UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HTH CORPORATION, PACIFIC BEACH CORPORATION and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL and HTH CORPORATION d/b/a PACIFIC BEACH HOTEL and KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL and PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142	Case 37-CA-07311 37-CA-07334 37-CA-07422 37-CA-07448 37-CA-07458 37-CA-07470 37-CA-07472 37-CA-07473 37-CA-07476 37-CA-07478 37-CA-07482 37-CA-07484 37-CA-07488 37-CA-07537 37-CA-07550 37-CA-07587

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

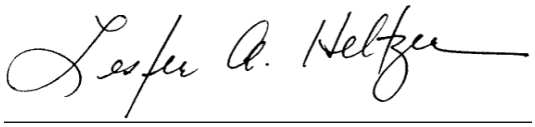
A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., **September 30, 2009.**

By direction of the Board:

Lester A. Heltzer



Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations appearing on the pages attached hereto. **Note particularly the limitations on length of briefs and on size of paper, and that requests for extension of time must be served in accordance with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570, on or before **October 28, 2009.**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

HTH CORPORATION, PACIFIC BEACH CORPORATION and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL

Cases 37–CA–7311
37–CA–7334
37–CA–7422
37–CA–7448
37–CA–7458
37–CA–7476
and 37–CA–7478
37–CA–7482
37–CA–7484
37–CA–7488
37–CA–7537
37–CA–7550
37–CA–7587

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

and Case 37–CA–7470

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

and Case 37–CA–7472

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL

and Case 37–CA–7473

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142

Dale K. Yashiki and *Trent K. Kakuda,* Honolulu, Hawaii, for the General Counsel.
Wesley M. Fujimoto and *Ryan E. Saneda*, of *Imanaka, Kudo & Fujimoto*, Honolulu, Hawaii, for Respondents

*Danny J. Vasconcellos (*with *Herbert R. Takahashi* and *Rebecca L. Covert* on brief), of *Takahashi, Vasconcellos & Covert*, Honolulu, Hawaii for the Charging Party.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: [1] This case was tried before me in Honolulu, Hawaii over 13 hearing days beginning November 4, 2008 and closing on February 27, 2009. The amended consolidated complaint, issued on September 30, 2008 by the Regional Director for Region 20 of the National Labor Relations Board is based upon original unfair labor practice charges filed by International Longshore and Warehouse Union, Local 142 (the Union) on various dates between January 22, 2007 and May 15, 2008. Many were amended along the way; the last amendment occurring on August 29, 2008. The amended consolidated complaint (the Complaint) alleges that Respondents HTH Corporation, Pacific Beach Corporation and Koa Management have violated §8(a)(5), (3) and (1) of the National Labor Relations Act. Respondents deny the allegations. [2]

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. All parties have filed briefs which have been carefully considered. Based upon the entire record of the case, [3] as well as my observation of the witnesses and their demeanor, I make the following:

I. Findings of Fact

a. Jurisdiction

There are three Respondents in this matter and their relationship is under scrutiny here. The first is HTH Corporation, which in many respects serves as a parent or holding company of the Pacific Beach Hotel. The second, a subsidiary of HTH, is Pacific Beach Corporation (PBC) which operated the Hotel before January 2007 and resumed operating it in December of that year. Finally, there is Koa Management, LLC which was created by HTH to satisfy the requirements of a lender, the UBS Bank, as the Hotel had become collateral for a loan to HTH.

The complaint alleges that all three entities are engaged in interstate commerce. Respondents admit that the hotel as a business entity, and therefore HTH and PBC, have gross revenue exceeding $500,000 and purchase products, goods and materials valued in excess of $5000 which originate outside the state of Hawaii. They therefore admit that PBC, at least is an

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[1] The first six volumes of the transcript erroneously described me as an attorney hearing officer connected to the San Francisco Regional Office. That description is not correct. The court reporter's errata on page 998, the fourth page of volume VII, more properly described me as "Judge." Moreover, my branch, part of the Division of Judges, is not in any way connected to the Regional Office.

[2] Given the large number of amendments, the General Counsel, for the convenience of the parties, issued a “Complaint Conformed to Reflect All Amendments as of January 13, 2009.” GCExh. 1(rrrr). That document is convenient to use as the operative complaint.

[3] The General Counsel’s motion to correct the record is granted.

employer engaged in interstate commerce within the meaning of §2(3), (3) and (6) of the Act. However, they deny that HTH and Koa Management are employers within the meaning of the Act, since they don't directly employ anyone.

Below, I will sort out the various relationships that HTH, PBC and Koa all have with one another, but for purposes of jurisdiction over this matter it suffices to observe that the Hotel is clearly engaged in interstate commerce and meets the Board's retail industry standards for the assertion of jurisdiction.

In addition, there is a fourth business entity which should be identified at this stage. This is a hotel management company known as Pacific Beach Hotel Management or simply PBHM. PBHM was specially created for the purpose of directing the operations of the Pacific Beach Hotel under a contract with HTH/Koa. It was owned by The Outrigger Enterprises Group. Outrigger owns, among other things, the Outrigger and Ohana hotel chains in Hawaii and some Pacific Islands. It is independent of the HTH entities.

b. Background

The Hotel is a large 837 room hotel in Waikiki. Taking up most of the city block bounded by Kalakaua, Liliuokalani, Kuhio and Kealohilani Avenues, it consists of one 38 floor tower (the Ocean Tower on the Kuhio side) and one 17 floor tower (the Beach Tower, facing Kalakaua). The towers are connected by a lower central building accommodating the main entrance, a shopping mall, several restaurants, and the Oceanarium, a large multi-story salt-water fish tank which can be viewed from restaurants on three different floors. The central section also houses meeting rooms on the third floor and a multifunction room on the seventh floor. Finally, there is a large parking structure topped by a tennis court located on the Kuhio Avenue side.

The Union's organizing drive was begun in 2002 at a time when the business was in the hands of Herbert T. Hayashi. Indeed, it is fair to say that the Pacific Beach Hotel is the Hayashi family's principal business. Through HTH (the name taken from Herbert's initials) the family also owns other businesses, including other hotels, [4] but the jewel is the Pacific Beach Hotel. Much of the Hotel's business traditionally has come from Japan where Herbert's nephew John Hayashi serves as the Hotel's agent. The evidence shows that John receives a substantial commission for sales originating in Japan. Herbert died in 2005, leaving his share of the business to his daughter Corine Hayashi. Ms. Hayashi has since married and her last name is now Watanabe.

The first NLRB election was conducted on July 31, 2002. The election was overturned by the Board in its decision in *Pacific Beach Corporation*, 342 NLRB 372 (2004). A second election was conducted on August 24, 2004. Among other things, the second election involved challenged ballots in a sufficient number to affect the outcome. The Board in *Pacific Beach Corporation*, 344 NLRB 148 (2005) ruled that first, certain challenged ballots should be opened and counted, and second, in the event the revised tally resulted in a majority favoring union representation, a certification of representative was to be issued; if it did not, the Union's objections were to be sustained, and a third election conducted. The ballots were opened, counted, and a revised tally issued showing that the Union had won by one vote. Accordingly,

[4] HTH owned the King Kamehameha Hotel in Kona on the Big Island until 2007, though it did retain title to the real property on which it sits. It also owns the Pagoda Hotel & Floating Restaurant in Honolulu.

on August 15, 2005, the Regional Director issued a certificate of representative in favor of the Union. It should be noted that the employer to whom the certification ran was HTH. This one vote margin of victory would become a flashpoint in the collective bargaining negotiations which would follow.

Robert M. ("Mick") Minicola appeared on the scene in December 2003. He had previously worked for The Outrigger Group in a variety of capacities. He was, and is, an experienced hotelier. He is a formidable personality. He testified that he went to work for both HTH and Pacific Beach Corporation on the same day. He was originally hired as regional general manager, to oversee the King Kamehameha Kona Beach Hotel, the Pagoda Hotel and Floating Restaurant, as well as the Pacific Beach Hotel. As time passed, and with the death of Herbert Hayashi, Minicola's duties expanded. During times material to this litigation, Minicola had become the regional vice president of operations for both Pacific Beach Corporation and HTH. He reports to Corine Watanabe. She would appear to be the Chief Executive Officer, though she is corporate vice president for both HTH and Pacific Beach Corporation. Watanabe did not testify in this matter, permitting Minicola to describe the relationships of the various entities. He testified that HTH is a closely held corporation whose shares are held by an entity known as the Hayashi Family Trust.

Since January 2005, apparently coincident with Herbert's death, the officers and executives of HTH and Pacific Beach Corporation have been identical. Both Watanabe and John Hayashi are members of the Board of Directors for both HTH and Pacific Beach Corporation. He is also a corporate vice president of both entities. Watanabe, Hayashi and Minicola are all on the direct payroll of Pacific Beach Corporation, and not HTH. HTH, through those individuals, however, issues directives to the Pacific Beach Corporation and its executives. There is a corporate interlock as well as an operational interlock.

In 2004, HTH created Koa Management when a new lender came on the scene to refinance a loan which had previously been held by a Japanese bank. The new lender, UBS Bank, wished to protect itself in the event of a default. It insisted that a so-called "lock-box" entity be created which would collect all receipts from the Hotel. In the event of a default, the bank could conveniently seize the lock-box. Koa served that function. So long as the loan was not in default, the money passed through Koa and on to Pacific Beach Corporation as the Hotel operator.

Koa is incorporated as a limited liability corporation and its only member is Pacific Beach Corporation. Watanabe is its special member and she controls it, albeit with UBS Bank oversight. [5] Koa, like HTH, has no employees itself. In fact, Koa would have no existence except for the fact that it is integrated into the corporate mesh. As will be seen, it was Koa which signed the management agreement with PBHM, not Pacific Beach Corporation or HTH. Indeed, Watanabe's signature is on all the appropriate documents. And, when PBHM was ousted, Koa signed another agreement – but with PBC, the original operating company.

The General Counsel contends here that all three entities constitute a single employer. Indeed, although it also offers some alternatives to that theory, its primary thrust has been to demonstrate that HTH, Pacific Beach Corporation and Koa Management are all one and the same. I find the facts prove that conclusion and that it will be unnecessary to consider any of

[5] The record, in various places, refers to the Wachovia Bank as the institution with which HTH/PBC dealt. The confusion, if any, is clarified when one understands that Wachovia served as UBS Bank's agent for the purpose of administering the loan.

the alternatives. Curiously, Respondents in their brief tend to ignore this primary theory and concentrate on the others.

As noted above, the first unfair labor practice charge in this case was filed on January 22, 2007. That would usually mean that the limitations period set forth in §10(b) of the Act began 6-months before that date, or June 23, 2006 would have an impact on the analysis here. Indeed, the facts havebeen developing since 2002, given the two elections and the reruns ordered by the Board, some of which are connected to unfair labor practices. It therefore behooves any observer of these facts to be aware of what transpired in the past, even though technically all of those matters are not material. What is material, however, is the Hotel's response to the certification of August 15, 2005, even though that is beyond the §10(b) period. Yet in order for §10(b) to have any role here it must have been properly invoked – by motion or by affirmative defensive pleading. It is not jurisdictional. If not so invoked, the Board will deem it to have been waived. *Public Service Co.*, 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833, 833 at n. 1 (1993); *McKesson Drug Co.*, 257 NLRB 468, 468 at n. 1 (1981). Cf., *K & E Bus Lines*, 255 NLRB 1022, 1029 (1981); *Laborers Local 252*, 233 NLRB 1358 fn. 2 (1977) which require the defense to be timely at the beginning of the matter or be waived. Post-hearing briefs are too late. Also, *Glazier Wholesale Drug Company, Inc.*, 209 NLRB 1152, 1153, fn. 1 (1975). Here, Respondents have not invoked §10(b) in any manner – not by motion, not by affirmative defense and not even by post-hearing brief. Accordingly, I deem them to have waived the limitations period as a defense.

Beginning with the certification, it appears that Respondents and the Union held approximately 37 bargaining sessions between November 2005 and December 14, 2006. One should not be overly impressed with that number of bargaining sessions, although it might suggest hard, but good faith bargaining. That suggestion is immediately dispelled when one learns that at the second session Respondents provided the Union with GCExh. 19, a collective bargaining proposal.

Section 1 of that proposal, Union Recognition, eliminates in its entirety the language of the Board certification. It substitutes the following: "The employer has and shall maintain at any and all times its sole and exclusive right to unilaterally and arbitrarily change, amend, and modify the certified bargaining unit set forth in Case 37–RC–4022, and any and all hours, wages, and/or other terms and conditions of employment at-will." This language clearly seeks to deprive the Union of the certification itself and to assign the scope of the unit to its sole discretion. The certified bargaining unit description is set forth in the footnote. [6]

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[6] All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data

Continued

Therefore, the proposal is, from the very outset, a rejection of collective bargaining. *Standard Register Company*, 288 NLRB 1409, 1410 (1988) (insistence to impasse on deletion of unit description from collective bargaining contract violates §8(a)(5)); *Columbia Tribune Publishing Co*., 201 NLRB 538, 551 (1973), enfd. in relevant part 495 F.2d 1384 (8th Cir. 1974) (holding that the bargaining representative is entitled to have description of the appropriate unit embodied in the contract.) Also, *Bremerton Sun*, 311 NLRB 467, 468 and 474 (1993).

It is true that the proposal could be construed as an initial starting point, but Respondent maintained that bargaining position throughout the entire course of bargaining, all the way through its final repudiation of the Union in December 2007. It has never wavered from this view. Furthermore this issue has nothing to do with the strength of the Union which won the certification by the single vote. Instead, it is designed to negate the Union's representative status in its entirety.

Also within the proposal is a management rights clause that proposes essentially the same thing, but with more detail.

> 1.A.a. The Hotel has and shall retain the sole and exclusive right to manage its operation and direct its workforce at will. All management rights, powers, authority and functions, to manage its operations and direct the working force, regardless of frequency or infrequency of their exercise, shall remain vested exclusively in the Hotel. It is expressly recognized that such management rights, powers, authority and functions include, but are not limited to, the right to select, hire, discipline and discharge employees at-will; transfer, promote, reassign, demote, layoff and recall employees; establish, implement, and amend rules and regulations, and policies and procedures; determine staffing patterns; establish and change work hours and work schedules; assign overtime; assign and supervise employees; establish service standards and the methods and manner of performing work; determine and change the duties of each job classification; add or eliminate job classifications; determine and change the nature and scope of operations; determine and change the nature of services to be provided and establish the manner in which the Hotel is to be operated; and any and all other functions of management. The Union shall not abridge these rights or any residual rights of management. The Union shall not directly or indirectly

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processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

oppose or otherwise interfere with the efforts of the Hotel to maintain and improve the skill, efficiency, ability and production of its work force, the quality of its product, or the method and facilities of its services.

1.A.b. It is agreed and understood between the parties hereto that the management rights, powers, authority, and functions referred to herein shall remain exclusively vested in the Hotel except insofar as specifically surrendered by express provisions contained in this agreement.

The management's rights clause, expansive as it is, must also be read in conjunction not only with the recognition clause, but also with the so-called Complaint Procedure, found in section 24 of the proposal. The Complaint Procedure was a response to the Union's relatively standard grievance-arbitration proposal which ultimately called for dispute resolution by a neutral third party. The Hotel's proposal was quite different:

24.a. and b. [omitted]

24.c. The steps in the Complaint Procedure shall be as follows:

1st Step -- The employee or Union shall first present the complaint in writing to the Department Manager or his designee.

2nd Step -- If the department manager or his designee does not adjust the complaint to the complainant's satisfaction within ten (10) calendar days from the time the complaint is presented, the complainant may present the complaint to the director of human resources, or his designee. Presentation to the Director of Human Resources or his designee must be made in writing within the next eight (8) calendar days.

3rd Step -- If the Director of Human Resources or his designee does not adjust the complaint to the complainant's satisfaction within ten (10) calendar days from the time the complaint is presented, the complainant may present the grievance to the General Manager or his designee. Presentation to the General Manager or his designee must be made in writing within the next eight (8) calendar days. The decision of the General Manager or his designee shall be in writing and must be rendered within fourteen (14) calendar days from the date the complaint is presented to the General Manager or his designee. All decisions of the General Manager under this section shall be final and binding upon the parties.

24.d. If management representatives fail to answer within the time specified in any step, the complaint shall be deemed unadjusted and the complainant may take the next step to secure a determination of its merits.

24.e. [omitted]

24.f. If any adjustment of the complaint is decided in any of the steps, no retroactive adjustment shall exceed thirty (30) Calendar Days from the date of the submission of the complaint at Step 1.

As the General Counsel aptly observes, these three proposals are all of a piece. The first is a demand for cessation of any control whatsoever over the bargaining unit itself. The second sets parameters which allow the Union virtually no say in the nature of the jobs held by employees which the Union represents. The third, facially allowing for some sort of appeal procedure in the event of an on-the-job grievance, actually sets up only an illusion. Not only does it all end up in the hands of the general manager, a remedy can only reach back 30 days from the time the grievance was initiated. This would mean that if an employee had been paid improperly for several months, under Respondent's own pay system, it would not be obligated to make any sort of correction beyond the 30-day limit. Clearly, such a system is not designed to allow for any objective, fair-minded, oversight. An employee's valid grievance could conceivably never be remedied simply because of the arbitrariness of the General Manager.

These three proposals demonstrate rather clearly that Respondents entered into the bargaining process with the mindset of evading its responsibility, mandated by §8(d) of the Act, [7] to bargain in good faith with the objective of reaching a collective bargaining agreement. It did not wish to grant the Union any authority whatsoever over the wages, hours and terms and conditions of its employees' employment. It wished to reserve all those matters solely to itself.

Nevertheless, it did go through the motions. Yet, it was not for the purpose of reaching an agreement, but only for the purpose of running out the certification-year clock. From the beginning, according to union negotiator David Mori, there were problems. Minicola asked for a six-week delay and observed that the Union had "only won by one vote." Then there was the excuse that "budget planning" needed to take place first. This was complicated by the death of Herbert Hayashi whose funeral warranted an extension. The first meeting did not occur until November 29, 2005, some 3-1/2 months after the certification had issued.

At that meeting the Union was accompanied by its negotiating committee members, all rank-and-file employees who were identified to Minicola and who subsequently routinely signed in on roster sheets provided for the meetings. From time to time, the Union's negotiating committee's members changed. However, participating as a member of the negotiating committee had consequences. In December 2007, when PBC resumed operations, the individuals whom it chose to retain did not include seven of the negotiating committee's members.

In any event, at the first negotiation session Mori hoped to be able to persuade Minicola to follow the outline of the collective bargaining contract which Minicola had negotiated with the Union's president, Fred Galdones, covering the King Kamehameha Kona Beach Hotel on the Big Island. That hope would not be met. According to Mori, the first order of business discussed that day was Minicola's insistence that before he would begin to bargain, the Union needed to agree in writing to certain ground rules which they were obligated to sign. These included that there would be only one spokesperson for each party, noneconomic issues would be negotiated before the economic issues, and before adjourning they would schedule the date for the next negotiation meeting. Mori agreed to those ground rules. Mori became the Union spokesman and Minicola took that role for Respondent.

First, Minicola insisted that Mori read the entire King Kamehameha-based proposal to the Company's committee, even though Minicola was entirely familiar with it. Second, Mori describes that almost immediately problems began with scheduling. Minicola insisted that he could not get his people "off" to attend the negotiations. So no negotiations could be scheduled in December. Mori also recalls that during the meeting Minicola said he wanted to advise the Union that the Hotel intended to give nonbargaining unit employees a Christmas bonus, but would not be giving such a bonus to members of the Union's bargaining unit asserting that it was somehow "illegal," because he would have to bargain with the Union. When Mori responded that the Union would have no problem with the Hotel granting the bonus, Minicola reportedly responded that he couldn't bargain about the Christmas bonus because it was an

[7] In pertinent part §8(d) states: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party,. . . ."

economic measure and the Union had agreed to put off economic negotiations until the noneconomic issues had been resolved. And, true to his word, Minicola granted a Christmas bonus to the nonbargaining unit employees, but not to the members of the bargaining unit.

Frankly, this must be seen as nothing more than a simple reprisal against the employees because they voted in favor of union representation -- indeed, Minicola's "one-vote win" resentment which this exposed continues to this day. It was followed by the January 5, 2006 proposals which I have discussed above.

On January 19, 2006, the Union rejected Respondents' proposal for an open shop in favor of the standard union shop provision. Minicola asserted that a union shop was illegal and once more observed that the Union had only won the election by one vote. Minicola also rejected the Union's proposal concerning dues checkoff even though he had accepted the same proposal at the King Kamehameha in Kona.

According to Mori, due to Minicola's intransigence concerning the "one vote" victory, a number of employees began to circulate a petition to demonstrate the Union's strength. At a meeting on April 27, 2006, the Union's bargaining committee members presented Minicola with a signup sheet containing more than 70 percent of the employees' signatures. Minicola, in general, was not impressed and continued to maintain the bargaining posture he had taken earlier.

Sometime in September 2006 Mori learned from sources other than Minicola and the company bargaining committee that some sort of agreement had occurred between the Hotel and The Outrigger Group. Indeed, negotiations had taken place and an agreement had been reached. The details would not really become clear to the Union until the instant unfair labor practice hearing.

While it is not necessary to detail all the false starts, it is fair to say that beginning in 2005, in the wake of Herbert Hayashi's death and the appearance of the Union on the scene, Corine Hayashi and Minicola began to seek options concerning management of the Hotel. Conversations occurred between Minicola and various Hawaiian and national hotel chains concerning possible business arrangements. Among the chains were the InterContinental Hotels Group, ResortQuest and The Outrigger Group; the last is concentrated in Hawaii, though all three are international in scope.

Initially, The Outrigger Group proposed a joint venture agreement of some sort to Corine Hayashi. Fearing loss of ownership of the Hotel itself Minicola and Hayashi rejected that concept. Ultimately the parties agreed upon a management agreement whereby an Outrigger subsidiary would operate the Hotel rather than PBC.

c. The Management Agreement

The hotel management agreement under which the Outrigger group began operating the Hotel was signed on September 7, 2006. [8] It is signed by Corine Hayashi on behalf of Koa Management, LLC and by David Carey, president of Outrigger Enterprises on behalf of its subsidiary PBH Management, LLC. (PBHM). The document consists of 37 pages of terms plus an additional 30 pages of attachments. Clearly it did not simply spring into being in September

[8] The document itself, GCExh. 38, bears the date "7th, 2006," demonstrating a scrivener's error in failing to recite the month of September. There is, however, no dispute about the date.

2006, but had been under discussion and negotiation for quite some time. Furthermore, the Koa entity was essentially unknown as the Hotel operator or owner. The current owner was known to be either PBC or HTH, not Koa. Furthermore, the terms of the agreement required it to be kept confidential, so the Union would have had no idea what Koa was, even if it had been able to review the document. The Union was well aware of HTH and PBC, but Koa was a Hayashi secret. Later, its existence became known but its role remained a mystery. During the hearing it all became clear, but the PBHM negotiators, acting pursuant to the agreement's terms, deliberately obscured it during the collective bargaining negotiations.

The terms of the management agreement also bear on the nature of Respondents' approach to collective bargaining. First, it required PBHM to hire all the current Hotel staff in their same jobs and with the same rates of pay and benefits. Second, it obligated PBHM to honor the employees' seniority dates.

Third, the agreement obligated PBHM to bargain with the Union, but did impose some limitations on PBHM's authority. The agreement contained language found in paragraph 3.2 of the management agreement which on its face seems to limit PBHM's ability to enter into contracts on the Hotel's behalf. It states that PBHM must obtain the UBS Bank's approval for any "major" agreement affecting the Hotel which was more than one year in length and which could not be terminated upon 30 days notice or, if the cost to the Hotel exceeded $350,000 or if it extended beyond the initial term of the management agreement but could not be terminated upon the Owner's 30 days notice.

This clause caused some problems of interpretation for PBHM's chief collective bargaining negotiator, Mel Wilinsky. [9] Clause 3.3 e. of the management agreement required PBHM to recognize the Union as the sole bargaining representative of the bargaining unit employees and asserted that from the date the management agreement became effective, that PBHM "shall assume Owner's obligation to negotiate with the Union and shall be responsible for completing negotiations with the Union, all at and as an Owner's Expense." It also required notification to the Union of the change. The Outrigger executives were uncertain whether clause 3.2 applied to any collective bargaining agreement it might reach with the Union. Clearly, the payroll would exceed $350,000 and the term of the agreement would probably be longer than one year. Yet, both PBHM and Minicola would allow the ambiguity to continue well into the term of the management agreement. It was not until the instant hearing that Minicola expressly asserted that clause did not apply to any collective bargaining agreement. Certainly during the course of collective bargaining, PBHM's negotiators were operating under the belief that the Owner's (Koa's) permission or approval was required before PBHM could sign a collective bargaining contract. Indeed, on July 30, 2007, PBHM's attorney Richard Rand wrote a letter to Respondents' attorney Ronald Leong which, inter alia, sought such permission as the likelihood of a successful negotiation became apparent.

In the letter Rand specifically asked "If Owner and you are now implying, for whatever reason, in your July 29 e-mail that Owner's consent is not required for the 2-year contract and the other terms as set out in the Union's proposal, we would appreciate your written confirmation of that position and we will proceed with and conclude the Union negotiations without the Owner's consent." By letter dated August 3, 2007 Minicola responded to Rand's letter (as well as one written by Wilinsky to Corine Hayashi on August 2 which specifically

[9] PBHM's other negotiators would include General Manager Bill Comstock, the Human Resources Manager Carise Iguchi, and Daryl Akiyoshi, whose role is unclear but who had been part of Minicola's HTH/PBC team.

requested approval) with a notice of termination of the management agreement, written on HTH letterhead. Neither Rand's letter to Leong asking for clarification nor Wilinsky's request for permission was ever specifically answered.

Therefore, despite Minicola's testimony to the contrary, I find that it was Respondents' intention to impose approval authority of any collective bargaining agreement which PBHM might reach with the Union and that the management agreement's limitation clause on major contracts was from the outset intended to do just that.

Nine months earlier, in late October 2006, notice was given to the Union that PBHM would begin operating the Hotel on January 1, 2007. In addition, Corine Hayashi sent thank-you letters to each of the employees describing the steps to be taken next.

In the meantime, of course, Minicola, assisted by John Lopianetzky (then the Hotel's food and beverage manager) had been negotiating with the Union. Lopianetzky was asked whether Minicola during the course of the 2005-2006 period had ever mentioned to the Union's negotiators if Minicola had ever referenced the "one-vote" victory. Lopianetzky said that Minicola had done so but he couldn't recall when or on how many occasions. He acknowledged that he himself had said the same thing "once or twice."

Melvin Kaneshige, Outrigger's executive vice president for real estate and development, was Outrigger's lead negotiator for the PBHM management agreement. He testified, corroborated by his contemporaneous notes, that during a meeting on May 19, 2006, Minicola observed, with regard to the union negotiations, that in August the NLRB's one-year certification period would expire and that "[we] can move to decertify." He went on to say that Minicola did not believe that negotiations would be concluded by August. In addition, Minicola remarked again that the Union had won by only one vote. Kaneshige remembered that Minicola made the one-vote reference several times during the course of the negotiations over the management agreement. And, during that same meeting he also recorded that Minicola had said Corine Hayashi was "pissed off" at the employees. He did record her reason, but could not read his own handwriting nor could he independently recall what Minicola asserted she was angry about.

Aside from Minicola's remark to Kaneshige that he doubted that the union negotiations would be concluded by August, the management agreement specifically required PBHM to assume all previous negotiated agreements that HTH had reached with the Union. Kaneshige testified that Minicola told him that the Hotel had not granted any wage increases since a 1996 3.6% across-the-board increase, though there had been some annual bonuses during that time frame.

Also under the terms of the management agreement, PBHM was obligated to provide employment to John Lopianetzky. Although not mentioned by name, Lopianetzky is the individual guaranteed employment under clause 3.3.d. "[PBHM] shall offer employment to the person holding (immediately prior to the Effective Date) the position of Director of Food and Beverage of the Hotel, upon terms and conditions determined by Operator in its sole discretion, and if such person does not accept Operator's offer, Operator shall, at Owner's expense, consult with such person for a period of eighteen (18) months after the Commencement Date to ensure a cooperative transition in the management of the food and beverage areas of the Hotel [but if PBHM hired the individual directly, it, and not the Owner, would pay his salary] . . . ."

In fact, Lopianetzky chose the consultancy rather than the directorship of the department; in that role he advised and assisted PBHM's general manager Bill Comstock on a wide variety of matters. These included interviewing job applicants and recommending the hire

a various employees for specific food and beverage jobs. Under the agreement, PBHM was obligated to provide Lopianetzky weekly reports concerning the performance of the food and beverage department. Lopianetzky, in turn, reported such matters to Minicola.

Moreover, clause 3.3.c. gave Koa the right to determine who the Hotel's general manager was to be. As a result of that clause, Comstock's hire was vetted by Minicola himself. That clause is most curious as one would think that PBHM and/or Outrigger, as the operator, would want to make that decision for itself. Nevertheless, Outrigger agreed to permit Minicola to select PBHM's general manager.

As 2006 wound down, there were several more negotiation sessions between the Union and Minicola. On December 7, 2006 Minicola provided Respondent's Last and Final Offer. In that proposal it maintained the same position that had always maintained concerning the recognition clause, specifically the right to "unilaterally and arbitrarily change, amend, and modify the certified unit set forth in case 37-RC-4022, and any and all powers, wages, and/or terms and conditions of employment at-will." Similarly, it maintained its overbroad management rights clause, its insistence on open shop (which even imposed a 31 day waiting period for employees to voluntarily join the Union), left dues collection to the union's own efforts (thereby rejecting the checkoff proposal), proposed the state minimum wage for all of the tipping category employees and a 75-cent wage increase for non-tipping categories. It also maintained the "complaint procedure" but modified it to the extent that an employee could, after a negative decision by the general manager, file a complaint with the "Department of Labor."

In some respects this last modification of the complaint procedure was worse than the original. Injecting the Department of Labor into a contract interpretation issue is generally beyond the scope of such agencies which have specific statutory duties that do not include interpreting the terms of a collective bargaining contract. Moreover, the proposal did not even specify whether it was the Hawaii Department of Labor or the United States Department of Labor. This change demonstrates how illusory Respondents' proposal actually was.

By making that observation I do not wish to give the impression that there had been no progress between Mori and Minicola. Indeed, GCExh. 17 sets forth approximately 170 tentative agreements concerning a proposed contract. A perusal of the exhibits, however, reveals that these are unremarkable noneconomic matters. No doubt many of them came from the King Kamehameha Kona Beach contract. In large part, despite its numbers and weight, the exhibit fails to offset the bad faith seen elsewhere in Respondents' proposal's.

At the end of 2006, all these matters were turned over to the PBHM negotiating team. Under the terms of the management agreement, PBHM was obligated to accept the status of negotiations as they had been left upon Respondents' departure. Thereafter, over the next 6 months or so, both PBHM and the Union made additional, even significant, progress toward concluding an agreement. The Outrigger executives responsible for collective bargaining were generally familiar with the law and the obligations it imposed and they approached the bargaining table with the idea that they would be able to reach an agreement with the Union, even as Minicola looked over their shoulders. Recall that Minicola had placed one of his people on the PBHM committee -- Daryl Akiyoshi.

In early August 2007, when Minicola notified PBHM that it was canceling the management agreement effective December 1, 2007, PBHM changed its bargaining team. Wilinsky was replaced by attorney Richard Rand. In some measure, this change occurred because Outrigger realized that legal problems were on the horizon, particularly those relating to collective bargaining. As a result, PBHM and the Union memorialized the number of the

tentative agreements which they had reached. GCExh. 26 sets forth a number of items, among which are a Union recognition clause which did not maintain the undermining elements found in Respondents' previous proposal and a complaint procedure which provided for a relatively traditional grievance-arbitration clause. It also established a daily housekeeping limitation providing that housekeepers would be assigned 16 rooms per day in the Ocean Tower and 15 rooms per day in the Beach Tower. The tentative agreements found in that exhibit were signed off by both Wilinsky and Mori. These all took place prior to Minicola's August 3 letter canceling the management agreement.

In addition, once Rand became PBHM's negotiator, new wage rates were negotiated for every job classification at the Hotel. That agreement was reached on August 30, 2007. Later, the duration clause was reached in mid-November 2007. Both of those tentative agreements were signed by Rand and Mori.

d. Information Demands – Corporate Relationships

I have adverted to some of the material leading up to Minicola's decision to terminate the management agreement, in the context of describing the continued control Respondents maintained over the Hotel during PBHM's incumbency. Equally pertinent, however, is Respondents' response to Rand's letter which preceded the cancellation. As noted above, Rand was seeking clarification concerning whether PBHM needed the owner's permission to finalize a collective bargaining contract. Connected to that, however were certain Union demands for information.

Mori, having negotiated with Wilinsky for 6 months had learned a few things about PBHM's relationship to Respondents. Wilinsky had said something which Mori realized meant that PBHM was not entirely in charge of the negotiations, despite Minicola's assertion that Respondents no longer had any interest in the outcome of the negotiations. Moreover, Mori knew that the Hotel itself remained in the hands of the Hayashi family and that PBHM's contract was not of indefinite duration.

Due to his incomplete understanding (caused by HTH and Koa's secrecy under the terms of the management agreement), on April 17, 2007, Mori wrote two identical letters. One went to PBHM's Wilinsky and the other went to HTH's Minicola. He explained his purpose in the first two paragraphs of the letter:

> "[The Union] has been involved in contract negotiations first with HTH Corporation and now with PBH Management LLC/Pacific Beach Corporation dba PBH for an inordinate length of time. Over the past six (6) months, negotiations with HTH and/or PBH management LLC have been disingenuous at times and have bordered on the Company/Employer's negotiators being in violation of its duty to bargain in good faith. On January 11, 2007 the Company's proposal was to have the "Agreement" changed from "Pacific Beach Corporation dba Pacific Beach Hotel" to "PBH Management LLC, dba Pacific Beach Hotel" to reflect the hotel's managerial changeover effective January 1, 2007. [10]

[10] A year earlier, in March 2006, Minicola had insisted that Pacific Beach Corporation be the signatory party to the contract, rather than HTH Corporation. At that time many of the personnel documents had contained HTH headers, including pay stubs and other materials available to employees. That issue never was resolved and when PBHM was inserted into the bargaining process, yet another entity had appeared whose legal status as the true employer

Continued

> The ILWU has sought information from the Company to substantiate the correct corporate entity which has the control "over contract negotiations as well as terms **and** conditions of employment for the bargaining unit members represented by the ILWU, Local 142." Accordingly, the ILWU hereby requests copies of the following documents:
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> [Underscore in original.]

This was followed by a list of 24 items most of which related to the negotiations for the management agreement as they may have involved HTH, PBC, Outrigger or PBHM. In addition, Mori sought a true copy of the management agreement, not knowing which enterprises were the actual contracting parties. In this regard, Mori was clearly in the dark about the existence of Koa Management, the entity which Corine Hayashi had actually used.

Minicola responded by telephone telling Mori that his attorneys had advised that he did not have to respond since neither HTH nor PBC were involved in the negotiations. He did not give a written response. Wilinsky, on the other hand, send Mori a letter decrying, to some extent, Mori's assertions concerning good faith bargaining as well as Mori's contention that it the Union did not really know who the employer was. He pointed to a number of earlier statements by both PBHM and the Union to the effect that PBHM had become the employer at the Hotel. He also attached to some material supporting his contentions as well as three heavily redacted pages from the management agreement, including the signature page. Although there is one earlier obscure reference to Koa Management, a letter from a PBHM Vice President to the ILWU's contract administrator which referenced Koa Management as the Hotel owner, the signature page was the first clear view of Koa Management Mori had seen. Its appearance without any explanation sparked a new area of inquiry. After all, Corine Hayashi was known to be the owner of both HTH and PBC. So where had Koa come from?

Now enlightened about the existence of Koa Management and its intermediate status between PBHM and HTH/PBC, but still unclear regarding Koa's role and remaining suspicious about PBHM being part of some sort of concealed stratagem to trick the Union out of its certification (a possible 'bait and switch' or to accept a 'pig in a poke' [11]), Mori wrote two more letters attempting to acquire better information. These were both written on May 30, 2007, one to Wilinsky and the other to Minicola. After explaining his purpose, he asked for thirteen numbered items. This time Koa Management was a principal target of his demands, though he continued to seek agreement combinations involving HTH, PBC, Outrigger and PBHM. In each instance he asked for agreements which described the authority of any of those entities to approve, reject or modify any collective bargaining agreement or other arrangement which had an affect on the wages, hours and terms and conditions of employment of the bargaining unit employees. He was clearly seeking information about which entity had control of the negotiations. Minicola responded by letter on June 7, 2007. The request was familiar to Minicola and he referenced earlier requests for information about the same topic. He said that he was aware an identical letter had been sent to Wilinsky. He "reminded" Mori that "HTH Corporation is no longer the employer of the Pacific Beach Hotel employees." He observed that the Union was meeting with Wilinsky on a weekly basis and that HTH "has no intention of interfering with the negotiations between ILWU and PBH Management, LLC and will continue to deny your attempts to meet with our President." He accused Mori of seeking to circumvent the

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was unclear. Indeed, there was a substantial question for the Union, given PBHM's subsidiary status to Outrigger, whether Outrigger might qualify as the true employer.

[11] *Merriam-Webster* defines 'pig in a poke' as "something offered in such a way as to obscure its real nature or worth."

negotiation process. Minicola did not provide any information sought by Mori's letter.

Curiously, during the same time frame Mori learned that Minicola was taking a variety of 'hands on' steps with Hotel employees. Mori:

> Well, for starters, you know, in my conversation with Mr. Minicola as well as Mr. Wilinsky -- and it's not covered in any of this information requests -- I asked even if we could have a letter from Ms. Hayashi at the time, or Mr. Carey, just to confirm that, you know, in writing that -- who is the proper entity.
>
> And there was no willingness to oblige, and there was also, you know, several comments made by Mr. Wilinsky and Mr. Comstock that, you know, certain things couldn't be done because HTH Corporation still was the owner.
>
> Some of the concerns I raised was that, you know there was report of Mr. Minicola directly making contact with employees. He appeared to still have, you know, a free access to the employees, and there was one incident where especially came to mind, because Mr. Minicola had actually called me up and asked to meet with me. And he had a concern about this -- an open letter that got to Ms. Hayashi. And he was actually doing an investigation, and he had actually interviewed several employees.
>
> And I also, you know, again, expressed my concerns and objection to Mr. Wilinsky and Mr. Comstock, that why was Mr. Minicola being allowed the right to interview or investigate their employees?
>
> And the comment was, he represents the owner, so they had no real say on the matter. They had to obligate (sic) [oblige] the request of the owner.

The semi-anonymous open letter incident is revealing on several fronts. It is found as an attachment to GCExh. 34 and consists of a handwritten letter signed by "The Workers and there familys'." (sic) The envelope was addressed to Corine Hayashi from "The Work Force" and contained a separate sheet having a traced outline of a child's hand. Written on the tracing was the phrase "The hands of our children" together with a cartoon drawing of a smiling child. The text of the letter is in the footnote. [12] The letter has an unmistakable pleading tone.

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[12] Text of the letter (unedited):

Ms. Hayashi.

The workers at Pacific Beach Hotel are still in negotiations after 16 month's, and with over 85% of the worker's wanting a union contract we still get no respect.

Mr. Wallinsky and Mr. Minicola has told our negotiating committee that you still have the final say, and that Outrigger Hotels has nothing to do with outcome of the contract. Ms. Hayashi we are still trying to secure a future for our family's so please make your father proud and do the right thing and give the workers a contract. The Hotel can still make a profit if "We" have a union contract, but this contract cannot be "open shop." This would create hostility in the Hotel and in turn affect your profit margin.

The workers know you have a big a social event on May 4. (The Hawaii Opera Theater.) We will be out in force and look forward to informing the public at this event, and other social events in the future. A so please do what is right and we can all move forward together and continue to make Pacific Beach very profitable.

We congratulate you on your recent marriage, and now that you have a family of your own we

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Minicola, however, in his letter of May 8 to Mori said the letter "appears to be designed to threaten and intimidate, and puts the Company in a position of needing to take action to protect Ms. Hayashi's safety." Certainly its reference to informing the public about the labor dispute at a public event involving Ms. Hayashi is nothing more than what the Union was already doing at the Hotel -- demonstrating for a collective bargaining contract. It is far from a threat of physical harm. Nonetheless, Minicola chose to make that accusation to Mori. Curiously, Minicola acknowledges that Mori and the Union were probably not behind the letter's writing but does ask the Union to do something about it. He goes on to reiterate Respondents' contention that the factual assertions in the letter concerning Respondents' role as the actual employer was incorrect. He also asserts that any demonstration at the Hawaii Opera Theater "should be avoided" as Ms. Hayashi would be mistakenly identified as employer.

Mori's principal point, however, was not the direction the letter said it would take, but the fact that Minicola instituted an independent investigation concerning who wrote it and how it got to Ms. Hayashi. He learned, by interviewing employees (putatively employed by PBHM) directly. He spoke to members of the bell staff to try to identify who had dropped the letter off at the bell desk and who had transmitted it to Ms. Hayashi. His purpose was not benign; it was to prevent employees from contacting someone they believed had ultimate authority over collective bargaining. Indeed, I find here, that the employees were correct. Ms. Hayashi's enterprises are in fact the true employer of the entire Hotel staff. Furthermore, had Minicola actually determined who had written the letter I have no doubt that he would have insisted upon discipline being levied and that PBHM would have had no authority to resist. [13] Moreover, it should be observed, the letter was entirely protected by §7 of the Act.

Mori's concern about Minicola's easy bypass of PBHM as the employer was legitimate. It was indeed evidence that PBHM's authority was circumscribed by circumstances which Mori did not then understand and which had been withheld from him. Those circumstances are set forth in the management agreement which he had not yet seen. Accordingly, his demand for information about HTH's and PBC's authority over PBHM was quite proper.

Moreover, Wilinsky and Rand knew it. In his letter of July 30, 2007 to Leong, Rand observed that the only information which had been previously provided to the Union had been a redacted version of the agreement. He stated that PBHM disagreed with Respondents that the information which the Union was seeking was irrelevant. He observed that there were limitations on PBHM's authority as imposed by the Owner and that "Under the National Labor

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hope that you understand the plight of the workers.

Thank you

The Workers and there family's

[13] Additional evidence of Respondents belief that it retained control the Hotel was its decision to replace hallway carpeting without consulting PBHM and Minicola's penchant for speaking directly to department managers without going through PBHM's general manager. And curiously, PBHM simply adopted the HTH/PBC personnel forms and procedures, in some cases not even bothering to change the logo heading the document. There is also evidence, from Barry Wallace, an Outrigger Hotels Hawaii vice president to the effect that Minicola insisted upon inserting himself into nearly every management decision which PBHM wished to make. Wallace's testimony is not, in my opinion, as significant as the other matters showing Respondents' continued meddling since it is not a as specific. Nonetheless, it is consistent with those other matters.

Relations Act (NLRA) any limit on a negotiator's authority to bind the employer to a CBA *must* be disclosed to the other party. *Metco Products, Inc.*, 289 NLRB 76 (1988); *Sands Hotel & Casino*, 324 NLRB 1101, 1108-09 (1997) (and cases cited therein)." He went on to say that such disclosures needed to be made before the agreement was finalized.

In addition, Rand observed that although "no one at Outrigger, HTH or Koa has control over the terms and conditions of the hotel employees and that [PBHM] alone is negotiating the CBA, [PBHM] believes Owner's requirement that it consent to the CBA is a limitation on [PBHM's] authority as the employer-negotiator and that this limitation *must* be disclosed to the union by providing the union with a copy of section 3.2(c) of the Management Agreement." Accordingly, he asked for permission to provide that material to the Union.

That portion of the letter is followed by another entitled "Agency Shop." Here, Rand, explains to Leong why he believes it appropriate to move off the open shop proposal, which had been HTH/PBC's proposal from the beginning and which PBHM had carried forth, and proposed an agency shop instead. He had advised Respondents shortly before, that an agreement could be reached with the Union if it included some form of union security and that an agency shop agreement would be satisfactory to the Union. He says, in support (nodding to Minicola's one-vote victory fixation), that PBHM believes that the Union is not supported by an overwhelming majority but that the Union would not go away quietly and that there is no indication that the employees have any intention of commencing a decertification. In his view the negotiations could not be concluded without agreement on the issue and that negotiations are interfering with the hotel operations. From his perspective the agency shop was a compromise which would "graphically demonstrate" that union dues (agency fee) would demonstrate that union representation has a price. "We believe in the end the agency fee will prove to be the ultimate undoing of the Union at the Hotel since employees will come to realize that unions are about dues, and not about helping employees." Rand made additional arguments and observations which are business-related, also supporting the need for compromise on the union security question.

Rand's assessment of the likelihood of reaching a collective bargaining agreement with the union was based, at least in part, on the fact that he and Mori on July 26 had signed off on pay scales for over 150 job classifications throughout the Hotel. See GCExh. 27. (The list of pay scales, though signed by Rand, had actually been negotiated between Mori and Wilinsky. Rand was certainly involved during that period, but on August 10, 2007, Wilinsky withdrew in favor of Rand and Rand became PBHM's principal negotiator, serving until the management agreement ended on November 30, 2007.)

Rand concluded his letter by saying "Should Owner continue to refuse to [grant] the above two requests for the consent, [PBHM] believes Owner will be in breach of the covenant to reasonably consent to the requests and will cause [PBHM] to no longer be able to bargain in good faith. [PBHM] does not want to bargain with the Union if its ability to reach a settlement which it believes is in the best interests of the hotel is impaired by Owner's refusal to consent to an agreement that extends beyond one year, or any agreement that contains agency shop. To do so would in our judgment constitute bargaining in bad faith; [PBHM] agreed to assume Owner's obligation to bargain with the Union on the assumption that [PBHM] could do so in good faith. [PBHM] accordingly would have no choice but to conclude that Owner is in breach of the Management Agreement and to ask Owner to assume the obligation to negotiate with the Union and to complete negotiations with the Union." He asked for a response by noon two days later.

Following up on Rand's letter, Mel Wilinsky sent a short version directly to Corine

Hayashi on August 2, 2007, attaching Rand's letter to Leong. He observed that Leong had not responded by the deadline and reiterated PBHM's need for permission to provide the information requested by the Union concerning both the Management agreement and the

owner's approval to propose the two-year collective bargaining agreement as Rand had described. That letter would appear to have crossed Minicola's response that day, hand-delivered to Outrigger President David Carey.

The response, as we have seen, was Minicola/HTH's August 3, 2007, cancellation of the Management Agreement. That termination was based upon clause 18.3 of the agreement which said the Owner "may terminate this Agreement for any reason whatsoever in the exercise of its sole discretion at any time from the commencement date to and including June 1, 2008...."

Minicola's cancellation letter proposed that December 1, 2007 be the transition date where the Owner would once again be the manager of the hotel. He asked for a meeting of appropriate persons to begin the "unwinding" process. It should be recalled at this point that Koa Management was the so-called "lock box" corporation setup for the benefit of UBS bank. It is also the entity which Corine Hayashi used to make the arrangement with Outrigger's PBHM to operate the hotel, even though until that time Pacific Beach Corporation was the operator and subsidiary to HTH.

Eventually, the transition was memorialized in a hotel management and service agreement between Koa Management and Pacific Beach Corporation. It is dated December 1, 2007, and is signed by Corine L. Watanabe on behalf of both entities. Unlike the PBHM Management Agreement, which microscopically detailed all matters, this document consists of only of four pages. In large part it is Watanabe speaking to Watanabe authorizing or limiting Watanabe's operation of the Hotel.

It seems self-evident from this fact pattern that Minicola and Ms. Watanabe née Hayashi were taking this step in order to create the appearance of successorship. Under successorship rules as established by decisions under the Act, a successor corporation may set the initial terms and conditions under which the employees of a continuing operation would be obligated to work. And, of course, where supported by proof that the incumbent Union has lost its majority status, it could lawfully refuse to recognize the Union. Frankly, this has all the ingredients of a sham.

Nevertheless, PBHM was to continue as the employer until midnight the night of November 30–December 1, 2007. This meant that PBHM was obligated, at least under the terms of the Management Agreement, to continue bargaining with the Union.

During that time frame at least two tentative agreements were signed off by both Mori and Rand. The first was the wage scale mentioned above but the other was duration of the agreement. The contract was to begin on the day it was ratified and last for one calendar year from that point. Mori testified that at that point there were only two major items left, the dues check-off and the agency shop.

On August 10, 2007, PBHM sent several letters, apparently to comply with the state Dislocated Workers Act, to the employees notifying them that as of December 1, 2007 PBHM would no longer be employing them as it would no longer be the Hotel Manager. It did not say anything concerning what Respondents intended to do. Simultaneously, PBHM's president (and Outrigger president) David Carey sent a letter to each employee thanking him or her for their service and promising to work with Pacific Beach Corporation, who he said would take over the hotel management, to make the transition as smooth as possible. He also attached a so-called update concerning negotiations with the Union, essentially describing the status as perceived by PBHM's bargaining team. He listed the so-called "open contract issues" as being

the recognition clause, the union security matter, dues check-off, some pay matters, substance abuse policy, subcontracting and successorship. In addition, he attached a copy of the press release which was being sent to the local press that day. Oddly, his list of open issues and Mori's two remaining issues are not congruent.

Also that day, PBHM (seemingly by its general manager Comstock) conducted a meeting of employees to say, verbally, the same things which were set forth in the letters. Minicola was not a part of any of these PBHM meetings.

Sometime in August, four hotel employees had written letters to the editor of the Honolulu *Star-Bulletin*. Those letters were published by that newspaper on August 19, 2007. The four employees were Guillerma Ulep, Todd Hatanaka, Larry Tsuchiyama and Virginia Recaido. All four of these individuals were members of the union's bargaining committee. Two, Hatanaka and Recaido were not kept in December. Each letter, to some extent, complained about working conditions and the fact that the Hotel had failed to bargain in good faith with the Union. In addition some complained about the fact that there had not been a raise in over 10 years. They also asserted that the union represented an overwhelming majority of the employees and that 2 years of negotiations was too long. In essence, they accused the Hotel of denying the employees the chance to gain the American Dream. They also complained that the Employer was unreasonably insisting upon an open shop, despite the overwhelming majority of employees who favored some form of union security.

e. Information Demands – Effects of PBC Resuming Operations

On September 11, 2007, the union's negotiator Mori wrote a letter to Minicola asking for a variety of information. Specifically Mori wanted to know who had made the decision to end PBHM's Management, and asked for copies of documents between Koa and PBHM covering that matter. He also asked for plans being made by PBC concerning the hotel employees who would be terminated and also asked for the document under which PBC would assume management of the Hotel.

Mori then asked for other information including the commitments that HTH and/or PBC would make concerning the retention of the hotel employees. He asked if PBHM had sought to make certain that PBC would retain the staff. He further asked if PBC would be offering employment to all the employees and whether some might be offered employment by HTH or Outrigger. He also demanded the list of all of the bargaining unit employees who had been working for PBHM as of August 10, 2007, together with relatively standard personnel information concerning those employees.

In addition, he asked whether there were any agreements or commitments on meeting and satisfying the continuation of employees' benefits and entitlements. He asked about the terms and conditions which PBC would seek in hiring employees who were currently with the Hotel. Finally, he wanted to know whether PBC would be requiring substance abuse testing or imposing a probationary period upon them, together with any documents which might describe these things. He asked for a response within 5 days.

Minicola did not respond and a second letter was eventually sent on October 11, 2007, in which the demands were repeated.

f. Demand to Continue to Recognize the Union

Meanwhile, on August 27, 2007, the Union's contract administrator, Michael M. Murata, wrote Minicola observing that the Union had been negotiating with PBHM and that it continued to be the sole and exclusive collective bargaining agent for the Hotel's employees and that it wished to continue negotiations including the Union recognition and Respondents' acceptance of all the tentative agreements which had previously been reached. He asked Minicola to contact Mori in order to arrange negotiation meetings.

Receiving no response, although the hiring procedures had gone forward as described below, Murata wrote a second letter to Minicola on November 28, 2007. He referred to the earlier letter and again asked for recognition of the Union and commencement of negotiations before November 30. He asked Minicola to contact Mori to make the arrangements.

g. The Rehiring Process

Under PBHM's management agreement, PBHM had been obligated to hire all the employees who had been employed by Pacific Beach Corporation. It did so. However, when PBHM was ousted from operating the Hotel, the same seamless change did not occur. Instead, PBC instituted an application process. Beginning on September 15, 2007, all of the Hotel employees were told that if they wished to remain with the Hotel, they would be obligated to reapply for their jobs. The reapplication process took about 2 weeks or 10 days.

The offer language can be found in some exemplars as part of GCExh. 79. It set the wage rate at the employee's then current rate (keeping the right to adjust it), established a 90-day 'introductory' period, described the employment as 'at will' (unless a contract or collective bargaining contract said otherwise), required the applicant to pass a drug screen and said that the benefits package would be described at a later date. It provided a signature line for the employee to accept the offer.

At some point prior to actually offering jobs to the applicants, Minicola testified that he consulted with his director of sales and marketing and the controller. He made some business projections in an effort to determine how many employees the Hotel should hire in each department. In connection with that process he also attempted to establish a budget. In addition, he says he discussed the issues with HTH's corporate director of human resources, Linda Morgan as well as the individual who had been his liaison with PBHM, John Lopianetzky. He asserts that they developed a six factor test to help determine which employees should be hired. In large part, these were subjective. Respondents do concede that they did not review any personnel files, either from the PBHM period or from the pre-PBHM period. Instead, they asked mid-level managers to provide their input regarding their knowledge of individual employees. Principally, that activity was carried out by Lopianetzky, Morgan and Christine Ko, the executive housekeeper. [14] Morgan gave testimony that Minicola was the one who made the decision to keep most of the department heads out of the decision-making process. Yet, so far as I can tell, Ko was the only department head involved in the process. The other two were Lopianetzky and Morgan. Morgan, however, had no direct knowledge about the work performance of any employee over the past 10 months. Lopianetzky's association was

[14] Ko had been Executive housekeeper for PBHM. On October 15, 2007 Respondents' director of human resources, Morgan, asked Ko to perform the same job for PBC. Ko accepted and was immediately tasked to select the housekeepers to be retained. Ko said she was given only a few hours to accomplish that duty.

somewhat better, since he had provided oversight for the food and beverage department's employees during the PBHM regime. The explanation was that speed was required and additional input from department heads, some of whom might be replaced themselves, would slow the process.

During the time frame these tasks were being carried out, Minicola had gone on a business trip to Hong Kong. It is fair to say that a large number of these decisions resulted in the rehire of current staff. In fact, shortly before he made that business trip in early October, Minicola had decided to close the Shogun Restaurant. [15] Simultaneously, Minicola decided to resume a free breakfast program for hotel guests which PBHM had jettisoned. He apparently hoped some of the employees who had worked for The Shogun could be assigned to the Neptune Garden restaurant which would be operating the breakfast plan.

Minicola testified that he did not wish to review or use the existing personnel files because it would have been "unfair." His explanation was that while some departments were understaffed, others were overstaffed and that referring to the personnel files could have meant that an employee with a bad record would be retained instead of an employee with a better work record in a department that needed a staff reduction. His 'fairness' explanation for not reviewing the personnel files makes little sense they would have reflected the employees' quality of work. Accordingly, he insisted upon using the six factors. These factors were attitude, job performance, flexibility in scheduling, attendance, customer service and teamwork.

While facially neutral, in fact, as will be seen below, in application this allowed for picking and choosing, resulting in the decisions not to rehire seven members of the Union's bargaining committee. GCExh. 71 lists 424 employees on the Hotel staff as of November 30, 2007, the day before Respondents resumed operations on December 1. The exhibit was prepared during the second session of the hearing from electronic data maintained by PBHM and was produced under subpoena. The list actually would have complied with one of the Union's demands for information, set forth above, as it described each employee's job title, wage rate and employee status, whether full-time, part-time or on-call. Clearly this information and other similar information which the Union sought could have been provided in response to the Union's demands. Outrigger's system contained all that information in an easily obtainable electronic format. It is clear that Respondents could have obtained the information from PBHM without any significant effort beyond requesting it.

h. Demonstrations

As the Union observes in its brief, beginning as early as 2006, it conducted a number of rallies in front of the Hotel. In addition, it notified portions of the Respondents' customer base in Japan of the labor dispute. These activities were continuing through the date of the hearing and apparently were the source of significant irritation on the part of Corine Watanabe. A number of the employees were quite visible in their boycotting activity. These included Cesar Pedrina and Guillerma Ulep. Both of these individuals had worked for the Hotel for about 20 years. Pedrina was a senior purchasing clerk and Union activist,. Ulep was a housekeeping employee who participated in many of the rallies in front of the Hotel. Both served on the Union's bargaining committee.

[15] The Shogun was one of the signature restaurants of the Hotel. Its shutdown necessarily meant that the kitchen and wait staff of the food and beverage department would be reduced by the number of individuals employed at the Shogun.

Minicola maintained an office on the second floor of the building on Liliuokalani Avenue directly across from the Hotel entrance. On September 20, 2007, a sidewalk rally was held on Liliuokalani Avenue in that narrow space. That location served two purposes: first, to serve as a confrontation between the Hotel and its arriving guests and second, to let Minicola know that the Union was not relenting in its efforts for a contract. Mori said that during the demonstration he telephoned Minicola to ask if he could come up to the office "to see him." Mori testified that Minicola hung up on him. When Mori reported to the demonstrators what Minicola had done, a group of them, without Mori's approval, went up to Minicola's office. Apparently they had no success, but Minicola did testify that he remembered seeing about 20 employees at that rally, including some of the Union's bargaining committee members.

Another rally was held on October 31, 2007. These employees were undergoing the rehiring process and were expressing displeasure with the direction that process was taking. In both cases hotel security officers were present.

By January 25, 2008, almost 2 months later, Respondents had completed all its hiring decisions. It had refused to deal with the Union in any way. Respondents had just opened business offices in the Kaimuki district of Honolulu, not far from Diamond Head, perhaps three miles from the Hotel itself. Minicola, together with other corporate officials, maintained an office there. Todd Hatanaka, Keith (“Kapena”) Kanaiaupuni and Rhandy Villanueva, three Union bargaining committee members who had not been rehired were leafleting the area under the eye of one of the Union’s organizers, Bill Udani. Minicola drove up and Udani engaged him in a conversation as Minicola made his way into the building. The conversation began on edgy terms when Kanaiaupuni offered to shake hands Minicola. Minicola refused and Kanaiaupuni, annoyed, asked why Minicola was upset since it was he and Hatanaka who should be upset because they were the ones without jobs.

The group then began a discussion out on a sidewalk, joined by yet another union organizer, Lance Kamada, during which Minicola told the group: "You guys made this personal," when during Christmas Hatanaka and Kanaiaupuni had personally named him as the one who had not hired them back. Several times Kanaiaupuni asked Minicola why he was upset and Minicola replied that the decision had been for business reasons, but … according to Kanaiaupuni … Minicola also said he "was upset about the boycott and the leafleting." The employees responded to that by asking him what he had expected them to do because they needed a contract. At that point a third union organizer, Eadie Omanaka, asked Minicola if he respected the employees' decision for the Union, and once again Minicola pointed to the fact that the Union had won the election by only one vote. Kanaiaupuni retorted reminding Minicola that he had rejected a subsequent petition signed by 70 to 80 percent of the employees who had reaffirmed their support of the Union.

It started to rain and Minicola invited the employees inside the doorway where the conversation continued. Hatanaka testified that Minicola said that when PBHM (Outrigger) came into manage the Hotel, one of the conditions Ms. Hayashi had imposed was that Outrigger needed to hire all the employees, but because of the union activities and rallies during 2007 she had become upset and offended and no longer cared if the employees were rehired when PBC resumed operating the Hotel. The General Counsel properly observes that Minicola's response here is consistent with testimony given by Mel Kaneshige of Outrigger. It is also consistent with union president Fred Galdones' uncontested testimony that on November 17 he had called Minicola requesting a meeting, but Minicola had declined saying he had been advised by his attorney not to talk to the Union because Respondents had not yet begun to operate the Hotel. Galdones followed up on December 3 with another telephone call but Minicola responded that

they were not going to recognize the Union, that no collective bargaining would occur and that Watanabe was taking things personally because the Union's boycott campaign and other activities [16] were affecting the financial condition of the Hotel.

On December 4, 2007, Galdones wrote Minicola a confirmation letter to confirm Minicola said statement on the telephone that the company was not recognizing the Union as a representative of the Hotel employees and would not engage in collective bargaining. So far as the record shows, Minicola did not respond to Galdones' letter. Nevertheless, it is undisputed that Respondents had no intention of recognizing the Union upon its resumed operation of the Hotel on December 1.

Simultaneously with its takeover and its refusal to recognize the Union, Respondents also discharged (through PBHM) all of the then current employees. Since it had also instituted the application process, it also offered employment to substantially fewer employees. Consistent with its concept that the employees were "new," it imposed a new employee manual's rules upon them. Each of the employees coming from the PBHM payroll to Respondents' payroll was given an employment processing packet along with their job offers. The packet included a 'conflict of interest' policy sheet which they were obligated to sign. The policy stated:

> Discouraging Potential or Actual Customers.
>
> Any advice by any Pacific Beach Corporation employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of Pacific Beach Corporation to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination.

Any fair reading of this rule leads to the conclusion that this rule was designed to prevent employees from engaging in activity protected by the Act, specifically boycotts or public demonstrations in front of the Hotel in support of a labor dispute. Furthermore, Respondents have offered no factual argument demonstrating the rule's neutrality to support its issuance.

Also in the packet was a similar document for the employee to sign entitled "Confidentiality Statement." The relevant aspect of the rule states:

> Any information acquired by myself during the performance of my duties pursuant to my employment act, or in association with, or outside the scope of my employment, at the Pacific Beach Corporation, shall be regarded as confidential and solely for the benefit of Pacific Beach Corporation.

[16] Two examples of such activities involved employees' children. During the Christmas holidays the Union used children to leaflet the public using a tourist trolley. A similar incident occurred a few weeks later in January during the Martin Luther King holiday. In that encounter, Kanaiaupuni and other Union members had stepped down from the trolley and encountered Minicola standing in front of the Hotel watching the leafleting.

In the context of the Act, such a rule would bar an employee from discussing his or her wages, hours and terms and conditions of employment with other employees or with outside individuals such as their union representatives. Information sharing such as this is specifically protected by §7 of the Act. [17]

Also part of the employee manual are additional rules which were imposed upon the newly re-transferred employees. Listed by the General Counsel in its brief, they are rules which: a. Prohibit the sharing of information with the media and outsiders. [18]; b. Require employees to keep confidential certain information about the business operations of the Hotel. [19] c. Bar employees from leaving the property or their work areas to during working hours. [20] d. Prohibit employees from making derogatory remarks. [21] e. Forbid employees from being on Hotel property when not scheduled to work, except for two exceptions: a 30 minute window when entering or exiting the property before and after work and using the fitness

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[17] In pertinent part §7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[18] Specifically, this rule first requires an employee to refer outside inquiries to the general manager and the employee's supervisor and than bars him or her from discussing their job or any aspect of the Company's operations and/or corporate business with the press "or anyone not employed by our company." This, of course would prohibit an employee from discussing employment matters with his or her union.

[19] In large part this tracks the confidentiality statement set forth above. Understandably, it lists legitimate business matters such as sales figures, marketing goals, profit margins, merchandise markups, sales reports, and operating reports. However it also lists and mixes business matters with material which employees may utilize while exercising rights under the Act. For example it bars employees from reporting to outsiders the "names and addresses of employees and hotel guests." While clearly the names and addresses of hotel guests can legitimately be held confidential, the names and addresses of fellow employees cannot, for it inhibits employees from engaging in conduct protected by §7. It also bars employees from providing the employee handbook to outsiders, such as union organizers or representatives. And finally, it bars employees from discussing their compensation "with anyone." Clearly, this too, is a barrier intended to prevent employees from engaging in §7 activity.

[20] This rule bars employees, not from leaving work while they are on the clock, but when they are off the clock, such as during breaks and meal periods. If they need to leave, they are obligated to obtain the prior consent of their supervisor. This rule would appear to be aimed at preventing employees from leaving work in order to engage in a lawful strike or demonstration. It would also appear to prevent an employee from attempting to meet a union official out on the public sidewalk or at a nearby meeting place. Again, this is aimed at prohibiting §7 activity.

[21] Specifically, this rule prohibits employees from "making... derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation." Clearly the definition of derogatory remarks is unsettled. There are obviously negative things which can be said about an employer which are protected by law, such as contentions that the employees are overworked or underpaid. Yet, this rule would reach such protected conduct. And, of course there good reason to prohibit certain types of derogatory comments about fellow employees or supervisors because they can negatively influence the working atmosphere. The latter is a legitimate purpose behind such a rule; the former is not. Respondent has conflated the two and they are so intertwined now that the two cannot be separated and employees would be confused concerning its breadth. Finally, I can envision circumstances in a labor dispute where disparaging remarks might nonetheless be protected by the Act, yet prohibited by this rule.

center for 2 hours either before or after work. This is enforced by a property pass rule. [22] A closely connected rule [f.] bans employees from "loitering or straying into areas not designated as work areas, or where your duties do not take you." That rule, too, is unlawful for the reasons set forth in the footnote. g. Prohibit "unauthorized" discussions in "public" areas. The rule itself says that employees are prohibited from "Discussing business, personal, or unauthorized matters in public areas where guests may be able to overhear the conversation." Again, the phrase 'public areas' is most ambiguous and mixes areas of legitimate business concern with areas of non legitimate business concern. For example, a public area might well be intended to apply to actual work areas such as the main lobby or a guestroom hallway. Respondents have a legitimate concern over work-related conversations which guests and customers might overhear. However, other public areas might be the parking structure or even restrooms open to the public, where private conversations would not be disruptive, yet could conceivably be overheard. Even so, those areas are not appropriate to regulation concerning work-related matters, particularly where they are protected by §7.

Also in conjunction with taking back operational control was a question of wage rates. Instead of concerning itself with or accepting the wage rates which had recently been negotiated between Mori and Rand, on December 1, 2007, Respondents announced that the workers would be getting a raise. Housekeepers and stewards received a $1 per hour raise, while others received 75¢. Those individuals were in the "non-tipping" category, meaning their remuneration was not normally connected to gratuities. Those job classifications which were connected to gratuities, such as restaurant wait staff, bellman and the like, were only granted a 10¢ hourly increase. As with other matters, this was not discussed with the Union in any way since Respondents had no intention of recognizing the Union or honoring its certification.

Respondents refusal to continue to recognize the Union as it again took over the Hotel, triggered additional demonstrations in front of the Hotel. I earlier cited that evidence in support of the contention that Respondents, in the form of Watanabe (and Minicola, too), had direct knowledge of the participation of members of the Union organizing committee's involvement. In addition, given their statements to the effect that the demonstrations had become "personal," one might infer union animus from those statements. However, there is more that can be discerned from Respondents' observations of the rallies.

The General Counsel has asserted that at least some of the rallies were closely observed by Minicola and that he was engaging an unlawful surveillance of protected activity when he did so. While it cannot be said that Minicola's observations necessarily were coercive, there is another allegation of unlawful surveillance and or polling which is substantially more coercive.

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[22] First, the General Counsel properly observes that company property is not really defined in the rule. It is clearly subject to an interpretation prohibiting them from being on the hotel premises in its entirety. Such a rule is no doubt valid for working areas, but has no application to nonworking areas such as the parking structure or even some of the restaurant seating areas. In any event, respondent has not offered any justification for the rule. Rules such as these are subject to the *Tri-County Medical Center* tripartite test for validity. 222 NLRB 1089 (1976). Under that case such rules are valid only if they 1. limit access solely with respect to the interior of the plant and other working areas; 2. are clearly disseminated to all employees; and 3. apply to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. Since Respondents have offered no reason for the rule, and since its ambiguities are obvious, the rule is unlawful.

In late April, 2008, Respondents, now fed up with the Union's continued and stepped-up demonstrations, decided to prove once and for all that the Union did not represent a majority of its employees. This was to counter the Union's "Justice on the Beach" campaign occurring during a Japanese holiday period known as Golden Week. On April 25, Respondents' department managers held a series of meetings with employees.

One of the cashiers, Jacqueline Taylor-Lee testified about the meeting she attended in the Oceanarium Restaurant with staff from both restaurants. [23] About 25 employees attended. Minicola began the meeting by observing that there was a boycott taking place outside the Hotel at that moment. John Lopianetzky (now the Hotel's general manager), Kazu Watanuke (in charge of Japanese sales), Edwin Dagdag (the new food and beverage manager) and Linda Morgan stood in support of Minicola.

Taylor-Lee describes what Minicola said:

> He started off, he welcomed everybody. And then he -- basically, he wanted to talk to us about the boycott, and whatever was going on outside. We had rallies going on that day.
>
> And the first thing I believe he started off with was, um, if you agree with what's going on outside, he hears it loud and clear, and it's fine.
>
> But if you don't, we want to hear from you. So, for those of you who don't agree with this, come over to HR, and we wanna hear from you.
>
> * * *
>
> After that, he said his hands were tied. Yeah, he needed to hear -- he needed to get feedback, he needed to hear from the employees.

Watanuke and Morgan both made comments as well. Taylor-Lee recalled Watanuke saying that he had recently been to Japan to solicit business but that no one wanted to talk to him.

Of Morgan, Taylor-Lee said: "[S]he mainly talked about our medical benefits. She told everybody -- she asked everybody, 'Where can you find another job that would pay for your medical benefits? We pay $600 for you, your family. Where can you get another job like that?' And she kept asking us, over and over again. And nobody answered."

After that, she said, Minicola proffered something to the effect of "[I]f we continue the way we're going, meaning the hotel, we're – we probably, all of us, will be out of jobs. And then he said, you know, "we" meaning the managers would probably get other jobs, but what about you? Can all of you get other jobs?"

A similar meeting was held outside the housekeeping office. Cesar Pedrina attended one of those meetings with about 40 to other employees. As before, Minicola, Morgan, Lopianetzky and Watanuke were present. One of Morgan's HR assistants, Monica Draper, was also there.

Pedrina testified that Watanuke told the group that he had been to Japan and had seen people passing out flyers about the Pacific Beach Hotel. Minicola asked the employees if they

[23] The Shogun was now closed, so these employees were from the Oceanarium and Neptune's Garden.

knew what a boycott was and supplied that the boycott was designed to hurt the Hotel, an object with which he disagreed. Pedrina reports Minicola saying that if the employees agreed with him, they should go to Draper's office or Morgan's office and speak with the HR managers. Guillerma Ulep corroborated Pedrina, but expanded slightly upon what Minicola had said. Her testimony: "He told us about the business going so slow because of the boycott, and it's affecting each and every worker, especially those with lower seniority. And he told us that if we want to do something about it, we have to go to the Human Resources office." Ulep testified that Morgan referred to the recent shutdown of Aloha Airlines, saying she pitied the employees who had lost their jobs and benefits there.

Although Ulep did not go to the HR office as invited, she was able to identify four employees who did. Even so, she said that after the meeting she no longer participated in any of the Union rallies. She no longer wishes to be identified with union supporters because she fears for her job. Like Ulep, neither Pedrina nor Taylor-Lee went to the HR office.

GCExh. 53 consists of a cover letter together with handwritten notes taken by Draper during this time frame. The cover letter, addressed to the investigating Board Agent, advises that Draper had taken the notes during her discussions with members of the maintenance department on or about April 23, 2008, along with other employees and some typewritten notes taken by other HR staff. The notes, which redact the names of the interviewees, are undated but nonetheless all detail the employees' disagreement with the Union and their disagreement with its boycott. They are clearly the product of the post-meeting interviews which Minicola had solicited.

It would appear that the maintenance department met as a group with Draper and nine of them adopted the same statement to the effect that there were 8 million Japanese union members but they did not want to come to the Hotel because guests are concerned about the noise from the rallies. It concluded "The boycott does not help ees, it hurt ees we don't understand how Union knows where we live, they come to our homes… We oppose boycott."

This is followed by 41 handwritten entries from redacted employees, all of whom expressed opposition to the boycott. There are also 12 typewritten entries by redacted employees to the same effect. The final entry is again handwritten by a redacted employee who says "We don't want to follow the step of Aloha Airline. We need a job which is dependable and reliable on like what have right now. Please stop the boycott and make our life live better." [Syntax in original]

Thus, it is clear that the HR department interrogated 63 employees concerning their Union sympathies and desires, all after providing them with the Company's point of view and implied threat of job loss. These interrogations are unlawful on several fronts. First, the whole thing qualifies as an unlawful poll. There is no evidence that any of the safeguards required by *Struksnes Construction Co.,* 165 NLRB 1062 (1967) were in any way followed. Under that case, the Board has consistently required that a polled employee be provided safeguards concerning the information sought. Specifically the employer must advise the employee that the purpose of the poll is: 1. to determine the truth of the union's claim of majority and 2. that no reprisals will be made for providing the information. In addition, 3. the poll must be by secret ballot and 4. the employer must commit no unfair labor practices or create a coercive atmosphere. Accordingly, since Respondents did not make any effort whatsoever to protect the employees from coercion, it is self-evident that this polling procedure was unlawful under

section §8(a)(1). [24] In addition, it qualifies as straightforward coercive interrogation concerning the employees' union sympathies, activities and desires. Finally, by cutting from the herd the employees who had been persuaded to reject the Union's tactics, it exposed those employees who continue to favor the Union and its tactics. That, too, was coercive and violates section §8(a)(1). See *Houston Coca-Cola Bottling Co*., 256 NLRB 520 (1981). Plus, in the final analysis, and despite its coercive nature, it did not even demonstrate that the Union had lost its majority. Indeed, determining the union's majority status by this tactic may not have even been the purpose. If its purpose was to halt the boycott, it failed. If its purpose was to intimidate employees from further union activities, it succeeded to some extent. See Ulep's decision to refrain.

Certainly Minicola's remarks and Morgan's rhetorical question concerning 'where else could they get a job if they lost this one?' is a threat to close the business which violates §8(a)(1) since it is not supported by any objective criteria.

As for the surveillance allegations, I am not persuaded. These are aimed at Minicola's observation of the rallies held in front of the Hotel's porte-cochere and right in front of Minicola's office window on the other side of the street. Clearly at least one purpose of using that location as a rally point was to attract Minicola's attention to it. In those circumstances it is difficult to conclude that Minicola's expected (hoped for) response could have had a coercive impact. In large measure this was the Union's invitation for him to make an appearance. Even if he chose to walk through the rally or encountered employees stepping off trolleys in the middle of such a rally, his presence, in a place where he would normally be, cannot be said to be coercive. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993) (An employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance).

i. Discrimination against the Seven Bargaining Committee Members

I return now to Respondents' decision not to retain a number of employees when it resumed operating the Hotel on December 1, 2007. Sometime in September, Minicola and his management team began work on determining which employees it would retain. As discussed above, it decided not to retain the entire staff as it had forced PBHM to do in January. Minicola contends that he reviewed occupancy rates and forecasts which informed his decisions. Part of that analysis included his decision to close the Shogun Restaurant. Minicola appears to have made the staffing level decisions on his own. There is no evidence that the individuals who compiled the data which he says he relied on contributed to the staffing level numbers he selected. Furthermore, as noted, the personnel jackets of applicants were ignored. Instead, he permitted Lopianetzky and Morgan to make most of the decisions. Morgan, as HR director, had no firsthand knowledge of the day-to-day performance of any employee. Accordingly, she enlisted the carryover executive housekeeper Christine Ko to select the housekeepers and floormen. On September 15, when Ko was given little time to formulate her list, Minicola had gone on the business trip to the Far East.

No detailed analysis of Minicola's thinking was ever presented in evidence. Neither he nor Lopianetzky could recall any specific number to be applied to any particular department, whether a reduction or an increase. Likewise Morgan could not remember any number which applied to any other department except for Housekeeping. There she knew that six employees

[24] Furthermore, Respondents failed to give the Union advance notice that the poll was to be taken. *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), enfd. as mod. 923 F.2d 398 (5th Cir. 1991).

needed to be denied employment. Even so, there is no explanation concerning why it was six, rather than any other number. Yet, she and Lopianetzky both agreed that Minicola told them how many employees needed to be subtracted by department. Curiously, at one point, Minicola testified that he never told anyone how many positions were to be eliminated. Instead, he waited for all the applications to come in and then made his determinations. Once he had a stack of applications for a particular department he says he told Morgan and Lopianetzky what he wanted from that stack. He claimed he didn't really tell them what he was thinking.

The upshot of all this is that there is no credible record explanation for the process that was used, aside from what ever was in Minicola's, Lopianetzky's or Ko's mind. It became a subjective process, somewhat tempered by the six factors mentioned above. With that as an introduction, I turn to the circumstances of each of the committee members who were not retained.

Darryl Miyashiro -- Miyashiro was a long-time member of the Hotel's banquet staff. He had been hired in 1992 and worked continuously until November 30, 2007 when his application for employment was not accepted. He was the most senior member of that staff. He was a member of the Union's negotiating committee, having been selected by his fellow employees. He participated in all of the contract negotiations, even up through his last day of employment. He was a strong union advocate. Indeed, he had personally negotiated with Minicola concerning a work distribution issue in both the Shogun Restaurant and banquet department. During some of those negotiations he became involved in some direct disagreements with Minicola. Minicola became angry with Miyashiro, pointed a finger at him, and asserted that he had "dealt with" Miyashiro when Miyashiro had sponsored a petition to change the gratuity system. At one point during the pre-PBHM negotiations Miyashiro had challenged a Minicola/Lopianetzky counterproposal deemed to be ridiculous and told them it was a slap in the face. Minicola had lashed back.

Miyashiro had an outstanding record as an employee. In 2003 he had been employee of the year and had been awarded a $1000 bonus. He turned down several promotion offers and had received no discipline whatsoever until a trash fire incident in 2006.

Lopianetzky testified that he chose not to (re)hire Miyashiro for two reasons: the trash fire and a complaint by a co-worker which had never been discussed with him. The trash fire incident occurred when he discarded into a trash can a used sterno canister which he believed had been extinguished. Unfortunately, it had not been and a fire ensued which was quickly extinguished without damage to anything other than the trash can. This occurred during Miyashiro's tenure as a negotiation committee member and discipline was imposed upon him during a sidebar to the negotiations. Minicola told Miyashiro that he would normally have suspended an employee for 2 weeks for such an incident, but because Miyashiro was such a good employee he was going to reduce it to one day. Lopianetzky, apparently disagreed, believing that the incident was too dangerous to be treated so lightly. Even so, Lopianetzky signed off on the-one day suspension, including a negotiated modification stating "This disciplinary action will not be precedence (sic) setting."

The second reason given by Lopianetzky, an undescribed incident involving a fellow employee seems to have no support. He gave testimony to that effect, but his prehearing affidavit given to the Board investigator did not mention the incident whatsoever. More likely, his testimony is an afterthought. I find whatever may have occurred involving the co-worker did not actually play a role in the decision to not retain Miyashiro. Accordingly, I give the second reason no weight whatsoever.

It is clear that the decision to not retain Miyashiro had nothing to do with the reasons given by Lopianetzky. He understood that the sterno incident could play no role in personnel decisions. Nor, do I think, that it did. Miyashiro's outspoken and assertive union activity made him a target in the course of Respondents' effort to shed itself of the Union in December 2007. Since Respondents had no intention of recognizing the Union when it resumed operations, it certainly had no desire to continue to employ a strong union activist such as Miyashiro. I find, therefore, that Respondents discharged Miyashiro because he was a union activist who could not be restrained. Accordingly, his discharge violated §8(a)(3) and (1) of the Act. In addition, Minicola's remark that he had 'dealt' with Miyashiro in the past for his protected conduct is a threat of unspecified consequences should Miyashiro assert himself in the same fashion again. It violates §8(a)(1).

Todd Hatanaka -- Hatanaka had been hired in November 1988. Initially he worked in the purchasing department, but sometime in 2000 had become a bartender in the food and beverage department. He became a member of the Union bargaining committee in 2006, having been selected by staff at the Oceanarium Restaurant. He continued as a bargaining committee member until November 30, 2007. He had an exemplary record, the last discipline having been levied upon him in 2001. As noted above, Hatanaka was one of four employees whose letters to the editor, critical of negotiations, were printed in the *Star-Bulletin*.

Lopianetzky asserted that he did not rehire Hatanaka because he "would not close checks in a timely manner" and some of his managers had made such complaints. Lopianetzky, however, was unable to support that assertion. Indeed, it is not clear when Hatanaka's supposed shortcomings occurred. Lopianetzky had great difficulty identifying the managers who made such complaints. He managed to mention one of the Shogun managers by name on his first day of testifying and on his second day identified an audit manager by name. How an audit manager would have any knowledge about the prompt closing of checks is unclear. Finally, there is no record that any manager ever spoke to Hatanaka about this supposed shortcoming. Lopianetzky admits that he never did so. Clearly, there is no record of any specific incident, much less any record of repeated incidents.

Lopianetzky also contended that Hatanaka "was not the most personable bartender' and he was uncomfortable tending bar. Once again, there is no record whatsoever pertaining to this perceived deficiency. In fact, when Hatanaka served as the bartender/cashier at the Shogun buffet his duties did not involve being especially personable. There, all he had to do was be polite, deliver beverages to the customer's table and later ring the dinner check at the register. Had Hatanaka had problems with customers, or even with coworkers, some sort of record would have been made. None was. Lopianetzky was not even certain whether any manager had ever taken steps or been directed to take steps to rectify whatever issues Lopianetzky claims to have seen. Frankly, Lopianetzky's contention here is not credible.

Respondents also assert that the main reason for not keeping Hatanaka was because the Shogun Restaurant had been closed and bartending shifts had been lost. That reason, however, is unpersuasive because one of the individuals kept was Edwin Nagasako, a bartender who in 2007 had jeopardized Respondents' liquor license by serving liquor to a minor, receiving a liquor commission citation for doing so. Compared to the trifling shortcomings exhibited by Hatanaka, choosing Nagasako over Hatanaka makes no business sense whatsoever, even assuming that the restaurant closing necessitated the loss of a bartender shift.

Therefore, I find that Lopianetzky's testimony is unreliable. Accordingly, since the reasons advanced to justify Hatanaka's discharge is neither supported nor plausible, the remaining evidence leads to the conclusion that Respondents discharged Hatanaka because of his union activities, specifically his support of the Union during the time frame in which Respondents were trying to evade their responsibilities under the Act. There has been no rebuttal of the prima facie case. Hatanaka's discharge violated §8(a)(3) and (1) of the Act.

Ruben Bumanglag -- Bumanglag was a Maintenance I employee who had worked in that department since 1996. He was one of three Maintenance I employees on staff during the changeover. The other two were retained; he was not, even though he filed a timely application. In fact, during the application process in September 2007, Bumanglag appeared in a Union television commercial relating to the ongoing labor dispute. He was one of the early organizers prior to the first election, and testified at two representation election hearings. After the Union won the second election, he was chosen as a member of the Union bargaining committee, providing information concerning the maintenance, curator, and landscaping departments.

Bumanglag's work history was exemplary. The only discipline which seems to have been applied to his record involved an incident for which the entire maintenance department was chastised. That occurred in 1998, 9 years before Respondents decided not to retain him. That incident is so remote and so unfocused that it would be unreasonable to have used it in the changeover process.

Lopianetzky and Minicola each testified that they had input into the decision. However their reasons differed. Lopianetzky asserted that Bumanglag had failed to properly repair some convection ovens in the Shogun Restaurant. Minicola testified that Bumanglag was part of a crew of employees that caused the electrocution of a sous chef in the banquet department, apparently due to some improperly repaired equipment. The sous chef's hand was burned, but to an extent not clear from the record. Respondent did not even examine Bumanglag about these episodes.

Despite these incidents, if they occurred, no record was kept and no discipline was levied at the time. Indeed, the dates of these incidents are not shown in the record. Lopianetzky admits that he did not ask Bumanglag's immediate supervisor to discipline him for failing to properly fix the ovens. Furthermore there is no evidence that Minicola took any steps concerning the so-called electrocution incident. Since someone got hurt in that event, a record should have been kept, either for OSHA reasons or for a worker's compensation claim. But none was.

In addition, Respondent contends that Bumanglag was really no different than the other two Maintenance I employees, observing that both of them were also union supporters. However, it is clear that Bumanglag's union activities were far greater, as were his commitment to the Union by becoming heavily involved in negotiations. Appearing in the television commercial made him a far bigger concern and therefore a bigger target.

Again, Respondents' effort to rebut the General Counsel's proof fails the plausibility test. Respondents' reasons are not only inconsistent and unsupported, they are made of whole cloth. They do not rebut the prima facie case. Bumanglag's discharge violated §8(a)(3) and (1) of the Act.

Virbina Revamonte -- Revamonte had worked for Respondents since 1989, most recently in food and beverages as a Pantry I worker. She was one of the employees originally

involved in union organizing, serving as a Union observer during both elections and giving testimony in both of the post-election hearings conducted by the Board. She was an original member of the Union's negotiating committee. In that role she was fairly active, particularly when it came to changes in the employee handbook. In June, 2006 she suffered an on-the-job injury and was off work for about 2-1/2 months, returning in a light duty capacity in early September. She worked in one of the Hotel's retail stores during that time. In April 2007, her condition became aggravated and she was forced to go on workmen's compensation leave. She remained in that status through the December 1, 2007 changeover date. She was aware of the obligation to file a job application and did so. Despite her August 27 application, Respondents did not offer her any job. At that time, she was seventh in seniority; plus, Respondents retained about ten pantry employees.

Minicola explained that Revamonte was not offered because the kitchen department was going to be reduced and they had no confirmation that she would be able to work. Similarly, Lopianetzky testified that she was not available to work. Connected to that is the observation that Revamonte was not on the active payroll of the time of the transition. Revamonte testified, however, that she said on her application that she was available for work. Moreover, she did not limit the hours available because of the disability.

In view of my finding elsewhere in this decision that the entire transition was part of a scheme to avoid unionization, and therefore had no real validity, I find that Respondents chose to bypass Revamonte for discriminatory reasons. Her availability or unavailability had no bearing on Respondents' decision. She was a Union activist, she was deemed to be a bit off the radar due to her worker's compensation leave and was considered a low risk person to discharge. Moreover, Respondents' explanation that it did not know whether she was available for work clearly fails as a credible explanation. She had said she was available on her application form and if Lopianetzky had a doubt, he could easily have spoken to her. Either way, she was entitled to maintain at least the very status that she then occupied -- workers comp leave. Beyond that, Respondents did recall people who were not on the active payroll. One example is Vickie Sabado, a housekeeper who was on workers comp at the time of the transition. In addition, another housekeeper, Joel Pancipanci was an on-call employee. Both Sabado and Pancipanci were offered jobs. If these two were offered employment, there was no need to disconnect Revamonte from her job. The General Counsel's prima facie case has not been rebutted. Revamonte's discharge violated §8(a)(3) and (1) of the Act.

Virginia Recaido -- Recaido had worked as a full-time housekeeper at the Hotel for about 15 years. Compared to the group of housekeepers who were retained on December 1, 2007, she had far more seniority than most of them. In 2005, her co-workers had selected her to become a member of the Union's bargaining committee. Indeed, she was one of three members of the housekeeping staff who were selected for the committee. She had been quite vocal, particularly concerning the fact that there were was inadequate time for room attendants to eat their lunch when they had sixteen rooms to clean each day. She says that, apparently in response, Minicola told them that if it were not for the goodness of Corine Hayashi most of the committee members would not be working at the Hotel.

Recaido participated in a number of the union rallies in front of the Hotel, was a leafleter, and occasionally spoke to representatives of the news media about a labor dispute. Indeed, her comments had been quoted in the newspapers and she had appeared in at least one union-sponsored television commercial. Her August letter to the editor criticizing the progress of negotiations was printed in the *Star-Bulletin*. The executive housekeeper, Christine Ko, acknowledged that she was aware of Recaido's public stance.

According to HR manager Morgan and Ko, Recaido was simply bypassed due to the system which had been put in place, somehow failing to meet one of the six criteria. Which of these criteria Recaido failed to meet is entirely unclear. Ko contended that Recaido did not have a good attitude, was not a team player, was insubordinate and had a poor attendance record. She cited two incidents leading her to that conclusion. The first involved an incident where an unnamed housekeeper had supposedly failed to check a bed which had become soaked with blood. Recaido, incredulous, said something challenging Ko's version and demanded to know the name of the housekeeper. Ko, naturally, refused to comply but used the incident to suggest that Recaido was not a team player and harbored elements of insubordination. I think it is clear that Recaido doubted the veracity of the report, believing that it constituted a smear of the housekeeping staff's integrity, possibly blaming the wrong person. Even so, Ko said she simply 'counseled' Recaido. It is quite possible that Recaido's challenge had a protected aspect to it, though on this scant record, that is not clear.

The second incident involved a day which involved a large number of checkouts. Ko, whose knowledge was secondhand, said Recaido told assistant housekeeper Bobbi Hind, that each staff member should be given only six checkouts that day and the Hotel should hire additional housekeepers. This incident does not support the "not a team player" accusation; in fact it is actually protected by §7 of the act as an act of mutual aid and protection of her fellow employees. Certainly Ko took no steps to discipline Recaido over the incident at the time.

But what really puts Ko's explanation into the untenable category was the fact that Respondents retained employees whose histories of transgressions were far worse. For example, housekeeper Imelda Garibaldi was suspended for one day for refusing to wipe down hallway baseboards, saying it was not her job and then publicly arguing about it. Similarly housekeepers Rosita Callo-Fieldad and Lydia Diego received warnings/counseling after guest complaints concerning bloody material found on bed sheets. The record shows several employees received warnings for failing to treat fellow employees with respect and courtesy, specifically over some room discrepancies and hurt feelings. One, Juanita Lucas, was the target of some gossip concerning her room discrepancies. Indeed, prior to the changeover of December 1, 2007, she had received a number of discrepancies and had been forced to turn over some unserviced rooms to a runner, as she had been unable to handle her daily assignment. Nevertheless, all of these individuals were retained over Recaido whose work performance was clearly superior.

Again, given Respondents' hostility and antipathy to unionization, and the hollowness of the assigned reasons for not keeping her, is clear that the General Counsel's prima facie case has not been rebutted. Recaido was discharged in violation of §8(a)(3) and (1).

Rhandy Villanueva -- Villanueva worked in the housekeeping department as a houseman. He had been employed by the Hotel for over 14 years. As a houseman, he performed a variety of tasks in support of the housekeeping staff, assisting with room cleaning as called upon, hallway and public area custodial work, and as a runner providing services (such as delivering rollaway beds) to Hotel guests. He was classified for payroll purposes as a Housekeeper II.

Villanueva was selected by the housekeeping staff to be one of its representatives on the Union's negotiating committee. He served continuously on that committee from its inception in 2005 through the changeover in December, 2007. During that time frame he missed only two bargaining sessions. He often sat directly across the table from Minicola. In addition, he

manned the Union's information booth on Kuhio Avenue behind the Hotel. On one occasion he noticed Minicola observing him as he attended rallies in front of the Hotel. Villanueva, like the others, had also filled out a job application form.

Shortly before the changeover, he says Ko asked him if he had received a job offer. When he responded that he had not, she told them that she was "surprised." He then asked her for a letter of recommendation and she agreed to provide one.

Ko told another story. She said that he was not hired because he failed to complete work assignments, had committed safety violations and had a poor attendance record. She cited an instance where he had supposedly failed to knock on a room door when delivering a rollaway bed, even though the guest had placed a "do not disturb" signed on door. In that instance, he should have asked Housekeeping supervision to call the room. In another incident he supposedly left a rollaway bed in the hallway after a checkout rather than returning it to its proper location. Ko also says Villanueva committed two safety violations: once over-stacking trash bags on a cart, allowing them to fall and on another occasion pushing one trash bin with another. Despite these transgressions, Ko admitted that there were no written disciplinary records on file for Villanueva.

To the extent that Villanueva had any absentee problems, they were attributed to an asthma-like condition. Each of these was explained by a doctor's note and Villanueva never failed to give notice of his situation. There were no no-call, no-show absences. His work was generally very good.

Villanueva was the only houseman who was not retained. As with the other housekeeping employees, Ko did not consult any personnel jacket entries for her decision and recommendation. Indeed, is not entirely clear who made the decision to not retain Villanueva since Villanueva testified Ko was surprised to learn he had not been retained. Ko, though, made some kind of recommendation and Morgan reviewed it. Whoever made the recommendation, made an odd choice given the records of those housemen who were retained. Housekeeper II Frederico Galam had been disciplined five different times between March 1 and September 30 2007. At least one of those was for entering a guest's room without authorization, something he had been counseled for previously. He also received a written warning for blocking an elevator door with a trash bag and was given another written warning for improper use of a guest elevator. Finally, in September 2007 Galam was given a 3-day suspension for changing his work assignment without a manager's permission. Ko signed off on each of the written disciplinary records.

Given Galam's clearly inferior record compared to union activist Villanueva's, the only conclusion that can be reasonably drawn is that Respondents chose not to recall Villanueva because of his union activism, including his long participation as a member of the Union's negotiating committee. The General Counsel's prima facie case, fraught with animus, has not been rebutted. Villanueva was discharged in violation of §8(a)(3) and (1).

Keith Kapena Kanaiaupuni -- Kanaiaupuni, frequently described in the record as Kapena, had worked for Respondents since 1983 and was a 25-year veteran who had served for most of that time as a full-time bellman. The front-of-the-house employees chose him as their representative on the Union's negotiating committee. He later became Chairman of the committee. Although he received an hourly wage of only $7.25 an hour, that job is considered gratuity-based. Indeed, there is a $3 porterage fee for each piece of luggage hauled by members of the bell staff. The porterage remuneration is shared by the bell staff, based on the number of hours each works during a pay period.

Kanaiaupuni became embroiled with Minicola during the pre-PBHM negotiations over who would share the porterage "kitty." In the past, managers had been part of the distribution, but the bell staff believed that was improper since managers did not handle any luggage. In addition, some of the money had been shared by parking lot attendants. Moreover, the porterage was a significant amount of income for each of the bellmen. Apparently, the managers were handling the money and taking a cut before the distribution. The negotiations between Kanaiaupuni and Minicola were protracted and heated, even involving shouting matches. Eventually Minicola relented and gave control of that money to the bellmen as a group. Later, when the bellmen changed the distribution formula, Minicola became upset and attempted to regain control, saying he would not make the same mistake again.

The porterage became a point of contention a second time when another bellmen made a mistake and transposed some numbers on the distribution spreadsheet resulting in a mistaken payment. For some reason Minicola took offense and threatened to fire Kanaiaupuni for stealing since he was the recipient of the overpayment. When Kanaiaupuni explained that he did not do the payroll and did not make out the spreadsheet, Minicola was forced to relent. As for the incident itself, the error was corrected and the proper individual received the correct payment.

Also during negotiations Minicola became exercised with Kanaiaupuni over a misunderstanding involving one of Minicola's proposals concerning combining the doorman job with the valet job and/or hiring an outside contractor to run the parking valet station. Kanaiaupuni somehow got involved with the valets who reported that he had told them that they would lose their jobs if the company proposal were implemented. Minicola became upset with Kanaiaupuni over the incident, although Kanaiaupuni explained how the miscommunication occurred.

Whether Kanaiaupuni accurately or inaccurately described to the valets what had happened during negotiations, it is immaterial for our purpose. As the Committee chair, Kanaiaupuni was attempting to provide information concerning negotiations to affected employees. That conduct is protected by §7 of the Act and his abilities to describe negotiation events to fellow employees is none of Respondents' business.

Respondent's managers do not tell a consistent story concerning who made the decision to not retain Kanaiaupuni. Lopianetzky said that was Minicola and Morgan. Morgan said it was Lopianetzky and Minicola after she shared some information with them concerning some of Kanaiaupuni's coworkers' complaints about him. She was quite vague about these complaints and could not describe them; neither could she say whether any of the complaints resulted in any discipline. Minicola said he did not hire Kanaiaupuni because of some attendance questions and because he grumbled about the work of the other employees. As for the grumbling, Minicola admitted that he had never heard Kanaiaupuni do so.

If attendance was actually a factor in the decision to retain employees, Kanaiaupuni's record is clearly superior to the attendance records of fellow bellmen Mark Nishida and Michael Bradshaw. As the General Counsel observes, in the seven years before the PBHM takeover, Nishida had been disciplined 25 separate times, 23 of which were for absences or tardies. Bradshaw was disciplined 21 times for absences and tardies. Kanaiaupuni received only 7 disciplines for attendance issues during that same time frame.

The grumbling question seems to be made of whole cloth, for there is no evidence whatsoever in the record concerning any such incident, unless one looks to Kanaiaupuni's behavior during negotiations. If that is what the Minicola and Morgan are referring to, it was protected conduct and may not be used to support a discharge.

Clearly the General Counsel has made a prima facie case that Respondents discharged Kanaiaupuni in violation of §8(a)(3) and (1) of the Act. Moreover, Respondents' assigned reasons for selecting him for discharge do not hold water and are entirely unpersuasive. Accordingly, I find that Respondents have not rebutted the prima facie case.

II. Conclusionary Findings

Any analysis of this case must begin with some basic understanding of Board law concerning the continued obligation to recognize and bargain with a certified labor organization. Generally speaking, once a union is certified as the exclusive collective bargaining representative of a group of employees, that union's status cannot be changed absent a legitimate movement by the employees themselves to do so. Thus, although it is often said, and the statute confirms it, during the first year of the certification the Union's majority status may not be challenged at all. It is unrebuttable. And, after the certification year expires, the presumption of majority status continues. Over the years, the Board has modified that concept only a little. In 2001, the Board decided *Levitz Furniture Co. of the Pacific*, 333 NLRB 717. In that case, after a short survey of the history of the treatment of post-certification year analyses, at 723, the Board solidified the rule as follows:

> In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition **unless it can prove that an incumbent union has, in fact, lost majority support.**
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> * * *
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> *Withdrawals of recognition.* The fundamental policies of the Act are to protect employees' right to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships. If employees' exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees. It also means that collective-bargaining relationships must be given an opportunity to succeed, without continual baseless challenges. These considerations underlie the presumption of continuing majority status:
>
> The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. . . . The resulting industrial stability remains a primary objective of the Wagner Act, and to an even greater extent, the Taft-Hartley Act. Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support. [fn. omitted.]
>
> Where unions continue to enjoy majority support, promoting stability in bargaining relationships and insuring employee free choice are one and the same.
>
> [Bolding supplied.]

Thus, under *Levitz*, an employer absent actual proof that the union has lost its majority status may not withdraw or refuse to recognize a §9(a) incumbent union.

Connected to that aspect of Board law, Respondents sought to prove a loss of majority by anecdotal evidence concerning the number of employees who actually participated in the demonstrations outside the hotel. See Mr. Sanada's offer of proof in volume XI; he also proffered in RExh. 12 and 12(a) (found in the Rejected Exhibit envelope), evidence to the effect that the employees perceived some sort of "general consensus" that they were against the Union's boycott and therefore against the Union. Such evidence is entirely conjectural and in any event is belied by Respondents' own actions when they (unlawfully) interrogated its employees in April 2008. The numbers it unearthed at that time did not come close to disestablishing the Unions' majority status, even 5 months after it withdrew recognition. Moreover, it never conducted a lawful poll, nor was it presented with an uncoerced disaffiliation petition. For those reasons, I rejected the offer of proof and the evidence supporting it and barred Respondents from presenting the hearsay evidence some of its employee witnesses might have provided. More specifically, see *Port Printing Ad and Specialties*, 344 NLRB 354, 357-358 (2005), enfd. per curiam 192 Fed.Appx. 290 (5th Cir. 2006).

The second point to bear in mind is that this involves protracted negotiations for a first contract in circumstances where there is strong evidence that Respondents were seeking to evade their obligation to negotiate in good faith. There are several factors in play concerning this point. First is its never-changing effort to impose an illegal recognition clause on the Union, forcing it to abandon its lawfully won bargaining unit description. This is closely connected to its management rights clause and its virtually absurd dispute resolution proposals. It is true, that during the PBHM regime, progress was made on those fronts. But that progress was illusory, for as soon as PBHM began asking for permission to enter into a collective bargaining agreement, Respondents canceled its arrangements with PBHM, effectively sabotaging all the progress PBHM had made. Indeed, the entire concept of bringing PBHM into the situation as some sort of surrogate would appear to be bad faith in and of itself. It became apparent, over the course of the hearing, that PBHM was suspicious of Respondents' motives from the outset, but proceeded anyway as a means of turning a profit. What it did not understand was that it was supposed to serve as a dead-end for the Union, a place for the Union to become trapped, humbled and de-energized. Instead, PBHM and its owners understood their legal obligations under the Act and actually attempted to reach an agreement with the Union. From Respondents' point of view, this was an undesirable direction.

A corollary to this second point is that since PBHM had failed to carry out its 'mission' as Respondents perceived it, all of its explanations for canceling the management agreement with PBHM are basically false. In this regard, Respondents have asserted that PBHM was failing in its responsibility to manage the Hotel properly. These included charges that PBHM was finagling the budget, failing to install the Stellex computer system in a timely way, and permitting the Oceanarium fish tank to lose its oxygenation together with a massive loss of Mrs. Watanabe's beloved tropical saltwater fish collection.

The only possible perceived valid reason for declaring PBHM to be incompetent is the fish tank issue because its value was immeasurable. And, and it is no doubt true that Minicola's assessment that large number of dead fish in the tank would be offensive to restaurant customers who normally had an excellent view of the tank and its occupants. Still, the incident occurred in May and was fairly rapidly cleared up, even if not all of the fish were readily replaced. By August 3, when Minicola canceled the management agreement, the issue was essentially resolved, even if not forgotten. Moreover, during the investigation process, the tank incident was not included in Minicola's affidavit in which he explained the reasons for PBHM's

cancellation. Minicola's explanation, to the effect that the investigator did not ask him the question, seems lame in the circumstances. If it had been a significant factor in the decision to cancel the management agreement, Minicola would not have omitted it. His explanation cannot be credited, particularly because of how acute he says Mrs. Watanabe's sense of loss was. If the loss had been as significant to the decision as he said, given its sharpness, he would not have omitted it from his affidavit. Accordingly, I conclude that the fish tank incident had little to no bearing on Respondents' decision to terminate the PBHM management agreement.

The other two reasons, PBHM's supposed to finagling of the budget and its failure to timely install the Stellex reservation system are unimpressive as well.

First, under the terms of the management agreement, preliminary budgets projections were known to be flawed, in the sense that they were to be corrected once PBHM had managed the hotel for 3 months and real numbers could be supplied. In fact, the management agreement set forth that exact scenario. Specifically see paragraph 10.3. Furthermore, that paragraph is entitled "No Reliance on Projections." When actual numbers could be supplied so projections could be made more reliably, rather than accepting those facts, Minicola and Watanabe became exercised over the effect that these numbers appeared to show negative performance compared to the previous numbers. Yet everyone understood, or should have understood, that the previous numbers were estimates and targets, not reflective of actual revenues. That being the case, Minicola's testimony on the point must be regarded as disingenuous insofar as it was a reason for canceling the PBHM agreement. In fact, the Hotel was performing reasonably well despite a market downturn.

The Stellex issue and the declining occupancy rate are intertwined. I think it is fair to say that the Stellex system, installed in June, was late. Two observations can be made about that fact. The first is that it was installed was later than either Outrigger or Respondents wanted. Second, even if it had been installed as promised, its full impact on reservations would not have taken effect for almost a year. Being installed in June meant that it was only operational for about 6 weeks. The way it operated was to place Respondents' Hotel as a "partner" on Outrigger's reservations website. Thus, any potential on-line Outrigger guest when reaching that website saw not only Outrigger's own eponymous hotels and a link to its Ohana properties, he also saw a link to the Pacific Beach Hotel.

Unlike Respondents, Outrigger marketed principally to the continental United States, Canada and perhaps the remainder of the Americas. Respondents had marketed the Pacific Beach Hotel principally to Japan and other far Eastern markets. Thus, Stellex was the Pacific Beach Hotel's first major marketing effort in North America. It could not have been expected to reap immediate benefits. Stellex, nevertheless, if left in place, would have exposed the Hotel to this entirely new market. It was a long-term strategy, but cancellation of the PBHM management agreement undercut it entirely. Minicola's blame, targeted at PBHM's handling of the Stellex installation, like the fish tank incident, does not fit the time line very well. Once in place, Minicola never permitted it the opportunity to succeed.

In sum, the reasons as cited by Respondents for canceling the management agreement are not especially persuasive. Standing alone, one might consider them to be justifications. However, they did not stand alone. The elephant in the room was the Union. PBHM was succeeding too well with the Union. It was about to enter into an agreement which would last at least two years and would give the Union significant authority over the manner in which Respondents dealt with its employees. That had been intolerable since the one-vote win in

2005 and remained so in 2007. Indeed, the Union's persistence and its resort to international boycotting and public demonstrations had worn thin with both Minicola and Watanabe. As Minicola said, they were taking it "personal."

Based on the foregoing, I have no difficulty in concluding that the reason Respondents canceled the PBHM agreement was to avoid having a union representing the Hotel's employees. Indeed, in reviewing the management agreement and Respondents' general behavior toward the Union, it seems clear that the entire concept of inserting an "independent" manager such as PBHM was nothing more than a long-term scheme to wash the Union from the Hotel. It was designed to make it appear that Respondents were a bona fide successor to PBHM where it could also claim that the Union's one-vote majority of two years before had become dissipated. If so, it reasoned, it could simply treat all of the employees as if they were new hires and set the new terms and conditions. Even if it could not rid itself of the Union entirely, at the very least it could ignore all of the collective bargaining that had gone before and set initial terms and conditions of employment under cover of the holding in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). There the court recognized that in a normal successorship an employer is free to set the initial terms and conditions upon which it will hire the employees. In other words, it is not obligated to accept an existing collective bargaining agreement. The court went on to say that there would be circumstances where it would be perfectly obvious that the successor intended to retain all of the employees in the bargaining unit that it would be appropriate to have him initially consult with the employees' bargaining representative before fixing those initial terms and conditions.

Respondents' scheme here anticipated that it might be obligated to both recognize and/or consult with the employees' bargaining agent, the Union. To avoid that, and to guarantee that the Union's one-vote majority could be seen as lost, it chose to discharge seven known union activists. After all, if the Union only had a one-vote majority, that majority would be extinguished if known union adherents no longer worked for the Hotel. And, as I have shown above, Minicola did exactly that when he discharged the seven bargaining committee members. Indeed, those discharges have above been found to be illegal and in violation of §8(a)(3) and (1).

Once it had accomplished destroying the Union's majority, it deemed itself free to behave as if it were a new employer, and not a successor under the NLRA. This ruse, however, is as transparent as it is simple. Its principal problem is not that it is difficult to discern but that it has created an intricate web of violations. Because nothing it did when it resumed operations upon PBHM's departure was with the Union's consent, nearly everything it imposed on the employees violated the Act.

As the General Counsel correctly observes, the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962), an employer violates §8(a)(5) and (1) by unilaterally imposing new and different wages, hours, or other terms and conditions of employment upon bargaining unit employees without first providing their collective bargaining representative with notice and an opportunity to bargain regarding the change. The topics over which such an employer must bargain are those which are regarded as mandatory bargaining subjects -- wages, hours, and other terms and conditions of employment. Specifically see *NLRB v. Borg-Warner Corp., Wooster Div*., 356 U.S. 342 at 349 (1958). In addition, an employer must respond factually with reasonable demands for information concerning not only underlying data germane to collective bargaining, but to information reasonably related to collective bargaining. This includes such matters as limits imposed on a bargainer and information concerning the nature of the actual employer.

More specifically, the general rule is that an employer is obligated to provide the employees' statutory bargaining representative with information in its possession relevant to collective bargaining. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Fafnir Bearing Co.*, 146 NLRB 1582 (1964), enfd. 362 F.2d 716 (2d Cir. 1968). Furthermore, The Board in *Sheraton Hartford Hotel,* 289 NLRB 463, 463-464 (1988), said §8(a)(5) obligated an employer to provide a union with the requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. When the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Postal Service,* 332 NLRB 635 (2000). (same).

The Act favors transparency. *Otay River Constructors*, 351 NLRB 1105 (2007). Some items demanded, of course, are producible on their face given the fact that they are presumptively relevant to collective bargaining. Others are producible upon a showing that they are indeed relevant, even if not presumably so. Here, one of the principal demands the union made as a contract began to appear on the horizon was to determine who the actual employer was. It knew, of course, that PBHM was doing the bargaining and was the direct employer, at least for that moment.

What it did not know was what limitations Respondents had placed upon PBHM. PBHM bargainers had hinted that there were some, but they were confidential and could not be revealed. The Union knew, from its prior experience bargaining with Minicola, that Minicola would not agree to anything close to a reasonable recognition clause. It also knew that suddenly the employing entity had magically become PBHM. Yet it could see Minicola working in the background, every day. The Union reasoned that if Respondents were really in control, then they were the parties to be bound by the contract. But the Union could not get access to the information it needed to determine whether it could safely sign a contract with PBHM. If it did so, would it be binding on Respondents in the event that Respondents reappeared on the scene? In those circumstances, information concerning the true employer was highly relevant to not only the recognition clause, but the signature clause as well. Therefore, I find that information relating to the true nature of the Respondents and their relationship with PBHM was information that was highly relevant and could not be kept from it by a claim of confidentiality. The information is clearly relevant to the intelligent negotiation of a collective bargaining contract. *Western Massachusetts Electric Co.*, 228 NLRB 607, 623 (1977). (Seniority data on non-unit employees who might have the right to displace unit employees.) Respondents violated §8(a)(5) by refusing and by directing PBHM to refuse to supply such information, including the relevant portions of the management agreement. Cf. *Leonard B. Herbert, Jr. & Co.*, 259 NLRB 881, 883 (1981) (Employer required to produce information about 'double breasting' at his companies as it is presumptively relevant to collective bargaining.) Also cases cited therein: *Associated General Contractors of California*, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980) and *Doubarn Sheet Metal*, 243 NLRB 821 (821 (1979). *Blue Diamond Co.*, 295 NLRB 1007 (1989) (demand for information to determine whether multiple companies were actually a single employer.)

Any objective analysis of this wide-ranging state of affairs must recognize that all of these things are of a piece. They are all designed with one purpose in mind: evasion of the Act. Respondents have chosen to defy not only the will of their employees, but the statute which provides for those employees' mutual aid and protection – §7 of the Act. It has rejected the validity of the certification under §9, its general duty to bargain in good faith as required by §8(d), its concomitant duty under section §8(a)(5) to provide relevant information to the Union

and its unlawful discharge of seven employees under section §8(a)(3). And this summary does not even reflect the wide variety of unlawful unilateral changes it undertook beginning in December, 2007.

Unilateral Changes

Since none of the changes are in dispute, I need not do more than provide a list of these unilateral changes. Suffice it to say that under *Katz*, all of them are mandatory subjects and all of them were imposed or implemented without first bargaining with the Union:

1. In mid-October 2007 Respondents imposed a conflict of interest rule upon its employees, effective December 1.

2. In mid-October 2007 Respondents imposed a confidentiality rule upon its employees, also effective December 1.

3. On December 1, 2007 Respondents granted wage increases to its bargaining unit employees, $1 per hour for housekeepers and banquet stewards, 75¢per hour for all other non-tipping category employees and 10¢ per hour for its tipping category employees.

4. On about December 1, 2007 Respondents increased the number of rooms its housekeepers were to clean per day, from 16 to 18 in the Ocean Tower and from 15 to 17 in the Beach Tower.

5. On December 1, 2007 Respondents imposed a new employee handbook containing a wide variety of rules affecting working conditions, many of which interfere with employee rights as defined under §7, but all of which relate to terms and conditions of employment.

III. The Remedy

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondents discriminatorily discharged Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte, they must offer them reinstatement to their previous jobs, or if they are not available, to substantially similar jobs, and make them whole for any loss of earnings and other benefits they may have suffered. Respondents shall take this action without prejudice to their seniority or any other rights or privileges they may have enjoyed. Backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondents make a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondents shall be required to expunge from their personnel files any reference to their illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982). In each case they will also be ordered to advise each of them in writing of the expunction and that the discharge will not be used against any of them in any way.

With regard to the §8(a)(5) allegations, there are essentially three types: the general refusal to bargain/refusal to continue to recognize, refusals to provide information and a variety of unilateral changes. With respect to the unilateral changes, Respondents will be ordered to roll all of them back, together with an appropriate restoration option. It will also be ordered to promptly supply the requested information.

As for the general refusal to bargain and the withdrawal of recognition, the General Counsel is seeking both ordinary and extraordinary remedies. Given the fact that Respondent has not bargained in good faith from the time it made its first counter proposal on January 5, 2006, the certification year will be extended for one year from the date of the Board's bargaining order herein. See generally *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962) and *Glomac Plastics, Inc.*, 234 NLRB 1309, enfd. in part 592 F.2d 94 (1979).

With respect to the extraordinary remedies, the General Counsel seeks an order requiring Respondents to make whole employee negotiators for any earnings lost while attending bargaining sessions. It also requests an order requiring Respondents to pay the Union for its costs and expenses in preparing for and conducting collective bargaining negotiations from January 1, 2006 through November 30 2007.

As the Board has stated the test, if it is quite clear that Respondents' unfair labor practices can fairly be said to "have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies" in cases of unusually aggravated conduct, then extraordinary remedies are appropriate. *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enforced in pertinent part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. (1997). And, as the General Counsel argues, requiring Respondents to reimburse for bargaining costs is appropriate where there is a "direct causal relationship between the [Employer's] action in bargaining and the charging party's losses." *Teamsters local 122 (August A. Busch & Co.)*, 334 NLRB 1190 at 1195 (2001), enfd. 2003 WL 880990 (D.C.Cir. 2003) (consent judgment). See also *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.,* 386 F.2d 562, 570 (4th Cir. 1967).

I find here that Respondent's conduct easily fits the test. There is no debate that Respondents engaged in bad faith bargaining from the outset, then entered into a scheme whereby it could 'wash' the Union's certification from itself and behave as if the employees never had selected the Union as their bargaining representative. In the process it discharged seven of the Union's principal adherents – both as a retaliation and as means of reducing what it perceived as the Union's thin majority. Accordingly, the General Counsel's requested extraordinary remedies will be granted.

Finally, because Respondents have a proclivity for violating the Act, because of the serious nature of the violations and because of Respondents' unyielding and egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by §7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Finally, given the nature of these unfair labor practices as I have described, I find that merely posting the notice will not have the salutary effect necessary to deter Respondents from this behavior in the future. It is necessary for all persons to become vigilant and aware of future unfair labor practices or repetitions of those committed in the past. Accordingly, in order to educate the employees about what Respondent has done in the past and what it is doing or likely to do in the future, I shall recommend that one of Respondents' responsible corporate executives in the presence of a Board agent read the attached notice (Appendix) to the employees during shift meetings called for that purpose. See *Excel Case Ready*, 334 NLRB 4 at 5 (2001). The Board agent may also answer employee questions at the meeting.

IV. Conclusions of Law

1. Respondents HTH Corporation, Pacific Beach Corporation and Koa Management, LLC together doing business as Pacific Beach Hotel constitute a single employer under the Act and is an employer engaged in commerce and in an industry affecting commerce within the meaning of § 2(2), (6) and (7) of the Act.

2. Respondents HTH Corporation, Pacific Beach Corporation and Koa Management, LLC together constitute a single employer under the Act and are jointly and severally liable for the unfair labor practices found herein.

3. International Longshore and Warehouse Union, Local 142 is a labor organization within the meaning of §2(5) of the Act.

4. At all times since the Board certified it as the §9(a) representative of the employees of the Hotel on August 15, 2005, the Union has represented a majority of the Hotel's employees in the appropriate bargaining unit.

5. At no time between August 15, 2005 and December 1, 2007, has the Union lost its majority status in that bargaining unit.

6. At no time between August 14, 2006 (the end of the certification year) and December 1, 2007 have Respondents offered to prove that the Union had actually lost its majority status.

7. Beginning in January, 2006 and continuing through the end of December 2006 Respondents bargained collectively with the Union with no intention of reaching an agreement.

8. Although between January 1, 2007 and December 1, 2007 Respondents contractually delegated PBHM to run the Hotel and to bargain collectively with the Union on Respondents' behalf, at no time were Respondents relieved of the obligation to bargain collectively in good faith with the Union.

9. Respondents utilized PBHM as a middleman as part of a scheme to disguise its decision to deprive the employees of Union representation and to escape its obligation to collectively bargain in good faith and when PBHM was about to reach a contract with the Union, Respondents canceled its operating agreement with PBHM to defeat any collective bargaining contract which PBHM might have achieved.

10. Respondents' conduct as described in paragraphs 7 and 9 above violated §8(a)(5) and (1) of the Act and constituted a general refusal to bargain in good faith.

11. On December 1, 2007, Respondents withdrew recognition of the Union as the §9(a) representative of the employees in the bargaining unit and thereby violated §8(a)(5) and (1) of the Act.

12. On or about October 12, 2007 Respondents unilaterally and without bargaining with the Union made a number of unilateral changes in the terms and conditions of employment enjoyed by bargaining unit employees. This was accomplished by promulgating rules through employment offers and/or issuance of the new employee handbook. The rules prohibited employees from discouraging potential or actual customers, and imposed a conflict of interest policy and confidentiality policy. These rules are overbroad and thereby discourage employees

from engaging in Union and or other protected activity. They independently violate both §8(a)(1) and also constitute unilateral changes in violation of §8(a)(5) and (1) of the Act.

13. On December 1, 2007 Respondents without bargaining with the Union unilaterally changed the housekeepers' workloads by adding two additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower, thereby violating §8(a)(5) and (1) of the Act.

14. In October, 2007 as a predicate to resuming operations themselves, Respondents unilaterally and without bargaining with the Union, imposed as a condition of continued employment new conditions on its employees including requiring them to apply for their own job and treating them as new employees, requiring a drug test, and imposing a 90 day probationary period all in violation of §8(a)(5) and (1) of the Act.

15. On December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of §8(a)(5) and (1) of the Act.

16. On December 1, 2007, Respondents unilaterally and without bargaining with the Union implemented wage increases for both its tipping and non-tipping category employees, thereby violating §8(a)(5) and (1) of the Act.

17. In April, August and September 2007 and again in April 2008 the Union made various demands for relevant information concerning the legal relationship between PBHM and Respondents, information concerning the PBHM management agreement, information concerning the changeover from PBHM's operation of the Hotel to Respondents, and information concerning the terms and conditions to be applied to employees after the changeover was effected. Respondents never replied to any of these demands, nor did id provide the requested information, and thereby violated §8(a)(5) and (1) of the Act.

18. On December 1, 2007, Respondents discharged the following employees because they were Union activists and thereby violated §8(a)(3) and (1) of the Act: Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte.

19. On April 23, 2008 and again on April 25, 2008 Respondents polled/interrogated its employees concerning their union activities, sympathies or desires and thereby violated §8(a)(1) of the Act.

20. Minicola's threat of unspecified consequences to an employee for being assertive during the collective bargaining process violated §8(a)(1).

21. On April 25, 2008, through Minicola and HR Manager Linda Morgan, Respondents violated §8(a)(1) when they threatened employees with losing their jobs if the Hotel had to close because of the boycotts.

22. Respondents did not engage in coercive surveillance when Minicola observed union demonstrations and rallies on the public street/sidewalks in front of the Hotel and his office.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

Respondents, HTH Corporation, Pacific Beach Corporation and Koa Management, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively polling its employees concerning their support for the Union and/or interrogating them about their union activities, sympathies and desires.

(b) Imposing overbroad policies which interfere with employee rights under §7 such as confidentiality and conflict of interest rules

(c) discharging employees because of their activities protected by §7 of the Act, including activity on behalf of Longshore and Warehouse Union, Local 142 or any other union.

(d) Bargaining without any intention of reaching an agreement with the Union.

(e) Withdrawing recognition of the Union as the exclusive bargaining representative of the employees in the certified bargaining unit or refusing to recognize and bargain with the Union.

(f) Unilaterally changing the terms and conditions of employment of its unit employees without first bargaining with the Union, including discharging employees or imposing changes in employees behavior rules.

(g) Failing and refusing to furnish the Union with the information the Union has requested which is necessary and relevant to the collective bargaining process and for the ability to properly represent the employees.

(h) Threatening employees with loss of their jobs or other unspecified punishment because they choose to engage in Union activity

(i) In any other 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) Immediately resume recognition of the Union as the exclusive representative of the employees in the certified bargaining unit and, upon the Union's request, bargain in good faith in the certified bargaining unit as if the initial year of certification had been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order in this case and, if an understanding is reached, embody it in a written, signed agreement.

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

(b) On the Union's request, rescind the unilateral changes, whether found in the employee handbook or some other location, and restore the previously existing wages and other terms and conditions of employment as they existed prior to December 1, 2007, and make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes. However, nothing in this Order shall be construed as requiring the Respondent to rescind any benefit previously granted unless the Union requests such action.

(c) Furnish the necessary and relevant information requested by the Union in April, August, and September 2007 and in April 2008.

(d) Within 14 days from the date of this Order, offer Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions displacing, if necessary, any more junior employees, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte, and within 3 days thereafter notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

(f) 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.

(g) Pay to the Union the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations subsequent to January 5, 2005, such costs and expenses to be determined at the compliance stage of this proceeding.

(h) Within 14 days after service by the Region, post at its Hotel in Honolulu, Hawaii, copies of the attached notice marked "Appendix." [26] Copies of the notice, on forms provided by the Regional Director for Region 26, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

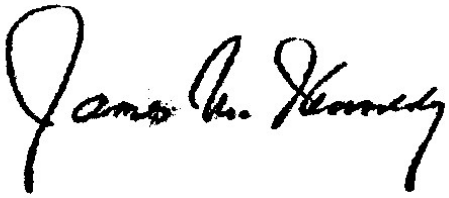
[26] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS

Continued

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 January 5, 2006.

(i) Within 60 consecutive days of the date of the Board's Order, convene the bargaining unit employees during working time at the Respondent's facility, by shifts, whereupon a responsible management official, in the presence of a Board Agent, will read the notice to employees. Afterwards, the Board Agent will answer any questions the employees may have in order to explain what has happened.

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



James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C. September 30, 2009

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 coercively poll you concerning your support for **International Longshore and Warehouse Union, Local 142** or any other labor union and **WE WILL NOT** interrogate you about your union activities, sympathies and desires.

WE WILL NOT impose overbroad policies which interfere with your employee rights under §7 such as confidentiality and conflict of interest rules which would interfere with your legitimate union activity.

WE WILL NOT discharge any of our employees because of their activities protected by the National Labor Relations Act, including activities on behalf of **Longshore and Warehouse Union, Local 142** or any other union.

WE WILL NOT collectively bargain without any intention of reaching an agreement with **Longshore and Warehouse Union, Local 142**.

WE WILL NOT withdraw recognition of **Longshore and Warehouse Union, Local 142** as your exclusive bargaining representative in the certified bargaining unit nor refuse to recognize and bargain with that labor organization.

WE WILL NOT unilaterally change the terms and conditions of employment of our bargaining unit employees without first bargaining with **Longshore and Warehouse Union, Local 142**, including discharging employees or imposing changes in employee behavior rules.

WE WILL NOT fail and refuse to furnish **Longshore and Warehouse Union, Local 142** with information it requested which is necessary and relevant information to collective bargaining and for its ability to properly represent you.

WE WILL NOT threaten any of you with loss of your job or some other unspecified punishment because you have chosen to engage in Union activity

WE WILL NOT in any other manner interfere with, restrain, or coerce any of you if you exercise your rights guaranteed you by law as listed above.

WE WILL immediately resume recognition of **Longshore and Warehouse Union, Local 142** as the exclusive representative of the employees in the certified bargaining unit and, upon the Union's request, bargain in good faith in that bargaining unit as if the initial year of certification had been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order in this case and, if an understanding is reached, **WE WILL** embody it in a written, signed agreement.

WE WILL, on the Union's request, rescind all of the unilateral changes, whether found in the employee handbook or some other location, and restore the previously existing wages and other terms and conditions of employment as they existed prior to December 1, 2007, and **WE WILL** make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes. However, the Union has the option of determining which of these shall be rescinded.

WE WILL furnish the information requested by the Union in April, August, and September 2007 and in April 2008.

WE WILL, within 14 days from the date of this Order, offer **Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte** full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions displacing, if necessary, any more junior employees, without prejudice to their seniority or any other rights or privileges previously enjoyed and **WE WILL** make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of **Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte**, and within 3 days thereafter notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL 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.

WE WILL pay to **Longshore and Warehouse Union, Local 142** the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations subsequent to January 5, 2005, such costs and expenses to be determined at the compliance stage of this proceeding.

WE WILL, within 60 consecutive days of the date of the Board's Order, convene the bargaining unit employees during working time at the Respondent's facility, by shifts, and a responsible management official, in the presence of a Board Agent, will read this notice to you. Afterwards, you will be permitted to ask the Board Agent to explain what has happened.

HTH CORPORATION, PACIFIC BEACH CORPORATION and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

300 Ala Moana Blvd – Room 7-245 Honolulu, HI 96850-4980

(808) 541-2814, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE SUBREGIONAL OFFICE'S COMPLIANCE OFFICER, (808) 541-2814.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HTH CORPORATION, PACIFIC BEACH CORPORATION and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL

and

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

and

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142

Case **37-CA-07311**
37-CA-07334
37-CA-07422
37-CA-07448
37-CA-07458
37-CA-07470
37-CA-07472
37-CA-07473
37-CA-07476
37-CA-07478
37-CA-07482
37-CA-07484
37-CA-07488
37-CA-07537
37-CA-07550
37-CA-07587

DATE OF SERVICE 9/30/2009

AFFIDAVIT OF SERVICE OF ALJ Decision

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

CERTIFIED MAIL
DANNY J. VASCONCELLOS, ESQ.
Takahashi Vasconcellos & Covert
345 Queen Street
Suite 506
Honolulu, HI 96813

CERTIFIED MAIL
RYAN SANEDA, ESQ.
IMANAKA KUDO & FUJIMOTO
745 FORT STREET MALL
SUITE 1700
HONOLULU, HI 96813

E-SERVICE
NLRB REGION 20 - SAN FRANCISCO
901 MARKET STREET
SUITE 400
SAN FRANCISCO, CA 94103

E-SERVICE
NLRB SUBREGION 37 - HONOLULU
300 ALA MOANA BOULEVARD
ROOM 7-245
HONOLULU, HI 96850

E-SERVICE
WESLEY M. FUJIMOTO, ATTY
IMANAKA KUDO & FUJIMOTO
745 FORT STREET MALL
SUITE 1700
HONOLULU, HI 96813

REGULAR MAIL
JUDGE JAMES M. KENNEDY
NLRB DIVISION OF JUDGES
901 MARKET STREET
SUITE 300
SAN FRANCISCO, CA 94103-1779

REGULAR MAIL
MR. FRED GALDONES, PRESIDENT
INTL LONGSHORE & WAREHSE UN., LOCAL 142, AFL-CIO
451 ATKINSON DRIVE
HONOLULU, HI 96814

REGULAR MAIL
MR. ROBERT MINICOLA, REGIONAL V-PRES.
PACIFIC BEACH HOTEL
2490 KALAKAUA AVENUE
HONOLULU, HI 96815

REGULAR MAIL
REBECCA COVERT
IMANAKA KUDO & FUJIMOTO
345 QUEEN STREET
SUITE 506
HONOLULU, HI 96813

REGULAR MAIL
RONALD Y. LEONG, ESQ.
WATANABE ING & KOMEIJI, LLP
999 BISHOP STREET
23RD FLOOR
HONOLULU, HI 96813

Subscribed and sworn to before me this _____	DESIGNATED AGENT
day of _____,20 _____	NATIONAL LABOR RELATIONS BOARD

FORM NLRB-1405A
(03-09)

EXCERPTS FROM NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS

Sec. 102.46 *Exceptions, cross-exceptions, briefs, answering brief; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.* -(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to Section 102.45, any party may (in accordance with Section 10(c) of the Act and Sections 102.111 and 102.112 of these rules) file with the Board in Washington, D.C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in Sec. 102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

(d)(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of paragraph (j) of this section.

(2) The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding.

(3) Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties.

(e) Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (b) and (j) of this section.

(f)(1) Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions.

(2) Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties.

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

(h) Within 14 days from the last date on which an answering brief may be filed pursuant to paragraph (d) or (f) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this subsection shall be limited to matters raised in the brief to which it is replying, and shall not exceed 10 pages. No extensions of time shall be granted for the filing of reply briefs, nor shall permission be granted to exceed the 10 page length limitation. Eight copies of any reply brief shall be filed with the Board, copies shall be served on the other parties, and a statement of such service shall be furnished. No further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.

(i) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of this section with a statement of service on the other parties. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(j) Exceptions to administrative law judges' decisions, or to the record, and briefs shall be printed or otherwise legibly duplicated. Carbon copies of typewritten matter will not be accepted. Eight copies of such documents shall be filed with the Board in Washington, D.C., and copies shall also be served promptly on the other parties. All documents filed pursuant to this section shall be double spaced on 8-1/2 by 11-inch paper. Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 10 days prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Sec. 102.47 *Filing of motion after transfer of case to Board*.--All motions filed after the case has been transferred to the Board pursuant to Section 102.45 shall be filed with the Board in Washington, D.C., by transmitting eight copies thereof to the Board, together with an affidavit of service upon the parties. Such motions shall be printed or otherwise legibly duplicated: *Provided, however*, that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

Sec. 102.48 *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.* -(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations contained in the administrative law judge's decision shall, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

(b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in Section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case.

(c) Where exception is taken to a factual finding of the administrative law judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this subsection shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly thereof on the other parties.

(3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies.

Sec. 102.111 *Time computation*. - (a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day. *(The closing time of the Board in Washington, D.C. is 5 p.m. local time).* When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) When the Act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the official closing time of the receiving office on the last day of the time limit, if any, for such filing or extension of time that may have been granted. A request for an extension of time to file a document shall be filed no later than the official closing time of the receiving office on the date on which the document is due. Requests for extensions of time filed within three days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. Provided, however, the following documents must be received on or before the official closing time of the receiving office on the last day for filing:

(1) Charges filed pursuant to section 10(b) of the Act (see also Sec. 102.14).
(2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.
(3) Petitions to revoke subpoenas.
(4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) The following documents may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

(1) In unfair labor practice proceeding, motions,exceptions, answers to a complaint or a backpay specification, and briefs; and

(2) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents. A party seeking to file such documents beyond the time prescribed by these rules shall file, along with the documents, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document shall not commence until the date a ruling issues accepting the untimely document. In addition, cross-exceptions shall be due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

Sec 102.112 *Date of service; date of filing.* - The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111.

Sec 102.113 *Method of service of process and papers by the Agency; proof of service.*

(a) Service of complaints and compliance specifications. Complaints and accompanying notices of hearing, compliance specifications, and amendments to either complaints or to compliance specifications, shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(b) Service of final orders and decisions. Final orders of the Board in unfair labor practice cases and administrative law judges' decisions shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy. thereof at the principal office or place of business of the person required to be served.

(c) Service of subpoenas. Subpoenas shall be served upon the recipient either personally or by registered or certified mail or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(d) Service of other documents. Other documents may be served by the Agency by any of the foregoing methods as well as regular mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

(e) Proof of service. In the case of personal service, or delivery to a principal office or place of business, the verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same. In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(f) Service upon representatives of parties. Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party shall satisfy this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of service permitted by these rules, including regular mail.

Sec. 102.114 *Service of papers by parties; form of papers; proof of service; filing and serving documents and papers by facsimile transmission* (a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically) or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of §§ 102.113(a) or 102.113(c) provide otherwise.

(b) When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made by a private delivery service, the receipt from this service showing delivery shall be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(c) Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either:

(1) a rejection of the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8-1/2 by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Carbon copies shall not be filed and will not be accepted. Non-conforming papers may, at the Agency's discretion, be rejected.

(e) The person or party serving the papers or process on other parties in conformance with sections §102.113 and paragraph (a) of this section shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in section (a) of this section shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(f) Unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if transmitted to the facsimile machine of the office. Other documents, except those specifically prohibited in paragraph (g) of this section, will be accepted by the Agency if transmitted to the facsimile machine of the office designated to receive them only with advance permission from the receiving office which may be obtained by telephone. Advance permission must be obtained for each such filing. At the discretion of the receiving office, the person submitting a document by facsimile may be required simultaneously to serve the original and any required copies on the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by facsimile transmission pursuant to this section, receipt of the transmitted document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will be be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(g) Facsimile transmissions of the following documents will not be accepted for filing: Showing of Interest in Support of Representation Petitions, including Decertification Petitions; Answers to complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

(h) Documents and other papers filed through facsimile transmission shall be served on all parties in the same way as used to serve the office where filed, or in a more expeditious matter, in conformance with paragraph (a) of this section. Thus, facsimile transmission shall be used for this purpose whenever possible. When a party cannot be served by this method, or chooses not to accept service by facsimile as provided for in paragraph (a) of this section, the party shall be notified personally or by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service or overnight delivery service.

(i) The Agency's Web site (*http://www.nlrb.gov*) contains certain forms that parties or other persons are permitted to file with the Agency electronically. Parties or other persons choosing to utilize those forms to file documents electronically are permitted to do so by following the instructions described on the Web site, notwithstanding any contrary provisions elsewhere in these rules. In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.