UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

REMINGTON HOTEL CORPORATION,
d/b/a THE SHERATON ANCHORAGE

Cases: 19-CA-32148
19-CA-32188
19-CA-32222
19-CA-32238
and 19-CA-32301
19-CA-32334
19-CA-32337
19-CA-32349
19-CA-32367
UNITE HERE!, LOCAL 878, AFL-CIO 19-CA-32414
19-CA-32420
19-CA-32438
19-CA-32487

EMPLOYER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND MEMORANDUM OF LAW IN SUPPORT

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Exception 1:

The ALJ Erred in Ruling Impasse Was Broken in the March 10-11, 2010 Bargaining Sessions, and Erred in Ruling that Respondent's Subsequent Implementation Violated Section 8(a)(3) of the Act.

While bargaining parties are required to possess an "open mind," and make a "sincere effort to reach common ground," *Montgomery Ward v. NLRB*, 133 F.2d 676, 686 (9th Cir. 1943), section 8(d) of the Act "does not compel" agreement or concession. Each party is entitled to press hard for a contract in its economic self-interest. Hard bargaining should never be confused with bad faith, as the 9th Circuit instructed in *Tomco v. NLRB*, 567 F.2d 871, 883 (9th Cir. 1978), by rejecting a standard that would prohibit management adherence to a proposal that would not have "the slightest chance of acceptance by a self-respecting union," nor may the Board "sit in judgment upon the substantive terms of collective bargaining agreements." *Id.* at 884.

In the present case, there was hard bargaining on *both* sides. While the ALJ correctly found impasse was reached in October of 2009, he erred badly in concluding impasse was broken in March of 2010. To understand this error, it is necessary to first gain a correct understanding of the bargaining history that led up to the final sessions on March 10 and 11, and the implementation that followed.

As ALJ Meyerson otherwise correctly found, "even under the 'self-respecting union test'," the charge against Respondent "of surface bargaining would fail." He stated further:

> Throughout negotiations, the Respondent reiterated that [its] proposed changes were based on two principles, namely an effort to make the hotel financially viable and profitable, and to bring the Sheraton into conformity with the other hotel properties managed and operated by the Respondent. <u>While many of the proposed changes including</u> sick days, vacation days, jury duty leave, the paid meal period, <u>a new medical insurance plan</u>, and the number of rooms housekeepers must clean <u>were not as favorable</u> to the unit employees and/or the Union as they had been in the previous contract, <u>the Respondent did not propose unreasonable changes</u>.

[Decision, p. 52 (*emphasis added*)]. The ALJ also took appropriate administrative notice that,

"during the time period the parties were bargaining . . . from October 2008 through March of 2010, the nation was in a prolonged and sever[e] [sic] economic recession," during which the Hotel's revenue dropped "sharply down," from a high of $ 19.14 million at year-end 2007 to $14.86 million by year-end 2009, and that the Hotel's projection for 2010 was lower still, at $13.70 million. [Decision, pp. 8 - 9].

ALJ Meyerson also correctly found that Respondent met its obligation under Section 8(d) to "meet at reasonable times and confer." The record indeed reflects that more often than not it was Respondent driving the parties to meet. [1] The ALJ noted that, "Respondent was the first party to initiate contacts," which led to the first two days of negotiations on October 27 and 28, 2008, [Decision, p. 53], and that "Respondent was genuine in [its] stated intention of negotiating a successful contract before the existing collective bargaining agreement expired on February 28, 2009." [Decision, p. 53]. The Union, by contrast, "seemed to have no interest in doing this," and in fact "stonewall[ed]" Respondent's efforts to negotiate during the months of November 2008 through January 2009. [Decision, p. 53]. Negotiations, nonetheless, did resume, and the parties met "in person in Anchorage for bargaining purposes on [twelve [2]] separate dates." [*Id.*].

The ALJ correctly rejected the General Counsel's argument that Respondent's frequent proposals to negotiate by telephone or videoconference – or face-to-face in Seattle, where Union lead negotiator Rick Sawyer was based – indicated bad faith or surface bargaining. Quite to the contrary, the ALJ found these proposals were offered "in an effort to *supplement* face-to-face negotiations in Anchorage," so that the "parties could negotiate *more frequently* and at a considerable cost-savings."

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[1] Including, most critically, the December 2009 and March 2010 meetings, as discussed below.

[2] The ALJ inadvertently listed only "ten separate dates" – "October 27 and 28, 2008; June 9, 10, 11, and 12, 2009; December 7 and 8, 2009; and March 10 and 11, 2010." The record is unmistakably, indisputably clear, however, that the parties met in addition on July 28 and 29, 2009. *See* Exhibits GC 39 and GC 41 (Union representative Jessica Lawson's minutes of the July 28 and 29 bargaining sessions); a*nd see*, testimony of Union witness Lawson at [Tr., pp. 1391, 1853-1854].

[Decision, p. 53 (emphasis added)]. [3] Respondent also accommodated the bargaining process by agreeing to extend the existing CBA "a number of times, from the expiration date of February 28, 2009 through August 31, 2009, a period of six months." [Decision, p. 54]. The ALJ concluded: "I am of the view that the Respondent agreed to these extensions with the genuine expectation that given more time the parties would in fact reach agreement." [Decision, p. 58].

The existing collective bargaining agreement provided for a Taft-Hartley Trust health & welfare plan, fully paid for by Respondent. During the four days of the June 2009 bargaining sessions, Respondent initiated a discussion as to whether it would be "financially reasonable" for the Employer to continue contributing to the Taft-Hartley plan. [Tr., pp. 4007-08]. Respondent asserted at the bargaining table, "that health care [is] so expensive and so difficult to get a handle on that . . . *if the Employer is paying for it the Employer ought to shop and compare* as often as is necessary, at least annually . . . to come up with whatever program [is] important to provide." [Tr., pp. 4173 -74 (*emphasis added*)].

On the fourth day of the June bargaining sessions, the Union dropped a bombshell regarding the Taft-Hartley health & welfare plan, announcing that the employer's contributions would need to be substantially larger than proposed earlier. The increase was on the order of "$3.00 and something" an hour, compared to $2.55 an hour, according to Union representative Lawson's recollection, at Tr., p. 2257-58; *and see,* testimony of lead Union negotiator Rick Sawyer, at Tr., p. 4197 & 4206-07, acknowledging that Respondent had been paying $2.55/hour, and that the increase announced in the June meeting was in the range of possibly 44% to 48% higher, and was in any event, "more, substantially more" than $2.55 an hour. According to Lawson, two Remington executives at the table were taken sharply aback – the jaw of one "dropped," and the other "kind of

[3] The ALJ "took administrative notice . . . that plane travel to Anchorage from the lower 48 states is time consuming and expensive," having made this trip himself "eight times . . . during the course of this trial." [Decision, p. 53].

sat back … they were like wow, that's, you know, a difference. It's a lot of money." [Tr., p. 1655]. [4]

Union representative Jessica Lawson, who sat through and took notes in all of the negotiations in June, as well as in July, December and March, admitted that Respondent voiced concern over the volatility of healthcare costs. [Tr., pp. 2253 and 2259]. Lawson admitted management negotiator Stokes asserted at the table: "the reason [management] said you have to shop and compare is because the health care market was volatile . . . we couldn't really control [the costs] and [the union] couldn't control it," and that management – as the *purchaser* of this insurance coverage – wanted therefore to be able to "shop and compare" on an annual basis. [*Id.*, at Tr., p. 2253]. Similarly, lead Union negotiator Sawyer, after acknowledging the "substantially more" cost-amount announced in the June meeting, admitted the following on cross examination:

> Q. And then what they [the Union-sponsored plan trustees] proposed was a rate that went up so much higher that we [Respondent] objected to the financial uncertainty and to the bulk amount of that increase. Isn't that true?
> A. That's true.

[Tr., p. 4197 (*emph. added)*].

Approximately a month later, on July 17, 2009, Respondent presented a new, and complete, collective bargaining agreement proposal, [Exhibit GC 38], which contained a new health & welfare plan proposal. This proposal was discussed during the July 28 and 29 bargaining sessions. At the heart of the proposal was Respondent's assertion of a right to select, on an "annual review" basis and in its "sole discretion," the "plan providers, plan benefits and employee contributions." G.C. Ex. 38, Article 31, p. 29]. The July 17 proposal identified the plan provider as CIGNA, and attached a plan summary to the proposed agreement.

By reserving to management the right to annually select providers, benefits and contributions, Respondent's proposal was in keeping with the two consistently maintained "principles" identified

[4] The actual amount of the increase above $2.55, discussed in June, is not clear from the record. As discussed below, though, the Union's "official position" in December and March called for an increase to $3.70/hour for the first year.

by the ALJ, of a "financially viable and profitable" hotel in the midst of a "poor economy," and "conformity" with other hotels managed by Respondent (which obviously wouldn't be party to the Alaska-based Taft-Hartley trust). [Decision, p. 52].

Following the July 28-29 bargaining sessions, Respondent submitted its final collective bargaining agreement proposal, dated August 21, 2009, [Resp. Ex 69], in which it made modifications, *inter alia*, to its health & welfare plan proposal, at sections 173-176. While retaining the right to annually review and select ("shop and compare") the providers, benefits and contributions, Respondent added language imposing an obligation requiring notice to the Union ("*shall give notice*"), and an obligation to bargain concerning such changes ("*will meet and confer*"). Respondent also added language setting a governing standard: "Any such changes will be made for sound business reasons."

After delivering the final proposal dated August 21, 2009, "Respondent made it clear," the ALJ found, "that its stance was firm." [Decision, p. 61]. At the same time, though, from August 21 through the date of implementation on October 17, as the ALJ also found, "[Respondent's lead negotiator] Stokes *repeatedly* invited the Union to make a compromise proposal, *but* [as of October 17] *the Union had not done so*." [*Id.* (*emphasis added*)]. In mid-October, by letters dated October 6, 9 and 12 from Stokes, Respondent declared impasse. [Jt. Ex. 2 – 104-110, 112, and 121-122]. Stokes explained Respondent's basis for impasse, including the fact – as stated in the October 9 letter – that "the Union has not accepted or responded in any way with a counter-proposal" of any kind to the August 21 final proposal. "Indeed," as he pointed out further in the letter, "the Union has not presented the Employer with a proposal since April 1, 2009." The ALJ correctly found:

> I believe that at this point the parties had in fact reached a genuine impasse in negotiations. They had been bargaining for approximately one year, and had meet [sic] on [eight [5]] separate dates (October 27 and 28, 2008, and June 9, 10, 11 and 12, 2009

[5] As explained in footnote 2, above, the ALJ, in counting the number of bargaining dates inadvertently overlooked the fact there were two additional bargaining sessions in July.

> [and also July 28 and 29]) for face to face negotiations in Anchorage. To date, there had been only limited movement in their respective positions, with the Respondent no longer insisting that the contributions to the Taft-Hartley Pension Plan be discontinued and lowering its room cleaning minimum from 18 to 17 rooms. However, the Respondent remained adamant that the room attendant minimum be raised from 15 to 17 rooms, that the Employer no longer be required to provide a paid 30-minute lunch period for the employees, insisting that free lunches be eliminated, and that the Taft-Hartley Medical Insurance Plan be replaced with a corporate CIGNA medical insurance plan. The Union was equally adamant in opposing all of these proposals from the Respondent.

[Decision, p. 61(*emphasis added)*].

Stokes' October 9 letter advised implementation would occur on October 17, and invited the Union to attend the announcement meetings. The following was implemented:

1. Employees required to clock in and out for meal breaks.
2. One ($1) dollar charge for meals.
3. Housekeeper's quota increased from 15 rooms to 17.
4. The number of holidays reduced to eight (8).
5. Sick leave days reduced from twelve (12) to five (5), paid at $51/day instead of $40, starting the second day.
6. Advance notice for Union representative visits required, restricted to non-work areas and non-work times.

[Decision, pp. 28, 62; *and see*, Resp. Ex. 104, and Fullenkamp testimony at Tr., pp. 6533-39]. It is important to note that Respondent's health & welfare plan proposal was *not* implemented at this time, and that Respondent continued contributions to the Taft-Hartley plan under the terms set forth in the now-expired [6] collective bargaining agreement. [Decision, pp. 28, 62; and *see*, Tr., p. 6534].

ALJ Meyerson, having found that Respondent bargained in good faith, and that the parties were legitimately at impasse, found further that Respondent "had the legal right" and was "permitted" to implement the changes made on October 17, "but for the Respondent's failure to properly notify the FMCS." [Decision, p. 62-63]. [7]

Following October 17, Respondent remained willing to meet, and also implored Mr. Sawyer

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[6] The CBA expired on August 31, 2009, following six months of mutually agreed extension. [Decision, p. 54].

[7] The issue of the FMCS notice will be addressed separately, at Exception 2.

on numerous occasions to engage with Mr. Stokes by telephone. [Jt. Ex. 2 – 127-129, 131, 135]. In the final paragraph of his letter dated October 16, [*Id.*, 124-125], Stokes made it clear, that while he didn't want to engage in a fruitless "waste of time and resources," Respondent would join nonetheless in "face-to-face negotiations," provided the Union would relent and make a "revised proposal." The final sentence in his October 16 letter stated this request in the plainest of terms: "*Employer renews its request for a revised proposal*."

The Union failed to honor this request. Nonetheless, the parties met nine weeks later, face-to-face in Anchorage on December 7 and 8, 2009. This meeting was held – as the ALJ found – "*at the Respondent's request*." [Decision, p. 63 (*emphasis added*)].

No progress was made, however, at this two-day meeting in December. The Union failed to make any proposals, and the ALJ concludes correctly there was no break in the impasse. In attendance were Stokes, Remington executive Mary Villarreal, and, for the Union, Sawyer, Jones and Lawson, along with three employee-committee members. [Decision, p. 32]. The ALJ admits to "confusion" concerning "what occurred" at the December meetings, and that he was "unable to totally resolve that confusion." [Decision, p. 32]. It is nonetheless clear, however, that the Union made no new proposals, only a so-called written "*Non-proposal*" – the cover page to which bore the title: "CONFIDENTIAL INTERNAL UNION DOCUMENT / Committee Discussion Non Proposal." [Resp. Ex. 47 & 134 [8] (*emphasis added*)]. The cover page of the Non-proposal addressed four items: medical insurance, wages, housekeeper's room quota, and job classifications.

The ALJ aptly characterizes the Non-proposal as a "sidebar document" or "trial balloon," finding that it was "not offer[ed] . . . as a contract proposal." [Decision, p. 32]. On this point, there is

[8] The Non-proposal document consists of two parts – a cover page that bears the "Non-proposal" title quoted above, and a draft revision of the CBA bearing the date "12/08/09" at the top. When Sawyer was examined concerning this document, it was referred to in the transcript as Resp. Ex. 47, and he had both parts before him, as reflected at pages 4208-09. However, Resp. Ex. 47 – *as filed by the court reporter* – is missing the second part. This "mistake" was corrected on the record, at page 7458 of the transcript, and the complete two-part document was re-entered into the record, as Resp. Ex. 134.

no controversy. Mr. Sawyer testified:

> I didn't propose anything to them, we were in a sidebar. What I did was I showed them a sheet marked confidential committee document or something and it listed out a possible counterproposal, and I said what about if we did something like this.

[Tr., p. 3725 (*emphasis added*); *see also,* Sawyer at p. 4210: "I handed it to [Stokes] . . . and it was marked as [a] confidential internal Union document so [Stokes] couldn't say it was a proposal"].

Among the four items listed on the Non-proposal cover page, Mr. Sawyer testified, "we did talk about the medical a lot." [Tr., p. 4210]. This discussion took place even though the lines over this issue had been clearly drawn. The Respondent's proposal to exit the Taft-Hartley plan and replace it with an employer-sponsored plan – coupled with a sole-discretion right to select new coverage on an annual basis (to "shop and compare") – had been on the table since July 17. Respondent modified this proposal in its August 21 final proposal, and thereafter "remained adamant," as found by ALJ Meyerson. [Decision, p. 61]. "The Union was equally adamant in opposing all of these proposals from the Respondent," including the Respondent's final proposal to exit the Taft-Hartley plan, as the ALJ also found. [*Id.*]. In his October 6 letter, Stokes stated, "[t]he Union has made no indication that it would accept replacement of its [Taft-Hartley] plan with the Employer's corporate plan," [Jt. Ex. 2, at 104], and nowhere in Mr. Sawyer's reply letters dated October 9 and 12 did he give any indication or reason to believe the Union was prepared to agree to any sort of employer-sponsored plan. [Jt. Ex. 2 – 111 and 114-120]. In short, as far as the Union was concerned, it was 'Taft-Hartley or nothing,' and indeed this attitude never changed at any time during negotiations, as Lawson confirmed on cross-examination:

> Q. You never made any proposal whatsoever . . . from April of 2009 until 2010 that budged from the position that the . . . Taft Hartley Trust was the position you wanted to take.
>
> A. Right.

[Tr., p. 2257].

The Non-proposal indicated (*i.e.*, should it become an actual proposal) that Respondent would pay the "same [Taft-Hartley] rates as the Captain Cook [Hotel]," starting at $2.95/hour.

However, the "official position" of the Union – as Sawyer put it, when testifying – was a rate starting at $3.70/hour, as set forth in the *attachment* to the Non-proposal. [Tr. P. 4208-10; and Resp. Ex. 47 & 134 [9]]. The far more important point, though – whether considering its "Non-proposal" or its official position" – is that the Union was interested *only* in retaining the Taft-Hartley plan. Respondent never moved a single inch across the divide to Respondent's desire to exit the Taft-Hartley plan altogether.

Sawyer testified Stokes was similarly unyielding during the December discussions. At least twice in his testimony, Sawyer referred to the fact that Stokes – in response to the suggested lower rate for the Captain Cook Hotel – expressed a preference instead for the "Hilton rate." [Tr., p. 3726 and pp. 4210-11]. Sawyer, in recounting this, was referring to the Hilton Hotel in Anchorage, whose negotiations with the Union – from July 2008 to March 2009 [Tr., p. 3229] – had preceded those at Respondent's Sheraton hotel. The Hilton negotiations also ended in dispute, and in impasse. Witness William Mede, the Hilton's lead negotiator, gave undisputed testimony that the Hilton implemented a final proposal in March of 2009, [Tr., pp. 3231 and 3238], pursuant to which the Hilton exited the same Taft-Hartley plan in place at Respondent's hotel, and put an employer-sponsored plan in its place. [Tr., pp. 3243-47].

Therefore, Stokes' preference in December for the so-called "Hilton rate" – as Sawyer put it, quoted above – was in fact a preference for abandoning the Taft-Hartley plan altogether, in favor of an employer-sponsored plan just as the Hilton had done eight months earlier in March. Sawyer then described his discomfort with the fact Respondent was headed toward the same "dispute" the charging-party Union had had with Hilton over this, testifying that he said the following to Stokes in December:

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[9] See the immediately preceding footnote. At transcript pages 4208-4210, the litigants referred to Resp. Ex. 47. However, to see the complete two-part document under discussion, the reader of the record is directed to Resp. Ex. 134.

> And I said . . . I don't know if I want to compare to that [*i.e.,* to the so-called Hilton rate], *that's a dispute*. I mean if you want to *compare yourself to a dispute then* I – you know, *I guess that's where we are*. So that was the discussion [with Stokes and Villarreal].

[Tr., p. 3726 (*emphasis added***)**]. And thus, notwithstanding that the parties "talk[ed] a lot about the medical," [Tr., p. 4210], the parties remained polarized as ever on whether to remain in the Taft-Hartley plan. Respondent stood firm on its proposal to be allowed to annually review and select coverage ("shop and compare").

The parties met again in Anchorage on March 10 and 11, 2010. Once again, it was *Respondent* who drove the parties to meet, as the ALJ found: "The Respondent asked the Union for bargaining dates in March of 2010." [Decision, p. 35]. While the ALJ correctly observes that the March 10-11 bargaining sessions were "highly acrimonious," [Decision, p. 63], the ALJ nonetheless errs badly in concluding that significant moves in bargaining were made, and errs in his legal conclusion that impasse was broken. [Decision, p. 63]**.**

The Union presented a document in March entitled, "Union's Package Proposal – 3/10/10". [G.C. Ex. 56]. Below the heading, however, were these critically important words:

> The Union offers this proposal in its entirety. Should any part of the sum be rejected, the proposal and all of its parts are to be considered withdrawn and the Union's prior position prevails.

(*emphasis added;* hereinafter, the "All-or-Nothing Caveat"). This document purported to present a three-part proposal. Interestingly, these were closely similar to three of the four proposals listed in the December "Non-proposal" [10] – which is the first clue that this March 10 proposal, with its All-or-Nothing Caveat, was in fact not a proposal at all, but merely a stalling tactic. [11] The three items in

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[10] The fourth item related to job classifications, discussed near the end of this Exception.

[11] It is important to understand the evidence, reviewed by the ALJ at pages 9-11 of his Decision, upon which he found that the Union throughout negotiations was "trying to avoid making . . . concessions." To summarize: In response to the bad economy – and in response to **"leaders in the [hotel] industry . . . [who were] proposing long-term concessionary contracts"** – the Union had failed to reach agreement at numerous hotels throughout the United States in 2010. While the ALJ didn't find a "national" connection to the negotiations in Anchorage, he nonetheless found this evidence, as well as "common sense," supports the conclusion that **"the Union [in**

the document were:

- The housekeepers' room-cleaning quota would move to 16 rooms during the first and second year of the contract, but revert to 15 rooms during the remaining two years of the contract.

- Remain in the Tart-Hartley Health & Welfare Plan at the same rates set forth in the collective bargaining agreement of the Captain Cook Hotel (with certain conditions, discussed below).

- Wage freeze in the first year of the contract, followed by 2% increases in each of the remaining three years.

Taking each of these three items in turn:

While the first proposal for a two-year move from 15 to 16 rooms (then reverting back to 15), viewed in isolation, superficially suggests a minor movement, in actuality – viewed in context – it constituted no movement at all. First, this issue was one of singular importance to Respondent, as it impacted both of the major "principles" identified by the ALJ as driving Respondent's bargaining positions: "the Respondent did not propose unreasonable changes . . . instead, the Respondent throughout negotiations clearly enunciated the reasons for its proposed changes, namely [1] the poor state of the economy, and [2] conformity with the Respondent's other properties." [Decision, p. 52].

Second, in the face of the importance of this issue to Respondent, who nonetheless previously made a significant concession – by reducing its original proposal from 18 rooms to 17 – one cannot imagine a more insignificant move than the one made by the Union; *i.e.,* a move to 16 followed by reversion to the status quo of 15. Accordingly, given the long stalemate over this issue – with Respondent firm on a *permanent* change to 17 rooms, and the Union having been equally firm on 15 – the proposal to *temporarily* move to 16 rooms, then revert to status quo, can hardly be viewed as the type of "substantial change" needed in order to "break an existing impasse." *Pepsi Cola- Dr. Pepper Bottling*, 219 N.L.R.B. 1200, 1200 (1975), reaffirming the "substantial change" standard set forth in *Webb Furniture*, 152 N.L.R.B. 1526, 1529 (1964), *enf'd* 366 F.2d 314 (4th Cir. 1966) and

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Anchorage] was trying to avoid making any more concessions than it had to in order to obtain a contract during tough economic times in the hotel industry." [Decision, p. 11].

Sharon Hat, 127 N.L.R.B. 947, 956 (1960), *enf'd* 289 F.2d 628 (5th Cir. 1961). This case law will be addressed below.

Third, and of greatest importance, is the effect of the All-or-Nothing Caveat. By expressly conditioning a temporary move to 16 rooms on acceptance of "this proposal in its entirety" – including its call for Respondent to *remain* in the Taft-Hartley trust – the Union effectively guaranteed non-acceptance of the proposed temporary move to 16 rooms. The Union was well aware Respondent was particularly committed to its proposal to allow it the right to annually review and select health & welfare plan coverage, and equally aware Respondent wanted relief from the "volatility" and "financial uncertainty" of the Taft-Hartley plan. [Tr., pp. 2253, 2258, 4197]. The parties had engaged once again on this front in December, and while the parties "talk[ed] about the medical a lot," neither side budged.

In short, the Union was plainly hedging – *i.e.*, making a "calculatedly non-committal or evasive" proposal. [12] While true the Union (on the surface) proposed a temporary change to 16 rooms, the Union carefully ensured avoidance of commitment to this proposal by tying it (all-or-nothing) to retention of the Taft-Hartley trust – a "hedge" the Union knew Respondent would never leap or pass through.

Further ensuring the effectiveness of this hedge, and non-acceptance of the all-or-nothing March 10 proposal, the Union, in presenting the health & welfare part of this proposal, moved regressively *away* from the December Non-proposal – a startling fact, in view of the absence of any interest by Respondent for the comparatively more management-favorable Non-proposal. There were in fact *two* regressive changes:

- The December Non-proposal contained contribution rates for the Taft-Hartley plan of $2.95/hour, $3.15/hour and $3.55/hour. [Resp. Ex. 47 & 134]. By contract, the March 10

[12] www.merriam-webster.com/dictionary/hedge/

proposal regressively set forth higher rates at $3.15/hour, $3.35/hour and $3.55/hour. [G.C. Ex. 56].

- Both the Non-proposal and the March 10 proposal *qualified* the availability of their respective rates with the following language: "Should the Captain Cook agree to raise its rates, then the Sheraton will raise their rates to meet those increases of the Captain Cook." However, the March 10 proposal regressively *removed* a limitation to this qualifier that had been contained in the December Non-proposal. The Non-proposal had limited the impact of a raise in rates with the following limitation, added to the end of the above-quoted qualifier sentence: " … but no greater than the rates originally proposed to the employer in the Union's original draft." [*Cf.*, G.C. 56 and Resp. 47 & 134]. In other words, as Sawyer explained in his testimony referring to the Non-proposal: "We gave [Respondent] a minimum [and] we gave [Respondent] a maximum." [Tr., p. 4204]. However, this "maximum" limitation was *removed* from the proposal that was actually made in March. The potential for the Captain Cook to raise its rates was apparently quite high, and was discussed by the parties in December.]." [Tr., pp. 3725-26].

The third and final item in the Union's March 10 proposal was a wage-increase proposal, which called for a first-year freeze followed by annual increases of 2% each. Three important points must initially be noted:

1. As the ALJ correctly found, wages were "not really a contentious subject during the negotiations and, in fact, had only been discussed minimally." [Decision, p. 66]. The "consensus of opinion seemed to be that this issue would not present a problem, once the more contentious issues were resolved." [*Id.*, at p. 57; *see also*, n.52 at p. 66].
2. Respondent had always been prepared to give a modest wage increase. It's proposed wage schedule, attached as "Exhibit 1" to its July 17, 2009 proposal, [G.C. Ex. 38], reflected an 18-

month wage freeze (from March 1, 2009), but was followed by a two (2%) percent increase to take effect September 1, 2010. This same wage-increase schedule was attached to Respondent's final offer on August 21. [Resp. Ex. 69]. [13]

3. The Union had made only *one* earlier wage proposal, provided in the initial exchange of offers in April of 2009. [Jt. Ex. 2 - 33-35]. Although it was in the nature of an opening-demand "wish list," nonetheless, at three (3%) percent for non-tipped employees (*i.e.*, most employees), it was not an unrealistic proposal, as so often seen in collective bargaining, and certainly not unreasonable as an opening-demand proposal.

Eleven months passed, from April 2009 to March 2010 – during which there was 'minimal discussion' on wages – before the Union finally made its second and only other wage proposal. This second proposal was substantially close to Respondent's last proposal. In short, wages were not an issue dividing the parties. This was an issue the parties could agree upon, *but only* – as the ALJ correctly found – "*once the more contentious issues were resolved*." [Decision, p. 57]. The wage-increase proposal was, therefore, a non-factor.

As noted above, to "break an existing impasse," there must be a "substantial change in the bargaining position of one party." *Pepsi Cola*, 219 NLRB at 1200. While this certainly doesn't mean that the "only course available [is] . . . to capitulate and accept," it *does* require that the parties move sufficiently enough "to suggest that future bargaining might be fruitful." *Civic Motor Inns*,

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[13] The ALJ, at page 22, refers to the wage schedule attached as "Exhibit 1" to Respondent's July 17 proposal, G.C. Ex. 38, and comments that counsel for Respondent referred in his brief to this schedule as reflecting a "wage freeze for the first year," while the General Counsel referred to the *same* document as reflecting a "two-percent increase." **Both characterizations are correct.** (except the proposed freeze was for 18 months, not a year). The ALJ, nonetheless, perceived a conflict, which in fact didn't exist. In an apparent attempt to resolve, the ALJ concludes: "… based on the respective positions of the parties as they proceeded to negotiate, *I believe the Respondent's counter proposal was actually a wage freeze.*" [Id. (*emph. added*)]. **This conclusion is plainly incorrect**. The ALJ cites no record evidence in support of this conclusion, and a cursory examination of "Exhibit 1" to the July 17 proposal readily shows Respondent plainly proposed a 2% increase beginning September 1, 2010**.** Moreover, **this 2% wage-increase proposal was retained in Respondent's final proposal dated August 21.** ["Exhibit 1" to Resp. Ex. 69].

300 NLRB 774, 776 (1990). In *Civic Motor Inns*, the parties had reached a good faith impasse over the employer's demand for an unlimited right to subcontract unit work. After a five month hiatus, the Union sought a resumption of bargaining, and said it was prepared to be "flexible," and make "new" proposals. The Union, however, supplied no specifics, and also referred to the subcontracting proposal as "unreasonable in the extreme." 300 NLRB at 774. The Board found and held:

> [W]e are unable to determine if the Union's bare assertion of "flexibility" on open issues and its generalized promise of "new" proposals represents "any change, much less a substantial change" in the Union's position . . . [w]e find that the record as a whole indicates that the Union continued to oppose the concept of unlimited subcontracting and that it failed to give a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful.

300 NLRB at 774 (*emphasis added*). Similarly, in the present case, a previous good faith impasse had been reached (on all issues, as the ALJ found). Also similarly, viewing the "record as a whole" – and, for the reasons shown above – the impasse in this case was not broken by the March 10 proposal. Succinctly stated, just as the Union in *Civic Motor Inns* "continued to oppose the concept of subcontracting," the Union here "continued to oppose the concept" of withdrawing from the Taft-Hartley Plan, as well as "the concept" of a permanent change to 17 rooms. Further, there was no indication whatsoever of any intent by either party to move on any of the other "October impasse" issues, such as the lunch issues, sick days and holidays. Although a move on wages was indicated, this was not an issue dividing the parties, as shown above. *See, AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1301-02 (4th Cir. 1995) (denying enforcement: "While the Board noted a movement in the discussions, from which it concluded that the declaration of an impasse was premature, it relied on movement on *collateral issues* which could *not overcome the fundamental disagreement* on wage concessions that actually formed the basis for the impasse," and adding that the parties "need not pursue negotiations . . . when there is no objectively reasonable hope of reaching agreement"); *and see, Retlaw Broadcasting Co.*, 324 NLRB 1148 (1997) (affirming the "substantial change" standard, summarizing *Civic Motor Inns* as holding that "[m]ere 'willingness' is not enough," and relying

further on the Fifth Circuit's endorsement in *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983), that actual "bargaining concessions, implied or explicit" must be made in order to break an impasse).

The ALJ's path to his erroneous finding that impasse was broken in March was aided further by his misplaced reliance on Respondent's presentation, in the March 10-11 negotiations, of an Aetna medical insurance policy. [Decision, p. 215]. The ALJ notes there were significant differences between this policy and the Cigna policy that had been attached to the original July 17 proposal. *Id*. This focus on the two policies is completely misplaced. First, the Cigna policy was never implemented. [Decision, p. 28, lns. 32-32, n. 15]. Second, and more important, the substance of Respondent's proposal had nothing to do with the identity of the carrier, or even the specific terms of the policy. The substance, instead – as set forth plainly in section 173 of the August 21 final proposal, [G.C. Ex. 38] – was for the right sought by Respondent to annually select the Hotel's "plan providers, plan benefits and employee contributions," and to be able to make such selections within its "sole discretion," subject to (a) "sound business reasons" supporting the selection, (b) the giving of "notice" to the Union, and (c) the obligation to "meet and confer" with the Union. This proposal was driven by the Respondent's great concerns, raised in the midst of a devastating economy, regarding the financial volatility of health care coverage, together with the plain, simple fact that, "if the employer is paying for it," then it is the employer who "ought to shop and compare as often as is necessary, at least annually . . . to come up with whatever program [is] important to provide." [Tr., pp. 4173-74, and 2253, 2259, 4197, showing these concerns had been raised at the bargaining table].

In short, the differences between the Aetna and Cigna policies are immaterial. The nature and purpose of Respondent's proposal was the right to control the selection of coverage. The Cigna policy was referenced in sections 174, 175 and 176 of the August 21 proposal as the "selected" policy … *but,* selected *only* "[a]s of the effective date of this Agreement." [G.C. Ex 38]. The summaries of benefits in sections 174 through 176 are explicitly "subject to annual review as

described in §173." The focus of the proposal – and the very nature of the deadlock – was on Respondent's desire to withdraw altogether from the Taft-Hartley trust, and to take control over selection. There was no break in impasse, because the Union was still calling for retention of the Taft-Hartley trust.

Ample notice concerning the substance of the Aetna policy was provided. Remington executive Villarreal spent 90 minutes in one of the March meetings explaining the policy, and provided detailed documents. [Decision, p. 116]. The Union was also provided contact information for the insurance broker, Janet Kapferer, who sent a letter to Mr. Sawyer, making herself available for questions. [Tr., p. 4214-16 (Sawyer); *and see*, Jt. Ex. 2-137-140 (Stokes' March 19 letter, affirming Kapferer's letter had been previously sent)]. Sawyer not only failed to contact the broker, he *refused* to contact her:

> No, I did not call her [Ms. Kapferer]. Candidly, I lost that contact information. I did get a letter [from her] but frankly, Ms. Stokes, by that time it was apparent to me that the employer didn't want an agreement. They had declared impasse . . . taking the time out to do that [call her] in my schedule was futile.

[Tr., p. 4216]. This testimony completely undermines the ALJ's finding that the Union wanted information for further bargaining. The ALJ points to Sawyer's April 1 letter:

> Sawyer argues [*in his April 1 letter,* at Jt. Ex 2 -141-143] that the Respondent needs to make information available to the Union "that will enable us to understand and assess the employer's brand new position on this complicated subject." [*quoting the April 1 letter*].

[Decision, p. 218]. This April 1 statement by Sawyer was a sham, and the letter as a whole nothing more than posturing. In the first place, it contains not a single request for information! As the above-quoted testimony confirms, Sawyer had no interest at all in "understand[ing] and assess[ing]" the Aetna policy, and the ALJ errs in concluding otherwise. This error is obvious in view of the overall record evidence of the deadlock over Respondent's proposal to withdraw from the Taft-Hartley trust, and is made further obvious by a Union flyer distributed shortly after the March

meetings that pointedly attacked the Aetna plan. [G.C. Ex. 45e; Tr., pp. 1886-92]. The flyer asserted the "Employer Medical" gives "No guarantee after 1st year that the costs will stay the same," that "Plan benefits can change," and finally, "It is not a good deal if it disappears in a year." These are the *same objections* the Union had been making *since July*, when Respondent first proposed to exit the Taft-Hartley trust and make its own annual selections.

The March 10 proposal, in short, was intended to fail, and the parties were in a deadlock on all issues. The Union made no further proposals following the March meetings. Sawyer's April 1 letter expressed nothing more than "mere willingness to meet," which as *Civic Motor Inns* teaches is insufficient to break impasse. None of this is surprising, though, when understood in the context that the Union, as the ALJ noted, "was trying to avoid making any more concessions than it had to," given the "tough economic times," and the Union's published view that "hotel industry leaders" in 2010 were seeking "long-term concessionary contracts." [Decision, p. 11, lns. 44-46; *and see*, evidence in footnote 11 above]. In short, the Union was equally engaged in hard bargaining, as the ALJ found. [*Id*., lns. 46–47]. Where a union is "equally adamant in adhering to its proposals," then an employer, even when adopting a "take-it-or-leave-it" position, cannot be accused of bad faith bargaining. *Romo Paper Products*, 208 NLRB 644, 650 (1974). Further evidence of the effort to "avoid making any more concessions" was the delay-game played in the final March 11 session, in which the issue of job classifications was brought up by the Union for protracted discussion. This issue, however, had been discussed at great length in June, [Tr., pp. 1641-77 & 1742-59], and had been largely resolved, as reflected in the December Non-proposal, which stated the Union "[c]an agree to employer classifications except for room attendant and seamstress." [Resp. Ex. 47 & 134; *see also*, Stokes' test. at Tr., pp. 7537-38 (the Union "conjure[d] up difficulties [even though] . . . we only disagree[d] on a couple of job classifications, and even on those there was no practical disagreement concerning what they did [in those classifications]"); *and see*, Ernenwein test. at Tr., pp. 6137-75, and her notes at Resp. Ex. 25]. When Stokes complained, Sawyer abruptly ended the

session, and the Union walked out of the room. [*Id.*]. No further bargaining was held. The Union made no further proposals.

Where a Union engages in such adamant, hard-bargaining tactics, and avoids and delays bargaining, the employer may give notice of the proposals it intends to implement, and may do so unilaterally *without* bargaining to impasse. *Auto Fast Freight v. NLRB*, 793 F.2d 1126, 1129 (9th Cir. 1986). As the Fifth Circuit has held:

> Unilateral implementation of changes in such a setting [where the Union has avoided or delayed bargaining and the employer has given notice of the proposals it intends to implement] is not a violation of the duties to bargain collectively, even in the absence of an impasse, if the employer notifies the Union that it intends to institute the changes and gives the Union the opportunity to respond to that notice.

NLRB v. Pinkston-Hollar, 954 F. 2d, 306, 311-12 (9th Cir. 1992) (*emph. added*). As stated in earlier Fifth Circuit precedent, relied upon in *Pinkston-Hollar*:

> It is true, of course, . . . that an employer may make changes without the approval of the Union as the bargaining agent. The Union has no absolute veto power under the Act. Nor do negotiations necessarily have to exhaust themselves to the point of so-called impasse. But there must be discussion prior to the time the change is initiated . . . [and the Union] afforded a reasonable opportunity to counter arguments or proposals.

Nabors Trailers v. NLRB, 910 F.2d 268, 273 (5th Cir. 1990), citing to *Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964); *see also, NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963).[14] The Court in *Pinkston Hollar*, 954 F. 2d at 310, also applied a "mere due diligence" standard to the question of whether a Union has waived its rights under the duty to request bargaining, rejecting the more stringent standard that retains the presumption of non-waiver unless there is "evidence of a clear and

[14] *See* Note, "Blind Faith or Efficiency? The Differences Between the Fifth Circuit and All Others on the Topic of Private Sector Impasse Bargaining," 80 *Washington U. L. Q.*, 1341 (2002). The author convincingly argues that the Fifth Circuit's approach, contrasted to the so-called "integrative bargaining" approach reflexively followed elsewhere, "enhances efficiency and free market operation," and that the "statutory scheme presently employed [by other circuits and the Board] is too variable and inconsistent to effectively guide employers away from violations of Section 8(a)(5)." *Id.*, at 1361 and 1362-63. Further, by enhancing "an efficient use of economic weapons," the Fifth's Circuit's "policy might foster agreement: the specter of unilateral change by an employer or a strike by the union might lead to further sessions at the bargaining table." *Id.*, at 1361.

unmistakable waiver."

Given the evidence reviewed above – including Sawyer's refusal to contact the broker, the failure to request information (while posturing to the contrary), the delay-game and walkout on March 11, and the absence of further Union proposals – the Union clearly waived its rights under the duty to request bargaining. The implementation of Respondent's health & welfare proposal on May 1, 2010, announced in Stokes' March 19 letter, [Jt. Ex. 2-137-140], and the reimplementation of the October impasse items, announced in the same letter, were legitimate and lawful.

Exception 2:

The Administrative Law Judge Erred by Placing Form Over Substance in Ruling that the Actual Notice Provided to the FMCS Did Not Fulfill the Obligations Described Under Section 8(d)(3) of the Act.

The ALJ's findings determined that the Hotel bargained hard, but took reasonable, earnestly held positions – the Hotel bargained in good faith. [Decision, p. 58]. The ALJ correctly found that "the parties were at a collective bargaining impasse" in October of 2009, "under which the Respondent would have had the legal right to put into effect certain of those proposals that it had been advocating for some time, *but for* the fact that it had failed to give the FMCS the requisite notice required under Section 8(d)(3) of the Act." [Decision, p. 62 (*emphasis added*)]. The "but for" portion of this finding and conclusion is in error. The ALJ overlooked the fact that the FMCS did in fact have notice – notice had been provided by the Union – and that implementation was therefore *fully* lawful, as has been held by the Ninth Circuit in a case with materially identical facts. *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 998 (9th Cir. 1981).

It is undisputed that the Federal Mediation and Conciliation Service received actual notice of the type required by Section 8(d)(3) of the Act – "notice of the existence of a dispute." The Respondent subpoenaed the FMCS for its records, in an effort to establish this receipt of actual notice. Although the FMCS filed a petition to revoke the subpoena, which was erroneously granted

in full (as addressed below), nonetheless, the FMCS stated in this pleading that the Union did in fact file an "F-7 Notice to Mediation Agencies, advising FMCS of the contract termination," and that the "matter was assigned for mediation." This pleading was admitted into the record without objection. [Resp. Ex. 19, at Tr., p. 1177]. An F-7 Notice is the standard form utilized by the FMCS for the giving of the "notice of the existence of a dispute" contemplated by Section 8(d)(3) of the Act.

Respondent also submitted an F-7 notice on February 3, 2010, in the record as Jt. Ex. 1 [stipulation, Tr., p. 512]. Although the precise date of the *Union's* F-7 notice is not directly reflected in the record, undisputed evidence points plainly to the fact it was sent prior to the October 17, 2009 implementation. Stokes testified he had been informed by Union representatives that they had provided the notice, [Tr., p. 3627], and he affirmed this understanding in his February 3, 2010 cover letter to the FMCS, in the record as Jt. Ex 1 ("I had been under the impression that the Union had already notified your agency of our negotiations and their status, and thus I was not aware of the need to do so."). The record is clear in any event that the FMCS did in fact have actual notice that the parties – as stated in Resp. Ex. 19, quoted above – had reached "contract termination," which occurred on August 31, 2009. This fact was communicated by the Union on the F-7 Notice, the form of which states the following in its preamble: "You are hereby notified that written notice of the termination or modification of the existing collective bargaining contract was served upon the other party to this contract and that *no agreement has been reached*." [*see example*, at Jt. Ex. 1 (*emphasis added*)]

"Congress's principal concern in enacting Section 8(d) was to give the mediation services time to intervene in an effective manner. This goal would not be advanced by requiring the initiating party to give notice after the other party had done so." *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 998 (9th Cir. 1981). During the senate debates over the Taft-Hartley Act in 1947, Senator Taft argued that the mediation services provision notice was included in Section 8(d) "in order to afford time for free collective bargaining, and then for the intervention of the Mediation Service." 93 Cong.

Rec. 3839 (1947); *See also Local 219, Retail Clerks Int'l Ass'n v. N.L.R.B.*, 265 F.2d 814, 818 (1959). In fact, Courts have held that the Board's strict interpretation of Section 8(d)(3) may not be appropriate in all situations. *Id.* at 969. ("…we do not read anything in the language of the statute or in its legislative history to indicate a rigid, absolute 30-day requirement.") So long as the FMCS had an opportunity to intervene, the intent of the Act has been fulfilled.

The Ninth Circuit Court of Appeals followed congressional intent in deciding *Mar-Len Cabinets*, 659 F.2d 995 (9th Cir. 1981). In *Mar-Len*, an employer and local union were engaged in a contract dispute. *Id.* at 996. In March, with the agreement on the verge of expiration, the union notified the FMCS of a dispute, the employer did not. *Id.* at 997. After the agreement expired, in August of that same year, the employer unilaterally implemented its proposed contract changes. *Id.* The Board, like the ALJ's decision here, determined that the employer violated its duty to bargain under 8(a)(5) by taking unilateral action without proper notification of the union. *Id.* On appeal, the employer argued, among other things, that it was relieved of its duty to notify the FMCS because the union had already notified them. *Id.* at 998. The 9th Circuit Court of Appeals disagreed. "No court has held that the initiating party must send a second notice *when the non-initiating party has already notified the mediation agencies*." *Id.* [emphasis added].

In its ruling, the Court's only caveat is a warning to employers that it may rely on a union's notice if that notice was effective to "apprise the mediation services of the particular dispute." *Id.* at 998; citing *Amax Coal Co. v. NLRB*, 614 F.2d 872, 889 (3d Cir. 1980). The Court in *Mar-Len* did not reach this issue, and instead remanded the matter to the Board to rule on the effectiveness of the union's notification when relied upon by the employer to justify its unilateral implementation. *NLRB v. Mar-Len* Cabinets, Inc., 659 F.2d 995, 998 (9th Cir. 1981). *On remand, the Board accepted the 9th Circuit Mar-Len ruling*, and determined that the notice was not effective because it was not

notice of a dispute between the two parties at issue.[15] *Mar-Len Cabinets, Inc.*, 262 N.L.R.B. 1398, 1399 (1982). While the necessity of providing a timely notice is not in doubt, it is error for the Board to mechanistically require a second duplicative notice where effective notice has already been provided.

The ALJ here made the same error as the Board in *Mar-Len*. The ALJ's ruling places form over function in finding that the Hotel violated Section 8(d)(3) even though there is undisputed evidence that the FMCS received the required statutory notice of the 2009 bargaining impasse.[16] The carefully worded Decision acknowledges that the basis for the ruling is that the *Respondent* did not make the requisite notice, not that there was no notice provided at all. Furthermore, contrary to the Decision's findings, the record contains no evidence that the notice requirements harmed the Employees' Section 7 rights in violation of Section 8(a)(1). Such a showing would require at least some impact on the rights of the employees, and none are shown here. The intent of 8(d)(3) is to give the FMCS the opportunity to intervene with mediation services if those services are deemed to be appropriate, not to simply add a nominal activity to a bargaining party's pre-implementation checklist. *Mar-Len* supra, at 998. *See Hooker Chemicals & Plastics Corp., Petitioner, v. National Labor Relations Board*, 573 F.2d 965, 968 (7th Cir. 1978). Here, hyper-technical compliance has consumed the intent of the original law.

Where a party's failure to notify the FMCS creates no prejudice and has no effect on the matters at hand, the remedy for a failure to notify is nullified or is limited accordingly. *See, e.g.*, *Mar-Len* supra, at 998 ; *Commc's Workers of America v. Southwestern Bell Tel. Co.*, 713 F.2d 1118,

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[15] The union's notice only provided notice of a dispute between parties to a master labor agreement involving a group of employers. At the time the union's notice was sent, the employer had already initiated bargaining with the union on an individual basis outside of the master labor agreement thereby creating a separate contract and a separate dispute. *Id.*

[16] The timeliness and sufficiency of the Hotel's February 3, 2010, notice to the FMCS of a second bargaining impasse between the parties prior to the Hotel's second implementation is not in dispute. *See* [Tr., p. 512; Jt. Ex. 1].

1126-1127 (5th Cir. 1983). "As the court stated in *Local Union 219, Retail Clerks International Association v. NLRB*, 265 F.2d at 818, 'the whole thrust of the section [8(d)(3)] is to give the Service [FMCS] sufficient time to intervene in an effective manner . . . .'" If the FMCS was contacted by the Union, it had the opportunity to intervene in a timely manner, and there was no prejudice to anybody from any alleged failure by the Respondent to separately contact the FMCS.

Here, there is no dispute that the FMCS had effective notice of the bargaining dispute. Resp. Ex. 19, a Petition to Revoke Subpoena filed by the FMCS in this case, is clear: "The Union filed an F-7 Notice to Mediation Agencies, advising FMCS of the contract termination." [Tr., pp. 1174 – 1176]. In considering Respondent's 19, the ALJ said, "there's really no doubt in my mind that the assertions that the FMCS is making in this Petition are correct." [Tr., p. 1175, lns. 20-22]. There is no dispute that the filing of Form F-7 was effective notice of the dispute between the parties.[17] The Union informed the FMCS of the expiration of the collective bargaining agreement which expired on August 31, 2009, and that the FMCS acknowledged receiving such notice. [18] [Decision, p. 24, ln. 18; Tr., p. 3627, lns. 6 – 24; Resp. Ex. 19]. Still, the Decision finds that the Hotel violated the Act for failing to provide its own, redundant, notice. This is a flawed ruling. *See Mar-Len* at 998; accepted for remand at *Mar-Len Cabinets, Inc.*, 262 N.L.R.B. 1398, 1399 (1982).

However, should the Board go against its precedent and affirm the Decision on this issue – which Hotel respectfully believes would be an error – the relative unimportance of this technical procedure in this case should be brought back into focus. Even after acknowledging its receipt of the Union's notice of a dispute, there is no evidence that the FMCS with mediation services to settle this

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[17] Form F-7, a publication of the FMCS was designed for use by the parties in filing a notice of dispute. 29 CFR 1402.1 (rev. July 1, 2010); *see* attached as Exhibit 1.

[18] The Hotel was stopped from developing its position because of the ALJ's decision to quash the Hotel's subpoena of the FMCS communications records. [Tr., p. 2042, lns. 2-23]. Questions about when such notice was provided to the FMCS and by whom could only have been answered by the FMCS or the Union. However, the Hotel's subpoena to both the Union and the FMCS were denied, ending any further inquiry. [*Id.*]. This issue is handled in greater detail at other locations in this brief.

dispute. [Resp. Ex. 19]. Indeed, it was the FMCS office in Atlanta was initially assigned the case. *Id.* The Hotel's alleged non-compliance with this technical FMCS notice did not somehow influence the bargaining unit to decertify the Union. Not a single witness at the hearing claimed that their reasoning for signing the decertification petition was because of the Hotel's non-conformity with the notice requirements regarding the Federal Mediation and Conciliation Services. The Decision's nonsensical ruling in this regard will be discussed in greater detail elsewhere in this submission.

Exception 3:

The ALJ Erred in Revoking the Hotel's Subpoena to the FMCS and the Union and Thus Blocking the Hotel From Receiving any Information Regarding the Notice the Union Provided to the FMCS During the Relevant Periods.

The Decision found that the Hotel violated Section 8(d)(3) of the Act by failing to provide notice to the FMCS of the bargaining impasse that existed between the Union and the Hotel prior to the Hotel's implementation of its last, best, and final bargaining offer. [Decision, p. 47]. As is discussed in the discussion of Exception 2 herein, the FMCS actually received notice of the impasse prior to implementation, [Resp. Ex. 19; Tr., at pp. 1174 – 1176], but the ALJ's hyper-technical application of the Act found a violation that placed form over substance. Though it is clear that the FMCS received notice of the impasse, the ALJ revoked the Hotels' subpoena, thus prohibiting the Hotel from receiving information from either the Union or the FMCS about when and in what form that notice was actually provided. This ruling was incorrect.

The Hotel subpoenaed records from both the Union and the FMCS for the timing of the communications between the Union and the FMCS. [*See* Tr., p. 2042, lns. 2-23]. The ALJ blocked the Hotel's receipt of this information by labeling them as protected communications, even though the Hotel only asked for proof of the existence of communications between the FMCS and the Union. [Resp. Ex. 19]. The ALJ relied wholly, and incorrectly, on the arguments of the FMCS, the Union, and his own admittedly vague recollection of the controlling law. [Tr., at p. 1175].

The Union filed a charge [19], on which the Board issued a complaint, alleging that the Respondent implemented its final proposal without contacting the FMCS. Meanwhile, the Union left the Respondent's negotiators with the impression that it would or already had contacted the FMCS regarding the pending negotiations. [Tr., at p. 3627]. The records requested are obviously relevant to the Respondent's defense to this charge, and should have been provided.

Also, during the Hearing, the ALJ was led astray by the FMCS' off-topic petition to revoke. [Tr., at p. 1175]. The Hotel asked for the telephonic records – who called who and when – from the FMCS regarding a discrete set of names and phone numbers, for a period of time during which Respondent and the Charging Party were conducting negotiations. [Tr., at p. 1175]. However, the FMCS interpreted this to be a request for confidential material regarding the substance of a mediator's communications during negotiations. [*See* Resp. Ex. 19]. All of the cases cited by the ALJ and in the FMCS' petition to revoke – and the principle upon which they all rely – relate to requests for data and testimony relating to the *substance* of certain bargaining negotiations in which the FMCS representatives had taken part. *See e.g. Tomlinson of High Point, Inc*., 74 N.L.R.B. 681, 683-684 (1947) (The material targeted by the subpoena "… appears to have been Mr. Beck's testimony with respect to certain conferences between the respondent and the Union … and … any memoranda or records made by him regarding those conferences."); *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 53 (9th Cir. 1980) ("…the Company requested that the administrative law judge subpoena Hammond and obtain his testimonial description of the last two bargaining sessions."); *Harowe Service Controls, Inc.*, 250 N.L.R.B. 958 (1980) (respondent attempted to obtain testimony from federal mediator who had attended bargaining sessions). That is not the nature of Respondent's request for information.

There was no request to divulge "information disclosed to commissioners and other

[19] 19-CA-32301

employees." *Cf.* 29 C.F.R 1401.2. Nor is there any violation of any conciliation principle or any risk of undermining the FMCS's "reputation for impartiality and integrity". *Id.* Furthermore, these telephone records are unlikely to be "contained in the files of the [Agency]; nor do they pertain to "any information acquired as part of the performance of [any FMCS representative's] duties," and therefore are not even encompassed by the prohibitions contained in § 1401.2.

Where there is a request for substantive communications between the FMCS and a party, clearly such requests are to be denied. Here, however, where the pending question is limited to whether notice had been provided by any one of the parties in dispute, and the only requested information is whether communication occurred at all, such information should not be withheld. The FMCS should distribute this information freely. Providing such information allows clear, objective questions regarding notice to be answered accurately. Withholding basic, non-substantive information in this context does little to violate the confidentiality of the FMCS role. Therefore, the ALJ's Decision in this regard should not be enforced.

Exception 4:

The ALJ Improperly Concluded That Portions of the Hotel's Rules of Conduct are Unlawful.

The Decision erroneously concluded that eight (8) of the Hotel's Associate Rules and Regulations [hereinafter "Rules" or "Rules of Conduct"] violate the Act. [20] [Decision, p. 79]. The Decision declared the hotel's rules of conduct regarding access, solicitation, and loitering all facially violative of the Act, but disregarded Board law that protects the Hotel's right to institute necessary work rules for the operation of its business, and failed to analyze whether the Rules of Conduct could reasonably be interpreted to chill Section 7 activity. This is an error.

In his cursory analysis, the ALJ could not point to any evidence that the Hotel promulgated the Rules in response to union activity. There is no evidence proving that even a single employee ever believed the Rules prohibit Section 7 activity. No employee ever utilized the "open door policy" to clarify the scope of the Rule, and other than the ULPs here at issue, there is no evidence that the Hotel ever disciplined an employee for conducting Section 7 activity on or off of its property under this long-held policy. Had the ALJ gone through the proper analysis, the proper outcome would have prevailed – these charges would have been dismissed.

In general, the ALJ's errors are based on a failure to give proper credit to the Respondent's

[20] In the order in which they appear in the Remington Associate Handbook [G.C. Ex. 7]: (1) Confidentiality and Proprietary Information. Employees are prohibited from disclosing confidential information, including "personnel file information" and "labor relations" information; [p. 4] (2) Solicitation. Solicitation of associates during working time by, or on behalf of, any individual's organization, club or society is prohibited. This includes promotion or sale of merchandise, services, clubs, organizations or ideas. The distribution of any literature, pamphlets or other material in a guest or work area is likewise prohibited. Further, associates may not solicit while they are engaged in the performance of work tasks, nor may any associated be solicited while working. Solicitation of quests by associates at any time for any purpose is also inappropriate [p. 27]; (3) I agree not to return to the hotel before or after my working hours without authorization from my manager [p. 33]; (4) I agree not to give any information to the news media regarding the hotel, its guests, or associates, without prior authorization from the General Manager and to direct such inquiries to his attention [p. 34]; (5) I understand that associates must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head [p. 34-35]; (6) I understand that conflict of interest with the hotel or company is not permitted; [p. 35]; (7) Behavior which violates common decency or morality or publicly embarrasses the Hotel or Company; [p. 36] (8) Insubordination or failure to carry out a job assignment or job request of management; [p. 36].

right to establish work rules. When evaluating whether an employer's work rules are lawful under the Act, the Supreme Court requires that the Section 7 rights of the employees be balanced against an employer's need for an orderly workplace. *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945). In certain situations, employers may institute policies for the enforcement of important activities and protections at the workplace, even if those policies have a limited impact on employees Section 7 rights. However, the ALJ prematurely ended his investigation of the issue after labeling employee misconduct as Section 7 activity and labeling any rule that limited this conduct "illegal." [Decision, p. 76, lns. 48-50]. The Rules in place were one of the mandatory subjects of bargaining, and were fully endorsed by the Union at the time the employees were disciplined. [Article 1, Section 6]. Thus, the ALJ's decision attempts to strike-down the long-standing terms of the employee handbook and the collective bargaining agreement between the Union and the Hotel. The ALJ avoided this analysis and the case law that flows from it. *See* [See Tr., pp. 58-60] .

Employers have the right to maintain order and discipline in their business operations through the institution of various work rules in negotiation with the Union. *Id.* at 803; *Schraffts Candy Co.*, 155 N.L.R.B. 581 (1979). To determine whether a work rule violates the Act, the Board considers "'whether the rules would reasonably tend to chill employees in the exercise' of their statutory rights." *Adtranz ADB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001); *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998). In making this assessment, the Board must engage in a two-step inquiry: (1) whether the rule "explicitly restricts" Section 7 activity, and if not (2) whether employees would reasonably construe the language to prohibit Section 7 activity; the rule was promulgated in response to union activity; or the rule has been applied to restrict the exercise of Section 7 rights. *Martin Luther Mem'l Home*, 343 N.L.R.B. No. 75, at *1-2 (May 19, 2004). If the answer to both questions is "no", the rule does not violate the Act. *Id.*

In the first step - which looks to see whether the rule explicitly restricts section 7 activity - the Board focuses on the text of the challenged rule. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374

(D.C. Cir. 2007). Courts have specifically rejected the argument that the mere "unrealized potential" that "the rule could reasonably be interpreted as barring lawful union organizing propaganda" rendered the rule facially invalid. *Fiesta Hotel Corp.*, 344 N.L.R.B. 1363, 1367-1368 (2005) In *Fiesta Hotel Corp.*, for example, the Board ruled that an anti-loitering rule and anti-denigration rule did not facially violate the Act. *Id.* Where, as here, the work rule does not specifically refer to Section 7 activity, the Board will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. *Lutheran Heritage Willage-Livonia*, 343 N.L.R.B. 646, 647 (2004)("To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.") Similarly, the Circuit Court for the District of Columbia has also made clear that the Board "may not cavalierly declare policies to be facially invalid without supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy." *Adtranz ABB Daimler-Benz Transp., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

None of the Rules are facially violative of the Act. Courts have invalidated only those workplace restrictions that explicitly prohibit individual employees from soliciting and distributing union literature during *nonworking* hours in *nonworking* areas. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (U.S. 1983); citing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974); *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280, 283-284 (CA6 1981); *General Motors Corp.*, 212 N.L.R.B. 133, 134 (1974). In hotels specifically, the Board has endorsed job rules that prohibit conduct *off the hotel's premises* or *during non-working hours. Lafayette Park Hotel*, 326 N.L.R.B. 824, 826 (N.L.R.B. 1998).

Since none of the rules are facially violative, a violation could only be found if the General Counsel shows (1) the rule was promulgated in response to union activity; (2) the rule has been

applied to restrict the exercise of Section 7 rights; or (3) employees would reasonably construe the language to prohibit Section 7 activity. *Martin Luther Mem'l Home*, 343 N.L.R.B. 646, 646-647 (2004). Here, the General Counsel did not present any evidence that the rules were implemented in response to union activity, or were discriminatorily applied to employees. Therefore, the only issue properly before the ALJ was whether employees reasonably would construe the language in the work rules to prohibit Section 7 activity— based solely upon a facial review.

In reviewing how employees would reasonably construe a rule, the Board does not allow parties to "nitpick" at various portions of workplace rules in order to find a violation. Indeed, the Board has consistently held that when determining whether a challenged rule is unlawful, it must "give the rule a reasonable reading," "refrain from reading particular phrases in isolation," and "not presume improper interference with employee rights." *Martin Luther*, 343 N.L.R.B. at 646; *Crowne Plaza*, 352 N.L.R.B. at 383; *see also Lafayette Park*, 326 N.L.R.B. at 825, 827.

In *Lafayette Park Hotel*, an employer Hotel maintained an employee standard that makes it unacceptable to engage in "Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community." 326 N.L.R.B. at 827. Specifically, the Board reasoned that this employee standard, in place before there was a labor dispute at the Hotel, could not be reasonably interpreted as a restriction on Section 7 rights. *Id.* [21] Thus, Employees would reasonably believe that this rule was intended to prohibit serious misconduct and not conduct protected by the Act. *Id.* at 827.

[21] The Board follows similar logic in its examination of other Lafayette Park Hotel employee standards which the General Counsel claims to have chilled certain employee Section 7 activity: no fraternizing with hotel guests anywhere on hotel property; no use of the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager; no divulging Hotel-private information to entities that are not authorized to receive that information; no being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives. *Id.* at 826-829. All of these hotel policies are acknowledged to restrict employee activity in some way, but employees could not reasonably believe that these rules were intended to restrict conduct protected by the Act. *Id.*

Here, under these same fundamental principles of interpretation, the ALJ, like any other reasonable employee, must read the Rules together and in context with the evidence of decades of peaceful collective union representation at the Hotel. [Tr., p. 87]. The ALJ avoided this contextual analysis. Instead, he analogized the Hotel's Rules to blanket "confidentiality rules" [Decision, p. 76, lns. 15-19], and then went on to affirm himself by declaring six of the eight rules to be violation of the Act because they were enforced against employees in violation of the Act. [Decision, p. 76, lns. 48-50]. This makes no sense.

The Hotel respectfully submits that no reasonable employee would read the Rules to prohibit Section 7 activity because they say nothing about and are not in any way related to Section 7 activity. Furthermore, the ALJ failed to consider the following key undisputed facts, which negate his conclusion that the Hotel's rules are unlawful:

- there is no evidence that the Hotel's rules actually restricted the exercise of Section 7 rights;
- there is no evidence that the Hotel promulgated the rules in response to union activity. To the contrary Employees acknowledge that these policies were long-standing, and clearly understood. [*See e.g.* Tr., p. 288];
- there is no evidence that even a single employee ever believed the rules prohibit Section 7 activity; and
- prior to the allegations at issue, there is no evidence that the Hotel has ever disciplined any employee for conducting Section 7 activity on or off of its property.

In light of all these facts, it would be unreasonable for an employee to read the Rules and think to himself, "I had better not conduct any union activity on or off hotel property, or I'll get in trouble."

Neither the employees nor the Board are required to check their common sense at the door. In this regard, the ALJ seems to have forgotten the Board's advice: "Work rules are necessarily

general in nature and are typically drafted by and for laymen, not experts in the field of labor law." *Martin Luther*, 343 N.L.R.B. at 648.

Moreover, the ALJ even failed to consider the Hotel's open door policy, which provides that employees can ask managers about concerns or complaints regarding any rule. [G.C. Ex. 7 at pp. 22-23 "NO MEMBER OF MANAGEMENT IS TOO BUSY TO HEARCONCERNS OF ANY ASSOCIATE" (emphasis as in original)]. Therefore, when the ALJ finds — in a vacuum— that employee Section 7 rights would be chilled by language that allegedly is overbroad, it is important to note that employees readily and simply can clarify any alleged uncertainly regarding the language through the Hotel's open door policy, which is part and parcel of the Company's policies. The ALJ fails to address why a "reasonable" employee would allegedly believe that Section 7 activity is prohibited without first asking management about how the rule should be interpreted. The Hotel cannot be expected to consider and take into account every potential possibility for employee confusion in its handbooks. If it did, employees would have to wade through hundreds of pages of legalistic language which is likely to result in even more confusion.

The ALJ found that six (6) of the Rules (rules (a), (b), (c), (f), (g), and (h)), were unlawful because they unnecessarily restrict the Section 7 activity of the employees. [Decision, p. 77]. However, the ALJ skips the examination of whether employees reasonably understood the rules to restrain Section 7 activity because "Respondent relied upon these rules in disciplining [its employees]…for engaging in protected Section 7 conduct." In fact, the ALJ's only basis for holding Rule (h) to be unlawful is that it was used unlawfully. [Decision, p. 77, n. 58]. This is circular. This faulty reasoning cannot be a basis for his misguided ruling.

In his analysis of Rule (a), the return to work rule, the Decision ignores any review or analysis of the Board's decision in *Crowne Plaza Hotel*, which is directly on point and would hold that the Hotel's "Returning to Work Premises" rules are valid. 352 N.L.R.B. 382 (2008). In *Crowne Plaza Hotel*, the General Counsel argued that the following rule was unlawful because it denied

employees access to outside non-working areas and it allowed a manager to select which employees could use the facilities:

> You should only be at the hotel during scheduled work hours. When you have punched out at the end of your shift, please leave the building promptly. Any employee caring to visit the hotel during non-work hours must first obtain permission from the General Manager. If an employee would like to patronize any of the food and beverage outlets, they may do so only with the prior permission of the General Manager.

Id. at 385.

On summary judgment, the Board rejected each of the General Counsel's arguments. The Board held that employees would not construe such a rule to deny access to outside non-working areas because the rule's second sentence requires that employees leave "the building" at the end of their shift. *Id.* The Board further held that "a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity" because it did not mention Section 7 activity and there were legitimate business reasons for a rule requiring off-duty employees to obtain permission before entering the premises. *Id*. citing *Lafayette Park Hotel*, 326 N.L.R.B. at 827.

The reasoning of *Crowne Plaza Hotel* was adopted by the ALJ in *Jurys Boston Hotel*, 356 N.L.R.B. No. 114, p. 15 (2011), another hotel where employees are restricted from non-work areas of the Hotel, and asked to leave the property during non-work time. *Id.* The ALJ in *Jurys* found that these rules "do not explicitly restrict Section 7 activity" and "simply restrict employee use of certain areas of the hotel to work-related purposes." *Id.* Under such circumstances, the ALJ found that it was not "likely that employees would read these rules as limiting their Section 7 rights" because they only "prohibit patronizing the hotel as a customer" and "have an apparent business justification." *Id.*

The rules found to be valid in *Crowne Plaza Hotel, Lafayette Park Hotel,* and *Jurys Boston Hotel* are similar to the Hotel's "returning to work" rule. Although the rule here requires an off-duty employee to obtain prior approval from management before returning to the hotel, "a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity" because the

rule does not in any way mention Section 7 activity. *Crowne Plaza*, 352 NLRB at 385; *Lafayette Park*, 326 NLRB at 827. Almost identical employee policy provisions were maintained under the prior employer at The Sheraton Anchorage Hotel & Spa, Interstate Hotels & Resorts, Inc.. [*See* generally Resp. Ex. 3]. For example Interstate's employee handbook contains nearly identical policies limiting the release of employee information [p. 15]; prohibition against conflicts of interest [pp. 15-17]; prohibition against "employees returning to [work] outside of regular work hours" [p. 17]; prohibition against solicitation and distribution at the hotel [p. 41]; prohibiting "saying or publishing or distributing maliciously false statements" [p. 49]; and "being in locations other than assigned work areas, unauthorized presence in guest areas or use of guest facilities" [p. 49]. There is no evidence that employees were in anyway chilled in their Section 7 rights under Interstate's employment, and there is no evidence that, prior to the contract dispute, that any employee was limited in the exercise of their Section 7 rights – to the contrary, the Union seemed to characterize it as a period of relative labor peace. [Tr., p. 87, 91]. The Hotel's policies were nothing new, and, as evidenced by the circulation of numerous petitions demonstrations, and flyer distributions among the Hotel employees, did not restrict the exercise of Section 7 rights. A reasonable employee simply would not believe the Hotel is undermining his/her Section 7 rights.

In his analysis of Rule (b), the anti-roaming statute, the ALJ created a false analogy to the *Fiesta Hotel Corp.* [22] case to find the Hotel's "anti-roaming" rule to violate the Act. The ALJ found that a rule intended to confine the employees to their immediate work areas and to prevent them from "roaming" the property to be unlawful by analogizing the Hotel's work rules to those discussed in *Fiesta Hotel Corp.,* 344 N.L.R.B. 1363 (2005); [Decision, p. 77]. These two cases are incomparable.

The Hotel's work rules were established to prevent employees from roaming through guest

[22] *Fiesta Hotel Corp. d/b/a Palms Hotel & Casino*, 344 N.L.R.B. 1363 (2005) is referred to in this brief and in most other legal authority as "Fiesta Hotel Corp." but is referred to in the Decision as "*Palms Hotel & Casino*."

areas. The *Fiesta Hotel* rule prevented employees from "loitering" during work and non-work time at the casino – an understandable rule in the gambling trade. *Id.* at 1390. (the "rule prohibits employees from 'loitering on company premises before and after working hours.'" And "was designed to stop employees, who are finished working, from being in the "back-of-the-house.") This has little in common with the Hotel's "anti-roaming" rule. The Hotel's roaming restriction asks employees to remain on station at their assigned place of work during work hours rather than roaming through a large, admittedly open facility. This rule has nothing to do with controlling employees' right to organize, and everything to do with encouraging employees to work when they are supposed to be working.

In his analysis of Rule (c), the "no solicitation rule," the ALJ overlooks an entire line of cases that allow employers to prohibit solicitation and distribution in guest areas of restaurants, retail establishments, and service areas. This reasoning is best described in in *McDonald's Corporation*, 205 N.L.R.B. 404, 407-08 (1973), which upheld McDonald's rule prohibiting solicitation by off-duty employees in its restaurants. In *McDonald's*, the Board recognized the:

> "Employer's rights to have a business where the customers in his retail establishment are not deprived of their rights to participate in the eating of his fare free from perhaps exacerbating disturbances which might readily arise from the exercise by the Employer's employees of their Section 7 rights in working areas even during their non-work time."
>
> *Id.* at 407.

In balancing the restaurant's right to operate its business free of disturbances caused by the exercise of Section 7 rights, the ALJ observed that the restaurants "were not industrial establishments where the presence of a customer is a rarity. They were retail establishments open to the public and designed and operated so to please each customer that they would be financially successful." 205 NLRB 404, 407. The ALJ in *McDonald's* reasoned that since the restaurants constituted a retail business where customers deal directly with employees, the no-solicitation rule was appropriate since solicitation by union representatives would disrupt guests. *Id.* at 408. In restaurants, like hotels,

customers deal directly with employees and customers are commonly found in the work areas of the business. Simply put, hotels and restaurants are much different than industrial establishments.

When deciding the *McDonald's* case the Board relied on two very early department store cases, *May Department Stores*, 59 N.L.R.B. 976, enf'd 154 F2d 533 (8th Cir. 1946), and *Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262 (1948), in holding that McDonald's could prohibit solicitation by off-duty employees in its restaurants. "Union solicitation in the [public restaurant] is as apt to disrupt the … business as is such solicitation carried on in any other portion of the store in which customers are present." *Id.* at 1271. The customer should be able to use a hotel's entrance without being subjected to unwanted contact with total strangers who are advocating a political position. Rule (c) prohibiting the "distribution of material of literature . . .in a *guest* or *work area*…" and the "Solicitation of *guests* by associates at anytime…" can only be read by employees to fulfill the legitimate purpose described in *McDonald's* and its progeny. The ALJ's finding regarding this rule is incorrect.

Rules (d) and (e) (excerpts from the Hotel's confidentiality provision and prohibition on media contact) do not reasonably tend to chill employees in the exercise of Section 7 rights. In *Lafayette Park Hotel*, the Board considered whether the employer's mere maintenance of certain rules in its employee handbook violated the Act. *Lafayette Park*, 326 N.L.R.B. at 827. The Board agreed on the standard to be applied--that is, whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect, the Board may conclude that their mere maintenance is an unfair labor practice. However, the Board was split on the application of the standard to rules substantially similar to those at issue here. *Id.* at 825-826. Thus, in a split decision, the Board found lawful, the employer's rules against "divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." In reaching its decision, the Board observed that the employer had not enforced the rule or by any other conduct led employees reasonably to believe that the rule prohibited Section 7 activity. *Id.* Similarly, the Board found that the employer's

maintenance of the latter rule was not unlawful. Specifically, the majority found that: (a) the rule was not ambiguous on its face; and (b) employees would reasonably understand that the rule was designed to protect the employer's interest in maintaining confidentiality of its business information, rather than to prohibit discussion of their wages. *Id.* Accordingly the majority concluded that the rule did not implicate employee Section 7 rights.

Consistent with the majority view in *Lafayette Park Hotel*, the Hotel did not violate Section 8(a)(1) of the Act by maintaining Rules (d) and (e). Applying this test, the Board must find the mere maintenance of these rules by the Respondent would not reasonably tend to chill employees in the exercise of the Section 7 rights. The rule does not expressly prohibit protected activity, nor could it reasonably be interpreted to do so. Further, there is no evidence that any employee has actually been prevented, discouraged, or restrained by these rules in any manner from exercising rights protected by Section 7, other than the unproven allegations under consideration here.

Prohibiting unauthorized release or disclosure of confidential information about patients or employees, does not expressly prohibit Section 7 activity and is justified by the Respondent's right to keep its business records confidential. Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information, and in protecting confidential personnel records against misuse by unauthorized persons. In fact, application of the rule is expressly limited to "confidential information," a phrase that, in context, employees would reasonably understand to encompass proprietary or private information of the Hotel. The employees would not reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union, or potentially exposing employees to discipline for doing so. The Board cannot speculate, as does the Decision, that Rules (d) and (e) “might” prohibit activity protected by Section 7. Thus, Rules (d) and (e) do not reasonably tend to chill employees in the exercise of their

Section 7 rights.

Rules (f) and (g) (a conflict of interest rule and a rule prohibiting indecent, immoral and publicly embarrassing conduct) are read by the ALJ to prohibit the employees from "discussing among themselves and others the terms and conditions of their employment." [Decision, p. 78]. This is a gross over reading of what are common terms in an employee handbook. An examination of the precedent regarding this issue (the ALJ cites no authority to support his findings in this regard) shows that the Decision has missed the mark. For example, in *Tradesmen International and International Brotherhood of Electrical Workers, Local Union No. 545*, 338 N.L.R.B. 460, 461 (2002), the Board overturned an ALJ's decision that employer's rules against conflicts of interest and "statements which are slanderous or detrimental." As is the case here, the Board found no prior evidence regarding the enforcement of any provisions of the rule. *Id.* In *Tradesmen International* the Board analogized a prohibition on "disloyal, disruptive, competitive, or damaging" conduct to rules found lawful in cases applying the *Lafayette Park* standard. In *Lafayette Park*, itself, a majority of the Board held that the respondent did not violate Section 8(a)(1) by maintaining a rule prohibiting "being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives." 326 N.L.R.B. at 825-826. The Board found that the rule addressed legitimate business concerns, and that any ambiguity in the rule arose only from "parsing the language of the rule, viewing the phrase 'goals and objectives' in isolation, and attributing to the Respondent an intent to interfere with employee rights," which the Board declined to do. The Board found that employees would not reasonably fear that the respondent would use the rule to punish them for engaging in protected activity, but would recognize that the rule was intended to reach serious misconduct. *See Id.* at 827; *see also Ark Las Vegas Restaurant Corp.*, 335 N.L.R.B. 97, fn. 2 and slip op. at 8-9 (2001) (respondent did not violate Sec. 8(a)(1) by maintaining a rule prohibiting "any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests . . .");

Flamingo Hilton-Laughlin, 330 N.L.R.B. 287, 288-289 (1999) (respondent did not violate Section 8(a)(1) by maintaining a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel"). Here, the Rules make reference to Section 7 activity, the rule has been in place for many years under many different employers, and, other than the present allegations, there is no history of enforcement of the rule in a way that would prevent Section 7 activity. The conflict of interest rule (f) is followed in the Associate Handbook by other provisions that further clarify the meaning of the "conflict of interest." [23] [G.C. Ex. 7, p. 35]. The Board does not find conflict of interest rules and indecent behavior rules to be illegal in this situation, and this ALJ failed to properly apply the law.

Exception 5:

The ALJ Erred in His Reliance on *Santa Fe Hotel*, 331 N.L.R.B. 723 (2000) by Ruling That the Two Entrances to the Sheraton Anchorage are "Non-Work" Areas and That the Termination of Four Off-Duty Employees for Distributing Flyers to Hotel Guests at the Two Entrances was an Unfair Labor Practice.

On February 2, 2010, Hotel employees Dudek, Tubman, Prichacharn, and Littau were found leafleting under the Hotel's porte cochere guest entrance – the main entrances to the Hotel that facilitates guest loading and unloading. [Decision, p. 25]. These employees were terminated for violating the Hotel policy prohibiting the solicitation of guests and returning to Hotel property on non-work time without manager approval. [Tr., pp. 284-285]. The ALJ erred in his decision that the termination of employees Dudek, Tubman, Prichacharn, and Littau was a ULP because the Board allows an Employer to prohibit solicitation and distribution of union materials within work areas. The ALJ's error is based on a misplaced reliance on the questionable holding in *Santa Fe Hotel*, 331

[23] "I understand that it is against company policy to have an economic, social or family relationship with someone that I supervise or who supervises me and I agree to report such relationships. I understand that it is against company policy for anyone to record a conversation with a guest, supervisor, other associate or vendor without first obtaining permission of all parties to record such conversation." [G.C. Ex. 7, p. 35]

N.L.R.B. 723 (2000).

To begin, *Santa Fe Hotel* is weak legal precedent. The Board in *Santa Fe Hotel* adopted the decision of an ALJ who reached the conclusion that the front entrance of a hotel and casino (which had bellmen, valet parkers, gardeners, and security staff working there) is a "non-work" area for purposes of delineating where off-duty employees may and may not solicit others in the exercise of Section 7 rights. *Id.* at 727. In reaching his decision, the ALJ in *Santa Fe* relies almost solely on a 1952 department store case, *Marshall Field,* 98 N.L.R.B. 88 (1952), which distinguished between "public selling" areas and "public non-selling" areas of a department store. The latter included the "public waiting room" in this large early-1950s downtown Chicago department store, as well as the store's public restaurant and washrooms, and a roadway owned by the department store that ran between the two buildings comprising the store which the public could use in accessing the store buildings. *Id.* at 91. The Board in *Marshall Field* held that off-duty employees could solicit union support in *all* of these public (so-called) non-selling areas. *Id*. at 93, 94.

The 7th Circuit Court of Appeals, modified the Board's decision in *Marshall Field v NLRB*, 200 F.2d 375 (7th Cir. 1952). The Court held that the employer's rule prohibiting the distribution of materials in public areas such as entrances, lobbies, and cafeterias was permissible, and the Board's decision failed to find how the rules "uniquely handicapped" the employees organizing efforts, and refused to acknowledge the very nature of Marshall Field's retail business. *Id.* at 380, 381, 382. In other words, the 7th Circuit rejected the very rationale the *Santa Fe Hotel* ALJ later used in reaching his conclusion.

The ALJ in *Santa Fe Hotel* analogized hotel and casino entrances to all of the public non-selling areas mentioned in *Marshall Field,* but failed to acknowledge the 7th Circuit's modification. 331 N.L.R.B. 723, 730. The oversight of this same 7th Circuit holding led to the ALJ's flawed findings in this case as well. Under the *Marshall Field* dissent and subsequent 7th Circuit ruling, the employer could prohibit solicitation in the store's lobby, entryway, cafeteria, and washroom. Only a

semi-private roadway was fair game from the union's hand-billers. 200 F.2d 375, 382. The dissent stated (quoted with approval by the 7th Circuit):

> "As a practical matter, all sections of a department store that are open to the public are inextricably interwoven with those which can be more literally termed 'selling areas' …. Such areas [as the public waiting room, public restaurant and washrooms] contribute to the desired relationship between retailer and customer, whether facilities are provided out of necessity, or for the customer's convenience, or merely to generate good-will. They should not be converted into an area for the organization of employees. The statute does not command that result, and this Board should not facilitate it."

Id. at 378.

If there is one place where a hotel has both out of necessity and a desire to contribute to the relationship between the hotel and the customer, it is a hotel's entrances. This is where guests are first received, greeted, luggage unloaded, and car parked. [G.C. Ex. 24; Tr., pp. 681, 1288, 1327, 5570, 6525] By extension, it is easy to understand why the entrances to the Sheraton Anchorage "contribute[] to the desired relationship between" hotel and guest, and should not, therefore, "be converted into an area for the organization of employees." *Marshall Fields v. NLRB*, 200 F.2d 375, 378 (7th Cir. 1952). Neither should the entrances be converted into an area for publicizing the Union's dispute with management and its boycott. *Id.*

A NLRB General Counsel Memo advises that a hotel may restrict picketing and demonstration on private property without violating the Act. *See* 1992 NLRB GCM LEXIS 11 (NLRB GCM 1992). Specifically, the General Counsel advised the Region to dismiss the ULP against a casino hotel for preventing picketing at the hotel's main entrance way because of the "heavy" presumption against unauthorized access to an employer's property. The General Counsel observed that the employees had a "reasonable alternative to trespassory picketing and hand billing at the east pedestrian entrance, since the striking employees would have an unfettered right to appeal from the public sidewalk to all Employer customers who use that entrance." *Id.*

The *Santa Fe Hotel* ALJ made an additional error by referring to *Marshall Field* as the

"seminal Board decision for determining what portions of [a department store] constitute working areas." 331 N.L.R.B. 723, 729. The *Santa Fe* ALJ is wrong. There is a whole host of "department store" decisions, and none of them make the kind of "public non-selling" distinctions made by the Board (but rejected by the 7th circuit) in *Marshall Field*. This very point was emphasized by the 7th Circuit while pointing to several such cases. *See e.g. J. L. Hudson Co.*, 67 N.L.R.B. 1403 (1946); *Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262 (1948); *Meier & Frank Co., Inc.*, 89 N.L.R.B. 1016 (1950). In short, *Marshall Field* is not a "seminal case." It's an outlier, as is its progeny beginning with *Santa Fe*.

An employer has a right to control its property even if that control restricts certain union activity. The Board also balanced an employer's right to control its property with the employees' Section 7 rights in *Peck, Inc.*, 226 N.L.R.B. 1174 (N.L.R.B. 1976) and found that the employer had an "immediate" interest in securing its property and rules in place prohibiting employees from remaining on the premises. In *Peck*, the NLRB found that the employer, a paper products manufacturer, did not violate the Act by discharging protesting employees who refused to leave the Employer's premises since their actions were intended to "prove a point" and "were not predicated on any necessary immediacy of action." The employer's interest in securing its property did not unduly interfere with or restrict the employees' statutory rights. In a decision adopted by the board, the administrative law judge in *Peck Inc.* noted that off-duty employees are generally not entitled to [protest a grievance on-site] "at least *where there is a rule prohibiting their access to the property and they are warned about it.*" (emphasis in original).

Beyond an erroneous conclusion that a hotel's front doors are non-work areas, there are still other reasons why *Santa Fe Hotel* is incorrect. For example, the Board in *McDonald's Corporation*, 205 N.L.R.B. 404, 407-08 (1973), upheld McDonald's rule prohibiting solicitation by off-duty employees in its restaurants. See discussion of *McDonald's Corporation*, 205 N.L.R.B. 404 (1973) *infra* at pp. 44 *et seq.* In sum, the Board observed in *McDonald's* that restaurants "were not

industrial establishments where the presence of a customer is a rarity. They were retail establishments open to the public and designed and operated so to please each customer that they would be financially successful." 205 NLRB 404, 407. Since restaurants constituted a retail business where customers deal directly with employees, the no-solicitation rule was appropriate since solicitation by union representatives would disrupt guests. *Id.* at 408. The same reasoning in *McDonald's* applies to the Hotel in that the Hotel's customers deal directly with employees and the presence of customers is not a rarity.

Just as it was true in *McDonald's*, it is true in this instance that the customer should be able to use a hotel's entrance without being subjected to unwanted contact with total strangers who are advocating a political position. The employer has the right to have a business where its customers can be free from solicitations and distributions from Union members during the union's fight with an employer. *McDonald's Corporation* 205 N.L.R.B. 404, 407-08 (1973); *May Department Stores*, 15 L.R.R.M. 173 (1944) (finding a "reasonable ground" for prohibiting solicitation on the selling floor because "the solicitation, if carried on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business"); *J. L. Hudson Co.*, 67 N.L.R.B. 1403 (1946) (employer operating a retail department store could properly prohibit union activity at all times on the selling floors, where customers were normally present); *Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262 (1948)(an employer's rules preventing a union solicitation's of employees at lunch counters inside it stores were valid, observing that "union solicitation in the restaurants is as apt to disrupt the Respondent's business as is such solicitation carried on in any other portion of the store in which customers are present); *Meier & Frank Co., Inc.*, 89 N.L.R.B. 1016 (1950).

In addition, the Decision failed to account for significant factual differences between *Santa Fe Hotel and* The Sheraton Anchorage Hotel & Spa. First, whereas the Hotel employees were subject to a no-solicitation rule, the same was not true under the facts in *Santa Fe*. In fact, the casino/hotel regularly held "holiday fairs and craft fairs," and "off-duty employees [were] invited to

participate and set up booths to sell products to the general public." 331 N.L.R.B. 723, 727.

Santa Fe is further distinguished in that the respondent's casino hotel encouraged its employees to return to the property to utilize the casino, see the shows, spend time bowling, use the ice skating rink, and spend their money on other hotel casino attractions. 331 N.L.R.B. 723, 726. The *Santa Fe* ALJ went so far as to place emphasis on how the hotel casino had no rule prohibiting employees from returning and utilizing the facilities while off-duty. *Id.* In contrast, here the Hotel employees were subject to a rule that prohibited them from being on property when off-duty without permission, and the four employees who were disciplined for their conduct had all been disciplined for this type of trespass before.

Also, unlike the Hotel, which sits on a single city block with close-by public sidewalks from which leafletters can easily reach their communication targets, the casino/hotel in *Santa Fe* sits on a 38 acre plot of land (15 miles away from the strip in Las Vegas), with public sidewalks and roadways a considerable distance from the front entrance (the opinion notes that cars entering the casino grounds, at the outer edge where the property meets the roadway, are going too fast to hand out leaflets). *Id.,* 724. During the Hearing there was testimony stating that the leafletting employees were standing in two of the main entries to the Hotel, forcing guests to interact with them as they entered and departed from the Hotel allowing employees to solicit support from guests on the property interfered with that obligation and with the Hotel's relationship with its clients. [Tr., p. 6542]. Unlike the employees in *Santa Fe*, the leafletters had the option of communicating with the Hotel guests by standing on the public sidewalk adjacent to the driveway leading into the hotel. [Tr., pp. 354, 444-445, 6520].

What's more, had the protestors moved only twenty feet to the left of the front door, been away from the Hotel's entrance, and enjoyed the publicity of demonstrating alongside one of the busiest streets in Anchorage, if not the state of Alaska. Instead, the leafletters chose to step in front of customers entering the Hotel, hand them a flyer, and tell them to take their business elsewhere.

[Tr., pp. 294, 353, 705, 6762]. Mr. Artiles testified that several customers checked out of the Hotel due to the leafletter's behavior. [Tr., pp. 6762, 6542]. Despite Mr. Artiles' testimony, the ALJ stated in his decision that there was no "contention, nor any evidence, that [leafletters] were in any way trying to physically impede the ingress or egress of individuals who were coming to or going from the hotel." [Decision, p. 71, lns. 30-32].

Further, an employer is not required to allow off-duty employees to distribute union literature to the public on its property. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In *Babcock & Wilcox*, the Court established that employers could not be compelled to allow non-employee union access to company-owned parking lots for distribution of union literature when other channels of communication were available to the union to reach the employees. *See also NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958) (approving the enforcement of otherwise valid no-distribution and no-solicitation rules against pro-union employees). The principles that applied to non-employees in *Babcock & Wilcox* must be applied to off-duty employees distributing handbills in work areas in this case. *Providence Hospital*, 285 N.L.R.B. 320, 321-322 (1987) (applying the *Babcock & Wilcox* balancing test when economic picketers and handbillers that included the employer's own employees). Specifically, the Board should consider whether the Hotel had a legitimate business interest in preventing them from soliciting guests in front of the Hotel entryways and from remaining on the property while they were off-duty and whether that interest outweighs the employees' purported rights under Section 7.

Overall, the February 2, 2010, leafletters were properly terminated after violating the Hotel's no solicitation/distribution rules while off-duty and in a "work area." The ALJ erred by holding the Hotel's entrances were "non-work areas" due to his reliance on the improperly decided outlier case, *Santa Fe*. Even if the Board decides *Santa Fe* was decided correctly, *Santa Fe*, itself on questionable legal footing, does not apply to the case at bar due to numerous factual distinctions.

Exception 6:

The ALJ Erred in Discrediting Ed Emmsley Sr.'s Testimony by Relying Solely on Mr. Wray's Clearly Biased Testimony, and Ignoring the Testimony of Other Unbiased Witnesses Whose Stories Contradict Mr. Wray's.

One hundred and ten (110) out of the one hundred and sixty-one (161) person bargaining unit signed the employee-led decertification petition. Of those one hundred and ten (110), sixty-eight (68) testified at the Hearing. Of those sixty-eight (68), only one (1), Dexter Wray, claims that he was cajoled, argued, and eventually bullied into signing the decertification petition by his supervisor, Ed Emmsley, Sr. No other employee experienced anything of the sort. No other engineering employee ever saw Mr. Emmsley with the decertification petition, let alone experienced an hours long argument on the subject. [Tr., pp. 5405, 6190]. Mr. Emmsley, Sr., denies Mr. Wray's claims. [Decision, p. 32]. Mr. Wray's questionable claims about Mr. Emmsley are plunged further into doubt when Mr. Encabo, a close friend of Mr. Wray and of no relation to Mr. Emmsley, directly contradicts Mr. Wray's claims. [Tr., 6252, 6255, 6257]. Still the ALJ chose to believe Mr. Wray's claims to the exclusion of all others. [Decision, p. 32]. This is an error.

An ALJ's credibility findings, may not be contradictory to the clear preponderance of all the relevant evidence. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950). This clear preponderance standard only applies when the ALJ bases his credibility determinations strictly on the demeanor of those testifying. When an ALJ looks beyond demeanor and uses other factors in his credibility analysis, the Board is allowed to conduct an independent examination and come to their own credibility conclusions. *Canteen Corp.*, 202 N.L.R.B. 767, 769 (1973); *See also Starcraft Aerospace, Inc.*, 346 N.L.R.B. 1228, 1231 (2006) (Reversing an ALJ's credibility decision against a witness due to the ALJ's ignoring corroborating testimony supporting the veracity of the witness' testimony.)

In his opinion, the ALJ decided the substance of Dexter Wray's testimony was credible because Mr. Wray held up well under cross examination and the ALJ decided the substance of Mr.

Wray's testimony held a "ring of authenticity." [Decision, pg. 140]. Moreover, despite unrebutted character evidence to the contrary, the ALJ favored Mr. Wray's testimony over Mr. Emmsley's [24] denial of having sent an improperly admitted photo of a text message to Mr. Wray's phone because it is not unusual for people in the world to "do something totally out of character." [Decision, pg. 141]. Not only does the ALJ base his credibility Decisions for Mr. Wray on factors other than demeanor, the ALJ completely ignores contradictory testimony from one of Mr. Wray's own friends, Mr. Encabo, and other witnesses. Therefore, the Board is free to consider its own independent evaluation of Mr. Wray's credibility.

However, should the Board decide that the ALJ used only witness demeanor in his credibility evaluations, then the clear preponderance standard applies, which examines all the relevant evidence. There are several portions of relevant evidence that overwhelmingly contradict swathes of Mr. Wray's testimony.

The ALJ seems to parrot Mr. Wray's stories without any further examination. There are several pieces of evidence left unexamined by the ALJ that show that Mr. Wray is not to be believed. First, during Mr. Wray's testimony, Mr. Emmsley is described as an incessant nag trying to bully Mr. Wray into signing a document that Mr. Emmsley knows he does not support. [Tr., p. 1060]. However, in person, the ALJ admits that Mr. Emmsley presents himself as a quiet, good-natured manager. This matches Mr. Encabo's characterization and the characterization of employees who work for him directly; a stark contrast to the overbearing, intrusive picture painted by Mr. Wray (a self-described "rebel"). [Tr., p. 1052].

Second, Mr. Wray claims that both Mr. Emmsley and Mr. Encabo approached him in the

[24] The ALJ's credibility decisions regarding Mr. Wray's testimony are even more erroneous due to the ALJ's holding in his decision that he credited Mr. Wray's testimony over that of "Ed Emmsley, Jr., the Chief of Engineering." [Decision, p. 81]. The ALJ also mentions that it was Ed Emmsley, Jr., the Chief of Engineering, who announced to Mr. Wray that the engineers would take the full responsibility of security personnel. [Decision, p. 81]. However, Ed Emmsley, Jr. was not the Chief of Engineering; he was a security guard. [Tr., p. 6005].

Engineering shop and told him that if he did not sign the Decertification Petition ("Petition"), he would be one of the first people dismissed. [Tr., p. 1053; Tr., pp. 1123-1124]. Mr. Encabo, a close friend of Mr. Wray, flatly denies that this occurred. [Tr., pp. 6252, 6255, 6257]. Mr. Encabo, a night bellman at the Hotel has no relationship with Mr. Emmsley, and showed no motivation to testify to anything other than the truth. Mr. Encabo remembers a quick encounter with Mr. Emmsley as he passed through the Engineering Shop, and remembers a brief exchange between Mr. Wray and Mr. Emmsley about health care plans. [Tr., p. 6261]. Mr. Encabo was unclear about exactly what Mr. Emmsley said, but was very clear that it was not a long or substantive discussion about the Union. [Tr., p. 6261]. Compared side-by-side, Mr. Encabo's testimony directly contradicts the testimony of Mr. Wray. *However, Mr. Encabo was left practically unmentioned by the ALJ.* The ALJ mentions Mr. Encabo in only three (3) sentences throughout the entire Decision, none of which mention Mr. Wray's testimony. [Decision, pp. 42, 89, 90]. The ALJ explains why he chooses to believe Mr. Emmsley, but says nothing of his basis for disbelieving Mr. Encabo.

Third, Mr. Wray claims that Mr. Encabo and Mr. Emmsley cornered him yet again to ask him to sign the petition. This second discussion, according to Mr. Wray, led them to debate the pros and cons of the decertification petition issues for two full hours in the Hotel's engineering shop. [Tr., p. 1054]. Both Mr. Encabo and Mr. Emmsley again deny that this occurred. [Tr., pp. 6312, 6252]. Mr. Encabo says that Mr. Emmsley engaged in only one conversation with Mr. Wray about the Petition that lasted for only a few minutes. [Tr., pp. 6257, 6268-6269]. Again, Mr. Encabo's clear testimony contradicts that of Mr. Wray.

Fourth, Mr. Wray first testified that Mr. Emmsley threatened his job if he did not sign the Petition. [Tr., p. 1053]. However, only a short time later, Mr. Wray changed his story under oath, and backed away from that claim. [Tr., p. 1123]. Once Mr. Wray finished contradicting himself with sworn testimony, he ultimately stated that Mr. Emmsley did not threaten him with termination if he refused to sign the Petition. [Tr., p. 1123]. Despite this obvious inconsistency, the ALJ still believed

Mr. Wray's testimony held a "ring of authenticity."

Fifth, all other engineering employees who testified about the decertification petition denied seeing or experiencing anything that would support Mr. Wray's claims. Engineer John Cain said he never spoke to Mr. Emmsley about the Union, and he does not think Mr. Emmsley was aware there was a decertification petition circulating. [Tr., pp. 5404-5405]. Engineer Reynaldo Reyes said that he did not have any conversation about the decertification petition with anyone in management. [Tr., p. 6190]. The ALJ's version of events asks an unbiased reader to believe that Mr. Wray (the pro-union rebel) was the *only* employee that Mr. Emmsley coerced, and that with all the others he held himself back. Furthermore, the ALJ believed that Mr. Wray's hours-long discussions in the Hotel with Mr. Emmsley over several days, were all mysteriously unwitnessed by any other employee. This defies common sense.

Mr. Wray claims Mr. Emmsley had more than six (6) separate conversations with him about his signature on the Petition. For one of those meetings, Mr. Wray claims that he had a private conversation with Mr. Emmsley "debating" the finer points of unionization for more than three and one half (3-1/2) hours, an extraordinarily long (and unlikely) discussion on any topic. [Tr., p. 1061]. Mr. Wray's claims of a long drawn out debate are even more unbelievable given that his vote really had no impact on the outcome of the decertification petition. Mr. Wray's signature on the Petition was far from necessary to reach a majority. With one hundred and ten (110) of the one hundred and sixty-one (161) bargaining unit employees signing the Petition, there were still fifty-one (51) bargaining unit employees who did not sign the petition. Why would Mr. Emmsely have pursued a self-described "pro-Union" employee as if "it were the only thing on his [Emmsley's] mind" if Mr. Wray's signature was completely inconsequential? [Tr., p. 1060, 1123]. Would Mr. Emmsley have threatened Mr. Wray with his job? Why would Mr. Emmsley choose to pursue the "pro-union" man,

while keeping the Petition hidden from Mr. Cain and Mr. Reyes? [25] It is simply not a plausible story. Would he have spent three and one half hours debating unionization? Of course not, but it does not appear that the ALJ asked himself these obvious questions.

The unrebutted testimony of Hotel employees (left unreferenced in the Decision) bares the truth. Contrary to Mr. Wray's claims, it is abundantly clear that the Petition circulators simply avoided most of the Union supporters because they knew that they were not likely to sign. John Cain and Reynaldo Reyes, engineers on the Hotel's day shift, had no information that would lead them to believe that Mr. Emmsley knew about the existence of the petition. [Tr., p. 5405, 6190]. Mr. Wray's story flies in the face of the other Hotel engineers who work for Mr. Emmsley.

A comparison of Mr. Wray's testimony with that of Mr. Encabo, Mr. Cain, and Mr. Reyes should have indicated to the ALJ that Mr. Wray's version of events was not accurate. Unfortunately, the ALJ seems to pretend that the testimony of these three objective eyewitnesses does not exist. The ALJ's credibility findings are unreasonable and not supported by the preponderance of the evidence. This portion of the Decision must be reversed.

Yet another example of why the ALJ erred in giving credibility to Mr. Wray's testimony over Mr. Emmsley's, are the circumstances surrounding the text message ("Text") Mr. Emmsley allegedly sent Mr. Wray. Of all the witnesses present at the hearing, only one person testified that Mr. Emmsley sent Mr. Wray the Text stating: "Just sign it I will never put u on the spot you know I'll always cover your black ass." [Decision, p. 33; G.C. Ex. 23]. That person was Dexter Wray. Mr. Emmsley denied sending Mr. Wray the Text, and Mr. Emmsley's wife of 25 years, Janet E. Emmsley, stated that she had never heard her husband use the kind of language contained in the Text. [Tr., pp. 6883-6884]. Another witness, Joel Encabo, stated that the language contained in the Text

[25] The ALJ fails to mention the testimony of either of these two engineering employees anywhere in the Decision. Both Mr. Reyes and Mr. Cain testify in stark contrast to Mr. Wray. They claim they never heard Mr. Emmsley mention anything about the decertification petition, and never heard him say anything about the union, good or bad.

was out of character for Mr. Emmsley and that Mr. Emmsley would never use such terms. [Tr., p. 6248]. Even the ALJ admits that sending such a text was not in character for Mr. Emmsley because anyone, even Mr. Emmsley "may do something totally out of character" on occasion. [Decision, p. 43, ln. 17].

The only evidence in the record involving a person actually saying the term "black ass" came from both Mr. and Mrs. Emmsley who both described an encounter with Dexter Wray on August 23, 2010:

> A: Okay. On August 23rd approximately about 2:30 p.m. after I pick up my daughter from high school, high school gets up at 2:00.
>
> Q: And which daughter is this?
>
> A: Jennalyn (ph), the fourth one.
>
> Q: Okay.
>
> A: She's sophomore at East High School.
>
> Q: Okay. Go ahead.
>
> A: And my husband, Ed, called me that he needed a ride to go pick up some stuff for his maintenance people. I said sure, I will be there after I pick up Jennalyn (ph), my daughter. So we drove to the Anchorage hotel and I called him back. I'm like two or three minutes away and he's like okay, some to the parking lot on the Fifth Avenue side. I said okay, sure. So we pulled into the parking lot and on the right hand side I saw three empty bottles in the corner of the parking lot. Then me and my daughter, Jennalyn (ph), approached to where Ed and Dexter were at in the parking lot and they -- Dexter had a big trash can in front of him. So we approached and then I said I'm ready -- this is what I told my husband, I said I'm ready, if you're ready we're ready then we're going to go. And I looked at Dexter and he was all sweaty. That was a sunny day that day. And then I'm like, Dexter, you're all sweaty and he just gave me that big smile and then said yeah, Mr. Ed's just working my black ass off,

exact words.

[Tr., pp. 6885-6886].

Despite ample witness testimony to the contrary, the ALJ decided to believe Mr. Wray. [Decision, p. 32]. Yet, the ALJ gives no explanation of any kind why he thinks Mr. Emmsley broke with his well-known devout character, and why he chose to disbelieve all other witness testimony to become the only person in the record to give credibility to Mr. Wray, other than Mr. Wray himself.

Exception 7:

The ALJ Erred in Granting Credibility to Dexter Wray's Testimony Regarding the Use of Hotel Engineers as Security Personnel, Which Resulted in the ALJ Erroneously Holding That the Hotel Committed A ULP.

As discussed elsewhere in this brief, during the hearing the General Counsel presented evidence alleging that the Hotel unilaterally transformed engineers into security personnel. The only witness providing testimony for such a transfer was Dexter Wray. Not only is Dexter Wray not credible, as discussed at length in the previous exception [26], but on its face, his allegations are, at most, *de minimis* departures from the agreement between the parties.

In paragraphs 9(a) and (g) of the Complaint, the General Counsel alleged that the Hotel, "through Artiles at the facility, assigned certain Unit employees duties of non-unit security guards." Despite this allegation, the CGC failed to present sufficient evidence to meet its burden of proving this charge. As a matter of record, out of the 122 witnesses present for the hearing in front of the ALJ, only one testified that the Hotel used engineers as security personnel. This one witness was Dexter Wray, a person whose credibility has already been proven to be nil through a preponderance of all the relevant evidence earlier in this brief. However, some facts are worth repeating.

[26] The standard for determining whether the ALJ's credibility finding was error, and bases by which the Board can find that credibility findings regarding Wray were incorrect can be found in Exception 6 contained this document.

Dexter Wray testified that multiple unit employees, specifically engineers, were required to act as security personnel for roughly one month. Furthermore, the original ULP charge (19-CA-32334) claimed that bell employees were also made to serve as security personnel. Despite these widespread allegations, the CGC did not ask any of the three bell employees called as CGC witnesses (Troy Prichicharn, Billy Toien, and Ron McCallion) any questions about being made to serve as security personnel. Moreover, the Respondent called several engineering and bell employees to testify (J.R. Filipo Toi, Joel Encabo, Eric Goff, Mario Vinoya, Joel Carino, Reynaldo Reyes, John Cain and El Llego), but not a single one made any mention of being forced into security duty. Furthermore, the CGC cross examined all of the previously mentioned employees and did not ask a single question necessary to corroborate Mr. Wray's story.

This charge is barred by Section 10(b) of the Act. Mr. Wray testified that the alleged assignment happened in July of 2008. Since charge 19-CA-32334 was filed on February 2, 2010, the six-month statute of limitations had run. *See* 29 U.S.C. 160(b). It should be noted that Mr. Wray did not testify just once or twice that the alleged assignment in question happened in 2008. Instead, as Respondent's counsel noted on the record:

> MR. TERRELL: . . . we [will] have many pages of this witness' testimony [Tr., p. 1093 – 1106 and 1151 – 1165] on this one issue and I will venture there were at least 50 references in questions and responses that the dates that he testified to was clearly in 2008. I know in my questioning, I referenced the year almost every time. So there can't be any confusion about that.

[Tr., p. 1165].

In fact, the ALJ agreed with Respondent's counsel by stating:

> ADMINISTRATIVE LAW JUDGE MEYERSON: I think that's – I think your representation is pretty accurate. The record ultimately will speak for itself . . .

[Tr., pp. 1165, 1166].

The record does speak for itself. After a close analysis of the record, it is undeniable that Mr. Wray spoke specifically of the events regarding engineers being made to work as security personnel as occurring in July of 2008 at least 19 times. [Tr., pp. 1093 – 1106 and 1151 – 1165]. Throughout

CGC Anzalone's examination, Mr. Wray claimed the date of his alleged transfer to security was in July of 2008, and Mr. Wray maintained his recollection of events occurring in July of 2008 while under cross examination. *Id.* It was only after Anzalone coached Mr. Wray's testimony did he changed his story. [Tr., pp. 1164-1165].

Mr. Wray clearly testified that he began working for the Hotel on May 7, 2008. [Tr., p. 1035]. Mr. Wray then confirmed and maintained that the forced transfers of engineers to security occurred in July of 2008, a mere two months after he was hired. [Tr., p. 1097]. It seems unlikely that someone who was telling the truth would claim a major event occurred at his place of employment only two months after his hire date and not realize he was off by an entire year. Without any basis for doing so, the ALJ attempts to correct Mr. Wray's mistake in his decision by stating how he is "unconcerned about [Mr. Wray's] recalling the events in question as having occurred in 2008, when clearly they took place in 2009." [Decision, p. 81]. The ALJ seems to forget that the only person who made any significant mention of the allegations is Mr. Wray. And Mr. Wray testified for seventy one (71) pages of transcript testimony that such events occurred in 2008 until he was led to a different answer by CGC. [Tr., pp. 1093 – 1164] There is no basis for finding that the facts surrounding this allegation "clearly took place in 2009." At the very least this should bring into question the veracity of Mr. Wray's story. Instead, the ALJ gives Mr. Wray full faith and credit, at the expense of dozens of other witnesses who showed Mr. Wray to be less than truthful. This is an error.

Furthermore, taken on its face – which is a risky endeavor when it comes to Mr. Wray – the allegations amount to a distinction without a difference. All that Wray's testimony comes down to is that for a brief period of time – in July of 2008, as he stated numerous times – it appears the Hotel, for reasons not known to the record, was short in its security staffing. Wray had no foundational knowledge and was incompetent to testify as to the actual staffing levels at the time, or why, if in fact staffing levels were low, that was the case. Wray testified simply that, in his capacity as an

overnight-shift engineer, his boss "came to me . . . [and] He said won't be no security tonight, you will have to be security." [*Id.*, Tr., p. 1096]. There is no testimony proving that this was a regular assignment. Instead, it appears to be a short term response to an unplanned occurrence. The security function was a secondary task of the engineers to begin with. [Tr., p.1161]. In any case, the Hotel increased their dedicated security force soon after. [Decision, p. 62]. This short-term duty provided no additional burden to the employee. From Mr. Wray's own testimony, this involved nothing more than a heightened awareness of his normal duty. "I'm not putting no handcuffs on nobody, nothing like that there," he stated. [*Id.*, Tr., p.1098]. Instead it was simply a matter of assisting with the vagrant problem which, as noted, is not the problem in July that it is in winter. "If they resist leaving [I would] take and call the police." *Id.* No other employees offered evidence to support the allegations.

None of Mr. Wray's testimony should be believed, and the ALJ's credibility decision in favor of Mr. Wray should be overturned. The most that could possibly be credited is that on a handful of occasions, for a very brief period of time, unplanned security shortages required an overnight engineer to assume a heightened performance of a traditional, secondary duties. Since, the bulk of Mr. Wray's testimony is not credible, the underlying ULP (19-CA-32334) was not proven. Therefore, the Hotel cannot be guilty of unilaterally forcing unit member engineers into the role of security personnel.

Exception 8:

The ALJ Erred in Ruling That the Decertification Petition Was Not an Objective Showing of the Union's Loss of Majority Support by Ignoring the Analysis Found in *Master Slack* 271 N.L.R.B. 78, 84 (1984) That Requires the General Counsel to Show How Employer's Conduct Had a "Meaningful Impact" in Bringing About the Employee's Disaffection for the Union.

On May 20, 2010, five Hotel employees delivered a signed decertification petition to Remington executive, who testified she was "pretty surprised" to receive this. [Tr., pp. 6838-39 ("I

had not expected that")]. The employees informed her they were still gathering signatures. Two additional pages were delivered on June 2 and June 14. [Id., p. 6840-41; the complete petition is at G.C. 61]. The names were verified against the Hotel's payroll records, and it was determined that the 110 signatures thereon constituted a clear majority of the bargaining unit of 161. [Id., pp. 6840-42]. In a letter dated July 2, 2010, the Hotel informed the Union it was withdrawing its recognition of the Union as the exclusive collective bargaining agent of the bargaining unit employees. [Resp. Ex. 112].

The Hotel presented the testimony of 68 of the 110 petition signatories during its case in chief. Almost every single signatory testified that the petition was circulated solely by hourly employees in a discreet, one-on-one fashion. With only a few exceptions, the employees attributed their desire to decertify the Union to three major issues: (1) the Union began utilizing high-pressure organizing tactics in the wake of contentious contract renewal negotiations that agitated the workers[27]; (2) the Union's pension fund announced that it was in "critical status" and would be unable to provide the employees' long-promised pension benefits; and [Tr., pp. 2795, 3155, 5473, 5575], and (3) the Union dues were too high. [Tr. pp. 3164, 6198, 6224]. [28] Unrebutted evidence showed that employees made independent decisions about the decertification and independently chose to withdraw their support from the Union.

The ALJ erroneously determined the decertification petition provided an illegitimate basis for the Hotel's withdrawal of recognition. He based his determination on ULPs that he erroneously concluded tainted the work environment, and his erroneous finding that management materially provided support to the decertification efforts. [Decision, pp. 94-95]. This flawed decision side-stepped the well-documented analysis required by the Board in the *Master Slack* line of cases, and

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[27] Testimony about the Union organizers' pushy style, being bothered win the employee cafeteria, frequent ill-timed photography, and confrontational language drove many would-be supporters away. See, for example [Tr. p. 3164].

[28] A runner-up issue, from a handful of employees, was disgruntlement over the boycott. *See, e.g.* Tr., P. 4732 (Peguero).

ignored the unrebutted testimony of the 68 witnesses who testified regarding their reasons for decertifying the Union. When the legal analysis is evenly applied to this set of facts, the outcome is different than what the ALJ here prescribes; to wit, the employees freely and fairly chose to decertify the Union, and the Hotel properly relied on that decertification petition in its withdrawal of recognition.

Board law regarding the legitimate withdrawal of recognition based upon a decertification petition is described in *Master Slack*, 271 N.L.R.B. 78 (1984) and its progeny. In *Master Slack*, as in the present case, the employer withdrew recognition from the union after receiving a decertification petition signed by a clear majority of the bargaining unit employees. *Id*. There, as here, the General Counsel asserted that the employer was not free to withdraw recognition based on the decertification petition alone, arguing that the petition had been signed in an atmosphere of unremedied ULP violations. *Id*. at 79. The Board rejected this argument, after examining whether there was a "causal nexus" between the ULPs and the employee's decertification efforts. *Id.* at 84-85. Central to that examination was the subjective importance of the ULPs on the decertification petition signatories. *Id.* at 84-85. ("Typical of the responses of the employees regarding their reasons for signing the petition is that of Barbara Griffin, hired in 1964, who testified that although she was aware of the unfair labor practice issues, they had nothing to do with her signing the petition.") Thus, the Board ruled, the withdrawal of recognition was properly based on the decertification petition because the unremedied ULPs at issue did not have a "causal relationship" to the employees decertification petition. *Id.* at 85. Here the ALJ erred by invalidating the Hotel's withdrawal of recognition without first undertaking the causal relationship analysis described in *Master Slack.* A pursuit of the same analysis here establishes that the Hotel's withdrawal of recognition was legitimate.

While it is well settled that an employer may not avoid the duty to bargain by relying on a loss of majority status attributable to his own unfair labor practices, *Pittsburgh and New England Trucking Co.*, 249 N.L.R.B. 833, 836 (1980), the unfair labor practices at issue must be of a character

as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. *Guerdon Industries*, 218 N.L.R.B. 658, 659 (1978). Stated differently, the unfair labor practices must have caused the employee disaffection, or at least had a "meaningful impact" in bringing about that disaffection. *Deblin Mfg. Corp.*, 208 N.L.R.B. 392 (1974). In short, not every employer unfair labor practice will taint evidence of a union's subsequent loss of majority support. There must be *specific proof of a causal relationship* between the unlawful conduct and the decertification petition. *Champion Enters., Inc.*, 350 N.L.R.B. 788, 791 (2007), citing *Lee Lumber*, 322 N.L.R.B. 175, 177 (1996); and *Master Slack* 271 N.L.R.B.. 78, 84 (N.L.R.B. 1984).

This causal relationship must be established through all of the following factors: (1) the length of time between the alleged ULP and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental, lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the Union. *Champion Enters., Inc.*, 350 N.L.R.B. at 791. Failure to establish a causal relationship using these elements is a failure to prove that the employer's activities tainted the otherwise legitimate decertification petition. This analysis was not conducted here.

The ALJ concluded that Respondent's "pervasive unfair labor practices" tainted the employee-led decertification effort. [Decision, p. 94]. He justified his conclusory findings by naming the alleged violations, but then failed to identify any specific proof of a causal relationship. [*See* Decision, pp. 94-96]. The violations he named are:

- <u>September 2009</u> – the Hotel unilaterally assigned security duties to bargaining unit engineers.
- <u>October 2009</u> – the Hotel failed to first give notice to the FMCS prior to implementation of its last, best and final negotiated offer.
- <u>November 2009</u> - the Hotel issued written disciplinary warnings to nine union supporters who presented General Manager Artiles with the Union's boycott petition;

- February 2010 - the Hotel discharged four union supporters who had distributed handbills at the entrances of the hotel, calling on potential customers to boycott the hotel.

- March 19, 2010 - the Hotel prematurely declared impasse, and unlawfully announced and implemented proposals (the withdrawal from the Taft-Hartley plan and implementation of the new employer-sponsored medical plan was announced at this time as well, and then put into effect May 1)

[Decision, p. 94, ln. 47 - p. 95, ln. 32; hereinafter, the "Allegations"].

As a preliminary matter, at other places in this brief the Hotel argues that the ALJ erred in some portion of his decision-making process for each of the above allegations. To the extent the Board agrees with the Hotel and dismisses the charge, those allegations must also be excluded from *Master Slack's* "specific proof" analysis. Only after the Board has made its final determination on the other ULP allegations, can it then go on to the four-step causal connection examination with regard to those ULPs that remain.

First, the Allegations are too distant in time to have any causal relationship to the decertification petition. Clear, recent Board precedent establishes that ULP allegations occurring approximately six (6) months prior to a withdrawal of recognition are too remote in time to cause employee disaffection with the Union. *See, Champion Enterprises,* 350 N.L.R.B. at 791, citing *Quazite Corp.*, 323 N.L.R.B. 511, 512 (1997). In *Champion Enterprises,* for example, the Board considered the well-publicized confiscation of an employee's union materials, the employer's refusal to bargain over the terms of a layoff, and the threat of a plant shutdown in reaction to a picket. All three occurred between five and six months prior to the employer's receipt of a decertification petition. The Board held, given this lapse in time, that these ULPs did not taint the employee's decertification petition and withdrawal of recognition. 350 N.L.R.B. at 791. Accordingly, in the present case, the above-listed Allegation incidents that occurred in September, October and November of 2009 are too distant to have had any significant impact on the employee's disaffection for the Union. Furthermore, not a single one of the sixty eight (68) employees who testified about

their reasons for signing the decertification petition cited any of the ULP allegations mentioned above. The Decision simply has no justification to support its assumption that these six-plus month old Allegations had a substantial impact on the employee's decision to decertify.

Second, these Allegations by their nature do not support a finding of taint. In *Champion Enterprises*, the Board found that the employer's confiscation of union materials from employee workstations, a plant superintendent's threat to close the facility in the face of employee pickets, and the employer's refusal to respond to information requests by the union, were all "isolated incidents." Significantly, it was determined, these were not widely known by the rest of the bargaining unit. 350 N.L.R.B. at 792. Similarly, in *Quazite,* 323 NLRB at 512, a "supervisor's threat to retaliate against two strikers if they returned to work" was deemed "isolated," and therefore "did not constitute the kind of unfair labor practices that would have likely caused the Union's loss of majority support."

Here, as in *Champion Enterprises* and *Quazite*, the alleged conduct is not of the type to have a lingering effect, and the nature of the conduct does not, in and of itself, engender employee disaffection for the Union. For example, as addressed above in Exception 7, the September 2009 Allegation concerning the very brief unilateral assignment of security duties to engineers and bellmen was based solely on the dubious testimony of a single witness, Dexter Wray. Even though numerous other engineers and bellmen testified, none of them corroborated Wray's story of being assigned to security duties. Wray's testimony amounts to nothing more than the following: For reasons not known to the record, the Hotel was short of staffing levels for a very brief period of time, and that Wray – who worked *by himself* on the overnight shift – was told on occasion, "tonight, you will have to be security" (there is no testimony showing this was a regular occurrence during this brief period of time). In addition, as also shown in Exception 7, engineers and bellmen traditionally, in hotels worldwide and at the Anchorage Sheraton, perform backup security duties as a secondary function.

With respect to the four employees terminated for distributing leaflets at the front entrance of

the Hotel in violation of Hotel policy, these employees were returned to work after the Union expressed its disapproval over their dismissal.[29] This became a point of strength for the Union, not weakness as the ALJ suggests. [Decision, p. 95] After the employees were terminated, the Union put well-publicized pressure on the Hotel to reinstate the four employees to their former positions. [*See* Union flyers describing marches, bake sales, and media publicity over the terminations at GC Ex. 44]. Apparently bending to the Union's pressure, the Hotel reinstated the employees to their former positions. [Decision, p. 74]. In this instance, the Union showed itself to be effective in the defense of unit employees, not "demoralized." Far from harming the reputation of the Union, these were victories that the Union could brag about (rightly or wrongly) to its employees and the public at large. As proof, the Union's largest rallies were held after the termination of these four employees, not before. [Tr., pp. 5615].

The ALJ errs also in concluding that the Hotel's failure to provide technical notice to the FMCS prior to impasse implementation caused disaffection by the employees. There is simply no evidence the employees knew what the FMCS is, let alone whether the Hotel completed Form F-7 in a timely fashion prior to the implementation of its impasse offer. The Decision itself states that were it not for this technical procedural question, the Hotel's implementation would not be considered a violation of the Act. [Decision, p. 48].

The written disciplinary warnings in November 2009, eight months before the Hotel withdrew recognition, was also an isolated incident limited to a small group of people. Each of the employees received discipline for violation of a policy that had been on the books for years, including the prior operator of the Hotel. [Tr., pp. 276, 280, 288-89, 368, 372]. Furthermore, the discipline was not heavy or of lasting effect. None of the employees were suspended or suffered loss of pay. Of greatest importance, the Hotel made it clear that the discipline was meted out for the

[29] These allegations are discussed in great detail at other locations in this document.

violation of the Hotel policies, not for engaging in Section 7 conduct. [Tr., pp. 6514, 229-232; G.C. Ex. 15, 17, 18, 19]. This is significant, in view of the fact that the record evidence describing this incident shows that numerous employees were picketing the hotel from the nearby sidewalks surrounding the building, both on this occasion and in the February, 2010 incident, and on other occasions. There is no evidence that any of these employees on any of these occasions were ever disciplined or threatened for participating. The discipline that was given out, therefore, was plainly tied to and identified only with the long-standing work-rule violations, and not to the exercise of Section 7 rights.

The ALJ's conclusion that the Hotel unilaterally implemented its bargaining proposal without the appropriate establishment of an impasse in March of 2010 is simply incorrect. A more detailed argument is presented in Exception 1. Furthermore, there is no evidence that any of the petition signatories chose to sign the decertification petition because of the Hotel's decision to unilaterally implement its proposals.

The final two elements – the tendency of the violation to cause employee disaffection and the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the Union – are simply not met here. It is unreasonable to suggest that a violation of FMCS notice provisions, the isolated, short-term assignment of security duties to an overnight employee, or the discipline of employees for violating long-standing work-rules (coupled with the *absence* of any discipline of employees overtly demonstrating mere steps away from the hotel on the public sidewalk) could cause employee disaffection for the Union. Each of these violations were limited in scope, short in duration, and known only to a few people. Once again, with respect to the discharged employees, the Union won a great victory that could have only enhanced its strength and reputation.

Had the ALJ chosen to perform the *Master Slack* analysis and followed Board precedent on these issues, the outcome would have been significantly different. The decertification petition is objective proof of the Union's loss of majority support upon which the Hotel could rely in its July

2010 withdrawal of recognition because the alleged violations of the Act did not reasonably cause employee disaffection.

Exception 9:

The ALJ Erred by Refusing to Consider the Testimonial Evidence of The Decertification Petition Signatories as Evidence Disproving the General Counsel's Allegations of Decertification Taint.

The decertification petition is objective proof of the Union's actual loss of majority support. To support the legitimacy of this petition, the Hotel offered the testimony of sixty eight (68) decertification petition signatories "to establish that they did so of their own free will and for reasons mostly involving their dissatisfaction with the Union." [Decision, p. 94]. The ALJ considered employee testimony in support of the petition to be "largely immaterial" and purported to instead look only to "objective evidence [that] establishes unfair labor practices…that would inevitably tend to dissipate support for the Union among bargaining unit employees." *Id.* In a few phrases, the ALJ disregards a majority of the witnesses who testified in the hearing. This is not correct.

Testimonial evidence from decertification petition signers should be considered to rebut the General Counsel's theory that allegations of misconduct are causally related to the employees' decertification efforts. Recent case law habitually cites to the Board's limitation of its causal connection analysis to only objective evidence of employer taint. *See e.g.*, *Comau Inc.*, 2010 N.L.R.B. Lexis 511, n34 (Dec. 21, 2010); *AT Systems*, 341 N.L.R.B. 57, 60 (2004). The Board's intention is to prohibit an employer that has engaged in unlawful conduct from taking "advantage of the chance occurrence that some of its employees may be unaware of its actions." *Hearst Corp.*, 281 N.L.R.B. 764, 765 (1986); overruled on other grounds at *Matthews Ready Mix, Inc.*, 324 N.L.R.B. 960, n14 (1997). The result has been a blanket prohibition on the consideration of employee testimony regarding their reasons for signing a decertification petition. *See e.g., SFO Good-Nite Inn,*

LLC, 2011 N.L.R.B. LEXIS 354, at *17, *20 (July 19, 2011). This has not always been the rule. [30] Quite the opposite. Indeed, two of the *Master Slack* elements – the *tendency* of the violation to cause employee disaffection, and the *effect of the unlawful conduct* on employees' morale, organizational activities, and membership in the Union – by their very nature require subjective evidence of employee impact for a proper analysis. In fact, the Board in the *Master Slack* decision relies almost exclusively on the subjective testimony of the employees in determining whether the alleged violations actually were the basis for the employee's decertification efforts. *See Master Slack,* 271 N.L.R.B. at 84-85. [31] The Board quoted employee testimony as evidence of the subjective impact that the ULPs had, or did not have, on their decision to decertify. *Id.* [32]; *see also Eastern States Optical Co., Inc.,* 275 N.L.R.B. 371, 372 (N.L.R.B. 1985) (where the Board was convinced of the efficacy of an employee's unadulterated intention to sign the decertification petition when she "testified unequivocally that her action was entirely voluntary and that [her manager] in no way encouraged her to sign the petition.") An evaluation of the causal connection between alleged ULPs and a decertification petition, without considering the subjective testimony of employees alongside the other objective evidence, leaves the Board to engage in rank speculation with respect to two of the four mandatory *Master Slack* elements. The Board's attempt to completely disregard the

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[30] Sixty eight (68) Hotel employees testified at the Hearing as to why they chose to sign the decertification petition. See Hotel's Post Hearing Brief at p. 72, Tab C. The ALJ in *Master Slack* determined that he only needed to hear eighteen (18) of the bargaining unit employees before he stopped the Employer from introducing any further evidence on the matter. *Id*. at 79. According to the ALJ, "even if case law did permit or require an employer to call enough signers to show that a majority of the unit did not want the recognized union to represent them, a representative number of witnesses would have to be acceptable." *Id*.

[31] "All of the 18 signers of the petition who were called by Respondent and permitted to testify on the subject, prior to my foreclosing Respondent from calling the other signers, testified that, to the extent they heard the talk about the prior and pending litigation, or the extent that they were aware of any such matters, none of those matters had any impact on their signing the petition." *Id*. at 85

[32] "Typical of the responses of the employees regarding their reasons for signing the petition is that of Barbara Griffin, hired in 1964, who testified that although she was aware of the unfair labor practice issues, they had nothing to do with her signing the petition. 'I signed it because I didn't want the Union. I didn't feel the plant needed a Union.'" *Id*.

testimony of employees as to the subjective impact of the alleged ULPs altogether ignores a key consideration – what do the employees actually think?

Here, subjective evidence of employee disaffection should be considered as evidence to combat the Counsel for the General Counsel's theories of employer taint. This is important not to show that the employees did not know about the alleged violations (as in *Hearst Corp.*), *but to show that the CGC's presumption of ULP taint is wrong.* In this case, it was the conduct of the Union, not the Employer, which motivated the employee disaffection. The Decision assumes that the stale, isolated, technical ULP allegations caused a unit-wide decertification petition. [Decision, pp. 315-324]. The testimony of the employees clearly shows otherwise, and shows that the motivating force behind the decertification effort was the Union's own tactics. [*See e.g.* testimony of employees Cindy Ford, Tr., pp. 5336. Et seq.; Eric Goff, Tr. pp. 5325, et seq.; Tony Sauceda, Tr., pp. 5369; Snezana Jaksic, Tr., p. 5712; Anthony Brown, Tr., p. 5721, et seq.] Here, the Employer is not seeking to benefit from the fruits of alleged misconduct, it is seeking to prove the true cause of the decertification petition. The truth behind the decertification is told through the under-oath testimony of 68 employees. The Board's precedent on this issue is in need of revision.

Exception 10:

The ALJ Erred in Finding That Three (3) Isolated Allegations of Managerial Influence Constituted More Than Minimal Assistance to the Petition's Circulation Among the One Hundred and Sixty-One (161) Person Bargaining Unit.

Only one of the 125 witnesses who testified in the Hearing alleged that Mr. Emmsley, Sr. attempted to coerce him into signing the decertification petition.[33] Only two of those 125 witnesses (Eusebio Bristol and Jose Lantigua) alleged that Chef Rydin had knowledge of a decertification petition, and two more testified that Mr. Bristol and Mr. Lantigua were mistaken. There is no evidence from any of the other 107 Petition signatories that would suggest any Hotel manager had any input, or even any knowledge, about the distribution of the Petition. Furthermore, there is no evidence that any of the three (3) individuals who were the alleged targets of this managerial coercion (Dexter Wray, Eusebio Bristol, and Jose Lantigua) spoke to any other employees about their supposed conversations. These were isolated incidents because every other employee who testified about the Petition believed that the managers had been kept in the dark.

Wray, Bristol, and Lantigua were outliers. There is no question as to why Dexter Wray, one of the Union's most outspoken supporters, would be the *only person*, of the many who testified, to put anti-union, pro-decertification language in the mouth of Ed Emmsley. Eusebio Bristol[34] and Jose Lantigua[35], both weak English speakers, were confused in their understanding of what was presented to them by Chef Rydin for signature. Still, the ALJ

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[33] The credibility of these allegations is challenged directly in Exceptions 6 & 7.

[34] Eusebio Bristol testified that he was not sure about who gave him the Petition, and merely thought it *could have been* Chef. Ms. Mathers, again remembers handing the Petition to Mr. Bristol for signature. [Tr., pp. 4984-88 (Bristol)].

[35] Chef Rydin testified that he handed Mr. Lantigua a new hire packet, not a decertification petition. Ms. Mathers confirms this recollection – she was the one that handed Mr. Lantigua the petition to sign. [Tr., pp. 6451-55 (Rydin); 6499-6501 (Fullenkamp); Resp. Ex. 100; and 7627 (Mather)].

ruled that the Hotel's managers coerced the one hundred (110) signatories of the decertification petition. [Decision, pp. 95-96]. This decision is not consistent with Board law.

An employer does not violate the Act when it provides "ministerial aid" to the distribution and signature of a decertification petition. *Narricot Indus., L.P.*, 2008 N.L.R.B. LEXIS 140 (May 6, 2008). While it is unlawful for an employer to initiate a decertification petition or solicit signatures for the petition, *Sociedad Espanola De Auxilio Mutuo Y Beneficencia de P.R.*, 342 N.L.R.B. 458, 459 (2004), the essential inquiry is whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *Narricot Indus., L.P.*, 2008 N.L.R.B. at 140. The Decision also cites this precedent, but fails to show how three (3) isolated interactions, in a 161-person bargaining unit could possibly constitute anything more than minimal aid to the decertification efforts. In fact, a proper application of Board law leads to a different outcome.

Employer assistance to employee-led decertification efforts does not spoil the employee's petition. *See Poly Ultra Plastics*, 231 N.L.R.B. 787 (1977). In *Poly Ultra Plastics*, a group of employees in the midst of preparing a decertification petition invited the employer's president to help them write the petition. *Id.* at 790. The president did so, and expressed his support for the petition. *Id.* The Board affirmed the ALJ's conclusion that the employer's conduct was not unlawful because it "was limited to aiding employees in the expression of their predetermined objectives." *Id.* Furthermore, the Board does not prohibit minimal employer intervention where the decertification efforts were initiated and motivated by the employees. *See KONO-TV-Mission Telecasting*, 163 N.L.R.B. 1005 (1967). In *KONO-TV*, in response to a question, an employer advised an employee to write a letter

to the NLRB to initiate the decertification process, and then went on to write most of that letter for him. *Id.* at 1106. Even though the employer initiated the decertification and expressed his tacit approval, the Board still affirmed the ALJ's conclusion that the employer's "assistance" was insufficient to establish that the petition did not constitute "the free and uncoerced act of the employees concerned." *Id.* n13.

Here, much like *Poly Ultra Plastics* and *KONO-TV*, the petition was an employee-initiated action. The ALJ agreed that Cindy Mathers, without any knowledge of the Hotel's management, downloaded a decertification petition form after looking it up on www.google.com. [Tr., p. 3092]. Employees Mathers, Lucero, Mejia, and the Emmsley sisters circulated the decertification petition while intentionally keeping the managers in the dark. [Tr., pp. 5504, 5508, 5689, 5797, 7260]. Sixty six (66) Hotel employees testified that they did not speak to a manager about their signature on the decertification petition, that they did not receive the decertification petition from a manager, and that they had no reason to believe that any manager in the Hotel knew of the petition. [*See e.g. Tr.,* p. 5327]. Despite the ALJ's confidence ("Clearly the Respondent provided more than minimal or 'ministerial' support…," [Decision, p. 96, ln. 15], the Decision avoids any analysis of this issue, and rushes to conclude that dealings with three employees in a 161 person bargaining unit taints the employee-initiated, and employee-led decertification petition.

In fact, Board precedent says something different. An employer's approval and influence over a significant portion of the bargaining unit does not taint a decertification petition so long as the petition is employee-initiated and employee-led. The Board has found no employer taint where a manager presents two employees with an employee-initiated petition, and stands by while watching them sign in their offices. *See Eastern*

States Optical Co., Inc., 275 N.L.R.B. 371 (1985). In *Eastern States Optical Co., Inc.* [36] an employee approached a manager asking him to find her a copy of the decertification petition declaring that she "might as well sign [her]self." *Id.* at 372. The manager got the petition for her, called her into his office, and watched as she signed the decertification petition. *Id*. It was undisputed that the employer played no role in the employees' decision to initiate decertification proceedings. However, it should be noted, there were only six employees who signed the decertification petition in this case. Thus, the managers' action described above, facilitating the signature by two of those employees influenced one-third of the decertification signatories. Nothing quite so widespread happened here at the Hotel.

Absent allegations involving the three separate employees, there is no other evidence of managerial intervention. The alleged employer influence was limited to three individuals, with no other witnesses, and no other evidence that any one had even heard that these allegations occurred. These truly were small isolated incidents. There is no dispute that the decertification efforts were exclusively initiated by employees and the distribution was an employee-led effort. In a 161-person bargaining unit, allegations involving only three individuals, even if true, would not taint the entire employee-initiated, employee-led decertification petition.

[36] A case cited in the Decision, but left unanalyzed by the ALJ.

Exception 11:

The ALJ Erred by Holding That the Reinstatement of the Four (4) Previously Terminated February 2, 2010, Leafletters With Back-Pay and No Loss of Seniority Did Not Remedy the Alleged ULP Created by Their Termination.

Four (4) Hotel employees -- Joanne Littau, Troy Prichacharn, Gina Tubman and Lucy Dedek -- violated established Hotel rules by entering the Hotel premises on February 2, 2010, while they were off duty and by passing out handbills to guests staying in the Hotel. All four (4) of the employees were aware that their actions broke Hotel rules. Each of the employees had received a handbook stating the rules, and they were warned when they violated the rules on at least two prior occasions. Ultimately, the employees were terminated because they repeatedly disregarded established Hotel policy put in place for a legitimate business purpose.

The Hotel reinstated the four (4) terminated employees with full back-pay and without loss of seniority in July of 2010. [Decision, p. 57]. However, the ALJ held that the Hotel's reinstatement did not do enough to repudiate the leafletter's alleged improper termination. [*Id.*] Citing *Passavant Mem'l Hosp.*, 237 NLRB 138 (1978), the ALJ outlined how the Hotel should also have reinstated the leafletters more quickly and issued a publication assuring the Hotel's bargaining unit members that their Section 7 rights would not be interfered with in the future.

To begin, the Board has made clear that full compliance with the *Passavant* factors is not required for an efficacious cure. *Extendicare Health Servs.*, 350 NLRB 184 (2007). In *Extendicare*, the employer unilaterally raised the price of employee meals by $.75 without negotiating with the Union. *Id.* at 192. The union cried foul, and the employer restored the prices to their original level, and refunded the overage. The employer did not complete the *Passavant* elements, and only went on to post a mechanistic notice. *Id.* Despite not having satisfied all that is required under *Passavant*, the ALJ held that the employer had cured the wrong. *Id.* at 191.

The ALJ is incorrect because the standard in *Passavant* is inapplicable to the facts of this case. In *Passavant*, the ULP to be remedied was a very public series of threats against members of

the bargaining unit. The respondent stood in front of 30-40 bargaining unit members in two different meetings and told them that they would be fired if they participated in an economic strike. *Id.* The *Passavant* ULP was, at its core, an exceedingly public offense. In contrast, the terminations of the four (4) leafletters were private. The leafletters were individually called into General Manager Artiles' office and each received explanations as to why their employment was being terminated. [Tr., p. 6514]. Mr. Artiles did not make an open declaration to 30 or 40 bargaining unit members. As a matter of fact, the terminations of the leafletters were not in the public spotlight until the several Union members gave interviews on local television stations and held a press conference in front of the Board's Anchorage office. [Decision, p. 26]. After the Union publication as to what occurred, the ALJ goes so far as to state that the bargaining unit members were "undoubtedly aware of what had transpired." [Decision, p. 26]. *Passavant* dealt with an open declaration that amounted to a ULP, but the leafletters termination (and alleged ULP) was not public in any way until the Union conducted their advertising campaign. Hence, *Passavant* is factually distinguishable and its requirements do not apply. By attempting to force the standards outlined in *Passavant* to the current case, the ALJ is prescribing medicine for a different disease.

The ALJ should have instead looked to what actually happened to the leafletters and the Union. The leafletters did not suffer in any economic fashion. There were restored to their exact circumstance as if they were never terminated. Moreover, the Union did not suffer in the eyes of the bargaining unit. Instead, the Union appeared even stronger to the bargaining unit because the Union placed very public pressure on the Hotel to rehire the four workers [G.C. Ex. 44] and their promises of reinstatement ultimately came to pass. [Decision, p. 74].

Dated: November 3, 2011

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

REMINGTON HOTEL CORPORATION,
d/b/a THE SHERATON ANCHORAGE

Cases	19-CA-32148
	19-CA-32188
	19-CA-32222
	19-CA-32238
and	19-CA-32301
	19-CA-32334
	19-CA-32337
	19-CA-32349
	19-CA-32367
UNITE HERE!, LOCAL 878, AFL-CIO	19-CA-32414
	19-CA-32420
	19-CA-32438
	19-CA-32487

PROOF OF SERVICE

I am employed in the County of Fulton, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is 3593 Hemphill Street, Atlanta, Georgia 30337.

On November 3, 2011, I caused the following document(s) to be served**:**

Employer's Exceptions to Administrative Law Judge's Decision and Memorandum of Law in Support

__ BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Atlanta, Georgia, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__ BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.

X BY THE NLRB'S ELECTRONIC FILING SYSTEM on its website: http://www.nlrb.gov. It was e-filed with Region 19 and The Office of Executive Secretary

X BY ELECTRONIC MAIL to:

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Executed on November 3, 2011, at Atlanta, Georgia.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

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