

Radisson Plaza Minneapolis and Hotel Employees and Restaurant Employees Union, Local 17 of St. Paul/Minneapolis and Vicinity, AFL-CIO.
Cases 18-CA-10848, 18-CA-11034, and 18-CA-11116

April 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On November 7 and December 17, 1990, Administrative Law Judge George F. McNerny issued the attached Decision and Erratum, respectively. The Respondent filed exceptions, a supporting brief, and a supplemental citation of authority. The General Counsel filed a cross-exception, supporting brief, and reply brief, and the Respondent filed a reply.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order as modified.

1. The General Counsel excepted to the judge's finding that the Respondent's confidentiality rule regarding salaries was lawful. We find merit in the exception. The rule, which appears in the Respondent's employee handbook and is accompanied by an illustration of a paycheck with the words "TOP SECRET" emblazoned across it, states:

Your salary is determined individually, is confidential, and *shouldn't* be discussed with anyone other than your supervisor or the Personnel Department. [Emphasis added.]

The judge reasoned that the rule was not mandatory and noted that there is no evidence that employees were warned or disciplined for contravening it. He found, therefore, that the Respondent did not violate the Act by maintaining the provision in its handbook.

In *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989), the Board found that the employer's maintenance of a rule

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

The Respondent also asserts in its exceptions that the judge's comments, "misstat[ements] of the record," and "selective" reading of the record reflect an "antiemployer and anticounsel bias." On careful examination of the judge's decision and the record in this proceeding, we are satisfied that the Respondent was accorded a full and fair hearing.

"requesting" employees not to discuss their wages with each other was unlawful in the absence of a business justification for the rule. The Board stated, "This prohibition constitutes a clear restraint on the employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment." Similarly, in *Waco, Inc.*, 273 NLRB 746 (1984), the Board found that supervisors' admonitions to employees against discussing wages violated the Act, in the absence of an overriding business justification, notwithstanding that such admonitions went unheeded and unenforced. Thus, *Heck's* and *Waco* make clear that the finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act. As the Respondent has not established a business justification for the handbook provision, we find that its maintenance of the confidentiality rule violates Section 8(a)(1) of the Act.² Therefore, we shall modify the recommended Order to direct that the Respondent cease maintaining the rule and rescind the offending provision in the handbook.

2. We agree with the judge's finding that the Respondent engaged in surface bargaining throughout the negotiations, in violation of Section 8(a)(5) and (1) of the Act. During the period from July 1988 through March 1989 (when negotiations took place), the Respondent's dealings with the Union³ both at the bargaining table and away from it were clearly calculated to impede bargaining and weaken the Union with a view to having it removed as the employees' collective-bargaining representative, rather than to reach agreement. Although we rely on all the judge's findings with respect to the Respondent's conduct during this period,⁴ we attach special significance to the conduct summarized below.

²In any event, whatever distinction there may be between a rule that *requires* employees to keep their wages confidential and one that *advises* them that they *should not* discuss wages—and we cannot discern one—certainly is obliterated by the Respondent's use of a graphic that boldly indicates that the contents of an employee's pay envelope are "top secret."

³We use the term "Union" to refer collectively to both the Hotel Employees Local 17 (the Charging Party) and Teamsters Local 638, because the Respondent had recognized the two Unions as joint representatives of the unit employees, and the Respondent's unlawful conduct was directed at both.

⁴Although animus against the Union was manifested in the Respondent's commission of 8(a)(1) violations through its surveillance of the Union's boycott poll and the references by its banquet manager, Lisa Wyland, to a refusal to hire job applicants suspected of being "Union plants," we do not rely on those incidents for the surface bargaining finding. They occurred after negotiations had terminated and after the Respondent had withdrawn recognition from the Unions.

First, we agree with the judge that three independent violations of Section 8(a)(5) committed by the Respondent manifest a mindset inconsistent with acceptance of the Union as the unit employees' bargaining representative for the negotiation of terms and conditions of employment. In October 1988, the Respondent's General Manager, John Kelly (who was also a member of the Respondent's negotiating committee), rebuffed a union request to discuss changes in banquet department and kitchen job assignments, saying that such matters could not be discussed with the Union until there was a collective-bargaining agreement and suggesting that individual meetings between Kelly and the employees would be a reasonable substitute for discussions with the Union.⁵ In March 1989, the Respondent made a unilateral decision on wage increases for 40 percent of the employees, to become effective in April. The Union first learned about the increases in April from employees who had received them.⁶ Around the same time, the Respondent stalled in responding to the Union's March 14 request for an updated list of basic information about the unit employees (e.g., their addresses, current wage rates, and job classifications). The Respondent never explained why such information could not have been promptly supplied, and ultimately defended its failure to supply it at all on the ground that it had received word of the employee decertification petition filed on March 24.

Second, we also take note of the Respondent's continuing insistence on incorporating in the agreement the employee handbook which it had used to operate the hotel on a nonunion basis and which was used at its other hotels to govern the working conditions of nonbargaining unit employees. The Respondent's position throughout negotiations was that this handbook

and the Respondent's existing policies on wage increases and benefits were to continue to govern. Because the Respondent included the handbook as an exception to the zipper clause (a clause titled "Complete Agreement," which had otherwise been agreed upon by the parties), and because the handbook provided that the Respondent reserved the right to alter or discontinue any of the benefits or other policies contained within it at any time "according to the needs of the business," the clause would operate, at best, as what the General Counsel correctly describes as a "perpetual reopener clause" encompassing the substantial number of significant mandatory subjects of bargaining contained in the handbook.⁷ Such a provision is at odds with the basic concept of a collective-bargaining agreement.⁸ Since unions are statutorily guaranteed the right to bargain over any change in any term or condition of employment, the Union could do just as well with no contract at all.⁹

The Respondent's insistence on continuing to control employee working conditions through its handbook is perhaps a clue to what was meant by its negotiator Stokes' demand, from the outset, that any agreement be "tailored" to the Respondent's unique needs—needs that were never clearly defined but that ostensibly rendered agreements with any other hotels, including hotels owned by Radisson, totally unsuitable as starting points from which bargaining might begin. Like the demand of the transportation employer in *NLRB v. Overnite Transportation Co.*, 938 F.2d 815, 822 (7th Cir. 1991), for a contract guaranteeing "uniformity" among all its terminals, this demand for "tailoring" smacks of an intent to remain unpersuaded by any combination of language from other agreements on

Concerning the Wyland incident, we have modified the recommended Order insofar as it directs the Respondent to cease and desist from refusing to hire applicants suspected of being union adherents. Only the comments—and not any actual unlawful refusals to hire—were alleged, litigated, and found as violations of the Act.

⁵Like the judge, we reject the Respondent's argument that the Union's failure to raise these matters with the Respondent's chief negotiator, Arch Stokes, or directly at the bargaining table somehow justifies or cancels out Kelly's response. In addition to the factors considered by the judge, we find that it was not unreasonable for the Union to approach the general manager about changes recently made under his management, and that Kelly's response that there could be no meetings on the subject until there was a contract discouraged any pursuit of the matter in contract negotiations.

⁶The Respondent argues that this unilateral action was lawful because the wage adjustments were merely a continuation of a past practice of applying a "clearly delineated program" to employee wages. In fact, the evidence supplied by the Respondent failed to show that the adjustments could reasonably be described as a mere repetition of a clearly defined practice, i.e., they were not automatically deducible, by a formula without discretionary elements, from data made known to the Union. The procedure by which the adjustments were determined was sufficiently flexible as to make it subject to the bargaining obligation.

⁷We do not rely on the judge's rationale that insistence on the handbook was not economically justified. See *Reichhold Chemical*, 288 NLRB 69 (1988).

⁸The judge also found that the demand for incorporation of the handbook could reasonably be read as destabilizing terms and conditions of employment, not by making them continuously bargainable throughout the agreement, but by allowing the Respondent to change them unilaterally at will. The Respondent has objected that a notation in its negotiators' bargaining notes indicates that Stokes has assured the Union that the Respondent would bargain over any mid-term changes in the subjects included in the handbook. The reservation of rights language in the handbook is consistent with this assurance, however, and the Respondent never proposed either deleting that handbook language or receding from its demand that the handbook be incorporated into the contract. In any event, for the reasons noted above, the Respondent's insistence on incorporating the handbook into the contract was indicative of bad faith even assuming that the Respondent was merely demanding a regime of continual bargaining, at its option, over most terms and conditions of employment as defined in the handbook.

⁹See *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984), citing *NLRB v. Johnson Mfg. Co. of Lubbock*, 458 F.2d 453, 455 (5th Cir. 1992).

the major subjects of bargaining that the Union might propose.¹⁰

Finally, we note conduct suggesting that the Respondent was focused more intently on the prospect of a termination of its bargaining obligation through the Union's loss of majority than on the successful negotiation of a collective-bargaining agreement. See *Prentice-Hall, Inc.*, 290 NLRB 646 (1988) (evidence that employer was counting on union loss of majority after stalled bargaining). Thus, after briefly renegeing at the outset on its recognition of the Union (recognition which was predicated on the results of a mutually agreed card check), the Respondent's representatives thereafter frequently referred to the slim margin of union majority; and proposals the Respondent was pressing up to the point at which it withdrew recognition required that the Union secure a two-thirds majority in a ratification vote of any agreement reached¹¹ and allowed the Respondent to require proof of union majority in each year covered by the agreement. Further, progress in negotiations was impeded by the Respondent's unwillingness to agree to the Union's requests for more frequent bargaining sessions¹² and the penchant of the Respondent's chief negotiator, Stokes, for consuming time during the 11 negotiating sessions with extensive perambulations on such topics as changes in tax laws, a former HEW Secretary's book on health care, union corruption, and his anger at adverse union publicity concerning the Respondent.¹³ With no real prospect of an agreement in sight and, as indicated above, the Respondent's continuing to operate the hotel as if the employees had no bargaining representative, it is not surprising that employees, seeing no improvement in their lot, would become at-

tracted to the idea of decertifying the apparently impotent Union.

3. Finally, we agree with the judge that the Respondent's withdrawal of recognition from the Union was unlawful despite the fact that the Respondent had received notice of the filing of a decertification petition. It is well settled that an employer's withdrawal of recognition from a certified or voluntarily recognized bargaining representative must be based on an objective, good-faith doubt of the bargaining representative's majority status,¹⁴ and that the withdrawal of recognition must occur in a context free of unfair labor practices.¹⁵ Although not all unlawful conduct will be found to have tainted employee efforts to decertify a bargaining representative, the Board recognizes that unlawful conduct away from the negotiating table combined with bad-faith bargaining at the table tends to cause employee disaffection with their bargaining representative.¹⁶

In the instant case, we find that the reasonably foreseeable consequence of the Respondent's unfair labor practices away from the table, combined with its dilatory at-the-table conduct which was calculated to frustrate agreement, was the disaffection of employees with the Union. In particular, as noted above, we find that the Respondent's refusal in the fall of 1988 to discuss current employee grievances in the absence of an executed contract, and its bargaining strategy, which sent a message that the Respondent was going to continue to operate its hotel essentially through the pre-existing employee handbook, were calculated to produce frustration among employees. As a result of the Respondent's unlawful conduct, the employees would see no change in their working lives from having a collective-bargaining representative.

Accordingly, we find that the Respondent was not privileged to withdraw recognition from the Union on

¹⁰The Union's action of returning, in the January 11 bargaining session, to its earlier proposal of an area agreement was possibly the result of its frustration at its fruitless efforts to clarify the Respondent's "tailoring" demand. (The agreement was one that applied to another Radisson hotel, known as the "Radisson South agreement.") As the judge found, however, the Union soon thereafter (under cover of a letter dated Jan. 18) proposed the agreement with the inclusion of provisions on which the parties had previously agreed. Under all the circumstances, we agree with the judge that the Union's action did not constitute bad-faith bargaining nor does it otherwise justify the Respondent's approach to negotiations, considered as a whole.

¹¹When a union representative objected to the Respondent's getting involved in the details of how the Union would solicit and secure contract ratification from employees it represented, negotiator Stokes indicated that the Respondent would continue to press a ratification clause, notwithstanding the Union's desire not to bargain over this permissive subject.

¹²See *Crispus Attucks Children's Center*, 299 NLRB 815 fn. 3 (1990) (bad faith shown in employer's refusal to agree to longer and more frequent bargaining sessions).

¹³While it is true, as the Respondent points out, that the Union took up 2 hours during a recess in one bargaining session to familiarize a new union negotiator with bargaining issues, we cannot conclude that this conduct is grounds for declining to find evidence of bad faith in the Respondent's pattern of dilatory conduct over the 9 months during which the parties were in negotiations.

¹⁴*Dresser Industries*, 264 NLRB 1088 (1982), approved in *Bryan Memorial Hospital v. NLRB*, 814 F.2d 1259 (8th Cir. 1987), enf. 279 NLRB 222 (1986). *Dresser* makes clear that a decertification petition cannot, per se, serve as grounds for good-faith doubt; rather such grounds may be established only if the employer is presented with such a petition supported by a majority of unit employees. 264 NLRB at 1089 fn. 7. The petition in this case was signed by 87 out of 165 employees; and Bob Ogren, the employee who circulated it, informed Stokes of the petition on March 28. It is not clear, however, whether Ogren advised Stokes of the number of signatures on the petition. Because, as explained below, we agree with the judge's finding that the petition was tainted by the Respondent's previously committed unfair labor practices, we find it unnecessary to determine whether, in the absence of taint, the Respondent's knowledge of the petition would have provided it with an objective basis for withdrawing recognition.

¹⁵*Celanese Corp. of America*, 95 NLRB 664, 673 (1951) ("the majority issue must not have been raised by the employer in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.") (Emphasis in original).

¹⁶*Premier Cablevision*, 293 NLRB 931, 933 fn. 5 (1989).

the basis of the employees' filing of the decertification petition.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Radisson Plaza Minneapolis, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Telling employees that applicants suspected of being union adherents would be rejected.”

2. Insert the following as paragraph 1(b) and reletter the remaining paragraphs accordingly.

“(b) Maintaining a rule prohibiting employees from discussing their wages with anyone other than their supervisors or the personnel department.”

3. Insert the following as paragraph 2(e) and reletter the existing paragraph.

“(e) Rescind the rule in the employee handbook prohibiting employees from discussing their wages with anyone other than their supervisors or the personnel department.”

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

After a hearing on which all parties had an opportunity to give evidence, it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice.

WE WILL NOT inform employees that we will refuse employment to applicants suspected of being adherents or members of Hotel Employees and Restaurant Employees Union, Local 17 of St. Paul/Minneapolis and Vicinity, AFL-CIO, or Local 638, International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT maintain a rule prohibiting employees from discussing their wages with anyone other than their supervisors or the personnel department.

WE WILL NOT engage in surveillance of or harass union members engaging in union activities on public property.

WE WILL NOT refuse to give information that is necessary for collective bargaining to the Unions.

WE WILL NOT refuse to bargain collectively with the Unions in the following appropriate unit:

All employees of the Radisson including food, steward, beverage, service, housekeeping, telephone operators, front desk clerks and hotel maintenance and repair department; but excluding all clerical employees such as secretarial, accounting, personnel, room sales, catering sales, clerical; hosts/hostesses; supervisors as defined in the Act; sales employees, managerial employees, guards and professional employees.

WE WILL NOT grant unilateral wage increases to employees without bargaining with the Unions.

WE WILL NOT withdraw recognition from the Unions in the absence of a good-faith doubt of their majority status in the bargaining unit.

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

WE WILL rescind the rule in the employee handbook prohibiting employees from discussing their wages with anyone other than their supervisors or the personnel department.

WE WILL upon request recognize and bargain collectively and in good faith with the Unions concerning grievances, scheduling, wage increases, rates of pay, hours of employment in the appropriate bargaining unit, and embody any understanding reached in a signed agreement.

RADDISON PLAZA MINNEAPOLIS

James L. Fox, Esq., for the General Counsel.

Arch Stokes, Esq. and *Frederick L. Warren, Esq.* (*Stokes, Lazarus & Carmichael*), of Atlanta, Georgia, for the Respondent.

Stephen D. Gordon, Esq. (*Gordon, Miller & O'Brien*), of Minneapolis, Minnesota, for the Charging Party.

DECISION

GEORGE F. MCINERNEY, Administrative Law Judge. Based upon a charge filed on April 10, 1989, in Case 18-CA-10848, as amended by Hotel Employees and Restaurant Employees Local 17 of St. Paul/Minneapolis and Vicinity, AFL-CIO (Local 17 or the Union (singular)). The term “Unions,” plural, refers herein to the jointly recognized Local 17 and International Brotherhood of Teamsters, Local 638. The Acting Regional Director for Region 18 of the National Labor Relations Board (Regional Director and the Board), issued a complaint on July 19, 1989, alleging that the Radisson Plaza Hotel Minneapolis (Radisson¹ or Respondent), had violated and was continuing to violate certain provisions of the National Labor Relations Act 29 U.S.C. § 151 et seq. (the Act).

¹Counsel for the Radisson Plaza Hotel indicated throughout the record his desire that his client be referred to as “Radisson.” I have no objection to complying with this fancy, but, for grammatical reasons, I must eschew the use of all-capital letters in the name of the Hotel.

On August 1, 1989, Radisson filed an answer denying the commission of any unfair labor practices.

An additional charge was filed by the Union on September 21, 1989, in Case 18-CA-11034 and amended on November 9, 1989. On November 13, 1989, the Regional Director issued an order consolidating Cases 18-CA-10848 and 18-CA-110234, and amending the complaint heretofore issued on July 19, 1989. Radisson filed its answer on November 21, 1989, continuing to deny the commission of any unfair labor practices.

A further charge was filed by the Union on November 22, 1989, in Case 18-CA-11116. This resulted in a further consolidation of cases and a new amended complaint on December 21, 1989. Radisson answered this new amended, consolidated, complaint by its answer of December 29, 1989.

Pursuant to an order rescheduling hearing issued by the said Regional Director a hearing was held before me at Minneapolis, Minnesota, on March 19-22, 1990, at which all parties were represented by counsel and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make motions, and to argue orally. Following the hearing, all parties filed briefs, which have been carefully considered.

Based on the entire record, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaints in this case allege that the Respondent Radisson is a corporation having its office and place of business in Minneapolis, Minnesota, where it is engaged in the operation of a hotel providing food and lodging for guests. During the calendar year 1988, Radisson derived gross revenue in excess of \$500 and purchased products, goods, and materials valued in excess of \$50 directly from points outside the State of Minnesota. The answer admits these allegations and I find that Radisson is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaints allege that both Local 17 and Teamsters Local No. 638, AFL-CIO (Local 638), are labor organizations. The answers at first denied these allegations, then, in the answer to the amended consolidated complaint averred that it was "without sufficient knowledge to admit or deny" these allegations. However, at the hearing, Radisson, through its counsel, stipulated that both Local 17 and Local 638, were labor organizations within the meaning of Section 2(5) of the Act, and I so find.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

For some years the parent Company of Radisson had owned and operated a hotel in Minneapolis known as the Radisson Downtown.² Local 17 and Local 638 jointly represented a group of employees in the following unit:

²The facts summarized here are taken from a document entitled "Card Check Agreement," dated May 20, 1988, executed by rep-

All employees of the Radisson including food, steward, beverage, service, housekeeping, telephone operators, front desk clerks and hotel maintenance and repair department; but excluding all clerical employees such as secretarial, accounting, personnel, room sales, catering sales, clerical; hosts/hostesses; Supervisors and defined by the NLRA; sales employees; Managerial employees; guards and professional employees.³ The Radisson Downtown was torn down, and in its place was built the present Radisson Plaza Hotel Minneapolis, which opened in 1987.

On May 20, 1988, a Card Check Agreement was executed by the parties in which, they agreed to effectuate and resolve disputes as to certain rights and obligations set forth in agreements signed in 1981,⁴ to be bound by a card check among employees in this unit to be conducted under the auspices of the Minnesota Bureau of Mediation Services, and the Radisson agreed to bargain with the Unions if they "establish that they represent a majority" of the unit employees.

The Card Check agreement recites that "in exchange for the promises and obligations set forth herein, LOCAL 17 agrees to dismiss the lawsuit against the RADISSON presently pending as Civil Action 3-87-174 in Federal District Court and Case Number 88-5046 MN on appeal to the Eight Circuit. The RADISSON agrees to dismiss any counter claims against LOCAL 17 in Civil Action 3-87-174."

An additional, final, clause in the Card Check Agreement sets out the agreement by the Unions "to communicate their total support for the RADISSON'S refinancing plan to the appropriate City of Minneapolis and MCDA OFFICIALS. Upon approval of such refinancing by the city of Minneapolis, the card check provision of this agreement will become effective _____. It is anticipated that city approval will occur on May 27, 1988."

Apparently the city did approve, and after some further disputes which were decided, pursuant to the parties' prior agreement, by Arbitrator Mario F. Bognanno, the card check went forward and the unions were found to have secured cards from majority of employees in the above-described unit. The results showed that the Unions had obtained 82 authorization cards out of 158 names appearing on a June 27, 1988 list of employees in the bargaining unit.⁵

representatives for Local 17, Local 638, and the Radisson Plaza Hotel Minneapolis, and received in evidence without objection by any party, and other documents, including an arbitrator's decision, received in evidence here. The facts contained in these documents are not disputed.

³This unit is substantially the same as the unit alleged in the several complaints here to be appropriate. The Respondent denied the appropriateness of the unit in its answer to the original complaint, but admitted the same unit to be appropriate in its answer to the consolidated complaint of November 13, 1989. There was no claim in the record of this case that the unit was not an appropriate unit. I, therefore, find that the unit is an appropriate unit for collective bargaining under the Act.

⁴While there is no further evidence about these 1981 agreements, it is reasonable to infer that the former hotel and the Locals agreed to some sort of re-employment procedures.

⁵I note that the arbitrator's order concludes with the following language:

Lastly, under the explicit terms of the Card Check Agreement, Paragraph (3), and the implicit understandings which were

B. *The Negotiations*

Negotiation Between the Radisson and the Unions

1. The participants

The representatives for the Unions attending the negotiations were headed by Dale Stormer, International vice president for the Hotel Employees and Restaurant Employees Union, who acted as chief spokesman for the two Unions with the exception of meeting 22 on August 12, 1988, and the last meetings on March 27 and 28; Dan Ruschke, secretary-treasurer of Local 17, who took over as chief spokesman on August 12 and at the last two meetings; Dick Heck, secretary-treasurer of Teamsters Local 638, who attended several of the meetings; Bill McCarthy, a union representative for Local 17, who also attended several meetings; Anne Theurer, an organizer for Local 17 and a former employee of both the old Radisson and the new hotel, who attended all of the meetings; together with members of the Unions' bargaining committee, who attended sporadically.

The company representative present were Attorney Arch Stokes, who acted as chief spokesman for the Radisson and who attended all the meetings, Radisson's personnel manager, Brian Langager, and General Manager John Kelly, who also attended all, or almost all, of the meetings; Attorney Frederick Warren, an associate of Stokes, who began attending at the meeting of September 29, 1988 (meeting 4), and who thenceforth attended all of the meetings. On the management side there were others, supervisors and rank-and-file employees, who attended one or more of the sessions.

Aside from the principal spokespersons, Stormer, later Ruschke, and Stokes, the only person who attended all the meetings, and sat through them all, was Anne Theurer.

At the several meetings notes were taken for the Unions by Anne Theurer, Bill McCarthy, and by DeDe (or Dee Dee) Thorson, a secretary in the Local 1 office; and for management by Brian Langager, Sue Gordon, corporate vice president for human resources for the Radisson corporation, and by Federick (Rick) Warren.

The notes offered by Radisson were received only over the objections of the General Counsel and the Charging Party who maintained that the notes constituted inadmissible hearsay. These parties have raised the same objections in their briefs. In his brief, the General Counsel pointed to the Federal Rule (FRE 801(c)) as defining hearsay as showing that the notes received here were hearsay, and to FRE 802 as authority for the general inadmissibility of such evidence. However, the General Counsel, as well as the Charging Party, admitted in their respective briefs that the Board, as an administrative tribunal, may exercise its discretion and consider hearsay evidence in appropriate circumstances, *RJR Communications*, 248 NLRB 920 (1980).

reached during the instant proceeding which led to the final determination of the Union's [sic] majority status, the Radisson is ordered to participate in collective bargaining negotiation with the Union *for the purpose of reaching a contract* [emphasis added].

In view of my findings herein it seems to me that there exists a real question of whether Radisson actually is or was in compliance with this order, but since the Unions did not see fit to follow up on that point, I can make no findings based thereon.

In this case, I have not relied on the notes to establish either a violation of law, or a defense to the allegations in the complaint. I found the Union notes to be sometimes unintelligible or illegible. The Respondent's notes were, it struck me, too obviously concerned with pointing the finger of blame at the union side for being late, or unprepared, with a view to later use of the notes in a forum like this one.

Notwithstanding these deficiencies, I read what I could read and understand of these notes, and I found them all to be in substantial agreement with the record testimony of the only witness who testified on the actual negotiations. That witness, Anne Theurer, I found to be forthright and candid. Her memory, while not perfect (she referred to her notes on a number of occasions to refresh her recollection), was truly extraordinary as demonstrated in extended direct examination, and over 300 record pages of cross-examination. Her demeanor was open and candid, and I found her to be entirely credible as a witness. Since the notes which were introduced were substantially corroborative of her testimony, I rely on that testimony and documents whose accuracy is not disputed, for my findings on the negotiations between Radisson and the Unions from July 1988 to March 1989.⁶

2. Lines, places, and duration of meetings

The negotiation meetings between the parties were held on the following dates:

Meeting 1	July 29, 1988
Meeting 2	August 12, 1988
Meeting 3	August 31, 1988
Meeting 4	September 29, 1988
Meeting 5	September 30, 1988
Meeting 6	January 11, 1989
Meeting 7	February 23, 1989
Meeting 8	February 24, 1989
Meeting 9	March 10, 1989
Meeting 10	March 27, 1989
Meeting 11	March 28, 1989

All of these meetings were held at the Radisson Plaza Hotel in downtown Minneapolis, except for meeting 10 on March 27, 1989, which was held at the Teamsters offices.

All except the first meeting were scheduled to begin at 10 a.m.

In connection with her preliminary work on this case, Anne Theurer prepared a chart showing the scheduled dates and times of the bargaining sessions, the actual time spent in the meetings, caucus time, lunchbreaks, and in cases where the meetings were adjourned before the scheduled time, which party requested the adjournment.

⁶I was naturally concerned why neither of the principal negotiators for the Unions, Stormer or Kuschke, testified here, and, even if Stokes and Warren were concerned about ethical questions arising over their testifying, why neither Rely nor Langager, both of whom were intelligent, articulate, and responsible witnesses, was asked any questions about the negotiations. However, all counsel here are experienced trial lawyers, and if they want to leave me with the evidence we have in this record, I am perfectly willing to decide the issues based on that record. Accordingly, I draw no inferences from the fact that none of the participants in the negotiations other than Anne Theurer, was presented as a witness.

The chart shows that there were 14 meetings scheduled, of which two, August 22 and September 6, 1988, were canceled by Stokes, and one, on November 30, 1988, was canceled because Kelly and Langager could not be present.

Only one meeting, that of March 10, 1989 (meeting 9), ran for its entire scheduled length. Stokes called for adjournment at the meetings of August 12, 1988 (meeting 2), 12:30 p.m. instead of 3 p.m.; August 31, 1988 (meeting 3), was called off by Stokes at 1:30 p.m. instead of 3 p.m.;⁷ February 24, 1989 (meeting 8), called off at 1 p.m. instead of scheduled 3 p.m.; March 27, 1989 (meeting 10), called off at 2:30 p.m. instead of 3 p.m., and March 28, 1989 (meeting 11), called off at 11:25 a.m. instead of 3 p.m.

Stormer cut short the meeting of January 11, 1989 (meeting 6), at 1 p.m. instead of 3 p.m.; and the meeting of September 30, 1988, was concluded by agreement of both parties at about noon, instead of at 3 p.m.

By my estimates, the parties spent about 35 hours at the bargaining table, exclusive of lunch periods and caucuses. Subtracting about 6-3/4 hours of caucuses (mostly called and used by the Union), and 6-1/2 hours of lunchtime, leaves about a total of 22 hours in actual negotiations.⁸

3. The bargaining meetings

Meeting 1 was held at the Radisson on July 29, 1988. Arch Stokes was the chief spokesman for Radisson and Dale Stormer for the Union. The meeting lasted only a half hour. The parties set up some future meeting dates and Stormer asked for information about employees' names, addresses, dates of hire and rates of pay. The Unions⁹ also expressed concern about Radisson employees on the bargaining committee being allowed to leave work and attend the sessions. Radisson assured the Unions that they would do everything they could to see that committee people were able to leave work and attend the bargaining session.

Meeting 2 was held on August 12, 1988, at the Radisson. Stormer was not present, and Dan Kuschke acted as the Unions' spokesman.

Kuschke began the meeting by asking for the names and addresses of current employees. Stokes replied that he wasn't going to give any addresses. He would not say why he would not give the addresses, but did say he would ask the employees of Radisson if they would be willing to give out their addresses to the Union.

Kuschke then presented the Unions' proposals which were in the form of what was referred to in the record as the "area agreement." This was lengthy document described on its title page as:

Collective bargaining Agreement between
The Ritz Hotel
Marquette Hotel
Omni Northstar Hotel

⁷Stokes was late to this meeting, as well.

⁸There are only minor differences between times noted in Respondent's notes and the times listed by Anne Theurer. On the whole the times listed are in substantial agreement.

⁹When I refer to the Unions or Radisson, in this section I am referring to the chief spokesman. If others speak, I will identify them by name.

Radisson South Hotel (as Individual Hotels)¹⁰
and

Hotel Employees and Restaurant Employees Union
Local No. 17 of St. Paul, Minneapolis and Vicinity
AFL-CIO

The term of this agreement was May 1, 1986, to April 30, 1989, and the proposed was submitted apparently without any change, even to be lack of inclusion of the name of the Hotel to be covered by the agreement, and the name of the joint representative, Teamsters Local 638.

Stokes responded by rejecting this proposal on the ground that they were "starting from scratch." He added that the Radisson was going to begin bargaining with the Radisson Plaza Employee Handbook, and that any agreement would be "an agreement in its totality, an agreement on the whole." There was no explanation of what he meant by the last remark, although the dynamics of collective bargaining generally operate on the basis that nothing is agreed upon finally until everything is agreed. Stokes' prior remark, that they were "starting from scratch," seems inconsistent with his statement that they were starting with the Employee Handbook, a 30-page document which most assuredly is not "scratch."

At about this point, as described in Anne Theurer's testimony, Stokes said that he wanted to base the contract on "the peculiarities of the Radisson Plaza Hotel." If Stokes seemed to be inconsistent in where his starting point was in these negotiations, he did not waver through the negotiations, and through the course of this hearing, and even in his brief filed on behalf of Radisson from the position that Radisson was and is a unique property, different from other hotels in downtown Minneapolis.¹¹ I do note that in its brief the Radisson does admit that even if it is not unique, it "was seeking to establish its niche in the market and attain profitability." The brief goes on to assert that "Those efforts would be handicapped to the extent RADISSON [sic] was handcuffed by a union contract that applied equally to other hotels, irrespective of the type, quality and location of the hotel. It was within that context that RADISSON [sic] entered negotiations and made its contract proposals."

Following his opening remarks Stokes went on to talk for 15 minutes or so about changes in tax laws, suggesting that the Union spend time looking into these changes and how they affected the hotel industry. He talked about the fact that hotel managers now had to be "business people" because of the changes in tax laws. Stokes talked about the Teamsters Union and about how his relations with the Teamsters were "very good" compared to his relations with the Hotel and Restaurant Employees Union.

¹⁰The Ritz (being demolished at the time of this hearing), the Marquette, and the Omni Northstar are all located in downtown Minneapolis, as is the Radisson Plaza. The Radisson South is about 12 miles south of the city center.

¹¹The American Automobile Association's North Central Tour Book for the 1988-1989 period awarded the Radisson four diamonds, along with the Hyatt Regency, the Marriott City Center, and the Marquette. The AAA ratings go up to five stars, awarded to such hotels as the Ritz Carlton in Chicago, or the Four Seasons in Washington, D.C. The AAA 1990-1991 Tour Book contains to list Radisson at four diamonds, along with the Hyatt, Marquette, Marriott, and Whitney hotels.

Stokes replied to a request to make a proposal that he didn't know, but he wasn't going to present a proposal at that time. He mentioned the fact that the Unions had only a "simple majority of cards" and he questioned "whether or not the Union represented a majority of the employees at the Radisson."

These last two items, tax laws and the Unions' slim majority, or its current purported lack of majority, were subjects which were alluded to constantly in the meetings which followed.

Further discussions at the meeting involved health and welfare benefits, and a book by former Secretary of Health, Education and Welfare Joseph Califano on the subject of Health Care in America. Stokes talked about this subject of health insurance and Califano's book at great length, urging the union people at the meeting to read the book. Also discussed were compensation for tipped employees. Stokes indicated he would supply certain requested information if the requests were put in writing. He also talked about dues checkoff, indicating Radisson's position that it would not be a "collection agency" for union dues.

Finally, Stokes raised the issue of tape recording the bargaining sessions. Kuschke would not agree to that.

According to Theurer, the session lasted about 3-1/2 hours with only about 20 percent devoted to contract proposals, the balance of the time consisting of monologues by Stokes on things like pie charts showing compensation for tipped employees, negotiations with the Teamsters, negotiations with other unions, tax laws, and Califano's book.

The General Counsel and the Union argue that Stokes "impeded" substantive discussions by his frequent "perorations" and by repeated insistence in recording bargaining sessions¹² and other nonmandatory subjects of bargaining such as contract ratification procedures and establishment of majority status.

All of these factors together with what the General Counsel claims are unreasonable demands are alleged to show unlawful surface bargaining by Radisson's agents and representatives during the period for July 1988 to March 1989.

As I have noted, it is difficult in these kinds of cases to come to decisions on critical questions of fact such as the fine line of difference between surface bargaining and hard but lawful bargaining.¹³ This difficulty is complicated; compounded even, in this case by the limited probative evidence offered. I have great respect for the testimony of Anne Theurer, which I have and will continue to credit, but it is difficult to get into the mind of a human being and determine what his or her motives were in particular situations, if that person has not testified under oath before the finder of fact. I do not have before me the testimony of Dale Stormer or Dan Kuschke, the Unions' chief negotiators, nor did I have any opportunity to observe their demeanor since, apparently, they did not attend this hearing. Thus, I can only attempt to discern their motives from their actions as described by Theurer, and by correspondence and contract proposals entered here in the record without objection.

With regard to the Radisson side of the bargaining table, John Kelly, general manager, and Brian Langager, employee

relations manager, of the Radisson did participate in most if not all of the bargaining sessions. Neither of these men was asked any questions about the sessions. They were both candid witnesses and I was impressed with the openness of their demeanor, and the fact that I thought they were truthful in answering questions put to them.

Frederick Warren, one of Radisson's lawyers handled some examination and cross-examination of witnesses in a workmanlike and professional way. He also testified here, but only for the purposes of introducing a series of minutes, or notes, of bargaining sessions which he, Warren, or others made during those sessions. I don't really need to make any findings as to his credibility or his demeanor. The evidentiary materials which were introduced through his testimony were objected to on grounds of relevance but not of authenticity.

Arch Stokes, Radisson's other attorney, and the lead attorney in this case, handled most of the direct and cross-examination of the witnesses here for the Radisson. Like Warren, he did this in a workmanlike and professional manner. Stokes did not, of course, testify here. I have indicated that I will draw no inferences from that lawyers frequently have good reasons not to testify, even in cases where they have played leading, even, as here, starring roles in the events leading up to the trial. Thus, I can make no findings based upon his demeanor or his credibility. However, he did try this case before me for the best part of 4 days, and I think I am entitled to draw certain conclusions on his personality, his ways of doing things, and his conduct.

So doing, I found Stokes to be a highly intelligent person, having a remarkable memory, and a broad, cultivated, and cosmopolitan mind. These qualities could explain his discussions and digressions referred to by Anne Theurer in her testimony, but I am still left with the question of whether these digressions and discussions are truly the products of a sensitive and intelligent person's wonder at the infinite variety of interesting things in this world- or a sham, designed to dazzle, then to distract and delay the collective bargaining process. This I will have to decide when I have set out all of the facts separately and then put them all together to establish the totality of Stokes' conduct here.

In this approach to this trial, Stokes was properly persistent and aggressive in the defense of his client. He was vigorous in argument, tending at times to swander away from the subject, and having a slight tendency to flick the whip of sarcasm or irony at opposing counsel.¹⁴ Beyond this, I found Stokes to be courteous, well prepared, and capable. This is, of course, consistent with, and collaborative of, Anne Theurer's description of Stokes' words and actions during the bargaining sessions.

I do not mean to slight the other learned and capable counsel in this case by this extended evaluation of Stokes, but they were not present at these bargaining sessions, were not acting as agents or spokespersons for any of the parties at these sessions, and were not subject to call as witnesses to testify about the bargaining sessions.

Meeting 4 was held on August 31, 1988, at the Radisson. Stormer returned as chief negotiator for the Unions. He presented the area agreement again for consideration and it was

¹² *Architectural Fiberglass*, 165 NLRB 238 (1967).

¹³ See, e.g., *Billion Oldsmobile—Toyota*, 260 NLRB 745 (1982), *U.S. Marine Corp.*, 293 NLRB 669 (1989).

¹⁴ A tendency which Stokes shared with other counsel at this hearing.

again rejected. Stormer then proposed using an agreement covering a San Francisco hotel. This, too, was rejected on the grounds that Radisson wanted an agreement “tailored to the needs of that particular hotel.” The Unions took a caucus after this initial discussion, but not before Stokes raised an issue concerning the card check agreement of May 1988, stating that this 1988 agreement was virtually the same as an agreement he had proposed in January 1987. He spent some time talking about that, during the course of which he again questioned the fact of whether the Unions, in fact had majority status.

After the caucus, the Unions presented another proposal, this one modeled on a currently effective contract covering the Holiday Inn in downtown Minneapolis.¹⁵ On receiving this, Stokes did discuss a few items, such as discipline and discharge, and government coordination, but then rejected the proposal as not “tailored” to the Radisson.

There was nothing else said at this meeting about these contract proposals. Stokes did ask that a meeting scheduled for September 6 be postponed, and that meetings be scheduled for September 29 and 30, by which time Stokes would have a proposal prepared and sent to the Union so that it could be reviewed before the next meeting.

Meeting 4 was held at the Radisson on September 29. Despite Stokes’ assurances the Radisson’s proposals had not arrived at the union offices in time to be reviewed before the meeting. The proposals had been delivered to the union office at the time this meeting opened, and someone had to go and get them.

The Radisson proposals were set out in a memorandum form, rather than in the form and language of a complete agreement. Starting with a proposal for a 5-year agreement, a zipper clause¹⁶ and a most-favored-nation clause, providing for changes in the parties’ contract if the Union entered into any agreement with “any other downtown hotel” (including the Radisson South, not a downtown hotel, but whose contract with the Union had already been rejected) containing provisions more favorable to Radisson than the current agreement, the Radisson proposals tracked the employee handbook for all wage and benefit items. The proposals did include a full grievance section calling for final and binding arbitration of grievances.

Supplementing their written proposals, the Unions submitted some additional items involving wage rates, work scheduling and use of part-time employees. Radisson added a proposal requiring the Union to obtain a majority vote of all unit employees eligible to vote in order to ratify any contract arrived at by the parties.

On this last proposal, Stormer said he could agree to a secret-ballot ratification, but he could not accept a requirement that a majority of eligible employees vote to ratify. Stormer insisted that this was an internal union matter.

Stokes rejected the Unions’ supplementary wage proposals on the grounds that the proposals “didn’t reflect the practice that was in use at the Radisson Plaza.” He then went on to talk at length about across-the-board increases, merit in-

creases, wage reviews, individual grading, and the role of unions in setting wage rates. He specifically referred to Local 17 as being “weak” and not having the “clout” to set wage rates in the city of Minneapolis.

At some point in the discussions Stormer had rejected the Radisson’s proposals. Stokes replied, “Well, if you reject mine, and I reject yours, we must be at impasse.”

This meeting lasted about 2 hours, of which about 80 percent of the time was used up by Stokes talking about the merit wage review system at the Radisson, and the Union’s inability to get wage rates in the local market.

Meeting 5 took place the next day at the Radisson. At the beginning of the meeting Stormer presented an amended wage proposal taken from a contract between the Union and the former Radisson Metrodome (at the time of the hearing this hotel had become a Holiday Inn), which had been negotiated by Stormer and Sue Gordon, corporate director of labor relations for the Radisson company. Stokes rejected this proposal without hesitation and without offering any reason or explanation, referring again to the Radisson’s merit system plan.

The next subject that came up involved an employee who was concerned that he had not received his review. Langager apparently offered to check on this, but Stokes referred to the Radisson Employee Appeal Process (REAP) and suggested that if this employee had not received his review, he could go through the REAP.

The Radisson merit review system was discussed several times during this meeting. Stokes offered to let the Union come in “at any time and review our records.” Stormer accepted.¹⁷

Stokes then talked for 10 to 15 minutes about his negotiations with various vice presidents of the Hotel and Restaurant Employees Union around the country, relating the facts about his dealings with them. He also talked at some length about an investigation into the International and its connections with “corrupt activities.” He also referred to Local 17 as “a joke” and invited the Local to “walk out.”¹⁸ After this, Stokes spent another 10 minutes talking about a program used at all the Radisson hotels called “Yes I can,” an employee orientation and inspirational program.

At length, after all these diversions, the parties commenced actually talking about the issues. They first went through the Union’s September 29 proposal. Initially several of the Union proposals were agreed to:

Article 1.1, Purpose and coverage was agreed to with a change suggested by Stokes to conform the coverage provision with the unit described in the card check agreement.

Article 2.1, Complete Agreement, (a “zipper” clause) would be agreed to when a complete agreement was reached.

Article 2.2, No vested interest was agreed to.

Article 2.3, Union-Management Cooperation was agreed to.

¹⁵This proposed agreement, unlike the Unions’ first proposal, was more carefully drafted than that first proposal. The second proposal stated that it was between the Radisson, not some other hotels, and the Union, but in substance the two proposals were fairly uniform.

¹⁶Including incorporation by reference of the entire employee handbook.

¹⁷Later, in October, Theurer and another, unidentified, union agent did go to the Radisson’s offices later and reviewed materials supplied her by Langager.

¹⁸It is not clear whether Stokes was inviting the Local to call a strike, or to physically walk out of the negotiations.

Article 3.1 Union recognition was agreed to. all of the rest of this article, including Union Shop, Check-off of Union dues, notification of New Hires, Bulletin Boards and Newspaper boxes, Union Buttons, Union Stewards and Union Visitations, were rejected by Stokes.

Article 4.1 Management Rights, it was agreed that the Union would accept Radisson's proposal on management rights set out in paragraph 4 of Radisson's September 29 proposal provided that the Union was given the right in this article to bargain over the effects of discontinuation of business.

Article 4.2, other Union Agreements, was agreed to.

Article 5.1 No Strikes. Stormer agreed to the Radisson's version of this, Paragraph 5 of Radisson's September 29 proposals provided the clause was expanded to lockouts as well as strikes.¹⁹

Article 5.2, Jurisdictional Disputes, was agreed to.

Article 6.1, Minimum Rates, was agreed to.

Article 6.2, permitting merit increases, over and above the wage scales in the agreement, was agreed to.²⁰

Article 6.3, New Classifications and Combinations and Article 6.4, Higher Rate (for working in higher classifications) were rejected by Stokes.

Article 6.5 Regular full-time Employees, was agreed to.

Article 6.6, Business costs.

Article 6.7, gratuities, Article 6.8, Gratuities on Large Parties, Article 6.9, Vomit Pay,²¹ Article 6.10 Ala Carte Compensation, and Article 6.11 Lip Allocation were all rejected.

Article 7.1, covering free meals and lunch periods was rejected.

Article 7.2, employer calls for provided uniforms. Anne Theurer was not sure whether this was agreed to or not.

Article 7.3, Regular Rate of Pay, was agreed to.

Article 7.4, calls for sanitary maintenance of employee dining areas and locker rooms. This was rejected by Stokes.

Article 8.1 No guarantee (of hours of work) was agreed to. The remainder of Article 8, including language covering standard work weeks, standard work day, breaks, overtime work, overtime pay, shifts, schedules, replacements, report-in pay, required meetings, and discontinuance of business were all rejected.

Article 9, covering seniority, was rejected.

Article 10, The Union accepted Radisson's proposal on this subject contained in Paragraph 12 of Radisson's September 29 proposal.

Radisson rejected Article 11, Discipline and Discharge, Article 12, Leaves of Absence, Article 13, Holidays, Article 14, Vacations, Article 15, Banquet Department, Article 16, Housekeeping Department, Article 17, Dining Room and Bar Department, and Article 18, Bell Stand.

Article 19.1, on Recognition of Existing Laws was agreed to, but Article 19.2 was rejected.

The remainder of the Union's proposals, Article 20, Health & Welfare, Article 21, on Retirement and Pension Benefits, Article 22, Successors and Assigns, and Article 23, Savings clause²² were rejected.

The parties also went through Radisson's proposals. Other than those agreements noted above on articles 2.2, 2.3, 3.1, 4.1, 5.1, 5.2, 6.1, 6.2, 6.5, 7.3, 8.1, all of articles 10 and 19.1, all of Radisson's proposals either were rejected by the Union, or put on hold.

Anne Theurer estimated that of the 2 hours spent at this meeting, about half, or 1 hour, was spent in actual negotiations, all the remainder in talk by Arch Stokes on the merit review system, and corruption at the highest levels of the International Hotel and Restaurant Employee Union.²³

Following this session, Theurer and her associate did take time going over materials supplied by Radisson dealing with its merit wage policy, and its wage adjustment policy. After this was done Theurer notified Stormer, who, in turn contacted Stokes to arrange another meeting. According to Theurer, Stokes and Stormer originally get up a meeting for November 30, but neither Kelly or manager could make that date, a date of January 11 was agreed on.

Meeting 6 on January 11, 1989, began with a discussion about the Radisson merit review system. The Union told the Radisson representatives that they had reviewed the system, and there was some discussion on the Union's understanding of the system. There was also some discussion about meeting dates. The dates talked about were February 23 and 24. Stormer said that it was "ridiculous" that they could not meet before February 23, that he was available the next week and he wanted to meet earlier.

There was also some talk by Stokes that each side should cost out each other's proposals and should understand the economics of the contract. Stokes further told the Union that he was going to prepare another proposal and mail it to the Union on January 16.²⁴

The Union then went into caucus and upon their return, Stormer announced that the Union was going back to its original proposal of the area agreement, expiring on May 1, 1989. There was some discussion about the Union's withdrawal of its September 29 proposals.²⁵ The meeting then adjourned.

²² Theurer was not sure about this article.

²³ If my experience is any guide, 1 hour is scarcely enough time to look at the proposals in the lengthy and complex document offered by the Union, and the shorter, but not less complex proposals of Radisson, much less to bargain with any depth or substance about the various issues presented by the proposals.

²⁴ This led to Stokes' mentioning that he would send these new proposals by Federal Express, which in turn led to a protest by Dick Hecht, from the Teamsters, about Federal Express being a nonunion operation, and a 10-minute defense of the merits of Federal Express by Stokes.

²⁵ In a letter dated January 12, 1989, from Stokes and Warren to Stormer and Dick Hecht, Radisson's lawyer reviewed the meeting substantially as noted above from Anne Theurer's testimony. The letter then went on to describe Stormer's withdrawal of the Unions September 29 proposals, adding that Stormer also withdrew the Union's agreements made on September 30, and stated that the

Continued

¹⁹ It is not clear whether this clause was agreed to at this meeting.

²⁰ Stokes apparently agreed to this, although at that time, he was not agreeable to any wage scales as proposed by the Union.

²¹ For cleaning up, presumably after guests who had partaken too liberally of Radisson's hospitality.

Meeting 7 was held on February 23, 1989, at the Radisson. On January 16, Stokes and Warren had forwarded to the Union, presumably by Federal Express, but with a copy to Dick Hecht by regular mail, a new set of proposals entitled "Radisson's First Complete Contract Proposal." This was an amplification of Radisson's original proposals, including the agreements reached at meeting #5 on September 30, 1988, but it continued to include the incorporation by reference of the Employee Handbook in the zipper clause.²⁶ The only changes from Radisson's position on the issues was a reduction from a 5-year to a 4-year term of the agreement.

The Union likewise had transmitted a set of new proposals to Radisson in a letter from William McCarthy, business representative, dated January 18, 1989. This set of proposals also reflected the agreements made at the September 30 meeting but otherwise reverted to the form of the area agreement first proposed on August 12, 1988. This time, however, the contract proposals purported to be between Radisson and the Unions, not three other hotels and Local 17 alone.

In a letter to the Union dated February 13, confirming the February 23 and 24 meetings, Stokes and Warren again requested that the meetings be videotaped, or at least reported by a "court reporter." Stormer replied to this on February 21, declining to agree to videotaping or the court reporter, but suggesting that the parties exchange their minutes after the meetings.

The request to videotape was repeated by Stokes at the opening of the February 23 meeting, and again rejected by Stormer. Stokes then began to talk about inaccuracies in literature distributed by the Union. According to Anne Heurer, the point of Stokes' objection to the literature was that it had mentioned a charge filed by the Union in January against Radisson, but did not mention that Radisson had also filed charges against the Union.

Stokes also raised the issue of the Unions' "renewing" on their proposals. Stormer replied, admitting that they had "regressed." There is no explanation in the record about this exchange. As I have noted, Stormer did announce on January 11 that the Union was withdrawing its September 29 proposals, and it is true that its new, January 18, proposals consisted of the area agreement. There are intimations in Stokes' January 12 letter to the Union that Stormer also, on January 11, withdrew the Union's agreements to certain issues made on September 30. There is no record evidence of this, but even if it were so, the Union's January 18 proposals include the agreements which had been previously made.²⁷ In this same conversation, Stormer said that the Union did not consider this proposal to be an association (multiemployer?) contract. Stokes replied by talking about a contract for the Radisson Plaza that was tailored specifically to that hotel. Again, Stokes did not explain what he meant by his requirement that

Union's position was firm and they would not budge. It is true that the Union reverted to the area agreement, but in the next proposals which the Union made on January 19, 1989, all of the prior agreements are memorialized. There is no indication that, even if withdrawal of previous agreements was threatened, those threats were carried out.

²⁶The paragraphs and articles in this proposal were not numbered or otherwise identified except by title.

²⁷In any event, there was little difference in substance between the Union's proposals of August 6 and September 29. The changes were cosmetic only.

the contract be tailored to the Radisson Plaza Minneapolis hotel.

In connection with this discussion about the area agreement Stormer raised a question about why Radisson did not follow "area standards" on leaves of absence and he read excerpts from an affidavit purportedly given by a former Radisson employee who was denied a leave of absence. Stokes replied to this by asking for the name of the employee and told Stormer that he could not reply to these allegations without knowing the employee's name. Theurer could not recall if there was any more discussion on this point. According to Radisson's notes on this meeting, Stormer refused to give the name of the employee.²⁸ Without relying on Radisson's notes, I think I can reasonably infer from subsequent events that the employee's name was not given to the Radisson's representative either at this meeting, or later.

There was some discussion, during the early stages of this meeting, about seniority. Stokes spoke "at some length" about permissive versus mandatory seniority, and said that he would not agree to any form of the latter. After about 10 minutes of this, Stormer suggested that they move to "an easier topic," bulletin boards and union buttons. The first of these topics did not prove to be any easier. Stokes would agree to bulletin boards, but not newspaper boxes (for employees to receive notices) because the Union had distributed inaccurate literature "and until the Union begins to distribute accurate information as they do in Canada, for instance, there will be no newspaper boxes for the employees here."²⁹

As far as union buttons were concerned, Stokes saw no objections to employees wearing them, but he would like to see one first. No one from the union side had a button with them but the Union promised to bring one in the next day to show to Stokes. It is surprising that among the union representatives and committee present that day, a total of eight people, there was nobody who had a union button with him, but even more surprising that Stokes a "sophisticated practitioner," with his far ranging practice, would not be able to remember what a union button for the Hotel and Restaurant Employees Union looked like.

At this point, the parties went back and started with Article 1 of the Union's new proposal.

Articles 1.1 and 1.2 were agreed upon.

Note: 1.1 had been agreed to on September 30; 1.2 was reviewed in the Union's January 18 proposals to reflect agreement on September 30 to Radisson's suggestion that the unit description be the same as the description in the June 1988 card check.

Articles 2.1, 2.2 and 2.3 were agreed to.

Note: 2.1 had been agreed to on September 30. 2.2 was agreed to with Radisson's proposal that "the

²⁸The employee's name was Gencie Benson, and later developments in this matter were to become a cause celebre in these negotiations.

²⁹The reference here to Canada was not explained. I have no idea why Stokes continued to intersperse his remarks during these negotiations, with references to the continental, even international, scope of his practice since such references seem to have only listed relevance to the issues. There seemed to be no objection by the Union to these glittering allusion, so I can make no findings thereon.

Radisson” be used where the word “Employer” occurred in the agreement. This was agreed to . 2.3 had been agreed to on September 30.

Article 3.1 was rejected by Stokes.

Note: This had been agreed to on September 30. There is a slight difference between the Union’s September 29 proposal which was agreed to on September 30, and the Union’s January 18 proposal which, reverting to the language of the area agreement, spelled out an exception dependent on differences which might appear in separate agreements covering other hotels covered by the area agreement. There is, however, no explanation in the record of why Radisson withdrew its agreement in this section.

As noted in connection with the discussion of union buttons, above, Stokes had agreed to the provisions of 3.5 depending on the results of his view of a union button, promised for the next day. All other provisions of article 3 were rejected.

Articles 4.1 and 4.2 were agreed to.

Note: 4.1 was agreed to on September 30 as the Radisson proposal with an addition providing for bargaining over the discontinuation of the business. It is not clear in the record whether 4.2 was or was not agreed to on September 30.

Articles 5.1 and 5.2 were agreed to on September 30.

Note: On September 30, Stormer had requested that 5.1 also include a no-lockout provision, which was agreed to. There was no change on February 23.

Articles 6.1 and 6.2 were agreed on September 30.

Note: 6.3 was rejected at both the September 30 and the February 23 meetings. 6.4 was rejected at the September 30 meeting, but agreed to February 23. There is a question on 6.5. Theurer testified that Stokes accepted this section defining full-time employees on September 30, and again on February 23. Radisson’s notes for the February 23 meeting indicate that the section was rejected. Since I generally credit Theurer’s testimony, I find that the section was agreed to at both sessions.

All the rest of the sections of article 6 were rejected by Radisson.

Articles 7.1 and 7.3 were agreed to on September 30.

Note: Theurer was not sure what happened on September 30 on 7.2, uniforms, but she did testify that Stokes agreed to the section in principle on February 23, but indicated he wanted a limit in the contract on the number of uniforms supplied. Section 7.4 was agreed to on February 23.

Article 8.1 was agreed to on September 30.

Note: At the February 23 Stokes withdrew his agreement on 8.1, saying he would not agree its being subject to seniority (Article 9). All other sections of Article 8 were rejected on September 30. On February 23, Radisson agreed to 8.3, standard work day, 8.4 on overtime work, 8.5 overtime pay and 8.9, no duplication of

overtime or premium pay. There was some discussion about 8.10, posting of work schedules, but no agreements were reached. The Union accepted the Radisson’s current policy on 8.12, report-in pay. Section 8.6, 8.7, 8.8, 8.11, 8.13, 8.14 and 8.15 were all rejected on February 23.

Article 9, on Seniority, was rejected in its entirety both on September 30 and February 23.

Article 10, grievance and arbitration procedure, was agreed upon, using the Radisson’s language. In the Union’s January 18 proposal made some changes is the provision as agreed to. There was some discussion on February 23 about 10.6, the award of the arbitrator and 10.7, contract remedy, and Stokes rejected a provision in 10.8 adopting the standards used in Elkouri and Elkouri’s book³⁰ in determining past practice.

Articles 11 through 16, providing for discipline and discharge leaves, holidays, vacations and special provisions for the banquet and housekeeping departments were rejected in their entirety.

Article 17.2 an equal opportunity was agreed to on February 23. Note: This article was numbered 19 in the Union’s September 29 proposals.³¹ At that time, Theurer stated that Radisson accepted 19.1, recognition of applicable laws, and that these was some discussion of 19.2, equal opportunity. She was unsure about the disposition of 17.1. which had been agreed to a September 30.

Articles 18, 19, 20, 21, 22, and 23 the remainder of the Union proposals were rejected by Radisson.

After the parties had gone through the Union’s new proposals, they briefly discussed the Radisson’s “First Complete Contract Proposal.” Other than matters already agreed upon, a provision for professional hospitality and the grievance and arbitration clause, Stormer rejected all of Radisson’s other proposals.

Meeting 8 was held at the Radisson on February 24.

At the beginning of the meeting as Stokes announced that he wanted to talk about three things, to introduce Sue Gordon, corporate vice president for human resources; to discuss the proposals already agreed to; and to talk about Theurer’s uninvited presence on company property. Stokes introduced Sue Gordon, then spoke at length about the facts that the parties did not have a contract, that Theurer had been on the Radisson’s property, in employee areas, particularly the halls, and that she had no right to be on the property.

After this Stokes did talk about some of the proposals, including the savings clause, article 22 in the Union’s January 18 proposals, which was accepted by Stormer. There were also some discussions of article 3, in which Stokes repeated his rejection of 3.1, 3.2, and 3.3. After some further discus-

³⁰Elkouri and Elkouri, *How Arbitration Works*, Bureau of National Affairs, Washington, D.C. Fourth Edition, 1985.

³¹The language of 19.1 in the September 29 proposals and 17.1 in the January 18 proposals is substantially the same. The first paragraph of 19.2 is identical with 17.2, but 19.2 has several paragraphs dealing with affirmative action which are not contain in 17.2.

sion about additional proposals which Stokes said he would prepare and send out, there was a caucus and a break.

After the break the parties talked about the next meeting, which was scheduled for March 10. Stormer urged that they meet before that but Stokes said that he could not.

The parties spent about an hour face to face in this meeting, with half of that time taken up by Stokes' comments on Theurer's presence on hotel property and his views on seniority. This meeting then adjourned.

Meeting 9 was held on March 10, 1989, at the Radisson.

On March 7, however, the Union had run a full-page advertisement in local newspapers concerning the problems of a former Radisson housekeeping employee named Gencie Benson. The advertisement bore a headline stating, in headline style letters "Unfortunately, the Radisson Plaza Hotel had no room for Gencie Benson's baby" and contained a photograph of a sad looking woman holding an infant. The text went on to describe Benson as a reliable employee, who served also as a babysitter for the children of the Hotel's general manager. Benson became pregnant, asked for lighter duty, asked for time off to have her baby, or for time off to look for another job. All of these requests were denied, and her supervisor is said to have "suggested the hotel would be willing to give her time off for an abortion." Benson was unwilling to do that, and she resigned.

The advertisement then left Benson, and talked about the Radisson corporation's owner, Curt Carlson, not keeping his word to the employees of the former downtown Radisson, nor to the city of Minneapolis, and about Radisson's hiring of an outside "union buster," "infamous for fighting employee interests to the bargaining table."³²

The advertisement concluded with a summons not to the barricades, but to a demonstration at Carlson Companies world headquarters in Plymouth, Minnesota, on Wednesday, March 8.

There was no testimony here on the merits of Gencie Benson's case.³³ I do note that the case was discussed at meeting 17 on February 23. At that time Stormer had read excerpts from an affidavit Benson had supplied to the Union, but did not reveal her name. Stokes' reply to this at meeting 7 was that he could not reply to the allegations without knowing the employee's name.

The publication of this advertisement set off a row that consumed most of meeting 9 on March 10. At the beginning of the meeting the Union handed out a new set of proposals. This consisted of the area agreement incorporating those items which had been agreed to on September 30 and February 23. The discussion that followed the presentation of this document, however, did not concern the new, or old, proposals, but the Gencie Benson advertisement.

Stokes, with real or feigned wrath, spoke about inaccuracies, libels, and slanders in the advertisement. He stated that he had been going to submit proposals, but he would not now because he wanted to include a publicity article in view of the Gencie Benson advertisement. Stormer kept asking him to bargain, or to take a proposal, but Stokes kept on with more discussion about the advertisement. He brought up

³² Presumably a reference to Arch Stokes, although I cannot attest as to the accuracy of the quotes.

³³ I don't know whether such testimony would be material to the issues here in any event.

again his proposal that the sessions be tape-recorded, or videotaped, and pressed Ruschke for explanations about a statement he had made to the newspaper (either about the state of negotiations, or the Benson advertisement, or the connection between the two).

After a break Stokes talked about requiring a two-thirds majority of unit members in order to ratify any contract. The parties then talked about meeting dates, selecting March 27 and 28, the first of these to be at the Teamsters offices and the second back at the Radisson. Stokes also mentioned the Union's proposals, saying that he had looked at them and that he would respond to them by the following Tuesday. He also mentioned what he considered the major differences between the parties, citing seniority, overtime, discipline, and discharge.

This meeting lasted 2-1/2 hours of which only a very few minutes were devoted to discussing contract proposals.

Meeting 10 was held on March 27 at Teamsters headquarters in Minneapolis. Prior to this meeting, Stokes had sent a new set of proposals under date of March 14. This document is divided into articles and sections but also consists of 55 consecutively numbered paragraphs.

The document contains a brief statement of the purpose of the agreement, and a preamble setting out in article 1 that because the Unions were not certified by the Board, but "are representing employees pursuant to a card check agreement" the Radisson could require proof of majority status each year during this first contract.

Paragraph 2. States that if either local 17 or Local 638 "is adjudicated by a court of law" to be dominated, or otherwise ceases to be a labor organization within the meaning of the Act, Radisson's obligation to bargain would cease.³⁴

Note: These provisions appear for the first time in these proposals.

Article 1

Paragraph 3 calls for a four year term, to continue from year to year thereafter in the absence of 90 days written notice.

Note: This provision appeared in the Radisson's January 16 proposals.

Article 2

Paragraph 4. Sets out the purpose of the agreement. Paragraph 5 describes the unit covered by the agreement.

Note: This article appears here for the first time, however, paragraph 5 had been agreed to on September 30, 1988.

Article 3

Paragraph 6 is a "zipper" clause stating that this document is the complete agreement of the parties and cannot be altered or amended except by mutual written agreement. The paragraph also contains the provision incorporating the Radisson Employee Handbook as "an integral part" of the agreement.

³⁴ There is no provision for the filing of 9(f), (g), and (h) affidavits.

Note: This provision was contained in the Union's January 18 proposals and was agreed to by Stokes on February 23, without the reference to the Employee Handbook.

Paragraph 7, provides that employees acquire no vested rights to benefits under the agreements beyond any change or termination of the agreement.

Note: This was agreed to on September 30 and February 23.

Paragraph 8. Provides for cooperation between the parties to improve business and enhance working conditions.

Note: This is a new provision in these proposals.

Article 4

Paragraph 9. Provides that the parties are dedicated to the "highest principles of hospitality." Note: This appeared in the January 16 proposals, but apparently was not discussed.

Article 5

Paragraph 10, lists a series of management rights.

Note: This is the same as Radisson's proposals of January 16. Paragraph 11. Provides for the Union to deliver to Radisson copies of agreements "with a hotel or motel."

Note: This a new proposal.

Article 6

Paragraph 12. Provides for recognition of the parties' legal and constitutional rights; provides that neither Radisson nor the Union shall lie, publish falsehoods, or libel or slander the other parties; and binds the Unions to hold Radisson harmless for any damages due to libelous or slanderous materials prepared, distributed, or "otherwise participate (d)" in by the Union.

Note: This is a new proposal.

Paragraph 13. Provides for spaces in the Radisson hotel where the Unions may place a bulletin boards, but also provides for prior approval by Radisson of any materials to be posted. Note: This is a new proposal.

Paragraph 14. Would allow the wearing of Union buttons or steward buttons provided the buttons are no larger than one inch in diameter.

Note: This is a new section.

Article 7

Paragraph 15. Provides for no strikes or lockouts.

Notes: This had been agreed to on September 30 and February 23. Paragraph 16. Provides that if there is a jurisdictional dispute between the Unions involved here, that such dispute shall not interfere with Radisson's business.

Note: This is a new proposal which appears to be limited only to dispute between Local 17 and Local 638.

Article 8

Paragraph 17. Provides that the Radisson's wage proposal for each of the four years of the contract shall be consistent with "Radisson's existing wage policies, practices and procedures whereby each employee is in-

dividually evaluated regarding his/her pay, subject to Radisson's business needs."

Note: This has been Radisson's position throughout. Paragraph 18. Provides for a higher rate of pay for work performed in a higher classification, and a lower rate for a lower classification.

Note: This had been agreed to on February 23.

Paragraph 19. Provides for exclusion of costs of meals uniforms, laundering and maintenance from employees' regular rates of pay.

Note: This had been agreed to on September 30. Paragraph 20. Provides for employees dining areas and locker rooms.

Note: This was agreed to on February 23.

Article 9

Paragraph 21. Would provide for no guarantee of hours or days or work.

Note: This was accepted on September 30. Paragraph 22. Calls for a standard work week of 40 hours.

Note: This was agreed to on February 23.

Paragraph 23. Provides for overtime when requested by supervisors.

Note: This was in Radisson's January 16 proposal.

Paragraph 24. Provides for no pyramiding or duplication of overtime pay.

Note: This was agreed to on February 23.

Paragraph 26. Provides for posting or work schedules' "in accordance with Radisson's current practice."

Note: This was discussed on February 23, but no agreement was reached. There was also some discussion on a number of other issues in this area of hours and scheduling.

Paragraph 27. Provides for report in pay in accordance with Radisson's current practice.

Note: This is a new proposal, in response to Union proposals.

Article 10

Paragraph 28. In an omnibus provision proposing that all benefits under this four year agreement will be consistent with Radisson's benefit policies, practices and procedure.

Note: This is not a new proposal, and reflects the position of Radisson from the outset of bargaining.

Article 11

Paragraph 29. Is a simplified definition of seniority.

Note: This is new, but reflects Radisson's consistent position throughout negotiations.

Paragraph 30. Provides that there is no mandatory application of seniority.

Note: Also new, but consistent with Radisson's position throughout.

Paragraph 31. Provides for posting of new job openings and award of these jobs to those Radisson considers qualified.

Note: This is a new proposal.

Article 12

Paragraph 32. Provides that Radisson shall have right to discipline and discharge for just and reasonable

cause and that employees accused shall be suspended before being discharged.

Note: This has been Radisson's position all along.

Paragraph 33. Is a catalogue of offenses for which disciplining action or discharge can be imposed.

Note: This provisions is taken *verbatim* from the Employee Handbook with a catchall addition at the end allowing discharge of any employee whose conduct is "detrimental to the welfare or business interest of Radisson." In Radisson's January 16 proposal, there was an offer to "negotiate" the list by shortening or collating the items, but that offer was not repeated in this proposal.

Paragraph 34. The Unions would have the right to appeal any discharge through the grievance and arbitration procedure.

Article 13

Paragraph 35. Provides that the Unions "agree to recognize the rules and regulations of Radisson on personnel policies, practices and procedures, consistent with their obligation to represent employees under the terms of this Agreement."

Note: I don't know what this means but it is the same as Article 10.10 of the Union's March 16 proposals. There apparently was no disagreement on this provision.

Article 14

Paragraphs 36-44. Contains the grievance and arbitration procedure. Note: While this provision, in the form originally proposed by Radisson on September 29, was agreed to on September 30 and February 23, the Union's March 18 proposals continue to contain provisions not agreed to.

Articles 15, 16, and 17

Paragraphs 45, 46, and 47 are Radisson's proposals on fringe benefits, holidays, vacations and leaves of absence, stating that those benefits will be the Radisson's existing practice. Note: This seems somewhat redundant in view of Article 10, paragraph 28, above, but is consistent with Radisson's position throughout.

Article 18

Paragraph 48. Proposes reopening of wage and fringe benefit provisions if Radisson is in serious financial trouble.

Note: This, too, seems redundant in view of Article 3, paragraph 6 above.

Article 19

Paragraph 49. This is a most favored nation clause.

Note: This clause appeared in Radisson's proposals of September 29 and January 16 and had been rejected by the Union on September 29 and February 23.

Article 20

Paragraph 50. Would provide that neither party shall require the other to violate any laws or regulations.

Paragraph 51. Would prevent pyramiding of wages because of provisions of Federal, State as Municipal laws or regulations.

Paragraph 52. Would require the Unions to follow through the grievance and arbitration procedure before filing a complaint with any administrative agency or court. The Unions would be required to waive any statute of limitations during the whole period required for the processing of a grievance.

Note: I suppose that if more than six months elapsed during the processing of a grievance, then, under this provision the Unions or an individual would be unable to file a timely charge with the Board.

Paragraph 53. Provides that the parties will not engage in discrimination which violates city, State or Federal equal opportunity law.

Article 21

Paragraph 54. Is a standard savings clause.

Article 22

Paragraph 55 required a two-third majority of unit members to ratify the contract in order for the ratification to be effective.

These proposals constituted the bulk of the discussions at the March 27 meeting. After the parties met and exchanged their proposals the Union called a caucus. One member of the Union's bargaining committee was not familiar with the issues, so the Union took about 2 hours to fill her in on what was happening.

Before the caucus Dan Kuschke announced that he would be the chief negotiator for the Union. Storer was no longer to be present, but no explanation for this was given. For some reason, perhaps connected to this announcement, and perhaps not, Stokes announced that he, Stokes, was the chief negotiator for Radisson, and the Union had better not try to do anything about trying to remove him as the chief negotiator.

After the caucus Stokes berated the Union for taking a 2-hour caucus, and making him sit there. Stokes also berated the Federal mediator for not taking the Union to task for the long caucus.³⁵ Stokes again returned to the subject of videotaping the proceedings, at which point Kuschke began to discuss the Radisson's latest proposals.

In the preamble Kuschke found both proposals "offensive" to the Union. Kuschke did not feel that they needed to get into these matters at the bargaining table.

There was disagreement on the term of the agreement, the Union wanting 3 years with 60-day notices, the Radisson 4 years with 90-day notices.

Article 2, paragraphs 4 and 5 were agreed to.

Article 3, paragraph 6 was agreeable except the Union would not agree to inclusion of the Employee Handbook.

Article 3, paragraph 7 was agreeable except for the provision superseding all past practices.

Article 3, paragraph 8 was agreed to.

Article 4, paragraph 9 was agreed to.

Article 5, paragraphs 10 and 11 were agreed to.

Article 6, paragraph 12 was rejected.

Article 6, paragraph 13 was accepted by the Union except for the last sentence.

Article 6, paragraph 14 was agreed to.

³⁵The Federal mediator had been sitting in on these negotiations since January 11.

Article 7, paragraphs 15 and 16 were agreed to.

Article 8, paragraph 17 was rejected.

Article 8, paragraphs 18, 19, and 20 were agreed to.

Article 9, paragraphs 21, 22, 23, and 24 were rejected.

Article 9, paragraph 25 was agreed to.

Article 9, paragraph 26 was not agreed to.

Article 9, paragraph 27 was agreed to.

Article 10, paragraph 28 was rejected.

Article 11, paragraphs 29, 30, and 31 were rejected.

Article 12, paragraphs 32 and 33 were rejected.

Article 12, paragraph 34 Theurer was not sure what was said on this paragraph.

At this point the meeting adjourned, having spent about 80 percent of the actual meeting time on discussions of proposals and 20 percent on corruption of the Teamsters and the Hotel and Restaurant Unions, wage range systems and other nonnegotiating matters.

Meeting 11 took place back at the Radisson on the next day, March 28.

At the beginning of the meeting there was apparently some discussion about article 15, paragraph 45, on holidays. Theurer asked some questions about how seniority affected days off for vacations and holidays. Stokes' response was that she had worked in the hotel and that she ought to know what Radisson's policies and practices were on those issues. They went on to discuss the issues.

Article 15, paragraph 45, article 16, paragraph 46, and article 17, paragraph 47 were rejected.

During a discussion of these issues, holidays, vacations and leaves of absence, there were references as to why Radisson did not follow seniority. Stokes replied that he had negotiated a contract at Colonial Williamsburg and he talked at length about that. The Union had a copy of that contract and they took a caucus to examine the provisions cited by Stokes. After about 15 minutes they returned and asked Stokes if perhaps they could use some of the language from the Williamsburg contract as a basis for seniority provisions for holidays and vacations. Stokes replied no, that the Williamsburg contract was designed specifically for that hotel. He went on to talk about the Williamsburg Hotel,³⁶ how it was different, how some of the people (employees) had been there for 50 years, the authenticity of the materials use and how authentic the hotel looked. This went on for 8 to 10 minutes.

The discussion about seniority concluded with Stokes' remark that the Radisson Hotel didn't hire "tyrants" so employee "couldn't have to worry about having a hard time getting time off for vacations and holidays."

Discussion of the articles then continued.

Article 18, paragraph 48, was discussed but no conclusions were reached.

Article 19, paragraph 49, was discussed. Kuschke said to Stokes that he had been saying throughout the negotiations that he wanted a contract tailored to the Radisson, why did he want a most-favored-nation clause. Stokes agreed to drop the article.

Article 20, paragraph 50, was accepted by the Union.

Article 20, paragraphs 51 and 52. Presented the Union with some problems of understanding, and they were deferred for further study.

Article 20 paragraph 53 was agreed to.

Article 21 paragraph 54 was agreed to.

Article 22 paragraph 55 was not acceptable to the Union. Kuschke said that the Union did not have to bargain about this and that the Union was not going to bargain about it. Stokes replied that he was going to bargain about it.

After this part of the meeting ended the parties talked about new meeting dates. Stokes talked about getting up some new proposals and mailing them to the Union. He also said that he was aware that a decertification had been filed the day before and that he expected to be in Minneapolis around April 6 or 7 to attend a hearing on that petition, suggesting that possibly they could get together around that date.

This meeting, the last meeting that the parties had, then adjourned.

4. Other alleged violations of Section 8(a)(5)

a. *The alleged refusal to bargain in October 1988*

On September 27, 1988, Anne Theurer wrote to John Kelly, general manager of the Radisson, pointing out that it had come to the attention of the Union that there had been certain changes in job assignments in the banquet department and in the kitchens. Theurer requested a meeting to discuss these issues "as they relate to conditions of employment."³⁷

There was no reply to this letter, so Theurer spoke to Kelly on the telephone in late October and reminded him of her request. Kelly replied, without referring the request, or Theurer's attention, to Stokes, that "as long as there is no collective-bargaining agreement in effect, I won't meet with the Union to bargain over other items. The employees can come to me individually if they like but until there is a contract" he would not meet with the Union.³⁸

Nothing further was done about this matter, but I do not feel that it is incumbent on the Union to continue on with the issue in the face of such a clear and unequivocal refusal.

In this situation, despite the pressures or compromises involved in the negotiation which led up to the 1988 card check agreement, there is no evidence that the agreement was forced on either the Radisson or the Unions, although both parties seemed to feel that they had been somehow jobbed by the other. The agreement was made, and it was voluntary. The Unions came up with a majority of cards, and Radisson recognized the two locals as the representatives of the employees in the unit involved here. No amount of writhing or squirming or hindsight can change that.

³⁷ A copy of this letter was sent to Sue Gordon, but not to Arch Stokes. In its brief, Radisson alleges that this was not an oversight, but a part of a plot to "bypass and underline" Stokes as Radisson's chief negotiator. There is nothing in this record which would warrant such a conclusion. If counsel was concerned about efforts to affect his position with Radisson, he could have filed a charge under Sec. 8(a)(1)(B) to have such efforts stopped.

³⁸ No one has raised any issue here under Sec. 10(b), but I feel obliged to recognize that the issue might be raised. However, I believe that this allegation, based on an occurrence in late October 1988, is closely related to, and properly includable within, the original charge in Case 18-CA-10848, filed on April 10, 1989, even though the specific incident was not mentioned in that charge, but only if the amended charge filed in that same case on July 17, 1989. *Winer Motors*, 265 NLRB 1457 (1982); *Ducane Heating Corp.*, 273 NLRB 1389 (1985); see *Redd-I, Inc.*, 290 NLRB 1115 (1988), 295 NLRB 766 (1989).

³⁶ Probably the Williamsburg Inn.

As of October there is nothing in this record to indicate that Radisson had any doubt, good faith or bad faith, about that majority. Thus, in late October, having voluntarily recognized the Unions, Radisson was under an obligation to bargain with those Unions concerning wages hours and conditions of employment, and was not free either to refuse to bargain about these matters, nor to enter into individual arrangements with employees concerning changes in working conditions. If Radisson did not wish to burden the ongoing bargaining process with matters such as these contained in Theurer's September 27 letter, then subcommittees of the bargaining committees of the parties could have been named to handle these collateral matters, or the Radisson's regular personnel staff could as well have handled the issue.

To have flatly refused on the grounds that there was no collective-bargaining agreement constitutes a violation of Section 8(a)(1) and (5)³⁹ and demonstrates an attitude which, I think, reflects on the good faith of the Radisson in all its dealings with the Unions. In view of the size and sophistication of the hotel itself, and its parent company, and considering the intelligence, experience, and ability of its counsel, as amply demonstrated before me at this hearing, I simply cannot believe that Radisson did not know that what Kelly did here was unlawful. I believe further that Radisson was aware of the probable impact on the strength of the Unions and the loyalty of their adherents as the result of this demonstration of their powerlessness.

b. *The refusal to supply information*

On March 14, 1989, Dale Storer wrote to Arch Stokes requesting an updated list of the names, address, classification, social security numbers and current wage rates of employees in the bargaining unit, together with a list of terminations of employees on the original list (supplied in 1988). As has been described above, the parties met on March 27 and 28, but the requested information was not delivered, and, as far as I can determine, was not discussed at these meetings.

On April 27 Dan Kurschke wrote to Stokes again requesting this information.

Radisson made no response to either of these letters, and the requested information was never supplied. Its defense to this allegation of the complaint was that it became aware of the decertification petition, and the employee support for that petition within 2 weeks of the first request for information on March 14, 1989. Since there was no deadline imposed in the Union's letter, and since prior requests for information had been handled just as slowly, Radisson's obligation to supply the requested information had ceased as of March 24, 1989.

This defense is viable, it at all, only if Radisson's bargaining duty terminated within a reasonable time after the request for information was made. My findings below, on the question of surface bargaining, result in a conclusion that Radisson's duty to bargain did not end in March 1989, but rather continues to the present time. Since there is no question here that the requested information was not relevant and material to the bargaining relationship of the parties and the duty of the Union to represent the employees in the bargaining unit, then the refusal to furnish this information is

a further violation of Section 8(a)(1) and (5) of the Act. *Pearl Bookbinding Co.*, 213 NLRB 532 (1974).⁴⁰

c. *The March 1989 wage adjustments*

In March 1989, Radisson increased the wages of certain unit employees. Brian Langager testified that Radisson has a program to adjust wages periodically as considered necessary to keep competitive within the industry.⁴¹ The process begins with a wage survey of competitive hotels in the area to see what the competition is paying for similar jobs. With this information in hand, Radisson then looks at a lot of factors, including the desirability or undersireability of certain positions, employee turnover, corporate policies, and budget restrictions imposed by corporate headquarters. The same procedure is followed, according to Langager, at other properties owned by the Radisson corporation. All of this material is evaluated by Radisson's personnel department, and a series of recommendations are made to the general manager, and then to corporate headquarters.

At the conclusion of this process in just described, March of 1989, wage increases were granted to 65 out of 160 employees in the bargaining unit. The Union was not notified of these increases and Theurer's repeated attempts to bargain about the increases, when she found out about them around April 7, were ignored.

It is clear from Langager's testimony that these increases were not automatic, nor the result of a continuing company practice. The wage surveys certainly were a continuing practice, but there was no pattern or practice as to who would receive wage adjustments. As Langager said, adjustments if any, or no adjustments, derived from a number of factors beyond the wage surveys and were dependent entirely on the discretion of either local managers, or corporate managers. As Langager quoted John Kelly, speaking at the January 11 bargaining session, Radisson was going to pay the "right wage" competition would allow, "not the best, not the worst, and increased pay based on merit as the hotel succeeds."

If follows, then, that the granting of these unilateral wage increases in March 1989 without notifying the Union, or bargaining about these increases, violated Section 8(a)(1) and (5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Matheson Fast Freight*, 297 NLRB 63 (1990).

⁴⁰ I have noted the General Counsel's reference to Stokes' oral response to an earlier request for information by flatly refusing and giving no reason. However, he did eventually give that information. Certainly there was enough of rudeness, insults and downright churlishness in this record. But in the collective-bargaining process one encounters all types and must, perforce, suffer a great deal of calumny not ordinarily experienced in day-to-day living but not in and of itself unlawful. It is only when such language impinges on the rights of other parties that the sanctions of Sec. 8(a)(1) and (5) may apply, and it is only in those areas that I will make findings below on some of the remarks made at the bargaining table. "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." *Albritton Communications*, 271 NLRB 201 (1984).

⁴¹ Radisson also has a program of periodic merit wage increases, which is not at issue here.

³⁹ *Royal Coach Lines*, 282 NLRB 1037 (1987).

5. Alleged instances of restraint and coercion of employees

a. *The Lisa Wyland incident*

John McDonald, a banquet server (waiter), testified that in late May 1989, he was in the office of the then banquet manager, Lisa Wyland, for the purpose of discussing his schedule. Wyland was speaking on the telephone to a person who was unknown to McDonald and, in the course of the conversation, she mentioned applicants for employment. Wyland said that a number of people had applied that week, some with Spanish surnames, like Martinez, names like that. She commented that it was unusual that so many had come in in 1 week, that she thought they “must be Union plants,” and told the person she was talking to, and incidentally, McDonald as well, that she refused to hire them because of that reason.

According to McDonald, Wyland repeated the same thoughts to other supervisors and employees “repeatedly” during the next couple of days, saying again and again that she thought these applicants must have been union plants, and that she had decided not to hire them because she was convinced they were from the Union.

Radisson presented no evidence on this issue. McDonald impressed me as a credible witness. I believe that the incidents happened as McDonald described them. Radisson argues in its brief that there is no evidence that any employee felt interfered with, restrained and coerced an account of Ms. Wyland’s comments. However, it is well settled that the assessment of a statement for purposes of determining whether that statement violated Section 8(a)(1) does not turn on the employer’s motive, but whether the remark or remarks tended to impede employees in the exercise of their Section 7 rights. Accordingly, I find that these remarks by Wyland violated Section 8(a)(1) of the Act. *Maywood, Inc.*, 251 NLRB 979 (1980); *Long-Airdox Co.*, 277 NLRB 1157 (1985).

b. *The boycott vote incident*

Prior to November 7, 1988, the Union had begun to feel frustrated about the progress of bargaining. The leadership of the Union decided to take a poll among the unit employees on the question of whether to institute a public boycott against the Radisson. The poll was to take place in front of the Radisson on Seventh Street on November 7 from about 1:30 p.m. to sometime after 5 p.m. They had secured a bus from the Teamsters and it was planned that employees eligible to vote would enter the bus to vote. Apparently, however, Seventh Street is one-way heading northwest so that the doors of the bus would not open on the sidewalk in front of the Radisson, but into the traveled roadway. The Union then had to improvise by setting up a table on the sidewalk in front of the hotel.⁴²

Theurer and an associate, Amy Taylor, arrived about 1:20 p.m. and set up the table on the fairly wide sidewalk in front of the Radisson.

About 10 minutes after they were set up General Manager John Kelly came out of the hotel together with some engi-

⁴² There was no evidence that this activity interfered with the entrances to the hotel, which, in any event, are in an arcaded area set back from the sidewalk with a drive coming off the street for guests’ cars and taxis.

neer⁴³ and Denny Hansen, the engineering supervisor. Kelly asked Theurer who was going to count the votes, and who decided who was going to vote. He also asked if a management person could be out there to observe the voting. Bill Reiling, a Teamster representative, then accused Kelly of just trying to observe who was voting and who was not.

Kelly remained for about 10 minutes, but Hansen stayed out there for about a half hour. Later another supervisor, identified only as “Curt” would come out for a while, then go back inside.⁴⁴ Langager came out of the hotel at one point, asked if he could vote, and asked questions about people who couldn’t read, or who did not speak English.

Other supervisors who came out to watch were Wanda Kittles, Minda Bakker, and James Haines. About 5 o’clock Nancie Buboltz, Tom Creger, and Michael Baker came out together and stayed for quite some time. They asked a lot of questions, and discussed the banquet department, and what the union people thought the positive effects of a boycott would be. Theurer said she noticed Buboltz looking at the voters’ list on the table.

Theurer also mentioned that she saw at least six employees who looked at the supervisors out on the sidewalk and who turned away. She could only identify one by name, Patrick Metzger, but Metzger later came in and testified on behalf of the Radisson that in fact he did vote, and that he saw no management people in the area. This last testimony does cast a shadow over Theurer’s otherwise reliable testimony, but I believe that whatever slipup occurred was the result of fatigue at the end of a long and detailed direct examination. I do not find that Theurer’s testimony, beyond the identification of Metzger as one of the employees who turned away, is in doubt.

As the General Counsel has pointed out in his brief, the Board reviewed its rulings in this area of the law in *Hoschton Garment Co.*, 279 NLRB 565 (1986). In that case the Board ruled that mere observation by management of open union activities at an employer’s premises does not violate the Act. When the employer goes beyond mere observation, as in *Hoschton*, where the employer sought to prevent handbilling on public property near its plant, and then stood “very close” to a union representative who was distributing handbills, this can constitute unlawful surveillance.

In this case, going beyond mere observation of the union representatives at their table on the public sidewalk in front of the Radisson,⁴⁵ management representatives, including the Radisson’s general manager and its personnel director, come up to and engaged the union people in conversations, not once or twice, but continuously throughout the afternoon. This conduct management representatives constituted “obvious overt and intended surveillance of union activities” on a public sidewalk. *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984). *Gupta Permold Corp.*, 289 NLRB 1234 (1988), cited

⁴³ Not otherwise identified. Engineers in maintenance and repair were members of the bargaining unit.

⁴⁴ There is no evidence about the weather, but it was November 7 in Minneapolis, which may have caused some of these “observers” to go back inside.

⁴⁵ I am inferring and I find that the sidewalk, on account of its location directly abutting the traveled portion of a downtown street, is in fact a public sidewalk.

by Radisson, is not inconsistent with the rules laid down in *Hoschton* and *Gainesville*, supra.

c. The confidentiality rule

On page 17 of the Radisson's employee handbook, entered in evidence here, there appears a provision entitled "Confidentiality" and reading as follows:

Your salary is determined individually, is confidential, and shouldn't be discussed with anyone other than your supervisor or the personnel department.

Accompanying this text is an illustration showing an envelope marked "Pay check" with the words "Top Secret" stamped across its face.

The General Counsel moved at the beginning of this hearing to add a new item to the complaint alleging this provision to constitute a violation of Section 8(a)(1) of the Act. Over Radisson's objection I allowed this amendment. The Radisson did not renew its objection to the amendment to the complaint in its brief. I, therefore, affirm my ruling. Radisson has pointed out the fact that the language of the cited handbook provision is not mandatory. I agree, and find that the provision is not mandatory, and the General Counsel has introduced no evidence that it was ever treated as if it were mandatory, or that any employees were warned or disciplined for discussing their salaries with anyone.

I must, then, find that there is no violation of Section 8(a)(1) in this handbook provision.

d. The surface bargaining allegations

In reaching a decision on this most critical issue, I have considered first, the Radisson's action away from the bargaining table; then the bargaining tactics employed at the bargaining table; and finally the bargaining proposals themselves, in an attempt to weigh and evaluate the totality of the conduct alleged to constitute surface bargaining.

(1) Conduct away from the table

The record does not permit a close examination of the motives and actions of the parties in coming together on the card check agreement in May 1988. Suffice it to say only that the historical background of the relations between Radisson, old and new, and the Unions; the circumstances of the card check agreement, the slim majority by which the Union succeeded in obtaining recognition, were never far from the minds of the participants.

Turning to matters which are in the record, I note first the refusal of General Manager Relly in October 1988 to talk with union representatives about scheduling and other employee problems. I have found that refusal to be a violation of Section 8(a)(5), and I further note that this unlawful act, and I believe, a willful act (because I do not believe that Kelly Would have undertaken this position without at least consulting with Vice President Sue Gordon who was sent a copy of Theurer's September 27, 1988 request to meet with Kelly, and probably with counsel as well) was calculated to undermine the Union in the eyes (and minds) of the employees and unfairly weaken its bargaining strength. *Thill, Inc.*, 298 NLRB 669 (1990).

A second incident was the surveillance of the Union's boycott poll on November 7, 1988. I have found the actions

of Radisson's management people to have been violative of Section 8(a)(1) of the Act. I think an inference is permissible here that the actions of the management people in this incident were calculated to show any employees who came out on the sidewalk to vote that their conduct was observed, and whatever action they took would be futile.

A third incident was the unilateral granting of wage adjustments in March 1989. Both of these prior incidents took place well within the time when bargaining was taking place. The wage adjustments were actually made by Radisson in March, but according to Brian Langager, were not actually transmitted, in the form of pay raises, until April. Theurer testified that she did not find out about the increases until the first week in April. Assuming that the imminence of the adjustments was not known to employees, I still find that the action was calculated to denigrate the Union and to sow doubt about its ability to represent employees effectively. It was only an intervening event, the filing of the decertification petition on March 14, and the withdrawal of recognition by Radisson as a result, which kept this incident from unfairly influencing the bargaining relationship.

Similarly, the Lisa Wyland incidents, which I have found to be a violation of Section 8(a)(1), occurred after the bargaining process had shut down, but here, as perhaps nowhere else in this case, is the antiunion feeling of Radisson so clearly exposed. This animus concerning the Union reflects both forward and back into the Radisson's relations with the Union and colors those relations indelibly. All of Radisson's actions must be evaluated in the light of this coloration.

(2) Conduct at the table

Before examining the discussions themselves it will be informative, I think, to look first at the actual time spent by the parties in talking about the issues. I have already estimated the time spent at the meetings, coming to a total of 22 hours in elapsed time spent together. Using Anne Theurer's estimates of the percentage of time spent at each meeting in discussion of the issues, I have calculated a total time of 8 hours and 15 minutes spent in such discussion.⁴⁶ Of this last figure, 6-1/2 hours were devoted to the issues in only four of the eleven meetings, September 30, 1 hour; February 23, 3 hours; March 27, 1-1/2 hours; and March 28, 1 hour. This left the remaining 1-3/4 of the total 8-1/4 hours to be divided among seven meetings.

Working backward from these facts, let us first consider the number of meetings, 11 in a period of 9 months (if one computes the time from the date of the card check on June 27, 1988) or 8 months (using the July 29 date of the first meeting to compute the time). This number might have been sufficient if the parties had been dealing with a renewal contract, with a few basic issues; or even a new contract, if they had been working from a single draft. It does not seem sufficient for even the most industrious and resolved negotiations to go through the complex documents submitted by both sides here as their contract proposals. Even on those three occasions here when the parties scheduled "double headers,"

⁴⁶This is an estimate, but it reflects the figures testified to by Theurer, which testimony I credit as accurately representing the facts.

that is two consecutive days⁴⁷ for bargaining not much was accomplished. For example, on September 29, 1988, the parties spent only 15 minutes in actual negotiations, while on September 30, they spent a whole hour; on February 23, 1989, they spent 3 hours going over proposals,⁴⁸ but on the next day February 24, only one-half hour; and on March 2, 90 minutes were spent bargaining, and on March 28, only 60 minutes.

The reason for the infrequency of meetings must rest primarily on Arch Stokes. Aside from the fact that Stokes canceled three meetings, on August 22, September 6, and November 30, 1988 (this last because Kelly and Langager were not available), he either could not or would not make sufficient time available for meetings despite the urging of the Union for more frequent meetings.

Radisson has given no explanation for the cancellation of these meetings, nor for the infrequency of scheduling meetings. In these circumstances, I can only infer and find that Radisson Did not want to have more meetings.⁴⁹

Looking next at the meetings which were held, we must consider the number of hours spent in the meetings, then the number of hours actually spent in negotiations and answer the question of who or what was responsible for the difference, and why. Certainly, Stokes was responsible for most of the talk which consumed so much time at the bargaining sessions. Some of his talks may have been at least peripherally connected with the issues, but extended discussions about health care in America, or former Secretary Califano's book on the subject would seem to have little relations to Radisson's proposals on health insurance, the plan described in the employee handbook, or merit pay increases, where Radisson's proposals were also derived from the employee handbook.

Despite these examples of talk which seems to be separated from the issues, it is still difficult to ascribe to Stokes a motive to delay the proceedings by waves of verbal battalions. Difficult, unless by other evidence some sort of motive may be discerned. I have already found that Radisson has violated Section 8(a)(1) and (5) of the Act, by refusing to meet with the Union over scheduling and job assignments; by granting wage increases without notification to, or bargaining with, the Union; by refusing to consider applicants for employment because of their supposed support for the Union; and by engaging in harassment by surveillance of a Union's poll of employees on a public sidewalk. All of these incidents show a lack of respect, indeed even a contempt, for the Union's rights and responsibilities.

In the negotiations themselves, Radisson's chief negotiator, Arch Stokes, showed the same lack of respect, and contempt for the Union, in his continuing references to the slim majority which the Union obtained in the June 27 card check; and in his premature reference to "impasse," in his challenge to the Union to "walk out." He continually played on the Union's alleged shortcomings. Storer was late on one occasion; the Union took a 2-hour caucus on March 27, leading

⁴⁷This was done for the convenience of Stokes, who had to come in from Atlanta for the meetings, and for Dale Stormer, who was based in Toledo, Ohio.

⁴⁸This was the most time spent at any meeting on actual negotiations.

⁴⁹The same inference holds for the five meetings which Stokes adjourned early.

to allegations of "not doing their homework;" the Union distributed literature alleged to contain false and misleading statements;⁵⁰ and the Union published in local newspapers an advertisement concerning former employee Gencie Benson and her request for maternity leave. There is nothing in the record about the Gencie Benson incident other than the wording on a copy of the offending advertisement submitted in evidence here.⁵¹ Thus, we do not know whether Ms. Benson was treated as the advertisement says she was, or that she was not. If Stokes had people who had observed the incident he could have brought them forward to testify here. Otherwise his outrage, his refusal to discuss any proposals on March 10 and his suggestions, again, that the proceedings be videotaped, or that the employees of the hotel be "polled to see if they believed the Gencie Benson ad," strikes me as forced and an exercise in showmanship.⁵²

A final item in this group of subjects referred to throughout negotiations by Radisson is corruption and organized crime. It is true that both the Teamsters and the Hotel and Restaurant Employee have over the years been the subjects of investigations, reports, indictments and convictions of various kinds, involving both corruption and connections with people identified as being in, or connected with, organized crime. Stokes made a number of references to these situations during negotiations, and included in his last proposals an article which would relieve Radisson of its bargaining obligation if either Local 17 or 638 is adjudicated by "a court of law to be dominated by organized crime, or ceases to be a labor organization" within the meaning of the National Labor Relations Act.

Without commenting on the legality or propriety of this proposal, I note that there is no evidence in this record of any connection with organized crime or of corruption by either of these locals. Nor does the record show that Stokes made any allegations or statements that these locals were, or had ever, been mentioned in any of the investigations, reports, indictments or convictions which he mentioned at the bargaining table. Radisson has advanced no relevant or logical reason why this subject should have been mentioned, or why, without any demonstrated, or even alleged, connection between these locals and organized crime and corruption, there existed a need to include such a provision in a collective-bargaining agreement.

Faced with all this, I can only conclude that the real reason for the talk, and the proposed article, was to further denigrate the Unions, and to undermine their standing in the eyes

⁵⁰This led to some vague allusions by Stokes to the way unions acted in Canada, England, and Sweden with no explanation of the connection, and to later contractual proposals to require all union materials posted on a bulletin board in the Radisson Hotel to be approved in advance by Radisson's management.

⁵¹And legible only with the aid of a magnifying glass.

⁵²If Stokes was serious in his angry question to the Union as to why the matter was not brought to Radisson's attention before the publication, he should have recalled Kelly's refusal to discuss grievance-type matters with the Union back in October, and his own statement, when told of an employee who was dissatisfied with his wage rate, that the matter should be referred through the Radisson Employee Appeals Process (without, of course, any participation by the employee's bargaining representative). Why should the Union, in the face of that sort of attitude, have had confidence that Ms. Benson's situation could have been fairly adjusted by reference to the Radisson.

of the employees⁵³ and unfairly to weaken their bargaining strength by placing these people in the same category those who in fact were the subjects of the investigations, reports and indictments mentioned by Stokes.

I find that this conduct of Radisson both at the bargaining table, and away from it, “does not represent the behavior of an employer that accepts the employees’ choses representative as an equal at the bargaining table and seeks through good-faith negotiations to reach a collective-bargaining agreement.” *Thill, Inc.*, supra. Indeed, the behavior of Radisson here appears “as if it was counting on the chance that the slim majority by which the Union won” the card check “and the passage of” a reasonable time “without any real prospect of a contract would culminate in a sufficient expression of employee dissatisfaction to permit.” Radisson to withdraw recognition on the filing of a decertification petition, and assist a good-faith doubt of union majority. *Prentice-Hall, Inc.*, 290 NLRB 646 (1988).

Turning to the bargaining proposals made by Radisson, I note, as the General Counsel has cited, the case of *Reichhold Chemicals*, 288 NLRB 69 (1988), in which the Board clarified its rule on the content of bargaining proposals as a factor in finding an intent to frustrate the bargaining process. In *Reichhold*, the Board emphasized that “in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith.”

That we will read proposals does not mean, however, that we will decide that particular proposals are either “acceptable” or “unacceptable” to a party. Instead, relying on the Board’s cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, or the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. The Board’s task in cases alleging bad-faith bargaining is the difficult one of determining a party’s intent from the aggregate of its conduct.⁵⁴

In this case I have attempted to summarize the several factual aspects of Respondent’s conduct, both at and away from the bargaining table in order to reach the conclusion I have above, that Respondent’s conduct was not undertaken in good faith and with a view to reaching a collective-bargaining agreement. I do not feel that it is superfluous, or inappropriate, to this decision to examine at least some of Radisson’s bargaining proposals to “consider whether, on the basis of objective factors” whether demands are “clearly designed to frustrate agreement” on a contract. As the Board stated, it “will not have fulfilled its obligation to look at the whole picture of a party’s conduct in negotiations if we have ignored what is after the central aspect of bargaining, i.e., the proposals advanced by the parties.”⁵⁵

The first demand to be considered, and one of those that run through all of the bargaining sessions, was the broad, general demand by Arch Stokes that any agreement between the parties had to be “tailored” to the Radisson, an institu-

tion which was literally one of a kind. Stokes offered no frame of reference through which Radisson’s unique qualities and requirements could be perceived. The Union was left completely in the dark as to what he meant by this threshold proposal. The Union offered an agreement covering local luxury hotels, including the Radisson South Hotel in Bloomington. This was rejected by Stokes on the grounds that the Radisson Plaza was a downtown hotel, and contract for suburban hotels were not relevant. The Union then presented an agreement adopted from the Holiday Inn Downtown in Minneapolis, but this was rejected because it was not tailored to the Radisson Plaza. Similarly, a hotel agreement from San Francisco was rejected because it was not tailored to the needs of Radisson.

At no point did Stokes ever explain, or offer reasons why Radisson was so different from other hotels either in the city or the suburbs, or what peculiarities there were which made the union proposals unacceptable. Even at the hearing, Stokes continued to argue and maintain that the Radisson Plaza Minneapolis was a special, unique kind of place which deserved special treatment. Evidence was introduced through General Manager John Kelly, who pointed with entirely justifiable pride to the efforts he and his staff made and continue to make for their guests, the number of favorable guest comments and the numerous awards garnered by the hotel and its management. All of these things show a management that cares about the image of their hotel, and a staff which was and is ready and willing to make extra efforts to make each guest’s stay at the Radisson pleasurable and memorable.

But none of this can make this hotel that much different from other similar institutions inside and outside of Minneapolis. The Radisson Plaza does not operate independently of corporate requirements. There are procedures supplied by corporate headquarters covering many aspects of hotel operations in order to keep those aspects uniform in the Radisson group. Stokes proudly maintained that the Radisson was “a collection, not a chain,” and this is a catchy slogan, but the links were rattling throughout the testimony of Kelly and Brian Langager on uniform requirements by the corporation, at least in the areas of personnel, housekeeping, accounting, food, engineering, and marketing. This kind of central control may be as appropriate for a collection as for a chain, but it all leads to the conclusion that Radisson is not a unique institution, not subject to the usual constraints affecting other, similar or related institutions.

I cannot believe that Stokes was not aware of this from the outset of negotiations. Yet he continued to insist on this ephemeral quality of uniqueness, with special needs and peculiarities not suited to a standard area hotel contract. It is clear from the evidence here that this special quality was not only unattainable, but it was nonexistent, and the insistence on the application of this nonexistent quality to these negotiations was only a pretext forcing Union representatives to the Sisyphean task of trying, as they did, again and again, to attain the illusory goal of a contract proposal suitable for the Radisson Plaza Minneapolis Hotel. The Unions never accomplished the task.

But, then, neither could Stokes satisfy his own requirement that the contract proposals should be tailored to the Radisson, Stokes’ first proposal was that the Radisson Employee Handbook should be adopted as the parties’ contract. The employee handbook does, neither, fulfill Stokes’ requirement

⁵³The meetings at the Radisson were open to all employees and the record notes that some did attend. Both these guests, and bargaining committee members, would, I find, quickly convey the events at the bargaining table to their associates and coworkers.

⁵⁴*Reichhold*, supra.

⁵⁵*Reichhold*, supra at 70.

that a proposal be tailored to the Radisson, nor meet any legal definition of a collective-bargaining proposal at all. We know, from the testimony of Langager and Kelly, that the employee handbook was developed under policies prescribed by Radisson's corporate headquarters. Indeed the handbook itself avers that if there is any conflict between the handbook and a "formal policy," then the policy prevails. Thus, the handbook is not "tailored" to the Radisson Plaza Minneapolis. Moreover, the employee handbook carefully and clearly describes itself as "not an employee contract." It seems equally clear that a offer for a collective-bargaining agreement, of a document which itself states that it is not a contract, is not a proposal at all.

After its initial "proposal," Radisson did submit three different sets of proposals, each a little more detailed than its predecessor, but all containing a provision which made the employee handbook an integral part of the proposal, excepting the provisions of the handbook from the so-called zipper clause of the proposed agreement. Here, again, this ambulatory document, the employee handbook, which, by its own terms, may be amended, modified or discontinued at any time and for any reason, without an obligation to notify or consult with an collective-bargaining representative, should not and cannot be considered as a legitimate bargaining proposal.

The employee handbook was also made a part of Radisson's proposals on all wage and fringe benefit proposals on all wage and fringe benefit proposals throughout all of these bargaining sessions. There was no reason advanced for these proposals. As stated in Radisson's brief, Radisson's effort to attain profitability "would be handicapped to the extent Radisson was handcuffed by a union contract that applied equally to other hotels, irrespective of the type, quality and location of the hotel." There is nothing wrong, or unlawful about a statement of this type, but there was in this record no indication that Radisson was having financial difficulties of could not, as opposed to "did not want to" pay competitive rates. I do not believe that the collective-bargaining process in the late 1980's and early 1990's should permit the taking of positions based on slogans or empty demands without some justification in fact for the substance of the proposals.

Beyond these thoughts, there is no question in my mind that the submission of, and adherence to these proposals involving the employee handbook, by an able and experienced labor relations attorney, through eleven bargaining sessions over an 8-month period, are "clearly designed to frustrate agreement on a collective bargaining contract." I, therefore, find that these proposals violate Section 8(a)(1) and (5) of the Act. *Reichhold Chemicals*, supra. See also *Atlanta Hilton Tower*, 271 NLRB 1600 (1984); *NLRB v. Insurance Agents*, 361 U.S. 477 (1960); *A-1 King Size Sandwiches*, 732 F.2d 872 (11, 1984), cert. denied 469 U.S. 1035 (1984); *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989). *Cincinnati Enquirer*, 298 NLRB 275 (1990).⁵⁶

⁵⁶I am not unaware that there was some bargaining here, and some agreements were reached, but these agreement did not affect those substantive provision on economics which were to be determined unilaterally by the employee handbook. Similarly, I have not ruled on other proposals by Radisson, including contract ratification by a two-thirds majority, annual review of the Union's majority in the unit, and a provision allowing Radisson to withdraw recognition if

6. The withdrawal of recognition

In March 1989, Bob Olgren, an engineer in the Radisson's maintenance department circulated a decertification petition among employees in the bargaining unit at the Radisson. He obtained 87 signatures out of 165 employees alleged in the petition to be in the unit at that time. He then filed the petition with the Board's Regional Office (Case 18-RD-1751 filed March 24, 1989).

There is no question in this record that Olgren, with some assistance from his fellow engineers, acted on his own, with no assistance from management.

Radisson determined at this point to discontinue bargaining with the Unions. By letter dated May 8, 1989, Stokes and Warren informed Kuschke that the decertification petition was supported by a majority of the employees in the unit, and that, because of the pendency of this petition, and "all circumstances of collective bargaining, and the unions' filing of a frivolous blocking charge on April 10" Case 18-CA-10848, the case here under decision). Radisson had a good-faith doubt of the Unions' continued majority status.

Without considering the numerous "reasons advanced by Radisson in its letter dated May 8 as amplified and enlarged in its letter of March 9, 1990, I find that the good-faith doubt alleged by Radisson based on signatures attached to the decertification petition is not warranted in view of the numerous and serious unfair labor practices which I have found in this case. The signatures of employees, ostensibly gathered in good faith by Bob Olgren, cannot help having been influenced by a course of conduct by Radisson at the bargaining table and away from it, from the commencement of bargaining in July 1988 to the gathering of these signatures in March 1989. Because these signatures are indelibly tainted with the unfair labor practices I have found, I find that Radisson did not act in good faith in withdrawing recognition from the Union. *Prentice-Hall, Inc.*, 290 NLRB 646 (1988).

IV. THE REMEDY

Having found that the Respondent has committed the unfair labor practices found above, I shall recommend that it cease and desist therefrom and that it shall take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully withdrawn recognition from the Unions as the collective-bargaining representative of certain of its employees, I shall recommend that the Respondent upon request recognize the said Unions as such. Having found that the Respondent has unlawfully refused to bargain with the Unions over grievances, changes in scheduling, and wage increases, I shall recommend that it shall, upon request meet and bargain with the Unions concerning these and related issues. Having found that the Respondent, has not bargained in good faith with the Unions. I shall recommend that it, upon request, bargain collectively in good faith with the Unions as the representative of its employees in the agreed-upon unit and in the event that an understanding is reached, to embody such understanding

the Union would find quality of corruption or domination by organized crime. Findings that these provisions, too, were unlawful would only duplicate the violations I have already found. See, e.g., *Teamsters Local 251 (McLaughlin & Moran)*, 299 NLRB 30 (1990).

in a written agreement, but, in any event, to negotiate in good faith for a reasonable time from the commencement of such negotiations. This reasonable time should start at the time negotiations begin again, because the facts here show that at no time after the recognition of the Union in June 1988 did Radisson engaged in good-faith bargaining at the table. *Royal Coach Lines*, supra. Having found that the Respondent has unlawfully refused to furnish information to the Unions, I shall recommend that it immediately furnish such information to the Unions.

CONCLUSIONS OF LAW

1. The Respondent, Radisson Plaza Hotel of Minneapolis, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hotel Employees and Restaurant Employees Union, Local 17 and Teamsters Local Union No. 638 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Unions are the collective-bargaining representative for the following appropriate unit:

All employees of the Radisson including food, steward, beverage, service, housekeeping, telephone operators, front desk clerks and hotel maintenance and repair department; but excluding all clerical employees such as secretarial, accounting, personnel, room sales, catering sales, clerical; hosts/hostesses; supervisors as defined in the NLRB; sales employees, managerial employees, guards and professional employees.

4. The Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to hire applicants because of suspicions that they favored the Union; by harassing and exercising surveillance over union activities on a public sidewalk; by refusing to bargain with the Unions over scheduling, grievances, and wage increases; by refusing to give information as requested; by bargaining in bad faith; and by withdrawal of recognition of the Unions without having a good-faith doubt of their majority.

On these findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended⁵⁷

ORDER

The Respondent, Radisson Plaza Hotel of Minneapolis, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants based upon suspicion that they are in favor of any union.

(b) Engaging in surveillance and harassing union activity or public property adjacent to the Radisson Hotel.

(c) Refusing to bargain with the Unions concerning grievances, scheduling, wage increases, or any other legitimate subject of bargaining.

(d) Refusing to negotiate in good faith with the Union for a collective-bargaining agreement.

(e) Refusing to supply relevant information necessary for collective bargaining to the Unions.

(f) Withdrawing recognition from the Union without a good-faith doubt as to their continuing majority.

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

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

(a) Upon request, recognize the Unions as the collective-bargaining representative for the employees in the unit found appropriate herein.

(b) Upon request, bargain with the Unions in good faith with the Unions concerning grievances, scheduling, wages, and other matters appropriate to bargaining.

(c) Upon request commence collective negotiations with the Unions in good faith with the Unions as the exclusive representative of these employees in the above-described unit, and embody in a signed agreement any understanding reached. Such negotiations under this order shall extend for a reasonable period from the date of the beginning of such negotiations.

(d) Furnish to the Unions information requested dealing with employees in the above-described unit.

(e) Post at its in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."⁵⁸ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."