Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC *and* Unite Here International Union Local 21. Case 18–CA–151245

August 15, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On May 27, 2016, Administrative Law Judge Sharon L. Steckler issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief. The General Counsel also filed limited exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified here, and to adopt the recommended Order as modified and set forth in full below.[2]

This case involves allegations that the Respondent committed violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) during the period in which the parties were bargaining for a successor collective-bargaining agreement. We affirm the judge's findings[3] and conclusions, with some modifications of her

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's remedy, Conclusions of Law, and recommended Order to conform to our findings and to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

We find merit in the General Counsel's exception that the judge erred by ordering that Kelli Johnston's remedy be limited under *Oil Capitol Sheet Metal, Inc*., 349 NLRB 1348 (2007). In *Oil Capitol,* the Board addressed the burdens applicable to compliance proceedings involving union "salts." There is no contention or evidence that Johnston was a salt, and therefore *Oil Capitol* does not apply here. Accordingly, we shall modify the judge's recommended remedy to include the standard reinstatement and backpay remedy for Johnston.

The Respondent excepts to the judge's finding that it unlawfully refused to meet and bargain with the Union in violation of Sec. 8(a)(5) and (1), but it does not argue that the judge's recommended affirmative bargaining order is improper even assuming the Board affirms the judge's 8(a)(5) finding in this regard. We therefore find it unnecessary to provide a specific justification for that remedy. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

[3] In the absence of exceptions, we adopt the judge's findings that the Respondent violated (1) Sec. 8(a)(1) by telling an employee that all the Union needs to do is sign the contract and employees will get their raises, and by threatening the union representative by ordering her, in the presence of employees, to leave the premises; (2) Sec. 8(a)(3) by refusing to assign additional work hours as a houseman to Kelli Johnston and by discontinuing longevity pay increases provided in the expired collective-bargaining agreement; and (3) Sec. 8(a)(5) by unilaterally discontinuing the past practices of allowing a union representative to visit hotel properties and allowing the Union to post notices on the Respondent's bulletin boards. Also, in the absence of exceptions, we adopt the judge's dismissal of the complaint allegation that the Respondent repeatedly showed up late and/or left early during bargaining sessions.

analysis,[4] for all but one of the allegations in this case.[5] In addition, for the reasons set forth below, we adopt the judge's findings that the Respondent violated Section 8(a)(5) of the Act by discontinuing the longevity pay

[4] For the reasons stated by the judge, we adopt her findings that the Respondent violated (1) Sec. 8(a)(5) by failing to provide the Union with information it requested regarding the Respondent's costs for the Union's health proposal for bargaining-unit employees and unreasonably delaying in providing information regarding the Respondent's costs for the Respondent's vacation proposal; and (2) Sec. 8(a)(1) by telling an employee that no raises will be given because no contract exists and telling an employee that she had not received a raise because there was no contract and because the Union would not agree to a "fair offer."

In addition, we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) by refusing to assign additional work hours as a bartender to employee Kelli Johnston. However, in so doing, we do not rely on *FES*, 331 NLRB 9 (2000), cited by the judge, but rather on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Cor*p., 462 U.S. 393 (1983). Moreover, we rely on the judge's unexcepted-to finding that the Respondent violated Sec. 8(a)(3) by refusing to assign additional work hours as a houseman to Kelli Johnston as additional evidence of the Respondent's discriminatory motivation.

Further, in adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by disciplining Graham Brandon, we find that the Respondent failed to timely raise its defense that a grievance resolution resolved the matter. See *SEIU United Healthcare Workers-West*, 350 NLRB 284, 284 fn. 1 (2007) (noting that it is well settled that deferral to the grievance and arbitration process of the collective-bargaining agreement is an affirmative defense that must be timely raised in the answer to the complaint or at the trial).

Finally, in adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by failing to sufficiently explain the union leave proposal, we note that the Respondent's only argument in its exceptions was that its proposal was a minor change from the union leave provision in the expired collective-bargaining agreement.

Chairman Ring would not find that the Respondent violated Sec. 8(a)(5) by failing to sufficiently explain its union-leave proposal. Although a failure to explain a bargaining proposal may, in some circumstances, be *evidence* of bad-faith bargaining, the Chairman would not find that it amounts, by itself, to an unfair labor practice. Whether a party has bargained in bad faith depends on the totality of its conduct. See, e.g., *West Coast Casket Co., Inc.*, 192 NLRB 624, 636 (1971), enfd. in relevant part 469 F.2d 871 (9th Cir. 1972). Moreover, relevant Board precedent appears to be in conflict. A party explains its bargaining proposal to persuade the other side that the proposal is fair and proper, but the Board has held that an employer bargains in good faith when it "reasonably believes" that its proposal "is fair and proper *or* that [it] has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (emphasis added). Thus, *Atlanta Hilton & Tower* stands for the principle that an unexplained proposal may be insisted upon in good faith if a party reasonably believes it has sufficient leverage to win agreement. On the other hand, in *Apogee Retail, NY, LLC*, 363 NLRB No. 122, slip op. at 1 fn. 3 (2016), cited by the judge, the Board stated that "'good faith bargaining . . . does require that parties justify positions taken by reasoned discussions'" (quoting *Blue Jeans Corp.*, 177 NLRB 198, 206 (1969), enfd. sub nom. *Amalgamated Clothing Workers of America v. NLRB*, 432 F.2d 1341 (D.C. Cir. 1970)). However, because the Respondent does not raise this apparent conflict in its very limited exception, Chairman Ring leaves resolution of this conflict for a future appropriate case.

[5] We disagree with the judge that the Respondent violated Sec. 8(a)(5) by making confusing pay proposals with the intent to stall negotiations. The judge's finding rests primarily on the pay proposal made for current employees through spreadsheets and hundreds of pie charts for individual employees and classifications. We agree with the judge that making proposals in this manner may have been confusing, particularly in light of inaccuracies or inconsistencies in some of the documents provided. However, regardless of these shortcomings, we cannot conclude that the pay proposals submitted in this form rose to the level of wage proposals that the Board has considered to be "a sham" calculated to impede negotiations in violation of Sec. 8(a)(5). See *Tritac Corp.*, 286 NLRB 522, 523, 542–543 (1987); *Billion Oldsmobile-Toyota*, 260 NLRB 745, 755–756 (1982), enfd. 700 F.2d 454 (8th Cir. 1983). We likewise disagree with our dissenting colleague that the submission of these proposals evinced objective bad faith, even if not intended, in the circumstances of this case. This is especially true in light of the fact that the Union did not object to the Respondent's voluminous proposal but, rather, sought to bargain over it by asking the Respondent for clarifications. Further, there is no dispute that the Respondent's spreadsheets summarized its pay proposals in a simple, accurate and understandable manner. We further find that the lack of clarity with respect to the status of tips in the Respondent's pay proposal for banquet servers did not independently violate Sec. 8(a)(5) and does not warrant a different conclusion with respect to the current employee pay proposals. *Billion Oldsmobile-Toyota*, 260 NLRB at 755–756.

We note that the judge mistakenly found that the Respondent introduced the individual pie charts for each current employee for each year of the Respondent's proposed contract during the negotiation session on March 24; the Respondent introduced the individual pie charts during the March 16 negotiation session. This minor error does not affect the result here.

Member McFerran dissents from her colleagues' reversal of the judge's finding that the Respondent violated Sec. 8(a)(5) by tendering more than 2500 pages of misleading pie charts as wage proposals and a proposal for banquet servers that cut their compensation and left to the Respondent's sole discretion whether they would receive a share of the service charge for any given event. The pie charts purported to show individual employee's "total real wage" or "TRW" by adding in the payments for breaks, workers' compensation, bereavement pay, and jury duty, and showed higher compensation than employees actually earned. The charts were not only "confusing," as the judge found, but also contained numerous and errors and inconsistencies and failed to identify the individual employees or their length of service. Although the Respondent explained elements of the charts and acknowledged certain errors, it compounded its obfuscation by presenting, remarkably, *more* pie charts.

The majority suggests a single standard for reviewing wage proposals for evidence of bad-faith bargaining: that the proposals manifest "'a sham' calculated to impede negotiations." Such specific intent is not required, however. Rather, the Board appropriately may decide "on the basis of objective factors" that a party's bargaining proposals evince bad faith. *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001). Objectively, the Respondent's mistake-ridden wage proposal for banquet servers indicates bad faith. This confusing proposal impeded the basic process of bargaining, which was made even more difficult by the Respondent's insistence on retaining sole discretion to decide whether the servers would share in service charges, and the Respondent's refusal to even discuss any parameters it would consider in exercising its discretion. Intended or not, such conduct is inconsistent with the notion of "good faith" bargaining envisioned by the Act and violates Sec. 8(a)(5). Cf. *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1220–1221 (2001), citing *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). As for the pie chart wage proposals that the Respondent tendered, Member McFerran further disagrees with her colleagues' suggestion that a party must voice complaints about its bargaining counterpart's conduct

increases set forth in the expired collective-bargaining agreement and by refusing the Union's request to meet for negotiations.

1. The Respondent's Unilateral Discontinuance of Scheduled Wage Rate Increases

As managing agent for the Kahler Hospitality Group (Kahler), the Respondent manages four hotel properties and one laundry service in Rochester, Minnesota. Before Kahler purchased these properties in 2013, a different hotel management company, Sunstone Hospitality (Sunstone), managed them. Sunstone and the Union were parties to a collective-bargaining agreement effective from October 1, 2011 through August 31, 2014. When Kahler took over operations in October 2013, it voluntarily assumed the collective-bargaining agreement, and the parties subsequently agreed to extend the contract until February 28, 2015.

Appendix A of the parties' expired collective-bargaining agreement included a wage grid for each property for each year, organized by job title. For each job title, the grid set out a specific starting wage, tied to date of hire and job performed, as well as four specific pay raises, to be awarded when employees reached identified employment duration milestones ("longevity pay increases"). Specifically, the four longevity pay increases became effective when an employee's tenure reached 12 months, 24 months, 42 months, and 60 months, respectively.[6]

When the contract extension expired on February 28, the Respondent stopped paying the longevity pay increases set forth in Appendix A. For the reasons explained below, we agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally discontinuing the longevity pay increases.

It is clear that, following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. See, e.g., *Triple A Fire Protection, Inc*., 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999). Often, these cases turn on a determination of what the status quo was at the time that the contract expired. In determining the status quo in this case, and in finding that the Respondent here unlawfully changed the status quo, we agree with the judge that this case is factually similar to *Wilkes-Barre General Hospital*, 362 NLRB 1212 (2015).

In *Wilkes-Barre*, the Board affirmed the judge's finding that the employer violated Section 8(a)(5) by ceasing to pay longevity-based wage increases after the parties' collective-bargaining agreement expired. Id. at 1212 & fn. 1. The judge concluded that, because the agreement did not address whether the employees would receive longevity raises post-expiration, the employer had a continuing statutory obligation to maintain the status quo by paying the longevity-based wage increases after the expiration of the parties' contract. Id. at 1216–1217.

Here, as in *Wilkes-Barre*, the collective-bargaining agreement did not address whether or not the employees were to continue receiving longevity pay increases after it expired. Because the parties' agreement did not indicate that the parties intended that the longevity pay increases would cease at the end of the contract, the Respondent's statutory duty to maintain the status quo required it to continue to pay the longevity increases after the contract extension expired. See also *Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 1 (2016) (affirming the judge's finding that the language of the expired contract failed to show that the contract provision regarding anniversary step wage increases was limited to the term of the agreement).

In addition, we observe that by refusing to pay the longevity pay increases, the Respondent effectively created a two-tier wage system. For example, a line cook who had worked over 12 months when the contract extension expired would be paid $11.80 an hour. But a line cook who was hired after the contract extension expired would still be making $10.41 an hour after 12 months. This wage "freeze" was a change in employees' terms and conditions of employment. See *Wilkes-Barre*, 362 NLRB at 1217, 1212 fn. 2 (then-Member Johnson concurring).[7]

Accordingly, when the Respondent discontinued the longevity pay increases upon contract expiration, it made a unilateral change in the status quo that it was obligated to maintain and thereby violated Section 8(a)(5) of the Act.

at the table (or register its dissatisfaction in a particular manner) in order to later support an unfair labor practice finding. The filing of a charge is itself a manifestation of such dissatisfaction in most unfair labor practice cases. She notes, in any event, that the Union pointed out errors and inconsistencies in the charts each time the Respondent introduced them.

[6] For example, a line cook hired at the Marriott Hotel in Rochester on or after September 1, 2011, would earn $10.41 per hour at hire. After 12 months' employment, the line cook would receive a raise to $11.34; after 24 months, $12.21; 42 months, $13.02; and 60 months, $13.88. A line cook hired on or after September 1, 2013, initially earns $10.41 per hour; at 12 months, he or she receives an increase to $11.80; at 24 months, $12.70; at 42 months, $13.54; and at 60 months, $14.44.

[7] We note that, in finding the violation, we find no need to rely on *Finley Hospital*, 362 NLRB 915 (2015), enf. denied 827 F.3d 720 (8th Cir. 2016). Chairman Ring and Member Kaplan express no opinion whether that case was correctly decided.

2. The Respondent's Refusal to Meet with the Union

The Respondent began negotiations with the Union for a successor collective-bargaining agreement on January 20, 2015. Between January 20 and September 24, the parties held 11 bargaining sessions.

At the end of the September 24 bargaining session, the parties scheduled another session for October 20. On October 19, Human Resources Manager Michael Henry sent an email cancelling this negotiation session, explaining that the Respondent did not see the need to meet and stating that "if you bring us something that is significant enough for us to move off of our last best and final offer then let us know." In response to this email, Union President Brian Brandt sent two emails to Henry, on November 4 and 11, requesting further negotiating dates. Henry sent an email back to Brandt, again stating that the Respondent would not meet with the Union again unless the Union presented a new proposal.

For the reasons set forth below, we adopt the judge's finding that the Respondent violated Section 8(a)(5) by refusing the Union's request to meet for negotiations. It is true that parties bargaining for a collective-bargaining agreement do not have to continue meeting indefinitely where there is no prospect of agreement. *Richmond Electrical Services*, 348 NLRB 1001, 1002 (2006) (finding that by the time the employer had declared impasse, it was reasonable to find that further bargaining would be fruitless); accord *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) ("[T]he Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."). Here, however, the parties specifically agreed at the end of the September 24 bargaining session to meet again on October 20. Then, the Respondent waited until the day before the parties were scheduled to bargain to demand that the Union present a new proposal for it to go forward with the scheduled meeting. The Respondent's last-minute precondition imposed after a prior agreement to meet deprived the Union of any opportunity to offer a counterproposal. Under these circumstances, we agree with the judge that the Respondent violated Section 8(a)(5).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3.

"3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act."

2. Substitute the following for Conclusion of Law 5(c).

"(c) telling an employee that no raises will be given because no contract exists."

3. Add the following as Conclusion of Law 5(d).

"(d) telling an employee that she had not received a raise because there was no contract and because the Union would not agree to a fair offer."

4. Delete Conclusion of Law 7(d) and re-designate Conclusions of Law 7(e) and (f) as 7(d) and (e).

5. Add the following as Conclusions of Law 7(f) and (g).

"(f) Failing and refusing to provide the Union with information it requested regarding the Respondent's costs for the Union's health proposal for bargaining-unit employees."

"(g) unreasonably delaying in providing information regarding the Respondent's costs for the Respondent's vacation proposal."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity pay increases contained in Appendix A of the expired 2011–2014 collective-bargaining agreement, we shall order the Respondent to rescind the unlawful change and resume giving longevity pay increases until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. We shall further order the Respondent to make employees whole for any losses sustained as a result of the unlawful change in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Having found that the Respondent unlawfully refused to hire Kelli Johnston for the houseman position and unlawfully refused to assign her additional work hours as a

bartender, we shall order the Respondent to offer her the houseman position for which she applied or, if that position no longer exists, a substantially equivalent position, without prejudice to her seniority or any other rights or privileges to which she would have been entitled if she had not been discriminated against. In addition, we shall order the Respondent to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in accordance with *Ogle Protection*, supra, with interest computed in accordance with *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

In addition, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

ORDER

The National Labor Relations Board orders that the Respondent, Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC, Rochester, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the UNITE HERE International Union Local 21 (the Union) as the exclusive collective-bargaining representative of employees in the bargaining unit.

(b) Unilaterally changing terms and conditions of employment of its unit employees, including by discontinuing longevity pay increases contained in Appendix A of the expired 2011–2014 collective-bargaining agreement, discontinuing the past practice of visitation for a union representative on hotel properties, and discontinuing the past practice of allowing the Union to post notices on the Respondent's bulletin boards.

(c) Refusing to explain or clarify bargaining proposals when requested by the Union.

(d) Imposing preconditions at the last minute that the Union must satisfy before it will engage in face-to-face bargaining.

(e) Failing and refusing to provide or timely provide information requested by the Union that is necessary for and relevant to the Union's performance of its duties as the exclusive bargaining representative of the bargaining unit.

(f) Threatening union representatives by telling them, in the presence of employees, that they cannot access nonworking areas of the facility.

(g) Telling employees that they could have wage increases if their collective-bargaining representative signed a new collective-bargaining agreement.

(h) Telling employees that they had not received wage increases because there was no collective-bargaining agreement and because the Union would not agree to a fair offer.

(i) Issuing discipline to employees because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity.

(j) Refusing to assign employees additional hours because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity.

(k) Discontinuing longevity pay increases due under the expired collective-bargaining agreement because of employees' union activity.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

(b) Before implementing any changes in wages, hours, or other terms and conditions employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(c) Furnish the Union with the information it requested concerning the Respondent's costs for the Union's two health care plans for only bargaining-unit employees and for its vacation proposal.

(d) Resume giving unit employees longevity pay increases as described in Appendix A of the expired 2011–2014 collective-bargaining agreement and maintain that practice in effect until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(e) On request of the Union, rescind the unilateral change to the practice of visitation for a union representative on hotel properties, and restore the status quo ante that existed prior to the change until such time it has bargained with the Union to an agreement or impasse.

(f) On request of the Union, rescind the unilateral change to the practice of allowing the Union to post notices on bulletin boards and restore the status quo ante that existed prior to the change until such time it has bargained with the Union to an agreement or impasse.

(g) Make whole eligible employees in the above-described unit for any loss of earnings resulting from the Respondent's elimination of the longevity pay increases as described in Appendix A of the expired 2011–2014 collective-bargaining agreement in the manner set forth in the amended remedy section of this decision.

(h) Within 14 days from the date of this Order, rescind the unlawful discipline given to Graham Brandon.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline given to Graham Brandon, and within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

(j) Within 14 days from the date of this Order, offer Kelli Johnston the houseman position for which she applied or, if that job no longer exists, a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(k) Make Kelli Johnston whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(l) Within 14 days from the date of this Order, remove from its files any reference to the refusal to assign additional work hours to Kelli Johnston, and within 3 days thereafter, notify her in writing that this has been done and that the refusal to assign the work hours will not be used against her in any way.

(m) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(n) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(o) Within 14 days after service by the Region, post at its facility in Rochester, Minnesota, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 28, 2015.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 15, 2019

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John F. Ring, Chairman

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Lauren McFerran, Member

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

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the UNITE HERE International Union Local 21 (the Union) as the exclusive collective-bargaining representative of employees in the bargaining unit.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees, including by discontinuing longevity pay increases contained in Appendix A of the expired 2011–2014 collective-bargaining agreement, discontinuing the past practice of visitation for a union representative on hotel properties, and discontinuing the past practice of allowing the Union to post notices on our bulletin boards.

WE WILL NOT refuse to explain or clarify bargaining proposals when requested by the Union.

WE WILL NOT impose preconditions at the last minute that the Union must satisfy before we will engage in face-to-face bargaining.

WE WILL NOT fail and refuse to provide or timely provide information requested by the Union that is necessary for and relevant to the Union's performance of its duties as the exclusive bargaining representative of the bargaining unit.

WE WILL NOT threaten union representatives by telling them, in the presence of employees, that they cannot access non-working areas of our facility.

WE WILL NOT tell our employees that they could have wage increases if their collective-bargaining representative signed a new collective-bargaining agreement.

WE WILL NOT tell our employees that they had not received wage increases because there was no collective-bargaining agreement and because the Union would not agree to a fair offer.

WE WILL NOT issue discipline to employees because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity.

WE WILL NOT refuse to give employees additional hours because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity.

WE WILL NOT discontinue longevity pay increases due under the expired collective-bargaining agreement because of employees' union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of our employees in the appropriate unit.

WE WILL furnish the Union with the information it requested concerning our costs for the Union's two health care plans for only bargaining-unit employees and for our vacation proposal.

WE WILL resume giving unit employees longevity pay raises as described in Appendix A of the expired 2011–2014 collective-bargaining agreement, and WE WILL maintain that practice in effect until an agreement has been

reached with the Union or a lawful impasse in negotiations occurs.

WE WILL, on request of the Union, rescind the unilateral change to the practice of visitation for a union representative on hotel properties and restore the status quo ante that existed prior to the change until such time as we have bargained with the Union to an agreement or impasse.

WE WILL, on request of the Union, rescind the unilateral change to the practice of allowing the Union to post notices on bulletin boards and restore the status quo ante that existed prior to the change until such time as we have bargained with the Union to an agreement or impasse.

WE WILL make whole eligible employees in the above-described unit for any loss of earnings resulting from our elimination of the longevity pay increases as described in Appendix A of the expired 2011–2014 collective-bargaining agreement in the manner set forth in the amended remedy section of the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discipline given to Graham Brandon.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline given to Graham Brandon, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Kelli Johnston the houseman position for which she applied or, if that job no longer exists, a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kelli Johnston whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the refusal to assign additional work hours to Kelli Johnston, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the refusal to assign the work hours will not be used against her in any way.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum back pay awards, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

RICHFIELD HOSPITALITY, INC. AS MANAGING AGENT FOR KAHLER HOTELS, LLC

The Board's decision can be found at www.nlrb.gov/case/18-CA-151245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, D.C. 20570, or by calling (202) 273-1940.

Tyler J. Wiese, Esq. and *Nichole L. Burgess, Esq.,* for the General Counsel.

Karl M. Terrell, Esq. and *Arch Y. Stokes, Esq*., for the Respondent.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried in Rochester, Minnesota, on December 15, 16, and 17, 2015. The UNITE HERE International Union Local 21 (Local 21) filed the charge on April 29, 2015, a first amended charge filed on August 20, 2015, and a second amended charge on September 1, 2015.[1] (GC Exhs. 1(a)-(f).) The General Counsel issued the complaint on September 3 and Richfield Hospitality, Inc., as managing agent for Kahler Hotels, LLC (Richfield) filed an answer on September 17. General Counsel issued an amended complaint on November 25 and Richfield filed an answer to the amended complaint on December 9. Richfield denies all alleged violations.

The amended complaint (complaint) alleges that Richfield committed violations of Section 8(a)(1), (3), and (5), all of which occurred while the parties were bargaining for a collective-bargaining agreement.

The complaint contends Richfield violated Section 8(a)(5) by showing up late and leaving early for negotiation sessions and by refusing to meet after November 11 unless the Union provided a new proposal. The complaint alleges two instances of failing to provide information, health insurance costs and vacation costs, in violation of Section 8(a)(5). The complaint also alleges that two of Richfield's proposals, one regarding wages and one regarding union leave, violated Section 8(a)(5). The complaint included allegations of unilateral changes, elimination

[1] All dates are in 2015 unless otherwise indicated.

of contractual wage increases and changes in past practices of the Union's access to the facilities and posting on company bulletin boards, in violation of Section 8(a)(5).

The elimination of the contractual wage increases is also alleged as a violation of Section 8(a)(3). Related to the unilateral changes are allegations about statements made that potentially violate Section 8(a)(1). Lastly, the complaint alleges Richfield violated Section 8(a)(3) by disciplining employee and shop steward Brandon and by failing to assign additional working hours to employee and shop steward Kelly Johnston.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Richfield, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Richfield is a Colorado corporation and a Minnesota limited liability company engaged in providing hospitality services, including the four hotels in Rochester, Minnesota, at issue here. During the last calendar year, Richfield, in conducting its operations, derived gross revenues in excess of $500,000 and purchased and received at its Rochester, Minnesota hotels goods and services valued in excess of $50,000 directly from suppliers located outside the State of Minnesota. Richfield admits, and I find, that Richfield has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Richfield admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Richfield manages the operations of hospitality properties, including the four hotels at issue and a laundry service in Rochester, Minnesota. The four hotel properties in Rochester are: the Residence Inn; Kahler Inn and Suites; the Marriott; and the Kahler Grand. The hotels are owned by a corporation. Javon Bea is the representing chair of the ownership group for the hotels now known as the Kahler Hospitality Group, which hired Richfield to manage the hotels in Rochester.

The previous owner of the hotels and textile service group was Sunstone Hotel Properties (Sunstone). Sunstone and the Union had a collective-bargaining agreement in place when the Kahler Hospitality Group purchased the hotels and laundry service (Sunstone contract). When Kahler Hospitality Group assumed operations in October 2013, it voluntarily assumed the Sunstone contract. Richfield also agreed to a 6-month extension of the Sunstone contract, which delayed the expiration to February 28, 2015.

Michael Henry (Henry), is the managing director of human resources for Richfield Hospitality for the Kahler Hospitality Group. Henry reports to the vice president of human resources for Richfield Hospitality. He has no role in the operations of the Textile Care Services.

Reporting to Henry are Chad Decker, the safety/benefits manager and retail human resources manager, and Mary Kay Costello, the human resources manager. (GC Exh. 30; Tr. 45–46.)[3] Decker attended negotiation sessions, starting in February. (Jt. Exh. 1.) Costello also served on the negotiating team and compiled Richfield's bargaining notes. (Jt. Exh. 1; Tr. 560.)

Richfield's chief financial officer in Rochester is Leslie Hohmann. Her office prepares payroll, budgets, monthly financial reports, and financial calculations regarding the hotels. (Tr. 465–466.) During negotiations, she compiled documents and helped assemble Richfield's wage proposals. (Tr. 466.)[4]

When Richfield assumed operations of the Rochester properties, the bargaining unit consisted of the hospitality employees and the Textile Care Services (TCS) employees, who are employed in laundry services. These employees are represented by the Union, which has represented these employees for about 40 years. (Tr. 131.) The four hotel properties employ approximately 300 employees.

The president of the Union is Brian Brandt. Its part-time union representative is Linda Henry, who previously worked in the hotels. Brandt asked for bargaining assistance from UNITE HERE Local 17 (Local 17). He requested Local 17's president, Nancy Goldman, act as the lead negotiator. (Tr. 131.) She agreed and was assisted by Martin Goff, organizing director and vice president of Local 17 in Minneapolis (Tr. 129).

At the time negotiations officially began in January 2015, the Union represented the service and maintenance employees at the

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

[3] The following abbreviations are used throughout this decision: Tr., transcript; Jt. Exh., joint exhibit; GC Exh., General Counsel exhibit; R. Exh., Richfield/Respondent exhibit; R. Br., Richfield/Respondent brief; GC Br., General Counsel brief.

[4] Richfield admits that all of the human resources staff, managers and chefs discussed herein, are supervisors within the meaning of Section 2(11) of the Act or agents within the meaning of Section 2 (13) of the Act. (See Jt. Exh. 1.)

hotels and TCS. In March, Richfield filed a UC petition to separate TCS from the hospitality group. On April 15, 2015, the Regional Director issued a decision separating the hotel employees from the TCS employees' bargaining unit.[5]

III. EVENTS RELATED TO BARGAINING AND THE RELATED UNFAIR LABOR PRACTICES

A. Events in 2014

During the course of 2014, the Union and Richfield met. The number of times the parties met is controverted. Goldman, Goff, and Brandt met with Javon Bea and Bill Bunce, on behalf of Richfield. Richfield presented its "wish list," with 12 items. It compared language from the contract in place against Richfield's desired changes. (Tr. 132; GC Exh. 2; GC Exh. 3.) For example, Richfield first examined the language of the Sunstone contract, which gave pay raises as annual increases and also set pay increases at "service points" of 12 months, 24 months, 42 months, and 60 months. Richfield instead suggested eliminating the rate increases at the service points and strictly having annual increases. (GC Exh. 3.) Richfield contended that some of the changes were necessary to remain competitive in the Rochester area. (Tr. 181.)

Henry testified generally that these discussions included separating contracts for TCS from the bargaining unit. He did not know how many times the parties met but estimated approximately 8 to 10 times. Henry also stated that compensation of banquet servers came up in discussions several times but was nonspecific about when discussions took place and never mentioned what the Union's position, if any, was. (Tr. 535.)[6] Richfield presented no bargaining notes for these sessions.

B. Events in 2015

The parties held 11 bargaining sessions, 10 from January through April, and 1 session in September. (Jt. Exh. 1.)

January 20:

The session began at 10:30 a.m. and ended at 4:50 p.m. Richfield was represented by Henry, Paul Jewison (president of TCS), Carissa Gisi, Chad Decker, and Mary Kay Costello. Local 21 was represented by Martin Goff, Nancy Goldman, and Brian Brandt. (R. Exh. 6, p. 1).[7] At about 12:30 p.m., Local 21 Union Representative Linda Henry (Linda Henry) joined the negotiations. (R. Exh. 6, p. 5). In addition, union stewards from the hospitality group and TCS were present. Among the hospitality group stewards attending were Graham Brandon and Kelli Johnston. (R. Exh. 6, p. 1.)

Richfield's bargaining notes reflect that Henry started the discussion by announcing that "we will be working on a separate agreement for TCS. The work they do is different and as we move forward, we will be working on separate agreements." (R. Exh. 6, p. 1.) He then framed the change as a proposal.

After the parties spent over 2 hours discussing TCS, the Union said it could not respond to it at that time. Goldman then presented the Union's proposal (GC Exh. 23(a)) to the Richfield representatives. The parties discussed uniforms, training drivers, sick leave, and pay. Henry proposed another meeting for January 29 at 9:30 a.m. in the same location. Goldman requested two more copies of Richfield's proposal, but Henry advised he did not have a proposal that covered the hotel employees. (R. Exh. 6, pp. 5–6.)

Richfield again raised removing the TCS employees from the rest of the bargaining unit and placing them in their own unit. The union representatives rejected the proposal as a permissive subject of bargaining[8] and did not want to discuss it any further. Goldman accused Richfield of not being prepared and specifically said the idea of two separate contracts was rejected. Henry said, "I can respect your ideas, but we are moving forward with two contracts." Goldman responded the Union would not and asked how long it would go on. Henry stated, "I hear you, but you have the document in front of you that we are moving forward with." (R. Exh. 6, p.7).

January 29:

The meeting, despite being scheduled at 9:30 a.m., started at 10:33 a.m. Richfield was again represented by Henry, Jewison, Gisi, Decker and Costello. The Union was represented by Goff, Goldman, Brandt and Linda Henry. As before, among the union stewards attending were Graham Brandon and Kelli Johnston. (R. Exh. 6, p. 10).

Richfield again insisted on discussing separating the laundry workers from the rest of the unit. Per Richfield's official bargaining notes, Henry announced, "Moving forward in our discussion we will be working on a separate agreement for TCS. The vision we have for the contract is to move forward with a contract for TCS. We want to share with you what the agreement looks like." (R. Exh. 6, p. 10).[9] Goff testified that Henry said he would not negotiate further unless the Union agreed to break up the bargaining unit. (Tr. 133.)

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[5] R. Exh. 15 is the Regional Director's Decision in *Richfield Hospitality*, 18–UC–145757 (Apr. 14, 2015).

[6] Respondent argues that contract negotiations began in 2014. Given that Respondent's official notes begin in January 2015 and Henry's lack of certainty about the 2014 negotiations, I find that official negotiations began in 2015.

[7] Respondent's "official" bargaining notes almost always were typed. Costello testified that she prepared and kept the notes. Entries sometimes referenced certain Respondent bargaining members' notes and led me to believe that the typed notes are an amalgam of different bargaining committee members' notes. See, e.g., R. Exh. 6, p. 59, at item 20, referring to what was in Chad Decker's notes.

[8] A mandatory subject of bargaining involves wages, hours and other terms and conditions of employment and must be bargaining if requested. These subjects may be lawfully bargained to impasse. The scope of the unit, such as separating TCS from the hospitality employees, does not involve wages, hours or other terms and conditions of employment and is a permissive subject of bargaining. Permissive subjects may not be bargained to impasse. *Antelope Valley Press*, 311 NLRB 459 (1993). Also see *WCCO-TV*, 362 NLRB 859 (2015) (if an employer insists on a change in the description of the unit, the proposal is a permissive subject).

[9] Henry denied telling the Union that Respondent was moving forward with two separate contracts and instead said he was having conversation about two separate contracts. (Tr. 60). I rely upon Respondent's bargaining notes as the best evidence of what Henry said.

The Union again informed Richfield's representatives that it was broaching a permissive subject of bargaining. (Tr. 58–59, 133; R. Exh. 11.) The Union reiterated that removing TCS was a permissive subject and left negotiations after less than an hour. (Tr. 133.) Nothing reflects that the Union was given a proposal for the hospitality group at this session.

February 5:

The negotiations were scheduled to begin at 10 a.m., but Richfield arrived at 10:25 a.m. (Tr. 134.)

Arch Stokes, Richfield's attorney, led Richfield's team for the next six sessions. Richfield's notes for this session are handwritten and more difficult to understand. More discussion about TCS and a separate contract and Stokes revealed the plan to have job clarification/unit clarification. Union, by Goff, said it was rejected and it is still a permissive subject. (R Exh. 6, p. 21.) The Parties set the next three negotiation dates. Richfield's notes do not indicate a departure time except for a notation of leave at "5:04 p.m. (?)" (R. Exh. 6, p. 36).

February 6:

The Union submits its complete contract proposal to Richfield on either February 5 or before the February 13 meeting. (GC Exh. 23(b)).

February 13:

The meeting started about 10:30 a.m. The meeting was originally scheduled for 10 a.m., but Richfield sent an email on February 12 to the Union, telling them that the meeting would be delayed until 10:30 a.m. (Tr. 134.) Richfield was represented by Stokes, Henry, Gisi, Decker and Costello. The union representatives at the table were Goff, Goldman, Brandt and Linda Henry. As before, among the shop stewards present were Graham Brandon and Kelli Johnston. (R. Exh. 6 at 38).

The Union presented a counter proposal with some tentatively agreed to language. Stokes said he wanted to address "cosmetic issues of the contract" to reduce and simplify language. Goldman said the Union did not want to change the content, but Stokes said he would include both substantive and cosmetic changes. The parties were able to address some items, such as vacation, to which the parties tentatively agreed. The parties broke for lunch at 12:36 p.m., and the parties were supposed to return at 2 p.m.; negotiations resumed at 2:19 p.m. (R. Exh. 6 at. 47.) Goldman requested to leave at 4 p.m.

After lunch, Stokes said Richfield reserved the right to make certain grammatical changes. (R. Exh. 6 at 47). The parties started going through articles and appendices. Goldman adds two additional negotiation topics, insurance and interns. Regarding interns, Goldman asked how many, how often and what school. Henry stated that they were paid by the guidelines of the students' school. Goldman said the Union would provide a proposal.

Sometime during the meeting, the Union made an additional proposal regarding covering health insurance deductibles and wage increases. (GC Exh. 2(c).) Goldman said the deductible on health insurance was unacceptable based upon the wages. Henry defended the plan. The Union stated it could offer a plan with a $1200 out of pocket maximum and no issues with out of network, with an employee assistance program. Stokes told Goldman to make a proposal and to include the UNITE HERE plan as well. (R. Exh. 6, p. 50)

February 26:

Per Richfield's notes, the meeting started at 10:59 a.m. Richfield was represented by Stokes, Henry, Gisi, Decker, Costello and Bill Bunce. Stokes again served as lead negotiator. Local 21 was represented by Goff, Goldman, Brandt and Linda Henry. Union stewards Brandon and Johnston again were present.

Stokes started the session again with separating TCS from the hospitality employees in the bargaining unit. He announced that Richfield filed a unit clarification petition with the Board and the hearing would likely take place about March 16.

The next topic was the wage and benefit proposal. Goldman stated the Union wanted a 5-year agreement. Regarding the health insurance, Richfield's plan that required deductibles of $4000 for a single employee and $8000 for a family would cause employees to seek state assistance. She said that the national plan was in design. The Local 17 plan, however, provided 100-percent coverage for employees with fixed rates for 5 years and no deductibles. Its premium was based upon working 75 hours per month, with a charge of $490 for single coverage. Stokes asked that Goldman email the proposal to them. Goldman said she would follow up with the national plan. Stokes said Richfield would need to understand the total hourly cost. (R. Exh. 6 at 53).

Goldman then brought up the wage proposal and increases. Richfield caucused from 11:30 a.m. until 2:06 p.m. When the parties reconvened, Stokes stated Richfield, during the caucus, calculated the cost for assuming the health care deductibles. Henry identified the number of employees who had single or family coverage. Henry announced the cost to Richfield would be $1.154 million and rejected the Union's proposal.

The parties reviewed the articles and had some items marked as tentative agreements. The Union requested a 2-hour caucus on the morning of the next meeting. The meeting ended at 5:45 p.m.

February 27:

The meeting began at 1:35 p.m. (R. Exh. 6 at 73). The Union submitted a proposal about probationary period and classifications. (Tr. 152; GC Exh. 23(d).)

Late in the meeting, the parties began to discuss wages. Richfield provided "pie charts" regarding wages for the employee members of the negotiating team. Richfield says the pie charts reflect current employees' wages. On each chart itself, "total real wage," or TRW, was presented.[10] The pie charts included in the pay calculation time the employer pays for breaks, workers compensation, and wages for bereavement leave and jury leave, which ultimately changed an employee's effective hourly wage rate. Thus, a base pay may be one rate, but the ultimate "TRW" will be higher. In response to the pie charts, the Union asked at

[10] During his initial testimony, Henry could not recall what TRW stood for. Henry testified that no one would receive a pay decrease and the charts "primarily" reflect how each employee's wages and benefits would apply. (Tr. 77, 482–483; GC Exh. 6(g).)

least twice for Richfield's proposal on floor and ceiling of the wages. (R. Exh. 1 at 18–22). When the Union expressed concerns about the pie charts' accuracy, Richfield agreed to provide a second set of pie charts. The parties continued to proceed through Richfield's proposals in order of its items.

March 16:

Goff testified that the meeting was scheduled to begin at 9:30 a.m. and Richfield arrived at about 10:10 a.m. (Tr. 135; R. Exh. 6, p. 77.) Richfield was represented by Stokes, Henry, Bunce, Gisi, Decker and Costello. The Union was represented by Goff, Goldman, Brandt and Linda Henry. Among the union stewards attending were Brandon and Johnston. (R. Exh. 6 at 73). Also in attendance was a mediator from the Federal Mediation and Conciliation Service.

Richfield began with an updated agreement and a cover sheet to its February 27 proposal. Richfield presented detailed discussion about its wage rates. The alleged cover sheet also stated that Richfield did not agree to any further extension of the Sunstone agreement. (R. Exh. 6, p. 78). Henry contended that he explained Richfield's position on wages, including the results of a wage survey that it conducted. (Tr. 506; R. Exh. 6, p. 78.) Henry represented to the Union that no employees would have their wages decreased, except for banquet servers. Regarding the banquet servers pay, a new hire would start at $13.00 and those who were already employed by Richfield would be "adjusted to $15.00 per hour." (R. Exh. 6, p. 78.)

Although some of the discussion related to TCS employees, most of the discussion related to the current employees at the hotels and their pay. Stokes said the Union would be provided pie charts for all jobs so that the Union could see economics. Goff asked whether he meant 400 pie charts and Stokes answered affirmatively. (R. Exh. 6, p. 78).

When questioned further by Goldman about the pay and establishment of a two-tier system, Stokes said Richfield was competing with nonunion hotels and it was difficult to predict revenues. (R. Exh. 6, p. 80). Henry and Stokes discussed the wage survey. However, Goldman asked whether the wage survey asked beyond wages—vacation, insurance, sick time, holidays and compensation packages. Henry offered that 40 percent of the hotels in the survey do not offer health care. He never answered the remainder of the question but shifted to what the employees at Richfield received. Goldman said it was the cost of doing business and questioned why everyone on the pie charts had jury duty included. (R. Exh. 6, p. 81). Stokes stated that no other hotel in the market was union, which placed Richfield at a competitive disadvantage. He further stated the pie charts were made to ensure Richfield got the best associates. (R. Exh. 6, p. 82). After a little more discussion, Stokes emphasized that this was Richfield's demand. (R. Exh. 6, p. 83).

Regarding competitiveness, Goldman argued that getting a 1-percent increase in 5 years was not competitive as insurance was costly. After some discussion about unionization in general in Rochester, the parties caused from 11:45 a.m. to 12:34 p.m. When the meeting resumed, Goldman asked about several employee pie charts and the assumptions underlying the charts. In an example, Goldman asked whether an on-call banquet server received pension and that the chart included Richfield's payment for taxes and workers' compensation. (R. Exh. 6, p. 85–86.) Hohmann, present to explain the charts, stated that the pension was a pooled amount that could not be broken down by each worker. Brandt asked if the Union would receive a 5-year history and Stokes said yes. (R. Exh. 6, p. 86.) Goff pointed out that the uniforms and benefits, included in the pay, were write-offs for Richfield. (R. Exh. 6, p. 87.)

The parties broke for lunch for an hour. Upon resumption, several banquet servers, who would be affected by changes in the service charges, attended. Richfield presented contradictory points of view on the service charge, which traditionally was paid to the banquet servers. Richfield proposed to do away with the service charge that banquet servers traditionally received. However, Richfield would keep the service charge. (Tr. 169.) Acceptance of this proposal would effectively cut banquet servers' pay up to 50 percent. Although Stokes was the main negotiator on that day, Bunce stated that Richfield would, at times, decide if part of the service charge was attributed to employees. (Tr. 169.) Stokes said if a service charge was levied, it would go to the servers. Goldman asked, how would the Union be able to monitor this proposal. Stokes said members would have to ask. Goldman pointed out that Richfield's proposal said no service charge to servers, and per Richfield's proposal, they would receive a flat rate of $13 per hour. (R. Exh. 1 at 31–32). Bunce explained that the company would take the money meant for the service charge. (R. Exh. 1 at 30). Stokes said that Richfield needed flexibility in this matter. (R. Exh. 6, p. 93). Goldman said she was not sure what Richfield was doing with this proposal. Henry stated flatly, "The Banquet team sitting here, they are taking a pay cut." (R. Exh. 6, p. 94.)[11]

Regarding health insurance, Goldman asked if Richfield had another offering. Henry stated that's what was offered. Goldman said the Union had three plans. Goldman presented two plans. One of the plans included fixed plan costs, would require 85 hours of service per month, and a third-party administrator in a self-insured plan. At the end, Stokes said they would study the health care proposal and Richfield would attempt to create 400 pie charts for the next meeting. The meeting ended at 3:36 p.m. (R. Exh. 1 at 32–33.)

March 24:[12]

The meeting was scheduled to begin at 9:30 and Richfield showed up at 10:45 a.m. (Tr. 135–136-Goff; R. Exh. 1 at 33.)

After discussing some side agreements, at about 12:10 p.m., Richfield requested a 20-minute caucus to clean them up. Instead of returning at 12:30 p.m., the 20-minute break turned into

[11] The Union also objected to Richfield's proposal for employee performance reviews due to subjectivity and that the form did not fit all job classifications. (Tr. 162–163; GC Exh. 19.) Regarding customer service on the "Compassionate" scale, the Union stated that some classifications, such as dishwashers, would not see guests, compared to servers and bartenders who would see guests. It pointed out other classifications, such as cooks, could add to the efficiency of the hotel, but others could not. The result would be that some employees would receive low or no scores, which could affect employees' wage increases. (Tr. 163.)

[12] Richfield's handwritten notes for this date are difficult to decipher.

2:40 p.m. and nothing was changed on the side agreements. According to Goff, the Union tried to reach Richfield during that time without success. (Tr. 139.) However, notes reflect the parties reconvened at 2:15 p.m. (R Exh. 1, p. 37.) A number of sections were marked as tentative agreements and some discussion involved cleaning up contractual language.

The parties met for 30 to 40 minutes when the parties broke for caucuses. The caucus started at about 3:30 p.m. (R. Exh. 1, p. 39.) The Union stated it had to leave at 4:00 p.m. that day. Despite its plans to leave, the Union waited for Richfield's representatives to return to the bargaining table. After making several calls to one of Richfield's secretaries, the Union waited until about 4:15 p.m. (Tr. 140.)[13]

Henry testified that, during the caucus, Richfield was "working feverishly" to finish the changes. He also testified that during the caucus Stokes "kept in touch" with Goldman about the delays. Henry, however, never stated how long the caucus actually took. Further no one, including Stokes, corroborated that Stokes kept in touch with Goldman. Lastly, he did not address what happened when he presented the Union with last, best and final offer. (Tr. 527–529.)

As the union representatives decided to leave, Henry handed them a copy of what Richfield called its "last, best and final offer." (Tr. 73–74, 140; GC Exh. 6(g).) The union representatives were in the hallway on their way to the elevator and some may have already been in the elevator. The proposal was 150 pages, signed by Richfield's representatives, including management representatives for TCS. Appendices A and B of Richfield's March 24 offer included, for 14 pages, its Appendix A wage proposal. However, that proposal only addressed the Marriott, the Kahler Grand Hotel and the Kahler Inn & Suites.

In addition to the 14 pages of the wage proposal, the proposal included more pie charts for a number of positions. (Tr. 78, 141.) The pie charts covered information on each of approximately 450 workers. (Tr. 165–166.) The box included pie charts for TCS as well. (Tr. 166.) Each employee's chart covered a 5-year period and could be as long as 13 pages. The pie charts reflected "total real wages," and went up for some employees over the years while others showed a loss. The pie charts included payments for bereavement and jury duty, which Richfield admitted in hearing was not accurate.

To determine what the pay would be for a particular position of a period of 5 years, one would have to look at the pie chart for each position for each year, with the base pay listed, and discussed "nonproductive work time," such as workers' compensation and uniform allowance, health and welfare cost per hour, to give a total real wage per productive hour of $18.60. (GC Exh. 6(g), p. 96.) The same process was repeated on a separate page for 2016, with an hourly rate of $11.21 and eventually reaching a total real wage per productive hour of $18.77. (GC Exh. 6(g), p. 98.) For 2018, the base pay was listed on the pie chart as $11.32 and, after adding in all the calculations per hour, including pay that an individual would not receive, like workers' compensation, the total real wage per productive hour was $18.94. (GC Exh. 6(g), p. 100.) The same process was repeated on separate pages for 2018, 2019, and 2020. (GC Exh. 6(g), p. 101–106.)

Henry said that the Union was told on many occasions to show the pie charts to employees so that employees could evaluate the pay proposal. (Tr. 78.) In addition, Richfield sent individual notices to employees to talk to the Union about their pie charts. (Tr. 78; GC Exh. 9.)[14]

April 16:

The meeting was scheduled to start at 10 a.m. (Tr. 136.) Schroeder's notes reflect that the meeting started at 10:35 a.m., when Richfield representatives arrived (R. Exh. 1, p. 40; R. Exh. 6, p. 135–10:33 a.m.) Representing Richfield were Henry, Patrick Short, Chad Decker and Costello. Stokes was not present. The Union was represented by Goldman, Brandt, Linda Henry, and Goff. Union stewards present included Schroeder, Brandon, and Johnston. The Federal mediator also attended.

Goldman began with some issues regarding overtime and asked the reason why the hotels were not going to receive it. Henry stated it was in "our best interest to do that." (R. Exh. 6, p. 136.).

Regarding health insurance, Goldman said she provided two proposals and Richfield did nothing. Henry said he sent her charts. Henry said the proposal would cost $2.70 on every hour paid, and it would reflect a cost of over $1.2 million to Richfield. They argued over what was covered. (R. Exh. 6, p. 137.)

Moving to wages, Goldman asked about the vacation. She stated that, although it was accepted as a proposal, she wanted to know the additional cost due to the change over the years. (R. Exh. 6, p. 137.) Henry's response: "This is designed to support retention of our employees." Goldman accused Henry of not evaluating the cost of the proposal. Henry did not present any costs. The parties broke and resumed at 12:05 p.m. (R. Exh. 6, p. 138.)

Upon resumption, the Union presented a counterproposal. Goldman reviewed the counteroffer. The Union rejected the wage plan in Appendix A of Richfield's proposal but accepted the start rate for new hires and proposed a one-time bonus. (Tr. 233; GC Exh. 23(e); R. Exh. 6, p. 139–140.)

The parties broke for lunch and caucus at 12:40 p.m. and were supposed to reconvene at 2 p.m. Richfield's notes contend that Henry went in alone at 1:50 p.m. (Tr. 233; R. Exh. 6, p. 140.) However, Goff testified that Richfield representatives left early that day without warning.

About 40 to 50 minutes later, Brandt called Henry to ask if he was returning. Henry said Richfield was done for the day and was not returning. (Tr. 142.) However, Linda Henry stated that

[13] Kelli Schroeder testified to similar events on April 28, but her bargaining notes for this session corroborate Goff's testimony that the union negotiating team waited over 2 hours, until 5:26 p.m. (R. Exh. 1, p. 39.)

[14] Richfield tried to adduce evidence that the pie charts were included in TCS 's collective-bargaining agreement. This agreement was negotiated in the summer of 2015, after the Regional Director's UC decision. Respondent contended the agreement was relevant because TCS was initially part of the bargaining unit and the parties reached an agreement, which demonstrates its good faith in bargaining. I decline to generalize that the separate negotiations for the TCS collective-bargaining agreement during the summer of 2015 demonstrate good faith with the hospitality group.

Henry came to the caucus about 2 p.m., briefly discussed Richfield's recent changes on union posting and union access to the facilities, then closed the negotiations for the day. Based upon Linda Henry's testimony, I find that Henry likely concluded negotiations by 2 p.m.

April 28:

Henry was Richfield's chief negotiator. Others attending for Richfield were Patrick Short, Decker, and Costello. The Union was again represented by Goldman, Brandt, Goff, and Linda Henry. Union stewards attending included Schroeder, Brandon, and Johnston.

The meeting began at 10:40 a.m., and apparently Richfield was 40 minutes late. Henry stated that items involving vacation structure needed clarification, but the remainder was rejected, and Richfield was sticking with its "last best and final" offer. (R. Exh. 6, p. 142.) Goldman protested and said that they needed to review and discuss the proposals line by line. Henry said they had taken the time to go over and discuss the proposal. Goldman said that not all of the issues had to do with money. Henry said Richfield understood the Union's proposals. Some of the items were briefly discussed. Goff stated that Richfield was required to go through the Union's counteroffer line by line. Henry asked if they were requesting information and Goldman reminded him of the request made 2 weeks before, to which the Union received no response. Henry said he did not understand the Union made an information request. Goldman said that Richfield put together a proposal and "toss this last best and final at us at 5:30 while we waited 3 hours to get it. Then trying to set meeting dates . . ." Goldman then pointed out that the pie charts were still not correct. (R. Exh. 6, p. 144.) After some invectives, Goldman again asked for the quantification of the vacation cost and Henry again said he did not recall the request.

The rest of Richfield's notes for that day reflect that Goldman displayed an angry tone. It does not say, however, when the meeting ended. (R. Exh. 6, p. 147.) Goff testified that Richfield, similar to April 16, left for a caucus. Brandt called Henry and Henry advised Brandt that Richfield was done for the day. (Tr. 143). Goff testified that the parties never had a "deep discussion" of the Union's proposals because Richfield went into a caucus. (Tr. 233.)

September 24: After Richfield requested another meeting, the parties met on this day.

Henry, Short, Decker and Costello represented Richfield. The Union was represented by Goff, Goldman, Brandt and Linda Henry.

Henry testified that the Union did not make a proposal any different than what it presented in April. (Tr. 542). However, the Union maintained it made a counter proposal, which is reflected in Richfield's bargaining notes. (R. Exh. 6, p. 150; GC Exh. 23(f).) The Union presented a number of proposals as well as rejected some of Richfield's proposals.

The Union's counterproposal detailed a number of issues, including: temporary employees; proposed an average of 20 hours per week for insurance coverage instead of Richfield's proposed 30 hours per week; reduce the retention of disciplinary action from 18 months to 12 months; reject changes to deletion of daily overtime; rejected Richfield's proposal to eliminate free meals for staff; demanded to discuss vacation pay and its quantification; proposed tip adjustments; proposed an 80/20 split between Richfield and employees in insurance premiums and reimbursement of deductibles and added a proposal to provide a 30-day notification for a re-opener should an insurance policy change. (R. Exh. 6, p. 150–154.).

Regarding pay, the Union rejected the banquet hourly rate and said overscale banquet employees should be paid the same as others in their classification.

Richfield's bargaining notes reflect that some issues were left unsettled with the Union waiting for a proposal from it or some clarification. Goldman asked for clarification on language related to leave. The most significant of the issues was the health insurance plan. Henry said that he was looking to find a plan with 100 percent coverage on preventative care and a prescription plan and still had nothing concrete to present. (R. Exh. 6, p. 154.)[15]

Clarification was needed regarding Richfield's plan to buy out vacation hours. Goldman pointed out that the proposal did not include language about reducing the number of hours an employee could be paid to cash out vacation instead of taking it. She also pointed out that Richfield might need to add language to clarify time off requests. (R. Exh. 6, pp. 153–154.) Goldman also reiterated that she made an information request for quantification of vacation costs and never received it. Now Henry stated it was a moving target. Goldman said the Union would like some kind of a range, "what it is worth this moment in time." (R. Exh. 6, p. 149.)

At the conclusion of the meeting, the parties had agreed to negotiate on October 20. That meeting did not take place.

On October 19, Henry emailed Goldman and canceled the meeting for the following day. The email stated:

> After very careful review of the union's counter proposal presented at our September 24th, 2015 meeting. There is nothing we have seen and that you have said over the past few months of negotiations that dictates quid-quo-quo. We have seen your opposition to the proposed changes to tighten up the effective operation of the hotels and to make us more competitive in the Rochester market and with the Rochester competition. As we continue to manage in the competitive Rochester market we must make changes to impact the fact that we are the only union hotels.
>
> We went through each of the line items and our responses are attached. Based on the status of the negotiations and the fact that you have not given us any significant reason to change our proposal we do not feel the need for an additional meeting to discuss the same things we have already discussed several times over the last several months. If you bring us

[15] This particular set of Richfield's bargaining notes also had highlights for strategy. For health insurance, a statement of leaving health insurance as an open item was not attributed to anyone and followed a comment by Goldman. (R. Exh. 6, p. 154.)

> something that is significant enough for us to move off of our last best and final offer then let us know.

(GC Exh. 13.)

On November 4, Brandt sent Henry an email requesting further dates for negotiations as the Union made several proposals that should be discussed. (GC Exh. 12.) On November 9, Brandt sent a second email, again asking for dates and deadlining Henry for a response by November 12. (GC Exh. 13.)

On November 11, Henry responded to Goldman, Goff, and Brandt via email:

> Hello Brian,
>
> I have attached a copy of the Hotel's response to the Union proposal forwarded below a copy of the email that was sent to you, Nancy, and Martin responding to all the proposed items presented to us at our previous bargaining session.
> As indicated in the final paragraph of that email. We are willing to meet with you and the rest of the team when you have given us a significant reason to do so. That is, presenting something different from what you have, and we have discussed at length over the past several months with you and your team.
>
> As per your email you are not presenting anything further or different that would encourage or force us to change our position. Furthermore, we have responded to all your proposals in our meetings and also in writing, with clarification on items you or the team had.
>
> If there are changes you would like to present that will assist us in tightening up the effective operation of the hotels and will contribute to the hotels being more competitive in the Rochester market. We look forward to discussing them.

For each item, Henry stated Richfield " heard . . . .and understood" the Union's position but adhered to its previous proposals. (GC Exh. 14.) Goldman responded, asking if the negotiation session scheduled for the following day was canceled. Henry confirmed that the meeting was canceled. (Tr. 111–112; GC Exh. 11.)

C. Allegations Regarding Bargaining Conduct

1. Beginning January 29 and continuing, Richfield repeatedly showed up late and/or left early during bargaining sessions (Complaint ¶12(a))

(a) Parties' positions

General Counsel concentrates on Richfield leaving early or showing up late. Goff testified that Goldman rebuked Richfield for its tardiness and timeliness. These rebukes went unanswered. (Tr. 137.) Other than the February 13 email, Richfield never advised the Union before it was late. (Tr. 137.)

General Counsel's brief calculates that Richfield was late to start meetings on eight occasions, for a total for almost 7 hours. Regarding leaving early, most of its testimony was left uncontradicted, particularly as Goff said that Richfield's March 24 proposal was essentially unchanged from prior proposals. General Counsel cites *Regency Service Carts*, 345 NLRB 671, 672 (2005); and *Golden Eagle Spotting Co.*, 319 NLRB 64, 77–81 (1995), enfd. 93 F.3d 468 (9th Cir. 1996). In addition, it states Richfield's conduct was more egregious than the employer in *Beverly Enterprises*, 310 NLRB 222, 238 (1999).

Richfield contends that no violation took place because the parties had extensive negotiations, with 11 sessions in 2015 and "three significant meetings in 2014." (R. Br. at 13.) Richfield suggests that not being timely for negotiations is "the nature of the beast." Id. Richfield says every party had its say and no surface bargaining allegation has been made. Richfield cites no case law for its position.

When asked during direct examination "whether the company was ever late for negotiations," Henry stated he did not know how Richfield could be late because the meetings were on the hotel property. This statement is incredulous as a person could be within a hotel property, yet not in the same portion of the property, much less the same room. Henry then segued in the same testimony that Richfield requested consecutive dates for negotiations, which the Union rejected. When directed to discuss whether Richfield was late, Henry answered the leading question, "We were not late." (Tr. 522–523.)[16] This testimony is not consistent with Richfield's bargaining notes, which reflect that Richfield was tardy. (R. Exh. 6.) Due to the leading questions and inconsistencies with Richfield's own notes, I do not credit Henry's testimony of whether Richfield was late for negotiations.

Stokes,[17] who led six negotiation sessions in February and March, testified generally that sometimes Richfield would be late and sometimes the Union would be late, particularly because Goldman drove to Rochester from Minneapolis. (Tr. 657–659.) He then specified that Goldman said on March 24 that she could not stay late, and Richfield was spending time correcting the pie charts. (Tr. 663.) Richfield's bargaining notes again do not correlate with this testimony. Further, the evidence shows the Union disclosed when it had to leave early, such as March 24, or late and when it requested time for caucuses. Stokes further claimed the parties would communicate about timing issues through emails. Richfield produced no emails to support this claim.

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[16] Much of Henry's direct testimony here was in response to leading questions, such as, "And please explain . . . specifically what Martin Goff said about his desire to leave before 5 o'clock, and usually around 4 o'clock every day." (Tr. 523–524.) The questions frequently gave broads hints and suggestions about the answer without foundation, or the answer was contained within the question. When leading questions on direct examination coached the witness to specific answers, the responses were not credible.

[17] Stokes' responses to questions, including those on direct, were at times rambling or generalizations. When General Counsel asked questions that only required a "yes" or "no" answer, he insisted on giving more information because he swore to tell the truth, the whole truth and nothing but the truth. He was instructed several times that Respondent's attorney could clarify his answers on redirect examination and failed to heed the warnings. When given the opportunity to pursue redirect, his co-counsel stated that he thought Stokes said everything he intended to say. I find that he intended to frustrate the cross-examination process and refuse to answer those questions that could be damaging to his role as a negotiator in this matter. His testimony therefore is of little value.

(b) Analysis

The bargaining notes have been the best evidence of the patterns of attendance. Richfield was frequently tardy and left early. It did not keep the Union informed about its delay, but at the same time, it was not as extreme as the Union presented.

> Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees...." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as the mutual obligation of the employer and Union "to meet at reasonable times to confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement...." 29 U.S.C. § 158(d). . . . Dilatory and delaying tactics that undermine the process of collective bargaining are indicative of bad faith bargaining. *See Kobell v. Paperworkers,* 965 F.2d 1401, 1408 (6th Cir.1992); *see also Radisson Plaza Minneapolis v. NLRB,* 987 F.2d 1376, 1382 (8th Cir.1993); *A.H. Belo Corp. v. NLRB,* 411 F.2d 959, 968 (5th Cir.1969).

Calex Corp. v. NLRB, 144 F.3d 904, 909 (6th Cir. 1998), enfg. *Calex Corp.*, 322 NLRB 977 (1997). Based upon *Calex*, supra, a pattern of purposeful delay would indicate bad faith. The facts in *Calex* are more extreme than presented here: The pattern of delay included canceling meetings and refusing the union's request for additional meetings. The Board also declined to find a violation for an employer's lead negotiator showing up late in *Houston County Elec. Co-op.*, 285 NLRB 1213, 1215 (1987). The parties negotiated 55 sessions and the lead negotiator was often tardy about 10 to 20 minutes. The Board found that the delay did not significantly disrupt bargaining. Id.

However, in *Beverly*, 310 NLRB at 239, the union negotiating team waiting over 4 hours for the employer representatives, who were supposed to provide certain information and failed to do that as well. The employer could have informed the union of problems that the chief negotiator had with travel but failed to do so. Given the other bad-faith actions of the employer, the administrative law judge found the employer violated the Act by being late and deliberately not notifying the union.

Although I agree that Richfield was extraordinarily rude, the level of the offense does not rise to the level of the general conduct in the cases cited by General Counsel. I therefore recommend that this allegation be dismissed.

2. Bargaining proposals and Section 8(a)(5) of the Act

General Counsel maintains that Richfield violated Section 8(a)(5) with two proposals: wages, with the pie charts, and union leave. In discussing these allegations, I will provide an overview of applicable law, provide additional facts regarding each proposal, and give my analysis.

(a) Applicable law

Parties, under Section 8(a)(5), have an obligation to engage in negotiations "'with an open and fair mind and a sincere purpose to find a basis for an agreement.'" *Houston County Electric Co-operative*, 285 NLRB 1213 (1987), citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). The Board usually does not sit in judgment of the substantive terms, but instead oversees the process to determine that the parties are making a sincere effort to reach an agreement. *Houston County*, supra, citing *Rescar Inc.*, 274 NLRB 1, 2 (1985). Also see *U.S. Ecology Corp.*, 331 NLRB 223, 225–226 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001) (discussing regressive proposals).

However, "[s]pecific contract proposals may be considered in determining whether a party bargained in bad faith." *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1220 (2001), affd. 50 Fed. Appx. 444 (D.C. Cir. 2002), citing *Reichhold Chemicals,* 288 NLRB 69 (1988), enfd. 906 F.2d 719 (D.C. Cir. 1990). The Board's analysis objectively examines whether the demand is "clearly designed" to frustrate reaching an agreement. Id. A proposal found to be unrealistically harsh or extreme may be evidence "that the party offering them lacks a serious intent to adjust difference and reach an acceptable common ground." *Liquor Industry*, 333 NLRB at 1220, citing *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 858 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). Although an employer may propose to retain control over certain issues, a proposal that comprehensively seeks to preempt the Union's statutory role as bargaining representative may indicate bad faith. *Liquor Industry,* 333 NLRB at 1220–1221.

In addition, to meet the requirement of good-faith bargaining, parties must "justify positions taken by reasoned discussions." *Unique Thrift Store*, 363 NLRB No. 122, slip op. at 1 fn. 3 (2016), citing *Blue Jeans Corp.,* 177 NLRB 198, 206 (1969), enfd. sub nom. *Amalgamated Clothing Workers of America v. NLRB*, 432 F.2d 1341 (D.C. Cir. 1970) (internal quotation omitted). "[F]ailure to define, explain or advocate a position" demonstrates a want of good faith. *Palestine Coca Cola Bottling Co.*, 269 NLRB 639, 645 (1984).

(b) Wage proposals

The complaint alleges that, since February 27, Richfield violated Section 8(a)(5) by offering an obscure and contradictory wage proposal, which would allow Richfield to have unilateral control over the wages. It also alleged that Richfield refused to answer questions about the proposal. The effects of the proposal, according to the complaint, would be to make the proposal impossible for the Union to enforce. Lastly, Richfield directed part of the information provided to the Union, in the form of pie charts, was not consistent with its "last, best and final" offer.

Two portions of wage negotiations are at issue: The current employees and the banquet employees.

Hohmann also testified about the "last, best and final offer" contained in GC Exh. 6(g). She stated that her understanding was Schedule A was the proposed starting wages for employees. Richfield prepared an Excel file for all employees who were on the payroll effective March 1. (Tr. 469; R. Exh. 3.) Hohmann testified that the spreadsheet was prepared for "March 6" meetings.[18]

Hohmann noted on the first page of the spreadsheet: "Requested by L21 for representative wage by current union employee as of 3/1/15." (R. Exh. 3; Tr. 474.) The Excel spreadsheet

[18] No negotiations took place on March 6. (Jt. Exh. 1.)

laid out information on each employee, start date, position, property, proposed pay rate for years 2015 through 2020, and percent changes for each of those years. It also contained a column for Hohmann's notes, such as red-lining, or holding the pay at the same level, for certain employees. It also contained wage increases for the TCS employees, who later were included in a separate bargaining unit due to the results of a UC petition.

Hohmann testified that she also prepared the pie charts for approximately "several hundred" employees for years 2015 through 2020. (Tr. 473.) Based upon a document dated March 20, 2016, Hohmann identified the assumptions she relied upon for developing the pie charts. The pie charts started with previous hours worked in 2014, then made assumptions regarding holiday hours, jury duty, taxes, and health and welfare. In item 7, Hohmann also listed assumptions for vacation, including proration and number of weeks to each employee based upon years of service. However, the assumption list on jury duty and bereavement costs contains this entry:

> After reflection and to keep our negotiations moving, charts have been redone with no jury duty or bereavement hours. All employees are eligible. They cannot be forecasted.

(R. Exh. 4, p. 1.)

Hohmann testified that Goldman asked for the pie charts in paper form so that they could show them to individual employees. (Tr. 495.) Hohmann was hesitant at first about who told her the Union needed printed materials. (Tr. 495.) This statement is not documented in the bargaining notes and, other than Hohmann's testimony, nothing reflects that the Union requested more pie charts to discuss with employees. Given the Union's antipathy to the pie charts and the Union's request for a "top and bottom" on wages, I find that Hohmann made a faulty assumption that the Union asked for more pie charts to discuss with employees.

During Richfield's case in chief, Henry testified at length about the need for a competitive wage rate. However, he testified in generalities as to the Union's response except to say that the Union rejected its offer.

Brandon, a shop steward who attended negotiations, testified that the information in pie charts was extremely confusing. He said that the proposed contract stated if an employee had not been employed for 5 years, pay would be reduced. He said his pie graph had a different number and was confused as to whether he was getting a small raise or if he was "going backwards with [his] wages." (Tr. 264.) Schroeder, another employee attending negotiations, reviewed her own pie charts. She found that the base pay was incorrect and looking at the pie charts was "like reading Chinese." (Tr. 363.) Goldman objected to the pie charts; Hohmann tried to explain the pie charts.

Goldman raised the concerns about misinformation in the pie charts. Stokes replied that Goff had asked for the pie charts as an answer about a floor and ceiling to wage increases on merit pay. (Tr. 167.) In examining the pie charts, the Union found Richfield expected banquet servers to take as much as a 50 percent wage decrease. (Tr. 167.)

At hearing, Henry testified that Richfield did not keep the pie charts. Hohmann testified that Richfield did not keep physical copies of the pie charts but it kept approximately 80 percent of the electronic copies and could recreate the other 20 percent through a template. (Tr. 498.) Richfield failed to respond to General Counsel's subpoena for the pie charts. Richfield prepared individual pie charts for the employees. Stokes stated that all the pie charts had been changed, but when General Counsel offered one for his review that showed a wage decrease, he could not identify whether it had later been modified. (Tr. 688, examining GC Exh. 10(i).) In explaining Richfield's failure to produce the pie charts pursuant to subpoena, Henry[19] testified that the only copies were given to the Union and Richfield did not retain any copies; he said he did not know what happened to the electronic copies. (Tr. 84.) This discrepancy is concerning: Richfield intended to rely upon 400 pie charts as its proposal, yet maintained it kept no copies, or at least did not keep a full set.

Regarding the banquet servers' pay, Goff testified that Richfield never clarified its position. (Tr. 170.) Richfield's bargaining notes of September 24 confirm that further discussion was needed on this issue. Henry's statement to the banquet servers, that they would take a 50 percent cut in pay, further supports that Richfield was not very interested in giving a reasonable offer.

(c) Parties' Positions

Richfield contends its pay proposals were designed to show how wages would play out over a 5-year contract and were easy to understand. It states the pie charts were designed to be helpful but it really does not matter how successful Richfield was with the pie charts. Richfield admits it prepared a spreadsheet for all current bargaining unit employees, stating wages for each person for each year through 2020. (R. Br. at 11–12). Regarding Richfield's alleged failure to answer questions, Richfield merely refers the reader to see Hohmann's testimony. It cites no case law to defend its position. (R. Br. at 12).

General Counsel cites *Billion Oldsmobile-Toyota*, 260 NLRB 745, 755–756 (1982), enfd. 700 F.2d 454 (8th Cir. 1983). There the employer submitted a proposal that would cut wages and then offered to pay an average of what other dealerships were paying to employees. As the dealership was the only unionized facility in town, the offer represented a pay cut. The administrative law judge stated:

> It seems elementary to me that if one party to a collective-bargaining agreement is proposing to the other a fundamental change in a critical area such as wages, the party proposing the

[19] During Respondent's case-in-chief, Henry, who was present during Hohmann's testimony, was asked whether he agreed with Hohmann's testimony. General Counsel objected as not a proper question. Respondent claimed it was trying to establish a foundation. Henry agreed with Hohmann's testimony. However, certain aspects of Henry's previous testimony conflicted with Hohmann. For example, Henry testified that Respondent retained no copies of the pie charts, while Hohmann said 80 percent were retained electronically.

> change has a duty both to state clearly and with adequate documentation the reason and rationale for the change, and to explain in detail what the change is and how it is expected to affect the other party.

260 NLRB at 755.[20]

General Counsel also cited *Liquor Industry*, 333 NLRB 1219. In examining the totality of the employer's conduct regarding wage proposals, the Board there found that a proposal that granted the employer broad discretion over wages with little proportionate incentive to the union, was designed to frustrate agreement. Id. at 1220–1221 and cases cited therein.

(d) Analysis

I find that Richfield's use of pie charts and contradictory proposals on banquet servers' pay failed to meet the requirements of good faith bargaining. According to Hohmann, the Excel spreadsheet presented as part of Richfield's proposal admittedly covered several hundred employees with individual wage rates and raises. Goff asked at least twice for the floor and the ceiling on the wages.

In response, Richfield presented pie charts. Henry said that these charts were Richfield's explanation. Henry testified that Richfield spent a significant amount of time explaining the pie charts and making changes to make the pie charts correct. However, his testimony was nonspecific as to when these discussions took place, except to say it was during March. Much of his testimony was in response to leading questions and still remained vague and wandering. (e.g., Tr. 518–519.) He then testified that Goff asked, on February 27, about wages for those already employed. As a result, he and Hohmann prepared the pie charts for the 5 years of the proposed contract. (Tr. 520.)

I find that Richfield presented confusing pay proposals for currently employed employees. The first proposal was confusing—it did not identify by job, job longevity, but identified each individual and a proposed pay rate. For current employees, proposed Appendix A was not by property either. Richfield seized upon Goff's request for clarification of the "top and bottom" to present a more confusing answer—even more pie charts. Pie charts are not a floor and ceiling answer. Instead of clarifying or simplifying the response, Richfield heaped more pie charts upon the Union and further muddied the negotiating waters.

Regarding the pay for the banquet servers, Richfield apparently never clarified what it was offering. It claimed it would keep the service charge and then Bunce said it would pay when it felt like it. The bargaining notes do not reflect when Richfield would do so. This shifting proposal indicates Richfield intended to exercise complete control over the banquet servers' pay. Richfield, throughout the hearing, justified its proposal with its need to complete in the Rochester marketplace. However, in many respects, charging a service charge and not paying it to the employees who earned it does not demonstrate how Richfield intended to make it more competitive. *Billion Oldsmobile*, supra.

The bargaining history demonstrates that Richfield violated Section 8(a)(5) in its pay proposals.

3. Union leave proposal

On March 24, Richfield's last, best, and final offer included a new provision about union leave. The proposal limited Union leave to 3 days:

> The Employer agrees to grant necessary time off, limited to *three (3) working days,* without pay or loss of seniority rights to any Employee designated by the Union to attend a labor convention or serve in any capacity on other official Union business. The Union agrees to give in writing a minimum of *two (2) weeks'* notice to the Employer. It is agreed that there shall be no disruption of the Employer's operation.

(GC Exh. 6(g), § 54.) (*emphasis in original*).

When the Union asked for an explanation of why Richfield sought this provision, Goff testified that Henry said Richfield wanted it. (Tr. 158.) Henry testified that he could not recall when the Union leave proposal was raised. He further said the language had not changed except for the addition of specifying a number of days for union leave. He could not specifically recall what was the Union's response, but then stated they did not make a counterproposal and never specified the date. (Tr. 547.)

On September 24, at the parties' last negotiation session, Goldman said that the union conference lasted 5 days and the Union wanted to increase the time "up to six months." Goldman explained that, if a housekeeper was needed to assist in organizing other hotels, that person would need a leave of absence. Richfield's bargaining notes show it made no response. (R. Exh. 6, p. 152, Item #54.)[21]

Richfield's position is to limit its discussion to the language of the provision and does not address any of the testimony. Richfield contends that nothing in the proposal reflects a loss of seniority rights to union employees. (R. Br. at 14.) General Counsel's position analogizes to times when an employer requested to remove union-security clauses based upon "philosophical" grounds. See *Universal Fuel, Inc.*, 358 NLRB 1504 (2012), and *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).

More recent case law requires that a party give reasons to justify its position. Here, Richfield did not meet the requirement to justify its positions taken regarding union leave by reasoned discussion, even as late as September 24, and therefore violated Section 8(a)(5) of the Act. *Unique Thrift Store*, 363 NLRB No. 122, slip op. at 1 fn. 3; *Palestine Coca Cola Bottling Co.*, 269 NLRB at 645.

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[20] The Eighth Circuit affirmed that the employer's offer of sham or frivolous wage proposals were part of the employer's course of bad-faith bargaining and violated the Act. 700 F.2d at 456.

[21] Goff presented reasons why this provision would have a chilling effect on employees' union activities. The international union convention occurs every 5 years. The convention delegates discuss union matters like dues increases and any changes to the constitution. (Tr. 156). Although the convention itself lasts only 3 days, it likely involves 1-day travel to the convention and a day back. (Tr. 157). The Union contends this proposal causes a loss of seniority for any other days taken off. (Tr. 157–160.)

IV. RICHFIELD DISCONTINUED THE SUNSTONE CONTRACT'S LONGEVITY PAY

The complaint alleges that Richfield unilaterally discontinued longevity pay, provided in the Sunstone contract, upon expiration of the contract. In addition, the complaint alleges that Richfield did so in violation of Section 8(a)(3) and made statements about the discontinuance of the raises in violation of Section 8(a)(1).

A. Facts regarding discontinuing longevity pay

The Sunstone contract, in effect through February, contained a wage grid for each property for each year. The new employees' pay was based upon when hired and the job performed. (See GC Exh. 2, Appendix A). Raises were scheduled for 12 months, 24 months, 42 months, and 60 months. For example, a line cook hired at the Marriott Hotel on or after September 1, 2011, would be paid $10.41 per hour at hire. After 12 months' employment, the line cook would receive a raise to $11.34; after 24 months, $12.21; 42 months, $13.02; and 60 months, $13.88. However, a line cook hired on or after September 1, 2013 initially earns $10.41 per hour; at 12 months, receives an increase to $11.80; at 24 months, $12.70; at 42 months, $13.54 and at 60 months, $14.44.

When the Sunstone contract extension expired, Richfield stopped paying raises identified in Appendix A. Thus, a hypothetical line cook at the Marriott who was hired on September 15, 2013 would have received a raise effective September 15, 2014, but nothing at the 24-month point on September 15, 2015, or thereafter. Henry explained that the parties had no agreement regarding wages or pay rates when the agreement expired, so Richfield had no basis for paying the increases noted in the Sunstone contract. (Tr. 65–66.) The record does not reflect that Richfield notified the Union it intended to stop the contractual longevity increases with the expiration of the Sunstone contract before it did so.

On June 11, 2015, Brian Brandt, Local 21 president, sent an email to Henry regarding a housekeeper who said she did not receive her 12-month pay increase. In the email, Brandt reported that the housekeeper said she spoke with Henry, who told her she would receive her pay increase until the contract was resolved. (GC Exh. 5.)

On June 17, Henry replied to Brandt by email, stating that the contract had expired and the Employer "has shared with the union that we will not be extending the previous contract" and that Richfield extended a last, best and final offer on March 24 that the union had not yet signed. Henry concluded, "The employer's [sic] position is that we are awaiting the signed and to be executed proposal that is on the table to provide the affected associates with the appropriate negotiated increase." (GC Exh. 5.)

President Nancy Goldman, via email dated June 22, advised Henry that regardless of the expiration of the agreement, ". . . [T]he Employer is obligated to continue the terms and conditions of the prior contract including the specified wage increases." Henry contended that stopping the pay increases was not discussed during bargaining and the Union did not raise it. (Tr. 68–69.)[22] Henry did not admit that the Union filed a grievance about the issue, but admitted he received an email. (GC Exh. 5).

B. Richfield Unilaterally Changed Longevity Pay Based upon the Sunstone Contract, in Violation of Section 8(a)(5)[23]

1. Parties' positions

Richfield contends nothing in Appendix A suggests these raises continue after the Sunstone contract expiration. In its answer, it contends that the Duration Clause, Article 27, states the wages will only be in effect during the term of the agreement. It cites the specific language:

> "This Agreement shall be effective as of October 1, 2011 and continue in full force and effect to and including the 31st day of August, 2014 . . . Wages increases set forth in Appendix A will be effective on the first full pay period after September 1, 2011, the first full pay period after September 1, 2012, and the first full pay period after September 1, 2013."

(GC Exh. 2, p. 26, Art. 27, "Duration".)

Richfield argues that nothing in the language reflects an understanding that the wage increases would continue after August 31, 2014, or that the extension permitted the wage increases after February 28, 2015. It also suggests that the Union waived its rights to bargain about the longevity raises.

2. Analysis regarding Richfield discontinuing the longevity increases

Richfield was not privileged to discontinue scheduled wage increases and presented the Union and the employees with a fait accompli. Nothing in the facts show that the Union waived its rights to bargain over these wages.

As often noted, an employer who unilaterally changes conditions under negotiations without notification or bargaining, or without reaching a valid impasse, violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Pursuant to Section 8(d) of the Act, an employer must continue the contractual terms after the contract expires. *Finley Hospital*, 362 NLRB 915, 916–917 (2015). Also see *Marina Del Rey Hospital,* 363 NLRB No. 22, slip op. at 3 (2015). The only exceptions occur when the union continually avoids or delays bargaining, or economic exigencies require the employer to respond promptly. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).[24]

Wages are a mandatory subject of bargaining. *JPH Management, Inc.*, 337 NLRB 72 (2001). When periodic wage increases are an establish term of employment, an employer violates the Act by unilaterally discontinuing them. *Finley Hospital*, 362 NLRB 915, 919 fn. 9 (2015), citing inter alia, *Daily News of Los*

[22] I credit Henry to the extent that he admitted that Richfield discontinued the longevity pay increases. The remainder of his testimony on this issue was evasive and cannot be credited. *Cherry Hill Convalescent Center*, 309 NLRB 518 (1992).

[23] The amended complaint termed these contractual wage increases as step increases. Richfield repeatedly objected to the term and I therefore substitute the term "longevity increases" to reflect the temporal nature of the pay increases.

[24] Richfield has not contended either of these exceptions apply.

Angeles, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). Changing wages after contract expiration, without first bargaining to impasse, violates Section 8(a)(5). See generally *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB 794 (2014).

Henry's June 17 email confirms that Richfield discontinued the scheduled pay increases in February, *before* Richfield gave an alleged final offer on wages. Like the respondent in *Katz*, 369 U.S. at 741–742, Richfield took action before the parties could have reached a bargaining impasse. In February, the parties had begun the bargaining process but had made little progress.

The pay increases were "fixed and automatic." The pay increases were tied to a definite length of employment, job title, and property, which defined the amount of the pay increase. This fixed and automatic raise is the "norm" at the hotels based upon the language in the collective-bargaining agreement. *Bryant & Stratton Business Institute, Inc. v. NLRB*, 140 F.3d 169, 181 (2d Cir. 1998), enfg. 323 NLRB 410 (1997) and 321 NLRB 1007 (1996).

The change occurred while when Richfield should have maintained the status quo. Richfield did not deny that the change took place at this time. Richfield presents no evidence that it notified the Union before it discontinued the raises or requested to bargain about the change. This unilateral change is an unlawful fait accompli.

Richfield cannot rely on the 2014 "wish list" to state that Union had adequate notice to bargain over the longevity wage table in Appendix A of the Sunstone contract. Richfield conveyed it wanted the pay changed and was listed as some of the topics for negotiation; nothing in the record conveys that Richfield notified the Union that these wage increases would stop when the Sunstone contract extension expired, nor does the bargaining history reflect that wages were discussed before Richfield discontinued it. Further Richfield does not point out any other items on the "wish list" that were changed.

Richfield and General Counsel both cite *Finley Hospital*, 362 NLRB 915 (2015). In *Finley Hospital*, supra, the Board found that the status quo of annual raises dictated that the raises continue after the contract expired. That case does not support Richfield's proposition that it was privileged to discontinue the longevity wage increases. According to *Finley*, changes may be made if the employer notifies the union and bargains the new terms or if the parties bargain and reach a lawful impasse. Id., citing *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036–1038 fn. 6 (2003), rev. denied 381 F.3d 767 (8th Cir. 2004). As noted, Richfield made no notification that it intended to discontinue these wage increases when the Sunstone contract expired. As of February, the parties were in the midst of negotiations, having only three negotiation sessions and much of the time was spent on Richfield's demands on a permissive subject, separating TCS from the rest of the bargaining unit. Impasse cannot be claimed.

Based upon the language in the collective-bargaining agreement, neither the timing nor the amount of the pay increases here were left to the employer's discretion. Compare *Daily News of Los Angeles*, 315 NLRB 1236, 1240–1241 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), rehg. and rehg. in banc denied (1996), cert denied, 519 U.S. 1090 (1997). *Daily News* deals with merit increases that were given annually, with the amounts left to the discretion of the employer. However, in this case, nothing was left to chance in the expired Sunstone contract, which specified the amount of raise due to an employee based upon job, location, hire date and length of service.

In *Marina Del Rey Hospital*, 363 NLRB No. 222 (2015), the Board further emphasized the difference between a contractual right, which may expire, versus a statutory obligation to maintain the status quo, which also bars a clear and unmistakable waiver. The Board examined whether an employer unlawfully ceased payments to an educational fund. The payments were within the contract. The "statutory status quo" required the employer to continue payments to an educational fund. Finding no express or implied waiver to permit discontinuing these payments, the Board found the employer violated Section 8(a)(5) and (1). *Marina Del Rey,* 363 NLRB No. 22, slip op. at 3–4.

Here, the plain language in the Sunstone contract says nothing about discontinuing wage increases when the Sunstone contract expires. The language gives a start date, not a stop date. The result is the Sunstone contract regarding wages was the "statutory status quo" that Richfield was required to maintain.

This situation is similar to *Wilkes-Barre General Hospital*, 362 NLRB 1212 (2015). In *Wilkes-Barre*, the parties' contract was silent regarding what would occur with the longevity pay increases for nurses after the contract expired. The contract specified when pay raises would accrue based upon specific dates and the length of time the nurse was employed. Although the contract expired, the hospital had an obligation to continue wages, hours and terms and conditions of employment for represented employees unless it gave notice and an opportunity to bargain to the union and reached a valid impasse. The hospital, by discontinuing the contractual longevity wage increases, violated Section 8(a)(5) of the Act.

Richfield, like *Wilkes-Barre*, had a practice established by the Sunstone contract and was required to maintain the status quo. Id., slip op. at 2, fn. 2. The status quo here requires Richfield to honor the pay scales set for in Appendix A of the expired collective-bargaining agreement. By discontinuing these pay increases, Richfield made an unlawful unilateral change in violation of Section 8(a)(5) of the Act.

Richfield also contends that language in the Sunstone contract relieves it of continuing the longevity raises and implies that the Union waived its rights to continue those raises. That language reads: "Wage increases set forth in Appendix A will be effective on the first full pay period after September 1, 2011, the first fully pay period after September 1, 2012 and the first full pay period after September 1, 2013." First, as discussed above, this language is consistent with the requirements in *Wilkes-Barre*, which shows a requirement to maintain the status quo. Secondly, this language does not constitute a waiver.

A waiver of a union's statutory rights, including the right to bargain about wages, must be clear and unmistakable and cannot be inferred lightly. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962). "A clear and unmistakable waiver may be found in the express language and structure of the collective-bargaining agreement or by the course of conduct of the parties. The burden is on the party asserting waiver to establish that such a waiver

was intended." *Leland Stanford Junior University*, supra. See also *NLRB v. New York Telephone Co*., 930 F.2d 1009 (2d Cir. 1991), enfg. 299 NLRB 35 (1990). Also see *Finley Hospital*, 362 NLRB 915, 917 (assent to change must reflect mutual intent to allow the change in spite of a duty to bargain). Silence in a bargaining agreement does not demonstrate a clear and unmistakable waiver. *S-B Mfg. Co., Ltd.*, 270 NLRB 485, 490 (1984), citing *Timken Roller Bearing Co v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963).

Because the contract was silent about stopping the longevity pay increases, the Union did not waive its right to bargain about discontinuing the pay increases. As often noted, waiver must be clear and unmistakable, with an unequivocal expression of mutual intent to allow the change in spite of a duty to bargain. *Finley Hospital,* 362 NLRB 915, 918–919. Given the lack of a clear and express waiver in the Sunstone contract, Richfield has failed to prove the Union waived its rights to negotiate about the longevity increases. Because the Union did not waive its rights and no language in the contract permits discontinuation when Richfield was required to maintain the status quo, Richfield violated Section 8(a)(5) by unilaterally discontinuing the longevity pay increases.

(C) 8(a)(1) Allegations Related to Discontinuing Longevity Increases

1. Applicable law

The Board established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara News-Press*, 357 NLRB 452, 475 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Blaming the Union for a lack of a pay increase is violative. See generally *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993), enfd. in rel. part, 39 F.3d 1312 (5th Cir. 1994), rehg. denied (5th Cir. 1995) (employer blamed union for lack of hours). Accord: *First Student Inc.*, 359 NLRB 208 (2012) (supervisor said no raises while bargaining ongoing); *Teksid Aluminum Foundry*, 311 NLRB 711, 711 fn. 2 and 717–718 (1993) (during organizing campaign, language telling employees raises would be frozen violated the Act).

2. Henry's testimony

Henry testified that employees talked with him about the lack of pay increases. Henry could not state how many employees spoke to him on this issue except to say it was more than 10. Two employees testified about their experiences hearing supervisors make statements about how the Union had to sign a contract in order for employees to receive their raises.

3. Brandon's uncontradicted testimony

Shop Steward Brandon testified that he approached Head Chef Ulrich at the Marriott several times during May and June about Richfield's failure to give the longevity raise to Derek Kotvask.

About May 1, Derek Kotvasz, a cook at the Marriott, was due for his 12-month longevity raise. Kotvasz approached Shop Steward Brandon several times about the raise. Kotvasz was concerned that he might not receive the raise based upon rumors and he had a job offer elsewhere. The conversations between Brandon and Kotvask regarding the raise continued through the end of May and into June because Kotvasz had not received his longevity increase.

Chef Ulrich advised Brandon that "HR is saying that they cannot give him a raise because of we're not under contract . . . ." Ulrich then asked Brandon what he knew about it. Brandon said he told him that, according to Union President Brandt, the raises should have been in effect. (Tr. 300–302.)

Brandon also testified that, about May, while approximately 15 to 20 employees were picketing at the loading dock, he overheard Jeff Burns, the manager of engineering at the Marriott, say in a loud voice, "You know, all they've got to do is sign the contract and they'll all get their raises." Brandon was standing approximately 5 feet from Burns and he saw Burns glancing at him.

Richfield did not call Chef Ulrich to testify. I draw an adverse inference because Richfield did not call Ulrich, who worked for Richfield. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("The decision to draw an adverse inference lies within the sound discretion of the trier of fact"). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). I also credit Brandon's testimony as his demeanor was earnest and he was able to explain the circumstances of why he had discussions with Chef Ulrich about wages.

(a) Analysis of Chef Ulrich's statements to Brandon

Regarding the discussions between Brandon and Chef Ulrich, Ulrich's statements tell Brandon that HR says no raises will be given because no contract exist. The statement therefore implies that, should the Union agree to a collective-bargaining agreement, raises would be available. I therefore find these statements violate Section 8(a)(1) of Act.

(b) Analysis of Burns' statement while Brandon was present

The statement of Burns, the engineering manager, was not alleged. "'[T]he Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and fully litigated.'" *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997), citing *Pergament United States*, 296 NLRB 333, 334 (1989), enfd. F.2d 130 (2d Cir. 1990). The statement is about the same issue—whether employees were receiving raises and whether Richfield's managers told employees that the Union's failure to sign a collective-bargaining agreement was to blame. I also have found other unlawful conduct about the discussion of raises. Therefore, the issue is closely related.

Regarding whether the issue was fully litigated, Richfield did not object to Brandon's testimony and cross-examined him about the statement. See *Parexel International, LLC*, 356 NLRB 516, 517–518 (2011), citing *Golden State Foods Corp.*, 340 NLRB 382 (2003). Richfield had an opportunity to present its own witnesses but did not do so. It had the opportunity to brief the

matter, although it did not do so. I therefore find that the issue was fully litigated.

Burns, by glancing at Brandon, intended for employee protesters on the loading dock to hear his statement. His statement squarely blames the Union: If they—the Union—would sign the contract, employees would have their pay raises. Blaming the Union for lack of pay increases or acting as an impediment to pay increases violates Section 8(a)(1) of the Act. See *Faro Screen Process, Inc.,* 362 NLRB 718, 718 (2015), citing *RTP Co.*, 334 NLRB 466, 468, 470, 471 (2001), enfd. sub nom. *NLRB v. Miller Water Mills*, 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003) and *Lafayette Grinding Corp.*, 337 NLRB 832, 839 (2002).

4. Schroeder's uncontradicted testimony

On June 19, Kelli Schroeder went to the Human Resources office with questions about her check. She waited in the outer room to receive assistance. While she waited, within the Human Resources office, the door to Costello's office was open.

Schroeder could hear Costello and Henry within the office, and they were talking with a housekeeper about her pay. Schroeder went down the hallway to listen more carefully. The housekeeper asked where her step pay increase was. Schroeder heard Henry reply, "We don't have a contract right now, the Union will not agree to this offer that's a very fair offer, you know, you really need to call Brian and tell him that he needs to accept everything. This is a great proposal, everything is really, really competitive." Henry then shifted the conversation to the employee's management potential. Schroeder stated she listened until her break time was over and then left. (Tr. 352–353.)

(a) Credibility

What Schroeder heard was consistent with Henry's email explanation about why employees would not receive a longevity wage increase. Schroeder was sure in her testimony and fleshed out details. Although Henry testified that he talked with at least 10 employees about the longevity increases, he never denied this conversation. Costello also did not testify about talking with employees about their raises or what might have been said.

Richfield implies that Schroeder should not be credited because she was an admitted eavesdropper. However, Schroeder readily admitted that she was listening in. I do not find that the admitted eavesdropping affected her credibility. See *Overnite Transp. Co.*, 336 NLRB 387, 392 (2001) (administrative law judge credits witness who overheard an employer instructing an employee to start a decertification petition). I therefore credit Johnston's testimony regarding this conversation.

(b) Analysis

The credited testimony shows Henry, with Costello present, told an employee that the reason she did not have a raise was two reasons: Not only was there no contract, but also the Union would not agree to a "fair offer." Henry then encouraged the employee to lobby Union President Brandt to accept the proposal. Henry places the blame on lack of raises directly upon the Union.

This statement is similar to a letter issued by an employer to employees about an unlawful rescission of a wage increase. The letter told employees that the Union caused the rescission, which the Board found coercive. The Board found the letter "constituted interference, restraint, and coercion that unlawfully tended to undermine the Union in violation of Section 8(a)(1)." *Faro Screen Process, Inc.*, 362 NLRB 718, slip op. at 1. For the reasons stated in analysis of statements involving Brandon, this statement is similarly coercive and unlawfully interferes with the Union, both of which violate Section 8(a)(1). Id. I therefore find that Richfield, by Henry with Costello present, coerced an employee about the lack of pay raises and interfered with the Union.

(c) Discontinuing the longevity pay increases also violated Section 8(a)(3)

Section 8(a)(3) states an employer commits an unfair labor practice by discouraging membership in any labor organization by discriminating in regard to hire or tenure of employment or any terms and condition of employment. An employer who withholds employee benefits because of union activity violates the Act. *Oberthur Technologies of America Corp.*, 362 NLRB 1820, 1831 (2015).

This case has similarities to *Crispus Attucks Children's Center*, *Inc.*, 299 NLRB 815 (1990). The employer withheld annual raises during negotiations because it insisted on negotiating all noneconomic issues before reaching the economic issues, which violated Section 8(a)(5). As the Union requested the annual raises, the employer's failure to pay the annual increases violated Section 8(a)(3). Id. at 836.

Richfield withheld scheduled raises based upon its unlawful conduct of stopping the raises, in violation of Section 8(a)(5). It stated its goals of the unilateral change to employees: Tell the Union to sign our version of the collective-bargaining agreement and you can have pay increases. Richfield therefore punished the employees by withholding raises because of the Union's position in collective bargaining and violated Section 8(a)(3) of the Act. *Crispus Attucks*, supra.

V. SINCE MARCH 2015, RICHFIELD CHANGED POLICIES REGARDING POSTING OF UNION MATERIALS ON BULLETIN BOARDS (¶6(J)) AND UNION ACCESS TO THE FACILITIES (¶6(I)), AND RELATED 8(A)(1) ALLEGATIONS

A. Facts Related to These Allegations

1. The Union had past practices with access to the hotels and posting on company bulletin boards

Before the 2015 negotiations, Union Representative Linda Henry traditionally posted union information at two of Richfield's hotels, the Marriott and the Kahler Grand. She visited the Marriott usually once per week to see employees. At the Marriott, she would see managers, including Crystal Adcox, the housekeeping manager, and of Operations Manager Scott Mauer. She also made postings on four areas: the union bulletin board in the break room and the boards outside the chef's office, by the restaurant manager's office, and by the time clock. Union Representative Linda Henry posted information on these boards and the information would stay up until she took the information down.

Brandon testified that he also posted union materials many times on bulletin boards at the Marriott, usually on the bulletin board by the restaurant manager's office and on the union bulletin board. During contract negotiations, he posted about the

negotiations. Before negotiations, these postings would remain until he removed them.

Linda Henry also visited with employees and posted notices at the Kahler Grand Hotel about once a week. Before she would go to the Kahler Grand, she would send an email to the human resources department either the day before or the morning of her visit. She visited with employees in the cafeteria, the housekeeping break room, and the maintenance break area. (Tr. 408.) To reach these areas, Linda Henry walked through the dish room, the kitchen, and by offices on the second floor into the housekeeping area. She posted flyers in the four areas at the Kahler Grand, including the "back room" to Starbuck's. (Tr. 408.) During these visits, she would run into some of the managers, including Henry, Costello and Decker from human resources, the food and beverage director, Director of Operations Mauer and the housekeeping manager.

2. March events

On March 25, by email, Linda Henry notified Henry and Costello that she would be visiting the Marriott, the Kahler Inn and Suites, and the Kahler Grand the next day. (Tr. 416; GC Exh. 25(a).) On March 26, between 7:30 and 8 a.m., she arrived in the Kahler Grand housekeeping department, in the area where employees have tables. As usual, Linda Henry left at 8 a.m. when the housekeeping employees left to clock in for work. She went out the door and ran into Chad Decker from human resources management at the end of the hall. Decker asked Linda Henry what she was doing. She said she was visiting with the members. Decker told her she was not supposed to be in that break room. Linda Henry told him that she had never been told she could not do so. (Tr. 418.)

During negotiations, shop steward Brandon saw that postings Linda Henry made were not staying posted on the boards. Linda Henry would notify him when she was making a posting. By the time he went to check the boards, on the same day, except for the union bulletin board, the postings were not present. Linda Henry stated that these changes began about the end of March. (Tr. 416.)

3. April 2 events between Richfield and Linda Henry

On April 1, by email, Linda Henry notified Henry and Costello that she would be visiting the Kahler Inn and Suites and the Kahler Grand the next day. (Tr. 418–419; GC Exh. 25(b).) On April 2, at about noon in the Kahler Grand, Linda Henry left the cafeteria break room and headed down to the maintenance break area through the kitchen. As she was leaving, she briefly spoke to a few employees in the kitchen and said hello. The employees asked what she was doing, and she said she was passing out flyers. She showed them the flyers but did not give any to the employees. Linda Henry estimated that at most, the conversation with employees lasted ten seconds.[25] On the way out, Seth Essar, a sous chef, told her she was not allowed to speak to his employees. He also said she was not allowed to pass out flyers. She told Seth that she had only shown the employees the flyers briefly. Essar also said something about walking through the kitchen, which was the only way she could get to the hotel's other break rooms. Essar told her he intended to call the human resources department. (Tr. 421–422.) Employees were in the area and the distance was disputed at hearing. (Tr. 423.)

After the conversation with Chef Essar, Linda Henry walked down the stairs and into the maintenance break area. She started talking with two employees. Within a few moments, Costello and Essar arrived. Costello, about 10 feet away from the employees, said in a very loud voice that Linda Henry was no longer allowed to go into any break rooms except the cafeteria and only allowed to post notices in the cafeteria. (Tr. 423–424.) Linda Henry said she had posted in these break rooms all the time and did not understand what the problem was. (Tr. 424–425.) Costello said it had been discussed in negotiations. Linda Henry said she never heard it discussed in negotiations. Costello left and Linda Henry resumed her conversation with the employees. The employees said to Linda Henry they were in disbelief that Costello would talk to her that way. (Tr. 425.)

4. April 7 events between Richfield and Linda Henry

On April 6, Linda Henry notified Henry and Costello by email that she intended to visit the Marriott, the Kahler Inn and Suites, and the Kahler Grand on April 7. (GC Exh. 25(c)). On April 7, in the Kahler Grand's housekeeping break area, with about eight to ten employees present, Josipa Jerkovic, the housekeeping manager, entered and told Linda Henry that she could not be in that break room any longer. (Tr. 427.) Linda Henry said no one had advised her that she was not supposed to use that break room and that she had been in that break room "all along," so she did not see anything wrong. Linda Henry testified that Jerkovic had seen her many time and had several conversations with Jerkovic in the past. Because the hour was approaching 8 a.m., when the housekeepers needed to clock in for work, Linda Henry said, "We'll talk later" and left.

5. In April, Manager Eggiman instructed employee Brandon to remove a posting

In about April, Restaurant Manager Mattie Eggiman called Brandon into her office at the Marriott to talk about the postings. She said Human Resources told her to remove all union flyers from the bulletin board outside her office. She gave him the choice of removing it himself or that she would take the posting down. (Tr. 298.) Brandon advised her that he would take the posting down himself. (Tr. 299.)

6. April 16: The issue is brought up during a negotiations caucus

On April 16, the Union raised the issue of employer removing the posting during a caucus. The union negotiating team, consisting of Brandt, Goldman, Goff, and Linda Henry and several employees, were caucusing. About 2 p.m., Henry came to the union negotiators, announced that Richfield needed to do more work and negotiations were ending for the day. The Union team raised the events described above. Henry said he could not believe that it happened and denied that posting was removed.

[25] Linda Henry previously worked in this department and knew many of the employees. She said that she would not ignore people who wanted to just say hello.

Linda Henry said she had witnesses, including a maintenance employee who was present with the Union in the caucus. Henry looked at the employee. The maintenance employee told Henry it really happened.

7. About April or May, Schroeder observes Costello with a union flyer

Kelli Schroeder, who was working at a barista at Starbuck's in the Kahler Grand, also noticed that union materials were disappearing from the bulletin boards, including the one in the back room behind Starbuck's that was separated by a door and not open to the public. Schroeder testified that previously, a flyer that announced a union meeting would stay up until a few days after a meeting, and she usually was the one taking down the flyers. Once negotiations started, she noticed the disappearance. About April or May, Schroeder, while working at bar, noticed Linda Henry came into the café and walked into the back room.

About 15 minutes later, Costello came into the café. Normally Costello gave Schroeder a friendly greeting, but not this time. Costello walked into the back and then exited into the café. As Costello walked past her, Schroeder noticed that Costello was carrying a UNITE HERE flyer "pinned" to her leg. When Schroeder was able to take her break, she went into the back room and saw no union notice posted. Schroeder called Linda Henry and told her that she saw Costello was a union flyer. Linda Henry, very upset, told Schroeder that she had just been yelled at and told that she could no longer have access to common spaces. (Tr. 347–349).[26]

8. June 5

On June 4, Linda Henry notified Henry and Costello by email that she intended to visit the Marriott, the Kahler Inn and Suites, and the Kahler Grand the following day. (GC Exh. 25(d)).

On June 5, about 1 p.m., Linda Henry was in the housekeeping break area, discussing a question with an employee, when Henry, Costello, Mauer, and Jerkovic entered. Henry said she was no longer welcome in the break room because she made employees feel uncomfortable. At that point, the employee left the break room. (Tr. 432.) Linda Henry responded that employees talked to her, were friendly and asked her questions. Henry said it did not matter, because employees came to his office and complained, so she would not be allowed in the area any longer. Linda Henry told him that the matter would need to be negotiated "[a]nd it took four of you to come up here and kick me out of this break room." Henry said, "We're not kicking you out. We're asking you to leave." (Tr. 433.) Linda Henry then left.

9. June 25

On June 24, Linda Henry notified Henry and Costello by email that she would be visiting the Kahler Inn and Suites and the Marriott the next day. (Tr. 434; GC Exh. 25(e).) On June 25, she was posting flyers in the banquet and housekeeping area bulletin boards, where she traditionally made postings. While she walked towards the housekeeping area, she ran into Housekeeping Manager Crystal Adcox and one of her supervisors. Adcox told her she was not allowed in the area. Linda Henry said she had always hung notices in the banquet area, where she was going. Adcox said she was not allowed to be there any longer. Linda Henry left. (Tr. 435.) Adcox did not testify about this event.

10. September 2

On September 2, Linda Henry notified Henry and Costello by email that she would be visiting Kahler Grand and the Marriott that day. (GC Exh. 25(f).) She went to the Kahler Grand housekeeping break area, where several employees were having lunch. Jerkovic came in and told her she was not allowed in the area. Linda Henry said that she thought things might have changed after the unfair labor practices charges. Jerkovic said she did not know about that and directed her to go to see Henry in human resources. Richfield did not call Jerkovic to testify and it did not ask Costello any questions about this incident.

B. Parties' Positions

Henry testified that he and other managers saw that the union flyers were "blanketing" the bulletin boards, covering information posted by Richfield and the schedules. Henry maintains that he permits posting on the union boards but not on the other boards. (Tr. 568.) Henry did not testify when he saw the blanketing, or which other managers told him about problems with the bulletin boards. Henry also did not testify about Linda Henry making employees uncomfortable. Richfield did not call Jerkovic and Eggiman to testify; Richfield asked no related questions to Adcox or Costello.

General Counsel contends that the Union had past practices for access and posting notices. To change these practices without prior notice or bargaining, according to the General Counsel, violate Section 8(a)(5) as a unilateral change. General Counsel also alleges that the statements made to Linda Henry, in the presence of employees, and other employees also violate Section 8(a)(1).

C. Analysis Regarding the Alleged Unilateral Changes of Union Access and Union Posting

The facts establish that the Union had past practices of union representative access to the hotels. The facts also establish that both the Union and the employees had a past practice of posting items on employer bulletin boards. By changing these past practices without prior notification or negotiation with the Union, Richfield had multiple violations of Section 8(a)(5).

1. Applicable law regarding past practice and the unilateral changes to union access and postings on company bulletin boards

Terms and conditions of employment may exist when established by longstanding and regular practice or custom, even if

[26] Respondent objected twice on hearsay grounds to Schroeder's testimony about this telephone conversation with Linda Henry. I ruled that the testimony was admissible through present sense impression. Present sense impression is defined as "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed.R.Evid. 803(1). Although the specific amount of time between the events and the phone call are not known, it was sufficiently soon enough after the events that Linda Henry said it "just" happened and was still crying. I give full credit to Linda Henry's statements to Schroeder. See *Webco Industries*, 327 NLRB 172 fn. 6 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000). Compare *Cumberland Farms Dairy of New York, Inc*., 258 NLRB 900 fn. 1 (1981).

not included in the collective-bargaining agreement. See *Hotel Texas,* 138 NLRB 706, 712–713 (1962), enfd. 326 F.2d 501 (5th Cir. 1964); *Frontier Homes Corp.*, 153 NLRB 1070, 1072–1073 (1965); *Central Illinois Public Service Co.*, 139 NLRB 1407, 1415 (1962), enfd. 324 F.2d 916 (7th Cir. 1963). A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353–354 (2003); *Eugene Iovine. Inc*., 328 NLRB 294, 297 (1999).

Because the past practice becomes a term and condition of employment, the past practice cannot be changed without offering the collective-bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc*., 349 NLRB 240, 244 (2007), citing *Granite City Steel Co*., 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co*., 291 NLRB 489, 493 (1988); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). The past practice may become a mandatory subject of bargaining and if the unilateral change is material, substantial, and significant, the employer violates Section 8(a)(5) of the Act. *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp*., 334 NLRB 165, 171 (2001). The burden of proof is upon the General Counsel. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006).

The Union's access to the workplace is a mandatory subject of bargaining. *Turtle Bay Resorts*, 355 NLRB 1272 (2010), enfd. 452 Fed. Appx. 433 (5th Cir. 2011); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403 (5th Cir. 1984). The Board views interference with union access as a unilateral change that impairs a representative's ability to represent employees effectively or interferes with the employees' abilities to support their bargaining agent. *Turtle Bay*, 355 NLRB at 1272, citing *Ernst Home Centers*, 308 NLRB 848–849 (1992). Also see *Unbelievable, Inc. d/b/a Frontier Hotel & Casino (Frontier III)*, 323 NLRB 815, 817–818 (1997), enfd. 118 F.3d 795 (D.C. Cir. 1997).

Regarding employee posting, posting union literature by employees also is a mandatory subject of bargaining. If an employer has permitted employees access to company bulletin boards for a variety of matters, the employer's removal of union literature violates Section 7 of the Act. *Fleming Companies, Inc.*, 336 NLRB 192 (2001), enfd. 349 F.3d 968 (7th Cir. 2003). If the employer has given previous access to employees to its company bulletin boards and discriminatorily removes union posted information, it also violates Section 8(a)(1) of the Act. *Honeywell, Inc.*, 262 NLRB 1402–1403 (1982), enfd. 722 F.2d 405 (8th Cir. 1983). Regarding the Union postings on the company bulletin boards, the practice can continue once an employer allows union access to company bulletin boards. *HealthBridge Management, LLC v. NLRB*, 796 F.3d 1051, 1059, 1075 (D.C. Cir. 2015), enfg. 360 NLRB 937 (2014). Also see *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991).

b. Analysis for unilateral changes on posting and access

The complaint alleges that Richfield changes its policies regarding the posting of union materials on bulletin boards. The facts deal with postings by employees and Union Representative Linda Henry. The union witnesses identified how they removed their own postings and Linda Henry's postings. Before contract negotiations, no other limitation was placed upon Linda Henry's posting or access. No other manager who testified was asked about this "blanketing." The testimony from Henry did not reflect any claims that Linda Henry disturbed working employees or harassed them. I therefore do not find that any managers told Henry about any difficulties with the bulletin boards. Richfield did not deny that Linda Henry previously had access and posting as she and the other union witnesses maintained.

Here, General Counsel established that the Union, particularly Linda Henry, had long-standing practices of posting on bulletin boards and access to the hotels. Richfield never presented evidence that it notified the Union or requested bargaining on this matter. I am particularly persuaded by Costello's removal of the posting, when she was seen walking with it, and Eggiman's directions to Brandon to remove the posting. I therefore find that, in each instance, Richfield unlawfully removed postings by the Union and employees and precluded Union Representative Linda Henry's lawful access. Because it did not notify the Union before changing these past practices or give the Union an opportunity to bargain, Richfield instituted unlawful unilateral changes in violation of Section 8(a)(5).

2. The 8(a)(1) allegations related to union access

An employer violates Section 8(a)(1) of the Act when it threatens to exclude union agents from a jobsite. *Swardson Painting Co*., 340 NLRB 179 (2003). In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire & Auto. Testing of Texas*, 308 NLRB 72 (1992). Further, "[T]he test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).)

Richfield provided no evidence that Linda Henry was disorderly or harassing employees, nor did it provide evidence of abuse of access. See generally *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 777–779 (1982), enfd. 740 F.2d 398 (5th Cir. 1984). Most of Linda Henry's testimony went unchallenged. Throughout her testimony, she was forthright, even when some of the information contradicted other union testimony and I find that I could rely upon her statement of facts. Each time a Richfield representative told her to get out, employees were close by. In one instance, the maintenance employee commented, demonstrating that an employee heard what happened. Richfield was making a show of its power when it ordered Linda Henry out of nonworking areas and as such, it is coercive to an employee. Despite Henry saying it was a request for her to leave, it was clearly an order. I therefore find each alleged instance of threats directed towards Linda Henry, in the presence of employees, violated Section 8(a)(1).

VI. INFORMATION REQUESTS

The complaint alleges that Richfield failed to provide information regarding health care costs and vacation costs. I will review the applicable standard for information requests. For each

of the information requests, I provide additional facts and analysis.

A. Applicable Standard for Information Requests

An employer has an obligation to provide information that is necessary and relevant for the bargaining representative to carry out its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). Information requests pertaining to terms and conditions of bargaining unit employees are "presumptively relevant," and the employer must provide the requested information. *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

The Board reviews relevance under a liberal, discovery-type standard and whether the information would have some bearing or use to the union in carrying out its statutory responsibilities. *Public Service Co. of New* Mexico, 360 NLRB 573, 574 (2014), citing *Sands Hotel & Casino*, 324 NLRB 1101, 1109, (1997), enfd. 172 F.3d 57 (9th Cir. 1999). The information may be necessary for the union to assess whether to exercise its representative function, such as advancing negotiations and policing an agreement. *NLRB v. Whitesell Corp.*, 638 F.3d 883, 894–895 (8th Cir. 2011), enfg. 355 NLRB 635 (2010), affg. 352 NLRB 1196 (2008); *Public Service Co. of New Mexico*, 360 NLRB 573 (2014). The fact that a union may obtain information by other means or from another source does not alter or diminish the obligation of an employer to furnish relevant information. *Holyoke Water Power Co.,* 273 NLRB 1369, 1373 (1985).

"Like a flat refusal to bargain, '[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act' without regard to the employer's subjective good or bad faith." *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012), quoting *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg., Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

The duty to furnish information also requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. Presumptively relevant information must be produced within a reasonable period unless the employer established legitimate affirmative defenses to production of the information. *Metta Electric*, 349 NLRB 1088 (2007); *Postal Service*, 332 NLRB 635 (2000). An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all. *Castle Hill Health Care Center*, 355 NLRB 1156, 1179 (2010) (citing *Amersig Graphics, Inc*., 334 NLRB 880, 885(2001); *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993)).

B. Information request regarding Union's health care proposal (¶6(e))

1. Facts

The Union presented healthcare proposals in February. After calculating the costs of the union plan during a caucus on February 26, Richfield rejected the proposal.

In March, the Union requested the costs to Richfield. Henry, via email dated March 20 to Union President Nancy Goldman, stated the proposal would increase cost greater than $1 million and Richfield rejected the proposal; he reiterated Richfield would maintain the proposal "consistent with the previous collective-bargaining agreement."

On March 25, Goldman emailed Henry, and Richfield negotiators Stokes, Costello, Decker, and Hohmann whether Richfield was referring to UNITE HERE Plan B or the Local 17 plan, and whether the cost of $1 million was for 1 year of the proposed 5 years. Goldman sent emails to Henry and Stokes again on March 27 and 30 regarding the requested information.

On March 31, Henry sent Goldman an email stating that the cost was over the life of the proposed contract. On the same day, Goldman emailed back to Henry that she wanted the calculations for each year for each of the plans proposed and deadlined him for April 3. Goldman, on April 4, again requested the information and extended the deadline to close of business on April 6. On Saturday, April 4, Henry provided costs for the Local 17 plan and Plan B based upon enrolled associates and included costs for nonunion members as well. It did not break out only bargaining unit employees. (Tr. 171; GC Exh. 20.)

On April 6, Goldman responded to Henry and said the information was skewed because neither plan allowed nonunion participation. Goldman, identifying a need for a more accurate calculation and a more realistic response to an important and costly issue for employees, asked for the "rest of the information" the following day. (GC Exh. 20.)[27] On April 16, Goldman apparently gave a verbal reminder to Richfield during negotiations, "[Y]ou've never sent any quantification I've asked for. You've included in what we've proposed non-union members." (R. Exh. 1, p. 42.) Richfield never provided the information related to only the bargaining unit employees. (Tr. 171, 234).

Henry testified generally that, during negotiations, he told the Union that their proposal would impact only the unionized work force, but Richfield was concerned with both the unionized and nonunionized employees. He said he told the Union that costs would be greater if the nonunionized employees were removed from the same health insurance coverage. (Tr. 569.)

Richfield claims that it met its obligation to provide the information and the Union made no further requests. Richfield further argues that, on April 6, Goldman did not ask for the information again but merely asked for "clarification." Richfield says nothing about Goldman's verbal reminder on April 16. (R. Br. at 4–5.)

Richfield clearly ignores the Union's April 6 email, which included another request for the information relevant to the bargaining unit and not any other personnel. (See GC Exh. 20.) Richfield also claimed that the information was equally available to the Union. Because Richfield failed to consider the documents, including its own bargaining notes in Respondent's Exhibit 6, and General Counsel's Exhibit 20, I also find that Goldman verbally reminded Richfield to provide the information on April 16.

[27] Respondent's contends that Goldman did not challenge the calculations except to say they were skewed. However, Respondent's brief ignores the remainder of the Union's request, which asked for the "rest of the information." Compare R. Br. at 4–5 with GC Exh. 20.

2. Analysis regarding the information request for health insurance costs

Richfield was obligated to provide the costs of the two health care plans for only bargaining unit employees to the Union and has failed to produce the information. Group insurance and its costs are encompassed within the concept of wages and are mandatory subjects of bargaining. *Stowe-Woodward, Inc.*, 123 NLRB 287–288 (1959). In Sylvania Electric Products v. NLRB, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852 (1966), the Court held, "[T]he Board could properly find that a union was entitled to information concerning the cost of welfare benefits, where the union sought 'better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay."

Similarly, in *Cone Mills Corp.*, 169 NLRB 449 (1968), the employer refused to provide information relevant to bargaining over a pension plan. The union requested information as to costs, actuarial assumptions, and employee census figures. The Board found the employer's failure to provide the information violated Section 8(a)(5) of the Act and "served to frustrate meaningful bargaining." Id. at 449.

Richfield contends that no authority exists to demonstrate that "an employer must provide precisely what the union has asked for, nor authority for the proposition that a union can demand that the employer perform calculations, or dig for information, particularly when such information is equally available or already accessible to the union." Richfield cited The Developing Labor Law (6th ed.)—*Tex-Tan*, 318 F.2d 472 and *Cincinnati Steel Casing*, 86 NLRB 592 (1949).

Tex-Tan, a case issued in 1963, does not comport with current Board law on what Richfield is required to produce. *Cincinnati Steel Casing*, which preceded *Tex-Tan*, does not demonstrate that Richfield was relieved from its duty to produce information: There the union requested a written list on the names of employees. The employer offered to provide the information orally, which was sufficient for the size of the bargaining unit at issue. Id. at 592–593. Therefore, *Cincinnati Steel Casing* only addresses the form in which the information was provided, not whether Richfield maintained the requested records.

On Feb. 26, Richfield was able to cost out covering deductibles during a caucus. How it could do so without being able to make other calculations is baffling. The costs sent to the Union on April 4 do not exclude the non-bargaining unit members, which is the Union pointed out was not of use to it. The failure to provide this information violates Section 8(a)(5).

C. Information Request Regarding Cost of Richfield's Vacation Proposal (¶6(f)):

1. Facts

The Union requested information about vacation costs as well. On January 20, Richfield proposed to decrease the service time necessary for vacation accrual. The Union accepted the proposal.

Henry testified that, sometime in February or March, he explained in negotiations that the rate of turnover precluded calculating a specific dollar value for vacations. (Tr. 558–559.) However, Henry testified that Goldman told him to give him "a ballpark number." (Tr. 559.) Richfield's bargaining notes reflect that this conversation probably took place later than February or March. When Goldman raised the information request in another negotiation session, Henry claimed he did not remember.

At the April 16 negotiation session, the Union requested quantification of the additional cost to Richfield of the vacation proposal. During negotiations, while discussing economic proposals, Goldman pointed out that the Union had tentatively accepted the vacation proposal, but the proposal had not been discussed. She asked what the vacation proposal was worth and why. (R. Exh. 1, p. 42.) Goldman again told Richfield at the April 28 negotiation session: "I asked you to quantify [the] vacation proposal; you haven't yet." (R. Exh. 1, p. 47.)

The Union received no response to its verbal requests. On May 6, Goldman emailed Henry and Stokes, again requesting the information on Richfield's vacation costs. (Tr. 171–172; GC Exh. 21.)

On September 3, the complaint, including the information request allegations, issued. By this time, Richfield had not responded regarding vacation proposals. Richfield filed its answer on September 17. As noted above, the parties met again on September 24. At negotiations, Goldman renewed her request for vacation cost information. Henry stated the information was a moving target. Goldman clarified that she wanted a range, "what it is worth this moment in time." (R. Exh. 6, p. 149.) Goff added that the Union also tried to find the range. Henry stated Richfield wanted to make sure the benefit would be beneficial and economic and must consider what the cost was to the employer. Goldman said the Union could make a proposal, but Richfield had to pay for it. Goldman again clarified that the estimate would be a range, rather than a down-to-the-penny calculation. (R. Exh. 6, p. 150.)

In Henry's October 19 email regarding Richfield's position that it saw no new changes in the Union's position, Henry now included the following information regarding additional vacation costs:

> We understand and hear your request for quantification of the proposal. As per our discussion at the negotiating table the change does benefit our associates. Your response on just having a ball park figure on what the cost is or will be to the employer. From what we have surmised this could be a cost of about $84k (we have the scenario of approximately 65 employees will be impacted. At an average cost of $1200 for the early additional week resulting in the $84k).

(GC Exhs. 22 and 23(f), p. 4.)

On October 20, via email, Goldman asked if the vacation calculation was for 1 year or for 5. On October 21, Henry responded: "The information provided is the ball park estimate of the potential yearly cost once the threshold are realized." (GC Exh. 22).

The Union wanted the quantification of the vacation proposal because it viewed it as "money on the table" that could be shifted towards a different area, such as health care. Extra vacation was not a priority and the Union wanted to make adjustments based upon the information. (Tr. 232.)

At hearing, Hohmann testified that, in the pie charts, she prepared vacation information on individual employees based upon prorations from hours working in year 2014 and the vesting table in the collective-bargaining agreement. (Tr. 501.) Hohmann said to put all the vacation costs in one document would be a slow process because everyone worked different hours. (Tr. 501.) At the same time, turnover in the hotels was 50 percent or more per year. (Tr. 501.) However, Hohmann also said that she prepared the pie charts based upon assumptions in the vacation. (Tr. 502.)

2. Analysis regarding the vacation information request

The duty to furnish information requires a reasonable good-faith effort to respond as promptly as circumstances allow. *Woodland Clinic*, 331 NLRB 735, 737 (2000), citing *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993). An employer must respond to an information request within a reasonable time. The Board has long held that a delay in providing information also establishes a violation. *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977) (3-month delay violative). If an employer is unable to comply with the request within a reasonable time, it must instead advise the union with a reason for the noncompliance. *IronTiger Logistics, Inc.*, 359 NLRB 236 (2012), reaffd. 362 NLRB 324 (2015).

Should the employer fail to respond within a reasonable time, it violates Section 8(a)(5) of the Act. *IronTiger Logistics, Inc.*, supra.[28] An unreasonable delay decreases the usefulness of the information to the union. *Woodland Clinic*, 331 NLRB 735, 736 (2000) (7-week delay). Indeed, an "unreasonable delay" in providing information is as if the information was not provided at all. Id.

The information requested is necessary and relevant. See generally *Valley Inventory Service*, 295 NLRB 1163, 1166–1167 (1989). Vacation is a benefit that is part of an employee's wages.

Richfield contends that the delay was de minimis and caused no prejudice to the Union. Richfield did not respond for 6 months: The delay lasted from April 16 to October 20. During that time, Richfield gave the Union no indication of why it could not comply with the request. Despite Richfield's contention, this delay is not de minimis and significantly diminished the utility of the information to the Union. Richfield never told the Union that it was having difficulties in making the calculations or that the Union should make its own calculations. Further, it is difficult to believe that Richfield did not cost out the change in vacation before Richfield included additional vacation as part of its proposal.

Richfield contends that the difficulty in attempting to make such a calculation is trying to hit a moving target. However, Richfield presented no documentation that it notified the Union of the difficulties in providing the "ball park" figure. Richfield's brief suggests that the request was not ignored but took some time because calculations were difficult and the Union was in "an equal position" to make the calculation. Richfield contends it was virtually impossible to make such a calculation because of turnover, unknown longevity, the economic changes that might cause new hires or layoffs, and "an employer's very purpose in agreeing to enhance the vacation benefit . . . to enhance employee retention." (R. Br. at 5–6.). Richfield identifies a number of assumptions it allegedly might have used in its calculations. None of these were shared with the Union. In addition, Richfield had already made some assumptions and calculations based upon Hohmann's preparation of the pie charts. (R. Exh. 4, p. 1, item 7.) Richfield's claims about difficulties in calculating vacation were diminished by Hohmann's testimony that she made certain assumptions for determining how much vacation an employee would receive as part of the pie charts. (R. Exh. 4.) Even if one believed that Richfield had these difficulties, it was required to notify the Union of these problems.

Richfield also contends that the Union had equal access to the information, including turnover at the facility. This defense is unavailing. Because Richfield failed to notify the Union of any reasons for a delay and did not produce the information for over 6 months, this failure to provide information is the same as not providing the information at all. Richfield violated Section 8(a)(5) of the Act by failing to provide the vacation cost information.

VII. SINCE 11/11/15, RICHFIELD CONDITIONED FURTHER MEETINGS UPON THE UNION PRESENTING AN ACCEPTABLE PROPOSAL (¶6(M))

A. The Parties' Positions

1. Richfield's position

Richfield contends that it is justified in "conditionally declining to meet with the Union" because a party is not required to "engage in fruitless marathon discussions" when the parties' positions are "calcified." For this proposition, Richfield cited *Teamsters Local 122 (August A. Busch & Co. of Mass., Inc.)*, 334 NLRB 1190 (2001), citing *NLRB v. American Nat. Insurance Co*, 343 U.S. 395 (1952).[29] Richfield defends its decision not to meet because the parties were "calcified" in their positions. The term "calcified" implies that Richfield is working upon an impasse theory.[30] Richfield contends that "only a handful of issues" remained for negotiations, which primarily were wages and the changes in compensation for the banquet servers. (R. Br. at 7.) It further relies on Goff's testimony that the parties went through every item in Richfield's proposal. (R. Br. at 8, citing Tr. 191.)

As a symptom of the calcification, Richfield's brief contends that the Union has made no new proposal since April 28. Citing Goff's testimony (Tr. 197–210), the Union allegedly made no

[28] The District of Columbia Circuit Court of Appeals affirmed this principle but remanded to the Board the determination that the information sought ultimately was not relevant. *IronTiger Logistics v. NLRB*, __ F.3d ___, available on Westlaw, 2016 WL 2941962 (D.C. Cir. May 20, 2016).

[29] Respondent's brief miscited the supporting case as *NLRB v. North American National Insurance C*o.

[30] Respondent never pled impasse as an affirmative defense, despite arguments about permitting evidence on impasse at the hearing. One might assume that Respondent failed to timely raise its "calcification" defense. See generally *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005) (attempt to deny corporate status or nonexistence defense not timely when first raised in the posthearing brief to judge). However, Respondent's opening statement euphemistically referred to the Union as "stuck in its position." As a result, I consider its argument.

material moves, even when it presented a proposal on September 24. Richfield states that the email from Henry, dated 11/11 (GC Exh. 14), was "clear to all."

On the last day of the hearing, Henry testified in Richfield's case-in-chief that the email communicated to the union officials that Richfield is willing to meet and continue the conversation if the Union could bring something that would "force us to move from our current positions." (Tr. 567). He testified that Richfield reviewed the Union's proposal on September 24 and that there had been no change. (Tr. 567).

Two days before, as an adverse witness, Henry testified that Richfield's last proposal was the March 24 "last, best and final." (Tr. 116). Henry denied that the Union provided any further proposals and instead said that the Union gave "additions to what we already have on the table and they have asked us to make some changes to a few things that are currently in the proposal, but they have not provided with a new proposal, no." (Tr. 117 and 124). Henry further testified "[T]hey have not presented anything that will change our positions currently, based on what we've presented." (Tr. 125).

Henry testified that the Union never asked for longer hours in bargaining or protested Richfield's representative not showing up early enough or not staying long enough. (Tr. 530).

2. General Counsel's Position

General Counsel contends that parties cannot condition meeting for negotiations upon the presentation of a new proposal. *Twin City Concrete, Inc.*, 317 NLRB 1313 (1995). In *Twin City*, the employer rejected the union's request for a face-to-face meeting. It instead by letter told the union to submit ideas in writing so that it could evaluate its concerns and arrange to meet if appropriate. Id. at 1313–1314. The Board there found that the employer violated Section 8(a)(5) when it failed to meet its statutory obligation to bargain "by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference." Id. at 1314, citing *NLRB v. Cold Storage Corp.*, 203 F.2d 924, 298 (5th Cir. 1953) (internal quotations omitted). General Counsel further contends that Richfield's violations of the Act would preclude any allegation of impasse.

B. Analysis

Richfield violated Section 8(a)(5) by refusing the Union's request to meet.[31] As previously noted, Section 8(d) of the Act provides that employers and unions alike have a mutual obligation to meet at reasonable times and confer in good faith about mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. *Riverside Cement Co.*, 305 NLRB 815, 818 (1991) (discussing Sec. 8(d)), enfd. 976 F.2d 731 (5th Cir. 1992). In light of the importance of the obligation to meet for bargaining, the Board has held that a party that limits, delays or refuses meetings for bargaining violates Section 8(a)(5) of the Act. *Lancaster Nissan*, 344 NLRB 225, 227 (2005), enfd. 233 Fed. Appx. 100 (3d Cir. 2007). The quantity or length of bargaining does not establish or equate with good-faith bargaining. *NLRB v. American National Insurance Co.,* 343 U.S. 395, 404 (1952). Although the duty to bargain does not require fruitless marathon negotiations, it is not done "at the expense of frank statement and support of its position." Id. at 403.

To determine whether a party bargained in good faith, the Board will consider the "totality of the conduct." *NLRB v. Suffield Academy,* 322 F.3d 196 (2d Cir. 2003). Because the allegation here is a failure to bargain, and not surface bargaining as a course of conduct, Richfield's motivation is not relevant. *Lancaster Nissan, Inc. v. NLRB*, 233 Fed. Appx. 100, 104 (2007), enfg. 344 NLRB 225 (2005). Also see *Port Plastics*, 279 NLRB 362, 381–382 (1986).

Richfield has the burden of proof to demonstrate that the parties were so deadlocked that further meetings would not be fruitful. Richfield contends that because the parties reviewed all of Richfield's proposals, everything has been discussed. However, Richfield admits that major economic issues were outstanding.

As of September 24, Richfield agreed to negotiate again in October. It then canceled the negotiations. This position reflects that Richfield and the Union both believed they had more to discuss and that negotiations had the potential to be fruitful, rather than Richfield's later shift in position. *American Standard*, 352 NLRB 652–653 (2008), affirmed by three-person Board in 356 NLRB 4 (2010), rev. denied 465 Fed. Appx. 1, reh'g denied (D.C. Cir. 2012).

I also agree with General Counsel that *Twin City* applies here. Richfield here vests itself with the power to determine whether the Union will offer it enough to change its position. However, that standard is not correct. When the Union asked to discuss its proposals, Richfield refused. As in *Twin City*, Richfield refused a personal conference, which violated and continues to violate Section 8(a)(5) of the Act. Also see *Columbia College Chicago*, 363 NLRB No. 154, slip op. at 5 (2016) (employer unlawfully required preconditions to bargain).

At the same time, Richfield had not considered all of the Union's proposals. Richfield emphasizes all of its proposals were discussed. This statement is rather telling as it does not state all of the Union's proposals were discussed. Further, Henry's contradictory testimony reveals that he did not consider the Union's offer in September to be a proposal and ignores what it identified as the open issues, such as health insurance. As I have found that Richfield has not made a clear wage offer and its September 24 bargaining notes reflect that it intended to clarify points, its shift to sticking with its prior proposals and not bargain is evidence of bargaining in bad faith.

Richfield's defenses are unavailing. *Teamsters Local 122*, supra, upon which Richfield relies, is a surface bargaining case that examined negotiations over a 2-year period. Richfield also claims that the parties were so "calcified" that any further negotiations were not warranted. Although this defense smacks of impasse, it never pled impasse in its answer. Although it

[31] The last charge was filed before these events occurred and does not include this specific allegation. Respondent did not include any new defense in its answer to the amended complaint, did not object to presentation of evidence on this matter at hearing and presented evidence in response to the allegation. I find that this allegation of bad faith bargaining is consistent with the course of conduct alleged in the charges and with the §8(a)(5) allegations contained in the initial complaint. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). Accord: *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927, 928–929 (1989).

attempted to adduce information regarding "calcification" at hearing, it never added the defense of impasse. Richfield could hardly claim an impasse, particularly given the unfair labor practices found in this decision.[32]

VIII. SECTION 8(A)(3) ALLEGATIONS INVOLVING GRAHAM BRANDON AND KELLI JOHNSTON

A. Graham Brandon's discipline

Brandon received a second written warning for allegedly failing to call in sick. I will first discuss the applicable law, facts relevant to Brandon's discipline and then provide analysis.

1. Applicable law for Brandon's discipline

Brandon's case requires a "mixed motive" analysis as the possible reasons for Brandon's discipline are both lawful and unlawful. In determining whether adverse employment action is attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Amglo Kemlite Laboratories*, 360 NLRB 319, 325 (2014); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 67 (2d Cir. 2009).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428–1429 (11th Cir. 1985). Because direct evidence of unlawful motivation is seldom available, the General Counsel may rely upon circumstantial evidence to meet his burden. See *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999). A showing of animus need not be specific towards an employee's union or protected concerted activities. *Colonial Parking*, 363 NLRB No. 90, slip op. at 1, fn. 3 (2016). Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc*., 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co.,* 337 NLRB 443, 451(2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect).

Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. *Purolator*, 764 F.2d at 1429.

An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996). An employer must show it consistently and non-discriminatorily applied its disciplinary rules. *Septix Waste, Inc*., 346 NLRB 494, 496 fn. 15 (2006).

2. Facts regarding Richfield's disciplinary action against Brandon

a. Brandon was an active and known union participant

Brandon, an employee at the Marriott Hotel from May 2011 until August 2015, initially held a position as a cook and was promoted on merit to lead cook in 2013. His duties as lead chef included supporting the cook's line during rush periods, running a hot Italian buffet and assisting the head chef. (Tr. 258–259.)

Brandon became a shop steward in 2013. As shop steward, he answered questions about the Union contract and represented coworkers in disciplinary matters. (Tr. 259.). He dealt with management, including the head chefs and front of house managers or supervisors. The head chefs he dealt with included Pascal Presa and Robert Ulrich. Both Presa and Ulrich talked with Brandon about the contract. (Tr. 302.) He became a trustee shortly after he became a shop steward.

Brandon also served on the Union's negotiating committee and attended approximately 10 negotiating sessions, including sessions throughout January and February.

b. Richfield issued a second written warning to Brandon on February 25

On February 25, Chef Ulrich presented Brandon with a second written warning for allegedly not following proper procedure for calling in with an illness. (Tr. 266; GC Exh. 27.) Brandon notified Ulrich by text message on the morning of Monday, February 16 that he was unable to work after exposure to extreme heat on February 15.

On February 15, Brandon began work at 5 a.m. and found the kitchen area extraordinarily hot when he opened it up. He contacted maintenance to relieve the problem, but nothing was done. At about 8:30 a.m., he finally discussed the matter with Chef Ulrich, who wanted to turn off a number of cooking appliances. Brandon insisted that orders had to be completed so the equipment had to remain on. Ulrich left the kitchen to see what could be done about the situation. After Ulrich left, Brandon vomited and then took a break.

Brandon advised Ulrich and a house manager of what occurred. He went to the Room Service desk to take a further break. While he was sitting there, Henry walked by and asked if he was feeling well. Brandon explained why he was sick.

Brandon rested for about 10 minutes before returning to work. He called another cook, who agreed to come in early but did not do so. Instead, Brandon worked until 11 a.m., when the other chef finally came in at his scheduled time. He again became sick

[32] Richfield would have the burden of proof to demonstrate impasse and did little to demonstrate its existence. See generally *E.I. Du Pont de Nemours & Co. v. NLRB,* 489 F.3d 1310, 1315 (D.C. Cir. 2007). *Columbia College Chicago*, 363 NLRB No. 154, slip op. at 5–6.

and vomited. He ran his symptoms through Google, which came back with a diagnosis of heat exhaustion. When Brandon went home, he had a temperature of 102 degrees. Brandon applied ice packs and he said he essentially "passed out" until the next morning.

On February 16, at about 6:15 a.m., Brandon woke up with a 7:00 a.m. shift scheduled. He still felt ill. He directed his son to call Chef Ulrich and his son left a message. Brandon also texted Ulrich about getting another chef to replace him for the day. (Tr. 273.)[33] On February 17, Brandon returned to work without anyone mentioning that he was not present for work the previous day.

On about Friday, February 20, Brandon saw Human Resources Manager Chad Decker around the back line of the kitchen and asked if Henry was available. Brandon said he had heard some rumors he might be disciplined because he had not called in 2 hours before the beginning of the shift. Brandon explained in detail what happened. Decker said to Brandon, "You don't have a pattern of missing shifts or anything of that matter, so I don't feel you should be written up." Decker told him not to worry about it. (Tr. 274–275.)

On Thursday, February 25, Chef Ulrich approached Brandon and told him that Henry wanted a "firm discipline" about his absence on February 16. Ulrich said he would write a "record of conversation." A record of conversation is a coaching tool, usually for a minor mistake. (Tr. 276.) Brandon told Ulrich that as long as it was not discipline, he was comfortable with it. (Tr. 276.)

Shortly after the "record of conversation," Ulrich asked Brandon to come to his office. Ulrich stated that Henry said Brandon could not have a record of conversation but had to be given formal discipline. Ulrich reported to Brandon that Henry said he would write Brandon up himself if Ulrich did not. Ulrich said Henry claimed Brandon had a history of attendance problems. Brandon asked Ulrich if he did and stated he was not aware of any problems. Ulrich said he was not either. (Tr. 277.)[34]

On the same afternoon, Ulrich, with Sophia Stensrud present as a management witness, called Brandon to the office again and presented him with a written discipline form. Although the form had boxes labeled for the level of discipline, e.g., "verbal warning, first written warning, second written warning," none were checked. The form also contained no discipline of discipline. Brandon stated he would not sign the form not only because he did not agree with it, but also because it did not state what level of discipline he was receiving. Ulrich said it was just a first step and asked him to sign the form. Brandon declined to sign the form. (Tr. 277–278). Ulrich presented him with a copy of the discipline. Exhibit 18, p. 11–12 shows discipline was given on February 25, 2015, as a second written warning, not a first written warning.

c. Richfield and the Union hold a grievance meeting

The Union filed a grievance for Brandon. Almost 2 months later, the parties held a meeting about the disciplinary grievance in Henry's office. Brandon, Union President Brandt, Henry and Food and Beverage Director Tyler Kase were present.

Brandt asked why Brandon was issued a final warning. Henry said Brandon had a pattern of absenteeism and showed him a write-up from June 26, 2014. The discipline reflected that Braham allegedly called off too many times and failed to bring a doctor's note when he returned. The period covered was May 2 through June 25, 2014, with Brandon leaving on June 26 to obtain a doctor's note to return to work. (GC Exh. 40.)

Regarding the 2014 write-up, Brandon testified that, during the period, he had an illness and his son hurt his ankle. He had talked to Henry about the May/June 2014 discipline, which had been written up by Chef Pascal Presa and failed to follow the proper protocol. Brandon testified that, 2 days after he had the write-up from Presa, Henry told Brandon that it was off his record. (Tr. 282.) The discipline that Brandon saw showed it was taken down from a final warning to a written warning. (GC Exh. 41.) In addition, when Brandon and Brandt saw it at the grievance meeting, the June 26, 2014 discipline had a notation: "This has been removed from Graham's file." (Tr. 283; GC Exh. 41.)[35]

Brandt asked why the discipline was not in the trash instead of on Henry's desk. (Tr. 284). Brandt also asked for proof of Brandon's attendance problem. Henry said he spoke with a supervisor who said he had an attendance issue. (Tr. 284–285.) Brandon said that was impossible because he did not have an attendance issue and demanded to know who the supervisor was. The meeting ended and Brandon returned to work.

d. After the grievance meeting, Henry directs Chef Ulrich to conduct an investigation into Brandon's attendance history

Within an hour of the grievance meeting, Brandon spoke with Chef Ulrich in his office. Ulrich told Brandon that Henry instructed him to perform a very thorough investigation into Brandon's attendance, check the time clocks and check all of any attendance issues. Ulrich said Henry wanted this information to prove the attendance issue. (Tr. 286.) Ulrich told Brandon that he would do what Henry asked because it was his job, but he did not think he would find anything. (Tr. 286–287.)

Ulrich called Brandon back to his office a few days later. Ulrich reported that he only found a single 15-minute tardy during that time. Ulrich said he would send the attendance record to Henry. (Tr. 287.)

[33] Brandon stated that, for several years, the cooks were supposed to call the Head Chef if they were not able to report to work. (Tr. 279–280.).

[34] Henry testified that Chef Ulrich came to him with concerns about Brandon's attendance and Henry advised him to document it and prepare disciplinary action. (Tr. 553.) Given the details provided by Brandon and his forthright demeanor, I credit Brandon's version. Chef Ulrich and Decker were not called to testify. As both are within Respondent's control, I draw an adverse inference regarding Respondent's failure to call them to testify.

[35] The line labeled "Name of Employee" in GC Exhs. 40 and 41 does not extend as long as the same form for other employees. I compared Brandon's "Employee Performance Discussion" in GC Exhs. 40 and 41 with those of Direen Hodges (GC Exhs. 45(a) and (b)), Daniel McIntyre (GC Exh. 44(b) and (d)) and Travis Allen (GC Exh. 43). Those forms all have employee name lines that are longer. I can only conclude that something was removed before GC Exhs. 40 and 41 were copied for production. GC Exh. 40 also had a notation that was not present when Brandon saw it at the grievance meeting. (Tr. 284; GC Exh. 40.)

e. Richfield and the Union negotiate a settlement of the grievance

Brandon testified that he eventually heard from Union President Brandt that his second written warning was decreased to a first written warning pursuant to a grievance settlement.

Brandon testified he was not present during the grievance settlement meeting and did not believe that he should have been disciplined, particularly in light of Richfield's inconsistent treatment towards others. (Tr. 288.) Henry contended that Brandon was present for the 2015 grievance meeting and that the matter was settled with Brandon's consent. (Tr. 555.) However, the grievance itself only reflects that Brandt agreed and has no evidence that Brandon consented.

f. Disparate treatment evidence

Brandon testified that two cooks had worse attendance records and received less discipline. Neither cook had a role with the Union. (Tr. 292.). The first cook, August Short, was late at least 10 minutes every day and biweekly, was 30 minutes to an hour late. On one occasion, about March 2015, Short showed up an hour and a half late and was intoxicated. Brandon later learned from Chef Ulrich that Short was sent home. (Tr. 288–289.) Brandon, as shop steward, was supposed to receive a copy of any discipline and never received any on Short. (Tr. 289–290.) No documents were produced that reflected any discipline for Short.

The second cook was Derek Kotvazs, who was scheduled to work either 3 to 11 p.m. or 3:30 to 11:30 p.m. Brandon said Kotvazs was late every day between January and March 2014. (Tr. 291–292.) Brandon was unaware whether Kotvazs received discipline for those incidents. (Tr. 292.)

Richfield's disciplinary records reflect that, on November 17, Kotvasz received a "record of conversation" about who would find coverage for a shift scheduled for November 22. However, the discipline also covered events of November 22.

Two incidents occurred with Kotvasz on November 19. The first incident: Kotvasz did not clocked in and started working, then left without telling the manager. For the first incident, he received a first written warning for incidents. This discipline states Kotvasz was warned "multiple times" about such conduct. The second incident involved tardiness of at least 2 hours, again for which he was warned.

Other examples of disparate treatment include:

i. Direen Hodges

Subpoenaed documents show that Richfield initiated discipline against Direen Hodges, a housekeeper, on September 1, 2015. She had five unexcused absences, starting March 28 through July 18, and seven tardies, from March 3 through August 28. For these absences, she received a first written warning.

A discipline on September 8 for Hodges shows that she was supposed to receive the first written warning on September 1 but had an additional no call, no show on August 31 and called for two other shifts within the following week. The discipline now reflected a final warning. On September 23, Hodges was terminated for two consecutive dates of no call, no show. (GC Exh. 45).

ii. Daniel McIntyre

Richfield also gave a "record of discussion" to Daniel McIntyre, a steward, for leaving the kitchen. The document conflicts on the dates of the discussion, stating both January 6 and July 9. A verbal warning for McIntyre was also dated January 21 and given to McIntyre on February 26 for a 4-hour tardy, and then leaving about 2-1/2 hours early.

On July 27, McIntyre incurred another "record of conversation" about leaving the kitchen, noting it was the fourth such conversation in recent weeks on this issue. On August 4, McIntyre received a final warning for sitting in the break room after working for only 15 minutes, then deciding to go home when Eggiman confronted him. The warning noted, "There have been several instances over the past few weeks that Daniel is not in his work area and cannot be located by the chef or a supervisor." On September 28, McIntyre received another final warning for a no call, no show on September 26. This final warning contained a note: "The disciplinary action to be taken in each case shall be determined by human resources." (GC Exh. 44.)

On November 5, McIntyre was ultimately terminated. The termination was caused by four further incidents of failing to report to work and leaving work without permission. (GC Exh. 44(f).)

iii. Alyse Moore

Moore, a housekeeper, during her first 60 days of employment, received a "record of conversation" dated December 9, 2014. The record of conversation included "two unexcused call offs" in the previous month. She also was not following dress code standards and had twice improperly used a cellular telephone while working. (GC Exh. 38.)

On June 19, Moore received a first written warning for a no call, no show on June 6. She had a call off on May 3, plus two tardies on May 2 and June 5. This form included the language that discipline would be determined by human resources. However, the form also said that she would need to be free of attendance issues for the following three months. (GC Exh. 38.)

iv. Ray Allen

On December 15, Housekeeping Manager Crystal Adcox wrote a "record of discussion" on Allen, who had been rehired on November 23 as a room attendant. Richfield placed a condition upon Allen's rehire: Unlike her previous period of employment, Allen was required to maintain good attendance during the first 90 days of employment. Within the first 3 weeks of returning to employment with Richfield, Allen called off on 3 separate days, including her third day of employment. She was 30 minutes tardy on her second day of employment. She also left early on December 6 and 7 due to "personal issues." (GC Exh. 38(k).)

v. Richfield's evidence regarding disciplinary action for others

Richfield also presented a first written warning for Katrina Welling, a housekeeper, who called in absent three times within a week. For two of the absences, Welling had no babysitter; the third day was due to a flat tire. (R. Exh. 7).

On November 21, Richfield had a record of conversation with Tamra Hutton. She called in sick on October 24, 25, and 26 and on November 13 and 14. She was reminded to call in 2 hours or more before the shift and speak with a manager. She also was reminded not to use social media to call in. (R. Exh. 9.)

Richfield presented a number of terminations for "no call no show" absences. However, it did not present the entire disciplinary history on these employees and I find that these have little similarity to the current allegations concerning Brandon.

3. The parties' positions and credibility determinations

General Counsel contends that Richfield's actions were motivated by antiunion animus. In support of this theory, General Counsel identifies timing, disparate treatment and the late investigation as evidence of Richfield's pretextual issues. Enforcing rules against an employee that are usually not enforced is a violation of Section 8(a)(3). *New Orleans Cold Storage & Warehouse v. NLRB*, 201 F.3d 592, 600 (2000), enfg. 326 NLRB 1471 (1998).

Richfield's brief contends Brandon never called in on the day in question and that he had a history of attendance disciplines. Richfield argues that the record contained no credible evidence that Brandon's discipline was related to antiunion animus. Richfield cites no case law and fails to deal with disparate evidence, despite the documents it produced to General Counsel at the hearing, or changes in the documents to which Brandon testified. In the alternative, Richfield suggests that the grievance settlement precludes any finding of an unfair labor practice as the matter is resolved.

In assessing the credibility of the witnesses, neither Chef Ulrich nor Chad Decker were called by Richfield to testify. Decker made an admission against Richfield's interest regarding Brandon's attendance history and likelihood of discipline. As previously noted, Richfield failed to call witnesses within its control, which leads to adverse inferences. Henry also did not dispute that he saw Brandon while he was ill from the heat.

4. Deferral to the grievance settlement is not appropriate

Richfield suggests that the settlement of Brandon's grievance is sufficient, although it never invokes deferral. Therefore, a threshold issue is whether to defer to the parties' grievance-arbitration procedure. *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 17 (2015); *United Hoisting & Scaffolding, Inc.*, 360 NLRB 1258, 1261 (2014).

Richfield never pled an affirmative defense of deferral in its answer or at hearing. The facts regarding the settlement were presented during the hearing but Richfield never amended its answer to include this affirmative defense. In its brief, Richfield also does not use the term "defer" or cite any case law. However, it contends that the grievance settlement is binding because the parties dealt with the same factual dispute and issues, such as whether Brandon had failed to call in and the weight to be given to his prior record. Although facts surrounding the grievance settlement were presented at hearing, I cannot consider Richfield's argument because deferral is an affirmative defense that must be timely raised in the answer to the complaint or at trial. *Columbia Memorial Hospital*, 362 NLRB 1256, 1259 fn. 3 (2015), citing *Babcock & Wilc*ox, 361 NLRB 1127, 1136 (2014) and *SEIU United Healthcare Workers West*, 350 NLRB 284 fn. 1 (2007).[36]

5. Wright Line analysis regarding Brandon

Regarding union activity and employer knowledge of that activity, Brandon was an active shop steward as well as a negotiating committee member. He attended negotiating meetings, including those in January, where Henry was in attendance.

As noted previously, antiunion animus may be established by Richfield's reasons for issuing a second warning to Brandon are pretextual. Richfield did not enforce its attendance policies consistently. Hutton called in five times within a month and may have had the same issue identified with Brandon—use of a text message to notify a supervisor of an absence. The attendance records, overall, also reflect more enforcement after February, and most were issued closer to the hearing. One example is Ray Allen, who was rehired on the condition of maintaining good attendance within her first 90 days of employment, yet within the first 30 days, she accrued five absences and left early. Additionally, Kotvasz's disciplinary actions essentially begin in earnest in November and do not reflect a period in which Brandon was advised of any disciplines.

Decker told Brandon he should have nothing to worry about on his attendance. Then Ulrich told him that he had to give him discipline. The "leap frog" of Richfield's disciplinary action, going to a second written warning when it already told Brandon that it removed discipline from his file and "not to worry about" the call-in during February, also demonstrates Richfield's animus. *Colonial Parking*, 363 NLRB No. 90, slip op. at 9.

After the first grievance meeting, which occurred 2 months after the second written warning was issued, Ulrich told Brandon that Henry wanted him to make a thorough investigation into Brandon's attendance. I find that Chef Ulrich made an admission against interest when he told Brandon that Henry told him to find more attendance violations on Brandon. The shift in Richfield's position towards Brandon's February absence and Henry's plan to closely examine Brandon's attendance records 2 months after discipline was issued reflect Richfield's plan to find additional reasons to justify its disciplinary action. *Enjo Architectural Millwork*, 340 NLRB 1340 fn. 2 (2003) (failure to call witness and shifting reasons for employer's action, among other factors, establish antiunion animus).

[36] Respondent cites no case law for its position. However, the correct standard for evaluating a prearbitral grievance settlement requires that settlement agreements be reviewed pursuant to *Independent Stave Co.*, 287 NLRB 740, 743 (1987). *Babcock & Wilcox*, supra. If Richfield had pled deferral as an affirmative defense, the grievance settlement is insufficient by *Independent Stave* standards. One of the factors to consider is whether the discriminatee and General Counsel agree to be bound. *McKenzie-Williamette Regional Medical Center Association, LLC*, 361 NLRB 54, 54 (2014). Brandon credibly testified he was not a party to the settlement. General Counsel could not have been a party to the settlement because the charge was not yet filed. In addition, I cannot substitute my judgment and say that Respondent could have given a lesser form of discipline and leave the grievance settlement intact. See generally *Yellow Ambulance Services*, 347 NLRB 804, 805–806 (2004). Another *Independent Stave* factor is whether Respondent has breached previous settlement agreements. *McKenzie-Williamette*, supra. Given the evidence regarding Respondent's failure to remove certain discipline from Brandon's file, remedying the unfair labor practice violation is necessary to ensure that the 2015 discipline is removed from Brandon's file. See generally *Krist Oil Co., Inc.*, 328 NLRB 825 (1999). Generally, *Valley Material Co.*, 316 NLRB 704,708–709 (1995) (deferral not warranted if settlement repugnant to the Act).

The additional investigation, initiated after the disciplinary action and grievance meeting, shows that Richfield did not conduct a thorough investigation. The events instead show at best a limited investigation and a tardy reliance upon discipline that was supposed to be removed from Brandon's file. Discriminatory intent may be seen when an employer fails to conduct a meaningful investigation or to give an employee an opportunity to explain. *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 860 (2006).

Richfield also must demonstrate that it would have disciplined Brandon for legitimate reasons and actually did so. Richfield's treatment must show like discipline for like offenses. *Marathon Le Tourneau Co., v. NLRB*, 699 F.2d 248, 252–253 (5th Cir. 1983), enfg. 256 NLRB 350 (1981). Richfield "cannot claim it treated employees with extensive histories of absenteeism and tardiness but who were not recognized union sympathizers, the same way it treated" Brandon. *Feldkamp Enterprises, Inc.*, 323 NLRB 1193, 1202–1203 (1997). Compared to other employees, Brandon was treated disparately. The most egregious documented examples were Moore and Allen, particularly as Allen was rehired despite poor attendance. The evidence shows that, overall, Richfield's enforcement of absenteeism rules was hit and miss. Most of the absence discipline provided by Richfield occurred after Brandon's discipline. Others were treated with more lenience compared to Brandon.

In light of Richfield's disparate treatment, additional investigation, admissions against interest, and shifting reasons, Richfield had pretextual reasons for discipline.[37] If a proferred reason for discipline is pretextual, an employer cannot establish a *Wright Line* defense. *Relco Locomotives*, 358 NLRB 229, 229 (2012), enfd. 734 F.3d 764 (8th Cir. 2013). Because these actions are pretextual, I find that General Counsel has carried its burden of proof and Richfield cannot establish a *Wright Line* defense. The disciplinary action against Brandon violated Section 8(a)(3).

B. Kelli Johnston and Her Attempts to Work More Hours

1. Applicable law

Johnston allegedly was precluded from working more hours at the Crossings Bar as a bartender and working in housekeeping as a house person. Denial of "overtime" or more hours constitutes an unfair labor practice when motivated by an employee's prounion stance. See generally *Marathon LeTourneau Co.*, 699 F.2d at 254–255. In reviewing these allegations, a refusal to assign additional hours is analyzed as a refusal-to-hire allegation. *Casino Ready Mix*, 335 NLRB 463, 464 (2001), enfd. 321 F.3d 1190 (D.C. Cir. 2003). The analysis is based upon the following elements:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

Casino Ready Mix, 335 NLRB at 464, citing *FES*, 331 NLRB 9, 12 (2000).

The parties' burdens of proof are similar to *Wright Line*, supra. *Casino Ready Mix*, 335 NLRB at 464. In reviewing these allegations, I first discuss Johnston's employment and union history, the facts regarding the bartender and the houseman allegations, and then provide analysis.

2. Johnson's employment history and union activities

Johnston has worked as a banquet server at the Rochester Marriott and the Kahler Grand Hotel for 16 years. She averaged 1,000 hours per year. Her schedule includes working night shifts. Her duties as a banquet server include setting up for special reserved parties, serving the meal and cleaning up the room. She also works as a senior bartender for the banquet department. (Tr. 313–314.)

Johnson is an active union member. She is the Union's vice president, a position she held for the past 2 years. She also had served as a trustee for 2 years before she was appointed as vice president. As vice president she attends monthly board meetings and assesses finances of the Union. She also is a shop steward, which she performed for 5 years. As shop steward, Johnston answers employee questions and serves as the union representative during possible disciplinary meetings. For 2015, she served on the Union's negotiating committee and attended 11 negotiation sessions with Richfield, including ten sessions in January through April.

3. Johnson attempts to work extra hours at the Crossings Bar

a. The Crossings Bistro and Bar has an opening for a bartender

Ericka Scrabeck is the food and beverage manager at the Crossings Bistro and Bar at the Kahler Inn and Suites. Scrabeck testified that she had work for bartending because a full-time bartender was leaving on vacation for a month, beginning February 27. (Tr. 589.) She attended a weekly food and beverage manager meeting for all the food and beverage managers with Food and Beverage Director Tyler Kase. The managers included the banquet managers. (Tr. 590.)

At a meeting before February 27, Scrabeck testified she said she would need someone to fill in the bartender position as soon as possible. (Tr. 590.) Kate Uuland, the banquets manager, said she might have some interested people. (Tr. 591.) Scrabeck testified that Uuland told her about Johnston and said Johnston had not worked in a regular bar environment for some time, so she might be rusty. (Tr. 592.)

b. Johnson applies for work at the Crossings as a bartender

Johnston testified that, in January, she desired to work more hours because the banquet department was slow. She spoke with her manager, Kate Uuland. Uuland advised that she speak with

[37] Additional evidence of antiunion animus is demonstrated by further unfair labor practices found below, including, but not limited to, discontinuing longevity pay increases in early February.

Scrabeck. The following day after her conversation with Uuland, Johnston went to the Crossings Bar and spoke with Scrabeck, who said the bar has some available shifts. Scrabeck assigned her a bartending shift for the following Monday during the day. Johnston did not fill out any transfer paperwork and was not instructed to do so. However, Johnston's personnel file contained a personnel action form (PAF), dated January 28, 2015, which approved her to work hours at the Crossings Bar. (GC Exh. 33). Scrabeck denied that the form could have been completed in January because she had no shifts at that time. (Tr. 602.) However, the form was initialed by the department head with a "K" and by Henry.[38]

Scrabeck testified that she assigned Johnston a daytime shift that lasted approximately 1 hour. The bar was not busy, and Johnston served one to two tables. (Tr. 593.)

After Johnston worked the bartending shift, Uuland told her that she had received an email with positive remarks about her performance. However, Johnston never received any further shift assignments at the bar.

Scrabeck also assigned bartending work to Derek Shot. She gave Shot a full night shift and found that he worked well. After Shot's shift, she spoke with him about his availability, which was a conversation she did not have with Johnston. (Tr. 604.) She assigned Shot approximately three to five shifts while the regular bartender was on vacation. (Tr. 596.) Shot was not a member of the Union's bargaining team.

During a break in negotiations on February 26, Johnston spoke privately to Food and Beverage Manager Tyler Kase about obtaining extra shifts at the Crossings Bar. Kase said he would speak to the manager in charge whether hours were available.

On February 27 and March 9, Johnston sent Scrabeck text messages about the extra shifts. Johnston apparently had the wrong telephone number and the texts were not received. Johnston sent the March 9 text message when she learned that another employee, Derek Shot, was working extra bartending hours at the Crossings Bar. Shot was not a member of the Union's bargaining committee.

Johnston and Kase were at a negotiation session together. Johnston again spoke with Kase during a break from negotiations and stated Shot was working the hours at the bar. Kase said she did not get any hours because she was not willing to work night shifts. Johnston denied to Kase that she said she would not work night shifts. In fact, she worked nights as a banquet server at the Marriott.

Scrabeck testified that she was a new manager and denied knowledge of Johnston's union activities. (Tr. 588, 597.) She said she had a "gut feeling" about her, despite a good performance early in the day. She did not speak with Johnston about her other experience. Despite having no conversation about availability, unlike Shot, Scrabeck testified that Johnston could only work a short time and could not work later.

c. Johnston's bartending experience

Richfield questioned Johnston about the range of liquors she served as a bartender at the Crossings Bar compared to what she served in banquets. At the bar, the range of liquors and mixed drinks was more diverse than in banquets bar, where she usually worked a smaller, portable bar with fewer drinks. However, Johnston testified that she also worked as a bartender for 26 years, most of which she spent tending a full bar. (Tr. 327, 336.)

4. Johnston attempts to find extra hours as a houseman

a. The housekeeping department had an opening for a houseman and Johnston applies

About early April, Johnston heard Marriott housekeeping posted an opening for a house person. She contacted the housekeeping manager, Crystal Adcox. They spoke in the housekeeping area about the position. Adcox explained what the position entailed, including physical requirements. (Tr. 627.) Adcox said it would be great as she had people working overtime and instructed her to complete a piece of paper requesting hours in a different department.[39] Johnston testified that she completed the paperwork in human resources and turned it in. (Tr. 324.) Although Costello admitted that Johnston picked up the form in the human resources department, Costello and Henry denied Richfield received a completed transfer form.

b. Nothing happens with Johnston's application

On April 6, Costello emailed Adcox. Costello wrote:

> Kelli came over here saying that she is going to start training for a housemen position. Is that correct? I filled out a PAF for a secondary job code. Is that what you need for me to do?

(GC Exh. 34.)

Adcox responded: "If you feel she would be a good candidate. I had some attitude issues with her in banquets . . . ." (GC Exh. 34.) Costello testified she did not respond to Adcox's remarks and about 1 month later, forwarded the email chain to Henry. (Tr. 623.) Adcox testified that she and Costello verbally discussed the need for a transfer form before Adcox could interview Johnston. (Tr. 635.)

Adcox testified that she did not take any action because she was waiting for a transfer form that would have been approved by her manager. She did not receive the PAF from Costello either. (Tr. 628, 630.) I do not credit Costello and Adcox's explanations as something triggered Costello completing the PAF and neither stated in the email discussion that they needed a completed transfer form. Costello also failed to testify about the verbal discussion with Adcox about the transfer form.

About 2 weeks after Johnston completed her form in the human resources department, Johnston spoke with a house person, Zach, who asked her why she had not been trained yet and that

[38] Costello testified that the initials were Manager Uuland and an assistant in the human resources office, Mandy Cutshall. However, I credit Scrabeck's recognition of Henry's initials because they are similar to those on other exhibits and the box calls for "Director of HR."

[39] Adcox testified she told Johnston to go to the human resources department but did not say anything about completing paperwork. (Tr. 628.)

he was working overtime. (Tr. 325.) Johnston never received any hours as a houseman in housekeeping. (Tr. 326.)[40]

c. Reasons why Adcox did not pursue Johnston for a position

Adcox denied hearing any complaints from Johnston's manager or hearing Johnston discussing wages or the collective-bargaining agreement. She testified she was concerned about what Johnston could offer the housekeeping department, "if she was going to come in with a positive attitude, motivating our team and . . . being in a happy environment." (Tr. 640.)

Regarding the claim that Johnston had "attitude issues," Adcox said she also observed Johnston when she brought food to the housekeepers and talked with them. Adcox said she did not hear the conversations Johnston had with the housekeepers. Adcox did not observe Johnston while she worked banquets or see how she interacted with customers. (Tr. 638.)

Adcox was questioned about what "attitude" meant in the April 6 email. (Tr. 632.) Adcox testified that she based her opinion on attitude was "the last one": Adcox said Johnston interrupted a meeting she was having with her team, which included stretching to music. (Tr. 633). Adcox said Johnston walked in, displayed body language, and told them to be quiet and shut the door. (Tr. 633–634.) Despite identifying this incident as "the last one," Adcox could not recall any other incidents involving Johnston. (Tr. 634.)

5. Henry's investigation for Johnston's desire for more hours

Henry testified that he conducted an investigation into Johnston's requests for more hours. He generally said that in speaking with the parties, "she wasn't getting hours, because it seemed as if she didn't want the hours." (Tr. 556.) Nothing indicates that Henry spoke to Johnston about the positions.

Regarding the houseman position, Henry said Johnston failed to complete transfer paperwork, which would be necessary for the hiring manager at the hotel to conduct an interview and determine whether an applicant should be hired. (Tr. 557.) Henry denied that Johnston's union activity had anything to do with Johnston not receiving additional hours of work.

I credit Johnston as she made it obvious by her interest in these positions that she was interested in more hours. As a current employee of Richfield, his testimony is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). I do not credit Henry's testimony regarding his investigation of Johnston's requests. The testimony was not specific when the investigation was conducted or who told him that Johnston was not interested in more hours. Indeed, the lack of desire for more hours sounded like some made-up excuse to deny her hours.

Johnston also denied making any statement that she was not available for more hours. In addition, much of the banquet work Johnston performed was in the evening, so it is difficult to believe that she was not interested in evening hours. Further, had she not been interested in gaining more hours, she would not have sought out Adcox about the posted houseman position. Richfield's belief that she was not interested in additional hours appears to be greatly mistaken.

6. Analysis regarding Johnston's attempts to work more hours

a. Bartender

In applying the three-step analysis similar to *FES*, supra, Richfield had an opening for a bartender to cover shifts at the Crossings. Richfield's attempts to show that Johnston did not have sufficient experience are unavailing. Scrabeck admitted that she did not discuss the job in any detail with Johnston. It appears that Scrabeck could not have known what bartending experience Johnston had and made assumptions based upon her experience tending bar in banquets.

Nothing supports Richfield's ideation that Johnston was not interested in obtaining additional shifts or working evenings as a bartender. Scrabeck testified that she did not talk to Johnston about her availability. However, at hearing and in its brief, Richfield claims that Johnston said she was not available for evening shifts. Food and Beverage Manager Kase, who served on Richfield's bargaining committee and was not called to testify, also told Johnston that she did not receive shifts because of lack of availability during the evenings and Johnston told him that she was indeed available. Johnston therefore made a sincere effort to obtain more shifts as a bartender. See *Jeff McTaggert Masonry, LLC*, 363 NLRB No. 149, slip op. at 1 fn. 1 (2016). Richfield's reason shows animus and pretext: It could not have known about Johnston's availability because Scrabeck admitted she did not speak with her about it.

Scrabeck assigned Johnston only to a day shift and did not obtain a valid comparison with Shot's performance on an evening shift. In addition, Scrabeck said she had a gut feeling about her. This nebulous explanation provides no specific reason why Johnston could not have been selected, nor did Richfield provide any evidence it spoke with Johnston about her supposed lack of qualifications. *Lemay Caring Center*, 280 NLRB 60, (1986), affd. sub nom. *Dasal Caring Centers v. NLRB*, 815 F.2d 711 (8th Cir. 1987) (table) (employer's failure to articulate a definite standard and relying on "gut feelings" raises a suspicion that the motives are discriminatory).

Animus towards Johnston need not be specific. *Colonial Parking*, 363 NLRB No. 90, slip op. at 1, fn. 3. In addition to Scrabeck's reliance on her "gut feeling," Kase and Henry served on the negotiating committee and were aware of Johnston's union activities. Henry performed a sham investigation in which he did not speak with Johnston. Because I find Richfield advanced reasons that did not exist and could not be relied upon, it cannot show it would have taken the action without her protected activities. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6–7 (2016). Because Johnston applied for an open position, was qualified and was denied the bartending position due to Richfield's animus and pretextual reasons, I find that Richfield violated Section 8(a)(3).

[40] Throughout negotiations Richfield bemoaned how tight the labor market was in Rochester. The bargaining notes reflect that it was recruiting in Detroit for positions such as housekeeping.

b. Housekeeping

Richfield's brief discusses nothing about Johnston's attempt to work as a houseman in housekeeping.

Housekeeping had an opening for a houseman that was posted. Johnston spoke with Adcox about the position and applied. Although Adcox and Costello failed to process her application, an employee told Johnston that he was still working overtime, so the position still existed. Costello was familiar with Johnston's role with the union negotiations, which were taking place during this time.

Several facts lead to a conclusion that Richfield's reasons for failing to offer the houseman position to Johnston are pretextual. Those facts include: use of the term "attitude" in Adcox's email, the failure to check with Johnston's manager about her performance or observe her performance; Costello's knowledge of Johnston's union activity; the failure of Costello's email or Adcox's reply to indicate a need for a transfer form; and again, Henry's incomplete investigation.

Adcox could only cite one incident that led her to believe that Johnston had an "attitude." A term like "attitude" is often a code words for union activity. *Intercon I (Zercon)*, 333 NLRB 233 (2001) ("negative attitude" as code word for union support); In re *Phillips Petroleum Co.*, 339 NLRB 916, 924 (2003) (judge's discussion on use of term "troublemaker"); *Waste Stream Management*, 315 NLRB 1099, 1132 (1994) (employer did not show that it relied on "bad attitude" to terminate an employee before the discriminatee).

Shortly after Johnston expressed interest in the job, Adcox was in close contact with Costello, who served on the negotiating committee and typed the bargaining notes. Costello did not deny that she was aware of Johnston's most recent union activities.

As with the bartending position, Henry's investigation was incomplete as he apparently did not speak with Johnston and presumed she did not want the hours. This presumption was false.

The explanation is also pretextual because Costello's email does not reflect the need for a transfer form but instead states she completed the personnel action form (PAF) and asked if Adcox needed anything else. However, Costello testified that she never received a transfer form, which was required, but Costello asked Adcox if she needed anything else. Because something triggered Costello to complete the PAF and Adcox never said that she needed the transfer form and Costello did not say she needed one as well, I find that Richfield unjustifiably relied upon the supposed lack of a transfer form. These positions are contradictory and indicate pretext as well. As found with the bartender position, Richfield fails to show it would have taken the same action absent Johnston's protected activities. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op at 6–7.

General Counsel has demonstrated a prima facie case and Richfield again did not demonstrate anything but pretextual reasons for failing to hire Johnston in the houseman position. I therefore find that Richfield failed to hire Johnston for the houseman position in violation of Section 8(a)(3).[41]

CONCLUSIONS OF LAW

1. Respondent Richfield is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

4. At all material times, the Union has been the exclusive representative of the employees in the above-described appropriate unit, for the purposes of collective bargaining with respects to wages, rates of pay, hours of employment, and other terms and conditions of employment.

5. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by:

(a) Telling employees they could have raises if their collective-bargaining representative signed a new collective-bargaining agreement;

(b) Telling the union representative, in the presence of employees, to leave the premises;

(c) Removing postings from company bulletin boards.

6. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by:

(a) Disciplining Graham Brandon;

(b) Refusing to assign additional work hours as a bartender and a houseman to Kelli Johnston;

(c) Discontinuing longevity pay increases provided in the Sunstone collective bargaining agreement, Appendix A.

7. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by:

(a) On February 28, 2015 and thereafter, unlawfully discontinuing longevity pay increases contained in the Sunstone contract, at Appendix A, without notifying the Union or negotiating to impasse;

(b) Unilaterally discontinuing the past practice of visitation for a union representative on hotel properties, without notifying the Union or negotiating to impasse;

(c) Unilaterally discontinuing the past practice of allowing the Union to post notices on Respondent bulletin boards, without notifying the Union or negotiating to impasse;

(d) Proposing confusing terms and conditions of employment with the intent to stall negotiations;

(e) Failing to explain the union leave proposal sufficiently;

(f) Since November 11, 2015, refusing to collectively bargain upon request with the Union.

8. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Act was not violated in any other way.

[41] Respondent asserted other affirmative defenses, including an untimeliness defense under Section 10(b) of the Act, in its answer to the complaint. I have rejected most of Respondent's affirmative defenses by my findings and conclusions above. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.,* 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Section 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its other affirmative defenses, including its 10(b) defense at the hearing and the affirmative defenses were not raised in Respondent's brief, I will not address them further.

REMEDY

Having found that Respondent Richfield has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to hire Kelli Johnston for bartending and houseman positions, Respondent will offer her instatement and make her whole for its unlawful conduct against her. The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), petition for review dismissed 561 F.3d 497 (D.C. Cir. 2009). Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Having found that Respondent unlawfully discontinued longevity pay increases, it must make the employees whole for any loss of earnings and other benefits suffered as a result of its unlawful unilateral change and its unlawful discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these finding of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The National Labor Relations Board order that Respondent, Richfield Hospitality, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercing employees by telling union representatives, in the presence of employees, that the union representative cannot be in non-working areas of the facility;

(b) Issuing discipline to employees because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity;

(c) Refusing to give employees additional hours because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity;

(d) Refusing to bargain collectively with the UNITE HERE International Union Local 21, as the exclusive representative the employees of the bargaining unit;

(e) Failing or refusing to provide information requested by the Union, that is necessary for and relevant to the Union's performance of its duties as the exclusive bargaining representative of the bargaining unit;

(f) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying or giving the Union an opportunity to bargain about those changes, including but not limited to:

i. Longevity pay increases;

ii. Access to the facilities by union representatives

iii. Posting on company bulletin boards by union representatives and employees

(g) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement;

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, upon request, bargain with UNITE HERE International Union Local 21 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, as agent for The Haler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn and Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc. as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

(c) Make whole its employees for any losses incurred as a result of its unlawful unilateral changes made in the terms and conditions of their employment, including the elimination of the longevity pay increases contained in the Sunstone contract at Appendix A. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(d) Within 14 days from the date of this Order, rescind the unlawful discipline given to Graham Brandon, without prejudice to his seniority or other rights or privileges previously enjoyed, and within 3 days thereafter, inform him in writing that this has been done and that the discipline will not be used against him in any way.

(e) Within 14 days from the date of this Order, having found that the Respondent unlawfully refused to hire Kelli Johnston for bartending and houseman positions, Respondent will offer her instatement and make her whole for its unlawful conduct against her. The duration of their backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc*., 349 NLRB 1348 (2007), petition for review dismissed 561 F.3d 497 (D.C. Cir.

[42] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2009).[43] Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(f) Compensate all employees and discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143, slip op. at 1–2 (2016).

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designed by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stores in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Rochester, Minnesota, copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 28, 2015. Due to Respondent's high turnover, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by Respondent at any time since February 28, 2015. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed any of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 28, 2015.

(i) Within 21 days after service by the Region, file with the Region Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent have taken to comply.

Dated, Washington, D.C. May 27, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that we discontinued the longevity pay increase because the Union has not signed a contract.

WE WILL NOT tell your union representative, in your presence, that she may not access the facility and is being removed.

WE WILL NOT prevent access to our facilities by Union Representative Linda Henry, who sought access to our facilities for the purposes of collective bargaining.

WE WILL NOT remove Union or employee postings on company bulletin boards.

WE WILL NOT discipline you, withhold longevity pay increases, refuse to give you extra hours, or otherwise discriminate against you because you engaged in activities in support of UNITE HERE International Union Local 21, or any other labor organization.

WE WILL NOT unilaterally change our practice of allowing union representatives access to the hotels to post union notices or to talk to you without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally discontinue longevity pay increases without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively and in good faith by failing to provide to the Union information that is relevant and necessary to the performance of their duties as the exclusive collective-bargaining agent of the bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, upon request, bargain with the Union about wages, hours, and terms and conditions of employment.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, including longevity pay increases, union access to the facilities, and union posting on company bulletin boards, notify, and upon

[43] Although this Order provides for instatement, the instatement award is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that Johnston would still be employed in each position had she not been a victim of discrimination. *Oil Capitol Sheet Metal*, 349 NLRB at 1354.

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

request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn and Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc. as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request of the Union, restore, honor, and continue your terms and conditions of employment set forth in the collective-bargaining agreement with the Union that expired on February 28, 2015, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL, upon request of the Union, reinstate the longevity pay increases stated in the expired Sunstone collective-bargaining agreement.

WE WILL make employees whole for any loss of earning and other benefits suffered as a result of our unlawful rescission of longevity pay increases.

WE WILL compensate the above-stated employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award for longevity pay increases, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL rescind the unilateral change in the parties' practice to allow union representatives access to our facilities.

WE WILL rescind the unilateral change that removed postings from the bulletin boards in non-public areas and WE WILL allow union postings on company bulletin boards.

WE WILL allow Union Representative Linda Henry access to the hotel facilities for purposes of union and collective-bargaining activity.

WE WILL make employees and former employees whole, with interest, for any and all loss of wages and other benefits incurred as a result of our unlawful discontinuance of the longevity pay increases.

WE WILL, upon request, provide the Union with necessary and relevant information.

WE WILL, within 14 days from the date of this Order, offer Kelli Johnston employment as a bartender and a houseman, who would have been employed in these position but for our unlawful discrimination against her, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileged previously enjoyed, discharging if necessary any employees hired in her place.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful refusals to hire regarding Kelli Johnston, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that our unlawful refusals to hire her will not be used against her in any way.

WE WILL make Kelli Johnston whole for any losses sustained as a result of our unlawful failure to hire, plus interest compounded daily.

WE WILL compensate Kelli Johnston for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay award to the appropriate calendar year.

WE WILL remove from our files any reference to the unlawful discipline of Brandon Graham and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

RICHFIELD HOSPITALITY, INC. AS MANAGING AGENT FOR KAHLER HOTELS, LLC

This decision can be found at www.nlrb.gov/case/18-CA-151245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.