

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**11 West 51 Realty LLC d/b/a
The Jewel Facing Rockefeller Center,**

Case No. 02-CA-256884

Respondent,

and

**New York Hotel & Motel Trades
Council, AFL-CIO,**

Charging Party.

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

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STATEMENT OF THE CASE

On February 20, 2020, The New York City Hotel and Motel Trades Council, AFL-CIO, (herein the Union), filed a charge in Case No. 2-CA-256884, alleging, *inter alia*, that 11 West 51 Realty LLC d/b/a The Jewel Facing Rockefeller Center (herein Respondent), within the past six months had made unilateral changes in terms and conditions of employment of its employees without first bargaining with or notifying the union, in violation of Section 8(a)(5) of the Act.

After investigation of the above charge, on August 4, 2020, the Regional Director of Region 2 issued a Complaint and Notice of Hearing (G.C. Exh. 1(c)) alleging that Respondent violated Section 8(a)(1) and (5) of the Act by making changes to certain terms and conditions of employment without notice and an opportunity to bargain with the Union. These changes included: (1) After September 2019, implementing new work rules for Floor Attendants, by requiring them to place four large King Size pillows on all beds in a room; (2) In about December 2019, discontinuing its policy of awarding a wage increase of two dollars per hour¹ upon an employee's two-year anniversary date; and (3) Beginning in about January and February 2020, modifying its vacation policy by declining to permit employees to take more than two weeks of paid vacation.

Respondent, by its Answer dated August 17, 2020 (G.C. Exh. 1(e)), denied the substantive allegations in the Complaint concerning the unilateral changes outlined

¹ At trial, after relevant evidence and testimony was adduced, Acting General Counsel amended this section (paragraph 7 of the Complaint) to allege an increase of "at least three dollars per hour" to conform to the evidence adduced. (Tr. at 158-159).

above.² A hearing on the above-described allegations was held before Administrative Law Judge Benjamin Green, remotely via the zoom platform, on January 11 and 12, 2021.

Background

Respondent operates a hotel named the Jewel Facing Rockefeller Center (herein the Jewel or hotel) in midtown Manhattan on West 51st Street (GC. Exh. 1c at par. 2(a)). Apparently, the Jewel is among a family of hotels operated by Club Quarters (Tr. 105-106). The hotel employs several categories of employees, among them Floor Attendants, also called housekeepers (Tr. 43, 85). The hotel also employs a category of employees called Guest Service Managers or GSMs. These employees are front desk clerks at the hotel (Tr. 19).

After a Board- supervised election in August 2019, the union was certified on September 4, 2019 as the exclusive bargaining representative of approximately 35 non-supervisory employees at the hotel, including but not limited to Floor Attendants and Guest Service Managers (GC Exh.1(c) at par. 5), Tr. 106).

Two-year anniversary wage increase

Lisbeth De Jesus holds the position of “Guest Service Manager” or “GSM” at the Jewel. (Tr. 19). Functionally, the position is that of a front desk clerk (Tr. 19). De

² Respondent had initially denied that the Union is a labor organization within the meaning of Section 2(5) of the Act but at the beginning of the trial, Respondent stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act, as alleged in Complaint paragraph 3 (Tr. 9). At trial, Respondent also stipulated, with respect to Complaint paragraph 9(b), that it is not claiming any notice was provided to the Union regarding the unilateral changes alleged in paragraphs 6, 7 and 8, but instead is asserting that those alleged changes did not occur. (Tr. 10).

Jesus commenced her employment on or about December 20, 2017 (Tr. 19). DeJesus testified that when she was hired, she asked her front desk clerk manager at that time, Anthony McDonald and an HR Department employee named Vanessa (apparently Vanessa Frattaroli—see Resp. Exh. 3, at Appendix A) whether she would be receiving a raise on her one-year anniversary of December 20, 2018. Both managers told De Jesus that she would not get a raise on the one year anniversary, but would be due a raise on her two- year anniversary, December 20, 2019. De Jesus’s recollection is that Vanessa told her, and McDonald confirmed, that she would get a \$2 per hour raise on that second anniversary (Tr. 21-22).

It is uncontroverted that on her two-year anniversary, December 20, 2019, De Jesus met with her Front Desk Manager, who by that point was Rene Lopez (Tr. 23). Nobody else was present at this meeting. De Jesus reminded Lopez about what Anthony McDonald and Vanessa had told her: that she would be due for a raise on her two-year anniversary. Since it was her two-year anniversary, she asked Lopez where her raise was (Tr. 24). Lopez acknowledged that she would have received her raise, agreeing that “was the way it usually goes.” But Lopez said he would not be able to do it and that all raises were on hold because of ongoing union negotiations.(Tr. 24)³ On January 10,2020, De Jesus sent a follow up email to Lopez regarding the issue of the two-year anniversary raise, as well as on sick and vacation pay issues. Lopez, in his reply email dated January 12, 2020, pledged to follow up with General Manager

³ De Jesus’s testimony about this conversation stands unrebutted. She was not cross-examined. Lopez was not called as a witness for Respondent. De Jesus tape recorded this meeting and that tape recording was admitted into evidence as GC Exhibit 3A. A transcript of that tape was admitted as GC 3B after Respondent stipulated that the transcript was an accurate representation of the taped recording (Tr. 31-32). Lopez’s statement about negotiations occurs just before the 3:00 mark of the tape.

Anthony McDonald on these matters. In that same email, Lopez repeated what he had initially told De Jesus was the reason she had not received her scheduled 2-year anniversary wage increase. In his words, the company and union “are in the middle of negotiations and monetary incentives and salary raises will only be considered after the current status quo.” (G.C. Exh. 4)

On January 23, 2020, De Jesus had a second in-person meeting with Hotel General Manager Anthony McDonald regarding her 2-year anniversary raise. (Tr.34) It is undisputed that De Jesus asked McDonald why she was not getting the 2-year anniversary raise, which she understood at the time was a 2 dollar per hour raise. McDonald told her the reason for the failure to pay her that raise was negotiations with the Union, but that it would be paid to her once those negotiations were settled (Tr. 35). Thus, McDonald acknowledged that she was entitled to the raise. (GC. Exh.5A and 5B, just after the 1:00 minute mark on the tape). Later on in the conversation, while discussing bonuses, De Jesus returned to the issue of the raise she did not receive and expressed her feeling that she was being “targeted” for unfair treatment (GC Exh. 5A and 5B, just before the 9:00 minute mark). McDonald assured De Jesus that she was not the only one affected, since he believed others would also complain when they don’t receive their anniversary raise (Tr. 35, GC Exh. 5A and 5B, just after the 9:00 mark). He mentioned one employee by name: “Leslie.” Leslie Kolancian is one of the other Guest Service Managers at the hotel (Tr. 35, GC Exh. 8). He also mentioned someone named “Nicky,” but then recalled that Nicky was at her maximum salary and would not necessarily be due for a raise. But McDonald, in discussing the wage freeze, explained to De Jesus that she was the one affected by this change in policy because

she was the only one whose anniversary fell within the period during which union negotiations were occurring (GC. Exh. 5A and 5B, just after the 9:00 minute mark). In McDonald's words: "So, but, you're the one that's, you're what do you call it, anniversary fell in that time, so that's why you're the one that's not seeing that. Everyone happened before that."

McDonald admitted that De Jesus was due her second anniversary increase in December 2019 (Tr. 208). He testified that he had a "mistaken" understanding that wages could not be increased and that there was a wage freeze because of negotiations with the Union (Tr. 208). McDonald further testified that he now knows his understanding was incorrect, but he did not specify when he learned it was incorrect (Tr. 208). In this regard, McDonald acknowledged that he never told De Jesus that he had been mistaken, and that to date, he has not granted her the two-year anniversary increase (Tr. 213).

With respect to the policy of granting the 2-year anniversary increase, on cross-exam by General Counsel, McDonald expressed familiarity with the hotel wage schedules. He also agreed that the hotel refers to the 2nd year anniversary as the beginning of the third year and that December 2019 was the beginning of the third year of De Jesus's employment (Tr. 212). Finally, when shown one of the wage schedules, McDonald admitted that De Jesus would have received a raise in December 2019 to \$29.30 per hour, from her rate at that time of \$25.86 (Tr. 212).

Documentary evidence that employees receive wage increase on 2-year anniversary date

Acting General Counsel Exhibits 7, 8, 9, and 10 show the wage increases granted to four other Guest Service Managers at the hotel. These exhibits comprise the

“employee compensation change” forms for each of these individuals. They were provided by Respondent pursuant to General Counsel’s Subpoena Duces Tecum. Consistent with the testimony cited above, the documents show that all four received a significant raise on their 2-year anniversary, or alternatively on or around July 1 of the year of their second anniversary.⁴ All in all, the pattern of these second year anniversary increases shows amounts ranging from \$3.00 per hour (Hakim) to \$3.96 per hour (Kolancian). Additionally, Acting General Counsel Exhibit 11 shows the current wage of Lisbeth De Jesus to be \$25.86. Based on McDonald’s admission that she would have received a second year anniversary raise in December 2019 to \$29.30 per hour, that raise (\$3.44) is consistent with the range of raises of the other Guest Service Managers of between 3 dollars and 4 dollars per hour. Accordingly, Counsel for the Acting General Counsel amended paragraph 7 of the Complaint to allege the amount of the expected 2 year anniversary increase, from \$2.00 per hour, to “at least \$3.00 per hour” (Tr. 159).

Respondent changed its vacation policy to limit vacations to no longer than 2-weeks in 2020

It is undisputed that, as per the Employee Handbook, employees at the Jewel accrue vacation week entitlements based on years of service. After one year of service,

⁴ Respondent stipulated to the start of employment dates for each of these employees (Tr. 156). Krystal Flowers, who commenced employment in 2016, received a raise to \$27.44 from \$24.33 on her 2nd year anniversary or the beginning of her third year in 2018 (GC Exh. 7). Leslie Kolancian, who commenced employment on June 22, 2015, received a raise to \$27.44 from \$23.50 on her second year anniversary in 2017 (GC. Ex 8). Sandy Huang, who commenced employment on August 29, 2014, received a raise to \$26.50 from \$22.13, in the year of her second anniversary. (GC Exh. 9). Finally, Abraham Hakim, who commenced employment on June 13, 2015, received a raise to \$26.50, from \$23.50, in 2017 in and around the time of his second anniversary (GC. Exh. 10).

employees receive two weeks of vacation. After five years of service, employees receive three weeks of vacation. And after 10 years of service, employees are entitled to four weeks of paid vacation. (GC Exh. 6, Resp. Exh. 3, at page 23, Tr. 81).

It is also undisputed that prior to 2020, employees regularly took their full complement of vacation weeks. So, for example, Havo Djeka, a floor attendant, also known as a housekeeper, testified that she commenced employment on March 27, 2010 (Tr. 42). As such, she reached her five year mark in 2015 and was thereafter entitled to 3 weeks of vacation (Tr. 50-51). Since 2015, Djeka always took her three paid weeks off, although sometimes she chose not to take those weeks off consecutively. In 2019, for example, she took 2 weeks off at one time and one additional week at a different time (Tr.51). In 2018, she took her 3 weeks off consecutively and was approved for another 4 days unpaid (Tr. 52.). Respondent Corporate Vice President Len Wolin acknowledged that employees in general, from 2017 through 2019, were regularly taking their allotments, as specified in the aforementioned Employee Handbook, in particular admitting that those with more than five years were taking 3 paid weeks off (Tr. 175). Wolin also acknowledged that during the period from January 1, 2020 to March 28, 2020 (at which time all hotel employees were laid off because of the pandemic) Anthony McDonald, the hotel general manager was handling vacation requests (Tr. 164-165).

In and around late January or early February 2020, floor attendant Djeka, was eating lunch with 3 of her co-workers, in the fourth floor lunchroom. (Tr. 54-55). General Manager Anthony McDonald came in and announced that for this year (2020) there would be no more than 2 weeks of vacation (Tr. 55 and 57). McDonald offered no

reason for this change. Djeka testified that at that time, she had not been planning a vacation for 2020 and had not requested any vacation time (Tr 57). But she spoke up when McDonald made his announcement, telling him that this was okay for this year but that next year when she would have 10 years of seniority, she would take her 4 weeks of vacation (Tr. 56). McDonald responded by shaking his head from side to side as if to indicate “no” and said “let’s see what happens next year”(Tr. 57). Djeka testified that after McDonald left the room, Djeka was explaining to her co-worker Angelica that according to McDonald, she can have no more than two weeks vacation in 2020 (Tr. 59-60). At around that time, apparently after overhearing the discussion, Human Resource Manager Fedelina Escoto Reyes came in and told the employees “you know why you can’t [have more than two weeks] –because you are asking for the Union.” (Tr. 60).⁵

Respondent introduced a spreadsheet, which, according to witness Len Wolin, is a report done by the hotel’s payroll department at his request (Tr. 130). The report appears to show all requests for time off by employees from September 1, 2019 to March 28, 2020 (Resp. Exh. 4). These requests, according to Wolin, at least since about the middle of 2016, are made online by employees in the hotel’s “Dayforce” payroll system (Tr. 129, 171-172). The document shows the name of the employee, the

⁵ Respondent’s witnesses, McDonald and Reyes, denied that they made the statements about vacation entitlements in 2020 testified to by Djeka (Tr.191-192, 209). McDonald just issued a general denial, while Reyes asserted that she recalls speaking with Djeka and other floor attendants about vacation policy in January or February of 2020. According to Reyes, those floor attendants asked if they could take more than their entitlement to go home to Europe for vacation. And also, according to Reyes, she told them that they would need to go through the hotel manager to have that extra time approved (Tr. 191-192). Reyes denied ever mentioning the Union in her conversation with the floor attendants (Tr. 192).

type of time off requested, the dates and number of days requested, and the status of the request, which includes “approved,” “denied,” and “pending.” As to type of time off requested, the categories of “sick day” and “vacation” seem self-explanatory. As to a third designation in this online system, “unavailable,” Wolin testified that he was not sure how those requests get processed, but speculated that this might mean “I can’t work on that day.” (Tr. 168-169). Wolin was not sure whether this category denoted paid or unpaid time off. As to the amount of days requested, Wolin explained that a request listed in the system for 14 days was for 14 calendar days, meaning 10 workdays or two work weeks (Tr. 176-177). Finally, Wolin testified that the hotel asks employees to request their vacation as early in the year as possible (Tr. 178-179).

The spreadsheet reveals no requests or approvals for vacation time, or of other types of time off, of more than two weeks in 2020. More specifically, the one approved request for two weeks (14 days) was designated in the “unavailable” category so that it is not known if this was for paid time off or even if it was for vacation time (See Resp. Exh. 4 at the entry for “Miriam Rajpaul”).

New work rules for floor attendants requiring them to place four large king size pillows on all Beds in a room

This change pertains to the protocols for the floor attendants concerning: (1) the number of pillows the hotel required them to place on each bed in a room; and (2) the size of the pillows that the hotel required them to place on each bed. Two witnesses, Havo Djeka and Oana Georgescu, testified about this issue for the Acting General

Counsel. Djeka has worked at the hotel since March 2010 and Georgescu commenced her employment on July 21, 2019 (Tr. 43, 84). Both witnesses testified about several interrelated changes regarding the number and size of pillows required, all of which were implemented by the hotel after the Union achieved certification in September 2019. With regard to this change, as with the other two unilateral changes involved in this case, Respondent admits that it neither gave notice to the Union in advance nor negotiated with the Union over these changes (Tr.10).

Havo Djeka testified consistently on both direct and cross-examination that prior to the Union election on August 27, 2019, king size beds had 2 king size pillows and 2 queen size pillows (Tr. 45-46, 65). While Djeka admitted that 2 of the upper floors in the hotel (14-15) had queen size beds only (Tr. 75), she clarified on redirect examination, that before the Union election, the size of pillows on king size beds consisted of 2 king size and 2 queen size, with queen beds having queen size pillows only (Tr.76-77).

Oana Georgescu largely corroborated Djeka in this regard. On direct examination, Georgescu explained that prior to the Union election on August 27, 2019, king size beds had 2 king size plus 2 queen size pillows and queen size beds had just two pillows (Tr. 85-86). According to Georgescu, those two pillows might be king size or queen size.

Both employees testified that this protocol or operating procedure changed after the Union election. It appears Georgescu got wind of this change before Djeka. Georgescu testified without contradiction that, in and around November 2019, the hotel's General Manager at that time (Zvi Cohen) told her that he was going to buy new

king size pillows and was “going to want us to use only four king size pillows on each bed” (Tr. 87). Georgescu testified that was the first time she was told she would need to put four king size pillows on both king and queen size beds (Tr. 87, at lines 22-24). But Georgescu also testified that this new policy was not implemented until February 2020 when some newly purchased king size pillows arrived (Tr. 88). At that time, Georgescu was working on the top floors and was required to put four new king size pillows on both king and queen size beds (Tr.88). Djeka testified to a similar experience, but apparently had not known in advance of this change. Djeka noted that the hotel brought in the new king size pillows in February, which she described as much larger than queen size pillows. (Tr. 46-48). Djeka described this change as a “big change” because the new king size pillows, four of which were required on all beds for the first time, were fluffy, fatter and “a little heavy.” (Tr. 48-49, 70). Djeka explained on both direct examination and cross-examination that it was not only very difficult to stuff the new king size pillows into the existing pillowcases, it was also difficult to remove them. Djeka added that as a result of the new pillows and the new pillow requirements, she began having pain and complained to her co-workers about it (Tr. 48-49 and 70). On this point, Djeka testified that General Manager McDonald told her that the hotel planned to start with the upper floors and would replace the pillows with new ones in throughout the hotel (Tr. 78).⁶

Georgescu testified similarly, explaining that, beginning in February 2020, she was required to place four of the new king size pillows on all beds, even queen size

⁶ The fact that other floors were not yet affected when the hotel closed on March 28, 2020 due to the pandemic does not mean the hotel did not plan to do so, but simply shows that their plans were interrupted by the closing due to the pandemic.

beds, and that the existing pillowcases were too small for these new large king size pillows (Tr. 88). Georgescu added that it was very hard to squeeze the new pillows into the pillowcases and she ended up with pain in her shoulders, arms and elbows as a result (Tr. 89). In contrast, Georgescu described the old pillows which had been replaced as smaller and easy to bend to shove into a pillowcase (Tr. 92). Georgescu mentioned the problem with the pillows to her co-workers and also reported the problem to the Union (Tr.89, 92). On one occasion which appears to stand out in her memory, Georgescu testified that she was struggling with one of the new pillows when she heard a crack in her shoulder and experienced pain. She reported this to General Manager Anthony McDonald. While Georgescu continued to work, she did take painkillers and bought an elastic strap to hold her shoulder in place to limit its movement (Tr. 90-91). Respondent's witnesses on this issue, Corporate Vice President Len Wolin and General Manager Anthony McDonald, conceded that the hotel began to purchase new king size pillows in February 2020. Respondent witness testimony and company documents show one shipment of 60 pillows and another intended shipment of an additional 60 (Tr. 122-123, Resp. Exh. 8). Further, while there is no evidence that Respondent ever notified the Union about its new pillow requirements, Georgescu testified that the General Manager Zvi Cohen gave at least some floor attendants advance notice, in November 2019 of the hotel's intention to both purchase new king size pillows and also to begin to require four of these new pillows on all beds, stands unrebutted (Tr. 87). But Respondent attempted to minimize the change. Respondent introduced documents showing that the new king size pillows weighed 50 ounces each while the old ones weighed 52 ounces (Resp. Exhs. 8 and 9). Nevertheless, Respondent witness Wolin

also readily admitted that the old pillows had been in use for a number of years and that such old pillows would not have the same heft or puffiness as brand new pillows out of the box (Tr. 186-187).

Respondent also introduced evidence and elicited testimony in an attempt to establish that any change in the number of pillows required, and in their size, was limited in scope to the upper floors of the hotel, meaning about 40 rooms, or about one third of the total rooms in the hotel (Tr. 110).⁷ Respondent also introduced a multi-paged online document titled “SOP” or “standard operating procedures” which contains a chart on page 1 indicating that “2 k” and “2 k” pillows (purporting to mean 4 king size pillows on each bed) is the standard for this particular hotel (Resp. Exh. 1, at page 1, Tr. 114-115).

ARGUMENT

Introduction

An employer violates Section 8(a)(5) of the Act when it unilaterally alters wages, hours, or other terms or conditions of employment without first giving the Union notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). It is well-settled that an employer is required to continue the status quo after certification with respect to its general business operations. *See, e.g., Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) (employer’s obligation while bargaining for first contract is to maintain status quo consistent with past practice).

In the instant case, Respondent stipulated that it did not provide advance notice to the Union and an opportunity to bargain regarding any of the changes alleged in the

⁷ Len Wolin testified that the hotel has about 135 rooms (Tr. 107).

Complaint and Notice of Hearing (Tr. 10). Therefore, it is undisputed that Respondent did not seek to bargain at all, much less bargain to impasse over its discontinuance of the 2-year anniversary wage increase, the change to the vacation policy of limiting vacation time to no more than 2 weeks in 2020, and the substantial change to working conditions involving requiring more, and newly purchased, king size pillows on all beds in the guestrooms.

POINT 1—Respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing the 2-year anniversary wage increase.

The Board, under *Katz*, supra, and its progeny, holds that the duty not to make unilateral changes and therefore to maintain the status quo imposes an obligation upon an employer not only to maintain that which has already been given to employees, but also to “implement benefits which have become conditions of employment by virtue of prior commitment or practice.” *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), *enfd. mem.* 718 1088 (4th Cir. 1983). *Accord: Illiana Transit Warehouse Corp.*, 323 NLRB 111,114 (1997) (employer unlawfully told employees “wages and benefits would be frozen at current levels for the period of negotiation” and unlawfully withheld annual wage increases for this reason). See *Covanta Energy Corp.*, 356 NLRB 706, 714, (2011), quoting *More Truck Lines, Inc.*, 336 NLRB 772 (2001), *enfd.* 324 F.3d 735 (D.C. Cir. 2003).

It is undisputed that Respondent had a known policy of granting a wage increase to employees on their second anniversary. First, McDonald (at a time when he was De Jesus’s department manager) and HR manager Vanessa, told De Jesus, in and around the time of her one year anniversary in 2018, to expect such a raise on her second

anniversary (Tr. 21-22, 24). De Jesus's testimony in this regard stands unrebutted. Second, Front Desk Manager Rene Lopez confirmed to De Jesus that was the normal practice ("that's the way it usually goes") in their conversation on December 20, 2019, which was De Jesus's second anniversary (Tr. 24, GC Exhs. 3A and 3B, immediately before and after the 2:00 minute mark of the tape). Third, General Manager Anthony McDonald in his conversation with De Jesus on January 23, 2020, agreed with De Jesus that she would have received such a raise but for the fact that the hotel was engaged in ongoing negotiations with the Union (Tr. 34-35, GC Exhs. 5A and 5B, at 1:00 minute and 2:00 minute mark of the tape). Fourth, Respondent's records show that De Jesus's fellow front desk clerks Krystal Flowers, Leslie Kolancian, Sandy Huang and Abraham Hakim, all received their regular second year wage increases, ranging from \$3.00 per hour to \$3.96 per hour (See GC Exhs. 7, 8, 9 and 10). It is also undisputed that De Jesus did not receive her 2-year anniversary wage increase and that Respondent knowingly failed and refused to grant DeJesus the 2-year anniversary wage increase. Most significantly, General Manager McDonald specifically admitted that De Jesus would have received a wage increase to \$29.30 per hour in December 2019, from her then current \$25.86 per hour (Tr. 212).

Respondent violated the Act by failing to implement the 2-year year wage increase for Ms. De Jesus, a benefit that had become a condition of employment by virtue of both prior commitment and prior practice. The Board requires employers to maintain the status quo consistent with past practice while bargaining for a first contract. In this regard, see *Jensen Enterprises*, 339 NLRB 877, 877 (2003), where the Board held that an employer violates Section 8(a)(5) if it withholds customary increases during

a potentially long period of negotiations for an agreement covering overall terms and conditions of employment. See also *Illiana Transit Warehouse Corp.*, 323 NLRB 111,114 (1997), *supra*, where the employer threatened to, and did withhold, expected annual wage increases.

Here, General Manager McDonald told De Jesus that customary increases, including her second year anniversary increase, were frozen during the negotiations for a first contract with the Union (Tr. 34-35, GC Exhs. 5A and 5B, at 1:00 and 9:00 minute marks). Respondent, based on the testimony of General Manager McDonald, appears poised to argue that there is no violation because McDonald misunderstood the meaning of maintaining the status quo and thus, made a good faith mistake when he withheld De Jesus's second year anniversary raise. (Tr. 208). Acting General Counsel submits that even if McDonald's testimony that he acted on a mistaken belief is credited, the facts show that Respondent violated the Act. It is not necessary for the Acting General Counsel to prove any discriminatory motive for such §8(a)(5) unilateral changes. *Castle Hill Health Center*, 355 NLRB 1156, 1192 (2010), citing *NLRB v. Katz*, 369 U.S. 736 (1962); *Gulf Coast Automotive Warehouse*, 256 NLRB 486, 488-489 (1981); *Merrill & Ring, Inc.*, 262 NLRB 362 (1982). Moreover, see *Kingsbury, Inc.*, 355 NLRB No. 1195, 1199 (2010) ["mistake is not a defense to the General Counsel's contention that [the Employer] had a duty to notify and offer to bargain"]; *Allied Aviation*, 347 NLRB 248 (2006) (violation even though Employer later claimed that unilateral change in implementing drug policy was a mistake).

Nor can Respondent succeed in defending this violation by arguing that Ms. De Jesus was the only one affected at that particular point in time. In fact, she was the only

one affected at that time, because she was the only one whose second year anniversary occurred during that precise period. McDonald made clear in his January 23, 2020 meeting with her that others would probably soon be affected also, in response to De Jesus's expressed concern that she felt she had been somehow singled out or "targeted" by the hotel's withholding of the wage increase (Tr. 35, GC Exh. 5A and 5B, just after the 9:00 minute mark). Indeed, McDonald's explanation to De Jesus shows that the withholding of the wage increase was in fact a general policy which he was applying, and which would presumably affect others, as long as negotiations with the Union on a first contract continued (Tr. 34-35, 208, GC Exh. 5A and 5B, after 1:00 minute mark and after 9:00 minute mark).

Based on the foregoing, Acting General Counsel submits that Respondent violated Section 8(a)(5) of the Act by discontinuing the second anniversary wage increase.

POINT 2—Respondent violated Section 8(a)(5) of the Act by unilaterally limiting vacation time to no more than 2 weeks in 2020, notwithstanding entitlements based on seniority set forth in existing company policy documents.

Respondent does not contest the evidence that hotel vacation policy prior to the Union becoming certified, provided paid vacation based on seniority and that those with 5 years or more were entitled to 3 weeks, while those with 10 years or more were entitled to four weeks (GC Exh. 6, Resp. Exh. 3, Tr. 126-127). Respondent instead claims it made no changes to its vacation policy in 2020. More specifically, Respondent denies that it told employees that they could take no more than 2 weeks of vacation in

2020 (Tr. 209). Accordingly, resolution of this issue depends in large part on the credibility of the witnesses who testified about this issue.

Acting General Counsel witness Havo Djeka testified about an encounter with General Manager McDonald in late January or early February 2020 in the employee lunchroom. Her testimony about McDonald announcing to her and a few other co-workers that they could take no more than 2 weeks vacation in 2020 was consistent on direct and cross-examination (See Tr. 54-60, 73-74). She testified about this in detail as compared with McDonald, who merely denied, by rote, that he had ever changed the vacation policy or told employees that 2 weeks vacation was the maximum for 2020 (Tr. 209). Djeka's testimony rang true in the sense that it was apparent that she was testifying about an event that stuck in her memory. She recalled a comment she made to McDonald about her own vacation and his response to that comment. In this regard, Djeka admitted that at the time McDonald issued his edict, she was not planning on taking vacation in 2020, but she apparently wanted his assurance that she would be able to take her allotment the next year, which would grow to four weeks since she was soon to reach her ten year mark (Tr. 56-57). In addition to this degree of recall as compared with McDonald, Djeka was someone who presumably was not personally affected in 2020, and thus does not have a countervailing personal interest in shading her testimony, since she was not intending to put in for vacation. For both reasons, including her straightforward demeanor and degree of recall, and lack of any reason to fabricate, her testimony should be given credence.

Further, Djeka is a current employee of Respondent. The Board has long held the testimony of current employees which is adverse to the interests of their employer is

not likely to be false. The Board has noted that when employees testify against the interest of their employer, they subject themselves to the possibilities of recrimination and the perils would be even greater if such testimony was false. *Bloomington-Normal Seating Co.*, 339 NLRB 191 (2003). See also *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006) (quoting *Flexsteel Industries*, 316 NLRB 745 (1995); *The Avenue Care and Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1 (2014) (current employment status may serve as a “significant fact which a judge may rely in resolving credibility issues).

For all of these reasons, Djeka should also be credited as to her testimony that HR Manager Fedelina Escoto Reyes told the employees that they were being limited to 2 vacation weeks in 2020 because they asked for a Union (Tr. 60). While this comment can be construed in more than one way, it certainly is not inconsistent with the announcement made by McDonald. In this regard, Reyes arrived after McDonald had left the lunchroom and was apparently commenting on what she heard the employees discussing in reaction to what McDonald told them. So, while her comment might reasonably also be construed as a statement of animus, for the purposes of the instant allegation involving a unilateral change, her comment confirmed for the employees that the vacation policy was in fact being altered for 2020.

Reyes’s testimony denying this statement is inherently implausible. According to Reyes, while she recalls an occasion when she spoke to Djeka and others about vacation, they supposedly asked her if they could take more than their entitlements to go home to Europe for vacation (Tr. 191-192). She says she referred them to their managers to get such permission. It is true that in the past, as testified to by Djeka, she

was able to get some extra unpaid days off in addition to her 3 week entitlement to travel home to Europe in the summer (Tr. 52). But it is inherently implausible that just after being told 2 weeks is the maximum vacation allowed for 2020, Djeka or the others would have asked the HR person if they could take more than three weeks, which was Djeka's entitlement at the time. Far more plausible is Reyes's comment, as Djeka credibly testified about, reaffirming what McDonald said to the employees about a 2 week limitation, after she heard them discussing the issue with each other.

Respondent acknowledged, through its corporate vice president Len Wolin (Tr. 104) that McDonald, the hotel's General Manager, had the authority to, and during 2020, was primarily responsible for, granting or denying employee requests for vacation time (Tr. 164-165). Thus, based on the credible testimony cited above, he implemented a unilateral change in that policy by telling employees that they could take no more than two weeks of vacation. There can be no claim that this change did not or would not⁸ affect at least those employees who were entitled, per their seniority, to more than 2 weeks per year. McDonald would have had no need to make this pronouncement at all if all hotel employees had less than 5 years of seniority and thus would have been entitled to just 2 weeks in any event (See p. 23 of GC Ex. 6, Resp. Exh. 3). So it is fair to assume that, in addition to Djeka, others at that lunchroom encounter would be affected by the change, which is why McDonald made his

⁸ Ultimately, all hotel employees were laid off on March 28, 2020, due to the Covid 19 pandemic, before the summer season when many presumably take vacation. Respondent Exhibit 4, containing the time off requests and approvals, covers only time off requested after September 1, 2019, and as such does not cover the previous year's summer vacation period for purposes of comparison with 2020. But as referenced above, both Havo Djeka and Len Wolin acknowledged that in years prior to 2020, employees regularly took off their full entitlements to vacation, including those employees entitled to more than 2 weeks by virtue of their seniority (Tr. 52-53, 128, 175).

announcement to that particular group. Respondent admits no notice was provided to the Union regarding this change (Tr. 10). Acting General Counsel submits that a change amounting to a cut of at least one third of a yearly vacation entitlement (for those with 3 or more years vacation) is more than enough to be considered a “material, substantial and significant” change such that it violates Section 8(a)(5) of the Act. See *Albar Industries, Inc.*, 322 NLRB 298 (1996), (change in vacation time required to be used by employees during plant shutdown periods from one week to two weeks); *North Carolina Prisoner Legal Services*, 351 NLRB 464 (2007), [change to full time schedules from reduced hours schedules and concomitant requirement to use accrued vacation time to make up the difference]; *Fresno Bee*, 339 NLRB 1214, 1215 (2003) [change in lunch period and shift times]; *Blue Circle Cement*, 319 NLRB 954, 954 (1995), enfd. in relevant part 106 F.3d 413 (10th Cir. 1997) (change in shift time); *Atlas Microfilming*, 267 NLRB 682, 695–696 (1983), enfd. 753 F.2d 313 (3d Cir. 1985) (extension of lunch period).

Finally, there is the matter of the spreadsheet referenced above, containing data on time off requests, approvals and denials from September 1, 2019 through March 28, 2020 (Resp. Exh. 4). Respondent apparently intends to argue that the data contained therein establishes a defense to the unilateral change violation. While the data does not show any employees who were granted more than two weeks of vacation for 2020, at least as of March 28, 2020 when all hotel employees were laid off due to the pandemic, this is not inconsistent with McDonald’s verbal edict. As noted above, it is true that the document also does not appear to show any requests for vacation or other time off in an amount greater than two weeks, for 2020. Acting General Counsel submits that this is

not surprising, given that the General Manager had told the group of employees, including Djeka, that for 2020, no employee could take more than two weeks. Given that edict, one would hardly expect those employees to go ahead and deliberately flout him, by submitting a request into the system asking for more than two weeks.⁹

Based, on the foregoing, Acting General Counsel submits that the Respondent violated Section 8(a)(5) of the Act by unilaterally limiting vacation time in 2020 to no more than two weeks.

Point 3- Respondent violated Section 8(a)(5) of the Act by unilaterally changing the number and size of pillows required to be placed on beds in the guest rooms.

Acting General Counsel submits that there can be no dispute that Respondent did effect at least some change as to pillow size (new hefty, fluffy king size pillows) and number required per bed (four of the new pillows on every bed), by February 2020. Respondent bought the new king pillows and Acting General Counsel witnesses testified that they were told to put four of these on every bed, on the floors they were working on at the time, as compared with just 2 king size pillows required, even on king size beds, prior to the Union election. The parties also seem to be in agreement, and the evidence appears to reflect, that floor attendants were cleaning about 18 or 19 rooms per day during the relevant period (Tr. 78-79, 202, 205, Resp. Exh. 6) Also, there is uncontradicted evidence that floor attendants are assigned to clean the same bloc of rooms for six months at a time before rotating to an assignment to clean a different group of rooms (Tr. 79-80, 204-205).

Respondent does not claim that notice was given in advance about this change or that this change was bargained. But Respondent appears to contest the scope of the change in terms of how many floors and total guest rooms were affected and appears to intend to argue that the limited scope should result in a finding of no violation.

First, to the extent that Respondent attempts to argue that no change as to requirements for the number of king size pillows actually occurred after the election, that argument must be rejected. There is no Respondent testimony or evidence effectively rebutting the Acting General Counsel witnesses on this point.

There are two glaring deficiencies in the SOP introduced by Respondent, referenced above. First, it is not dated and therefore one must rely on Mr. Wolin's testimony as to when it was first created and put into effect. Wolin claimed it was in effect as a standard by sometime in August 2019, even before the Union achieved certification (Tr. 114-115). But there is nothing on the document which would establish that fact. Second, credibility aside, a more significant infirmity in this document is that Wolin conceded that the SOP is kept online and is only accessible to managers (Tr. 183-184). Thus, there is no evidence that anything contained in the SOP was ever specifically communicated to floor attendants. In that regard, the testimony of Djeka and of Georgescu as to the actual practice and requirements placed on them in the period prior to the union election stands unrebutted. There is simply no credible evidence that any changes were actually implemented until February 2020, in terms of requiring four king size pillows on all sized beds. The testimony of Ms. Djeka and Ms. Georgescu, as noted above, and which should be fully credited, is to the contrary. To the extent that the change, which the hotel began to implement in February 2020, may

have only affected the upper floors as of the time the hotel shut down on March 28, 2020 for Covid-related reasons, that fact as explained below, even assuming it is true, is not a defense to the unilateral change violation.

First, Djeka testified without contradiction that she was told by McDonald that the hotel intended to continue to buy new king size pillows for the whole hotel. It just had not completed that plan as of the time the hotel closed down because of the Covid pandemic in late March. Second, even if the change was ultimately relegated to the upper floors, which comprise one third of the rooms in the hotel, that would still constitute a significant material change sufficient to establish a violation. In order to constitute a violation, a change must be “material, substantial, and significant.” *Peerless Food Products*, 236 NLRB 161 (1978). In this case, both the size (more king size pillows required to be utilized) and the number (four king size on each and every bed compared with two before the election) were changed. As shown by their testimony, this was significant when viewed from the perspective of the floor attendants, who clean 18 to 19 rooms per day. The synergistic effect of using the new rigid pillows which did not fit properly into the pillowcases, and the fact that more of these were now required to be used, clearly caused pain and discomfort for the floor attendants, as they credibly testified. This significantly affected their working conditions, since their daily duties became more onerous as a result. The Board has found changes which affected employee health and safety to constitute the type of material changes which need to be bargained with the Union. In these cases, the Board does not pass judgement on whether the change makes the workers more or less safe or more or less healthy. Rather, the focus is on whether the bargaining representative has

raised a legitimate concern regarding the effect of the change on unit employees. See *Northside Center for Child Development*, 310 NLRB 105, 105 (1993) (employer required to bargain over decisions to stop providing guns to its guards and stop requiring guards to carry guns while on duty because this affected the guards' duties and the union had legitimate concerns for the guards' safety; employer's concerns that guns reduced its clients' safety did not insulate it from duty to bargain). In the instant case, the Union, based on reports from the floor attendants, has legitimate concerns about their health in terms of potential injuries they may suffer from having to wrestle with the new king size pillows and the fact that more of those pillows must be used than in the past.

For all of the reasons outlined above, Respondent violated Section 8(a)(5) of the Act by unilaterally changing the types and number of pillows required to be placed on beds in the guest rooms.

CONCLUSION AND REMEDY

Counsel for the Acting General Counsel urges the Administrative Law Judge to find that the Respondent in this matter has violated Section 8(a)(5) of the Act in the three respects outlined above, and to fashion an appropriate remedy. In this regard, the violation concerning withholding the second anniversary wage increase should be remedied by a Cease and Desist Order, an order that the raise to De Jesus be retroactively implemented, a Notice posting, and make whole relief to Lisbeth De Jesus consisting of backpay with interest in the amount of any wages or other benefits lost to date as a result of the failure to implement her second year anniversary increase. With respect to the unilateral restriction on vacation time for 2020 to two weeks, the remedy should include a Cease and Desist Order and Notice Posting. It is not believed that any

employees lost pay as a result of this unilateral change in addition to losing the opportunity in 2020 to take more than two weeks of time off. However, if that is revealed at the Compliance stage, then make whole relief for those employees would also be warranted. With respect to the unilateral changes involving pillow size and numbers of pillows required, the remedy should include a Cease and Desist Order, Notice Posting and return to the status quo ante, with an opportunity for the union to negotiate over any intended changes to those practices.

Respondent Should Provide W-2 Forms to the Regional Director

Counsel for the Acting General Counsel also respectfully requests that the final Board order in this matter specifically require Respondent to produce appropriate W-2 forms to the Regional Director. In *Tortillas Don Chavas*, 361 NLRB 101 (2014), the Board announced it would routinely require respondents to compensate employees for the adverse tax consequences of receiving lump-sum backpay awards covering periods longer than one year and to file a report with the Social Security Administration (“SSA”) allocating backpay awards to the appropriate calendar quarters. In that decision, the Board (i) explained that allocating backpay to the appropriate earnings periods for tax purposes is consistent with the Board’s make-whole remedial power and (ii) established SSA allocation as a standard remedy. In *AdvoServ of New Jersey*, the Board noted the SSA had not accepted such backpay reports respondents had submitted prematurely. 363 NLRB No. 143, slip op. at 1 (2016). The Board also observed that SSA would not accept backpay reports prior to its receipt of the affected employees’ W-2 forms. *Id.* To address these issues, the Board ordered that respondents send completed reports directly to the Region, which would transmit them to SSA at the appropriate time. *Id.*

The Acting General Counsel therefore requests that, in support of effective administration of the SSA allocation remedy specified in *Tortillas Don Chavas*, the Board require Respondent to submit appropriate W-2 forms to the Regional Director (in addition to the SSA reports). Doing so will allow the Region to compare the information on the W-2 forms and the SSA reports to ensure accuracy and consistency between the two. Experience has demonstrated the SSA will not credit earnings to the correct calendar year where the SSA reports are inconsistent with the corresponding W-2s or the SSA has not received the proper W-2s, leading to lower SSA benefits than those to which some discriminatees would be otherwise entitled. See General Counsel Memorandum 20-02, "Submission of W-2s to the Regional Director," (Nov. 12, 2019). Requiring Respondent to produce the appropriate W-2 forms to the Regional Director will enable Regional personnel to ensure the reports are correct prior to submission to SSA.

The Board ordinarily orders respondents to preserve and, where good cause is shown, provide information to the Regional Director, including payroll records, SSA payment records, timecards, and other personnel records necessary to analyze backpay due under the terms of its orders. See *Ferguson Electric Co.*, 335 NLRB 142 (2001). Ordering respondents to provide W-2 forms in cases involving backpay requires a minimal effort on their part, especially given that they are providing them to SSA already yet doing so will significantly aid the Regions' administrative effectuation of the Board's remedy in the compliance stage.

In sum, ordering Respondent to provide the Regional Director with appropriate W-2 forms serves the goal of ensuring accuracy in the reports and allows Regional

personnel to identify any inaccuracies or inconsistencies before problems arise in this connection at SSA.

Dated at New York, New York
This 16th day of February, 2020

Respectfully submitted,

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CERTIFICATION OF SERVICE

Copies of Counsel for the **Acting General Counsel's Brief to the Administrative Law Judge** have been sent, in the manner indicated below, this day, February 16, 2021, to:

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