza about his failure to ask Respondent for information about the blocked off elevators. (Tr. 344:8-23). Esparza denied that activity in the lobby, such as blocked off elevators or construction workers fixing leaks, gave him notice about the timeline of Respondent's renovations, insisting that he learned the construction had begun in 2018 because members of the Union had informed him. (Tr. 346:7-10).

cleaning tasks or workload either during the renovations or as a result of them?

- (2) What is the actual or anticipated start date and completion date of the renovations? If there are different start dates and completion dates for different phases of the renovation, please specify.

(JX 5; Tr. 311:1-4, 311:13-20, 315:5-10).

On March 6, 2018, GM Rader responded to the Esparza's information request by email. While he was clear that the Hotel's renovations would include both towers, he also stated that the start date for Phase One began on February 26, 2018, and the finish date for that phase would be May 31, 2018. (JX 6:1). Phase One of the renovation was focused on the West Tower and would include wall finishing, paint, and new carpet. (JX 6:1). There would also be an installation of walk-in showers in some guest rooms, but the number had not been determined. (JX 6:1).

As to the Union's request asking "Will there be a change in any work requirement for bargaining unit members as a result of the renovations? For example, will housekeepers have additional cleaning tasks or workload either during the renovations or as a result of them?[,]" Rader responded that "There should be no changes in work requirements based on the renovation. There may be special projects that are available to staff, based on hotel discretion." (JX 6:2). Phase One of the renovations was not completed by May 31, 2018. (Tr. 316:1).

2. The Union's June 19, 2018 Information Request

On June 19, 2018, Esparza sent Rader a second information request seeking more specific information about the renovations.¹⁰ (JX 7; Tr. 316:22-25). Because Esparza heard from Unit members that renovations had not been completed in the West Tower, he requested the following information in item (1) “What is the status of the current phase of renovations? When was it completed or if not complete, when is the expected date for completion?” (Tr. 317:3-10). Concerned that renovations could result in significant change in the workload and impact employee safety, as the staff could be performing tasks they had not been before, Esparza also requested in item (4) that Respondent “[p]lease specify which guestrooms underwent changes to walk-in showers” and, in item (5), that Respondent “[p]lease describe the size of the glass-door and walk-in showers, so we may determine the impact on housekeeper workload.” (Tr. 317:11-19).

Esparza did not initially receive a response from GM Rader, so he sent on July 2, 2018, a follow-up email concerning his information request. (JX 8:3; Tr. 318:3-11). On that same day, Rader responded by email stating that the Respondent was still gathering the requested information and he would send the answers to Esparza as soon as possible. (JX 8:3).

The next day, July 3, 2018, Rader provided a partial response to the Union via email. (JX 8:1-2). In response to item (1), Rader represented that “Our current phase of renovations is still ongoing. Completion date for renovation Anchorage and West Towers

¹⁰ Respondent asserts that the Union hassled it with information requests during the busiest season of operations, from June to September. (Tr. 3-14). However, the Union testified that an information request was sent in June 2018 because Respondent had previously stated that the renovations in the West Tower would be complete by the end of May 2018. (Tr. 317:8-10). Because the Union wanted to bargain over the potential changes, and the Union did not yet know what changes had been made, Union Representative Danny Esparza sent an information request asking Respondent for clarity. (Tr.317:1-19).

is projected to be approximately 12/31/18.” (JX 8:1). Additionally, in response to item (4), Rader noted that, “No rooms had been converted yet to showers. It is still being determined which rooms will receive the showers.” (JX 8:1).

On July 6, 2018, Rader sent a second email providing responses the Union’s information request. (JX 9). As to the Union’s item (5), Rader noted, “See shower glass quote attached. The size of the opening is included.” (JX 9:1). The shower glass quote listed the item size as 60 inches wide and 76 inches tall. (JX 9:66). After this email, the Union did not communicate further with the Respondent about the showers until November 2018 because the renovations were still ongoing; meanwhile, Esparza did not receive reports from Unit employees. (Tr. 319:13-16, 320:1-9).

3. Union’s November 20, 2018 Information Request and Bargaining Request

In November 2018, Esparza received reports from housekeepers that the renovations were almost complete. (Tr. 320:15-21). These reports prompted Esparza to send an additional information request to Rader on November 20, 2018. (Tr. 320:19-21).

Esparza asked in item (1):

Provide a detailed update on the status of renovations and the extent of work to date. Has work been completed in the Old West Tower? If so, what was the completion date? If not, provide a description of what work remains in what floors/rooms. Has work started on the Anchorage Tower? If so, when did it start? Provide a description of the status of the work.

(JX 11:1).

As the request itself indicates, Esparza was seeking information regarding whether the work in the West Tower was complete because the changes due to renovation could affect its membership. (Tr. 322:14-16). In addition, the Union did not know if work in the West Tower had been completed or if work had started in the Anchorage Tower. (Tr.

323:6-12). Further, the Union still did not know which rooms, if any, had the new glass showers. (Tr. 323:15-17). Thus, Esparza also asked in item (7):

As of July 3, 2018, you stated 'no rooms have been converted yet to showers. It is still being determined which rooms will receive showers.' On July 6, 2018, you provided a quote for the shower glass. Provide updates on the status of the guest room bathroom changes to walk in showers.

(JX 11:3).

Esparza testified that he believed this category of information was relevant to the Union as the information would inform it as to how post-renovation work assignments could impact housekeepers. (Tr. 324:3-5). The Union did not know if one housekeeper's work assignment could have fifteen rooms with showers, while another's work assignment could have only two. (Tr. 324:5-7). The Union believed that this could be a significant change in a housekeeper's workload and safety. (Tr. 324:7-9).

In addition, Esparza had heard from housekeepers that they had been assigned to clean up debris in the renovated bathrooms post-construction and that cleaning the glass showers was very difficult. (Tr. 325:9-11). Accordingly, Esparza asked specifically in 7(a), "How many guest rooms will be converted to walk-in showers?" and, in 7(b), "Which rooms/floors will be (or have been converted)?" (JX 11:3). Further, because previous communications with Respondent had only stated that "staff" will clean rooms with glass shower doors, Esparza sought clarification with request item 7(c), asking, "What classifications of employees will be used to clean the glass shower doors?" (JX 11:3; Tr. 326:1-7).

Moreover, the Union was concerned about Respondent potentially giving housekeepers specialist tools, what any training and safety related to the use of these

tools would be, and the potential to bargain about these items. (Tr. 326:18-25).

Therefore, Esparza requested in 7(e) and 7(f), respectively:

What, if any, tools does the Employer consider appropriate for cleaning glass shower doors? Provide manufacturer specifications for all such tools.

What, if any, training has been or will be conducted with respect to cleaning glass shower doors. Provide copies of all training materials.

(JX 11:3).

In the remainder of item (7), the Union emphasized that, in its experience, the introduction of glass shower doors has a material impact on the workload of housekeepers due to the increased physical demands involved with the task, the difficulty of cleaning glass without leaving water spots, and the impact upon work rate owing to the introduction of a more time-consuming work process. (JX 11:3).

In the letter, the Union also demanded that:

[B]efore any housekeeper is require to engage in this task, the Union requires that the parties agree to appropriate time-and-motion studies in order that ... it does not result in any increase to the status quo with respect to housekeeper workload. Please advise when we might confer regarding this.

(JX 11:3). Esparza explained that the Union's intent in demanding to "confer" was to request bargaining over the above stated issues. (Tr. 368:19-23). Despite this request, Respondent did not perform a time and motion study prior to, or during, the period in which Respondent placed the guest rooms with new glass showers into service, which the housekeepers were therefore required to clean. (Tr. 421:2). Rather, as presented at the hearing, Respondent had videos of a "time study," which was actually a single housekeeper cleaning a single "shower" room and then a single "tub" room, using different cleaning techniques. (R 25).

In addition to not being a verified time study, the video was produced using the labor of Cylene Fedderson (“Fedderson”), a housekeeping supervisor at the downtown Marriott hotel; she is neither a Union member nor employed at the Hotel in any capacity. (Tr. 743-745, 749:5-12, 766:20-22). Rather, Fedderson cleaned the two rooms at the Hotel just “the one time” for the purpose of filming the video. (Tr. 744-745). In addition, this video was created several months after renovated guest rooms were already put into service at the Hotel, filmed by Respondent’s subsequent general manager Ryan Akkaya (“Akkaya”).¹¹ (Tr. 17:8-11, 752:9-18). There is no evidence that the video and its accompanying “time study” documentation were ever provided to the Union, much less provided prior to bargaining over the work duties of the housekeepers and housepersons.

On December 6, 2018, Esparza received an initial response to his information request of November 20th from Rader stating, “In the meantime and in partial response to the Union’s requests, please be advised that the renovations in the Old West Tower were complete as of November 5, 2018. (JX 12:2). The renovation work in the Anchorage Tower began September 24, 2018.” (JX 12:2-3). Esparza had not previously received notification from Respondent that renovations had been completed in the Old West Tower or that renovation had begun in the Anchorage Tower. (Tr. 328:10-12, 328:13-17). In addition, at the time he received this email response, Esparza had not toured the non-bathroom portion of newly renovated rooms or bathrooms renovated to have walk-in showers. (Tr. 331:18-25, 332:1).

¹¹ Based on the timeline provided, it appears likely that this “time study” was not even created until after the Union had filed the charge(s) in the above case. Rader was the General Manager until May 2019, and Ryan Akkaya is the current General Manager. (Tr. 404:11; Tr. 17:8-11).

On January 4, 2019, Esparza received an additional email response from Rader in response to his November 20 request for information. (JX 12:1). In response to item (1), Rader stated, "This issue was addressed in my Dec. 6th email." (JX 12:1). In partial response to item (7), Rader stated, "Based on the information we currently have, we do not believe it takes staff more time to clean rooms with walk-in showers than it does those rooms with bathtubs." (JX 12:2). As of the date of this email from Radar, there had been no bargaining between the parties regarding either whether cleaning a glass shower would result in more work for housekeepers or what the status was as to the work on newly renovated walk-in shower rooms or the non-bathroom portions of renovated guest rooms. (Tr. 332:20-23, Tr. 333:1).

In his two limited responses to the Union's outstanding information requests, Rader did not explicitly say what tools would be provided or provide manufacturer specifications (Tr. 426:22-24, 441:1-4). Additionally, Rader did not provide the Union with information about what training would be conducted for cleaning the new rooms. (Tr. 427:3). Further, Rader did not provide the Union with information about which rooms or floors had or would receive glass shower installations, aside from the total number of showers anticipated. (Tr. 425:9-11).

By the end of Esparza's tenure with the Union in April 2020, Respondent had not offered or agreed to bargain either a full or side agreement related to work in the newly renovated hotel rooms. (Tr. 334-2). Additionally, by that time, there was no negotiated agreement related to the installation of the walk-in showers in the renovated guest rooms. (Tr. 334:3-6). In fact, during Esparza's employment, Respondent never agreed to, much

less offered to set up dates, to bargain any of the aforementioned subjects. (Tr. 334:7-9).

G. Respondent's Renovations Are Completed and Rooms Put Into Service

1. Respondent's Guest Room Renovations and Resultant Changes in Duties

Respondent made several changes to the Hotel's guest rooms when renovating them. One change was Respondent's placement of sofa beds in the majority of king-bed rooms, when sofa beds were previously only in suite rooms. (RX 9:19-20. Tr. 81:2-3). This is significant, as housekeepers clean these sofa beds whenever a guest has used one. (Tr. 81:16-22). When cleaning a sofa bed, the Housekeeper strips and replaces the sheets, as well as folds the bed back into the sofa. (Tr. 81:16-22). Afterwards, housekeeping inspectors inspect and place the cushions back on the sofa. (Tr. 82:15-17).

Another change was that Respondent outfitted the guest rooms with new pillows that are thicker and heavier than the old pillows. (Tr. 83:1-10, 244: 12-14). These pillows are bigger and longer, so housekeepers must use more effort to change the pillowcases than previously. (Tr. 243:12-14). In addition, Respondent increased the number of pillows in guest rooms as well; for example, while double bed used to have three pillows, there are now four pillows on each bed. (Tr. 246:2-6, 436:7-9).

A wide-spread change, in addition to those listed above, included Respondent's replacement of the furniture in all guest rooms in the Old West Tower, New West Tower, and Anchorage Tower, including, among other items: bed frames, desks, chairs, lamps, curtains, carpet, and artwork. (RX 9:17-18; Tr. 431:21-24). Housekeepers report that

this new furniture is heavier than before, which is notable given that they must move furniture to vacuum. (Tr. 136:17-19).

In addition, due to the new furniture, housekeepers must dust more surfaces. (Tr. 244:7-9). While this might seem trivial, as housekeeper Mai Lee explained, it was not – for example, the surface area of the flat screen televisions alone is greater than the older televisions, meaning it is a larger surface for housekeepers to clean. (RX 9:15,23; Tr. 266:23-25, 267:1-10). Further, because these new flat screen televisions are now on the wall, guests tend to drop items over the other side of the table and housekeepers have to clean that side of the table more often. (Tr. 267:13-17). Mai Lee also noted that the lamps have an additional surface for housekeepers to dust. (Tr. 268:24-25).

The most onerous housekeeping change, however, was Respondent's installation of around 300 new glass showers, spanning multiple floors in both the Anchorage and West Towers. (GCX 2-3; RX 9:31). Respondent did not install new showers in the Old West Tower because bathrooms either had custom sized bathtubs or previously installed ADA-compliant accessible walk-in showers. (Tr. 429:14-17). However, Respondent did install showers in the New West Tower, starting in around room 1022 and above. (GCX 2-3; Tr. 430: 9-10). Additionally, Respondent installed new, glass showers throughout the Anchorage Tower, with the exception of the second floor and rooms 2261 and 2261. (GCX 2-3).

The glass shower panes are approximately 60 inches wide and 76 inches tall, or 63 square feet. (JX 9:66; 433:13-18). When cleaning the glass showers, housekeepers now clean both sides of the doors and the overlapping area where the sliding glass door obstructs the stationary glass. (Tr. 73:9-24). They also wipe underneath where the glass

door slides and remove a long, grated metal drain to clean it thoroughly. (Tr. 78:22-23, 241:6-8). Cleaning these new glass showers is particularly difficult for the average height and shorter housekeepers, such as Mai Lee, who is 4'10", and cannot reach the top of the shower glass.¹² (Tr. 237:4-9).

This presents a particular problem, as housekeepers must regularly clean the metal roller system at the top of the shower glass. (Tr. 141:2-4). Shorter housekeepers must therefore rely on housekeeping inspectors, bargaining unit members, to perform this work. (Tr. 237:16-18, 295:3-6). When the housekeeping inspectors conduct their inspection of the shower, if the top of the shower isn't clean, they must clean the top part on behalf of the housekeeper. (Tr. 237:8-11). Housekeeping inspectors understand that if the top of the shower is dirty, this is because the housekeeper could not reach it. (Tr. 294:23-25).

In addition, as some housekeepers reported, the tile, as well as the glass panels, in the new glass showers is taller than the old bathtub tile. (Tr. 180:10-15). Recognizing this, as well as the fact that cleaning the glass shower doors require a different approach, Respondent gave housekeepers a tool to assist them called a squeegee, which has a short handle with a perpendicular shaped attachment with a sponge. (Tr. 86:2-5, 240:2-7). However, some housekeepers reported that the squeegee is difficult to use to due to the strength required to push it against the glass and move it side to side or up and down. (Tr. 240:12-15). Accordingly, these housekeepers have instead used other tools, such as a blue microfiber towel that doesn't leave streaks on the glass. (Tr. 240:16-19).

¹² Even average height housekeepers, such as Fedderson who is 5'5" and is depicted cleaning a glass shower in Respondent's Exhibit 25, cannot reach the top of the glass showers. (RX 25; Tr. 750:113-14). Mike Just, who is around 6'1, stated that the glass showers are taller than him. (Tr. 72:13-17).

2. Impact of the Renovations on Housekeeper Bonus Rooms

Because the renovated rooms take longer to complete, housekeepers report having to work additional hours to receive room bonuses; this dissuades some of them from pursuing those bonus rooms.¹³ (Tr. 230:21-25). The evidence bears out this anecdotal evidence.

From January 5 to February 28, 2018, before renovations had begun, Respondent's 13 listed housekeepers worked 3,196.75 hours, of which only 122.75 were overtime hours.¹⁴ (JX 17; GCX 7:1-12). This means approximately 4% of housekeeper hours during this period were overtime hours, and each housekeeper averaged about 246 hours worked during this period. (GCX 7:1-12). The individuals named in Respondent's housekeeper hours report received room bonuses totaling \$504.80 during that same January 5 to February 28, 2018 period.¹⁵ (JX 17; GCX 8:1-4; RX 27; Tr. 789:17-21). Dividing the room bonuses by hours worked, the Unit housekeepers in the dataset accrued bonuses at a rate of approximately \$0.16 per hour worked during this period.

¹³ Though there were extensive discussions with Respondent's counsel and the ALJ about the relevance and size of GCX 5, which is about 22,000 pages of housekeeping records, and the General Counsel at one point indicated she would not enter them in to the record, the parties agreed to submit them. However, the General Counsel has ultimately not included further analysis of the housekeeping reports in this facts section due to the difficulty of parsing them, or the notes in them, and consolidating them for analysis.

¹⁴ The list of housekeepers' names and hours provided by Respondent was, upon comparison to the payroll records provided in GCX 6, incomplete. For example, Clemencia Castillo worked 80 hours during the two-week period from January 5 to January 18, 2018. (GCX 6:37). Khou Her was another housekeeper who worked substantial hours during that same period. (GCX 6:48). However, because of the difficulty of combining or comparing the payroll records and the list of daily employee hours in GCX 7, CGC is relying upon GCX 7 because it provides a clearer summary of information. Only those room bonuses from GCX 8 which accrued to the employees named in GCX 7 are being considered in the above calculations. Data was parsed as accurately as possible from incomplete Respondent records.

¹⁵ The January 5, 2018 cutoff is used because Respondent only provided room bonus information from January 5, 2018 onwards. (GCX 8:1).

During the directly comparable seasonal time period in 2019, from January 1 to February 28, during the period the Respondent was progressively rolling out renovated rooms for housekeepers to clean, the figures differ. Respondent's 34 listed housekeepers worked a total of 10,181.72 hours, 1,213.21 of which were overtime hours.¹⁶ (JX 17; GCX 7:35-76). This means that approximately 12% of housekeeper hours during this period were overtime hours, and each named housekeeper averaged about 299 hours worked during this period.¹⁷ The individuals named in Respondent's housekeeping hours report received room bonuses totaling \$933.90 during that same January 1 to February 28, 2019 period. (JX 17; GCX 8:10-13). Dividing the room bonuses by the number of hours worked, the Unit housekeepers in the January to February 2019 dataset accrued bonuses at a rate of approximately \$0.09 per hour worked. They accrued this lower rate of bonuses despite having worked more overtime hours as an overall Unit by both percentage and raw total.

Respondent provided additional exemplar data, though they do not provide pre- and post-renovation mirror comparisons for the same point(s) in the seasonal room fluctuation(s) in the manner the January to February data did for 2018 and 2019.¹⁸ They are nevertheless included for completeness below.

August and September 2018 were relatively uniform months in the data sample; Respondent's 14 listed housekeepers worked 6170.25 hours across the 61 days in those

¹⁶ Unlike the data for January and February 2018, the data provided in GCX 7 for January and February 2019 appears to be complete and match with the payroll records and the complete record of room bonuses in GCX 6 and GCX 8 respectively.

¹⁷ Because the 2018 period was January 5, 2018 to February 28, 2018, it was only 54 days versus 59 in the 2019 period that began January 1. Prorating the 2019 period by multiplying it by 54 days and dividing it by the full 59 day period, the equivalent number of hours per housekeeper in the 2019 data sample would be 274 hours per worker.

¹⁸ See JX 1 and JX 17.

two months.¹⁹ (GCX 7:13-34). Of those, 1753 were overtime hours, meaning that approximately 28% of all hours the Unit's housekeepers worked were overtime hours. (GCX 7:13-34). The individuals named in Respondent's housekeeping hours report received room bonuses totaling \$1,186.95, and so bonuses accrued to housekeepers at a rate of about \$0.16 per hour worked.²⁰ (GCX 8:5-9).

In April 2019, after all or nearly all renovations had been completed, Respondent's 17 listed housekeepers worked 2726.99 hours, of which 220.71 were overtime hours.²¹ (JX 1; JX 17; GCX 7:77-88). This means approximately 8% of housekeeper hours during this period were overtime hours.²² The individuals named in Respondent's housekeeping hours report received room bonuses totaling \$174.20 during April 2019. (JX 17; GCX 7:77-88; GCX 8:15-17). Dividing the room bonuses by the number of hours worked, the Unit housekeepers in the April 2019 dataset accrued bonuses at a rate of approximately \$0.06 per hour worked.

¹⁹ The caveats about incomplete housekeeping records hours, and limitations on the included room bonuses, apply here as well, as explained in footnotes 14-15, *supra*, and 21-24, *infra*. Where one housekeeper is listed as Neeng Neeng on GCX 8:9, it is presumed to be the same person as Ngeeng Saechao in all other records, including GCX 8:10-19.

²⁰ The data Respondent provided for bonuses includes coverage from August 1, 2018 to September 27, 2018, but moves to December 2018 after that point. It is unknown if additional bonuses were paid out for September 28th through 30th. (GCX 8:9-10).

²¹ As with the date explained in footnote 14, *supra*, the list of housekeeper names and hours provided by Respondent in GCX 7 for April and May 2019 are also incomplete, though more complete than for January and February 2018. Notably, Mai Lee, who testified at hearing, was missing from the list of housekeeper hours in GCX 7, but was included in the room bonuses for GCX 8, for these months. (GCX 7:77-105; GCX 8:16-19). The list of bonuses in GCX 8 shows additional housekeepers received room bonuses during this period, but were not listed in GCX 7. Those housekeepers were excluded from the above analysis, as were the room bonuses they accrued, balancing the analysis. While imperfectly complete, the information cited still serves as a large sample and meaningful exemplar for the purpose of the above analysis, as the analysis is largely based on ratios.

²² Because the 2018 period was January 5, 2018 to February 28, 2018, it was only 54 days versus 59 in the 2019 period that began January 1. Prorating the 2019 period by multiplying it by 54 days and dividing it by the full 59 day period, the equivalent number of hours per housekeeper in the 2019 data sample would be 274 hours per worker.

However, in May 2019, there was a large relative increase in the number of hours worked, rate of overtime, and room bonuses. The same 17 listed housekeepers (as in April 2019) worked 4725.5 hours during the 31 days of May, of which 1955 were overtime hours. (GCX 7:89-105). This means that approximately 41% of housekeeper hours during this period were overtime hours and that employees worked almost as many hours of overtime as straight time.²³ The individuals named in Respondent's housekeeping hours report received room bonuses totaling \$3,369.50 during May 2019.²⁴ (JX 17; GCX 7:89-105; GCX 8:17-19). Dividing the room bonuses by the number of hours worked, the Unit housekeepers in the May 2019 dataset accrued bonuses at a rate of approximately \$0.71 per hour worked.²⁵

3. *Respondent Asserts There is No Increase in Workload, but Qualifies its Assertion*

GM Rader does not believe that there was any increase in the housekeepers' workload as a result of the post-renovation room duties and, in fact, that many of the changes to the rooms would make it easier to clean the rooms. (Tr. 515-517). However, Rader also admitted that he has only done "touchup cleaning" in the rooms, and has not timed the amount of effort it requires to clean the new showers or renovated rooms; he also admitted he has never had to work a 17-room quota while cleaning these rooms. (Tr. 562:20, 653:22).

²³ Because the 2018 period was January 5, 2018 to February 28, 2018, it was only 54 days versus 59 in the 2019 period that began January 1. Prorating the 2019 period by multiplying it by 54 days and dividing it by the full 59 day period, the equivalent number of hours per housekeeper in the 2019 data sample would be 274 hours per worker.

²⁴ The total room bonuses paid out in May 2019 appear to be \$4,589.75, but those room bonuses which were awarded to housekeepers not on the hours list in GCX 7, as with all other months, were excluded. (GCX 7:89-105; GCX 8:17-19).

²⁵ This comes to about 681 bonus rooms in May 2019, dividing \$3369.50 by \$4.95 per room.

Housekeeping Director Just claimed that the Director of Rooms, and later, Director of Operations, Brendan Donnelly denied that the renovations made the tasks “harder” but nonetheless admitted that the housekeepers would “have to get adjusted to it” in the same way new employees have to “develop [...] skills” to clean rooms. (Tr. 699:24-700:6). As to first-hand knowledge, however, he personally admitted that he is 6’3” tall, and that if he were 5’0” tall he would not have been able to reach the top of the glass shower without a tool. (Tr. 562:24-563:4).

H. Housekeepers Tell Management They Have Increased Workloads and Changed Working Conditions Due to Renovated Rooms

1. Respondent Requires Housekeepers to Affirm Quota on February 28, 2019

Housekeeping Director Just had not received many complaints from housekeepers about other employees failing to complete the room quota prior to Respondent’s guest room renovations. (Tr. 97:6-13). However, in February 2019, housekeepers Yocasta Guerrero, Ana Ynfante, and Sung Hee (listed as “Lee”) approached Just. (Tr. 102:19-103:6, 379:10, 805:9; GCX 13:2-4). They stated that, after reviewing other housekeepers’ boards, they noticed that some housekeepers were not cleaning all of their required rooms. (Tr. 103:5-22). As a result, these employees told Just they didn’t feel it was fair that they had to continue cleaning 17 rooms with the new, glass showers. (Tr. 103:10-22).

In response, on February 28, 2019, Just presented a typed document with information about the room quota to the housekeeping staff to sign. (JX 13). The document clearly stated, “Failure to comply with the following Room Cleaning standards will result in further disciplinary action up to and including termination.” (JX 13). During

his tenure, Just previously had never needed to create an acknowledgment form of this type. (Tr. 96:12-14).

After having housekeepers sign the document, Just presented the document to GM Rader, explaining that he had issued a written reminder to the housekeepers about the room quota. (Tr. 442:5-10). Rader reminded Just that he did not want to immediately issue discipline involving the guest room renovations, as there was a learning curve associated with cleaning the renovated rooms. (Tr. 442:8-10, 442:12-14). Specifically, Rader felt that there was a “muscle memory” to cleaning the guest rooms and a lot of the housekeepers had been cleaning the same, unrenovated rooms for a long time. (Tr. 442:14-16).

However, later in 2019, Just did discipline housekeepers for failing to complete their full room quota. Specifically, on June 12, 2019, Just issued discipline to housekeeper Vladana Tesic (“Tesic”) for only completing 13 of her 17 assigned rooms. (GCX 16; Tr. 671: 20- 672:3, 673: 9-10). On June 26, 2019, Just issued discipline to housekeeper Larissa Rollins for completing only 7 rooms of her assignment. (GCX 14; Tr. 673:9-17).

2. The Housekeepers’ March 26, 2020 Meeting with Respondent

On March 26, 2020, the Hotel’s housekeepers, represented by the Union, held a meeting with Respondent. (Tr. 372:5-13). There were around 10 housekeepers present, of whom about two were housekeeping inspectors. (Tr. 372:23-25). These 10 housekeepers included Yolanda Belen (Tr. 398:21-24; GCX 13:1), Yocasta Guerrero (Tr. 376:13-15; GCX 13:2), Sung Hee (or “Lee”) (Tr. 390:3-5; GCX 13:2), Ana Ynfante (Tr. 390; 6-7; GCX 13:4), Irene Meneses (Tr. 390: 10-11; GCX 13:3), and Angela Hall (Tr.

390: 10-11; GCX 13:2). Esparza and Darya Valades (“Valades”) were present as Union representatives. (Tr. 372:22). Valades, specifically, functioned as an English to Spanish translator. (Tr. 374: 4-7).

Respondent brought several representatives to the meeting, including Rader, Just, Director of Operations Travis Merrigan, Housekeeping Assistant Manager Margarita Andino (“Andino”), and Human Resources Director Christine Talley (“Talley”). (Tr. 372:15-21, 541-542). The meeting was held in the Prince William Room, a conference room at the Hotel. (Tr. 373:4-10).

The primary topic of discussion was the housekeepers’ working conditions, including the additional efforts required to clean the new, glass walk-in showers. (Tr. 375:1-3). Housekeeper Yocasta expressed that she needed more time, effort, and strength to clean the glass showers. (Tr. 375:16-18). She noted that her arms and shoulders would ache after her shift. (Tr. 375:19-20). Rader responded that the old bathtub had a shower curtain, and that needed to be washed, so the work wasn’t new. (Tr. 376:1-4). However, the housekeepers agreed that it was their practice in bathtub rooms to call housemen to replace the shower curtains when they were dirty; they never had to wash or clean them. (Tr. 376:9-12).

In response, Rader interjected that it was Respondent’s expectation that the housekeepers should be wiping down the shower curtain liner every day. (Tr. 391:19-22). Nonetheless, Yolanda expressed that her arms hurt from having to clean the new, glass showers. (Tr. 375:16-21).

Sung Hee, who had worked at the hotel for 20 years, said that cleaning the glass showers was more difficult. (Tr. 377:9-11). She emphasized that cleaning the glass

showers caused her arms, shoulders, and hips to ache. (Tr. 377:11-14). Rader responded by saying that it took time to get used to the new showers and that the housekeepers would be getting training and new tools. (Tr. 377:18-22). Further, Rader took the position that there would be a difference between when housekeepers first started cleaning the glass showers and a year later — that they would get used to the work. (Tr. 377:20-22).

During the meeting, Respondent's managers noted that the Hotel had provided the housekeepers with squeegees to clean the glass shower doors. (Tr. 378:2-4). However, Irene stated, and other housekeepers agreed, that when they used the squeegees, because of soap and chemical stains, it was necessary to wipe the shower doors multiple times to clean them to Respondent's standard. (Tr. 89:15-21). Echoing this, Yocasta noted that it took her multiple passes to clean the glass door, so these showers took her longer and more effort to clean. (Tr. 90:2-7).

One housekeeper specifically complained that washing the glass showers made her arms hurt. (Tr. 88:4-6; 375:16-21). Another lamented again that, after 20 years at the Hotel, the task of cleaning the new glass showers were making her arms, shoulders, and hips ache. (Tr. 377:2-14). The housekeepers' expressed consensus was that the squeegees provided didn't always remove the water, chemical spots, and streaks on the glass. (Tr. 90:13-16; Tr. 378:11-13).

Further, the housekeepers agreed that it was difficult to clean the gap between the two glass shower doors because the squeegees did not fit, requiring them to use rags instead. (Tr. 90:5-12; Tr. 378:13-18). One housekeeper noted that cleaning other parts

of the shower were also difficult, specifically the new grate-style metal shower drain, which she had to remove from the shower floor with her personal keys. (Tr. 91:14-20).

The housekeepers also raised the difficulties they were having cleaning the guest rooms apart from the glass showers. For example, the housekeepers complained that the pillows on the king-sized beds were now bigger and heavier. (Tr. 379:1-2). The housekeepers told Just and other managers that the pillows did not fit well into the pillowcases, so they had to apply more strength to get the pillows in and out. (Tr. 87:25-88:4, 379:3-5). Housekeepers expressed that because of the increased number of pillows in each guest room, it was more difficult for housekeepers to finish their room quota. (Tr. 92:20-24).

Esparza asked the housekeepers what Respondent could do to make their job better. (Tr. 396:17-19). Angela requested, and the other housekeepers concurred, that their room quota be reduced to 15 rooms. (Tr. 396; 19-22; Tr. 398:2-8). The housekeepers further agreed that it took them about 15 minutes longer to clean the renovated rooms. (Tr. 380:20-25). Anna, who had worked for Respondent for 8 years, said that she had never ended her shift only having cleaned 14 rooms, but since the renovations, this had happened. (Tr. 379:19-24). She emphasized that, because of the extra time and effort it took to clean the newly renovated rooms, she was not able to finish the 17-room quota. (Tr. 379:23-24).

Angela said that her work was hard for her—that she was aching physically and feeling bad emotionally about not being able to finish the 17-room quota. (Tr. 400:12-14). Angela added that she had considered putting in her two weeks' notice, but she needed the job, so she was pushing through the work. (Tr. 400:15-20). Rader asked the

housekeepers if it took them longer to clean the guest rooms solely because of the new glass showers. (Tr. 381:4-6). The housekeepers insisted it was not just the new showers, but that it took them longer because of the showers and all the other changes Respondent had made during the renovation as well. (Tr. 381:9-12).

3. Housekeeper Requests to Lower the Room Quota or Transfer Assignments

Some housekeepers also approached Respondent's management individually to express their concerns about the continued 17-room quota, in light of the renovations. Housekeepers Yolanda Belen and Yolimar Berrocales both told Just that they were not meeting the 17-room quota because some of their rooms had the glass showers. (Tr. 101:13-21; GCX 13:1-2).

In the summer of 2019, housekeeper Mai Lee spoke to Housekeeping Assistant Manager Andino, expressing that completing 17 rooms during her workday was "a lot" if those rooms also had the new glass showers. (Tr. 253:11-14). Andino told Lee that if it was too hard to clean 17 rooms with showers, then maybe she could clean 15 or 16 rooms instead. (Tr. 253:15-19). However, Lee was not allowed to clean fewer rooms because Andino could not get permission from a male supervisor. (Tr. 253:20-25).

After Lee's request to have a lower room quota was denied, she reiterated how cleaning the guest rooms with showers was difficult for her and a lot more work. (Tr. 242:17-20). Specifically, Lee explained that the work took longer and there were places she could not reach in the shower to clean the glass. (Tr. 249:18-25). Andino transferred her from the 11th floor of the West Tower to the 7th Floor so she could clean rooms with bathtubs, as she had before. (Tr. 242:19-20).

4. Respondent Asserts that it Will Accommodate Housekeepers' Needs and Lowers the Room Quota

Just testified that housekeepers requested to be assigned to rooms that did not have the new, glass showers because they were more difficult to complete. (Tr. 98:18-22; Tr. 99:1-4). He granted those housekeepers' requests, including a request from housekeeper Irene. (Tr. 98:23-25; 102:5-6). However, because Respondent has continued to rent the rooms with the new, glass showers, other housekeepers have been assigned to those rooms.

During the 2020 COVID-19 pandemic, Respondent lowered the housekeepers' room quota because housekeepers are only cleaning checkout rooms. (Tr. 584:19-22). As a result, the room quota is now between 15 and 16 rooms per 8-hour shift. (Tr. 584:21-22). Respondent did not notify the Union when it made this change. (728:11-18).

III. RESPONDENT VIOLATED §§ 8(a)(1) AND (5) OF THE ACT AS ALLEGED

A. Credibility Favors the Acting GC's Witnesses and an Adverse Inference Should be Drawn Due to Respondent's Failure to Call Any Personnel With First-Hand Knowledge of Regularly Cleaning the Renovated Rooms

Significant weight is given to an administrative law judge's credibility determination because the administrative law judge actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including expressions, posture and appearance, manner of speech, and non-verbal communication, may convince the administrative law judge that the witness is testifying truthfully or falsely. Credibility determinations may also be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Medeco Security Locks*, 322 NLRB 664 (1996); *Shen Automotive*

Dealership Group, 321 NLRB 586, 589 (1996). *Accord V&W Castings*, 231 NLRB 912, 913 (1977), *enf'd*. 587 F.2d 1006 (9th Cir. 1978).

CGC witnesses Mai Lee, Daniel Esparza, and Darya Valades were highly credible, as their testimony was blunt, clear, consistent, and held up under cross-examination and FRE 611(c) examination. Importantly, Mai Lee and Amy Dingle were the only housekeepers to testify about the longstanding past practices and experiences of cleaning both pre-renovation and post-renovation rooms across an entire quota-based workday. As such, their testimony was not contradicted or impeached in any way.

In addition, Darya Valades detailed recounting of the housekeepers' complaints at the March 26, 2019 meeting confirmed how widespread and obvious the impact on workload was.²⁶ Conversely, Respondent's supervisors testified from a position of minimal or sporadic experience, and with the benefit of being much taller and larger than the physically strained female housekeepers that made up nearly the entirety of Respondent's roster. Indeed, even Just, at 6'1", reluctantly acknowledged that he could not reach the top of the new showers. Moreover, it is telling that Fedderson was the only housekeeper Respondent provided to partially testify about any part of the process of cleaning renovated rooms at the Hotel and she was a supervisory housekeeper from an entirely different property. As such, Respondent's witnesses are not to be credited as to the severity of the change the housekeepers' encountered post-renovation.

²⁶ To the degree Valades' testimony was hearsay, such evidence is admissible in Board proceedings "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *Midland Towers*, 324 NLRB 1141; *Rome Electrical Systems*, 356 NLRB 170 n. 4 (2010) (Board "may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable"). As Valades' testimony was consistent with the housekeepers' complaints to Just as well as the testimony of Mai Lee and Amy Dingle, it is reliable and credible.

In addition, this failure of Respondent to call any witness with first-hand knowledge of how the housekeepers' day-to-day terms and conditions actually changed post-renovation warrants drawing an adverse inference. The Board has held that an adverse inference may be drawn based on the failure of a party to question its own witnesses about matters which would normally be thought reasonable, where such omissions do not appear unintentional. *Colorflo Decorator Prods.*, 228 NLRB 408, 410 (1977). In fact, “[w]here relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him.” 29 Am. Jur. 2d § 178. See also *Avon Convalescent Center, Inc.*, 219 NLRB 1210 (1975); *Bricklayers Local Union No. 1 of Missouri, Bricklayers, Masons and Plasterers International Union, AFL-CIO (St. Louis Home Insulators, Inc.)*, 209 NLRB 1072 (1974). Compounding Respondent’s testimonial evidentiary dearth was the absence of any evidence introduced that contradicted the housekeepers’ personal experiences and difficulties in cleaning the renovated rooms.

B. Respondent Commits a Unilateral Change by Increasing Unit Employees’ Workload (Complaint Paragraph 8)

In general, an employer may not make a change to terms and conditions of employment without first providing the union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). However, to trigger this obligation the change must constitute a material, substantial, and significant change in work assignment. See, e.g., *Peerless Food Prods.*, 236 NLRB 161 (1978).

1. The Charge in this Case was Timely as to the Unilateral Changes

The facts clearly show that the Union's charge in this case is within the six-month § 10(b) period. The § 10(b) period begins only when a party has "clear and unequivocal" notice of a violation of the Act. *Desks, Inc.*, 295 NLRB 1, 11 (1989); *Leach Corp.*, 312 NLRB 990, 991–92 (1993), *enf'd.* 54 F.3d 802 (D.C. Cir. 1995). The burden of showing such notice is on the party raising a § 10(b) affirmative defense. *Leach Corp.* at 991-992. Constructive notice will not be found where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct. *A & L Underground*, 302 NLRB 467, 469 (1991). See also *Taylor Ridge Paving and Construction Co.*, 365 NLRB No. 168, slip op. at 3–4 (2017); *Cab Associates*, 340 NLRB 1391, 1392 (2003). Here, the initial charge alleging unilateral changes was served on Respondent May 14, 2020, meaning that Respondent must prove that the Union had actual or constructive notice of altered working conditions before November 14, 2020. It cannot and did not carry this burden.

While the Complaint properly alleges that the unilateral changes began on or about November 5, 2018, GM Rader had told the Union it expected the renovated rooms to be placed into service on or about December 31, 2018. In fact, Respondent's limited responses to the Union's February 2018 and June 2018 information requests indicated substantial uncertainty about the renovations, including which floors would receive showers, how many rooms would receive showers, and various other details about the status and progress of the ongoing plans for renovating the Hotel. Respondent did not give the Union any formal or informal notice about the new rooms being completed and placed into service in November 2020; indeed, both Esparza and Valades testified without contradiction that they did not have access to view the updated rooms before this time.

In addition, both Esparza and Valades testified they would not have known what was happening with the renovation by being where they were in the Hotel when they did have access, and they could not access to guest rooms without special permission or tours.

The fact that Unit members may have had some notice or knowledge about selective new rooms being placed into service – because they were required to clean them – does not impute that knowledge to the Union. “[W]hether unit employees’ knowledge is imputed to their bargaining representative for purposes of determining when the § 10(b) limitations period commences depends on the factual context.” *In Re Konig*, 318 NLRB 337, 339 (1995). The context here does not support such imputation.

Esparza’s testimony makes clear that he did not know that any remodeled rooms were about to be placed into active service until about late November 2018, and immediately sent out the November 20th information request with its concomitant demand to “confer,” when he found out. Additionally, Esparza explained that housekeepers reported to him that they were cleaning up the rooms post-construction but pre-rental and, therefore, before the rooms were in the regular work rotation for housekeepers.

Respondent’s witnesses’ vague references to elevators being out of order, or Union representatives walking near rooms that were being remodeled throughout the process, do not provide the necessary context either. Simply stated, there is no concrete testimony indicating that Esparza could or should have known that housekeepers were being assigned to regularly clean the remodeled rooms, including those rooms with glass showers, before November 14, 2020. As such, the charge was timely and the allegations in paragraph 8 of the Complaint are properly before the ALJ and/or Board.²⁷

²⁷ All other allegations in the Complaint are plainly and facially within the § 10(b) period.

2. The Changes Were Material and Substantial

The Board has long held that both addition of new duties and increasing the quantity of existing duties (if material, substantial, and significant) constitute unilateral changes that must be bargained over. *HTH Corp.*, 356 NLRB 1397, 1401 (2011) (violation to unilaterally increase housekeeper workloads from 16 to 18 rooms per day), *review denied, enf'm't granted sub nom. Frankl ex rel. NLRB. v. HTH Corp.*, 693 F.3d 1051 (9th Cir. 2012); *The Bohemian Club*, 351 NLRB 1065, 1066 (2007) (violation to unilaterally require cooks to start wiping down walls, counters, refrigerator doors and other tasks, even though they had previously been required to do some cleaning tasks). In *Bohemian Club*, the added tasks took about 30 minutes to complete. *Id.* at 1065. In another case, the Board found a violation in the employer's newly and unilaterally requiring pressmen to mop the pressroom floor, a task that took 20 minutes. *Ironton Publ'ns, Inc.*, 313 NLRB 1208, 1211 (1994), *enf'd*, 73 F.3d 362 (6th Cir. 1995). The ALJ in that case took note of testimony about an employee's reaction to the change, writing "this was not an insignificant or trivial change in the job but one that drove a veteran employee to retire somewhat earlier than he had planned." *Id.* at 1211. In the instant case, the changes were substantial enough that more than one housekeeper specifically requested to be assigned to "non-shower" rooms because they were unable to complete their housekeeping tasks because of the dramatically increased workload.

Moreover, if a respondent changes a number of procedures in ways that increase some work duties and reduce others, even by relatively small amounts, it will often constitute a unilateral change (or set of changes). However justified or explained, "upward production rates *may* also require greater effort by the employees;" if proven to

require greater effort on the part of some employees, it will constitute a unilateral change when not first bargained to agreement or impasse. *Kal-Equip Co.*, 237 NLRB 1234, 1236-39 (1978). As further noted below, the fact that an employer formally warns employees that failure to meet the increased production standards is a punishable offense, and/or actually disciplines employees for such failures, confirms such unilateral changes. *Id.*, 237 NLRB at 1239. See also *United Cerebral Palsy of NYC*, 347 NLRB 603, 609 (2006).

The changes in this case were functionally an imposition of an increased production rate requirement, as employees were being required to clean more difficult rooms with additional cleaning surfaces, but keep the same room quota. To the degree Respondent may seek to rely upon its broad, unilaterally implemented Management Rights language to justify these additional widespread changes to employee duties and workloads, it cannot. The Board has previously rejected the “argument that a management-rights clause in the contract proposal that it unilaterally implemented after a bargaining impasse justified subsequent unilateral changes in unit employees' terms and conditions of employment.” *Raven Services Corp.*, 331 NLRB 651, 652 (2000), *reconsideration den'd*, *Raven Gov't Servs., Inc.*, 336 NLRB 991, 992 (2001). Indeed, to interpret the Implemented Terms so broadly would functionally convert the governing Management Rights clause itself into something unlawful. See, e.g., *Altura Commc'n Sols., LLC.*, 369 NLRB No. 85 (May 21, 2020).

In general, privileging an employer's unlimited self-grant of power to change mandatory subjects of bargaining rests at the bottom of a slippery slope, one that extinguishes the statutory obligation to bargain over changes in working conditions. See, e.g., *McClatchy Newspapers*, 321 NLRB 1386 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir.

1997), *cert. denied* 524 U.S. 937 (1998) (employer violated Act when it granted wage increases according to terms it implemented at impasse which themselves gave the employer unlimited discretion over wage increases). *See also California Offset Printers, Inc.*, 349 NLRB 732, 736 (2007) (respondent's conduct was not privileged by broad management rights clause, despite dissenting member's invocation of *McClatchy*).

While an employer is not obligated to bargain about every decision, but only “issues that settle an aspect of the relationship between the employer and the employees.” *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). The Act does not obligate an employer to bargain about those “managerial decisions, which lie at the core of entrepreneurial control.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)). An employer is, however, obligated to bargain over the effects of such decisions on represented employees. *See, e.g., NLRB v. Columbia Tribune Publ'g Co.*, 495 F.2d 1384, 1391 (8th Cir. 1974) (employer obligated to bargain over effects of switching methods of typesetting).

Respondent clearly met and exceeded this baseline level of severity in its unilateral change to establish a violation as plead. The 300 renovated rooms with showers added 63 square feet of glass to clean,²⁸ and required the introduction of new squeegees to do so. The addition was major, as the employees' complaints to Respondent make clear – not only were there complaints about physical complaints that the work created, but the tools provided proved inadequate and forced employees to wipe down the showers

²⁸ The new showers, according to specifications provided to the Union, were 76 inches by 60 inches. Moreover, there are two sides of the glass to clean. $76 \times 60 \times 2 = 9120$ square inches, which is equivalent to $63 \frac{1}{3}$ square feet.

multiple times, unlike the one-off video provided by Fedderson. There was also a long-established practice that was abandoned; that of having housemen take down the shower curtains rather than requiring housekeepers to clean themselves. Housekeepers uniformly provided evidence for this past practice, while Respondent failed to refute it in any way, despite its expressed wish that the practice did not exist. *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3-4 (2016).

The change also required such a change in work that some housekeepers found themselves unable to complete 17 rooms when they were assigned “shower rooms;” of course, each time Respondent granted an accommodation to these employees, other housekeepers would inevitably be required to clean more shower rooms themselves. Other housekeepers experienced hip, arm, and shoulder pain from the effort in cleaning these new showers.

The new showers, though likely the greatest changes, were far from the only changes. Even in the rooms that retained bathtubs, heavier furniture and new furniture arrangements required employees to find new strategies and methods to clean rooms to Respondent’s standards. The new furniture covered a greater surface area to clean/dust and a much greater weight to move while cleaning. In addition, the new extra-large pillows, of which some rooms now had an additional pair, required employees to work extra hard to stuff pillowcases. Further, the mounted TVs now required foraging for forgotten or misplaced guest possessions. While these are only examples, the renovations, as reported to management, increased the housekeepers’ total workload by as much as 10 to 15 minutes per room.

In addition, there is evidence employees suffered injuries to their ability to pursue room rate bonuses. Dingle specifically testify that she was dissuaded from pursuing bonus rooms because the normal quota rooms took longer. Moreover, data for the comparable periods of January-February 2018 (before renovations) and January-February 2019 (as renovated rooms were being imposed on housekeepers without accommodations or bargaining) shows that employees received a lower rate of room bonuses per hour worked, even while they worked substantially increased overtime, all of which points toward employees working longer hours for less remuneration.²⁹

3. *The Union Made a Bona Fide Request for Bargaining Regarding the Unilateral Changes*

A union may waive its right to bargain by failing to request bargaining when it is put on notice of an impending change. *See, e.g., Peerless Publ'ns*, 231 NLRB 244 (1977), *remanded* 636 F.2d 550 (D.C. Cir. 1980), *modified*, 283 NLRB 334 (1987). However, a union's request to bargain need not use any magic words to preserve its rights, but only clearly communicate an objection to implementation and desire to bargain. "The Board and the courts alike have recognized that a request to bargain 'need take no special form, so long as there is a clear communication of meaning.'" *Midwest Terminals*, 365 NLRB No. 158 (2017) (internal citations omitted); *Ohio Edison Co.*, 362 NLRB 777 (2015), *enf. den'd* 847 F.3d 806 (6th Cir. 2017) (union president telling a respondent, "[o]h

²⁹ Though there is evidence of a high rate of room bonuses for May 2019, it was accompanied by extremely high rates of overtime, and there is no comparable data for May 2018. It appears likely be that short-staffing, summer vacations, and the extremely seasonal nature of hotel occupancy in Anchorage lead to similar bonus structure discrepancies during summers. Room bonus rates and overtime rates were also higher during the August-September 2018 period in the data, but not to the degree both metrics reached in May 2019.

no you don't! Again? Now you know I have to file a board charge” was sufficient to constitute a request for bargaining.)

As set forth earlier, the Union in its November 20, 2018 letter demanded that:

[B]efore any housekeeper is require to engage in this task, the Union requires that the parties agree to appropriate time-and-motion studies in order that ... it does not result in any increase to the status quo with respect to housekeeper workload. Please advise when we might confer regarding this.

(JX 11:3). The Union’s usage of “confer” follows exactly the obligation outlined in § 8(d) of the Act: “the mutual obligation ... to meet at reasonable times and **confer** in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of a contract” (emphasis added). Combined with the Board’s instructions in *Midwest Terminals*, 365 NLRB No. 158, it is very clear the Union made a request for bargaining as soon as it discovered that the renovations had been completed and rooms had already been placed into service for the housekeepers to clean.

The Union’s failure to demand bargaining further in advance was not its own doing; in June 2018, Respondent had told the Union that the room renovations were not expected to be completed until December 31, 2018. Instead, Respondent began placing rooms into service somewhat sooner, though irregularly. Once the Union knew, it simultaneously requested additional information about the current nature of the renovations and sought to have the Respondent to preserve the status *quo* until bargaining could be completed. Moreover, without knowing more details about Respondent’s rollout of the rooms, or cleaning requirements, it is unclear how the Union could have known the precise details of the changes being implemented. This is exactly why the Union requested bargaining when it did.

The testimony of Respondent's then-General Manager Rader indicates that Respondent actually had more time to bargain with the Union over these issues, because of the staggered nature of the renovations. Though Rader was unclear about when certain types of remodeled rooms were placed into service, when remodeled bathrooms were placed into service in specific buildings, and which rooms had new sofa beds installed, it was clear that many or most of those "new rooms" were not placed into service until early 2019.

Despite this, Respondent still did not confer with the Union, did not bargain over or agree to a neutral time and motion study, and did not propose accommodations for housekeepers likely to be impacted by the new work. Further, it did not abide by its own implemented requirement in the Management Rights' clause, to alert the Union to such activities within 7 days. Respondent also did not abide by its own Article XXVIII, which acknowledges an "obligation exists to meet and confer" over issues and concerns shared by the parties and "that when requested such a meeting will be scheduled within 7 days of the request.

Indeed, whether there was a bargaining obligation that directly flowed from the changes to working conditions, a unilaterally implemented "agreement," or as an "effect" of the renovations, Respondent simply pretended the Union's demands didn't exist. Respondent made changes first and didn't bargain later; this is the essence of failing and refusing to bargain. See *e.g.*, *Eugene Iovine, Inc.*, 328 NLRB 294, 294, n.1 (1999) (employer unlawfully implemented discretionary reduction in work hours where union had no notice of or opportunity to bargain over reduction before it occurred), *enf'd*, 1 F. App'x 8 (2d Cir. 2001).

Finally, regardless of how Respondent tries to construe the March 26, 2019 housekeepers' meeting organized by the Union, it was not a form of conferring or bargaining with the Union. In addition, any bargaining about unilateral changes after they have been fully imposed on workers would relegate the Union "to the status of a supplicant, a position incompatible with the purposes and policies of the Act" and would not salvage Respondent's prior conduct. *Kajima Engineering and Construction, Inc.*, 331 NLRB 1604, 1620 (2000).

4. Respondent's Remedial Obligations

The Acting General Counsel does not dispute that Respondent was privileged to make the room renovations at issue. That does not change the fact Respondent was obligated to bargain over the resultant changes in its Unit employees' workload and duties. *King Soopers, Inc.*, 340 NLRB 628 (2003) (while Respondent had right to install new scanner technology, it had responsibility to bargain over implementation of work rules requiring the use of scanners). Indeed, the Union never demanded that it be able to bargain over the renovations or redesign of the hotel rooms, but only over how those renovations would impact the time and motion that housekeepers would have to use to clean the renovated rooms.

This principle is plainly obvious; after all, if Respondent's remodeling had increased each room's size by 100 square feet, or had consolidated two rooms into one much larger room, it could never plausibly claim that the 17-room quota would carry the same workload afterwards, or that the Board's entrepreneurial control doctrine shielded it from bargaining over that workload. In this case, Respondent was cognizant enough of the breadth of changes that it forced its employees to sign documents reinforcing that it

would hold employees to the 17-room quota. Thus, while some marginal changes in the layout or furnishing of a guest room may theoretically fall short of a change, the scope of changes from the renovations in this case vastly exceeded that threshold and triggered a bargaining obligation.

As a result, the proper remedy is for Respondent to roll back all of its instructions and impositions of work upon housekeepers, to the degree possible, and bargain with the Union over how the new rooms will be cleaned, which employees will have responsibilities for certain cleaning tasks (such as the glass showers), and the degree to which this may impact the room quotas. More succinctly, Respondent must be ordered to restore the status *quo ante* for its housekeepers' workloads to its pre-renovation equilibrium, as closely as possible, until and unless it bargains with the Union. *HTH Corp. (I)*, 356 NLRB 1397, 1431 (2011); *HTH Corp. (II)*, 361 NLRB 709, 716 (2014) (hotel required to reverse its change in room quotas and workload and return to the status quo until it had bargained over the proposed changes).

In addition, Respondent must be required to make housekeepers whole for all lost wages and bonuses that flowed from the unilaterally implemented change in their work duties, including the resultant lost opportunities for bonus rooms. *HTH Corp. (II)*, 361 NLRB at 716 (requiring hotel to reimburse housekeepers for lost wages and interest arising from unilateral increases in workload); *Columbia Coll. Chicago*, 360 NLRB 1116, 1118 (2014). See also *New York Univ.*, 363 NLRB No. 48 (2015) (removing adverse comments in employee performance evaluations relating to unlawful unilaterally imposed secondary duties). As plead in the Complaint, the monetary remedies that most correspond to this derivative make-whole obligation would be to pay employees a share

of \$4.95 room bonuses employees stochastically lost out on as a result of the harder work and lengthier room cleaning.³⁰

Moreover, if it is determined that “effects bargaining” is the only construct under which these changes fall, the remedy is not rescission of the changes, but backpay from 5 days after the date of the Board's decision until: (1) Respondent bargains to agreement with the Union on the effects of the hours reduction; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of the Board decision, or to commence negotiations within 5 business days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). While the backpay period shall in no case be less than 2 weeks, *W.R. Grace*, 247 NLRB 698 (1980), the remedial period in this case, with backpay equaling the amount and allocation of lost potential room bonuses, would be from November 2018 to the present.

Although *Transmarine* is most often applied to plant closures, it also applies in other contexts where effects bargaining is required. See, e.g., *Heartland-Plymouth Court MI, LLC*, 359 NLRB 1518 (2013), *re-aff'd*, 362 NLRB 5 (2015); *Rochester Gas & Elec. Corp.*, 355 NLRB 507 (2010). Indeed, the Board has also held that even where an employer is not required to bargain over the decision to implement some new system, procedure, or technology, it is required to bargain over the discretionary effects of the new system on employees and rescind those changes if it makes them unilaterally.

³⁰ Though substantial documentary evidence was entered into the record regarding the room bonuses, hotel occupancy rate, and housekeeper assignment sheets, the parties agreed that these exemplars were insufficient to prove or disprove a monetary remedy was owed to any one employee.

Fresno Bee, 339 NLRB 1214 (2003). In *Fresno Bee*, the Board found that the decision to implement a new computerized employee benefits system was distinct from the changes to employee lunch breaks and shifts that it chose to impose in response to the new system. *Id.*

To avoid the obligation to bargain over such effects, it is the employer's burden to show "not only that the change resulted directly from th[e] decision, but also that there was no possibility of an alternative change in terms of employment that would have warranted bargaining. *Id.* at 1214–15. It is clear that there were many potential changes and moving parts available here, including e.g. reduction in room quotas that multiple housekeepers requested at the March 26, 2019 meeting. Therefore Respondent cannot sidestep its obligations by appealing to *Fresno Bee* and progeny.

C. Respondent Threatened Employees by Requiring Them to Sign Off on a Room Requirement Sheet (Complaint Paragraph 6)

When an employer unilaterally implements changes to working conditions that abrogate union rights, and then threatens employees with potential discipline for running afoul of the changed requirements, it commits a § 8(a)(1) violation. *See, e.g., Opportunity Homes, Inc.*, 315 NLRB 1210, 1226 (1994). Here, when Just required Respondent's housekeepers to sign off on a sheet "reminding" them that they needed to complete their entire quota of 15 to 17 rooms or face discipline, in the immediate aftermath of the increases in their workload, Respondent committed just such a violation. While it is true the 15 to 17 room quota is part of the unilaterally implemented terms, the requirement that employees sign off on this document was not at all random. Instead, Just implemented this requirement on February 28, 2019, immediately after there were worker

conflicts over the inability for some housekeepers to complete all their “shower rooms” in the allotted time.

When Just went to GM Rader to tell him what he had done, Rader cautioned against disciplining employees in the short term – not overall of course – to allow them to adjust. In other words, Rader wanted to give employees time to find strategies around the increased and changed working conditions the new rooms confronted them with before cracking down if and when they couldn't.

This was no mere idle threat. At least one employee was disciplined for falling modestly short of expectations (13 of 16 rooms completed). Moreover, because the threat of discipline had followed directly on the heels of employee complaints about some housekeepers being unable to finish their room assignments, employees had every reason to believe that the room quota enforcement was being scrutinized. A reasonable employee would interpret the sign-in requirement as a threat to enforce the unilateral changes. Moreover, the fact that – when confronted with such dangers - employees may have found ways to work harder, or with more energy, and with different physical tolls on their body, does not in any way alter the reality that their workload changed. It was clearly a violation of § 8(a)(1).

D. Delay and Refusal to Provide Information (Complaint Paragraph 7)

1. Legal Standard for Information Request Cases

Since the advent of the Act, the Board has held that an employer's duty to bargain includes supplying the union with relevant information upon request. *S.L. Allen & Co., Inc.*, 1 NLRB 714, 728 (1936). Indeed, the Supreme Court emphatically agreed that “[t]here can be no question of the general obligation of an employer to provide information

that is needed by [its employees'] bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967).

Information that implicates terms and conditions of employment of bargaining unit employees is presumptively relevant. *CalMat Co.*, 331 NLRB 1084 (2000); *Whitesell Corp.*, 355 NLRB No. 134 (2010). The relevance standard is a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. at 436. The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. *Pennsylvania Power & Light*, 301 NLRB 1104, 1105 (1991). An employer "must furnish information that is of even probable or potential relevance to the union's statutory duties." *Conrock Co.*, 263 NLRB 1293, 1294 (1982). Indeed, a union is entitled to request and receive information that substantiates, undercuts, or in any way informs its good faith efforts at contract administration. The Board need only decide whether the information sought has some "bearing" on these issues, or would be of use to the union. *Dodger Theatricals Holdings*, 347 NLRB 953, 970 (2006).

Finally, and most pertinent to this case, the information an employer provides cannot avoid the subject matter or misdirect from the express nature of the questions posed by the Union. A respondent can just as fully violate the Act by "submitting inaccurate and incomplete responses." *Airport Aviation Servs.*, 292 NLRB 823 (1989). See also *E.I. Du Pont De Nemours & Co.*, 366 NLRB No. 178 (2018) (adopting ALJ finding that "incomplete/insufficient" responses were a violation of the Act).

2. Respondent's Refusal to Provide Room Renovation and Tool Information

As Esparza testified at the hearing, and as the documents entered in at the hearing established, Respondent did not provide the Union with the specific, relevant information

it requested on November 20, 2018, as detailed in paragraph 7 of the Complaint. Each of these requests facially related to the issues attendant to the renovated work rooms, including the showers. Beyond their facial relevance, Esparza explained their relevance to Respondent in his original information request as well.

Respondent not only did not provide the information, it did not inform Esparza that the information did not yet exist, nor did it later provide “rolling” production. It simply skipped over these responses or provided clearly inadequate answers. Respondent’s last response to the November 20th request came in on January 4, 2019, and did not complete the response(s).

Respondent’s primary defense during the hearing was an incoherent attempt to tar the Union’s requests as some vague form of harassment. In addition, Respondent implied that GM Rader’s availability and willingness to speak casually to Esparza during work visits functioned as responsive information. Unfortunately, vague testimony that its managers spoke to Union officials such as Daniel Esparza about work issues does not establish that any of the specific information requested was provided.

Most important, Respondent did not provide additional documents, nor specific testimony, refuting Esparza’s testimony that the information was not provided. Respondent did not show it provided the responsive information to those four questions, and it is not the Union’s responsibility to repeatedly re-request the information. Respondent’s reply to Esparza’s request for a “detailed” update on the status of renovations was inadequately answered; for example, Respondent completely ignored his request for details about which floors and rooms were in which stages of renovation. Moreover, because Respondent established a pattern of responding to information

requests in waves, the Union may not have known that Respondent did not plan to ultimately provide all the remaining information. In any case, Respondent never provided it, further emphasizing its lack of commitment to good faith bargaining.

It should also be noted that Respondent has engaged in a pattern of overlooking information requests made by the Union. *CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage & Unite Here! Local 878, AFL-CIO*, (JD-07-20), 2020 WL 1061592 (Mar. 4, 2020). During the instant trial, Respondent also implied that the Union was both making frivolous and burdensome information requests and that it was somehow lax in paying attention to or following up on the status of renovations in the case. Neither is true and the information requests Respondent referenced were neither relevant to the instant case nor indicative of any bad faith on the part of the Union.

Having shown that the Union requested the information, that the information was relevant to the Union's representational duties (in several ways), and that said information was never provided, it must be concluded that Respondent violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint.

IV. CONCLUSION

Respondent unlawfully changed its housekeepers' workloads due to the scope and scale of its renovations. It also ignored the Union's request to confer over the coming changes, then doubled down by threatening employees with discipline pursuant to those unlawfully implemented increased workloads. Finally, it compounded all this by failing and refusing to provide the Union with facially relevant information. Respondent, by those actions, violated §§ 8(a)(1) and (5) of the Act.

The ALJ should so find and recommend that the Board fashion an appropriate remedy which would require Respondent to: cease and desist from its unlawful conduct;

post an appropriate Notice to Employees at its Anchorage facility, a proposed copy of which is attached; immediately bargain with the Union until agreement or impasse over the changes to housekeepers' work duties; rescind all of the changes to its housekeepers' work duties to the degree possible and/or rescind the 17-room quota while bargaining; pay housekeepers for any room bonuses they may have lost due to having to work longer and more strenuously on the remodeled rooms; and provide the Union with the remaining information it has not provided.

Dated at Wasilla, Alaska, this 29th day of January, 2021.

Respectfully submitted,

/s/ Kristin E. White

/s/ Rachel Stopchinski

Kristin White

Rachel Stopchinski

Counsel for the Acting General Counsel

National Labor Relations Board

PROPOSED ORDER

Respondent, CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage, Anchorage, Alaska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Failing and refusing to bargain in good faith with the Union about any changes to its employees' terms and conditions of employment;
- (b) Making material changes to housekeepers' workload and duties while holding them to the same room-cleaning quota without first reaching agreement on those prospective changes and/or on an overall collective bargaining agreement with the Union;
- (c) Threatening employees with discipline if they failed to abide by its same room-cleaning quota after its unlawful unilateral changes, including its increased housekeeper workload and duties; and
- (d) Failing to provide the Union with information it requests and is necessary for the Union's performance of its collective bargaining obligations.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- (a) Rescind all changes made to housekeepers' job duties due to the renovation of rooms, to the full degree practicable, and bargain with the Union over those changes and their effects;
- (b) Reduce the room quota per shift for its housekeepers, at the request of the Union, should rescission of the changes to the housekeepers' job duties due to the renovation of rooms not be fully practicable;
- (c) Upon request, bargain in good faith with the Union as the employees' exclusive collective bargaining representative for an agreement regarding, and/or an overall collective bargaining agreement containing, terms applicable to housekeepers' workload and duties;
- (d) Provide the Union with all the information it requested on or about November 20, 2020;
- (e) Make whole all housekeepers who have worked since November 5, 2018, for the wages and other benefits lost, including opportunities to earn tips and bonuses as well as the \$4.95 contractual premium per additional room for the additional time they spent because of the changes it made to their cleaning duties without first providing notice and the opportunity to bargain to the Union, and such remedy shall run until one of the following happens: (1) Respondent bargains to agreement with the Union about housekeeper duties in cleaning renovated guest rooms; (2) Respondent reaches a bona fide impasse in bargaining with the Union; (3) the Union fails to timely request bargaining or

- commence negotiations after receipt of Respondent's notice of its desire to bargain; or (4) the Union fails to bargain in good faith;
- (f) Within 14 days after service by the Region, post at its facility in Anchorage, Alaska, copies of the attached notice marked Appendix.³¹ Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent; and
 - (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NOTICE

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

Unite Here! Local 878 (“Union”) is the exclusive collective bargaining representative of our employees in the following unit (“Unit”):

All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at our facility located at 500 West 3rd Avenue, Anchorage, Alaska.

WE WILL NOT refuse to meet and bargain in good faith with your Union about any changes in your terms and conditions of employment before we change your duties.

WE WILL NOT materially change our housekeepers’ duties such that they are required to spend more time per room but still meet the same room-cleaning quota without first providing notice and the opportunity to bargain to your Union about those changes.

WE WILL NOT threaten our housekeepers with discipline for not completing our room-cleaning quotas after we changed their duties without first notifying and bargaining with your Union.

WE WILL NOT fail or refuse to provide your Union with information that is relevant and necessary to its role as your bargaining representative.

WE WILL, upon request, bargain in good faith with the Union as to changes in your terms and conditions of employment and, specifically, the demands on our housekeepers regarding cleaning renovated guest rooms.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Acting General Counsel's Brief to the Administrative Law Judge was served on the 29th day of January, 2021, on the following parties:

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