

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

**ARBAH HOTEL CORP. d/b/a
MEADOWLANDS VIEW HOTEL**

and

**NEW YORK HOTEL AND MOTEL
TRADES COUNCIL, AFL-CIO**

**Cases 22-CA-257539
22-CA-259975**

**COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Sharon Chau
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
(862) 229-7046

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	.1
II.	ISSUES	.1-2
III.	BACKGROUND AND PRIOR UNFAIR LABOR PRACTICES.	.2
IV.	STATEMENT OF THE FACTS	.3-17
	Respondent's Defense.	.12-17
	The Terminations and Subcontracting.	.12-16
	The Failure to Provide Information.	.16-17
V.	ARGUMENTS	.17-33
	1. Respondents Disparaged and Denigrated the Union, In Violation of Section 8(a)(1) of the Act.	.17-19
	2. Respondents Terminating All Unit Employees, in Violation Of Section 8(a)(3) of the Act.	.19-22
	3. Respondent Terminated Unit Employees Without Prior Notice To the Union and Without Affording the Union An Opportunity to Bargain, in Violation of Section 8(a)(5) of the Act.	.22-26
	4. Respondent Subcontracted Unit Work to Agency and/or Non- Unit Employees Without Prior Notice to the Union and without Affording the Union an Opportunity to Bargain, in Violation of Section 8(a)(5) of the Act.	.26-30
	5. Respondent Failed and Refused to Furnish Relevant Information Requested by the Union Concerning the Termination Of the Entire Unit of employees and Subcontracting of Unit Work, In violation of Section 8(a)(5) of the Act.	.30-31
	6. Respondent Unlawfully Withdrew its Recognition of the Union As the Exclusive Collective Bargaining Representative of the Unit Employees, In violation of Section 8(a)(5) of the Act.	.31-33
VI.	CONCLUSION	.34

TABLE OF AUTHORITIES

Cases

<i>A-1 Door & Building Solutions</i> , 356 NLRB 499 (2011).	30
<i>Affiliated Foods, Inc.</i> , 328 NLRB 1107 (1999).	19
<i>Albert Einstein Medical Center</i> , 316 NLRB 1040 (1995).	17
<i>Alpha Associates</i> , 344 NLRB 782 (2005).	25
<i>Arbah Hotel Corp. v. NLRB</i> , -- F. App'x --, 2021 WL 567513, at *1 (3d Cir. Feb. 16, 2021), enforcing, 368 NLRB No. 119 (2019).	.2, 8, 23, 33
<i>Austal USA, LLC.</i> , 356 NLRB 363 (2010).	19
<i>Billion Oldsmobile-Toyota</i> , 260 NLRB 745 (1982)..	17
<i>Boeing</i> , 364 NLRB No. 24 (2016).	30
<i>Bottom Line Enterprises</i> , 302 NLRB 373 (1991) enfd. 15 F.3d 1087 (9 th Cir. 1994).	24
<i>Carib Inn San Juan</i> , 312 NLRB 1212 (1993).	17
<i>Ciba-Geigy Pharmaceutical Division</i> , 264 NLRB 1013 (1982) enfd. 722 F.2d 1120 (3d Cir. 1983)..	23
<i>Comau, Inc.</i> , 364 NLRB No. 48 (2016).	24
<i>Corson & Gruman Co.</i> , 284 NLRB 1316 (1987).	32
<i>Defiance Hospital</i> , 330 NLRB 492 (2000).	24
<i>Endo Painting Service</i> , 360 NLRB 485 (2014).	30
<i>Equitable Gas Co. v. NLRB</i> , Enf Denied 637 F.2d 980 (3d Cir. 1981).	27
<i>Fibreboard Paper Products v. NLRB</i> , 379 U.S. 203 (1964)..	26, 29
<i>Harley-Davidson Motor Co.</i> , 366 NLRB No. 121 (2018).	23
<i>Kitsap Tenant Support Services, Inc.</i> , 366 NLRB No. 98 (2018)	22
<i>Lapeer Foundry & Machine</i> , 289 NLRB 952 (1988).	22, 23

<i>Lehigh Lumber Co.</i> , 230 NLRB 1122 (1977).	17
<i>Lou's Produce, Inc.</i> , 308 NLRB 1194 (1992).	32
<i>Lucky Cab Co.</i> , 360 NLRB 271 (2014).	19
<i>Manno Electric, Inc.</i> , 321 NLRB 278 (1996) enfd. Mem. 127 F.3d 34 (5 th Cir. 1997).	19
<i>Master Window Cleaning, Inc. v. NLRB</i> , 15 F.3d 1087 (9 th Cir. 1994).	24
<i>NLRB v. Advertisers Mfg. Co.</i> , 823 F.2d 1086 (7 th Cir. 1987).	22
<i>NLRB v. Eagle Material Handling, Inc.</i> , 558 F.2d 160 (3d Cir. 1977).	21
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).	22, 26
<i>NLRB v. Omnitest Inspection Servs.</i> , 937 F.2d 112 (3d Cir. 1991)..	22
<i>NLRB v. Rain-Ware, Inc., Inc.</i> , 732 F.2d 1349 (7 th Cir. 1984).	19
<i>NLRB v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956).	31
<i>NLRB v. 1199 National Union of Hospital and Health Care Employees</i> , 824 F.2d 318 (4 th Cir. 1987).	22
<i>Oster Specialty Products</i> , 315 NLRB 67 (1994).	17
<i>Pan American Grain Co.</i> , 351 NRB 1412 (2007).	22, 23
<i>Paramount Poultry</i> , 294 NLRB 867 (1989).	32
<i>Parkview Furniture Mfg. Co.</i> , 284 NLRB 947 (1987).	18
<i>Pontiac Osteopathic Hospital</i> , 336 NLRB 1021 (2001).	24
<i>Port Printing & Specialties</i> , 351 NLRB 1269 (2007) enfd, 589 F.3d 812 (5 th Cir. 2009).	24
<i>Prudential Insurance Co. of America</i> , 317 NLRB 357 (1995)	17
<i>Raskin Packing Company</i> , 246 NLRB 78 (1979).	24
<i>Southern California Gas Co.</i> , 344 NLRB 231 (2005).	30

<i>RBE Electronics of S.D., Inc.</i> , 320 NLRB 80 (1995).	23
<i>Temp Masters, Inc.</i> , 344 NLRB 1188 (2005).	19
<i>T&J Trucking Co.</i> , 316 NLRB 771 (1995).	19
<i>Torrington Enterprises</i> , 307 NLRB 809 (1992).	26
<i>Tri-Tech Services, Inc.</i> , 340 NLRB 894 (2003).	22, 23
<i>United Graphics</i> , 281 NLRB 463 (1986).	30
<i>Wayron, LLC</i> , 364 NLRB No. 60 (2016).	32
<i>Westinghouse Electric Corp.</i> , 150 NLRB 1574 (1965).	28
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enfd.</i> 662 F.2d 899 (1 st Cir. 1981) cert. denied 455 U.S. 989 (1982).	19

I. STATEMENT OF THE CASE

On July 28, 2020¹, the Regional Director for Region 22, acting for and on behalf of the General Counsel for the National Labor Relations Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Consolidated Complaint”), as amended at the hearing, alleging that Arbah Hotel Corp. d/b/a Meadowlands View Hotel (“Respondent”) engaged in unfair labor practices affecting commerce within the meaning of Section (a)(1), (3) and (5) of the Act. [GC 1(h), Tr. 29].² In its Answer to the Consolidated Complaint, Respondent generally denied the unfair labor practices set forth in the Consolidated Complaint. [GC 1(j) and (h)]. Pursuant to the Notice of Hearing, a hearing in the instant case was held by videoconference before Administrative Law Judge Jeffrey Gardner on January 21 and 22, 2021.

II. ISSUES

1. Did Respondent disparage and denigrate the Union, in violation of Section 8(a)(1) of the Act, by telling employees that the Union:
 - Refuses to bargain in good faith for a successor collective-bargaining agreement,
 - Does not care if employees lose their jobs,
 - Is responsible for the employees’ loss of employment,
 - Would not allow Respondent to provide insurance for the employees,
 - Because the Union has taken Respondent to court, it no longer has money to pay them, and
 - Because the Union refuses to negotiate for a collective-bargaining agreement, Respondent will have to close all Union departments.

2. Did Respondent terminate all bargaining unit employees, in violation of Section 8(a)(3) of the Act?

¹ All subsequent dates are in 2020 unless otherwise indicated.

² As used herein, “GC” refers to the General Counsel’s exhibits, “R” refers to Respondent’s exhibits, and “Tr.” refers to the pages of the official transcript.

3. Did Respondent terminate all bargaining unit employees without prior notice to the Union and without affording the Union an opportunity to bargain, in violation of Section 8(a)(5) of the Act?
4. Did Respondent subcontract bargaining unit work to Agency and/or non-bargaining unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain, in violation of Section 8(a)(5) of the Act?
5. Did Respondent fail and refuse to furnish relevant information requested by the Union concerning the termination of the entire unit of employees and the subcontracting of bargaining unit work, in violation of Section 8(a)(5) of the Act?
6. Did Respondent withdraw its recognition of the Union as the exclusive collective-bargaining representative of the bargaining unit employees, in violation of Section 8(a)(5) of the Act?

III. BACKGROUND AND PRIOR UNFAIR LABOR PRACTICES

Respondent operates a hotel in North Bergen, New Jersey, and began a collective bargaining relationship with the Union in approximately January 2011. The parties entered into a collective bargaining agreement, effective July 1, 2011 through June 30, 2015, which covered all room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiters, waitresses, busboys and dishwashers (“Unit”) (GC 2). Although the parties commenced negotiations for a successor agreement in May 2014, no agreement has been reached. Instead, Respondent disregarded the Act, which led to a series of unfair labor practice charges being filed in 2017 and 2018. On November 29, 2019, the Board issued an Order affirming an ALJ Decision issued on December 20, 2018, finding Respondent to have unlawfully discharged a Union shop steward, threatened and then ceased to make contractually required health insurance contributions, unlawfully denied Union Representatives, including George Padilla, access to its facility, bypassed the Union and dealt directly with Unit employees, and refused to bargain. See *Arbah Hotel Corp. et al.*, 368 NLRB No. 119 (2019), enf’d, -- F. App’x --, 2021 WL 567513 (3d Cir. Feb. 16, 2021).

IV. STATEMENT OF THE FACTS

Following the issuance of the November 29, 2019 Board decision, Amy Bokerman³ emailed Respondent's counsel, David Shivas, on December 2, 2019 and December 10, 2019, requesting to discuss the decision. Shivas did not respond. (GC 5, Tr. 148) Bokerman also emailed Shivas from August 2019 to January 2020, seeking to resume negotiations for a successor contract. (GC 3 & 4, Tr. 144-145)

The parties finally met on February 6 at the U.S. District Court building in Newark, New Jersey for a very brief session, lasting only 15 to 20 minutes. Present were Shivas, Mark Wysocki⁴, Manager Desiree Ruiz, Richard Maroko⁵ and Bokerman. At this meeting, Respondent did not present any proposals but merely objected to the format of the Union's proposal. At no time did Respondent mention any inability to pay the workers or that layoffs were possible. (Tr. 145-148) Later that day, Shivas emailed Maroko and Bokerman a copy of the same contract proposal that Respondent had provided to the Union in 2018, to evince the desired format. Contrary to Wysocki's unsubstantiated testimony that he had emailed new proposals on behalf of Respondent to the Union after the February 6 meeting, it is undisputed that the contract attached to Shivas' February 6 email was already two years old at that point and contained no new proposals. (GC 43 & 44, Tr. 245-246, 270-273)

Amidst the Union's push for contract negotiations and the ongoing legal proceeding in the prior NLRB cases, Respondent decided to terminate the entire Unit and subcontract the Unit work. In anticipation of the mass termination, Wysocki entered into a "Staffing

³ Bokerman was the Union's Assistant General Counsel from January 2011 to August 2020 and became the Union's General Counsel in August 2020. (Tr. 142)

⁴ Wysocki has been employed by Respondent since 1997 and became its Regional Vice President in 2005. (Tr. 181)

⁵ At the time, Maroko was the Union's General Counsel. (Tr. 168)

Agreement” with Express Employment Professionals (“EEP”) on February 20, 2020 to hire agency employees to perform Unit work at the hotel. (GC 26 & 27, Tr. 254) It is un rebutted that Respondent gave no notice to the Union of the decision to terminate Unit employees or subcontract Unit work. (Tr. 109-110, 143-144)

Nine days, later, Respondent terminated the entire Unit. On February 29, Manager Vanessa Rubio (“Rubio”) held a meeting with the Unit employees who were working at the hotel on that day. She told them that they were being fired and that she was fired as well. Rubio then handed each employee a termination letter that stated the terminations were due to “[r]eorganizations, productivity initiatives, market demands, profitability issues... – any one of these situations may require organization redesign and reallocation of resources. The termination of your services will be effective as of February 29, 2020.” (GC 39, Tr. 40-43)

Laundry employee Fausta Flores was not at work on February 29 but received a text from supervisor Francina on that day to report to work the next day, March 1. When Flores arrived at the hotel on March 1 at 7 am, she observed that the café and laundry room were locked and the time clock was removed. Laundry employee Cecilia Guevara was at the hotel and told her that they were terminated⁶. (Tr. 61-62) As other Unit employees reported to work, they learned of their terminations and waited for Wysocki. At about 1:30 pm, Wysocki and Rubio addressed them in the lobby. (Tr. 44-47) Guevara and Flores testified, and Flores’ video recording corroborates, that Wysocki addressed the employees saying the Union was to blame for the terminations, the Union was unreasonable and had refused

⁶ Guevara worked on February 29 and was one of the employees who received a termination letter from Rubio. (Tr. 39-43)

to bargain over a contract, the contract the Union wanted would bankrupt the Hotel, and the Union did not care if the workers lost their jobs. Wysocki further said that the Union had cost them \$300,000 in legal fees and that the money could have gone toward the workers' salaries, that the Union would not allow him to provide the workers with Respondent's health insurance, and that the Union prevented him from speaking to the employees. Rubio translated portions of what Wysocki said and she told the workers, in Spanish, that the Union refused to negotiate a successor contract and insisted on Respondent signing a contract comparable to what Manhattan hotels have signed and Wysocki would have to close down all Union departments, and that the Union did not care if employees lost their jobs. It is important to note that neither Wysocki nor Rubio made any references to the ongoing COVID-19 pandemic as the cause of Respondent's financial bind while there were countless references to the Union and the prior NLRB case against Respondent. (GC 7 & 8) The relevant portions of the recording are set forth below:

Speaker⁷	Foreign Language	English Translation	Transcript Page #	Minute: Second on Video
Speaker 1 Wysocki		I cannot allow you to come here with the Union and strike [Unintelligible].	3	2:06
Speaker 1 Wysocki		This is your Union, but this is a business. They, they, they very unreasonable, for two years I'm trying to explain to them that if they're going to be so, stiff and strong with negotiations, everybody will lose their jobs.	3	3:00
Speaker 1		Listen, look, I'm not saying it's...it's over, but I need...The	4-5	4:03

⁷ After reviewing the video recording at the hearing, the ALJ concluded that Speaker 1 was Wysocki, Speaker 6 was Rubio, Speaker 3 was employee Fausta Flores, Speaker 5 was employee Cecilia Guevara and Speaker 9 was employee Jose. (GC 7 & 8, Tr. 86-87)

Wysocki		Union will have to ...contact me and we'll have to work to...And I told them: "listen, guys, [Unintelligible], I told them, [Unintelligible] Everybody would lose their jobs, because this place would go bankrupt. They don't... they don't hear.		
Speaker 6 Rubio	Y ellos no han querido negociar, ellos siguen insistiendo que tenemos que firmar ese contrato. Y la última es ya, las últimas veces que él fue la Unión le dijo, claramente le dijo, a mí no me importa [Unintelligible]...	And they have not be willing to negotiate, they continue to insist we sign that contract. The last one is, the few last times he went to the Union, they told him, clearly told him they do not care [Unintelligible]...	5-6	5:15
Speaker 6 Rubio	Claro... y... yo ya varias veces les digo, vas a... va a llegar un punto que nos va a, bueno... que le va a tocar cerrar todo los departamentos de la Unión, si no quieren seguir negociando...	Of course... and... I have told them several times you're going to have to... we are going to reach a point that, well... you are going to have to close all the Union departments if they don't want to continue negotiating...	6	5:30
Speaker 5 Employee Cecilia Guevara	...porque no va a ser ahora... para mañana decirme que yo no tengo trabajo...	...because it cannot be he tells me today I don't have a job tomorrow...	6	5:38
Speaker 7 Unidentified Employee	Debieron hacerlo antes que empezar la temporada.	They should have done it before the season started.	6	5:47
Speaker 5 Employee Guevara	Dan 30 días para ver qué uno puede hacer.	They give 30 days for us to see what we are going to do.	6	5:50
Speaker 7 Unidentified	[Unintelligible] para que uno se planificara y tuviera	[Unintelligible] so we can plan and have a job...	6	5:51

Employee	uno trabajo...			
Speaker 6 Rubio	Escúchame la decisión de él se tomó en base de la ultima negociación [Unintelligible]	Listen, the decision was based in the last negotiation [Unintelligible]	6	5:53
Speaker 1 Wysocki		...I can talk to you right now because you, your positions were terminated. Before I couldn't talk to you because the Union prevented me from talking to you.	9	7:40
Speaker 1 Wysocki		Because it is the Union... When I did it last time, you remember last time when we went to the second floor about the... about the insurance? The Union took me to Court, because I was talking to you, and it cost us money, guys I spent three hundred thousand dollars on the lawyers, for your Union! Three hundred thousand dollars! This money could be payed your salary, but they put me to Court right now. I'm on two... two court cases with them! I mean, you know, I know they're trying to put the pressure on me, and everything, I can tell that, because as I said [Unintelligible]...	9	8:04
Speaker 1 Wysocki		I couldn't talk to you guys, I couldn't... here...	21	16:40
Speaker 1 Wysocki		...when you were members of the Union I couldn't come and talk to you. And if I tried, they sue me.	21	16:42
Speaker 1 Wysocki		Because last... because two weeks ago I met with the Union in a Federal Court and they put	22	17:15

		me like... and they didn't give me any other option.		
Speaker 1 Wysocki		Guys! You have your representatives. The Union. You have to be putting pressure on them to close this [Unintelligible] Nobody here in this [Unintelligible]. Union didn't let me to talk to you. Union didn't let you to use the insurance that I provided. The Union don't want to talk to me at all. They took me to court.	25	19:35

On Monday, March 2, Union Vice President George Padilla and Union Representative Thomas Oliva visited the Hotel and asked to meet with Wysocki regarding the terminations. Manager Rubio responded that she was not authorized to discuss the terminations. Padilla asked why the front desk employees were still working if all the Unit employees were terminated. Rubio responded that only the “Union employees” were terminated. (Tr. 106-107)

Later that afternoon, at around 1:30 pm, Oliva, Padilla and Shop Steward Mercedes Suarez met with Wysocki and Rubio in the hotel’s breakfast room. The unrebutted testimonial evidence provided by Oliva regarding this meeting is as follows: Wysocki began the meeting by saying that he was disappointed that Padilla had shown up to the Hotel again⁸. The Union agents then asked Wysocki why the entire bargaining unit was

⁸ Wysocki testified that he had asked the Union not to send Padilla to the hotel and to change the Union representative because Padilla had a physical altercation with an employee. (Tr. 227-228) Wysocki’s claim is not only unsubstantiated but was also rejected by the Third Circuit: “The Hotel claims that Padilla got into a ‘fight’ with an employee. Pet’r’r Br. 16. But the record suggests otherwise...” *Arbah Hotel Corp.*, -- F. App’x --, 2021 WL 567513 at 3. Wysocki’s testimony also further revealed his hostility toward the Union. Indeed, Wysocki’s denying Padilla access to the Unit employees at the hotel was found to be in violation of Section 8(a)(5) in the earlier proceeding. See *Arbah Hotel Corp.*, 368 NLRB No. 119, slip op. at 1.

terminated and why the front desk employees were not terminated. Wysocki responded that it was a business decision and that he did not have to provide them with answers. The Union noted that there were non-Unit employees cleaning the rooms and asked for their wage and hour information. The Union also asked Wysocki to provide them with payroll and financial documents if Respondent was contending an inability to pay the Unit employees. Wysocki responded that he did not have to provide any information to the Union and told them to speak to his lawyer. Wysocki then invited the Union to take him to court as they had done in the past. (Tr. 107-109) It is undisputed that Respondent did not provide any of the documents requested by the Union at this meeting. (Tr. 109)

On March 2, Union counsel Bokerman emailed Shivas demanding to bargain over the terminations and reiterating the Union's request for information. She requested specifically, "Please advise what specific changes are set to happen at the Hotel that would necessitate termination of employees. Also please send me a list of each employee who received a termination notice, and also provide their classification, wage rate, and date of hire." (GC 10, Tr. 149-150)

On March 3, Bokerman again emailed Shivas, reiterated the Union's request for information and demand to bargain. She also requested additional items of information based on the Union's March 2 meeting with Wysocki and after receiving a letter in the mail from Respondent on March 2 which was dated February 28, regarding the terminations, as follows:

1. A list of all employees who were terminated, which includes their name, classification, date of hire, hourly wage rate, address, phone number, and e-mail address, and copies of any letters sent to said employees;
2. Schedules for any and all employees for the past 3 months;
3. Punch records for any and all employees for the past 3 months;
4. Payroll records for any and all employees for the past 3 months;

5. Layoff and recall notices for any and all employees for the past 3 months;
6. Total benefit days, i.e., vacation, sick, personal, accrued by all bargaining unit employees;
7. Total amount of benefit days paid out to all employees, broken down by employee and specifying which benefit day, i.e., sick day, vacation, etc. was paid and the applicable time period;
8. The name and contact information of the subcontracting company in which the Hotel has engaged to staff the Housekeeping, Laundry, Maintenance, and Coffee Shop at the Hotel;
9. Any and all contracts or agreements between the Hotel and such subcontracting company;
10. Any and all invoices or bills from the subcontracting company;
11. Any and all correspondence with the subcontracting company;
12. Any and all documents relating to the decision to subcontract or terminate bargaining unit employees;
13. Detailed list of the scope of work such subcontracting company shall perform in the Hotel;
14. Any and all information, including, but not limited to, payroll records, full first and last name, etc., regarding the wages and economic benefits received by employees of the subcontracting company while working in the Hotel.
15. Any and all notices of layoff sent to the Union; and
16. Any notices sent to the Union regarding the intention or decision to subcontract bargaining unit employees.

In addition, Bokerman requested the following 17 items in connection with Respondent's claim that there was a financial motivation for subcontracting Unit work:

1. The formal name and address of the owner, operator and/or manager of the Hotel;
2. The names of any individuals or entities that have an ownership, management, or control interest in any entity identified in response to request # 1.
3. Any and all audited or unaudited financial statements for the past 5 years;
4. Any and all profit and loss statements for the past 5 years;
5. Any and all tax returns for the past 5 years;
6. Any and all occupancy, rev par, room rate, or similar reports for the past 5 years;
7. Any and all occupancy, rev par, room rate, or other financial projections;
8. A list of any and all methods for obtaining or booking guests (e.g., websites; advertisements; agreements with or participation in travel agencies or web-based booking sites; agreements with travel agencies, travel groups, web-based booking sites, or the like; etc.);
9. Any and all mortgages, notes, or other liens on the Hotel;
10. Any and all correspondence between the primary lending broker and the Hotel;
11. An accounting of any and all bank, savings, investment or similar accounts held by the Hotel;

12. An accounting of any and all tangible or real property owned by the Hotel or in which the Hotel has an interest;
13. An accounting of any and all debts of the Hotel;
14. An accounting of any and all assets of the Hotel;
15. An accounting of any and all accounts receivable of the Hotel;
16. Any and all other leases and/or contracts to provide services that require on-site labor at the Hotel; and
17. Any and all correspondence regarding the financial viability or position of the Hotel.

Bokerman testified that the information requested was relevant after learning that not only were all the Unit employees terminated but that their work was subcontracted. Further, the Union needed documents from Respondent to verify its claim of financial inability to pay the Unit employees. (GC 6 & 11, Tr. 150-154)

On March 12, Bokerman again reiterated the Union's request for information and demanded to bargain over the February 29 terminations, and provided the Union's proposal for an overall successor collective-bargaining agreement. She reminded Shivas of Respondent's bargaining obligation and informed that the Union was ready and willing to bargain. In a separate email dated March 12, Bokerman provided Shivas with Maroko's and her cell phone numbers in case Shivas wanted a conversation. Shivas did not respond. (GC 12 & 13, Tr. 154-155)

Bokerman reiterated the Union's request for information and demand to bargain on March 23. Shivas did not respond. (GC 14, Tr. 155-156)

Bokerman again emailed Shivas on March 30 to follow up on her previous emails. In response, Shivas stated that "[d]ue to the ongoing circumstances, I have been unable to meet with my client. I will advise later in the week as to the status." However, Bokerman did not hear back from Shivas later that week. (GC 15 & 16, Tr. 156)

By emails dated April 6 and 24, Bokerman again reiterated the Union's request for information and demand to bargain and received no response. (GC 17 & 18, Tr. 156-158). Thereafter, there were a few emails exchanged between Shivas and Maroko in May which led to a conference call on June 6. However, it is undisputed that to date, Respondent has not provided any of the information requested by the Union nor has Respondent responded to the Union's demand to bargain over the February 29 termination of the entire bargaining unit and for a successor collective-bargaining agreement. (GC 19-25, Tr. 158)

Respondent's Defense

The Terminations and Subcontracting

While it is undisputed that Respondent had not notified or bargained with the Union before deciding to terminate the entire Unit and subcontract Unit work, Respondent argues that it had to take drastic actions quickly because of the emergent situation created by the sudden drop in business activity and sales occurring in January and February, directly attributable to the COVID-19 pandemic. In support, Respondent offered into evidence a news release from the Department of Labor dated March 26, 2020 and an economic study circulated by American Hotel and Lobbying Association based on "Oxford Economics (End of March, 2020)". Respondent contends that these documents generally show that COVID-19 had a significant impact on the hotel industry and hotel employees. (R1 & 2, Tr. 230-234) However, these documents should not be given any weight as they post-date the February 29 terminations and were therefore not relied upon by Respondent in its decision to terminate the entire Unit or to subcontract.

In further support, Wysocki testified that there was an "avalanche of cancellation" beginning in January and "all of a sudden closing the restaurants and hotels." (Tr. 207-208)

On cross-examination, however, Wysocki conceded that the hotel's restaurant did not close until March 9, after the termination of the Unit, and the hotel did not close at all.⁹ (Tr. 248, 257-258) Further, despite the unsubstantiated claims that the hotel's occupancy decreased by 20% to 30% in November and December 2019, and that it was losing all future reservations in January with only \$19,000 in the bank¹⁰, and that only 15% of the hotel's rooms were used in January, Respondent continued to operate with a full staff¹¹; Respondent's payroll records for December 2019 and January 2020 show that its payrolls were 92,920.15 and \$132,493.07, respectively. (R5, Tr. 181-182, 191, 196, 206, 209-210, 247) Wysocki testified that because of the hotel's low occupancy in February (which was also at 15%, the same as January), he reduced the February payroll to \$68,494.70. (Tr. 196, 204) However, Wysocki offered no credible explanation for his refusal to further reduce the Unit employees' hours or lay off some or all of the Unit pursuant to its expired collective bargaining agreement.¹² Instead, Respondent got rid of the entire Unit on February 29 without letting the Union know.

At the hearing, Wysocki provided shifting and contradictory explanations for the terminations. Initially, Wysocki repeatedly asserted that the mass termination was necessary because based on future reservations, an inevitable and imminent shut-down

⁹ The hotel could not take reservations for a couple of days in April and July because of a system crash but was otherwise open. (Tr. 258-259)

¹⁰ Respondent offered no documentary support that it had only \$19,000 in the bank which allegedly prompted the mass terminations. To the contrary, the EEP Staffing Agreement signed by Wysocki on February 20 indicates that Respondent's account with TD Bank had an average checking balance of \$175,000 and average balance of \$107,000. (GC 26)

¹¹ Wysocki testified that the average monthly payroll was about \$93,000 or \$94,000. (Tr. 221-222)

¹² Article 36 of the expired contract states that Respondent "shall not subcontract, assign, sell, transfer, lease or abandon all or any portion of its current business operation" without "notifying the Union of such intended action and receiving Union approval as to the terms and conditions" thereof, and "[i]n the event [Respondent] fails to receive such Union approval, [Respondent] shall not take such action." Article 10 requires Respondent to give at least one week's notice prior to any permanent or temporary layoff of "employees by reason of business or seasonal requirements..." (GC 2)

would occur and he had to “extinguish” the business, but he had to keep the hotel open for about two to three weeks in order serve the guests who were still coming to the hotel. Therefore, he “had to make a very drastic decision to – just leave in the hotel people who are essential to the process of extinguishing business” and to “restructure practically how the hotel was – is operated.” (Tr. 208-209, 224, 244, 249, 254) However, in the next breath, Wysocki asserted that he had expected to restart the business within three or four months as the pandemic would not last long. (Tr. 209, 245, 257-258) Regardless, Wysocki conceded that he had no expectation that the Unit employees would be recalled. (Tr. 255) Wysocki further conceded that when he terminated the entire Unit on February 29, he did not terminate a single non-unit and managerial employee¹³. (Tr. 255-256) In fact, Respondent’s March payroll records show that the hours of the employees in the front desk, accounting and café departments (non-Unit departments) were only slightly reduced while the hours of the housekeeping supervisors increased from 336 to 512 and the hours of the executive office individuals increased from 457 to 538. Further, Respondent did not reduce the pay of these non-Unit and managerial employees. (R5, Tr. 256-257) The hours of Respondent’s non-Unit employees and managers for January, February and March, based on Respondent’s payroll records (R5), are set forth in the following table:

NAME	JAN 2020 HRS	FEB 2020 HRS	MAR 2020 HRS
Front Desk Dept.			
Anci, Christopher	272.00	168.00	160.00
Casadiego, Johnny	244.00	159.71	144.85
Estrella, Gabriel	189.45	98.55	72.15

¹³ The employment of front desk employee Cassandra Terrero and housekeeping supervisor Estefania Falconi appear to have terminated in January 2020. (R5) Also, although EEP offered front desk services, Respondent did not hire any agency workers to perform front desk work. (GC 27, Tr. 255-256)

Florian, Cassandra	205.45	98.75	149.20
Ramos, Ezequiel	229.20	115.21	49.70
Samiento, Joshua	97.95	33.55	32.00
Terrero, Cassandra	36.50		
Terrero, Lineth	177.8	65.70	66.10
Velez, Alex	17.10	38.00	61.75
Front Desk Total	1,469.80	777.47	735.75
Accounting Dept.			
Claudio, Andrea	272.00	144.00	161.60
Naroz, Afaf	232.00	160.00	160.00
Urena, Marilyn	248.00	160.00	160.00
Accounting Total	720.00	480.00	451.60
Café			
Ruiz, Magdeli	187.90	129.15	115.05
Housekeeping Supervisors			
Falconi, Estefania	255.75		
Natareno, Paula	276.00	160.00	336.00
Sanchez, Francina	276.00	176.00	176.00
Housekeeping Supervisors Total	807.75	336.00	512.00
Maintenance Supervisors			
Castro, Ramon	248.00	160.00	80.00
Executive Office			
Diaz, Jennessy	238.75	158.40	159.00
Pichardo, Rianny	235.85	158.75	148.58
Rubio, Vanessa	90.00	60.00	110.00
Ruiz, Desiree	120.00	80.00	120.00
Executive Office Total	684.60	457.15	538.48

While Wysocki asserted that the termination of the entire Unit was not motivated by union discrimination, he admitted that his decision to terminate was based on his experience with the Union at the February 6 negotiation session and a conversation with Maroko in 2019. In this regard, Wysocki testified that on the two occasions, he had

informed the Union that Respondent was short on money but the Union was indifferent to his requests for help and Maroko responded with the “f” word. Wysocki also asserted that he had similarly negative experiences with the Unit employees who had threatened to strike. Wysocki testified that as a result of these experiences with the Union and Unit employees, he concluded that his main concern was to protect the business and that he did not want to recall these employees even if the layoff was to last only two months. He also concluded that with the contract’s seniority provision, he could not get from the Union the staffing flexibility that he could get from an agency. (Tr. 224, 243-251) While Respondent contends that it was in a dire financial situation and there was no time to bargain with the Union, Wysocki found ample time to enter into a staffing agreement with EEP on February 20, 9 days before the mass termination, and arranged to have agency workers perform Unit work at the hotel after the Unit employees were terminated. (Tr. 250)

Despite the devastating impact of the pandemic on the economy, Respondent’s hotel continued to have room occupancies which required Unit work to be performed. Immediately after the Unit was terminated, Respondent began using agency employees to handle the housekeeping, housemen, laundry and prep cook (Unit) functions at the hotel. From March 1 to March 22, Respondent was billed 760.87 hours solely for Unit work performed by EEP workers. (GC 28-37, Tr. 224-225) Wysocki testified that that after March 22, the hotel stopped using agency workers and used instead the non-Unit employees and managerial staff to perform the Unit work. (Tr. 256, 261-264)

The Failure to Provide Information

Respondent contends that counsel’s communication with the Union in connection with the Union’s information requests was delayed because Wysocki was busy dealing with

room cancelations and refunds during the first week of March. (Tr. 228) While counsel could have easily explained Respondent's predicament to the Union at the time, the fact remains that to date, Respondent has failed to provide to the Union any of the information requested by the Union representatives on March 2 and set forth in Bokerman's March 2 and 3 emails¹⁴. (Tr. 158)

V. ARGUMENTS

1. RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY DISPARAGING AND DENIGRATING THE UNION.

The Board has found violations of Section 8(a)(1) by an employer's disparaging or undermining employees support of the union, and the union or its representatives. *Prudential Insurance Co. of America*, 317 NLRB 357 (1995); *Oster Specialty Products*, 315 NLRB 67 (1994). See also *Lehigh Lumber Co.*, 230 NLRB 1122 (1977) (employer violated Section 8(a)(1) when it remarked that the union was no good, was "screwing" employees, and that employees ought to look for another union); *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982) (employer's remarks to worker that it would be the union's responsibility if employees did not get a raise and that the union was indifferent to the welfare of employees); *Carib Inn San Juan*, 312 NLRB 1212, 1223 (1993) (employer's statement that the union did not back up employees and should have obtained certain moneys for employees, and that no union could defend them); *Albert Einstein Medical Center*, 316 NLRB 1040 (1995) (supervisor told employee that the union could not help a discharged employee get his job back because it was too weak, it had no money and had a lawyer with

¹⁴ There is also no dispute that the Union had not received the information in question from a NLRB investigator. (Tr. 169-172) Moreover, it is Respondent's legal obligation, not the NLRB's, to provide the relevant information to the Union.

Alzheimer's disease, and that the employees should have listened to management and not voted for the union); *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987) (employer's disparaging statements against the union were one of the elements of conduct used to "orchestrate and create heightened animosity, dissatisfaction, and hostility towards the union and discourage support for, and cause disaffection from, the union.")

In this case, as captured by a video recording, Respondent's vice president Wysocki and manager Rubio addressed the employees after their terminations and made numerous disparaging comments about the Union, including the following:

- The Union refused to bargain in good faith for a successor collective-bargaining agreement (*"And they have not be willing to negotiate, they continue to insist we sign that contract"*)
- The Union did not care if employees lose their jobs (*"I told them...Everybody would lose their jobs, because this place would go bankrupt. They don't... they don't hear"*)
- The Union was responsible for the employees' loss of employment (*"They, they, they very unreasonable, for two years I'm trying to explain to them that if they're going to be so, stiff and strong with negotiations, everybody will lose their jobs"*)
- The Union would not allow Respondent to provide insurance for the employees (*"you remember last time when we went to the second floor about the... about the insurance? The Union took me to Court, because I was talking to you"*)
- Because the Union has taken Respondent to court, it no longer has money to pay them (*"The Union took me to Court, because I was talking to you, and it cost us money, guys I spent three hundred thousand dollars on the lawyers, for your Union! Three hundred thousand dollars! This money could be payed [Sp] your salary, but they put me to Court right now. I'm on two... two court cases with them!" "Union didn't let you to use the insurance that I provided. The Union don't want to talk to me at all. They took me to court"*)
- Because the Union refuses to negotiate for a collective-bargaining agreement, Respondent will have to close all Union departments (*"I have told them several times you're going to have to... we are going to reach a point that, well... you are going to have to close all the Union departments if they don't want to continue negotiating..."*)

Wysocki and Rubio's condemning comments about the Union at the March 1 meeting conveyed a strong message to the Unit employees that union membership led to

their loss of employment. It is respectfully submitted that Respondent's acts of disparagement and denigration against the Union interfered with, restrained, or coerced employees in the exercise of their Section 7 rights, in violation of 8(a)(1) of the Act.

2. RESPONDENT VIOLATED SECTION 8(A)(3) OF THE ACT BY TERMINATING ALL THE UNIT EMPLOYEES.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board required the General Counsel to make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. A discriminatory motive or animus may be established by circumstantial evidence, inferred from several factors, including the timing between the employees' protected activities and the adverse employment action, pretextual and shifting reasons given for the adverse action, statements showing the employer's general or specific animus, and other unfair labor practices. *NLRB v. Rain-Ware, Inc., Inc.*, 732 F.2d 1349 (7th Cir. 1984) (timing); *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005) (shifting or pretextual defenses); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (contemporaneous 8(a)(1) violations). The burden then shifts to the respondent to show that it would have taken the same action, even in the absence of the employee's protected activity. *Austal USA, LLC.*, 356 NLRB 363 (2010). Under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996) enfd. Mem. 127 F.3d 34 (5th Cir. 1997).

The credible evidence shows that Respondent's decision to terminate the entire Unit was part of an overall campaign to evade its bargaining obligations and remove the Union from the facility. In that regard, Wysocki admitted that the Union's bargaining demands and its enforcement of the employees' bargaining rights through Board litigation was the motivating factor for terminating the Unit employees.

Respondent's unlawful intent is also made manifest by the contemporaneous admissions of its Vice President Wysocki and Manager Rubio to employees that the Union was to blame for the mass discharge because of the Union's stance and the expenses of the earlier Board litigation: "I told them...Everybody would lose their jobs, because this place would go bankrupt. They don't... they don't hear", "for two years I'm trying to explain to them that if they're going to be so, stiff and strong with negotiations, everybody will lose their jobs"; "the Union took me to Court, because I was talking to you, and it cost us money, guys I spent three hundred thousand dollars on the lawyers, for your Union! Three hundred thousand dollars! This money could be paid your salary" "I have told them several times you're going to have to... we are going to reach a point that, well... you are going to have to close all the Union departments if they don't want to continue negotiating..." These denigrating statements about the Union revealed not only the true motive behind the mass termination but also demonstrated Wysocki's extensive hostility towards the Union.

Although Respondent argues that the termination of the entire Unit was motivated by business reasons, Respondent does not meet its *Wright Line* defense to establish that it would have "reorganized" the facility in the absence of the employees' protected selection of the Union as their representative. In this regard, Wysocki testified that his termination decision was hastened by exigent circumstances in light of a sudden decline in business in

January and February directly related to the COVID-19 pandemic. However, Respondent did not present any evidence that its business declined in any meaningful way immediately prior to the terminations that would require the entire Unit to be terminated, especially since the hotel remained open for business to provide housekeeping and laundry services to the guests who had reservations and were expected to arrive, and in fact arrived¹⁵. Meanwhile, Respondent retained every non-Unit employee and manager/supervisor without reducing their pay, as if the hotel's allegedly dire financial situation was not impacted by the continued employment of these 19 individuals. In fact, Respondent increased the work hours of the supervisors and managers in March while the non-unit employees' hours were only slightly reduced. Respondent has also failed to explain its failure to comply with the collective-bargaining agreement in connection with the layoffs. Respondent's refusal to provide the Union notice of its intent to discharge the entire Unit or provide the Union any alternative measures, such as partial layoffs or part time schedules, is additional evidence of its anti-union motivation. In sum, the timing of the mass discharge shortly after an adverse Board decision ordering Respondent to bargain, the lack of evidence of financial need at the time of the terminations, the overt statements of hostility

¹⁵ The facts in this case are distinguishable from that of *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160 (3d Cir. 1977), which recognized that a partial closure and layoff of employees does not violate Section 8(a)(3) if it is solely motivated by financial considerations. Here, Respondent did not effectuate a closure of part of its business. Rather, the work continued to be done, even after the COVID-19 pandemic reduced work levels, by supervisors or staffing agency employees. Moreover, as in *Eagle Material*, where the court actually enforced the Section 8(a)(3) violation, there is substantial evidence here of anti-union animus in the admissions of Respondent's managers and Respondent's prior adjudicated Section 8(a)(1), (3) and (5) violations.

and anti-Union motive, and Respondent's other unlawful conduct all support a conclusion that the elimination of the entire unit was in violation of Section 8(a)(3)¹⁶.

3. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY TERMINATING UNIT EMPLOYEES WITHOUT PRIOR NOTICE TO THE UNION AND WITHOUT AFFORDING THE UNION AN OPPORTUNITY TO BARGAIN.

An employer violates Section 8(a)(5) of the Act when it makes unilateral changes to a mandatory subject of bargaining without providing the employees' union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). It is well settled that the decision to lay off employees is a mandatory subject of bargaining. *Tri-Tech Services, Inc.*, 340 NLRB 894, 894-895 (2003); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works as a dramatic change in their working conditions (to say the least) Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining."). Where a layoff occurs solely for economic reasons, the union has the right to bargain over the layoff decision itself and not just the effects of that decision. See *Pan American Grain Co.*, 351 NLRB 1412, 1413-1414 (2007); *Lapeer Foundry & Machine*, 289 NLRB 952, 953-954 (1988); see also, *NLRB v. 1199 National Union of Hospital and Health Care Employees*, 824 F.2d 318 (4th Cir. 1987) (an employer's decision to lay off employees based on a desire to reduce labor costs is amendable to resolution through the collective-bargaining process). In order to be excused of a duty to bargain about the decision to lay off employees for economic reasons, an employer must meet a high burden

¹⁶ *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (May 31, 2018) (timing, other unfair labor practices, statements revealing animus, disparate treatment, departure from past practice, and pretextual reasons all indicate unlawful employer motivation); *NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991) (Third Circuit assesses whether an adverse employment action violates Section 8(a)(3) by considering "whether the employer was hostile towards the union; the timing of the employee's discharge; and the employer's reasons (or lack thereof) for discharging the employee").

to demonstrate that “economic exigencies” compelled immediate action. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). In the absence of such economic exigencies, an employer must provide adequate, prior notice to the union to provide a reasonable opportunity to bargain about both the layoff decision and its effects on the bargaining unit. See *Lapeer Foundry & Machine*, above at 954-955; see also *Pan American Grain*, above; *Tri-Tech Services*, above at 895 fn. 6. Even if an employer is able to meet the heavy burden to establish under the circumstances that exigent situation required it to take action before bargaining with the Union, the employer still is required to bargain about the effects of that decision. *Pan American Grain Co.*, above; *RBE Electronics of SD*, above; accord *First National Maintenance*, 452 U.S. 666 (1981).

As the Third Circuit recently admonished Respondent, “[e]mployers may not make major decisions about unionized employees on their own. Instead, they must work with unions in good faith to solve problems.”¹⁷ Here, Respondent admits that it did not give the Union notice prior to making the decision to lay off the Unit employees. Respondent’s February 28 letter, which was **mailed** and not received by the Union until March 2, announced that the Unit employees would be terminated effective February 29. As the Board has stated, “[t]he key here is that the proposal should be presented to the union in a timely manner.” *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 3 fn. 8 (2018). “To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain.” *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983). Here the

¹⁷ See *Arbah Hotel Corp. v. NLRB*, -- F. App’x --, 2021 WL 567513, at *1 (3d Cir. Feb. 16, 2021), enforcing, 368 NLRB No. 119 (2019).

Respondent gave the Union no warning that a layoff was in the works until after the implementation and the timing is clearly deficient. The Board has found that in certain situations, even advance notice is not timely. See *Comau, Inc.*, 364 NLRB No. 48, slip op. at 6, 24 (2016) (violation where notice was given 6 days before implementation); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1022-1024 (2001) (violation where notice was given 20 days before implementation); *Defiance Hospital*, 330 NLRB 492, 493 (2000) (violation where employer's letter gave union 7 days to respond to the notice of a change).

Respondent argues that due to exigent circumstances, the hotel had no duty to bargain with the Union because it was acting out of business necessity. Exigent circumstances, as defined by the Board, have been limited to extraordinary unforeseen events having a major economic effect requiring an employer to take immediate action. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994); *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)). See *Port Printing & Specialties*, 351 NLRB 1269 (2007), *enfd.* 589 F.3d 812 (5th Cir. 2009) (The employer did not violate 8(a)(5) when it closed operations and laid off all employees as per a mandatory evacuation order in anticipation of a hurricane, without affording the union notice or an opportunity to bargain; however, the employer violated 8(a)(5) by failing to bargain over the effects of the layoff after the hurricane and by failing to bargain over the use of non-unit employees to perform unit work); *Raskin Packing Company*, 246 NLRB 78 (1979) (The employer did not violate 8(a)(5) when it immediately closed the plant without notifying the union, after discovering that its credit line was discontinued). The burden is

on the Respondent to prove it experienced such dire and unforeseen circumstances, and that burden is “heavy.” *Alpha Associates*, 344 NLRB 782, 785 (2005).

Here, Respondent’s version of facts fails to establish that its failure to notify and bargain with the Union was due to any “exigent circumstances” or to any lawful reason at all. When Wysocki arranged with EEP on February 20 to have agency employees perform Unit work at the hotel, he had already decided to lay off the entire Unit. There was no exigent circumstance at that point to prevent him from notifying the Union. Instead, he waited eight days to mail, instead of email, a letter to the Union about the layoff, ensuring that the Union would not interfere with his scheme to get rid of the entire Unit. Indeed, as Wysocki admitted at the hearing, he intentionally chose not to contact the Union because of the Union’s posture at the February 6 negotiation session. Further, as discussed supra, Respondent has not presented any evidence to substantiate its claim that it was faced with dire and unforeseen circumstances to justify the immediate termination of the entire Unit, especially in light of Respondent’s failure to terminate any non-Unit employees or managerial staff.

In addition to the lack of notice to the Union about the mass termination, Respondent has also refused to bargain with the Union about the effects of the terminations. In this regard, the un rebutted evidence shows that on March 2, Wysocki rejected the Union’s attempts to bargain over the terminations and subcontracting as well as the requests for information relevant thereto. Thereafter, on March 2 and 3, the Union requested in writing to bargain over the termination of the Unit, the effects thereof and requested relevant information concerning the termination and the subcontracting. On March 12, the Union in an effort to get Respondent to bargain for a successor collective-

bargaining agreement presented a contract proposal to Respondent and advised that they were willing to continue bargaining. On March 23 and 30 and April 6 and 24, the Union repeatedly renewed its demand to bargain over a successor agreement and concerning the termination of the Unit employees. To date, Respondent has neither responded to the Union's demand to bargain nor provided the Union with the requested information.

Since Respondent admittedly had not informed nor bargained with the Union regarding the February 29 termination, and has continued to refused to bargain with the Union over the effects of the termination, and Respondent presented no viable defense, it is respectfully submitted that Respondent's unilateral discharges of the entire Unit violated Section 8(a)(5) and (1) of the Act.

4. RESPONDENT SUBCONTRACTED UNIT WORK TO AGENCY AND/OR NON-UNIT EMPLOYEES WITHOUT PRIOR NOTICE TO THE UNION AND WITHOUT AFFORDING THE UNION AN OPPORTUNITY TO BARGAIN, IN VIOLATION OF SECTION 8(A)(5) OF THE ACT

As set forth above, an employer violates Section 8(a)(5) of the Act when it makes unilateral changes to a mandatory subject of bargaining without providing the employees' union with notice and an opportunity to bargain. *NLRB v. Katz*, supra. Contracting out bargaining unit work that unit employees are capable of performing is a mandatory subject of bargaining about which the employer must bargain in good faith with the Union, within the meaning of Section 8(d) of the Act. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). However, an employer is not required to bargain if the subcontracting "involve[s] a significant change in scope and direction of the enterprise". *Torrington Enterprises*, 307 NLRB 809, 810-811 (1992) When all that is changed through the subcontracting is the identity of the employees doing the work, the Board finds that an employer must bargain

with its employees' collective-bargaining representative before subcontracting the work. *Id.* at 811.

Here, although Wysocki asserted that he had to “restructure” the hotel operation because of the hotel’s financial situation, the “restructuring” did not entail a change in the scope or direction of Respondent’s overall business as the unit work was still being performed, either by non-unit employees/managers or by employees Respondent retained from an agency. Thus, even if Respondent is able to establish that it had revenue losses at the hotel, Respondent was still replacing unit employees with non-unit employees and would not be justified in failing to bargain with the Union over the decision to subcontract Unit work.

Respondent also argues that it subcontracted out of business necessity and therefore had no duty to bargain; this argument is equally without merit and any reliance on *Equitable Gas Co. v. NLRB*, 637 F.2d 980 (3d Cir. 1981), is misplaced.

In *Equitable Gas Co.*, the Third Circuit found that the employer’s evidence established a business necessity defense. In that matter, the Third Circuit applied the following *Westinghouse* criteria in determining whether the employer was excused from its duty to provide the union with prior notice and an opportunity to bargain over subcontracting out Unit work: (1) the recurrent subcontracting is motivated solely by economic considerations; (2) it comports with the company's traditional methods of conducting its business operations; (3) it does not vary significantly from prior established practices; (4) it does not have a demonstrable adverse impact on employees in the unit; and (5) the union had the opportunity to bargain about changes in existing subcontracting

practices at general negotiating meetings. *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

In the instant matter, Respondent does not satisfy any of the *Westinghouse* factors that would support a finding that Respondent did not have a duty to bargain over its decision to terminate the bargaining Unit and subcontract out the work. To that end, regarding the first factor the evidence clearly reflects that the subcontracting was not solely motivated by economic considerations. Instead the evidence supports a finding that Respondent harbored anti-union animus, as evidenced in the March 1 meeting with employees where Wysocki and Rubio disparaged and denigrated the Union when they repeatedly blamed the Union and the lawsuits the Union brought against the Hotel as the basis for terminating the employees.

The second and third *Westinghouse* factors require that Respondent have a traditional method of subcontracting or an established history of subcontracting out bargaining Unit duties in the hotel. In this instance, the un rebutted evidence shows that Respondent has never subcontracted out any of the Unit work prior to March 1st. Therefore, Respondent failed to show that it has a history or practice of subcontracting out Unit work.

The fourth *Westinghouse* factor is deemed as the “the most critical” in that it deals with the effect the subcontracting will have on bargaining Unit employees. In *Equitable Gas*, the Court noted that if it appears there has been no adverse impact on existing working conditions, an employer's decision to subcontract does not violate his obligations under Section 8(d) of the Act. The Courts found that there must be evidence to support a “demonstrable adverse impact on employees in the unit”. In the instant matter, the

evidence is crystal clear that there is a “demonstrable adverse impact on employees in the unit” because every single Unit employee was terminated on February 29. They came to work on that day employed and by the end of that same day, without any prior notice to them or their collective bargaining representative, they were terminated and were left wondering what happened.

The fifth and final *Westinghouse* factor addresses whether the Union was given an opportunity to bargain prior to the announcements of the terminations. In the instant matter, no such opportunity to bargain prior to Respondent’s termination of all Unit employees was afforded the Union. In fact, Respondent issued termination letters to the employees at the end of their shift on Saturday, February 29 with the terminations being effective that same day. The Union first learned of the terminations from the employees as the Respondent’s “notice” to the Union was mailed and not received until March 2.

Based on the foregoing, Respondent has not supported its contention that it had no duty to bargain with the Union prior to subcontracting because it took that action wholly based on economic and business necessity. Instead the case law is very clear that when an employer has failed to show that its business rationale for subcontracting is beyond its labor costs and its disputes with the Union, then mandatory bargaining is required. *Fibreboard Paper Products*, 379 U.S. 203 (1964). Indeed, in *Fibreboard Paper Products*, the Supreme Court upheld the finding that unilaterally replacing an entire bargaining Unit with independent contractors under similar conditions of employment out of a desire to reduce labor costs, even without anti-union animus, was an unfair labor practice, and ordered the entire Unit reinstated with back pay. *Id* at 217.

Respondent clearly failed to meet its bargaining obligation with respect to this

mandatory subject of bargaining, and by doing so violated Section 8(a)(5) and (1) of the Act.

5. RESPONDENT FAILED AND REFUSED TO FURNISH RELEVANT INFORMATION REQUESTED BY THE UNION CONCERNING THE TERMINATION OF THE ENTIRE UNIT OF EMPLOYEES AND THE SUBCONTRACTING OF UNIT WORK, IN VIOLATION OF SECTION 8(A)(5) OF THE ACT

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Endo Painting Service*, 360 NLRB 485, 485 (2014), citing to *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as the bargaining representative. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). Here, it is undisputed that the Union requested presumptively relevant information in connection with the elimination of the entire Unit, including the Unit employees' schedules, punch records, payroll records, and layoff notices.

The Board has also specifically held that information regarding non-bargaining unit employees can be relevant when necessary for the enforcement of the CBA, such as in this case where the Union was seeking information regarding whether after a layoff, non-bargaining unit employees were performing work. See *United Graphics*, 281 NLRB 463 (1986); *Boeing*, 364 NLRB No. 24 (2016). Clearly, information relating to the wages and hours of non-Unit employees are relevant to the Union's investigation of whether Unit

employees were disparately terminated and whether Unit work was being performed by non-Unit employees and subcontractors.

Similarly, claims of inability to pay bargaining unit employees justifies a request for information relating to an employer's finances. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) In this case, the Union is entitled to Respondent's financial information to verify Respondent's claim that the mass termination and subcontracting were financially motivated.

Although Respondent has not disputed the relevancy of the information requested by the Union, Respondent provided no explanation for its complete lack of response to the Union's repeated requests. In this regard, the unrebutted evidence shows that on March 2, Union agents verbally requested information relevant to the termination of the Unit employees and the subcontracting of Unit work, as well as Respondent's claim of inability to pay the Unit employees. The unrebutted evidence also shows that Union counsel Bokerman made written requests on March 2 and 3, which were repeatedly reiterated thereafter on March 12, 23 and 30, and April 6 and 24, for information relevant to the mass terminations, subcontracting, and Respondent's claim of inability to pay. The Respondent does not deny that it received these requests and has failed to provide the Union with any of the requested information. Respondent has also provided no viable defense for its failure to provide information.

Therefore, Respondent has unlawfully failed and refused to provide relevant information to the Union, in violation of Section 8(a)(5) and (1) of the Act.

6. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY UNLAWFULLY WITHDRAWING ITS RECOGNITION OF THE UNION AS THE EXCLUSIVE COLLECTIVE-BARGAINING REPRESENTATIVE OF THE UNIT EMPLOYEES

The Board has recognized that a withdrawal of recognition need not be explicitly stated to run afoul of the Act; rather, the Board will examine an employer's statements and actions in context to determine whether a violation has occurred. *Paramount Poultry*, 294 NLRB 867 (1989); *Corson & Gruman Co.*, 284 NLRB 1316 (1987). The Board in *Lou's Produce, Inc.*, 308 NLRB 1194 (1992), found the respondent in that case to have effectively and unlawfully withdrawn recognition from the union by engaging in the following actions: (1) ceased making contributions to the pension and benefit funds without bargaining with the Union; (2) conducted an unlawful poll of employees, without prior notice to the Union, to determine whether the Union still enjoyed majority support; (3) subsequent to, and in reliance on, the poll results, declined the Union's repeated offers to negotiate the outstanding issue of health insurance, instead stating at every opportunity that it wished to get rid of the Union; and (4) unilaterally implemented its own health insurance plan, also in reliance on the poll results.

Citing *Lou's Produce*, the Board in *Wayron, LLC*, 364 NLRB No. 60 (2016), also found the respondent in that case to have implicitly withdrawn recognition from the unions for a month by failing to notify the unions regarding the termination of all employees and delaying its response to the unions' request for bargaining for nearly a month.

In this case, the overwhelming and credible record evidence establishes that Respondent had engaged in the following unlawful conduct:

- Making disparaging and denigrating comments about the Union to employees;
- Terminating all bargaining unit employees in order to remove the Union from the facility;

- Terminating all bargaining unit employees without prior notice to the Union and without affording the Union an opportunity to bargain;
- Subcontracting unit work to non-unit/agency employees without prior notice to the Union and without affording the Union an opportunity to bargain; and
- Failing and refusing to furnish relevant information requested by the Union concerning the termination of the entire unit of employees and the subcontracting of unit work.

The myriad unfair labor practices committed by Respondent have no doubt undermined the collective bargaining process by extinguishing employee support for the Union. Indeed, Respondent's unlawful conduct is even more ruinous now because this is not the first instance of Respondent flouting its obligations to bargain in good faith with the Union. The elimination of the entire Unit, which is probably by far the most devastating misdeed, comes on the heels of Respondent unlawfully barring a union representative from its premises, canceling employees' health insurance without bargaining with the Union, and terminating a shop steward for complaining to her union. See *Arbah Hotel Corp. v. NLRB*, -- F. App'x --, 2021 WL 567513, at *2-4 (3d Cir. Feb. 16, 2021). It is respectfully submitted that by engaging in the numerous unfair labor practices set forth above, Respondent has effectively and unlawfully withdrawn recognition from the Union, in violation of Section 8(a)(5) of the Act.

IV. CONCLUSION

Based on the credible evidence in the record and the foregoing reasoning, Respondent has violated Sections 8(a)(1), (3) and (5) as alleged in the Consolidated Complaint. General Counsel respectfully requests that a remedial order be issued requiring Respondent to:

- Offer reinstatement and make whole all Unit employees adversely affected by Respondent's unlawful conduct.
- Rescind all unilateral changes and return to the status quo ante.
- Upon request, bargain in good faith with the Union as the recognized bargaining representative of all Unit employees.
- Furnish the Union with all requested necessary and relevant information.
- At a meeting or meetings scheduled to ensure the widest possible attendance, ensure Respondent's representative Mark Wysocki read the notice to the employees on work time in the presence of a Board Agent.

General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Newark, New Jersey
February 25, 2021

Respectfully Submitted,

/s/ Sharon Chau

Sharon Chau
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
(862) 229-7046

CERTIFICATION

This is to certify that copies of the foregoing Post-Hearing brief on Behalf of the General Counsel to the Administrative Law Judge have been duly served on the Administrative Law Judge, Respondent's counsel and Charging Party's counsel on February 25, 2021 as follows:

BY ELECTRONIC FILING

Honorable Jeffrey Gardner,
Administrative Law Judge
National Labor Relations Board
Division of Judges
26 Federal Plaza, 17th Floor
New York, New York 10278

BY ELECTRONIC MAIL

Brian C. Laskiewicz, Esq.
David Shivas, Esq.
Bell & Shivas, P.C.
brianlaskiewicz@bsblawgroup.com
dshivas@bsblawgroup.com

Amy Bokerman, Esq.
General Counsel
Hotel & Motel Trades Council of New York
abokerman@nyhtc.org