

Waterbury Hotel Management LLC and Waterbury Hotel Equity LLC, subsidiaries of New Castle Hotels LLC and Local 217, Hotel and Restaurant Employees & Bartenders Union, AFL-CIO.
Cases 34-CA-7815 and 34-CA-7879

March 9, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On August 9, 1999, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent and the Charging Party Union each filed exceptions and a supporting brief. The General Counsel filed a response to the Respondent's exceptions. The Respondent filed a reply brief.

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 briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.⁴

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

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

In addition, some of the Respondent's exceptions allege bias and prejudice in the judge's rulings, findings, and conclusions. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

³ We adopt the judge's conclusion that, because the Respondent unlawfully refused to hire employees of the predecessor employer, it was not free unilaterally to set initial terms and conditions of employment for its hires without bargaining with the Union and violated Sec. 8(a)(5) by so doing. See *Pacific Custom Materials*, 327 NLRB 75 (1998), and *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB No. 27 (2000). Member Hurtgen's dissenting position on this issue is, as he conceded in his dissent in *Jennifer Matthew Nursing & Rehabilitation Center*, supra, contrary to Board precedent, which has been approved by the circuit courts.

⁴ We deny the Charging Party Union's request that the Board order the Respondent to reimburse the Union for litigation expenses incurred in this proceeding. The Respondent's defenses, although generally meritless, were debatable rather than frivolous and therefore do not warrant the extraordinary remedy requested. See, e.g., *Frontier Hotel & Casino*, 318 NLRB 857, 860-864 (1995).

We also deny the Union's request for remedial reimbursement of organizing expenses inasmuch as we find that the Respondent's unfair labor practices were not so egregious that they cannot be redressed by the traditional remedies of a bargaining order and other make-whole relief included in the judge's recommended Order.

The Respondent requests de novo review by the Board of the unfair labor practice issues presented in this case. It contends that the judge's verbatim incorporation of the General Counsel's posthearing brief as a major part of the judge's decision proves that the judge did not make the necessary independent analysis of the record evidence and the Respondent's arguments in defense of its conduct. According to the Respondent, the judge has engaged in misconduct, manifested prejudice against the Respondent, and denied it due process. We deny the Respondent's request.

It is the special function of the administrative law judge to prepare for the Board an independent and careful analysis of the factual issues and legal arguments in the case over which the judge presides. *Babcock & Wilcox Co.*, 112 NLRB 546 (1955). Further, the Board has clearly stressed that it does not condone a judge's extensive use of partisan briefs.⁵ However, it has not held that such a practice is per se prejudicial or otherwise constitutes reversible error. To the contrary, the Board has stated that, where a judge has carefully reviewed the record and has determined that one of the briefs submitted to the judge fully and accurately discusses the case, it is permissible to rely on portions of that brief in the judge's decision.⁶

In this case, we conclude that the judge's extensive reliance on the General Counsel's posthearing brief is not reversible error. Footnote 4 of the judge's decision manifests full consideration of the record, witness credibility, and the posthearing briefs filed by both the General Counsel and the Respondent. The Respondent cites no specific basis, apart from the challenged decisional practice, to disbelieve the judge's declaration of a full and independent review. Based on that review, the judge expressly found "that the General Counsel's brief, with modification, correctly set[s] out the credible, relevant facts and applicable law." Although admittedly derived in substantial part from the General Counsel's brief, the judge's decision is indeed quite comprehensive of all relevant evidence and legal issues. Importantly, the

⁵ *Regency Electronics*, 276 NLRB 4 fn. 2 (1985); *Washington Beef Producers, Inc.*, 264 NLRB 1163 fn. 2 (1982). In this regard, Chairman Truesdale wishes to specifically note his agreement with former Chairman Dotson in *Regency Electronics* that a judge's adoption of portions of the General Counsel's posthearing brief "makes a poor impression on the bar and the courts and needlessly consumes Board resources by inviting exceptions grounded on the judge's apparent failure to exercise independent judgment." However, for the reasons set forth infra, he agrees with his colleagues that the judge's decision here manifests full and independent consideration of the record and that disregarding the judge's findings is therefore not warranted.

⁶ *Washington Beef Producers*, supra at 1163 fn. 2, citing the judge's decision in *Shield-Pacific, Ltd. and West Hawaii Concrete*, 245 NLRB 409, 410 fn. 2 (1979).

Board has itself independently reviewed the entire record, including the judge's decision, in consideration of the exceptions and briefs. Under these circumstances, we find no merit in the Respondent's argument that it has been denied due process or otherwise prejudiced by the judge's decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Waterbury Hotel Management LLC and Waterbury Hotel Equity LLC, subsidiaries of New Castle Hotels LLC, Waterbury, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

MEMBER HURTTGEN, concurring in part and dissenting in part.

The judge found, among other things, that the Respondent violated Section 8(a)(1) and (5) by "promulgating, maintaining and enforcing a rule prohibiting employees from wearing Union buttons at the Hotel," and Section 8(a)(3) by discharging employees for wearing union buttons. Specifically, the judge found that the rule was unlawful because the Respondent failed to demonstrate "special circumstances" establishing that such a rule—to the extent that it prohibited the wearing of union buttons—was necessary to maintain production or discipline. The judge further found the rule was not evenly enforced, and was discriminatorily targeted at the wearing of union buttons. The judge also found that the rule was unilaterally promulgated, in violation of Section 8(a)(5). Finally, the judge determined that the Respondent unlawfully discharged employees because they wore union buttons at work. Although I agree with the judge that the Respondent violated the Act, I do so only for the following reasons.

As noted above, the judge concluded that the Respondent's rule would be unlawful even if it were uniformly applied. My colleagues agree with the judge in this respect. I disagree. I adhere to the view, adopted by certain courts of appeal, that "where an employer enforces a policy that its employees may only wear authorized uniforms in a consistent and nondiscriminatory fashion and where those employees have contact with the public, a 'special circumstance' exists as a matter of law which justifies the banning of union buttons." *United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1994), quoting *Burger King Corp. v. NLRB*, 725 F.2d 1053, 1054–1055 (6th Cir. 1984). See generally *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964). In the instant case, the Respondent's hotel dealt with the public. Thus, if a rule

had been evenly enforced, I would not find that the Act had been violated. Cf. *Meijer, Inc. v. NLRB*, 130 F.3d 1209 (6th Cir. 1997). However, the rule here was discriminatorily enforced. After tolerating the wearing of nonwork related buttons and badges, the Respondent—in response to employees wearing union buttons—orally promulgated a rule prohibiting employees from wearing buttons, disparately applied that "rule" against union buttons, and discharged employees who refused to remove union buttons. In addition, the rule was unilaterally promulgated in violation of Section 8(a)(5). In these circumstances, I agree that the Respondent thereby violated Section 8(a)(1), (3), and (5) of the Act.

The judge further found that the Respondent violated Section 8(a)(3) by unlawfully refusing to hire employees of the predecessor employer, because of those employees' protected union activities. I agree. However, I do not agree with the judge's further finding that, based on this unlawful refusal to hire, the Respondent gave up its right to set initial terms and conditions of employment for its hires. As set forth in my dissenting opinion in *Pacific Custom Materials*, 327 NLRB 75, 76 (1998), I adhere to the rule recognized by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), that a successor employer has the right to set initial terms and conditions of employment. In my view, this right is not lost simply because of the 8(a)(3) refusal-to-hire violation. Further, I find "[i]t is excessive and punitive to use those 8(a)(3) violations to take away the legitimate defense to an 8(a)(5) allegation concerning the setting of initial terms." *Pacific Custom Materials*, supra at 76. See also *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB No. 27 (2000) (dissent). Accordingly, I would not find that the Respondent violated the Act by setting the initial terms and conditions of employment for its work force.¹

APPENDIX A

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives
of their own choice

¹ Of course, subsequent changes to the initial terms and conditions of employment would be subject to a bargaining obligation.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

**To act together for other mutual aid or protection
To choose not to engage in any of these protected
concerted activities.**

WE WILL NOT refuse to hire bargaining unit employees of J.L.M. Inc., d/b/a Sheraton Hotel Waterbury and the Trustee, the predecessor employer, because of their union-represented status in the predecessor's operation, or otherwise discriminating against the employees to avoid having to recognize and bargain with the Local 217, Hotel and Restaurant Employees & Bartenders Union, AFL-CIO.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees, including all guest relations agents, express service agents, express service supervisors, night auditors, housekeeping employees, housekeeping supervisors, desk attendants/health club attendants, food service agents, bar attendants, culinary service assistants/food and beverage assistants, conference captains, concierge/Club Lounge host/hostess, Café Pronto host/hostess, cooks (1st and 2nd), utility workers/cafeteria, kitchen administrative assistant/receiver, shipping and receiving clerks, and engineering employees (Classes 1 through 4) employed by Respondent at its Waterbury, Connecticut facility; but excluding all other employees, all office clerical employees, gift shop employees, sales employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of unit employees without first giving notice to and bargaining with the Union about these changes.

WE WILL NOT unilaterally promulgate, maintain, and enforce a rule prohibiting employees from wearing a union button.

WE WILL NOT discharge employees because they engage in union or other protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer to the unit employees of the predecessor, J.L.M. Inc., d/b/a Sheraton Waterbury Hotel and the Trustee, named below, who would have been employed by the Respondent but for the illegal discrimination against them, employment at the Hotel, or if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If Respondent does not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list. In addition, make whole, with interest, the following named employees for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to employ them.

Debbie D'Agostino	Anna Light
Kevin Anderson	Leatha Lipusz
Bella Berdan	Harold Luna
Yolanda Berardo	William Martin
Patricia Blake	Ernest Mayshaw
Patricia Bender	Kathy Meccariello
Vivian Bertelsen	Robert Murgatroy
Michael Bibeau	Kathryn Nicholson
Nelson Buxton	Thomas Oakley
Thomas Castonguay	Luis Ocasio

Lynne Ciacin	Steven Ortega
Sharon Colangelo	Amy Ouellette
Randy Cremasco	Cynthia Pavlik
Estelle Davila	Louise Pesce
Paul Depecol	Daniel Peszek
Mike Doughwright	Sheryl Pinho
Linda Doughwright	Reynaldo Ramos
Sigfredo Echandia	Geilson Ribeiro
Cecilio Echandia	Iris Rasbo/Berengeur
Martin Echandia	Denise Rodriquez
Carmelo Feliciano	Marilyn Rossi
Zosh Flammia	Steven Ruegg
Jose Garcia	Patricia Salouski
Steven Giancarli	Larry Schwartz
Melissa Gugliotti	Eliza Svehlak
Hasip Hasipi	Alberto Tavares
Barbara Hillman	Candida Vadnais
Vera Jackson	Caryn Vareika
Eric Johnson	Susan Vaughn
Sylvia Kelley	Eleanor Williams
Rene LaVorgna	Brenda Williams
Regina Levesque	Beatrice Saunders

WE WILL, within 14 days from the date of the Board's Order, offer Joann Lo, Francis Engler, and Jonathan Zerolnick immediate and full reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings or other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to hire any of the employees named above and any reference to the unlawful discharges of Joann Lo, Francis Engler, and Jonathan Zerolnick, and notify these employees in writing that this has been done and that the unlawful refusal to hire and discharges will not be used against them in any way.

WE WILL preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records and reports, and all other records, including an electronic copy of the records.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify the Union in writing that we recognize the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and will bargain in with it concerning terms and conditions of employment for employees in the unit.

WE WILL on the request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of the predecessor J.L.M. Inc., d/b/a Sheraton Hotel Waterbury/ Trustee's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from January 28, 1997, until it negotiates in good faith with the Union to agreement or to impasse. Nothing in this

notice shall be construed to authorize or require the Respondent to withdraw any improved condition or to result in the employees' loss of any beneficial unilateral change.

WE WILL rescind our rule prohibiting the wearing of union buttons by employees.

WATERBURY HOTEL

William E. O'Connor, Jennifer Dease, and Thomas E. Quigley, Esqs., for the General Counsel.
Alison J. Hurewitz and D. Jay Sumner, Esqs., of Washington, D.C., for the Respondent.
Laura Moye, State Director, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On August 12, 1998, based upon unfair labor practice charges filed by Local 217, Hotel and Restaurant Employees & Bartenders Union, AFL-CIO (the Union), an order consolidating cases, consolidated complaint and notice of hearing issued in this case, alleging that Waterbury Hotel Management LLC and Waterbury Hotel Equity LLC, subsidiaries of New Castle Hotels LLC (the Respondent): (1) in about February 1997, promulgated, maintained, and enforced a rule prohibiting employees from wearing union buttons at the hotel, in violation of Section 8(a)(1) of the Act; (2) since about January 28, 1997, refused to hire the 62 individuals named in paragraph 8 of the complaint in violation of Section 8(a)(3) and (1) of the Act; (3) discharged its employees Joann Lo, Francis Engler, and Jonathan Zerolnick on April 2, 4, and 9, 1997, respectively, in violation of Section 8(a)(3) and (1) of the Act; (4) since about January 1997, has failed to recognize and bargain with the Union as a successor employer to the predecessor employer at the Sheraton Hotel Waterbury, in violation of Section 8(a)(5) and (1) of the Act; and that (5) since about January 1997, has established the rates of pay, benefits, hours of work and other terms and conditions of employment of the unit, which concern mandatory subjects of bargaining, in violation of Section 8(a)(5) and (1) of the Act (GC Exh. 1(g)).¹

The Respondent filed a timely answer to the complaint in which it admitted, *inter alia*, some of the commerce allegations, along with the fact that Respondent has owned a hotel in Waterbury and managed the hotel (GC Exh. 1(i)). Respondent denied the Union's labor organization status and other factual allegations, such as the supervisory and agency status allegations involving its president, human resources manager, and controller (GC Exh. 1(i)).² Respondent denied the commission of any unfair labor practices, and raised various affirmative defenses, including "laches," lack of jurisdiction, and the claim that Respondent "has the absolute right to set initial terms and conditions of employment for its employees at the Hotel" (GC Exh. 1(i)).

The hearing was held in Hartford, Connecticut, for 20 hearing days on various dates between January 21 and March 2, 1999. At the hearing, I granted counsel for the General Counsel's motion to amend the complaint to allege that Respondent's rule which prohibited employees from wearing union buttons violated Section 8(a)(5) as well as Section 8(a)(1) of the Act as a change in terms and conditions of employment of the unit employees, and to include *Nelson Buxton, Iris Rasbo/Berengeur, and Beatrice Saunders* as alleged discriminatees, and to delete *Roberto Rivera* as a named discriminatee.³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,⁴ I make the following

¹ References to the exhibits of the counsel for the General Counsel and Respondent will be cited herein as "GC Exh. ___" and "R. Exh. ___," respectively, followed by the appropriate exhibit number or numbers.

² At the hearing Respondent withdrew this portion of its answer and admitted the remainder of the commerce and jurisdictional allegations of the complaint as well as the supervisory/agency status of these three individuals.

³ I also granted counsel for the General Counsel's motion to amend par. 6 of the complaint to conform to the exhibit Respondent offered of the correct names of the screeners and interviewers at the job fair.

⁴ This case produced a very large record. Both General Counsel and Respondent filed thorough briefs which marshalled the facts and legal

FINDINGS OF FACT

I. JURISDICTION

Respondent New Castle Hotels LLC owns and operates hotels in the United States and Canada. At all material times, Respondent Waterbury Hotel Equity LLC, a subsidiary of New Castle Hotels LLC, owns and operates a hotel in Waterbury, Connecticut. Another subsidiary of New Castle Hotels LLC, Respondent Waterbury Hotel Management LLC, manages the Waterbury Connecticut hotel at issue. The complaint alleges, and I ultimately find in this decision, that the three Respondents constitute a single integrated business and a single employer within the meaning of the Act. The Respondents admit the commerce allegations of the complaint and I find that that the Respondents, as a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In a nutshell, this case involves the purchase of a bankrupt unionized Waterbury, Connecticut hotel by Respondent, a major owner and operator of hotels in much of the U.S and Canada. Upon the purchase of the hotel, Respondent shut down the hotel and hired an entirely new work force, the large majority of which were not former employees of the hotel. It hired the work force by means of a job fair held while the hotel was shut down. The credible evidence reflects that Respondent did not avoid the shutdown of the hotel and hire the former employees because it did not want to be saddled with the Union. Respondent's president stated this objective to the Trustee in Bankruptcy shortly prior to the change in ownership and followed through with a plan to avoid the Union. This was a very long case, made that way primarily because Respondent attempted through its own employee witnesses and several "expert" witnesses to demonstrate that the manner in which it went about taking over the hotel was the sound business way to do it, the matter of the Union aside. I did not believe it when I heard the evidence, I certainly do not believe it now. In the circumstances of this case, the hiring scheme and its actual implementation were clearly driven by union animus. Respondent continued to demonstrate animus when it discharged certain of the employees it hired when they engaged in union activity. Set out below are my factual findings, credibility resolutions, and conclusions with respect to the evidence.

A. Background Facts

1. Prior proceedings before the Board

The Waterbury Sheraton Hotel (Hotel) opened in 1985 as a "three star" hotel. The hotel property was owned by a couple, Joseph and Loretta Calabrese, who were also the sole shareholders of a company they named JLM Inc. (JLM), which actually operated the Hotel. The Calabreses arranged that JLM technically leased the hotel property from them.

In April 1989, Local 217, Hotel and Restaurant Employees Union began an organizing campaign at the Hotel. As more fully described in *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993), in response to the Union's organizing campaign and a representation petition filed on December 15, 1989, JLM engaged in a series of serious unfair labor practices which resulted in a Board Decision and Order which included, *inter alia*, a *Gissel* bargaining order.

JLM appealed the case to the Second Circuit, which upheld the discharges and the numerous violations of Section 8(a)(1) of the Act but denied enforcement of the Board order as to the

arguments in as about a concise a manner as possible. Having read both briefs and upon review of the evidence, I found that the General Counsel's brief, with modification, correctly set out the credible, relevant facts and applicable law. As noted elsewhere herein, I did not believe many of the witnesses appearing for Respondent were telling the truth, or at least the whole truth. On the contrary, I found General Counsel's witnesses to be credible. Thus, in order to conserve several months of time to prepare a decision which would essentially track the findings and conclusions in General Counsel's brief, I have utilized General Counsel's brief to a significant degree in the preparation of this decision. Had I believed the testimony of Respondent's witnesses, which I do not, I would similarly used its brief.

bargaining order aspect, based upon employee turnover. *J.L.M. Inc. v. NLRB*, 31 F.3d 79 (1994). On June 29, 1995 (more than 5 years after the first election), a second election was held at the Hotel, pursuant to the Board's "Supplemental Order, Decision and Direction of Second Election," reported at 316 NLRB 238 (1995). Pursuant to this second election, on July 10, 1995, a Certification of Representative issued in which the Union was certified as collective-bargaining representative in a unit of hotel service, front desk, restaurant, and maintenance employees.

A 5-day compliance hearing (December 14 and 15, 1995, and January 23, 24, and 25, 1996) with respect to the backpay amounts owed the six discriminatees. Of the six discriminatees from the original 1990 case, only one—Eliza Svehlak—opted to return to work at the Hotel, in April 1995. On December 16, 1996, an administrative law judge upheld the Region's backpay computations and issued an order requiring JLM to pay over \$44,000, plus interest, to the six employees.

Meanwhile, the Calabreses declared personal bankruptcy in late 1994. In June, Prudential Insurance Co., which held the mortgage on the property, foreclosed on the hotel property. As a result, JLM filed a petition under Chapter 11 of the Bankruptcy Code. On about February 16, 1996, Michael Daly, who had been appointed by the bankruptcy court as a receiver in bankruptcy, assumed the actual operation of the Hotel and began managing the Hotel on a day-to-day basis as the trustee and general manager.⁵

2. Respondent's operations

New Castle Hotels, LLC, owns and/or manages numerous hotels and resorts in both the United States and Canada. Its normal practice is to set up affiliated companies when it goes into business in any particular area. It did so when it purchased the Hotel in Waterbury. It formed one affiliate for ownership purposes, Waterbury Hotel Equity, LLC, and another, Waterbury Hotel Management, LLC, to run the Hotel. David Buffam is the president of each company, and dominant partner, through a family-limited partnership. Gerald Chase is the executive vice president. Roger Clark is vice president of development. Marion Barbieri is vice president and director of human services. Robert Pope is the corporate director of sales and marketing. They each have ownership interests in the companies. Brian Woodhouse is corporate controller, and has a small ownership interest in one of the companies. Kenneth August is director of Mott and Bailey, New Castle's construction subsidiary.

Buffam first got involved in the hotel industry in the late 1970s. Prior to that, he was a corporate attorney in New York. He purchased his first hotel in Bangor, Maine, in about 1980. Over the next 15 years, Buffam's operations expanded, and he formed New Castle Hotels, LLC. Marian Barbieri has worked in some capacity for Buffam ever since she got out of high school. Gerald Chase joined the firm in 1988.

B. Events Prior to the Closure of the Hotel

1. Respondent considers the Hotel as an investment

At the time of Prudential's foreclosure action on the Hotel property, in January 1995, representatives of the mortgage holder, Prudential, contacted Respondent about a possible management role for Respondent in the event Prudential gained control of the property. Prudential nominated Respondent to be the receiver in the foreclosure action. This began Respondent's long involvement with the Hotel. By January 5, 1996, Respondent was actively promoting a change in flags for the Hotel.⁶ Vice President Roger Clark wrote to Prudential's representative Ralph Sorley, requesting an information "wish list," including a recent appraisal on the Hotel, recent profit-and-loss statements, recent capital improvements, reports on the contributions of the Sheraton reservation system and a copy of the current Sheraton Franchise Agreement, in order to proceed with its analysis.⁷

⁵ As Trustee in Bankruptcy, Daly was the legal alter ego of JLM. See *Airport Limousine Service*, 231 NLRB 932 (1977).

⁶ All dates hereinafter will refer to 1996, unless otherwise noted. "Flags" as used in this case refers to the brand or chain of hotel with which a particular hotel might be allied. Some of the common flags are Sheraton, Marriot, Hilton, etc.

⁷ As will be developed below, Respondent denied at trial the need for much of this information in making its proposal to reflag the Hotel.

Meanwhile, Prudential moved to protect its interests by seeking to exercise its rights to be shareholder of JLM and replace Joe Calabrese, who in turn contested Prudential's action. In February, the bankruptcy court determined to name a Chapter 11 trustee to administer the bankruptcy estate. While finding that Prudential's actions technically violated the automatic stay previously issued against such unilateral conduct, it affirmed Prudential's right to take control of the stock and replace Calabrese. However, because the principal creditor would now also be the owner and operator, it appointed Michael Daly as Trustee, effective February 15.8 For security considerations, it also appointed Respondent as temporary trustee to secure the property until Daly could assume control. At the meeting at the bankruptcy court, Union Representative Laura Moye was present to testify at Prudential's request. Respondent's President David Buffam was present because Respondent was advising Prudential about various issues concerning the operation of the Hotel, and Prudential was considering retaining Respondent to operate the Hotel if it succeeded in gaining control of it through the foreclosure action. Buffam was also trying to secure a management agreement from the Trustee. Buffam met with Moye at the hearing for the first time. Buffam also met with Daly at the hearing. He informed Daly that Respondent already had people at the Hotel and requested an immediate meeting. Daly declined an immediate meeting, but informed Buffam that he would shortly be at the Hotel, and if there was any business that he wished to transact, he should plan to meet Daly there.

Pursuant to the bankruptcy appointment as interim trustee, Respondent immediately assigned its general manager at the Dunkirk Sheraton in New York, Robert Scheiner, to come to the Hotel and secure the records and property. Vice President Gerald Chase waited for him for 5-6 hours, during which time he walked around the property and inspected it. When Scheiner arrived, Chase instructed him to inventory records which were in dispute between Calabrese and Prudential. Part of the dispute between Prudential and Calabrese concerned Prudential's desire to review certain financial records. Prudential had engaged Respondent to review those financial records. The records being reviewed consisted of credit card receipts, tax returns, interdepartmental financial statements, copies of operating budgets for the Hotel, and similar records.

The situation at the Hotel itself was curious when Daly arrived the next day to assume his duties. Waiting for him were Joe Calabrese and, at Calabrese' request, labor attorneys Edward "Bud" O'Donnell and Nick Grello, who quickly filled him in on the labor situation and history. Respondent's representatives Buffam and Gerald Chase were also present. Daly determined that the status quo should prevail for the weekend until a plan could be devised for the Hotel, that the current management of the Hotel should stay, but Calabrese should leave. He also determined that Respondent should stay on to secure the records.

Pursuant to Daly's instructions, Respondent remained on the property, and controlled the records in question, which were stored in a room on the second floor. Respondent's corporate controller Brian Woodhouse, Accounting Manager Arthur Curtis, and Scheiner then inventoried certain of the records, and determined that most of the ones inventoried were valueless. Additional records were secured in a room to which only Scheiner had the key. Because Prudential's legal representatives were unable to complete their own review of the records, they requested that the records be removed and stored off-site, and Daly consented. While stored, they were in the control of Prudential's representatives.

On February 17, Buffam wrote a letter to Daly recounting what had transpired at the property up to that point with regard to the records, and which provided information related to Respondent's efforts to gain a managerial role at the Hotel. Meanwhile, Scheiner prepared and faxed to Chase from the Hotel on February 20 a detailed report of the conditions at the Hotel and about the conduct of the staff at the Hotel, particularly that of the Hotel's managers. Based

⁸ One of the most significant credibility resolutions to be made in this decision is that of whether to credit Daly's testimony over that of other witnesses to the extent that they conflict. I found Daly to be an entirely credible witness. He is intelligent, a trained attorney, and has no continuing interest in the outcome of this proceeding. Indeed, his actions as Trustee indicate that he has no love lost for the Union and absolutely no reason to give untruthful testimony in its favor. He did not willingly testify and had to be subpoenaed. I credit Daly's testimony in its entirety.

on his own observations about the property, Chase began developing initial projections as what it would take to reflag the property. At some point, Buffam met with Daly and made an offer of Respondent's managerial services, but Daly declined.

Meanwhile, Union Representative Moye began calling Daly and finally spoke to him at his home on Presidents' Day. She asked him what his intentions were, and inquired about his plans for an upcoming scheduled negotiating session. Daly, however, indicated that he was in the process of retaining counsel, and said he was not in a position to discuss his plans with her. The Union drafted, and many employees signed, a petition to Daly requesting that progress be made with negotiations. It was not to be. Instead, the relationship between the Trustee and the Union continued along the same fractious lines which had existed since the Union's first efforts in 1989. Almost immediately upon the assumption of duties by Daly, the Union filed both amended and new unfair labor practice charges. On April 2, Daly had a letter delivered to employees recounting a history of collective bargaining up to that point, which he had prepared and which he discussed with his labor and bankruptcy attorneys. Daly, who had had no involvement in prior negotiations, and no background in labor negotiations, perhaps did not realize how provocative this letter, or his selection of Bud O'Donnell's law firm to continue on as representative of the Hotel, would be. The Union responded with a bitter letter, signed by its current Negotiating Committee, which protested his selective history of negotiations and his selection of O'Donnell's law firm. The letter implored Daly to come to negotiations. Daly, however, had no direct contact with the Union again until he spoke with Moye in November 1996, to discuss the impending layoff of the employees due to the sale of the Hotel. The Union continued to file additional unfair labor practice charges during the spring and summer. Daly, in turn, directed his counsel to file an unfair labor practice charge against the Union, alleging, *inter alia*, a refusal to bargain with his chosen representative, *i.e.*, Bud O'Donnell.

The Union commenced regular picketing and leafleting at the Hotel, particularly on Thursday afternoons. While there would often be only one or two pickets, at other times there would be a significant number of people picketing, particularly when there were large events at the Hotel. One prime example of the Union's disruptive public activities took place about July, when there was an event for the area's Congressman at that time, Gary Franks. The Union assembled a large crowd who picketed, chanted, and used bullhorns. Daly called the police at the time to maintain safety. The Union carried its grievances to Daly's law office in New Haven in the spring or early summer. When the police were called and they were ordered to leave the building, the Union put up a picket line around his building and distributed a flyer protesting Daly's actions since he became Trustee. In late spring, the Union commenced an area-wide consumer boycott of the Hotel, which was put on the AFL-CIO boycott list. The Union also commenced legal action on other fronts, and filed charges with the State Department of Labor, the State Commission on Human Rights and Opportunities, and contacted the State Attorney General's office concerning various alleged wage-and-hour violations, and discrimination allegations. On August 9, 1996, the Union sent to Prudential's attorney Mark Bane a list of 116 endorsements of the boycott, including past and prospective patrons, and numerous State legislators. It informed Prudential of the cancellation of one Catholic church function in the coming year. Counter to the union's efforts, employee Brian Griffin filed a decertification petition on July 10, 1996, which was held in abeyance due to the pending unfair labor practice charges.

Meanwhile, in the midst of the continuing and increasingly public dispute between the Union and the Hotel, Respondent's interest and involvement in the Hotel deepened. When Daly took over as Trustee, he was notified by the Hotel's General Manager Richard Bair that the Sheraton Four Points franchisor had sent Calabrese a letter informing him that renovations were needed if the Hotel wished to retain the Four Points flag. Pursuant to recommendations made by the Four Points franchisor, Daly interviewed several design firms concerning the required renovations. During this process, Respondent contacted him to solicit the renovation work. Respondent also discussed the possible renovations with Bair, who, pursuant to Respondent's request, sent to Respondent the Project Improvement Plan or "PIP," which the Four Points franchisor had sent to Calabrese in August 1995. Bair also agreed to meet with Respondent on July 12, 1996. Chase did a walk-through of the Hotel on July 12, with either Daly, Bair or both, and examined the Hotel. He noted down the items already completed, and made estimates concerning the work still that needed to be done. He performed this task because by this time Daly and Bair had requested his professional advice about how to accomplish the renova-

tions required to keep the Four Points designation. Based on this walk-through, as well as his examination in February, Chase immediately prepared a detailed report which included an item-by-item estimate of the costs of the Four Points renovation, as well as an item-by-item estimate of the costs of a more substantial renovation to reposition the Hotel with an upscale flag, such as a Hilton, Westin or Marriott. He forwarded the report on July 15 to Buffam, Clark and Woodhouse. The cost of the Four Points renovation would be about \$1,450,000, while the estimated cost of an upscale renovation was about \$2,735,000.

In July, Respondent began having extensive contacts with possible upscale franchisors about repositioning the Hotel, contacts which continued through September. In July, Buffam and Clark met with representatives of the Omni, who examined the Hotel and provided their own estimate of the renovation costs of about \$3,800,000 in order to gain their franchise. Buffam and Clark next met with representatives of the Crown Plaza franchise at the Hotel, who responded favorably to Respondent's proposed repositioning of the Hotel. Chase also dealt with the prospective franchisors and visited the property with them. Meanwhile, Respondent's interest in the property turned from a managerial one to one of actual ownership, while at the same time it continued to deal with the Trustee on possible renovations to maintain the Four Points flag.

About late July or early August, Prudential representative Ralph Sorley informed Daly that it was likely that the Hotel was being sold or transferred to Respondent, and therefore Respondent should be involved in the design work and renovation discussions. Daly complied with this direction. Chase, Woodhouse, and a designer named Jeffrey Ornstein inspected the Hotel with Daly's cooperation, and on August 27, Respondent, by letter from Woodhouse, proposed that its wholly owned subsidiary Mott and Bailey be the project manager for the Four Points renovations to perform "Phase One" of the project. Daly agreed. Daly continued to deal with representatives of Respondent at the Hotel during September concerning Phase One. Moreover, Daly solicited further proposals for Phase Two of the Four Points renovations, and had established a preliminary budget.

In addition to the extensive contacts with Respondent's representatives at the Hotel regarding renovations, Daly also allowed representatives of various proposed franchisors, along with Respondent's representatives, including Buffam, to tour the Hotel property. Daly accompanied them during these inspections.

Prudential had decided that it did not want to own the Hotel once its foreclosure action was successful, and the bankruptcy actions were completed. It solicited an offer to purchase the Hotel from Respondent, which Respondent completed on September 6. Negotiations had commenced about a month earlier, Respondent offered to pay \$13 million for the Hotel. Although the final agreement would not be signed for another 2 months, the parties made it clear by their actions that they had every intention of consummating the deal. As noted above, in late July or early August, Prudential had instructed Daly to treat Respondent as the expected purchaser. In mid-September, Daly was asked to attend a meeting at Respondent's corporate headquarters in Shelton. Prudential representative Ralph Sorley was present, as were Buffam, Chase, Woodhouse, and Judy Schofield, who is Respondent's vice-president and treasurer. Sorley informed Daly that he was in serious negotiations with Respondent to purchase the real estate, when and if the foreclosure was completed. He questioned Daly about the current state of the Hotel's operations and finances. At some point, Sorley left and Daly met with Buffam and Schofield⁹. They spoke about the transition from Daly's operation of the facility to Respondent's ultimate takeover. Buffam acknowledged that Daly had generated a substantial amount of good will in the Waterbury community, and that he hoped Respondent would accede to that good will. Buffam expressed his desire for an orderly transition, and stated that together they could make it a mutually beneficial transaction, both from the perspective of the bankruptcy estate and Respondent's ability to operate the Hotel. Buffam suggested that Daly be the "Grand Marshall" of this transition. Daly expressed that one of his primary concerns was what would happen to the 180-odd people who had worked for him over the past 7-8 months. Buffam stated that he would interview all of the people that worked for Daly, and that he would assist in the transition wherever possible. He said that Daly would have input into hiring recommendations, but not the actual hiring decision itself. Daly expressed his other primary

⁹ Daly could not recall whether Chase or Woodhouse remained at the meeting.

concern that the client contracts that had been agreed to, and which had been negotiated by the people who worked for Daly, be honored. Buffam said Respondent would be taking over the client list and contracts, and that he would honor the commitments Daly had made to his employees. They also discussed how renovations would be ongoing, but that Respondent would now take a much more active role, because they wanted the property the way they wanted it. Daly left the meeting believing that the Hotel would not shut down, and that he would give a "turnkey operation" to Respondent.

In none of the discussions that Daly had with Respondent's representatives in the prior months had Respondent ever indicated that the Hotel would need to be shut down for renovations. In fact, however, Respondent's initial proposal, so recently given to Prudential, called for closure of the Hotel: "To permit Buyer to renovate the Property and introduce its own franchise, management systems and personnel, Seller shall close the Property upon the sale to Buyer. Seller shall cause the current employer to provide all required W.A.R.N. notices to employees in connection with such closing." Respondent allowed Daly to continue operating, and cooperating, under the illusion for the next several months that Buffam would live up to the commitments he made. When he returned from vacation in early October, Daly, his executive staff, his management team, and his sales staff began having meetings with Respondent's representatives at the Hotel where they addressed a "whole host of issues" in order to effectuate an orderly transition. Daly also had discussions with his labor and bankruptcy counsel over such issues.

Meanwhile, Respondent continued evaluating different franchise deals, and Clark and Chase toured the Hotel for an "on-site review" with representatives of Crowne Plaza on September 17. On September 27, Clark wrote to Crowne Plaza requesting that a decision be made "as soon as possible." That very day Crowne Plaza sent a PIP and proposed conversion plan to Respondent based on the September 17 inspection. Chase continued to refine his estimates for renovation costs.

Respondent also prepared a detailed report entitled "The Waterbury Four Points Hotel September 1996" to provide to prospective lenders for financing purposes. The report related the history of the Hotel as originally developed as a "full service" hotel, which for "several years was the dominant facility in the Waterbury, Connecticut region for both lodging and catering," despite the lack of experienced and efficient management of the property.¹⁰ It described how financially successful the Hotel had been for years, generating "in excess of \$2 million per year as a full service Sheraton Hotel, but has receded to about a \$1 million level over the past several years as economic trends and the defaulting owner's financial difficulties have hindered performance." The report contained very specific data on the Hotel's financial history over the years 1990-1995. It also contained detailed projections of what the property could make in the future as a Four Points, and as a repositioned hotel.

Respondent went into great detail in its direct examination of Buffam concerning some of the financial information contained in the document. According to Buffam, the last two pages of the document were "pro forma of operations," and represented projections of what the property could do under two possible alternatives. The first alternative was to keep it as a midscale hotel with limited renovations, but with competent management and more aggressive marketing. The second projection was for an upscale hotel, requiring two or three times the investment which would be required to maintain a midscale hotel. While Respondent projected that it would make more money in the short term by operating as a midscale hotel, if it repositioned upward, it would have a higher net operating profit after 3 years. The key factor to look at in projecting whether their investment would be successful was the projected net operating income. If Respondent could bring the net operating income up to a certain level, \$1,632,000 by the end of 1999, that would enable Respondent to qualify for a capitalization rate of 10 percent, which would enable it, in turn, to refinance and pay off its loan to Prudential at that time. Respondent chose the latter course, which Buffam described as a "radical step". The report described how Respondent had performed a "pre-acquisition due diligence."¹¹

¹⁰ Buffam tried to dismiss this description of the property as a "typo."

¹¹ As will developed below, Respondent gave confused and contradictory testimony about the information it had when it prepared this report and the due diligence it had performed, all in an apparent attempt

As contacts grew between different levels of management at the Hotel and various representatives of Respondent, the relationship between the Hotel management and the Union continued to slide. On October 29, pursuant to Daly's instructions, his counsel filed a new unfair labor practice charge against the Union. On that same date, the Union amended certain charges of its own. On October 31, Daly issued a letter to his employees bitterly complaining about the Union's conduct, and lamenting the Board's failure to process the decertification petition because of the outstanding complaint against the Hotel.

On November 14, Prudential and Respondent signed a final purchase and sale agreement. The agreement provided, *inter alia*, that there would be no tenants on the property at the time of closing, and that Respondent would "have no obligation to hire any of the employees currently employed at the Hotel property." In it the seller also pledged that there would be

[n]o Order. No United States or state governmental authority or other agency or commission of the United States or state court of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any . . . injunction or other order in effect and having the effect of . . . imposing conditions or restrictions upon the ability of Purchaser to operate the Hotel Property on substantially the same basis as presently operated such that there is a material adverse effect on the Hotel Property; nor shall there be pending or threatened any action or proceeding by any such governmental authority, agency or commission seeking any injunction, order or decree to any such effect which would be, in the reasonable opinion of counsel to Seller, a meritorious claim.

The purchase and sale agreement required that Respondent be liable for "any liability relating to Service Contracts and Advance Bookings which are so terminated or resolved or which cannot be terminated or resolved as of the effective date of the JLM Plan of Reorganization, shall be assigned to Purchaser." It also provided that Respondent would be assigned "any obligations and liabilities associated with the license agreement by Four Points Hotel," and pledged the seller and Respondent shall cooperate in connection with the modification, termination and replacement of the Four Points agreement.

The agreement also provided that Prudential would sell the Hotel's "FF&E" to Respondent.

2. Respondent refuses to interview unit employees prior to closure of the Hotel

On November 14, Prudential's attorney Mark Bane sent a letter to Daly confirming a previous conversation wherein Bane had informed Daly that Prudential and Respondent had reached agreement and his lease was being terminated, and requested that Daly issue WARN notices to employees, and file a plan of reorganization and a disclosure statement. Daly had declined to do so without being given confirmation in writing of the sale. Bane's letter also informed Daly that the agreement provided that "Prudential will endeavor, with your assistance, to terminate or otherwise resolve all executory contracts and bookings that can be terminated or resolved without damage claim, either by the terms of such contracts or by consent. The New Castle affiliate will assume all liability arising with regard to all remaining executory contracts and bookings, including the Four Points license if still applicable."

Pursuant to Prudential's instructions, Daly had WARN notices drafted, which were approved by Respondent that same day, November 14. Daly sent out the WARN notices on November 18 to employees, the Union, and to various governmental entities, which stated that the Hotel would close on January 21, 1997. The following day he met with employees to inform them personally that the facility was being closed and that WARN notices had been sent out. Daly had only recently been informed by one of Respondent's representatives that the Hotel would actually be closed for a period of time. Ongoing discussions began between Respondent's representatives and clients about the length of the shutdown.¹² Daly was concerned about the impact on the business already booked, and also the effect of the closure on employees. He had conversations with various of Respondent's managers, particularly

to buttress its demonstrably false claims that it lacked access to the facility, or to accurate information about what was taking place at the Hotel during the year it sought to take it over.

¹² Daly assumed that Respondent would close the Hotel for a lengthier period of time than it was and that all of the renovations would be completed during the shutdown, but Respondent did not actually explain to him what it meant by "substantial renovations."

Schofield and Woodhouse, but also with Buffam and Chase, in which Respondent committed to interviewing employees on the Hotel property. In light of these promises, Daly informed employees by letter, several days after he had issued WARN notices that, inter alia, the new owners had assured him that they would interview them and that a date for those interviews would be set shortly. Daly had, in fact, offered to make employees available during worktime, and to provide rooms for Respondent to conduct interviews.

During this period, both before and after the announced closure, representatives of Respondent regularly met with various managers of the Hotel on the Hotel property to discuss various issues, including what business was on the books. However, once the WARN notices went out Daly stopped attending those meetings because he felt it best for Respondent to develop opinions about the Hotel's managers without his involvement.

Respondent moved forward rapidly with its plans for running the Hotel. On November 15, Schofield sent a letter to the Mayor's office announcing that Respondent was "acquiring the land and building located where the Waterbury Four Points Hotel is currently operating." She requested a meeting for her and Buffam with the Mayor on November 18, a meeting which in fact took place.

On December 5, Woodhouse, pursuant to a conversation he had with Chase, sent Daly a letter requesting that various items be left at the Hotel for the transition including "Financial statements/statistics/balance sheets/general ledgers; Star Reports, Market Share Information; All Sales Files; Monthly Sales Reports; Delphi History: All information pertaining to business on the books; User manuals for all computers; List of all 1996 Accounts Payable vendors." Woodhouse also requested that Daly provide him a list of all permits and licenses and copies of each "as soon as possible." Daly assumed that these items were needed by Respondent to begin operations. The right to these items was in fact being assigned by Prudential to Respondent.¹³

The next day, Respondent's corporate director of sales and marketing, Robert Pope, began sending letters to customers of the Hotel who had already booked functions, informing them, inter alia, that Respondent planned a \$3 million renovation of the public areas and guestrooms, installation of "4-STAR service levels and a new upscale franchise. Commencing December 16 we will have a sales person ready to work with on a new contract to insure the success of your function. While we will not be assuming the contracts of the prior operation, we will do everything in our power to service your requirements completely and responsively."

One of those functions was to be as early as February 27, 1997.

Meanwhile, Respondent was coming under pressure from the Union and other interested parties. On November 25, 1996, the Region notified Respondent of the pendency of unfair labor practice charges against JLM, and detailed the history of litigation at the hotel.

When the Union received a copy of the WARN notice, Moye called Respondent's headquarters in Shelton, and left a message. Her call was returned by Respondent's labor counsel, Jay Krupin, right before Thanksgiving. Krupin told her that he had dealt with the Union before, and she should check with the former secretary/treasurer of the Union about his reputation. He said that he didn't know what Respondent wanted to do yet about the employees, but he was a real "straight shooter" and he would let her know as soon as "he got direction from his client." Krupin did not, however, call as promised. In the ensuing weeks, the Union proceeded on many fronts. Moye went to the mayor's office and asked the mayor to use the force of his office to try and encourage Respondent to hire all the workers. The Union also contacted Senate and Congressional representatives, and started contacting other community supporters seeking their assistance. On December 10, the NLRB issued an order consolidating cases, amended consolidated complaint and notice of hearing, scheduled for hearing on January 21, 1997, consolidating new charges with an already outstanding complaint.

The mayor's office contacted Respondent about the pressure it was getting from the Union to hire the existing work force, and sought information about what was occurring. Accordingly, Buffam had labor counsel Krupin respond, rather than do so directly. He claimed at trial that he had Krupin call because there were "questions beyond my range of knowledge or

expertise." After speaking to the mayor's aide, Greg Zupkus, on December 16, Krupin wrote a letter to the mayor's office stating, "WHM is presently in the process of developing operational and staffing guidelines for the new hotel. Accordingly, it is unclear whether WHM will have a duty to bargain, under federal labor law, with any union . . ." Krupin assured Zupkus that Respondent would bargain if required to do so after the takeover.

Krupin's letter did not, however, inform the mayor's office that Respondent had, in fact, already determined what the hiring process would be, and when it would occur. That very day, December 16, Barbieri set in motion an extensive process whereby Respondent would fly managers in from New Castle properties all over the country to conduct a "job fair," with an arrival date of January 27, 1997. She planned to have a number of managers from different disciplines to conduct the job fair. Moreover, the letters sent by Barbieri to the various properties made clear that Respondent had already determined a timetable for opening and training, and would fly both managers and hourly employees for training and opening beginning February 17, 1997.

Meanwhile, Daly grew suspicious as to Respondent's intentions. Despite his efforts to accommodate and cooperate with Respondent, he began to be troubled by Respondent's actions on the one hand, and by its inaction on the other. Although he was operating under the assumption that client contracts would be honored with only minor adjustments, clients were reporting that Respondent's proposed adjustments to existing contracts were overly burdensome and onerous. They felt they were being "left in the lurch" by Daly and his staff because they had represented that only minor adjustments to their contracts would be made. Daly felt these actions were inconsistent with what Pope was telling him. Clients were also interpreting the letters being sent to them, some of which were forwarded to Daly, as implying that they had not been getting adequate service from the Hotel before, and a lot of the clients, as well as staff, were offended by the implication.

Daly was also becoming increasingly concerned with Respondent's failure to follow up on its promise to interview the Hotel's employees at the Hotel on worktime. He had asked Respondent for employment applications, but none were provided. He began calling Schofield and Woodhouse, with whom he got along particularly well, on an almost daily basis and asked them when did they want the meeting, and how could Daly schedule interviews for employees who wanted them. Schofield and Woodhouse would routinely tell Daly that they were working on it, and would get back to him. Eventually, they began to tell him that he had to understand that while he had two issues he was concerned about, they had a host of issues to deal with. Daly was becoming increasingly "testy" with Respondent's inaction. At one point, Schofield finally told him to calm down, that he needed to relax because they were not ignoring him, but they were in a transition process and he needed to understand there were a "lot of steps." She told him that it wasn't the case that they were sitting there doing nothing and ignoring him, but in fact they were very busy getting to the point where they could do what he was asking them to do. Her response seemed reasonable to Daly at the time.

However, Daly was getting closer to a point where he needed a definitive commitment. He had employed a consultant group specializing in the hotel and hospitality industry called the Hopgood Group to help employees and managers deal with the transition. Daly was also dealing with the State Department of Labor, the mayor's office, and even the Governor's counsel on various issues affecting the employees. As part of Daly's efforts to assist employees and managers to secure employment, the Hopgood Group was organizing a job fair at the Hotel for other hotels, hospitals and other businesses to come to the Hotel to interview interested employees. Daly wanted to know whether Respondent would even participate in the Hopgood job fair, much less fulfill its earlier promise to interview employees at the Hotel. At that point, "the rubber hit the road," and he wanted a definitive answer. He called Schofield again, this time from his car phone. He told Schofield that he needed a date, that he had a lot of people and they were all planning on interviewing, and he needed applications. He told her that he needed to be able to schedule this, and to work around the Christmas parties and other functions at the Hotel to make sure they had space available. At that point Schofield said, "Mike, we will not come onto the property to interview your employees while that hotel is open." Daly, in his own words, "lost it," and he became extremely upset because it was contrary to everything he had been told up to that point. He felt he had gone out on a limb making representations to people that worked for him that were not going to materialize. He began yelling and screaming at Schofield, who at that point put Marian Barbieri, Respondent's director of human resources,

¹³ At trial Buffam maintained that Woodhouse had sent this letter even though Respondent purportedly had no use for these items or for the information contained therein. This represented one of many examples of Respondent's attempts at trial to disavow its own documents.

vice president and part owner, on the phone. Barbieri then told Daly that Respondent would not come on the property and would not participate in the job fair. When Daly asked why, Buffam said that he knew the reason why and that Respondent would not participate. When Daly asked why they had said they would participate, Barbieri would only state in response that they were unable to come onto the property to participate in the job fair or to interview the employees that worked for him in that facility. That was the extent of her explanation to Daly.¹⁴

At some point in mid- to late-December, Buffam clearly became concerned about Daly and decided he had to address him directly. Daly and General Manager Richard Bair met with Buffam in the Hotel restaurant, the Garden Cafe. At first, they spoke about issues concerning the impact of the transition on clients and their contracts, and the effect of Respondent's actions with regard to those contracts on the Hotel's sales, marketing and banquet peoples' ability to continue in a sales function within the community. They spoke of other transition issues as well, relative to inventories being completed, and what Daly needed to do mechanically for a turnkey operation. At that point, Buffam asked to speak to Daly alone about a couple of issues, and Bair left. When Bair left, Buffam made a few jokes about Daly's behavior and expressed that he was not behaving the way that people expected him to. He said there were things that Daly just needed "to toughen up and accept." He said that the Hotel transition would get completed and it was a rough time for everybody, and Daly just had to deal with it and "put a lid on it" and not be "so emotional." Buffam said there were different things that were just going to happen and Daly had to accept it. Daly expressed his feeling that he had been deceived and misled because he had gone out and made promises to people that he cared about, based on representations made to him about how the transition and how people would be treated during the transition, but these promises never materialized. He stated that he felt that those promises had been made for the sole purpose of keeping a lid on him until "this was a done deal." Daly discussed Respondent's failure to provide him with job applications, failure to participate in the job fair, and similar issues. Buffam told him that what he needed to understand was that "in this particular situation the tail was wagging the dog," and that "under no circumstances" would he, or could he participate in interviewing for employment opportunities for the people that worked for Daly as long as he was operating this hotel, and that was "a fact of life." Daly asked why. Buffam said that he had received advice of counsel and that he needed to be concerned about who he hired and how he hired. He said there were certain hiring parameters that he couldn't exceed, and there were certain things he couldn't do in order to avoid issues down the road. Buffam expressed that he had three concerns: the hiring, the immediate postclosing hiring, and then the subsequent hiring. He was afraid that at the end of the day, with the confusion of the transition, that those thresholds would be unintentionally exceeded. He was concerned that he not exceed the parameters that he needed to maintain. He said that what they were doing is taking "a calculated risk" that they could have "labor issues down the road," but they felt this was the best way to operate the hotel at this point in time, and he was willing to accept those risks and defer payment of the attendant costs until a later date. At that point, Daly realized that he would not get what he wanted and there was no room for movement, so he terminated the meeting and walked Buffam to the door to see that he left.

At hearing Respondent devoted about half its presentation attempting to establish that it did not hire the existing staff because it was planning on repositioning the Hotel upward and needed employees with the greatest hospitality skills. Had Buffam told Daly that this plan was the reason that he could not hire the existing staff then this presentation would have some

¹⁴ Respondent made no attempt to rebut Daly's testimony concerning his conversations with Schofield and Woodhouse, nor does it appear that it offered any evidence to rebut his account of his conversation with Barbieri. Schofield was not called to testify, and Barbieri never specifically denied that Schofield put her on the phone to speak with Daly, as he described. If Respondent meant to deny that conversation took place, then it should have offered clear testimony to that effect, and should have produced Schofield as a witness. It would be inexplicable not to call Schofield to deny the fact of the conversation, since Daly's un rebutted testimony was that Schofield put Barbieri on the phone. Further, since she offered no testimony at all as to the substance of that conversation, Daly's testimony stands un rebutted.

meaning. However, Buffam said nothing to Daly about the need to hire most hospitality oriented employees. He laid the entire decision on the "labor issues," clearly the unionized status of the existing work force. Thus, I view the entire presentation about the need for a new work force with a hospitality mindset nothing more than smoke and mirrors designed solely to fabricate a legitimate reason for not hiring the existing force, when the true reason for not hiring the work force was unlawful.

Although Respondent had already set in place its plans for the job fair by mid-December, it avoided informing the Union about those plans, even though Krupin had promised to inform Moye immediately about any hiring plans. Moye, having not heard from Krupin, informed Buffam by letter dated January 4, 1997, that the current employees wished to apply for jobs unconditionally. Krupin responded by letter of January 7, 1997, confirming that he represented Waterbury Management LLC, and restating that *he* would let her know when staffing plans would be made so that employees could apply. Krupin still did not inform Moye in that letter that Respondent had, in fact, already set up a job fair. Finally, by letter dated January 16, 1997, Krupin informed Moye that Respondent would be conducting a job fair from January 28 to 30, 1997, and that Respondent would be advertising the existence of the job fair in local newspapers on the Sundays of January 19 and 26, 1997. Krupin further noted that predecessor employees could apply at the job fair, and that Respondent intended to select the best qualified applicants. By letter dated January 22, 1997, Moye requested that the Union be given a table at the job fair. Krupin replied, by letter, on the following day, and informed Moye that the Union's presence "would not be conducive to the Employer's task of screening and interviewing applicants." On January 28, the day the job fair began, Krupin informed Moye by letter that Respondent was aware that "some individuals interested in obtaining a position with (WHM) at the hotel presently known as the Waterbury Four Points Hotel have forwarded applications by mail to the corporate office of (WHM)." The letter stated that "no applications for employment for the initial staffing of the hotel will be considered if the official (WHM) application is not fully completed and followed by a screening interview at the job fair."

Respondent never offered at trial any explanation for why it kept the Union or the public in the dark for so long about its plans for a job fair. While keeping the employees, the Union, and Daly in the dark about its hiring plans, it was moving ahead quickly with its hiring processes. As noted above, Respondent had moved by December 16 to set up the job fair for hourly employees in late January, and Barbieri was sending out for managers and other personnel from various other New Castle hotels to be present for it on January 27, 1997. Barbieri also placed advertisements in trade journals for management positions, and began to keep piles of resumes in her office. She claimed they were "generic" ads, and did not specifically mention the Sheraton Waterbury.¹⁵ By December 20, Chase had already interviewed, and made an offer to Robert Cappetta, the general manager of the Woodcliff Lake Hilton, to become general manager of the Hotel with a start date of January 27. By January 2, 1997, Corporate Vice President of Sales and Marketing Robert Pope had made an offer to Robert Dorr, a manager at the Hilton at Cherry Hill, to become the director of sales for the Hotel beginning on January 13. By January 2, Corporate Chief Engineer Ken August offered the job of director of engineering to Michael Tassiello, then director of engineering at the Ypsilanti Marriott. By January 6, Barbieri had made an offer to Melissa Oates, then human resource director at the Sheraton University Hotel in Syracuse, New York, to become human resource director for the Hotel beginning on January 23. By January 6, Barbieri had made an offer to Patrick Roy to become human resource manager beginning on January 13. Unlike all those named previously, who were "internal transfers" from other New Castle properties, Roy was hired from outside the company. His sister, who worked at the Ypsilanti property, had referred him. Barbieri met with

¹⁵ Although Barbieri and Chase maintained that the they were not specifically seeking applications for Waterbury, Respondent objected to the production of the advertisements, and did not produce them. Barbieri explained that they were receiving some resumes and documents specifically for the Waterbury hotel due to the work of the Hopgood Group helping former Hotel employees at Daly's request. However, the record shows that applicants who were not former Hotel employees nor internal applicants from other New Castle facilities, were specifically submitting applications and resumes to Respondent as early as December 23, specifically for employment at the Hotel.

him, and made him an offer, despite the fact that he had no specific human resource background. Barbieri personally did the reference check on him very quickly because she needed somebody to start pulling together materials for the job fair.

By January 10, Vice President and Corporate Controller Brian Woodhouse offered the Hotel's controller position to Tito Tejada to begin of January 27. Tejada was the only member of the opening executive committee who was not an internal transfer within the New Castle family.

By January 13, Respondent began filling lower level management positions. On that date, Barbieri offered the job of guest relations manager to John Kirwan, who had been night manager at Respondent's Dunkirk Four Points Hotel, to start on February 10. She claimed that she made the offer because the Barry Asalone was not yet present. By January 13, Corporate Chef George Crea offered the job of sous chef to Darron DeRosa, who had been sous chef in Ypsilanti, to start on February 10. By January 16, Robert Dorr offered the job of director of sales to Cynthia DeLauri, who had been a former manager at the Hotel, to start on January 27. Barbieri did not know when Dorr would have spoken with DeLauri. Similarly, by January 16, Dorr also offered Jane Pinho the position of sales manager-BTSM, which means business transient sales manager, to start on January 27. Pinho also was a former manager at the Hotel. By January 23, Barry Asalone offered the job of reservations manager to Lois Phillips, another former manager of the Hotel, to start on January 29. Barbieri did not know where Asalone interviewed her, but did not think it was in the corporate offices in Shelton.¹⁶ By the time her offer letter was sent, Asalone had agreed to be the director of operations-rooms division manager. By January 23, Crea offered an executive chef position to Mark Portier, who was not an internal transfer, to start on February 10. Robert Scheiner executed the offer sheet for Portier. By this time, Scheiner was the opening food and beverage director. By January 23, Scheiner also offered the job of assistant banquet manager to Susan Haskell to start on February 3. Haskell was not working at the time and lived locally. By January 23, Corporate Food and Beverage Director Vince Barrett offered another assistant banquet director position to Eileen Merritt to start on February 12. Merritt was working as an independent contractor at the time at the Westin Nova Scotia. Scheiner executed her offer sheet. Finally, by January 23, Scheiner had also extended an offer to Jerome Schneider to be the restaurant manager starting February 3. Schneider was the former restaurant director at the Hotel. All offers of employment to the managers were made "pending the actual closing of the transaction." Respondent continued hiring managers over the next several weeks, including another former manager of the Hotel, Karen Houghtaling, who received an offer by February 6, 1997.

While the interviews and hiring of managers continued, Barbieri engaged in a curious process. She took the application, screening and interviewing questions prepared by her seasoned human resource directors from other properties, and which had only been recently put in final form, and she virtually purged them of experience related criteria and questions. She acknowledged at trial that the existing Hotel employees would have had an advantage over other applicants if the questions reflected experience, since the Hotel was the largest hotel in town.¹⁷

While Respondent stonewalled the Union in its efforts to have its employees interviewed, the Union continued to try to get access to unit employees on the Hotel property. In light of the imminent closing of the hotel and the conduct described in the consolidated complaint, on December 19, 1996, the Regional Director for Region 34 filed for a temporary restraining order and injunction under Section 10(j) of the Act, requesting that the employer/receiver (Daly) be ordered to meet and bargain with the Union concerning employee grievances and allow union access to the facility. The district court denied the temporary restraining order, and set a hearing for January 6, 1997. On January 9, 1997, the district court verbally ordered that the Union be allowed access to the facility, and a construction-type trailer was installed at the rear of the hotel, for use by the Union and any employee wishing to speak to the Union representa-

tives. The written District Court Order issued on January 13, 1997. The remaining relief requested was resolved by means of a Stipulation approved by the District Court Judge.

With respect to the sale of the hotel, the Union also instituted a public relations campaign in which it asked Waterbury Mayor Giordano, U.S. Senators Dodd and Lieberman, Congressman Maloney, and a number of State representatives to send letters to New Castle urging that J.L.M.'s employees be retained. J.L.M. employees also solicited signatures from the community at large on a large number of petitions in which New Castle was asked to retain J.L.M. employees.

Meanwhile, the Union and the Hotel entered into an agreement in December 1996, concerning severance pay for hotel bargaining unit members. About the third week of January 1997, Bud O'Donnell, labor attorney for the Hotel, notified the Union that it would not honor the severance agreement unless the Union agreed to withdraw all pending charges and requested withdrawal of all pending complaints. On January 23, 1997, the Union received a letter from O'Donnell, notifying the Union that the "creditors committee" had not approved a settlement agreement negotiated between the Union and the hotel.¹⁸ The next day the Union filed a new unfair labor practice charge against the hotel and requested injunctive relief. However, the parties immediately resumed bargaining, and reached another settlement agreement; in which the Union agreed to withdraw all pending Board charges against the Hotel.

The Hopgood Group conducted a job fair for Daly in mid-January. Respondent did not attend. Respondent's managers continued to come and go from the Hotel during January. There was a series of meetings and conference calls regarding the date of the closure. Daly and his sales and banquet managers met with Pope and Woodhouse, who were concerned about the impact of the closure on customers and clients. In particular, there was an event scheduled for an association the last weekend in January, who would have no place to go if the Hotel shut down. Accordingly, Daly agreed to keep the Hotel open. Representatives of Respondent approached Daly on a number of issues related to the client lists, disposition of the computer system, and the phone number, and similar things. Daly's banquet people met with Respondent's banquet people to complete the inventory. There were other inventory needs as well. Daly closed the Hotel on January 27, 1997. He agreed to lease several rooms and the ballroom to Respondent during the week January 28-February 5, during which Respondent conducted the job fair. Prudential directed him to deliver the FF&E, personal property, and business records to Respondent, which he did between January 27 and February 5, 1997. A representative of Respondent signed a receipt for those items, which included the computer system, the client lists, all client files, and copies of all of the contracts for pending functions, and the Delphi, which is a specialized computer program. In addition to the hardware, Daly gave to Respondent all of the assets used to keep the business operating. The only thing he did not turn over were the employees. After he left the Hotel, Prudential directed him to deliver receivables in excess of \$100,000 to Respondent

3. Respondent's stated reasons for not interviewing unit employees at the Hotel prior to its closure, and its decision to hold a job fair

Respondent gave unconvincing explanations for why it declined Daly's offer of convenient access to the Hotel's work force for the purpose of interviewing interested employees. At trial Buffam explained that he declined Daly's offer because, "We declined to do that prior to knowing whether we would have title of the hotel . . . We were unwilling to engage in an interview process for a hotel that we had no assurance we would own. That was the nature of the insolvency proceeding that we were in." Moreover, this unwillingness extended to interviewing former managers of the Hotel. "We didn't want to conduct interviews of anyone." Instead, they wanted to interview everybody in the first week of February. Buffam explained that they wanted to conduct a job fair in the first week of February because by that time the

¹⁶ At first Barbieri did not recall that Phillips was a former Hotel manager, but later corrected her testimony.

¹⁷ While Respondent went to great lengths to demonstrate that the remaining questions would allow it to determine a "hospitality" mindset or disposition on the part of an applicant, there was no credible reason offered for deleting the questions which would demonstrate experience.

¹⁸ That December 20, 1996 settlement agreement, was signed by negotiating committee members and alleged discriminatees Steve Ruegg, Nelson Buxton, and Zosh Flammia. Moye recalled that negotiating committee members Eliza Svehlak, Martin, and Freddie Echeandia were also involved in the severance negotiations, although they did not sign the actual severance documents.

“tolling of the law” for the foreclosure action would occur, which was 45 days from the judgment of foreclosure in late December. He testified:

So we said between day 40 and 45, if lenders have not visited the property and if there doesn’t appear to be a financing commitment of the property to pay off this former lender, we are 99.9 percent sure that we are going to become the owner of the hotel, at that time. But to make that judgment back in December, to make that judgment in early January, when we knew Mr. Calabrese was making efforts to redeem the property, would have been premature. So that was the time we wanted to have the job fair and that’s when we wanted to interview managers.

Buffam explained that they wanted “to interview everybody at the same time in a fair and consistent manner, rather than one here, one there, interview somebody that the trustee recommended, not interview the others. We just thought that wasn’t a professional way of going about doing this process.” An exception would be made for a management assignment from elsewhere within the organization to this property, or for someone who was to come in as part of the task force, which decisions would have to occur earlier. With regard to the hourly employees, the “reason we declined to interview those employees prior to the closure of the hotel is that we did not know when we would become the owner of the hotel or if we would become the owner of the hotel.” He testified that the decision not to interview the existing work force earlier was made by the Operations team headed by Chase, and which included Barbieri, with guidance from Buffam as to the status of the bankruptcy and foreclosure actions. Buffam further explained that his “key managers,” Chase and Barbieri, “were very concerned about the idea that we would go out there and imply to employees that they could be considered for a job and then not have anything to offer them. So that was the primary reason.” When pressed to explain why they did not take up Daly’s offer to allow interviews of the Hotel’s employees separate and apart from Daly’s own job fair, Buffam explained, “Because we wanted to interview employees in a fair and consistent manner, at a time when the best hospitality professionals in the area could all be invited to be considered side-by-side.”

When asked to explain why Respondent did not assemble a task force and interview the existing work force at the Hotel prior to its closing, Buffam further explained:

Because from the time that we had agreed to purchase this property at a price considerably in excess of its appraised value, we knew that the only way this acquisition was going to be successful is if we repositioned this property physically and operationally to an upscale property. The only way we could that is by recruiting the best hospitality talent in that market. And the only way we know how to do that in a fair and consistent manner is with a well-publicized job fair, announcing the opportunities that would exist in the property to the employee base of that area.

Buffam explained that Respondent had purchased the Hotel for \$13 million. It had put up \$500,000 in equity, and taken a loan from the seller, Prudential, for \$12-1/2 million. It had agreed to pay off its loan to the seller in 3 years. It also borrowed \$3-1/2 million loan for renovation work. Respondent was making “a calculated risk that we could turn this property around in three years,” and Buffam felt “we were going way out on a limb with a bank to borrow money to do that.” Therefore, “it was very important for us to create a plan . . . that would actually work because we were putting a lot of our own available capital.” Buffam admitted that he had personally secured one loan for the property for \$250,000, and pledged other New Castle properties as security. Respondent purportedly had determined that repositioning the Hotel to an upscale flag was the only option that made any financial sense given the cost the purchase and the timeframe of 3 years needed to pay off its loan to Prudential. Buffam testified that if Respondent did not achieve the projected net operating goal by the end of the third year, Respondent would lose its investment and the Hotel. Buffam testified that Respon-

dent chooses to use a job fair in these specific circumstances: “A job fair is the best way of hiring a staff for a property that is newly opened, has been shut down and is going to be re-opened, or is being repositioned from one quality tier to another quality tier.” he had specifically denied that closure of the Hotel was a factor, and testified that Respondent would have held the job fair even if the Hotel had not closed. Buffam thus based the need for a job fair in Waterbury on the planned repositioning of the Hotel to an upscale hotel.

Buffam claimed at trial that “the question of what the labor status in the hotel was at the time that we were interested in acquiring had absolutely no impact upon the job fair at all.” He only cared about safeguarding the employees’ free choice, that “it was their decision that controlled what happened.” If that staff hired happened to be employees that had previously worked for this hotel, that would be great and we anticipated that many of them would be. That would have made it incumbent upon us to negotiate with the Union although at that point we weren’t certain what the status was because we understood that there was a decertification petition or something like that going had either taken place or was being discussed but the status of the union the previous operation did not have an impact on it because we needed to have the best work force and if we had the best work force and we had the Union, that would be fine.

One problem with regard to Buffam’s explanation at trial concerned the former managers of the Hotel. Buffam explained in his first day of testimony that although they did not want to interview anybody, including the managers, they succumbed to the constant pressure of Daly to interview some managers, albeit just a few of them. When asked if he was aware that former supervisors and managers were interviewed offsite prior to the Hotel’s closure, Buffam testified that “My recollection is that after persistent demands by Mr. Daly that we interview certain managers, that a couple such interviews took place, but I am not aware of who was interviewed, where they were interviewed and by whom they were interviewed.” He explained: “We didn’t think it was a good idea to begin sparse interviews with managers before the transaction concluded. We were concerned about the expectations that that might have created. And we didn’t want to do it. But he implored us to speak to, at least, a few managers, and we finally caved in and said, okay, we’ll do it.” Daly’s request allegedly concerned a couple of “key sales people” that Daly thought would damage the future operation of the Hotel if they went to another hotel. Buffam added that there were a couple of others but he couldn’t remember who they were. In fact, he claimed that he could not remember who the sales people were either. Chase decided to go ahead and do it, based on pressure from Daly coming through Buffam, even though he was “very uncomfortable doing it.” Buffam said this reluctant acquiescence to Daly was conditioned on a clear understanding that “we may not own this hotel, and we’re talking to you only (on) the condition that we would be interested in considering you for a job if we do own the hotel.”

Early in his second day of testimony, when Buffam was asked to explain how, if he did not know who conducted the interviews, who was interviewed, or where the interviews took place, he could be so sure there were only a couple of managers so interviewed, Buffam then came up with a explanation uncorroborated by anybody. He claimed that when he conveyed Daly’s request to the operations people, they resisted, and said it was “premature, it would be unfair to the others to begin to talk about employment in any way, shape, or form with one or two managers.” However, when they gave in and did interview those managers, “there were misunderstandings relating to that, and we stopped doing it.” When asked to explain, he claimed that there was a letter addressed to Respondent, probably through bankruptcy counsel, instructing them not to “continue interviews at the property.” Buffam claimed at that point they were “baffled at now having complied with his request, why we were being asked to discontinue it.” Buffam later claimed that shortly after this purported letter, they received another communication from the Trustee’s bankruptcy attorney stating that he did not mean to state in the letter what he had stated in the letter, and he did not mean to prohibit interviewing at the property. Despite this alleged disavowal, “we concluded after this episode that our misgivings concerning the perceived¹⁹ favoritism, the political aspect of interviewing people that Mr. Daly was asking us to interview was such that we should go back to our original position of not interviewing anybody until we were prepared to interview everybody.” They regarded this

¹⁹ The transcript mistakenly reports the word as “proceed,” and it is hereby corrected to read “perceived.”

development “as an example of the confusion and misunderstanding that can arise when you selectively interview people. We didn’t want to do it. And we then reverted back to our procedure of not doing it.”

Buffam thus raised in his testimony that Respondent was concerned about favoritism, and that somehow Daly would interfere with the hiring process if Respondent accepted his invitation to interview employees at the Hotel while it was still in operation. Although the testimony was confusing, he appeared to imply that such favoritism would interfere with Respondent’s ability to choose the best available employees. He had not explained exactly how Daly would interfere in a fair interview process. While at times he claimed that Daly would be influencing who would be selected to be interviewed, at other times he acknowledged that Daly wanted everyone to be interviewed and given a fair opportunity for employment.

However, late in his third day of testimony, Buffam elaborated on his purported reasons not to interview employees at the Hotel, when he testified about his conversation with Daly: “I told him that our primary focus was to have a process that was fair, above board, well advertised, not conducted in back hallways, not conducted over lunch conversations about who was going to be hired and who wasn’t going to be hired and that one of the reasons that we wanted to do that was to avoid any claim that there was discrimination. I don’t believe that I discussed this with him but I knew that because the Union had been recognized at the property in the event that for some reason we hired less than all of the work force or less than the number required to require further bargaining that claims of discrimination on some basis might arise and I told Mike this process has to be done fairly. It has to be done openly and it has to avoid any form of discrimination and I was uncomfortable with his method of doing it which was to tell me in effect who to hire and to recommend people and to suggest that we come into rooms and interview employees. I just felt that that was going to be something that would be controlled by him and we would be basically hiring the people he wanted us to hire.”

Buffam testified further that: most of his recommendations had to do with managers but the process that he was suggesting be employed I felt and I think our people felt more than me would lead to a process of being strongly influenced by him and his then management team as to who should be hired at the hotel and who should not be hired and we had spent a lot of time and a lot of effort developing procedures to find the best talent in the market place and we were not prepared to see that process changed by what we would consider to more of a back door approach.

As noted above, Buffam never actually explained how his interviewees would be controlled by Daly or his management team in this process. There is an irony in Buffam’s testimony. Daly had testified that Buffam informed him that he would not interview employees at the Hotel because of legal concerns about labor issues. When Buffam asked to speak with him alone, he told Daly that he had to “toughen up and accept” what was going to happen. He explained to Daly that, pursuant to his counsel’s advice, he could not interview on the property, and had to be careful that they not exceed certain parameters in their hiring, and there were certain things he couldn’t do in order to avoid issues down the road, labor issues. Daly testified that Buffam explained to him that “in this situation, the tail was wagging the dog.” In Buffam’s testimony, he now claims that Respondent’s motive for not coming on the property was in fact rooted in the fear of being sued by the Union if it did not hire a sufficient number of Union employees to require that it bargain with the Union, which is one, but not the only logical implication of what Daly testified Buffam had said to him.

Furthermore, Buffam then went on to attribute the whole discussion what percentage of employees might be hired to Daly’s persistent effort to learn how many of the existing employees Respondent normally hires when it takes over a hotel. Buffam claimed that he refused to give Daly a number because

I was pretty concerned about that because I knew that if he was asking me about it he was asking me for a reason and I felt that the reason was that he was going to go back and tell everybody at the property don’t worry about your job. I’ve just talked to Mr. Buffam and he said he’s going to hire 60 percent or 70 percent of the people. So I told him that it was impossible to give him a number of what percentage of people would be hired in the course of administering the job fair.

Further, Buffam claimed that he explained to Daly that his concern was that “we could end up making commitments or implied commitments to people in excess of the number of people

that we needed to operate this hotel and we would end up with a staff of 100 when in fact we needed a staff of 50.” Several things are striking about this testimony. First, Buffam’s claim that “our people more than me” were concerned about Daly’s influence on the hiring process was not at all supported by the testimony of either Chase or Barbieri. Second, Respondent was in fact engaged during that time period in extensive interviewing of managers and supervisors, and its practice was to make all offers contingent upon the actual takeover of the Hotel. None of Respondent’s witnesses explained why they couldn’t make similar contingent offers to unit employees. Moreover, Respondent claimed that it kept certain records from the job fair it eventually conducted in order to possibly contact applicants in the future. Indeed, the record has many examples of applicant records showing they were being held for future consideration. Keeping a preferential hiring list is a routine matter. Respondent simply did not need to know the exact number of positions it intended to eventually fill, especially since it was planning to have a gradually expanding work force. Respondent could have saved the time and expense of the job fair process had it accepted Daly’s offer. With regard to the interview process itself, Buffam made no effort to work out an arrangement with Daly which could have cured any of his purported anxieties about Daly’s interference in such a process. Rather than address such concerns and deal with them, Buffam instead made it clear, as Daly testified, that “under no circumstances” would he come onto the property to interview while Daly ran the Hotel.

This testimony by Buffam came in his third day of testimony, and was given on direct examination by his own counsel. Coming 20 days after Daly had testified, it appeared to be an attempt to get around Daly’s testimony without directly contradicting him. I do not buy it and accept Daly’s version of the conversation set out above. Respondent claims Daly is unreliable and emotional about the issue. He seemed somewhat emotional about it, but also seem to be telling the truth. Respondent sought to soften the impact of Daly’s testimony by subtly re-arranging it and attributing critical aspects of it to Daly, and not to Buffam. I do not credit Buffam’s testimony in this regard. Buffam made no attempt to explain away his reference to the “tail wagging the dog,” a phrase, while arguably subject to various interpretations, at a minimum indicated that the hiring process would not proceed as it would under normal conditions. Further, he made no attempt to deny that he was refusing to interview at the property on the advice of counsel. As noted above, Buffam was relying upon his counsel at this very time to deal with the Union and the Mayor’s office over the issue of hiring the existing work force.

In their testimony, neither Chase nor Barbieri corroborate Buffam’s claim that concern about favoritism or interference by Daly caused them to decline Daly’s invitation to interview employees at the Hotel while it was operating. Chase’s testimony was, to say the least, odd. When asked if he had had the opportunity to interview the work force at the Hotel prior to its closing, he responded, “You know, I don’t recall that. Having an opportunity.” When asked who made the decision not to interview the hourly employees at the Hotel, he stated:

You know, this property, I would not interview the employees. And I wouldn’t interview the employees anywhere unless I had a commitment that I was going to be involved. I can’t hire people for something I don’t have in large . . . I mean commitment to them that I couldn’t make. I didn’t have control of this property. I did not have ownership of this property, I did not close on this property.

When asked whether he had inquired whether he had the opportunity to meet with the employees, he explained: “When I say ‘the opportunity,’ I don’t have the opportunity to hire these people, therefore it’s ridiculous to interview the people if I don’t have the ability to be able to hire them.” When asked who made the decision not to interview hourly employees at the property, Chase took responsibility for the decision, but it was almost impossible for him to explain what he meant: “Well, I’m the chief operating officer of the company. And that type of decision would have been consistent with something I would be involved with, and approve or authorize or direct. I can’t recall which type of term you want me to offer to it, but you know, I would have been responsible for that decision.” When again asked if he made the decision, he explained:

You know, I have a real difficult time, so I believe I did. Because, you know, I have a difficult issue of hiring

people that I don't have a job for. I mean, I've never done that. Unless I can actually offer somebody for a specific job, I'm not going to hire them. And therefore it's not prudent for me to go through an interview process, and mislead these individuals. And I choose not to do that, whether or not you agree with it or not. I choose not to mislead individuals. And I'm not going to interview individuals I can't hire. And I can't hire at that point . . . I've expressed to you, I'm not going to mislead people and give them false hopes. I'm not going to interview people I can't hire.

Whatever it was that Chase was trying to say, he nowhere asserted that concern about interference or favoritism was a factor in his thinking. Chase, when pressed to explain his decision, claimed Respondent had no choice because of the pressing economic requirements of the purchase agreement:

We had three years to get this property to perform. To renovate it, to make sure was repositioned properly, to get it . . . the best people hired, get them used to performing, to make money, to make sure we had to earn out by the third year. That was the goal. And to do that, we wanted to hire the best people. That was part of the criteria. Part of the business decision for buying the property. We didn't have options. That has to occur. And we needed every piece of that turnaround, or—I'm sorry, *repositioning* formula that we could do. That was absolutely a must for us. And we didn't have an option to have time to see if there were or weren't friendly, good people. We had to have the ability to be able to hire the best friendly people at this property.

Chase's slip in using "turnaround," and then apologizing for its use, and substituting "repositioning" in its place, was ironic, and telling, for the decision to hold the job fair was in fact contrary to Respondent's normal practice. Respondent, a specialist in turnarounds of failing hotels, does not normally conduct job fairs when it takes over an existing, operating hotel.

Barbieri, testifying after having heard all the testimony of Buffam, Chase, and Respondent's so-called expert witnesses, still was unable to keep the story straight, because while she also emphasized the economic requirements of the purchase as critical in the decision to hold the job fair, she slipped back into the notion that the fact that the Hotel closed was a factor as well:

This was a property whose lease had terminated, whose staff had been laid off, whatever the terminology would be. It was an empty hotel. We had the opportunity to make, by taking some risk, make this opportunity to come from a Four Points to a full service Sheraton, to bring this property from the level it had been operating on for a number of years to a new standard that would allow for the refinance down the road which would give us basically an asset for which we had to come up with our half million dollar equity stake. In appearing for that and what we needed to do to make sure this property was the success that it needed to become is based on our experience, was the thing we needed to do was a job fair. Because we had done it in other locations and it had proven to be very successful for the company.

Although she brought up the Hotel's closure as a factor, Barbieri did agree with both Buffam and Chase, that fear of losing their investment was also a critical factor:

The risk is that at the end of three years you're not able to refinance, you lose the asset, you lose the half million dollars, and I think Mr. Buffam personally signed some other things associated with that, if I recall. So you'd have put in all this work and energy and effort and some money, and then at the end you don't make that nut, as we would say, that thing that you've been working so hard for, it would all have been for nothing.

Barbieri testified that in mid-December Chase gave her the "green light," so she went ahead and set up a task force. She claimed that there was not really an actual decision to hold the job fair.

It was an assumption. I don't know if it ever was a decision making process. It was just that a hotel was going to close. There was, the lease was canceled, the employees were let go, and then the next logical assumption was that there would need to be a job fair. I don't know if there was a literal decision that was involved inasmuch as we are going to be opening a hotel. Okay, then there is to be a job fair. It's just very logical, it would be a very logical jump in my mind. I don't know if it's an actual decision making process.

When she learned that it looked like the deal was going through, she asked Chase should she go ahead and start organize the job fair, and he said yes. According to Barbieri, there was never "any other real choice there in my mind."

Barbieri claimed at trial that she did not want to participate at Daly's job fair because she hadn't determined what the wage rates would be, and didn't know what the staffing levels would be. Moreover, she was acquainted with the way New Castle holds job fairs, but did not know how Daly's would be conducted. Finally, she was concerned that the other employers would have actual jobs to offer, whereas Respondent's plans might not come to fruition, which might lead employees to pass up other opportunities. Later in the trial she offered a further explanation for not interviewing the hourly employees at the Hotel prior to closing:

There were a number of factors. First, again, we weren't 100% sure that the closing was going to occur and we were hiring, I realize, and interviewing management team, but that's a necessity because you have to have your Managers. We knew there was an obligation coming in February . . . with the time commitments we had and the time constraints, I needed a management team in advance. As far as the associates, we've also expressed a desire for them to come and interview with us, but I needed the executive committee to basically be in place to make the hiring decision. So if somebody came and interviewed and, you know, to set the process, they still would've had to wait for the other job fair to be completed before they would've got a job offer because you needed to interview everyone in the area. So if I set this whole little process, this mini job fair up for these individuals, they still wouldn't have gotten any farther along than when the big job fair occurred and you saw the rest of the community. All they would've had is their paperwork in sooner, but that wouldn't have guaranteed that they would've been the best candidates at the end of the day. So why would I spend the time and money to bring a team in to do a mini job fair just to bring that same team back to do a big job fair. It doesn't make sense.

Barbieri testified that interviewing the hourly employees prior the closure of the Hotel, unlike the managers whom Respondent was willing to interview, would have been “a waste of time of money.” This explanation implies that Barbieri could have set up an interview process at the Hotel, but declined to do so because Respondent planned to hold a larger job fair under any circumstances. However, she also offered some remarkable testimony by denying that she was presented with any other opportunities to interview by Daly other than to interview “a couple of his sales team” and attend Daly’s job fair. If that were true that would mean, at a minimum, that Buffam, who acknowledged that Daly did give Respondent the opportunity to meet with employees at the property separate and apart from Daly’s job fair, kept her in the dark about that opportunity. It would also contradict Buffam’s testimony that Chase and Barbieri rejected Daly’s invitation to do so because of the fear of favoritism and interference by Daly.

Curiously, Barbieri’s explanations, like Chase’s, mentioned nothing about concerns about interference by Daly, favoritism, or fear of lawsuits, factors mentioned by Buffam. Thus, Respondent’s three top managers and coowners were unable to give a coherent or consistent account as to what motivated their refusal to interview the existing work force pursuant to Daly’s invitation. The confusion can be readily understood in light of the dilemma Daly’s testimony posed for Respondent. In position statements submitted during the investigation, Respondent emphasized that the Hotel had been closed, and it had no access to employees of an existing work force, and this left Respondent with no choice but to develop the job fair process. In an early position statement, Respondent stated:

The assumption of management by WHM at the hotel location known as the Four Points was vastly different from the typical takeover, in which the business continues uninterrupted, with a ready-made work force comprised of the predecessor’s employees. In this case, the prior manager’s employees were sent WARN Act notices of employment termination, and the hotel ceased operations and closed. When WHM assumed the management of the hotel building, there were no guests, no vendors, and no employees.

In a later statement, Respondent elaborated:

The most important issues which determine how the property will be staffed is whether the property has been closed by the Seller, and whether the employees have been terminated by the Seller. When New Castle has assumed management of various hotels, some have been closed, such as in Cherry Hill and Waterbury, and the work force previously terminated by the Seller. In such cases, New Castle has had no choice but to develop a non-discriminatory hiring process based upon legitimate, business-oriented criteria, in order to obtain the best employees to staff the vacant and closed hotel.

Moreover, the statement claimed that “WHM was not permitted on the hotel premises when it was under prior management, and neither before nor after the takeover has WHM obtained access to the seller’s employment records.” This statement was patently false, since Daly virtually begged Respondent to come on the property to interview employees.

The most striking problem confronted by Respondent at trial was the appearance of the Trustee, Michael Daly, pursuant to General Counsel’s subpoena. All the barriers erected to keep from taking over the existing unionized work force were erected by Respondent. *It* decided to close the Hotel and not accept Daly’s offer of a “turnkey operation.” *It* decided not to interview the existing employees at the Hotel prior to its takeover of the Hotel. In light of Daly’s testimony, Respondent was forced to offer a different explanation than the one given earlier in the position statements. Contrary to Respondent’s position during the investigation that the job fair was necessary because the facility was closed and Respondent was not allowed access to the facility and the employees prior to closure, Buffam at trial specifically denied that

the closure of the Hotel was at all a factor in choosing to have a job fair, and stated that Respondent would have held one whether the Hotel closed or not. This remarkable turnaround left Respondent the problem of explaining why it spurned Daly’s offer to interview the existing employees at the Hotel, while it was still operating, a fact denied in its position statement.

Respondent’s witnesses claimed their choice to go ahead with a job fair was based on their “experience.” As noted above, Buffam testified that, based on experience, Respondent utilizes a job fair when it opens a new hotel, the hotel being taken over has been closed, and where it is repositioning a hotel upscale. However, Buffam admitted that the Sheraton Waterbury was the only hotel that it had repositioned upwards, and Respondent had never done it before. Buffam testified that Chase and Barbieri were the ones who told him that holding a job fair was the best way to do it. What then was the experience on which it was based? Buffam admitted that Barbieri’s sole experience and entire work history was tied to Buffam’s career. So where did she get her experience concerning job fairs? She got it when Chase joined the firm in 1988 with a team of experienced managers. Buffam then pointed to Chase’s experience before joining New Castle as the basis of Respondent’s experience with regard to job fairs. However, Chase’s experience did not explain why a job fair was chosen in this case. Chase described that in his prior experience he was responsible for opening 18 new hotels. In each case he used a job fair, the date of which was determined by the expected date of the completion of construction. There is, however, no evidence that Chase, or any of his managers, ever took over a hotel to be repositioned upward, and held a job fair to do it. Instead, Chase admitted that this reposition “was the only one we’ve ever done.” Therefore, Buffam’s reliance on Chase’s experience did not to explain why Respondent chose to use a job fair in this case when there was an existing work force in place.

Buffam testified that in all situations where Respondent takes over a hotel Respondent assembles a task force and usually interviews the existing work force. Buffam admitted that in most cases where Respondent takes over a hotel, whether as manager or owner, it does not hold a job fair, and the evidence in the record was overwhelming in support that admission. Respondent’s experience generally is that it has been highly successful in taking troubled properties and turning them around, and in almost all cases it does not conduct a job fair. A prime example was the Woodcliff Lake Hilton, which so successful that Buffam described it as a real “feather in our cap.” He believed that its success greatly contributed to Respondent’s reputation as a turnaround manager. Yet Respondent did not hold a job fair there. Instead, it hired virtually all of the employees, through an application and interview process, as it usually does. Moreover, it did so even though it had a contractual right to hire anyone it chose. General Manager Robert Cappetta boasted in a memo to Barbieri shortly before the job fair in Waterbury about how important the employees at the Woodcliff Lake Hilton had been in the turnaround. Instead of holding a job fair there, Respondent had held its normal interview process, hired the existing work force, and successfully trained the existing work force in the New Castle system. The Woodcliff employees improved each year, and the hotel achieved was able to improve each year, and the property achieved “a dramatic turnaround.” Respondent had assumed control of the property in April 1992. Therefore, this dramatic turnaround, which greatly enhanced Respondent’s reputation, thus took place in about 4 years, and was not done through a job fair. So how could it be that it would not try to duplicate its achievement in the Woodcliff Lake Hilton, when there was clear evidence of its success in utilizing the existing work force? When Barbieri was asked why Respondent could not have accomplished the same success with the work force in Waterbury as it did at the Woodcliff Lake Hilton, Barbieri discounted her role in the decision-making process:

I wasn’t in a lot of that decision-making process, but the fact that they were, again, from my experience, speaking from my own experience, the flag had been lowered, that they lost the Sheraton and had to go to a Four Points. I don’t know if there was ever a time in their record where they proved themselves. I don’t know if there was ever, I don’t know where you would hang your hat on past history, but I’m not really not an expert in the past of that hotel. I wasn’t really involved in some of that process.

Confronted with a simple question, Barbieri had no real answer so she denied her responsibility for the decision. However, her answer is telling because she seems to be basing the decision not to interview the Hotel employees in the way Respondent normally does on the fact that the Hotel had been brought down to a Sheraton Four Points, and this somehow was a negative factor for the existing work force. This is particularly curious since Respondent had brought in two managers from the Dunkirk Four Points, Kirwan and Scheiner, to be managers at the Hotel. If the fact that the property had been graded a Four Points was so significant and so negative for the employees of the Hotel, what justification would there be in bringing down the managers of another Four Points to run the new Hotel?

Respondent's history with regard to job fairs at the time it decided to hold one for the Sheraton Waterbury Hotel was, in fact, extremely limited. The first use appears to have possibly been at the Lucerne Inn in Dedham, Maine. The property had been closed for 5 to 6 months. The property had failed, and was owned by a bank. Respondent assumed management on April 1, 1993. Respondent, which already ran the Bangor Marriott, came in as a favor to the bank, hired a staff and operated the property until the bank could dispose of it. The record is devoid of any details as to the nature of that "job fair," how it was conducted, how many people were involved, how many employees were hired, or who conducted it. Buffam testified that he thought Respondent had held a job fair there, but when asked to explain the basis of that thought, he gave a general answer: "When we need to bring in new work force, I think that's the most fair and objective way of getting the best talent in the community, and so we tend to employ that process when we are seeking to hire an entire work force." There is no mention of holding a job fair there by Barbieri in her extensive testimony about the job fairs that she had had some involvement in, nor was any record related to it produced, although Barbieri introduced records from the other job fairs she was associated with. Neither is there any mention of a job fair for Lucerne in Chase's testimony. This seems particularly anomalous, since Buffam had attributed all his knowledge about job fairs to Chase and Barbieri. What actually transpired at Lucerne is simply not discernible from the record as it stands.

What is clear, however, is that Respondent did hold two job fairs in the 2 years prior to the one held in Waterbury. The first was held at the Cherry Hill Hilton in Cherry Hill, New Jersey. The owner of the property was Mutual Benefit Life (MBL), which was itself in liquidation in New Jersey. MBL commissioned a broker to put together a package and offer the property for sale. Hyatt was the property manager at the time, but its lease was terminating. The employees were represented by the Hotel and Restaurant Employees Union. Respondent submitted a "low-ball bid," and was awarded the bid. The transaction took place very quickly, without the normal due diligence or market study. Respondent utilized a corporate shell known as Livingstone to purchase the property on October 28, 1994, which was then immediately transferred to an investor group, which Buffam testified was Cherry Hill, P.A. The investor set up another entity known as East-West, P.A. as its operating entity. Buffam testified that East-West employed Respondent's affiliate, Cherry Hill Hotel Management, LLC as its managing agent. According to his testimony, East-West PA developed their own business strategy with regard to how they wanted to operate the property, what flag they wanted to fly, and how much they wanted to invest in the renovation of the property. Respondent assisted them in preparing renovation plans, some of which East-West accepted, and some they did not. Buffam claimed they actually rejected most of Respondent's recommendations concerning renovations and franchise recommendations. East-West determined the timing of when the hotel would open, which was in March 1995. Otherwise, pursuant to the management agreement Respondent was responsible for all hiring decisions. Respondent chose to conduct a job fair. Buffam testified that Respondent had no control of the closure of the property, and said that it would have been "impossible" to have continued operating the hotel at the time of the purchase. "The owner was delivering to the new owners a piece of real estate in a condition that required substantial renovation. It would not have been possible to have continued a hotel operation in that sequence with one manager leaving the property and another owner and manager coming in with an entirely new flag and with a major renovation." The job fair was conducted about February 1995. It was at the time of the takeover of Cherry Hill that Barbieri met Respondent's counsel Jay Krupin for the first time.

The former employees of the Hyatt at Cherry Hill were represented by the Hotel and Restaurant Employees Union, Local 54, which filed charges over the hiring practices on May 1995. Complaint issued on some of the charges on May 30, 1997.

While the investigation of those charges was pending, Respondent conducted its next job fair in the summer of 1996 at the Westin Nova Scotia in Halifax, Nova Scotia. That property had been closed for 2-1/2 years. The property had been operated by Hilton International. It had formerly been run by Hyatt, which had a falling out with the owner. It had been a grand upscale hotel built in 1929. Its employees had been represented by a union. However, at the time of the takeover, there was only one employee, a mechanic, at the hotel. There was a question under Canadian labor law whether Respondent was obligated to bargain with the union, but Respondent entered into a recognition agreement which would allow Respondent to either hire former employees or pay an increased severance payment. All the former employees received some form of severance payment whether they were hired or not. Respondent held a job fair. Once again Jay Krupin was on the scene. Due to bad weather, Krupin and Barbieri conducted the training session for screeners and interviewers in a room at Logan Airport in Boston. Prior to the interview process at Halifax, Respondent's managers had a list of everyone who had been a former employee of the hotel. Respondent did not hire the vast majority of former employees.

Barbieri testified that there was never any other choice in her mind about holding a job fair in Waterbury because they had had "such great success with the job fair." She based her opinion about the success in Cherry Hill on all the great people who attended the first anniversary party there, as well as discussions in the office. She admitted, however, that she did not review any turnover records concerning Cherry Hill, or The Westin Nova Scotia for that matter, before making a decision to hold a job fair in Waterbury. Neither did she have any financial records to review. She testified that turnover rates at Cherry Hill and the Westin Nova Scotia had no impact at all on her decision to hold a job fair in Waterbury. What then did she know about whether the job fairs had actually led to hiring employees who stayed for any length of time? The clear implication of her testimony is that she was not even thinking about whether or not there had been high turnover at either facility. She testified she only reviews property turnover records at the end of the year for purposes of awards, and for review of the property's wage and benefit summaries to see if there is a problem. Otherwise, the turnover records are an internal tool for each property, and not a corporate tool which she uses.

Barbieri's lack of interest about the turnover rates at Cherry Hill and Halifax after their job fairs was particularly anomalous given the fact that Respondent's witnesses emphasized turnover as a serious problem. Daniel Mount, Respondent's first expert witness, opined that high employee turnover leads to a "cycle of failure" that can create serious problems for a hotel. Mount testified that high employee turnover makes it difficult to develop customer loyalty. Mount testified that finding new employees is a significant expense and is to be avoided if at all possible, and candidly acknowledged that he "would not shut the Hotel down for a month just to hire a new work force." Of course, shutting the Hotel down for a month to hire a new (non-union) work force (and to conduct a few minor repairs) is precisely what Respondent did in this case.

Buffam described turnover in terms of 50 percent, "over the course of time" as what he considered acceptable turnover. Chase admitted that the goal in hiring is to avoid high turnover and stated that "we don't like to see employee turnover" as it leads to the "spiral of death" outlined by Respondent's hotel specialists. Bill Long, another one of Respondent's experts, concluded that high turnover has a negative effect on hotels.

There is in fact no evidence in the record showing that Respondent in any way examined the results of the job fairs in Cherry Hill, Westin Nova Scotia, or in Waterbury to determine whether they had actually produced a stable complement of employees. As will be developed below, the results of the job fair in Waterbury belied all the grandiose claims made about its success. However, Respondent did know one sure thing about the job fairs in Cherry Hill and Westin Nova Scotia—they did not hire a majority of employees from the previous work force in either situation.

Respondent never answered at trial the simple question as to why, if job fairs are so good, it does not hold them routinely whenever taking over a hotel with a current work force? After the job fair in Waterbury, Respondent continued its normal practice of taking applications and interviewing the existing work force when it takes over existing hotels. In this regard, when Respondent took over an existing hotel in Richmond, Virginia, the Commonwealth, shortly after the takeover of the Sheraton Waterbury, Respondent conducted its normal interview process and did not hold a job fair. That property had been a five-star hotel in the past, and

Respondent planned to make it one again. If that is the case, then why did Respondent not hold a job fair, since its goal was to bring the rating of the hotel up? When Buffam was pressed to explain, he seriously undermined his previous testimony about job fairs—he claimed that the interview process had the same effect as a job fair.²⁰ Similarly, when Respondent took over the Smithtown Sheraton in January 1998, it did not hold a job fair, but conducted its normal application and interview process. There was no union in either situation.

When Respondent testified that it relied upon its “experience” in deciding to hold the job fair, there was a significant experience which bore on its decision. The Norwalk Holiday Inn, the Chicago Sheraton Plaza, and the Milwaukee Marriott Hotel were the second, third and fourth hotels that Buffam had purchased. He bought the Norwalk Holiday Inn in 1984, and the other two in 1985. In each case the existing work force was hired. The employees in Norwalk and Chicago were represented by unions. Indeed, the Union in this case represented the employees in Norwalk. These three hotels were the only hotels which Buffam had an ownership interest which actually failed. Moreover, Buffam was individually at risk in the Norwalk and Chicago properties. It was a period before Respondent began to use labor counsel. There were labor problems in Norwalk, and Respondent was subject to picketing during the contract negotiations. At that time it maintained its corporate headquarters at the Norwalk Holiday Inn. Buffam was personally sued in Chicago by the unions there for pension and health and welfare fund payments. Although at trial Buffam claimed that the unions had nothing to do with the failure of either the Norwalk or Chicago properties, I believe his experience with the Union in Norwalk had clearly left its mark on him.

In discussions with William Collins, the former Mayor of Norwalk, who currently is in a business relationship with Buffam related to a new hotel project in Norwalk, Buffam took certain stands which strongly indicates his animus against the Union.²¹ Respondent wanted to lease certain property of Collins, along with two other parcels, in order to build the new hotel. Buffam and several members of his staff met with Collins in his home in about June 1997. Buffam presented an economic proposal to Collins which Collins found to be generally satisfactory. He informed Buffam that he would want to have a clause in the lease that would make it easier for employees to organize than it is under the National Labor Relations Act. Buffam responded that that probably wouldn't be much of a problem because he had considerable experience with the Union in Norwalk at the Norwalk Holiday Inn which he had owned some years earlier. In their conversation they both recalled that Collins had participated in picketing with the Union at the hotel when he was Mayor while Buffam operated it. On June 12, 1997, shortly after the meeting, Collins signed a letter of intent to lease the property. Over the next number of months there were a number of drafts of the proposed lease. It was a difficult negotiation over economic issues. Collins submitted through his attorney proposed language for a neutrality agreement, which called for voluntary recognition after a card check by a neutral party showing majority support in an appropriate unit. For a long period of time, Collins did not receive a response to this particular proposal. At a negotiating meeting in the fall of 1997, in Collins' attorney's office, Collins pulled Buffam out into the hallway and expressed his discontent that they were not yet dealing with the labor issue. Buffam said he'd try to speed it up. About October 15, 1997, Collins finally received a response to his proposal. In February 1998, there was a meeting between Buffam and Collins with a mediator to try and resolve the issue. On March 24, 1998, Buffam sued to enforce performance on the letter of intent. There were several unresolved issues, including the proposed neutrality agreement. Collins met Buffam in court in Stamford in the summer of 1998, with Collins' attorney Gary Obers and Buffam's attorney Edward Scofield. Both sides had been disappointed that the Judge had not offered any advice on the potential outcome of the case, and they decided to sit down and negotiate. In that meeting, Buffam told Collins that he did not want a union in any hotel built on their property. Buffam told Collins that he felt that if there was a union in his

hotel it would put him at a “marked competitive disadvantage” with other hotels in Norwalk and in Stamford, which is part of the market area. As they left the meeting, Collins' attorney expressed that he had been rather startled at Buffam's adamance and determination in wanting to fend off the Union. Everyone understood that Local 217 was the union at issue.

About a month later, the parties met in Collins' attorney's office to depose Buffam. In an off-the-record remark, Buffam became more emotional than usual. He was generally very self-controlled. He referred to the Norwalk Holiday Inn. He made a remark about how Local 217 had cost him the hotel in Norwalk, his investment, or a great deal of money, but Collins could not remember which one of the three possibilities it was. Upon making the remark, Buffam caught himself, and said, “Well, of course there were other factors involved, too.”

In their meetings, Buffam indicated to Collins several times that he was having labor difficulties at the hotel in Halifax. Collins brought up to Buffam the fact there was a neutrality agreement at the Omni Hotel in New Haven, which was one of his labor attorney's other cases, and suggested that was an example of what Buffam might want at their property. Buffam said that it was a different thing in New Haven, that the hotel there was built with government involvement, and that is why there was a neutrality agreement, and he did not feel it should be a precedent for him. Collins presented Buffam with neutrality agreements from other cities in the country. Buffam pointed out that there were special circumstances in those situations, and they should have no bearing on the property in Norwalk. He was not prepared to discuss a neutrality agreement. Buffam pointed out that he did have neutrality agreements in a couple of places, either in Detroit or Chicago, but those agreements reflected the climate in those communities, meaning they were “union towns.” Buffam said Norwalk was not a union town, so he didn't see any reason to give in to a card check or a neutrality agreement. In their meetings, Buffam made it clear that he adamantly opposed Collins' proposal for a card check and expressed concern that it would provide an opportunity for the Union to tell lies about the employer, and provide gifts to employees to persuade them to sign a union card. Ultimately, the parties settled their case, and Collins agreed to a much watered down clause related to possible unionization at the hotel property, because he felt it was the best he was going to get.

Curiously, although Buffam testified that the Union had no impact of the failure of the Norwalk Holiday Inn, he never in his testimony denied making the statements attributed to him by Collins.²² Collins' testimony clearly shows animus on Buffam's part toward the Union.

Buffam had a lot at stake in the Sheraton Waterbury. His testimony that he was unconcerned about whether the Union represented the employees at his hotel is not credible. The record shows that he lost the Norwalk Holiday Inn sometime between 1990–1992. After that event, Respondent began to take a different approach to labor issues. Respondent sought out new labor counsel and eventually chose Jay Krupin. Krupin was present at the takeover of the Cherry Hill Hilton. As noted above, Respondent held a job fair at Cherry Hill, and did not hire a majority from the previous work force. Once the Cherry Hill Hilton was up and running, Krupin provided the first of his “Positive Employee Relations” seminars for senior management at that facility in 1995. Those seminars addressed the needs of employees, and why people organize. Krupin compares traditional reasons with more contemporary reasons why employees organize. He stresses the need for an open door policy, and fairness in discipline. He addresses the concept of recognizing something in the workplace that would indicate employee dissatisfaction. Interestingly, Krupin conducted similar seminars at the Halifax property in 1997, as well one at the Sheraton Waterbury in the summer of 1997. More recently, he conducted one at a new property, the Deerhurst Resort in Ontario. Barbieri recalled one being held at the Woodcliff Lake Hilton as well. Thus, Krupin held his seminars concerning what leads modern employees to organize at the three hotels where Respondent chose to have job fairs.

²⁰ Buffam tried to explain away the lack of a job fair at the Commonwealth by the small number of employees at that property. However, Sarisky testified that the job fair was held at the Victor Hampton Suites, a new property, even though it was very small.

²¹ I found Collins' to be credible and credit his testimony. However, I view the testimony of Collins on the matter of Buffam's antiunion animus as simply corroborative of the far more important testimony of Daly.

²² Similar to the situation with Daly's testimony, any attempt by Respondent to argue that Buffam's testimony should be construed to deny making those statements should be rejected. If Buffam meant to deny the statements, that should have been done clearly. It would appear that Respondent wants to avoid having a credibility determination be made between Collins and Buffam, and for good reason, since Collins has nothing to gain by his appearance pursuant to General Counsel's subpoena. Respondent may once again try to put a spin on Collins' testimony, to make it seem that he may have misinterpreted Buffam, but such spin should be rejected.

Either Krupin, or his associate Alison Hurewitz, were directly involved in directing and overseeing these job fairs.

In each of the above noted cases, after having purged most of the former unionized employees from its new operation, Respondent had Krupin quickly on the scene to train Respondent's managers in union avoidance. Moreover, this also highlights the rather unbelievable testimony of Respondent's three top officers that they were unconcerned about what was taking place at the Hotel prior to the purchase, and never sought to find out what was going on there. This goes directly to Respondent's efforts to claim that they had not performed a "due diligence" concerning the Hotel prior to its purchase of it.

Although Respondent was forced to concede at trial that it had been given access to the facility to interview employees, but which it declined, it continued to go to great lengths at trial to pretend that it had had very limited access to the facility. Buffam testified that he had knowledge that the Union represented the employees, that there were negotiations going on, the Union had claims in the bankruptcy action, and that there was a decertification petition, but said he didn't believe what he knew about what "would be considered union activity or union problems." Buffam claimed that Respondent was not welcome at the property prior to the Purchase and Sale Agreement, while afterward Respondent was subject to constant entreaties by Daly to discuss Respondent's plans for the property. Otherwise, according to Buffam, access had been limited to the work for the Bankruptcy Court, to his visit to the property when he made a management proposal to the Trustee, a limited amount of access relative to a limited amount of planned renovations for the Trustee, and several visits related to financing. When asked if Respondent was doing a detailed analysis in the summer of what renovations would be required at the property, Buffam testified, "We would like to have, but it was impossible to do that..." He even claimed that Respondent had even placed a bid to perform renovations without examining the property. When questioned about the basis of Respondent's initial proposed Purchase and Sale Agreement to Prudential, dated September 6, 1996, he denied that Respondent had done a careful analysis of the conditions at the property. He testified that, "We were assuming in that statement that we would have to pretty much replace everything in the hotel. We had not gone into the hotel and checked every room out, looked at the back of the house, evaluated the kitchen." He claimed that Respondent's evaluation of renovations needed to reposition the Hotel, as expressed in the proposed Purchase and Sale Agreement, was done with "very limited access to the property." Instead, Respondent was "going by market analysis, franchisor input, and a limited degree of our own impressions from walking around the property."

As noted above, by September 1996, Respondent had prepared a report to provide to a potential financing source, which contained a great deal of information about the past history of the Sheraton Waterbury (GC Exh. 108). When first questioned about the basis of the information contained in this document, Buffam testified that they had had "great difficulty getting any financial data on the property," and he believed it was based on an appraisal on the property done for Prudential, the lender. He claimed there were very few documents available through bankruptcy regarding the Hotel's operations. He testified that he did not receive whatever reports Daly was filing in bankruptcy. Then he admitted that Respondent actually could have received the reports Daly was filing in bankruptcy from Prudential, and that he did see one of them, but it "was completely impossible to understand what the hotel operations were doing. And we did not insist upon seeing those anymore." Further, the report contained a great deal of information about the past history of the Sheraton Waterbury.

Buffam testified that Respondent had done "many, many" of such studies as the ones placed in the document. He testified that the data contained in the pro forma was based on a "vast amount of experience, information, staffing guides, comparable properties." However, despite the great detail presented in the pro formas, Buffam testified that Respondent did not need much information from the property itself.

You have to know where the property is. You can't make a reposition analysis for a property without that information. You need to know the type of construction that is used in the property. Is it a brick or what's it made out of. Does it have the ability to look like a full service upscale hotel. That you can do by just walking by it or walk-

ing inside and looking around. You have to know some basic things like does it have a through the wall system that you can see from visual inspection a through the wall air conditioning system and you should know approximately the layout of the meeting space. But what you don't need to know is you don't need to know how they are staffing the property at this time at the time you're looking at it. You don't need to know how they cook a hamburger or what their menu is like or how much money they're making. That is somewhat irrelevant to the analysis that's done here.

Thus, Buffam virtually ridiculed the notion that operational facts of the Hotel were of any significance. However, if it were true that such facts were irrelevant, why did Respondent go into such detail about the Hotel's history in the September report it prepared for the lender?

As noted above, the September report described that Respondent had performed a "pre-acquisition due diligence." Buffam testified that a preacquisition due diligence would normally include a variety of factors, assuming that there are no time constraints, no access restraints and that the information is reliable. He defined "due diligence" as "a way of once you've decided in principal to go forward with a transaction, it's a way of making sure that you have decided to do the right thing." It includes "doing a lot of on-site work. Testing things like environmental matters. Checking up on your, the financial statements of a property. In some cases interviewing people at the property about conditions past, present and future." It would "determine if the individuals at the property were pleased with their compensation. Or if they felt that it was not adequate, I think it would cover that." When asked if it would uncover conditions of labor strife,²³ strikes, things like that, he answered, "If those things were happening during the due diligence process I think it would uncover that, yes."

Buffam, when first asked about whether Respondent had performed a due diligence on the Sheraton Waterbury, testified, "[W]e did no due diligence on this acquisition. It was a bankruptcy case and we purchased properties out of bankruptcy as we did in Cherry Hill without due diligence." When asked if Respondent tells prospective lenders that it does do due diligence when they had not done so, Buffam explained his denial:

Due diligence can mean different things in different transactions. If you're buying out of bankruptcy, with seven days to close, you do a different due diligence than you do when you have a three-month period of time, and the property, you have the property to control. And you have the opportunity to obtain reliable information on the property. In this particular case, we had no ability to determine precisely when the property would come into our possession. We had a bifurcated, if not trifurcated property, where the operation was under control of someone else. We were acquiring only the brick, mortar and land. And our entire due diligence was directed to the market positioning of this property as we were creating it. And we told the lenders that's what we were doing. We made no representation to the lenders about anything that going on in the property at that time that was relevant to their financing. They were financing a new property that we were developing out of the land and the building that existed at that time.

However, despite this explanation, Buffam was forced to admit that the September report contained historical data about the Hotel, which would indicate to the lender that Respondent had access that information. Moreover, he also admitted that Respondent represented that it believed the information was accurate when it put the report out.

²³ The transcript incorrectly has "strike" instead of "strife" and it is hereby corrected to reflect this.

Chase also denied performing a due diligence about the property prior to the actual purchase of it.

Respondent was so determined to deny that it had access to the facility because it wanted to deny that it evaluated the labor situation as it existed, and wanted to present itself as essentially uninterested in it. Thus it continued to deny obvious facts set forth in their own records.

The seriousness of its confusion in trying to articulate a cogent explanation for its refusal of Daly's offer to interview the existing work force was aggravated by its desire not to bring to light the full truth of its interview process regarding managers. As described above, Respondent was in fact engaged in extensive interviewing and hiring managers in December and January. Buffam's testimony that Respondent did not want to interview managers until February simply does not seem true. Neither Barbieri or Chase corroborated Buffam's story about reluctantly succumbing to Daly's pressure and agreeing to interview a couple of managers. Neither did they corroborate the story about letters from Daly's bankruptcy counsel withdrawing permission to interview managers at the property, and then rescinding that withdrawal. Moreover, Respondent was not able to produce any such letter. Buffam's account was not corroborated by anyone, and contradicts Daly's testimony that he sought to make everyone available, but that Buffam refused. Buffam's story about not wanting to interview either managers or employees until February began to unravel when he was confronted with a memo from Judy Schofield dated January 2, 1997, which recounted what had transpired at JLM bankruptcy hearing on December 31, 1996. Daly had balked at allowing the plan of reorganization to go forward after protracted negotiations because of the language regarding executory contracts. At that hearing on December 31, Buffam represented to the Court that the reason the contracts were being terminated was because there were things that they could not or might not be able to honor, such as dates, menu items, and the like. At the bankruptcy hearing, Buffam represented that Respondent would be responsible to the clients for any damages they might incur as a result of the termination of those contracts. According to Schofield's memo, Respondent also agreed that "By January 10, 1997 we will have attempted to contact by telephone all advance booking contracts to offer new contracts with 'no worse terms.' We represented to the court that we will do what it takes to make the customers happy." The memo also makes clear that all the relevant dates were clearly set:

The confirmation date is set for January 23, 1997. This means that barring no other scheduling changes, the bankruptcy plan can go into effect on February 5, 1997 (the same date the foreclosure and the personal bankruptcy cases will be finalized) and title to all the assets will pass on February 5, 1997. The trustee still plans to close the hotel on January 27, 1997, and between January 27, 1997 and February 5, 1997, we will arrange with the trustee to gain access to the hotel building.

Respondent also committed to have the dates of the job fair announced by January 10, and asserted that the job fair would take place "in the second half of January, 1997." (GC Exh. 113.) The memo is telling for several reasons. There is not the slightest hint in the memo that there was any fear that former owner Joe Calabrese could upset all their plans and reclaim the Hotel. Neither Buffam nor Barbieri mentioned such a fear in their conversations with Daly. Indeed, Respondent produced not a single document to show that that was a real concern to Respondent at that time. Moreover, the memo makes clear that Respondent was in fact committed to interviewing managers by January 15:

By January 15, 1997 any manager currently working at the hotel who we are considering for employment at the Waterbury hotel will have been contacted and an interview with that person will have been scheduled. Those who are not contacted by January 15, 1997 are not being considered for employment at the Waterbury hotel.

Respondent made this commitment to the Bankruptcy Court because of Daly's concern over the managers, and possible severance packages for them. Confronted on the stand with this

memo, Buffam suddenly remembered that they were in fact interviewing managers, and his recollection was "refreshed."²⁴

Despite this refreshed recollection, Buffam continued to maintain his ignorance of who was interviewed, by whom or where. When asked whether Respondent had lived up to this commitment, he stated, "I have to assume that we did, because this memo related that intent. But I . . . I'm not part of that process, so I can't tell you that that was done, but I assume that it was done." One of the more remarkable aspects of the hearing was the stubbornness with which Buffam, Chase and Barbieri all clung to their professed ignorance about the interviews of former managers of the Hotel.

Chase's testimony concerning the interviewing of managers was noteworthy in that he specifically denied that Buffam ever instructed him to finish the interview process of former managers of the Hotel by January 15, as Buffam had committed to the Bankruptcy Court. He denied getting any instructions to interview such managers pursuant to the decision in Bankruptcy Court. He claimed that Respondent did not interview such managers until very close to the day that we did the job fair, and there "wasn't very many that we did have dialogue with. I mean, there's a couple [of] salespeople, but there wasn't a lot of managers. And we did not specifically hold interviews with the managers." He recalled that two salespeople, and one food and beverage coordinator from the former Hotel were interviewed, and the two salespeople were hired. He recalled someone was hired as sales manager, and a woman as director of sales. He was unable to name them, and was unable to identify the food and beverage coordinator who was not hired, according to him. He testified that the salespeople were hired by Robert Cappetta.

He testified that he was himself interviewing people for executive committee positions, the senior management positions. Two of these people were Robert Scheiner, the General Manager of the Dunkirk property, and Barry Asalone who had come down from the Halifax property. Asalone was being interviewed for the director of operations. They were in the area to meet with Chase, to look at the area and see if it would be good for their families, and to consider whether they wanted to relocate. Chase claimed that due to his "frugal nature," he decided to put them to work. He testified, "I said, 'Why don't we get these people in, because if we do take over, we are successful in the takeover process, we might as well have the process in place.'" He described it as a "jump ahead in the process." Despite this frugal act of jumping ahead in the process, Chase professed ignorance as to the specifics of their activities. When asked if they hired anyone, he testified,

You know, I don't know. I really don't know. Because they met with some people. I don't recall who they met with, or what happened with those individuals, who they were. But I do know that they did those type of interviews. It was more of a cursory process, it was a productive process. They were asked to meet with some people. I don't know what the outcome was.

He wasn't sure how many people they met with, but testified that it was not many, and "could be two, could be three." Chase testified that they were staying at, and conducted interviews at, the Courtyard By Marriott in Waterbury. However, he did not believe any of the former managers of the Hotel were interviewed at the Courtyard By Marriott. Curiously, when asked if he was aware that job offers to managers were being sent out as early as January 6, he asserted that he was not focused on it:

²⁴ The sudden refreshment of his recollection in the face of an incontrovertible document was belied by the adamance of his prior testimony that they did not want to, and with minor exceptions did not interview managers prior to January 15. Buffam admitted that his prior testimony had been different. That testimony had in fact taken place over 2 separate days, January 27 and February 8, 1999, which meant that Buffam had had over a week to reflect on his first day of testimony, yet his memory remained "unrefreshed" until confronted with documentary evidence that undermined his prior testimony.

You know, I really wasn't all that concerned about it. Because of yet, there was such speculation whether or not we were actually going to be involved with the property. There was so much up and down that was going on with the transfer of the property, or sell the property, that I wasn't sure that we would ever be involved in the property.

Barbieri testified that Asalone was not staying at the Courtyard By Marriott. However, she did not know where interviews took place, and acknowledged they could have taken place there. She claimed that Asalone wanted to leave his most recent assignment in Halifax for tax reasons, and was in town to speak with Chase concerning a possible assignment at the Commonwealth in Richmond, Virginia. They decided to make him the operations manager in Waterbury until his next assignment was available. Since he was in town, she decided to give him some resumes to go through and pull any he might be interested in. She acknowledged that Asalone was interviewing former managers of the Hotel, but claimed she did not know where. When asked who authorized interviewing former managers of the Hotel, she referred to the "Court document that indicated that people we were interested in we should speak to by the fifteenth of January." She said Executive Committee members would then have chosen people for interviews based the resumes she had. She claimed she had no idea where any of the interviews were being conducted.

Although the facts show an extensive hiring process was taking place involving a myriad of managers, the record is devoid of evidence showing how the interviews of managers were conducted or where. Respondent produced a limited number of records for managers it actually hired, but virtually none for those not hired, but who applied and were perhaps interviewed. It claimed that it did not keep such records. The activities of Asalone and Scheiner are particularly curious. Both were in fact employed as managers by Respondent at the Hotel, and were on the Hotel's payroll. Yet no records were produced showing when they were offered jobs at the property, or transferred there. Barbieri claimed there were no records for them because they were "transfers." However, Respondent had records for other managers transferred from other New Castle properties to the Hotel (R. Exh. 21, Cappetta, Oates, Zucker, Kerwin, Dorr). Moreover, Asalone and Scheiner were let loose to interview prospective managers even before they were transferred to the property. Both Chase and Barbieri claimed they basically let their executive committee members deal with the hiring process on their own, and they were unaware as to who they interviewed or where. Barbieri claimed that she simply gave out resumes to the interviewers to cull through and interview whomever interested them. She did not keep the resumes. Respondent thus had no records to show how it interviewed prospective managers.

This haphazard approach to the hiring of managers, and to record keeping concerning that process, stands in sharp contrast to Respondent's hiring process for hourly employees, and the extensive records kept therein, which will be developed below. Chase testifies that Respondent was concerned about thorough documentation of the process for hourly employees because "we have a lot of discrimination issues, a lot of issues that come up under various government bodies. It's real important to have evidence to the fact that we actually were consistent, that we were fair, and that we actually based our decisions on information that we uncovered or—not uncovered, interviewed at the time of the screening process and interview process." He further explained, "It's there for lawsuits, but it's an issue that we ask the questions consistently. To make sure that we recognize what may occur. You know, because today there's a lot things out there, with EEOC and a lot of other issues that you have to be conscious of. And you also want to be fair and consistent." He was unable to give a coherent explanation as to why that same concern would not be important for managers. When asked if he could face possible charges of discrimination at the managerial level, he responded that "[y]ou know, I've never had it in my entire career. I've never had any issues on that level." When asked whether while he was at the Marriott chain or with New Castle any manager had ever sued for discrimination, he responded "Not me." When asked about his company, he responded, "Not my company. I've never had a case that was won, and very few that were filed. But I've never had a case that was won based on discrimination." However, he then acknowledged that they did have charges: "We've had a number, yes. I would guess we had some people that did. I can't recall what

they were, but yes, we've probably had a few." When asked if he'd had lots of charges from hourly employees, he responded, "No. Actually, we do a pretty good job there, too." He then claimed that they didn't need to document interviews of managers because they had more time to speak with them.

That, however, still does not explain why documentation is important to defend against one form of discrimination, and not the other. The professed lack of concern for documentation of the interviews and applications of managers raises an inevitable inference that Respondent was not concerned about just any old form of discrimination, but rather was concerned about charges related to the anticipated unfair labor practices to be filed by the Union in this case. Buffam even admitted at trial that the expectation of such charges was one reason he declined Daly's invitation to interview at the Hotel. One is led inevitably to the inference that Respondent anticipated such charges because it had already determined that would not hire a majority from the predecessor employees, and therefore it had to be very careful about how it went about hiring, as Buffam explained to Daly.

While Respondent's purpose in keeping extensive documentation of the hiring process for hourly employees makes sense in light of anticipated unfair labor practice charges, Respondent's utter disregard for keeping records regarding the interviews of managers still seems peculiar. Chase's expressed concern over possible EEO charges would seem to be equally applicable to managerial positions, and it would appear to be simply good business judgment to have some records of such interviews and applications. Unless, of course, Respondent had a reason in this case for not keeping such records. While Respondent's near-obsessive record keeping with regard to hourly employees was based on anticipated litigation with the Union, it is reasonable to infer that that same fear of litigation with the Union might have been behind the lack of record keeping concerning the managers.

The question of what degree of access Respondent had to the Hotel and its work force has run through both the investigation and the trial of this case. As noted above, during the investigation Respondent based its decision to hold the job fair in part on the false assertion that it lacked access to the hourly employees. The question of what access Respondent had to the former managers of the Hotel is important in several ways. The most obvious one concerns the opportunities Respondent had to learn from former managers about the union activities of individual employees, who was a Union supporter, and who was not. Respondent denies that it had access to such knowledge, yet the record shows that it had actually hired at least four of the former managers before it even held the job fair. How many former managers were interviewed, where, and by whom is a mystery.²⁵ Buffam, Chase, and Barbieri all denied knowledge of such facts, and the lack of records of such interviews, and Respondent's failure to call any of its managers and former managers who participated in such interviews to testify, left the record devoid of such important information. Secondly, not keeping such records could have been helpful to its intended defense that it lacked the opportunity to interview the Hotel's work force. However, that defense that crumbled when Daly testified.

Respondent went to extraordinary lengths at trial to assert that it lacked significant access to the Hotel prior to its purchase, and to information about employee Union sympathies and activities. As noted above, it had made assertions in its position statements that it lacked access to employees and was unwelcome at the Hotel, which proved to be completely untrue. These fictitious claims of lack of access were obviously extremely important to Respondent. However important those fictions were, however, Respondent was willing to sacrifice its credibility with regard to the claimed lack of access when confronted with the possibility that another of its key rationales for holding the job fair was placed at risk. That rationale concerned the notion that Respondent never considered operating the Hotel as a Four Points, and began operating almost immediately as a Sheraton. In its efforts to keep that notion intact, Respondent exposed a lack of credibility.

When confronted with a document from Chase in July 1996, which on its face appeared to show detailed knowledge of the renovation needs of the facility, Buffam dismissed it as "SWAG," which he defined as a "Silly Wild Ass Guess." He unconvincingly asserted that Chase didn't have, and didn't need, significant access to the Hotel to prepare the estimates

²⁵ Discriminatee Larry Schwartz had been interviewed for a manager position by someone prior to the job fair. Barbieri admitted that someone interviewed former Manager Kelly Zampano prior to the job fair.

therein. He claimed the estimates were based on a PIP given to the Hotel for renovations needed to remain a Four Points hotel, and which had been given to Respondent by the Trustee.

Chase testified that after he visited the Hotel in February, he began putting together estimates for renovations. Chase, while characterizing the SWAG as a "Scientific Wild Ass Guess," testified that it was based on the observations he had made in the limited access he had had to the Hotel, which he had just testified about, and which concerned his visit to the Hotel in February. He testified that it did not take a detailed analysis of the condition of the property to come with the SWAG: "This is something that I can put together. Usually at this level because this is very preliminary, I can put something together like this in about a half a day. I can do it in the office." However, in his second day of direct testimony, Respondent introduced through Chase a remarkable document, the actual PIP from Sheraton Four Points which the Hotel's general manager, Richard Bair, had given to Respondent, with an accompanying letter. Respondent had failed to produce that document pursuant to General Counsel's subpoena, and Respondent's counsel admitted that she made a conscious decision not to produce it, claiming she did not think it was covered, although it clearly was. The letter accompanying the PIP was addressed to Brian Woodhouse, and it spoke about how Bair looked forward to meeting with him on July 12. As noted above, Chase then did an actual walk-through of the property with either Bair or Daly, or both, and observed the condition of each area in the Hotel. Based on his observations, he marked up the PIP with his estimates as to what would be needed in each area. Contrary to his earlier testimony, he now admitted that the SWAG was actually based on that walk-through, and that the estimates given for the renovations needed for the Four Points were being given as his professional advice to the Trustee. Those admissions contradicted both his earlier testimony, as well as Buffam's. The non-production of the PIP and the letter appears to be part of Respondent's efforts to pretend it lacked access to the Hotel. It is particularly noteworthy that the walk-through by Chase in July 1996 occurred right about the time when Union activities were particularly heating up, and Daly felt compelled to call the police to restrict the public protests and picketing.

In explaining why she was introducing the Sheraton Four Points PIP at trial, Respondent's counsel explained "quite frankly, this is a document that did not become relevant until we realized that there was an error in the earlier documents that was purporting to be Four Points." Why did Respondent feel compelled to bring to light and introduce a document previously undisclosed, and introduce testimony contradicting prior testimony? What was so significant about the perceived "error" that in effect, Respondent impeached its own witnesses on a point that they had striven to make, that Respondent lacked access and had little first-hand knowledge about the Hotel? The answer to those questions lies in the explanation given by Respondent at trial for its decision to hold a job fair, and not interview the existing work force as it normally does.

The logic of its explanation at trial was that due to the strict financial requirements of its purchase, and concomitant timetable for repaying loans, it had no choice but to reposition the Hotel, and had no choice but to hold a job fair if it was repositioning. Respondent went to great lengths to establish that it always intended to operate the Hotel as an upscale hotel if it purchased it, and went to extraordinary lengths to wipe away anything that might indicate that it actually considered operating the Hotel as a Four Points. Respondent thus became extremely concerned over the introduction of a document which Chase signed on January 24, 1997, which on its face was a list of required renovations for the Four Points Hotel. Internally the document states: "The following is a List of Required Renovation which must be completed as part of the Change of Ownership process. The work must be completed by November 15, 1997." Further, "All of Four Points Hotels mandatory identity items must be in place throughout the facility and operating standards for Four Points Hotels must be implemented as per the Four Points Operating Standards Manual." When Buffam was shown the document, he identified it as "the Four Points list," and specifically denied that it was the list required by Sheraton to be a full-service, first-class Sheraton Hotel. He testified:

[T]his is a document that was generated by Sheraton at a time when they probably weren't entirely sure what we were going to do, whether we were going to become an upscale, full-service property and have the Sheraton flag? Whether we were going to become an Omni Hotel, or a

Marriott Hotel, or a Hilton Hotel? But they are saying in this document, if you want to remain a Four Points hotel and you want us to approve an application from you to be a Four Points Hotel, this is what you need to do.

He attributed the document to "some of the confusion on the Sheraton side of things." Buffam was adamant that Respondent never sought nor applied for a license agreement to be a Four Points, although he admitted that Respondent actually operated as a Four Points, and claimed that it did so without a license. He testified that Respondent was able to operate as a Four Points because, "We had permission, by virtue of their having received our application for a Sheraton hotel franchise, and their having provided us with a franchise agreement for Sheraton that said until you become a Sheraton, you've got to continue to operate as a Four Points."²⁶

When Respondent called Chase to testify and first questioned him about the document, he too identified it as a list of required renovations of Four Points. Respondent had him describe the differences in detail between it and required renovations to become a full-service Sheraton which Sheraton had provided in October 1996. He testified that Respondent never contemplated performing the renovations required in the document to be a Four Points:

We never had a variance in our, or at least my expectation that this property was going to be a upscale full service product. So this document, or this consideration from [the Sheraton Four Points inspection] was a consideration or, as a identification of their needs to be a Four Points if we chose to be that. My standpoint that would not be a consideration. The only consideration would be for a upscale product. If Sheraton wasn't available to us, or it they would [not] flag us as a Sheraton, I had an agreement in the bag with Crowne Plaza. And I would have gone with them as first-class flag. But I would not have kept this property at mid-market product.

When Chase continued his direct testimony 5 days later, he now claimed that "this particular Four Points document is not Four Points requirement." He then described that he had mistakenly signed the document on January 24, 1997, because the first couple of pages were similar to the full-service Sheraton requirements set forth in the October document, and the signature page on it mistakenly had the signature page of that October document. He testified that he signed it because he was in a hurry, and that when Buffam saw it he indicated to Chase that it was "not something we're going to rush because we're not doing anything else." Buffam asked him if he had realized "this is a Four Points?" and Chase said he hadn't. Therefore, it was not returned to Sheraton with Chase's signature because, Chase testified: "We only had one option available to us with Sheraton, and that was for us to do an upscale full-service Sheraton."

Respondent then had Chase go through the January document, and show that it was not even what it purported to be, an improvement plan to remain a Four Points, although Buffam had already identified it as such. It was precisely at that point in Chase's testimony that Respondent then introduced the Sheraton Four Points PIP (R. Exh. 21) in order for Chase to show the January document was not a Four Points required renovation list. Respondent never did explain at trial what the January document actually was, since Respondent's witnesses had already pointed out that it differed from a full-service Sheraton PIP (GC Exh. 167), and now was claiming it was not really a Four Points PIP. What was it then? Why would Sheraton be sending such a document to Respondent?²⁷ Whatever the document meant to be, it is unmis-

²⁶ Curiously, Respondent actually filed an application for a franchise agreement in April 1998, well over a year after it commenced operations.

²⁷ Chase later claimed that the January document was actually a renovation list for a "repositioned" hotel, despite his detailed earlier testimony to the contrary. This change in testimony again calls into question the credibility of Respondent's witnesses.

takably clear that Respondent's concern at trial was to eliminate the slightest notion that operating as a Four Points was ever an option. Respondent became rather desperate to explain away the fact that Chase actually executed the document on January 24, 1997, 4 days before the job fair began. Respondent was so concerned that it introduced the Four Points PIP, thus impeaching the prior testimony of both Buffam and Chase concerning the origin of Chase's "SWAG." It was so concerned with maintaining the notion that it never even considered operating the Hotel as a Four Points that it was willing to let the fiction that it lacked access to the property, and was not welcome at the property, take a serious blow.

The reason for its concern is clear—Respondent's defense now hinged entirely on the notion that for economic reasons it had no realistic choice but to hold a job fair. Buffam had admitted at trial that the closure of the Hotel had not been a factor in the decision to hold the job fair, and testified that Respondent would have held it anyway. Respondent was worried at the mere suggestion that it might continue to operate as a Four Points, and impeached its own witnesses to dispel such a thought.

Respondent never attempted to explain the falsehoods set forth in the position statements. During the investigation, Respondent took the position that it was forced to hold a job fair because, in part, the Hotel had closed and Respondent had not been allowed access to the facility to interview employees. At trial Respondent took the position that it declined Daly's invitation to interview the Hotel's employees at the Hotel prior to its closure because it intended to hold the job fair anyway. Respondent had come full circle in its explanations.

Respondent's inability to adequately explain why it closed down the Hotel was rooted in the simple fact that there is no evidence in the record showing that any hotel ever shut down when it could have kept operations going in order to hold a job fair. Even its own expert, Daniel Mount, testified that he was unaware of any hotel ever being kept closed in order to hire a new work force. Moreover, he admitted that he never advocated, and never would, coming into a hotel, terminating employees, and shutting it down in order to hire new work force, "because that would be difficult to transition into." Its other expert, Phillip Fortunato, admitted in his experience that Hilton had never let go of the existing work force when Hilton took over an existing hotel, although they did lay off a number of managers when they took over. Finally, its other expert, William Long, also testified that he was unaware of any hotel shutting down in order to hire a new work force, and he never advocated that it should be done.

Respondent's expert witnesses in effect corroborated Laura Moye's un rebutted testimony that industry practice is to hire most, if not all, of the existing work force when a hotel is sold or transferred. Thus, neither industry practice nor Respondent's own past practice support its decision to shut down the Hotel, and keep shut down for a month, in order to hold the job fair, and then take the time to train the new work force.

The record is clear that it was Respondent who decided to close the Hotel, and that Daly did everything possible to prevent that decision. Daly in fact went to extraordinary lengths to accommodate Respondent's needs, and to help it maintain steady operations. It was Respondent who proposed to Prudential that the employees be let go and given WARN notices. Respondent even asked to review the WARN notices before they were issued. Respondent never denied that it misled Daly into believing that it was closing the Hotel in order to do renovations, but that was not true. Respondent in fact only did a small amount of renovations during the shutdown. From the time Respondent first brought Daly to Respondent's corporate office in Shelton to anoint him as the "Grand Marshall" of the transition, and through the transition itself from the Trustee to Respondent, Respondent treated Daly with contempt, and manipulated him into cooperating with it. Even during the summer Daly cooperated with the Prudential and gave Respondent the inside advantage for any renovation work being planned. Daly escorted all potential new franchisors that Respondent was considering. Daly sought to help Respondent in every way, yet Respondent continued to treat Daly with contempt at trial by attempting to portray him as manipulative, self-seeking and unstable. However, I find that Daly continued to cooperate in every way with the transition, including making the Hotel available for Respondent's own job fair.

When Respondent received the unfair labor practice charge in this case it misled the Region during the investigation by claiming that it had not been welcome at the property prior to its closure, and that it had no access to the employees there.

At trial Respondent once again tried to maintain the fiction that it lacked significant access to the Hotel prior to its purchase of it, and lacked significant knowledge of the Hotel's opera-

tions and conditions. It was willing to risk the credibility of those claims because it wanted to maintain the notion that it had no economic choice but to operate as a full-service Sheraton, and that it needed a different work force to accomplish its goals. It purportedly had no choice but to break with standard industry practice, and its own past practice, and shut down the Hotel to hire a new work force. Yet even on this claim it could point to nothing concrete which could justify its rejection of standard industry practice. On the contrary, the decision made no economic sense. Buffam admitted that Respondent did not expect to finish the renovations required to be a full-service Sheraton until the fall of 1997. He further admitted that any period of significant renovations such as the renovation done at the Hotel causes "customer dissatisfaction with the amount of commotion going on at the hotel." He admitted that customer indexes showing satisfaction with the Hotel had risen only after the renovations were complete. Chase also described how Respondent's operation of the Hotel only improved after the first 6 months after trying to "dig out" of the initial opening. Barbieri's testimony made clear that Respondent expected that the first 6 months in particular would be very difficult and would lead to high turnover. She testified that two factors in particular impact on turnover:

An opening is a very hard process. There's a lot of hours. There's a lot of business fluctuations. There's work and then there's not work. There's trainings. There's a million things going on and there's getting used to the guests and we probably in an opening I would say 60 to 70 percent of the management team is gone in the first six months because the managers have burned out from the opening and an opening is very often traumatic on the line staff because if the managers are under so much pressure it all flows down. A renovation if very similar. A renovation process is a relatively difficult time for staff. . . . Not only do you have guests complaining on a more regular basis because of the renovation, the amount of work brought about by a renovation is tough when you have an opening. For a renovation it's really tough. To not expect turnover would be foolish. It's something that you just have to expect under those types of circumstances.

Moreover, even under normal circumstances turnover is high in the industry. Thus one would expect that Respondent would put a premium upon competence and stability in such a highly stressful situation. As will be developed below, Respondent's job fair, and its hiring of a new work force, led precisely to results so readily foreseeable, and the turnover rates of the newly hired work force was staggering. Ironically, the turnover rate of the small group of former employees who were hired was much better than that of the strangers which Respondent hired.

Respondent's decision to shut down the Hotel, hold a job fair and undergo weeks of training had significant costs to Respondent. Not only did Respondent have to disrupt operations elsewhere in the country by flying in managers and employees to conduct the job fair and training, and pay the Trustee \$8000 to lease the Hotel the week of January 28, 1997, but more significantly, every day it was shut down was a day the Hotel was losing money. As Buffam described in detail, the key expense in a hotel is the capital cost and debt service. Respondent's goal is to increase the net operating income to the point where it could refinance with a lower cap rate. Respondent, of course, was already bearing the capital costs from the moment it took over the Hotel. Thus, each day it was closed, and was not making any net operating income, was a day that it was losing money. Furthermore, and even more significant, Respondent was jeopardizing its own operation of the Hotel by risking alienation of its customer base by the shutdown. The evidence in the record clearly showed that customers were upset by the shutdown and transition. Indeed, the obvious reason Buffam misled Daly for months about his actual plans for the Hotel was because he needed Daly's cooperation so as not to alienate that customer base. Moreover, when you know that renovations create a high degree of customer dissatisfaction, why would you bring in a totally inexperienced work force to such a highly stressful situation which could only cause greater customer aggravation? The prospect of high

turnover among an inexperienced staff would, under normal circumstances, lead to efforts to promote stability and continuity. However, in this situation, “the tail was wagging the dog,” and Respondent defied its own successful past practice, standard industry practice, and simple common sense by choosing to shut the Hotel down, and conducting the job fair.

The final fiction that Respondent sought to maintain was that it was operating at Sheraton service levels from the moment it commenced operations. Buffam testified:

From the beginning the management and the staff operated the property according to the Sheraton standards from a staffing standpoint, from a service level standpoint, from a food and beverage standpoint. That was implemented immediately subject obviously to the normal training period of time for new staff.

Chase also claimed that Respondent operated at Sheraton upscale standards from the day Respondent took over. However, earlier Buffam had testified that the “property has been operated as a Sheraton,” according to Sheraton standards, since the renovation was completed, which was in late 1997. Buffam claimed that only corporate problems on the Sheraton side of the relationship caused a delay in getting formal approval. In particular, there was a dispute over a demand for new bathtubs. Otherwise, according to Buffam, Respondent had been conditionally approved as a Sheraton when the renovations were completed in the fall of 1997.

In order to maintain this last fiction, Respondent was forced to deny its own records, and to contradict the testimony of the few current managers who were called to testify. In the summer of 1998, General Manager Robert Cappetta escorted representatives of Sheraton on an inspection of the property. He then wrote a memo on June 11 to Bryan Woodhouse going into great detail about all the renovations required by Sheraton that had not been completed, which included far more than the bathtubs cited by Buffam. The following week, on June 16, Sheraton’s representative Bonnano wrote a letter to Chase confirming a telephone conversation that he had with Chase the previous day, and which outlined again all the renovations still needed. Chase then wrote a memo to Cappetta and Woodhouse in which he requested immediate action on their part. He attached Bonnano’s letter to the memo, and informed Cappetta and Woodhouse that Bonnano “will recommend the conversion to a Sheraton Hotel once we show him a committed time frame for 1998.” Moreover, he requested that they “Please have the above items to me *no later than June 30, 1998*. My goal is to have a September 1 1998 conversion date and this will give me enough time to prepare and sign the schedule and attachment that needs to be returned to James Bonnano.” Finally, on September 29, Ken August sent Chase a memo attaching another list of items that “require immediate attention when repositioning the property from a ‘Four Points to a full service Sheraton.’ It is my intent to fulfill our 1998 obligations on a priority basis.”

Remarkably, when Buffam was presented with Cappetta’s memo indicating the renovations still needed, Buffam simply denied the plain words of the document: “That is the way it was expressed in this memo. But that’s not the way it was.” Chase testified as well that Cappetta simply did not know what he was talking about: “I believe he believed that, yes,” but asserted it was not a true statement. When confronted with its own documents, as well as correspondence from Sheraton showing that Sheraton had not approved Respondent and that Respondent was still operating as a Four Points, Buffam and Chase simply say the documents are wrong. Why then would Chase write a memo to his managers demanding immediate action? Why would he put in his memo that his goal was to have a September 1998 conversion date, and therefore he wanted his managers to address the items listed? Why would August write a memo to Chase talking about what was needed to be done in order to reposition if it had already repositioned?

Respondent’s false claim to being a full-service Sheraton was exposed when the General Counsel called Respondent’s director of human resources, Gwenneth Henderson, to testify. Henderson made it plain that Respondent had not yet operated at full-service Sheraton standards. She specifically testified that Respondent still needed to fill several positions to fulfill its Sheraton requirements.

Respondent and Sheraton did not, in fact, sign a franchise agreement until January 15, 1999. That agreement provided that February 1, 1999, was the opening date as a Sheraton. The record evidence is thus overwhelming that Respondent continued to operate as a Four Points into 1999.

Respondent’s shifting reasons for refusing to engage in its normal practice of interviewing the existing work force when it takes over a hotel simply does not stand up to either the facts, past practice, industry practice, or common sense. Moreover, its actual conduct of the job fair and its subsequent hiring practice only confirm Daly’s version of his conversation with Buffam—Respondent did not intend to exceed certain parameters in its hiring, i.e., it would not, in any circumstances, hire a majority of its employees from the former work force. The job fair, directed by Barbieri under the watchful eye of Respondent’s counsel, Alison Hurewitz, was designed to assure control of the hiring process so those parameters would not be exceeded.

C. Conduct of the Waterbury Hotel Job Fair

1. Barbieri’s creation of the job fair documents

Respondent’s bad faith in utilizing the job fair for the Waterbury facility is apparent from a review of the “screening” process Barbieri herself employed to weed out questions in the interview process which conceivably might have given the hotel employees a reasonable chance for hire. Her careful and deliberate “de-selection” of interview questions that three of her top human resource managers in the country had spent months compiling for her dramatically reveal Respondent’s unlawful motive.

Barbieri testified that in December 1995 she commissioned a group of her experienced HR directors and managers to form a committee to develop a set of “standardized screening and interviewing questions for all hourly/supervisory positions.” The committee, composed of senior HR officials (who actually worked in hotels) Laura Klemme, Melissa Oates, and Marcy Conti, worked on this project throughout the year, creating a lengthy (35 pages of questions) manual entitled “Managers Reference Guide to Applicant Screening and Interviewing” for delivery of the final product to Barbieri in late 1996.²⁸

In January 1997, Barbieri began the process of weeding out from the “Managers guide” her experts had created practically every single question that revealed an applicant’s previous work experience in the field. For example, her managers had created the set of seven questions for the “front desk clerk” position, five of which touch on experience in some form or another. Barbieri ignored all five experience-related and chose to put only one question on the Waterbury “Applicant Interview Evaluation” for Express Service Agent: “What does hospitality mean to you?”

With respect to the “PBX Operator’s” duties (which were encompassed by the Guest Relations Agent (GRA) position) the manual (R. Exh. 15) revealed that at least four of the five questions dealt with experience; Barbieri ignored them all. Experience-based questions for the “Reservations Agent” position, such as seemingly critical ones in the areas of telephone and reservation experience, were ignored. Virtually every experience-based question in the housekeeping department was deleted, as Barbieri adopted just 2 of the 27 questions the managers had recommended (compare R. Exh. 18(d) with R. Exh. 15, questions for “Room Attendant, Houseperson, Housekeeping Supervisor, and Laundry Attendant.”

Barbieri even took no chances with the “Utility” position (the dishwasher), by deleting two of the three top questions the managers had devised for this position: “Have you ever operated a commercial dish machine before?” and “Do you know how hot the water should be for proper washing of dishes?”

Thus Barbieri, who admitted that experience-based questions would have given the predecessor employees an advantage in the hiring process because the Hotel was the largest in the area, ensured against this outcome by carefully extracting experience-based questions and substituting generalized ones concerning “motivation” and “hospitality.” Barbieri claimed that she considered motivation (“what motivates you?”) a very important question and the hospitality question “extremely important.” In fact, while deleting most experience-based questions (except in certain obvious areas in which she admitted required experience, such as the bartenders, cooks, and engineering positions) Barbieri placed greater emphasis or weight on the non-experienced ones, such as the “motivation” ones.

The applicant screening form which Barbieri prepared for the job fair provides predecessor employees with virtually no advantage for their past service with the predecessor employer. The form evaluates the existence of negative factors, i.e., poor composure, poor grooming, poor

²⁸ Barbieri testified that Klemme, Conti, and Oates had all worked in their respective positions for “a number of years.”

communication skills, etc., rather than the reality of demonstrated ability to perform the job skills at issue.

2. Directions to screeners and interviewers

The screeners and interviewers utilized by Respondent at the job fair consisted of various managers from other New Castle hotel properties across the country. Respondent offered the testimony of just one of the many screeners from the job fair, Mary Sarisky, at the time a human resources manager at Respondent's Guthrie Inn in Sarah, Pennsylvania. The written instructions to screeners and interviewers noted that applicants could include individuals who were previously employed at this location by another employer, and that screeners and interviewers should give these applicants "the same consideration as all other applicants."

The screeners gathered the day before the job fair began at Respondent's corporate headquarters in Shelton, Connecticut and met with Hurewitz and Barbieri.²⁹ They reviewed the applicant screening forms and were given another packet of instructions. In this packet of instructions, screeners were instructed to "Document, Document, Document," the reason why an applicant was not passed on for further interviewing. None of Respondent's witnesses were able to provide cogent explanation as to why Respondent was so concerned with documenting negative factors and reasons why applicants were not passed on. Indeed, both Barbieri and Chase denied authoring the document, which is particularly odd since Barbieri spent so much time putting the documents for the job fair together.

Various forms and instructions were reviewed at the meeting in Shelton, Connecticut, the day before the job fair. Barbieri distributed a list of different job classifications available at the Hotel with a brief description of each, the number of the full-time and part-time positions needed for each job classification and the rate of pay for each job classification, to be used by the screeners to "have an idea of what the positions were and how many needed to fill." The document which listed the target hire numbers and pay rates lists 130 jobs to fill for the job fair. As seen below, Respondent fell far short of that goal.

3. The job fair process

With respect to the mechanics of the job fair conducted on January 28, 29, and 30, individuals were directed to the large ballroom at the Hotel, where they were greeted by New Castle representatives and provided with an application for employment. The ballroom was set up with tables for individuals completing applications, and chairs for those who had finished the applications to wait to be called for a screening interview. Upon completion of the application, applicants returned to the greeting table where the greeters reviewed their application and then provided the applicant with a number. Screeners would then call the number and meet with the applicant for a screening, during which the applicant screening form was completed.

The applicant screening form for each applicant required a narrative answer to eight specific questions: employment history and a review of employment gaps, the position applied for, salary expectations, availability (hours, days, shifts), physical restrictions, transportation difficulties, why the applicant is leaving a current job, and why the applicant is interested in working at the Waterbury Hotel. The applicant screening form then listed 11 negative factors which could be checked by the screener. The 11 factors were: unable to perform essential job functions, poor grooming/hygiene/appearance, does not have hospitality understanding or have interest in serving guest, lack of interest in job as described, poor composure, pay not acceptable, incompatible hours, poor job stability, lack of transportation, poor communication skills, and questionable motivation. After the screening interview is completed, the screener may check any of the negative criteria in the evaluation section of the Form, and write any additional comments. The screener then decided whether or not to pass an applicant on for a first interview. If an applicant was rejected, the screener, as instructed by Respondent, would then document the reasons why an applicant was not hired. Screeners then placed the applicant's application and screening form in boxes along a table in the screening area. The boxes in-

cluded a rejection box and separate boxes for different departments in the Hotel for the next, so-called "first" interview.

Applicants who successfully completed a screening were then directed to a "first" interview. The interviewer then completed an "Application Interview Evaluation" form, which varied slightly by position. All of these forms asked identical questions under the heading of customer service orientation: "What does hospitality mean to you?" under the heading of customer service experience: "Give me an example of a time in which you went beyond the call of duty," and under the heading of flexibility: "How flexible are you in scheduling?"

Interviews were conducted in accordance with questions set forth on the interview forms, forms which had been specifically developed by Barbieri for each available position at the Hotel. Every applicant for the same position was purportedly asked the same set of questions, and the responses were supposed to be recorded on the respective forms. At the conclusion of the interview, applicants were advised that they would be telephoned for a second interview if the Hotel was interested. The interviewers then completed a form indicating whether they recommended the applicant for a second interview, or whether they should be held for future consideration, referred to another department, or removed from consideration. The interviewer then placed the applicant's various forms on the corner of the table; the completed forms then would be picked up and separated by Barbieri into two general categories: those who needed to have a second interview arranged, and those who were rejected.

Applicants successfully completing the first interview were called back for second (and sometimes third) interviews at the Hotel. At the second and third interviews the same application interview evaluation form was used. Upon completion of the interview process, the references of successful applicants were checked. Preemployment phone reference check forms were completed for each reference call made for each applicant. References were asked to provide their opinion with regard to an applicant's attendance record, cooperation, initiative, productivity, job knowledge, reliability, guest service skills, and work quality maintained by the applicants.

According to Mary Sarisky, a screener at the job fair who also performed phone reference checks, applicants receiving two positive references from different employers were then offered positions at the Hotel. Also, upon discovering that many Connecticut-area employers refused to give detailed references and merely confirmed employment and eligibility for rehire, Barbieri instructed reference checkers that one positive and one confirmation of employment would be suitable to offer an applicant employment at the Hotel. However, if an applicant received one negative reference, the applicant was allegedly no longer considered for employment.

Throughout the 3-day job fair, Marian Barbieri, Respondent's vice president of human resources at the corporate level, was in charge. Also present at the job fair was Respondent's labor counsel, Alison Hurewitz. During the job fair, Barbieri would collect the screening forms, interview forms and applications of all the applicants passing through the job fair process. Barbieri would review the forms and input the names of all the applicants by job classification into a spread sheet on the computer. Barbieri would then document in the computer the negative reasons why an applicant was not passed on in the interview process. For those who were passed, Barbieri merely indicated that the applicant was passed on in the process, but would not document any negatives noted for those passed on or any positives noted for any applicant. The "job fair log" was maintained by Barbieri continuously throughout the job fair process. At the end of each job fair day, Barbieri, Hurewitz, the executive committee for the Waterbury Hotel (the managers and department heads), and screeners and interviewers would meet over dinner and discuss results and progress of that day's job fair and review the job fair log.

D. Inconsistent Application of the Hiring Process and Criteria to Predecessor Employee Applicants

1. Introduction

The complaint, as amended at hearing, alleges 65 predecessor employee discriminatees. Of these 65 discriminatee applicants, only 19 made it past Respondent's first barrier to employ-

²⁹ This is similar to the training meeting Sirisky attended for Respondent's Halifax Nova Scotia job fair. In this regard, Respondent also arranged for its labor counsel Jay Krupin (named partner in Hurewitz' law firm) to oversee that instruction process. There was also a union involved at the Halifax property. Krupin's law firm also attended the Cherry Hill job fair, in which a number of NLRB charges emanated in 1995, and a complaint issued against Respondent on May 19, 1996.

ment, the screening interview.³⁰ In most cases, employees who had been working at the Hotel for years were summarily disqualified based on a 5-minute screening interview and ushered out of the Hotel. Of the 19 that made it past the initial 5-minute screening, seven (7) were rejected after the first interview, seven (7) were rejected after the second interview, 31 one (1) was rejected after a third interview³² and four (4) were rejected after the last step of the hiring process, the phone reference check. As can be expected, most of the former employees were anxious and eager to apply to get their jobs back at the Hotel, and most went to Respondent's job fair on the first day, January 28, 1997, and were waiting right when the job fair doors opened. Unfortunately for these employees, many of whom who had worked at the Hotel for years, almost all of them were rejected for employment after Respondent's 5-minute screening. Thus, 55 of the discriminatees applied for their jobs back on the first day of the job fair, 39 of them were screened out and "shown the door."

Looking closely then at the screening process, the evidence reveals that the factors leading to disqualification according to Respondent were inconsistently applied by Respondent's screeners to disqualify predecessor applicants. In this regard, predecessor applicants were disqualified and not passed on for further interviewing for the eleven negative factors listed at the bottom, while the stranger applicants would be passed on despite the presence of the same negative factors. The inconsistent application of the hiring process only confirms the inference already drawn—the purpose of the job fair was to avoid hiring a majority of the predecessor employees.

The reasons advanced by Respondent for not hiring predecessor employees include: salary or pay not acceptable; hours or lack of flexibility; questionable motivation or just needed the money; no hospitality understanding or interest in serving guests; and lack of interest in the job as described. However, the very same criticisms which resulted in the predecessor employees not being hired are noted in some of the interview documents for certain of those outside applicants who were, in fact, hired.

With regard to this aspect of the job fair, the Respondent relies solely on the hearsay notions made on the screening and interview forms. Respondent called only *one* person from the "task force" it assembled to conduct the job fair, and yet asked that witness no specific questions with regard to the actual applicants Sarisky did screen. In this regard, Sarisky testified on direct about a different job fair, hypothetical outcomes to hypothetical applicants and general broad unspecified instructions given to her with regard to her conduct at the Waterbury job fair. When confronted on cross-examination with the inconsistent application of negative criteria, Sarisky was unable to explain why she treated predecessor applicants differently from stranger applicants.

The screening process was essentially a deselection process. The screen is, at bottom, subjective and subject to corruption. The evidence reveals that screens overstated or distorted what predecessor employee applicants said to the screeners.

2. Known union activities of predecessor employees

While representing the employees at the hotel throughout the years, Moye had developed a sense of who supported the Union at the hotel and who did not: "It was very clear." Her testimony as to the union sympathies and activities of the employees was uncontradicted, as Respondent chose not to call any employee witnesses.

Moye testified that several J.L.M. employees were active in the Union's negotiating committee (Steve Ruegg, Zosh Flammia, Candy Vadnais, Eliza Svehlak, the Echeandia brothers, Dan Peszek, and Nelson Buxton), that employees regularly visited the union trailer set up outside the hotel in January 1997, that she recorded their visits, and that she even completed job

applications for six such individuals (Ruegg, Svehlak, Blake, Nicholson, Flammia, and D'Agostino) at the trailer and sent those applications to Respondent. As previously noted, Moye testified that Flammia was an extremely active union supporter, and was "far and away the most helpful" in working with the Union to seek the aid of the community in the efforts to secure the jobs for J.L.M. employees.

Moye was also well aware of which employees, and there were many after the years of contention the union issue had generated, had no use for the union. She recalled that Flaherty, hired by Respondent as a cook, was known as being anti-union. Gugliotti, also hired as a cook, was not a known union supporter. Greene began dating a manager and lost any affection for the Union. Brian Griffin, who filed the decertification petition in 1996, was hired, the only predecessor chosen from the engineering department.

James Mullen, hired in the utility position, did not support the Union. In the housekeeping department, none of the pro-union employees, such as Svehlak, Murgatroy, Vadnais, or Nicholson were hired, while Foote, Davilla, Gagnon, and Hall, none of whom supported the Union, were given job offers by Respondent. From the restaurant, Respondent hired five employees Moye recalled as being antiunion: Breton, Carrano, Clark, Dostaler, and Nelson. Flammia, in banquets, described by Moye as a "phenomenal leader" was not hired.³³ In the kitchen, Steve Ruegg, Harold Luna, Carmella Feliciano, and the Echeandia brothers were known union leaders; none were hired. The kitchen's administrative assistant, Dottie Onofrio, was known to be antiunion; she was hired.

Moye recalled that Nelson Buxton, who had written a letter to the editor which was published in the local newspaper in support of the Union, became a very active union supporter and eventually joined the organizing committee; he was not hired. Marilyn Rossi, an experienced "PBX operator," supported the Union and was not hired. Tom Oakley, a veteran banquet captain and strong union supporter, was not hired.

Moreover, as previously noted, in the last few weeks prior to the closing the Union maintained a trailer at the hotel for communicating with the employees. Moye testified that the Union trailer was located about 50 feet behind the hotel for about 17 days, beginning on January 9, 1997, and that she and her fellow union organizers recorded most of the names of and numbers of visits by employees. Moye recalled that generally speaking only the pronoun employees took the time and trouble to request from their supervisors the extra 5 or 10 minutes permission to visit the trailer. Moye concluded from her log of trailer visits that only 4 of the 40 employees who visited the trailer received jobs from Respondent, and that these four had only visited the trailer once: Davila, Gagnon, Matuzcak, and Tranberg.

3. The testimony of the witnesses

a. *Eliza Svehlak—housekeeping*

Svehlak had been employed at the Hotel for 12 years in the laundry department. During that time, Svehlak was a staunch and outstanding supporter of the Union's first organizing campaign at the Hotel. In 1990, Svehlak testified in an unfair labor practice proceeding regarding her own termination and was reinstated to the Hotel in 1995. Of the six discriminatees in that proceeding, Svehlak was the only employee to return to work at the Hotel. Svehlak participated in a 1995 election as an observer on behalf of the Union. Svehlak continued her involvement with the Union as member of the Union negotiation committee and by providing testimony in a Board compliance proceeding and in support of another unfair labor practice charge in late 1996. Svehlak regularly wore her union button or pin to work until the closing of the Hotel on January 27, 1997. As a laundry aide, Svehlak's duties entailed washing, drying, ironing, folding, and stocking all the linens in the Hotel.

On January 27, along with most of the predecessor employee applicants, Svehlak applied to get her job back on the first day of the job fair held by Respondent. At the screening interview, the screener described that Respondent's housekeeping position included cleaning rooms and houseman duties in addition to working in the laundry department. Svehlak told the screener that this was fine because she had experience in all departments of housekeeping. In fact, on

³⁰ One discriminatee, Carmelo Feliciano, only applied at the job fair and was not screened. Another discriminatee, Luis Ocasio, applied for employment with Respondent on April 23, 1997.

³¹ One discriminatee, Kevin Anderson, did not show up for his second interview. After the second interview of discriminatee Larry Schwartz the interviewer recommended a reference check, but no reference check was done and Schwartz was not offered a position.

³² After discriminatee Vera Jackson's third interview, the interviewer recommended a reference check be performed, however, no reference check was done and Jackson was not offered a position.

³³ Flammia testified and was one of the most outgoing and personable people I have met. I find it incredible that this person was not considered "hospitality" oriented or motivated by Respondent's screeners.

cross-examination, Svehlak testified at length about her experience performing housekeeping duties in addition to her regular laundry duties. Svehlak also told the screener that the wage rate the screener described, \$6 an hour, would be fine. Also, Svehlak indicated to the screener that she was available to work at any time, had no problem with transportation to and from work, and was able to perform any lifting requirements in the job. Svehlak admitted that she was a little nervous at the screening interview, but still made eye contact with the screener and smiled.

The screener, Mary Sarisky, testified, but was unable to independently recall Svehlak or the reasons why she made certain notations. Sarisky's notations indicate that Svehlak was not passed on for a first interview for three reasons. First, the screener checked off, "pay not acceptable" as a reason for rejecting Svehlak. Svehlak testified, however, that she told the screener that Respondent's pay rate would be fine. Additionally, the screener's own notations indicate only what wage Svehlak previously received at the Hotel (which is also indicated on her application), and, in any event, Svehlak allegedly indicated that \$6 an hour was better than other hotels in the area.

Sarisky also indicated poor communication skills, however, Svehlak admitted that she was a little nervous at the screening, but still smiled and made eye contact with the screener. Had the screener spent some more time questioning Svehlak, she may have learned what Respondent's counsel learned on cross-examination, that Svehlak's interaction with guests was precisely the attitude Respondent was looking for. Svehlak testified she would readily greet guests in the hallways, knock politely on doors before entering the rooms to clean them, and when guests would ask for directions, Svehlak would escort guests to the location instead verbally giving directions or directing the guest to the front desk.

The screener also checked off "poor grooming" as a reason for rejecting Svehlak, however, Respondent offered no evidence that such was the case. While Sarisky was unable to verify her notes of the screen, Svehlak credibly testified that she was dressed neatly in a nice pair of pants, nice sweater and coat. Svehlak's uncontradicted testimony must be credited over a document—the screening form—that could not even be substantiated by the screener, Sarisky, during her testimony.

b. Melissa Gugliotti—bar attendant

Gugliotti worked at the Waterbury Sheraton Hotel for 2-1/2 years and a banquet waitress and bartender. During the last 2 months of her employment, Gugliotti was appointed by her manager, Kelly Zampano, to train other employees. Before working at the Waterbury Sheraton, Gugliotti had extensive experience as a waitress at the Southbury Radisson Hotel for 3 years as a banquet server, restaurant server, hostess bartender, and banquet captain. While working at the Waterbury Sheraton, Gugliotti was an active union member who attended rallies, meetings and visited the trailer set up outside the Hotel in January 1997.

Gugliotti applied for employment with New Castle at the job fair on January 28. Unlike most predecessor applicants, Gugliotti made it through the Respondent's screening and interview process. However, like most predecessor applicants, Respondent found a reason to disqualify Gugliotti in the last steps of the hiring process, the phone reference check. Interestingly enough, Respondent purports that Gugliotti was no longer considered for employment because of a negative reference from Zampano, despite the fact that at her second interview Gugliotti provided the interviewer with a glowing letter of recommendation from Zampano and despite the fact that shortly before the Hotel closed in January 1997, Zampano had assigned Gugliotti to train new employees.

c. Candida Cimino (Vadnais)—housekeeping

Employed at the Waterbury Sheraton Hotel for nearly 12 years in the laundry department, Vadnais also sought to get her job back after the closing of the Hotel by applying at the job fair held by Respondent. At the screening interview, Vadnais indicated that she previously worked in the laundry department of the Hotel. When the screener asked Vadnais if she was willing to learn other jobs, Vadnais testified that she replied that it would not be a problem because she liked working at the Hotel. The screener, however, checked off "lack of interest in job described" and disqualified Vadnais because "she did not seem interested in leaving laundry" when the screener explained that the laundry position included other duties. NOTE!!! Respondent will likely argue that Vadnais was not considered for future consideration based on the

screener's notations that Vadnais was not interested in the job as described. In contrast to the unauthenticated notations by the screener, Vadnais credibly testified that although she previously worked only in the laundry department, she was willing to learn other job duties because she liked working at the Hotel. Additionally, Vadnais had no transportation difficulties or scheduling restrictions.

d. Thomas Oakley—conference captain/food service agent

Oakley worked the Waterbury Sheraton for nearly 10 years. During that time, he worked his way up the ladder from dishwasher to busboy to a waiter. After working as a waiter in the restaurant for a year and a half, Oakley became a banquet waiter. Before the Hotel closed, Oakley had been recently promoted to the banquet captain position. Oakley also supported the Union by wearing a union button to work and visited the Union's trailer at the Hotel.

Oakley applied for reemployment at the Waterbury Hotel on January 28, 1997. Oakley went to the New Castle job fair with a fellow banquet server, Sharon Colangelo and after filling out his application sat together with Colangelo and Zosh Flammia, another former banquet employee. At his screening interview, in response to the screener's question as to whether it would be a problem for Oakley to get into work early, he told the screener that he took the bus, but knew other people that would be able to give him rides and that it would not be a problem for Oakley to get in early and had no restrictions on his ability to work any shift. When the screener asked Oakley why he wanted to work at the Hotel, Oakley told her that he had been working there for almost 10 years, enjoyed working at the Hotel and would like to continue to work there. Oakley provided the screener with four letters of recommendation from managers and supervisors of the Waterbury Sheraton. Respondent only considered Oakley for Respondent's conference captain position, despite the fact that Oakley expressed a willingness to also take a position as a waiter, which Respondent calls a food service agent. Interestingly, on his way out of the job fair, Oakley was identified by a manager from New Castle, Bob. Bob saw Oakley and Flammia in the hallway and he said to Flammia, "Are you still here?" and Oakley replied that Flammia was waiting for him. Bob then turned to Oakley and said, "Oh, you're Tom." Oakley could not figure out how Bob, a New Castle manager who did not interview him, could have known his name.

The screener's notations on the applicant screening form for Oakley do not reflect Oakley's responses. The screener noted that transportation and hours could be a problem, but does not note that Oakley told the screener that he knew a lot of people and getting in early would not be a problem. Further, although Oakley never missed work as a result of taking the bus or relying on others for transportation to work, the screener did not see fit to write down that he did not foresee any problem getting to and from work, which is the question number six on the screening form. Apparently, an applicant indicating that he had been working at the same hotel for nearly 10 years, enjoyed working at the Hotel and would like to continue to work there is not a positive indication that someone was motivated and enthusiastic about working at the Hotel. The screener, in fact, characterizes Oakley's response that he had been previously employed by the Hotel as a negative, instead of the fact that he was committed to working at the Hotel based on his length of service. The screener notes that he has "questionable motivation" and gave her the impression he was entitled to the job. Further, although not specifically indicated anywhere on the screening form, the screener added on for good measure, that Oakley had no hospitality understanding or interest in servicing a guest. Presumably, the fact that Oakley had made a living at serving guests and relying on the tips left by guests for nearly 10 years also indicated an lack of "hospitality understanding or interest in serving a guest."

Although the screener saw fit to reject Oakley as an applicant for employment at the Hotel, apparently he was just fine to hire as a temporary banquet server for the Hotel on a regular basis. Oakley was able to work at the Hotel again, as long as he did not have to go through any of New Castle's screeners to get hired. While working as a temporary employee at a banquet under the direction of Acting Banquet Manager Eileen Merritt, Oakley learned the real reason why he was not hired by New Castle. Oakley explained to Merritt that he attempted to reapply at the Hotel after the job fair on the recommendation of a Hotel employee, Kathleen Finnemore, who had recommended Oakley to Merritt, but that he did not get hired after filling out an application. Merritt replied, "I'm sorry, but we were told not to hire any of the old people back."

e. Deborah D'Agostino—housekeeping

D'Agostino was employed as a housekeeper at the Waterbury Sheraton Hotel for about 4 months prior to its closing. During that time, D'Agostino joined the Union and visited the Union's trailer. After the Hotel shut down, D'Agostino went to the job fair with Eliza Svehlak and applied for a job with Respondent. At the screening interview, D'Agostino was asked what job she was interested in, about available hours of work and if she had transportation. D'Agostino responded that she had no problems with transportation and would be available anytime, but that she preferred 9 a.m. to 5 p.m. The screener also asked D'Agostino why she wanted to work at the Hotel and D'Agostino responded that she wanted to work there, was a hard worker, and needed a job. D'Agostino also told the screener what wage rate she was making previously as a housekeeper at the Hotel. D'Agostino was rejected for dressing inappropriately. However, the screener did not elaborate on her manner of dress. D'Agostino testified that she wore clean presentable clothes that were appropriate.

f. Zosh Flammia—conference captain/food service agent

Flammia was employed by the Waterbury Sheraton from 1986 to 1997 in the positions of banquet server, banquet bartender, and banquet trainee[r]. Flammia was one of the original employees involved in organizing the Union in 1989 and in the Union's second organizing effort in 1995. Flammia served as an observer at the second election at the Waterbury Sheraton in June 1995. After the Union won that election, Flammia served on the Union's negotiating committee until the day the Hotel closed, working to obtain a severance package for the employees. She also campaigned to convince the new owner of the Hotel to retain the current employees. She met with the Mayor of Waterbury and the Alderman in an effort to urge the community to support the employees in their fight to retain their jobs.

Flammia attended the job fair on the first day and waited with about 30 fellow workers before the job fair opened. When Flammia met with a screener, the first thing the screener said was that Flammia was applying for too many jobs and that she should only apply for one.³⁴ Flammia had applied for Banquet captain, bartender and/or server. She told the screener that she had been at the Hotel for 10 years and that she was able to perform more than one job, but that she understood that she might have to start at the bottom and work her way up, and that she was willing to do that.

Flammia told the screener that she was available from 6 a.m. on, 7-days a week. The screener asked why she wanted to work for the Hotel and Flammia responded that she had been in the hospitality business for about 20 years, enjoyed working with the public and felt that she could be an asset to their company since she knew all the customers. The screener also asked about Flammia's rate of pay, and she told her that she was presently making \$10 to \$13 an hour, but that she was negotiable. The screener told Flammia that she was not really sure how much the new company would be paying banquets. This was patently false, since each screener was given a list of job classifications and wages for those jobs. Flammia also offered to work as a server in the restaurant. Before leaving, she handed the screener a packet with her resume, an introductory letter to Buffam, and some reference letters.

Flammia specifically denied on cross-examination stating that she told the screener that she wanted \$12 or more due to her longevity at the Hotel property, which the screener wrote on the screen form. Flammia credibly testified that Cappetta, general manager of the Hotel, was talking to applicants in the waiting area, and that she asked him about Respondent's new food service positions. Cappetta explained that in the beginning they would want to cross-train and that a banquet server would be expected to do a la carte (restaurant). When she asked him how the Hotel was going to pay banquet servers, Cappetta answered that he was not really sure.³⁵

According to screener's notes, Flammia was rejected because of "lack of interest in job as described" and for seeking a pay rate above Respondent's starting scale. Despite Flammia's

³⁴ This fact in and of itself is rather amazing, since Respondent spent a good bit of time at the hearing heralding the benefits of cross-training. Moreover, other employees applied for multiple positions, and Respondent pointed some applicants to jobs they had not themselves put on their application form.

³⁵ In fact, Respondent did know what the pay rate would be, but chose not to share this information with Flammia.

testimony that she told the screener she was willing to start in any position, work her way up, and make herself available from 6 a.m. on every day, the screener noted that Flammia gave her the "impression we should hire because she worked here before; feels she is entitled to job . . . doesn't see this as new challenge of opportunity—wants it because she feels comfortable with it; didn't seem real flexible in scheduling (a.m. vs. p.m.)." However, the screener's own notes reflect that Flammia's response to the question "why are you interested in working at this hotel?" was because it was "challenging, likes to work with public enjoys it."

g. Marilyn Rossi—front desk/guest relations agent

Rossi had been employed as a switchboard operator at the Waterbury Sheraton since October 1992. In this position, Rossi worked from 7 a.m. to 3 p.m., Monday through Friday. Rossi was a member of the Union and wore her union button to work occasionally and visited the union trailer every day on her way into to work.

Rossi attended the job fair and applied for employment with Respondent on January 28 and applied for a job as a switch-board operator. During her screening interview, Rossi was told that there was no such job as a switchboard operator with the new employer and that now the front desk personnel were going to answer the switchboard. Rossi told the screener that she was unable to work the front desk position. Rossi asked the screener if there were any other positions in the Hotel for which Rossi would be qualified. The screener said no and directed Rossi to the exit.

Rossi testified that she did not tell the screener she had accounting experience because she knew the screener had her resume which detailed her previous experience in accounting, particularly working for 30 years with a doctor as an office manager and completing the weekly payroll. Screener notes indicated that Rossi was rejected for "lack of interest in job as described." Rossi had given the screener a copy of her resume which detailed her lengthy experience and expanded on the brief list of duties on her application, revealing that Rossi would have been experienced or able to perform the accounts payable or receivable positions. The screener did not, however, discuss what duties Rossi performed as a switchboard operator, explore the possibility of different positions with Rossi by reviewing her resume, or bother asking about her experience in other jobs. The Screener also noted that Rossi had only missed 3 days of work in the 5 years she had been working at the Hotel, but failed to pass her on for an interview. Rossi did not see any list or posting of positions that were available with the new employer.³⁶

h. Patricia Blake—health club attendant

Since 1990, Blake was employed by the Waterbury Sheraton as a sports complex attendant. She worked from 6 a.m. to 1 p.m., Monday through Friday. Blake was also an active member of the Union who picketed in front of the Hotel, wore a union button to work and solicited employees to sign petitions in support of the Union. Blake regularly visited the trailer on her workbreaks.

On January 28, Blake applied at the job fair. At the screening interview, the screener asked Blake why she wanted to work at the Hotel. Blake replied that she liked her job and got along well with the guests and the employees, that she was conscientious in her work, and that the guests and members had often told her that they enjoyed being at the sports complex when she was working. Blake also explained that she would not be able to work hours other than 6 a.m. to 1 p.m. because there was only one bus available between Waterbury and her home.

While the screener's notes reflect that Blake was rejected for "lack of hospitality understanding or no interest in serving guest" and lack of transportation, and that Blake appeared to have a basic "external hospitality understanding but appeared to be critical of internal customers" and was "only available to work Monday through Friday opening because only one bus to

³⁶ While dismissing Rossi from consideration, Respondent evidently assessed an outside applicant, Audry Lynce, to a second interview, and then held her application for future consideration. Although the first interviewer expressed concerns about Lynch' ability to handle the front desk position, the interviewer suggested that Respondent consider Lynch for the PBX Operation position. Such consideration, of course, was not offered discriminatees such as Rossi, who only had about 34 years of experience in the field.

Naugatuck.” Blake detailed that she was conscientious in making sure the chemicals in the pool were safe and bathrooms and locker rooms were clean and that guests had told her that they knew when she was there the place was clean and sanitary and that when others were there they didn’t feel it was as well taken care of.

i. Eleanora Williams—housekeeper

Williams was employed by the Hotel as a housekeeper for 9 years and had become a trainer for housekeeping. During her employment, Williams participated in union meetings and testified on behalf of the Union in the previous unfair labor practice hearing in 1990. Before the hotel closed down, Williams wore a union button to work and visited the union trailer.

On January 28, Williams applied at the job fair. At her screening interview, she was asked if it would be a problem for her to get to work in the morning; Williams said it was not. The screener asked Williams why she wanted to work at the Hotel and Williams told her that she had been at the Hotel for a long time and liked the people she worked with there. When asked by the screener what she expected to get paid, Williams replied about what she was getting “now,” about \$8 an hour. The screener did not tell Williams what the position paid. Williams did not tell the screener she would not accept less than \$8 an hour. According to the screener’s notes, Williams was rejected for “pay not acceptable and does not have hospitality understanding or interest in servicing guest”. Despite Williams’ testimony that she did not insist on \$8 an hour and the fact that the screener did not even tell Williams what the position paid, the screener noted that Williams expected \$8 an hour at least and noted that such a salary was over the starting scale

j. Anna Light—guest relations agent

Light was employed by the Hotel for about 6 months prior to the closing. Light held three positions with the Hotel: front desk clerk, night auditor, and PBX operator. Notably the duties of these three positions were combined by Respondent into the position of “guest relations agent.” A front desk person checked guests in and out, answered the phone, and performed customer relations. A PBX operator answered the phones and took reservations, while the night auditor balanced out the books for each of the hotel’s individual departments, as the name indicates, at night.

Light attended the job fair with her sister Rebecca Light and applied for a job. At the screening interview, Light was asked if she was willing to take a pay cut, and asked how she got along with other employees. Light told her screener that she was willing to take a pay cut and that she got along well with all employees—except the front desk manager. The screener replied that she had heard several people comment on the former front desk manager throughout the day. The screener did not inform Light of the job’s pay rate.

After Light described the positions she had been performing at the hotel, the screener said that the new employer had combined the positions into one area and asked if would Light mind that change. Light said no, that she had performed those duties anyway. She told the screener she was available to work anytime and that she wanted to work at the hotel because it was close to home and convenient because her mother and sister provided transportation for her to work. Light testified that she had never had a problem getting to work because of her reliance upon her mother and sister for rides to work. Light also provided the screener with certificates and diplomas from hotel-related courses she had taken in controlling food costs, hospitality law, and food safety in a restaurant.

The screener’s notes reflect that Light was rejected for lack of transportation because she relies on other to get to work. However, her notes indicate that there is not a problem getting to and from work. Further, the screener noted that Light said she was moving within the year (which Light admitted). The screener noted under “hours” not that Light said that she had open availability but that Light “relies on mother and sister to get here.”

k. Denise Rodriguez—housekeeping

Rodriguez was employed by the Hotel as a housekeeper for 3 years. During that time, Rodriguez earned an “employee of the month” award. She wore a union button to work for 2 months around the time of the 1995 election and visited the union trailer in January 1997 on one occasion. Rodriguez attended Respondent’s job fair with her nephew Steven Giancarli, who was also a predecessor employee of the Hotel.

Rodriguez applied for employment on January 28. Unlike most predecessor applicants, Rodriguez made it through Respondent’s screening and interview process. However, like most predecessor applicants, Respondent found a reason to disqualify Rodriguez in the last steps of the hiring process: the phone reference check. Like Gugliotti, Rodriguez was rejected by Respondent because of an unsatisfactory reference from Kelly Zampano, director of Catering/Banquets for the predecessor. Rodriguez, however, worked in the *housekeeping* department and, after her second interview, gave Respondent three names to contact for references, Bill Aloisa, Housekeeping Manager, Pat LaBonte, assistant housekeeping manager and Mike Daly, trustee for the Hotel. Rodriguez testified that she did not even know a Kelly Zampano. Nonetheless, Respondent called Zampano and relied on her negative reference of Rodriguez, an employee she had never even supervised, to reject Rodriguez.

Two months later Rodriguez reapplied for employment at the Hotel after seeing an advertisement in the *Waterbury Republican* newspaper that the Hotel was looking to hire housekeepers. Rodriguez went to the Hotel and reapplied. After submitting the application, she was told that the housekeeping manager would contact her. Rodriguez did not hear from the housekeeping manager and when she attempted to call him herself, was told that he would call her back. Rodriguez never heard from the Hotel again.

l. Steven Ruegg—cook

Ruegg was employed by the Hotel for a total of about 5 years. Ruegg began working for the Hotel in about 1991 as a night/p.m. line cook and was promoted after a few months to the nighttime kitchen production manager. A year later, Ruegg was terminated by then Chef Ron Pasko because of a lack of creativity with specials and the menu. About a year and a half later Ruegg was called back by one of the hotel chefs and asked to come back to work. He returned as a p.m. line cook. Eventually, Ruegg transferred to the day shift as the “a.m. line cook.”

Ruegg was a very active union supporter, assisting in the organizing in 1995, picketing in front of the Hotel, attending rallies and, after the Union was elected, joining the negotiating committee, a position he held until the Hotel’s closure in January 1997. Ruegg wore his union button to work from the time the Union was elected until the time the Hotel closed. He also visited the union trailer on a regular basis.³⁷

Ruegg attended Respondent’s job fair and applied for employment at the Hotel. After the screening interview by Patrick Roy, Ruegg was passed on for a first interview with the new chef. During the screen[ing], Ruegg provided Roy with a letter of recommendation from Richard Bair, the hotel’s former general manager. During the first interview with the chef, Ruegg supplied him with answers to questions about cooking terminology. Ruegg related his past experience in the hotel, his education in hospitality management, and his cooking experience in restaurants. During the interview, the chef commented about the state of the kitchen and said, “Oh, the place was a mess back there.” Ruegg responded that it was probably because the previous chef knew he was being let go during the last couple of weeks and he probably let things slide. Ruegg then used the comment as an opening to discuss the fact that when he attended school for Hospitality Management, he took a special class in sanitation and received a certificate in sanitation.

According to the interviewer’s notes on the Recommendation Form after the first interview, the interviewer checked “no further interest” and noted that Ruegg “lacks drive to maintain clean and organized work area.” This notation was entered despite the fact that Ruegg had a *certificate in a special course in sanitation*, noted on his application and discussed with the interviewer.

m. Kathleen Meccariello—food service agent

Meccariello was employed as a part-time banquet and restaurant waitress at the Hotel for about 8 years. Meccariello worked nights and weekends for a total of about 25 hours per week. Although not particularly active with the Union, Meccariello visited the trailer on one occasion during the time the trailer was outside the Hotel.

³⁷ Ruegg also testified about some J.L.M. employees who were hired; he trained both Marianne Green and Joe Flaherty, who had only worked there for a short time. Ruegg knew, based on his organizing activities on behalf of the Union, that Flaherty and Green did not support the Union.

Meccariello applied at the job fair on January 28. At the screening, Meccariello and the screener discussed how long she had worked at the hotel and how she enjoyed her job as a waitress. In response to the screener's question about Meccariello's availability, she told the screener that she was only available on a part-time basis. Meccariello recalls no discussion about salary or the pay rate for the food service agent position.

The screener's notes reflect that Meccariello was rejected because she had "poor composure and communication skills." The screener noted that she did not see a great hospitality personality in Meccariello, who allegedly did not mention serving the guest. According to the screener's notes, Meccariello had a "dull sneer" and did not smile. The screener's notes directly conflict Meccariello's testimony regarding the screening interview. Meccariello felt that she had a good conversation with the screener and specifically testified that she smiled during the interview and laughed with the screener. It seems unlikely that Meccariello, who testified with poise and composure even under vigorous cross-examination from Respondent's counsel, exhibited poor composure or communication skills in a screening interview. Meccariello even testified that she was more comfortable at the interview than at the hearing.

Meccariello also candidly testified that she felt a little "put out" by having to apply for a job that she had held for 8 years and sad about the fact that the Hotel closed and everyone lost their jobs. Respondent, however, sought in its cross-examination of Meccariello to place a negative spin on these quite understandable and natural feelings a long-term employee might have for a workplace.

n. Daniel Peszek—culinary assistant

Peszek began working at the Hotel in September 1988, as a part-time banquet set-up employee. About 2 or 3 years later he was promoted to banquet set-up supervisor. A banquet set-up employee was responsible for setting up the different banquet rooms at the Hotel for various functions that were held at the Hotel. As banquet set-up supervisor, Peszek would delegate employees to set up different rooms, in addition to his other set-up duties. Peszek held the banquet set-up position in addition to working full time as a machinist for Dossert Corporation in Waterbury, Connecticut. Peszek was a union member who participated in the negotiating committee, wore a union button to work, and visited the trailer on a regular basis.

Peszek went to Respondent's job fair on January 28 to apply for a job. Peszek applied for a banquet set-up position, but when he met with the screener, he was told that there was no longer such a position. Peszek asked if there were any other available positions, as he had worked at the hotel for 8 years and could perform other duties. The screener told Peszek that the best position would be a culinary aid, which involved working in the kitchen and performing odds and ends.

Regarding wages, although the screener did not indicate what wage rate a culinary aid would receive, Peszek indicated to the screener that he would like to make what he was making before the hotel closed, \$7.15 an hour, but left the wage open on the application³⁸ (Tr. 648). When the screener asked what hours Peszek was available to work, he explained that he had a full-time job and therefore was available at night during the week, but if possible would like a day or two off during the week. On weekends, Peszek told her that he was available starting at midnight Fridays and continuing thereafter (Tr. 648–649, 654–655). When asked why he wanted to work at the hotel, Peszek told the screener that he liked the hospitality business and liked working with people (Tr. 649).

Peszek was rejected by the screener because his pay was not acceptable and he had incompatible hours (R. Exh. 78-2). Without telling Peszek what the culinary aid position started at, the screener noted that he desired a wage that was higher than the starting salary and was only available 6 p.m. to 11 p.m., three to four nights a week. The screener also noted that he was very monotone and never smiled.

About 6 months later, Peszek applied for work at the hotel through Kelly Services, a temp agency in Waterbury. Peszek saw an advertisement for a banquet set-up person for a local hotel. Although he applied at the temp agency and was told that things looked good since he

had the experience working at this hotel, the temp agency never called Peszek for temporary employment at the hotel.

o. Robert Murgatroy—housekeeping

Murgatroy was employed by the Hotel for 2 years in the housekeeping department. His duties involved cleaning the public areas and bathrooms in the hotel. During his employment, Murgatroy was involved with the Union and attended rallies, wore a union pin to work on his uniform almost everyday, and before the hotel closed, visited the trailer and circulated a petition among the employees for the purpose of saving their jobs at the Hotel.

On January 28, at about 11:00 a.m., Murgatroy applied at the job fair neatly groomed, showered and shaved, and wearing dungarees, sneakers, a dress shirt and a western jacket. At his screening interview, Murgatroy explained that he cleaned floors, shampooed rugs, cleaned bathrooms and assisted in laundry when they needed him. He also explained that on weekends he cleaned the bar at the hotel. The screener also asked Murgatroy what he was making in his position at the hotel and he told her that he was making \$6.50 to \$7 an hour. She asked if he would take a drop in pay. Murgatroy said although he was not happy about it he would go down a little bit, to about \$6.25 an hour. The screener did not tell Murgatroy what the housekeeping position with the new employer would pay.

During the screening interview, Murgatroy also told the screener that he had no problem with transportation and was available to work full time. When asked why he wanted to work there, Murgatroy told the screener that it was convenient to his home and he knew the hotel like the back of his hand since he had worked there for almost two years. Murgatroy made eye contact and smiled and considered himself enthusiastic about applying for the job.

The screener's notes reflect that Murgatroy was rejected for employment by Respondent because his pay was not acceptable and poor grooming/hygiene/appearance. The screener commented that he smelled a little, but seemed nice enough, although he "seemed a bit unenthusiastic about job." The screener's notes about Murgatroy's pay expectations were that he really wanted \$6.50. Murgatroy testified that he told the screener that if it was possible he would like the same pay rate he was making, however, he was willing to take a twenty-five cent pay cut, which notably was the pay rate Respondent purports to have been offering housekeepers. Nonetheless, the screener decided that although Murgatroy told her he would accept \$6.25, the pay rate was still unacceptable. Further, Murgatroy testified that he showered and shaved before he went to the job fair and dressed in a neat fashion. Thus, the screener's comments about Murgatroy's grooming and appearance are unsubstantiated.

p. Sharon Colangelo—food service agent

Colangelo was employed for about a year and a half as a banquet server at the hotel. Colangelo signed a couple of petitions and letters to the governor or mayor that the Union was circulating. She applied for employment with Respondent at the job fair on January 28. Colangelo was passed through the screening interview and had a first interview on the same day and was called back to the hotel a few days later for second interview. After the second interview, Colangelo was rejected.

Colangelo testified that she was asked the same questions at the second interview as the first and provided similar answers. At the second interview, however, Colangelo remarked to the interviewer that *if the new owners wanted a smooth running hotel, that Respondent should hire all the predecessor banquet servers because they did their job well together*. Specifically, Colangelo named predecessor employees and union activists Flammia and Oakley, and questioned why such long time employees with so much experience were not called back for second interviews. Thus it appears that Colangelo advanced in the interview process because she was not identified initially as a union supporter or active employee; however, after making comments about hiring predecessor employees, especially Flammia and Oakley, Colangelo was no longer considered for employment.

The second interviewer noted on the form that he had no further interest in Colangelo, that she joked all through the interview and doesn't like to be told what to do; the interview form, however, does not reflect that she did not like to be told what to do. The first interviewer made similar comments about Colangelo and nonetheless passed Colangelo on for a second interview, apparently recognizing that she was nervous. Colangelo was also honest in providing her best and worst qualities and explained that she did not like to be picked on by co-workers.

³⁸ Peszek eventually found a second job cleaning offices in the evening that pays \$6.50 an hour and after he left the Sheraton worked a seasonal job during Christmas for about 2-1/2 months at \$6 an hour

q. Sigfredo Echeandi—cook

Sigfredo Echeandia (Sigfredo) worked at the Hotel for 11 years, and is one of the five brothers employed by the hotel over the years. His brother Hector was one of the six original discriminatees in the 1990 Board case and the subsequent compliance case of 1995–1996. Sigfredo worked as a full time dishwasher and was promoted in the last year to “prep-cook.” Like his brothers, Sigfredo was an active union supporter, participating in rallies, picketing, committees and wearing his union button to work.

On January 28, Sigfredo went to the job fair to apply for employment as a prep-cook. During the screening interview, the screener asked him when he would like to work. Sigfredo responded that he would like to work Monday through Friday, 7:00 a.m. to 3:30 p.m. Sigfredo also told her that he had previously worked the night shift and did not have a problem with working that shift. The screener also asked what pay he would like to receive and he answered he would like \$9 or \$9.50 an hour, but did not say that was all he would take.³⁹ The screener did not bother to tell him what the position paid.

The screener rejected Sigfredo for seeking a starting salary over scale and wanting to work Monday through Friday, mornings only, no weekends. Sigfredo explained that when asked by the screener what days he would *like* to work, he told her Monday through Friday from 7:00 a.m. to 3:30 p.m. because this was the shift he had been working at the Hotel. Further, he testified that because the screener did ask about the weekends, Sigfredo did not indicate whether or not he wanted to work on the weekends. The screener, however, failed to note on the screening form or consider that Sigfredo indicated that he was willing to work the night shift.

r. Martin Echeandia—utility/dishwasher

Martin Echeandia (Martin) worked as a dishwasher at the hotel for 10 years. Like his brothers, he attended the Union’s rallies in front of the Hotel and union meetings, wore a union button to work and visited the trailer.

Martin applied at the job fair on January 28, along with two of his brothers, Cecilio and Freddy (Sigfredo) (Cecilio was also a former employee and is named in the instant Complaint as a discriminatee). At the screening interview, the screener asked Martin how long he had been working there. When Martin told him that he had been working there for 10 years, the screener commented that that was a good reason to hire him. The screener also asked Martin if he had any problems getting to work and Martin told him he had no problems because he had his own transportation. When asked about his availability, Martin told him that he could work any time and wanted full time, but would also take part time. When the screener asked Martin why he wanted to work at the hotel, Martin repeated that he had worked there for almost 10 years and needed a job.

The screener’s notes reflect that the screener rejected Martin for “poor composure and questionable motivation.” The screener noted that Martin showed no interest or motivation and had one-word answers, and that the screener had a hard time pulling out information. The screener notation for Martin’s answer to the question, “[W]hy are you interested in working at this hotel?” was “feels very comfortable here.” This honest answer was apparently held against this long-time and loyal hotel employee.

s. Nelson Buxton—security guard/guest service

Buxton worked for the hotel full time for almost 2 years. His duties were divided between a security and bellman’s position. Buxton sat on the union’s negotiating committee, attended a rally, visited the union trailer and wore a union button to work. Buxton also was a part of the Union’s campaign in the months before the hotel closed, to engender community support for the employees to keep their jobs at the hotel with the new employer.

Buxton attended the job fair on about January 28, and applied for a job in guest service or security. During the screening interview, Buxton was asked why he was interested in working there. Buxton explained to the screener that he wanted experience to help further his education. Buxton was asked if he had transportation, which he did. The screener asked what salary Buxton was looking for and he replied that it was negotiable but that he was earning \$7 an hour

before the hotel closed. When asked how he got along with the guests, Buxton, who appeared pleasant enough, said very well and that the guests were pleased with his work. Buxton attempted to provide the screener with a letter of reference from some guests who had stayed at the Hotel for approximately 2 years. The screener would not accept the letter.

The applicant screening form indicates that Buxton was applying for a security position, even though Buxton wrote both guest services and security on his application. Additionally, Buxton was qualified in both positions as a result of the dual duties he had previously performed. Despite the fact that Buxton never told the screener that he was applying only for security, this appears to be the only position for which he was considered.

While the screener noted that Buxton had no enthusiasm, Buxton credibly testified that he wanted the job and felt that he belonged at the hotel and showed enthusiasm for the job. Buxton felt that the *screener* showed no enthusiasm or interest in interviewing him and had the feeling that the screener wanted to rush through the questions and get the screen over with. As noted above, Buxton even attempted to give the screener a copy of a letter of reference from guests of the Hotel, yet the screener noted that Buxton did not show any hospitality understanding and no mention of customer service. Inconsistent with the above-proffered reasons for failing to pass Buxton along were the screener’s notes of Buxton’s answer to “why he wanted to work at the Hotel,” which includes a note that Buxton wanted to be with “people one on one.”

t. Steven Giancarli—health club attendant

Giancarli was employed as a full-time pool attendant at the hotel for a year and a half. His normal work schedule was from 3 to 10 p.m., Monday through Friday, and 8 a.m. to 3 p.m. on the weekends. Giancarli went to the job fair on January 28, and applied for a job as a health club attendant. During the screening interview, Giancarli told the screener that he wanted the job because he just bought a car, and that he knew the job as he had been performing that job for a year and a half. Giancarli told the screener that he would like to work during the day because he was attending school at night during the week and that he was available anytime on weekends.

The screener noted that she rejected Giancarli because of lack of hospitality understanding or interest in serving guest, as well as noting his “questionable motivation.” The screener evidently decided that because Giancarli wanted a day job while in school, he “appeared to be interested only in obtaining a job,” and therefore had questionable motivation (although it seems obvious that a person applying for a job *wants* a job). The screener felt it necessary to note “no mention of serving the guest” although the screener never bothered to ask Giancarli about how he interacted with the guests who came to the pool.

E. Evidence of Disparate Application of Negative Criteria to Predecessor Employee Applicants Reveals that the Hiring Process was Biased and Inconsistently Applied Against the Former Employees

The only evidence of why an applicant was rejected by Respondent are the screening and interview forms filled out by the screeners and interviewers at the job fair. At the screening, the screener was instructed to document why an applicant was rejected and to this end, at the bottom of the screening form, eleven negative disqualifying factors were listed for a screener to check off. The eleven factors were: unable to perform essential job functions; poor grooming/hygiene/appearance; does not have hospitality understanding or have interest in serving guest; lack of interest in job as described; poor composure; pay not acceptable; incompatible hours; poor job stability; lack of transportation; poor communication skills; and questionable motivation. Also, there was an area on the Form for screeners to provide additional narrative comments as to why an applicant was not passed along at the screening level. Most predecessors were rejected at the screening level, however, the negative criteria was not applied to the predecessor and stranger applicants in the same fashion. This is demonstrated by the fact that predecessor employees were rejected for reasons also attributed to stranger applicants who were hired or passed on to the next step in the interview process.

³⁹ In fact, Sigfredo’s next job after the Waterbury Sheraton paid only \$5.50 an hour.

1. The categories used for disqualification of discriminatees in comparison to stranger applicants

a. *Pay not acceptable*

In this category, 14 discriminatees were rejected for employment for allegedly answering the question, “What are your salary expectations” at an unacceptable level.⁴⁰ Interestingly, most employees who testified indicated that they were never told what Respondent was offering as a pay rate in the applied for position. The evidence shows that nonpredecessor employees were hired or passed on despite stating an expected salary level that was above Respondent’s initial pay rates for the position as reflected in the document provided to screeners and interviewers at the job fair. Also, the evidence reveals that Respondent regularly did not reject stranger applicants at the screening level for stating a pay rate that was higher than Respondent’s initial pay rate for each position.

(1) Houskeeping positions

Respondent was offering \$6 an hour for its housekeeping position and \$7.50 an hour for a housekeeping supervisor position. The following discriminatees who applied for a housekeeping position were rejected for “pay not acceptable” as follows:

- (a) Elenora Williams was rejected for stating that she would like \$8 an hour;
- (b) Eliza Svehlak was rejected for stating what she had been making, but agreed to Respondent’s pay rate;
- (c) Robert Murgatroy was rejected for stating he would like \$6.50 an hour but was willing to take a small pay cut;
- (d) Jose Garcia was rejected for an answer of \$6.50 an hour;
- (e) Bella Berdan was rejected for indicating a wage of \$8.25 or \$1 less; and
- (f) Reynaldo Ramos was rejected for indicated he would like to make \$6.25.

In comparison, stranger applicants were passed on from the screening interview and eventually hired by the hotel even though they stated at the screen an expected salary more than Respondent’s pay rate for a housekeeping position. For instance, Norma Gomez wanted \$7 an hour, LaTonya Jones wanted between \$6 and \$6 and Mark LaFrance wanted \$6 to \$7 an hour. Other applicants were passed on by the screener even though they indicated a pay expectation above Respondent’s set pay rate. Elaine Dasilva was passed on by the screener even though she indicated she wanted \$7 an hour. Antoinette Franks was passed on by the screener despite wanting \$6 to \$7 an hour at the screen. Hennette Nadau was passed on by the screener after stating she wanted above \$7 an hour. John Pastor was also passed on after stating he wanted \$7 to \$8 an hour. Gladys Quintana stated that she wanted \$7 an hour at her screening for a housekeeping position and was passed on for an interview by the screener. After her first interview, Quintana was referred to a utility position because of her poor communication skills and was eventually offered that position with Respondent .

(2) Cooks

Respondent had assigned a pay rate of \$8 an hour for first cooks and \$6 to \$7 an hour for second cooks. Predecessor employee Sigfredo Echeandia was rejected for stating he would like to make \$9.50 an hour. On the other hand, Chalor Huenerberg wanted \$10 an hour and the screener checked “pay not acceptable” but passed Huenerberg to a first interview, and Huenerberg was eventually hired. Also, Lamphear wanted \$10 to \$12, negotiable, for the cook position and was passed along and hired despite this unacceptable salary expectation.

⁴⁰ See the specific individual’s summary above, wherein it is indicated that often the screener did not write down the answer given at the interview and/or the individual stated an amount but said they were open to other wages.

(3) Food service

Respondent told screeners that that food service agents would be making a \$3.75 tipped rate and a \$9 banquet rate. A conference captain position would be paid \$11 an hour. A number of witnesses testified, however, that they were told by Respondent at the job fair that they were not sure what the pay rate would be for food service agents and whether the rate would be a tipped or flat pay rate. Despite Respondent’s claimed uncertainty with regard to the pay rates for food service agents working in the restaurant or at banquet functions, discriminatees were rejected anyway for wanting an unacceptable pay rate. Predecessor employee Zosh Flammia testified that she told the screener that she had been making \$10 to \$13 an hour as a conference captain, but was negotiable on a wage rate. Flammia was rejected by the screener for wanting \$12 and up an hour. William Martin was rejected for stating that he would accept \$9 an hour for banquets, which is in conformity with Respondent’s banquet rate. Sylvia Kelley was rejected for requesting \$12 an hour if the pay rate would be a flat (instead of tipped) rate.

(4) Utility position

Discriminatee Cecilio Echeandia was rejected for indicating that he would like to make \$8 and hour for the utility worker (dishwasher position) which Respondent was paying \$6 an hour. Gladys Quintana stated that she wanted \$7 an hour at her screening for a housekeeping position, but was referred by Respondent to the utility position that paid less, because of her poor communication skills, without concern that at her screen she indicated that she wanted more than the utility pay rate.

(5) Guest relations

Respondent’s guest relations agent position paid \$6.75 an hour. Discriminatee Yolando Bernado was rejected for indicating a salary expectation of \$7 an hour and, according to the screener’s notes, Cynthia Pavlik indicated that she “must make” \$8. Stranger applicant Michelle Braun, who was hired, “would settle for \$7.50” and the screener noted that the hourly rate may be a concern, but did not check “pay not acceptable” and passed Braun on for an interview. Sheila George was passed to a first interview despite wanting \$10 an hour. Likewise, Donna Gonzales wanted \$8.50 or more an hour and was passed on to a first interview. The screener held Derek Kulikauskas for future consideration even though he wanted \$8 an hour and the screener tried to “sway” him to a different position so that he could receive the higher wages. Audry Lynch wanted \$7 to 7.50 an hour and was not rejected at the screening. Colleen Razza was passed on from the screen after indicating she wanted \$7 to \$8 an hour. Otto Rothi was passed on to a first interview from the screen, even though he indicated a salary expectation of \$7 and hour for a guest relations position.

(6) Other inconsistencies

Dan Peszek, who was considered for a culinary service assistant position, which Respondent was paying \$5.25 for restaurant service and \$6.25 for banquet, was rejected when he said he had been making \$7.15 an hour, but was negotiable. Stranger applicant Philip Adamo was passed on even though he wanted \$15 for an engineering position that paid at the most \$10.75.

Respondent was offering \$7.25 an hour for its security position, but a number of stranger applicants were passed on in the job fair process even though they indicated a higher salary expectation. In this regard, Clint Greatory, who wanted a minimum of \$8.25 an hour and noted “feels he should be at top of scale due to experience,” was passed on to an interview. Clearly the inference to be drawn for this notation is that experience can trump a negative salary expectation, so long as it is not the “experience” which comes with being a predecessor employee. Also, Cesar Cabrera wanted \$8 to \$8.50 an hour for security but the screener noted “salary may be issue, although currently is not working” and also noted that Cabrera had done the job before. Eric Bartley preferred \$8 an hour for the security position, and the screener noted that it was a bit more than Respondent was offering, but passed him on anyway. The screener noted that Robert Coffey stated that a “starting salary of \$7.25 an hour seemed low to him but the screener passed him on because his “prior experience may be helpful for a security position.” Calvin Ellerbee wanted \$10 or more per hour for security, but the screener passed him on because Ellerbee was “very qualified and serious about job.” John Meehan also wanted \$10 an hour for Security but was held for future consideration because he “had good credentials.” What is more interesting than Respondent passing along individuals seeking a higher

pay rate is the fact that *experience*, a factor Respondent was so quick to dismiss as relevant to its hiring decisions especially with regard to the former employees, was so positively noted by the screeners in this category and used as a justification for passing on the applicant despite the presence of criteria that would normally disqualify an applicant, especially a predecessor applicant.

b. Limited hours or availability and scheduling

Twenty-five discriminatees were rejected due to limited availability or purported lack in flexibility in scheduling. In this regard, some former employee applicants expressed a shift preference, discussed part-time school schedules and preferences not to work on Sundays or other days on the weekends. In contrast, 23 stranger applicants were offered a position with Respondent despite the same, if not more pronounced, scheduling preferences and restrictions.

A most striking example is discriminatee Pat Blake, who applied for the health club attendant position but was rejected for limited availability because she could only work 6 a.m. to 1 p.m., Monday through Friday. Additionally, discriminatee Steve Giancarli, another health club attendant applicant, was also rejected for limited availability because he was only available Monday through Sunday during the day and because he indicated that he attended night school Monday through Thursday. In contrast, the applicants who were eventually hired by Respondent for the health club attendant positions had extremely limited schedules. Joann Lo, a Yale student who applied at the job fair and discussed in detail below, had very limited availability because of her class schedule in college. Further, new applicant Stacey Constantino was hired for the health club attendant position and not rejected for limited availability, although she could only work part time until May, Mondays and Fridays after 11 a.m. and Tuesdays and Thursdays after 1 p.m. Constantino also indicated that she preferred the morning shift on Saturdays and Sundays. In September, Constantino was returning to school and presumably a different schedule of classes.

New applicant Michael Stanco was also hired as a health club attendant, despite the fact that it was specifically noted that he had limited hours, and was available on a part time basis, 1 to 3 days a week, because he had school on Monday nights and Respondent would have to work around his schedule as a fireman. Joann Lo testified that she knew that a health club attendant hired at the hotel that was a fireman who only worked one shift per week.

Other discriminatees were rejected for having limited availability as indicated by the screener for the following scheduling restrictions:⁴¹

- (a) Tom Oakley could not before 7 a.m.;
- (b) Debbie D'Agostino wanted to work 9 a.m. to 5 p.m.;
- (c) Zosh Flammia could work any day from 6 in the morning on, but preferred to alternate between a.m. and p.m. shifts;
- (d) Dan Peszek was available 3 to 4 nights a week from 6 p.m. to 11 p.m. and Saturday and Sunday a.m. on;
- (e) Sigfredo Echeandia was available Monday through Friday, a.m.'s only;
- (f) Yolando Bernado did not want to work every Sunday;
- (g) Vivian Bertelson preferred days;
- (h) Michael Bibeau was not available only when his band had a job;
- (i) Thomas Castonguay needed a set schedule because he attended school;
- (j) Cecilio Echeandia was available Monday through Friday;
- (k) Lynn Giacin preferred working in the p.m. ;

(l) Rene LaVorgna wanted full-time days instead of evenings (R. Exh. 60-9);

(m) Regina Levesque wanted part-time days, with an occasional evening;

(n) Harold Luna wanted morning shifts;

(o) Ernest Mayshaw said any time, but preferred not to work early mornings;

(p) Cynthia Pavlik wanted days;

(q) Cheryl Pinho wanted part-time evenings;

(r) Reynaldo Ramos wanted part time, Monday through Friday after 3 p.m., and weekends mornings or first shift;

(s) Larry Swartz was in school Tuesday and Thursday nights and unavailable at those times;

(t) Alberto Tavares could not work holidays;

(u) Caryn Varieka did not want to work Sundays and would prefer Tuesdays off; and

(v) Susan Vaughn wanted part time, two to three nights per week.

In contrast, the following applicants were hired despite having limited availability or scheduling preferences that were far more restrictive than the discriminatees' alleged limits on availability. Assuming Respondent's scheduling remained the same for all applicants, it is inexplicable why the following individuals were not rejected as were the similarly situated discriminatees:

(a) Mel Attenberg was not available Monday through Wednesday from 6:30 to 8:30 p.m.;

(b) Lawrence Barone preferred the first shift because he had classes at night;

(c) Michelle Braun wanted part time nights, from 4 p.m. to 11 p.m., Sunday through Friday. She noted she wanted to keep Saturdays free. The first interviewer noted that her schedule was limited and the second interviewer noted very limited hours;

(d) Matthew Cizauskas was hired part time, 16 hours per week, and indicated that weekends were O.K. but not every weekend (WARC);

(e) Gladys Quintana preferred the afternoon shift 3 to 11 p.m., or 4 p.m. to 12 a.m.;

(f) Michael Demers (WARC), was hired for Monday through Friday, 7 a.m. to 4:30 p.m., depending on public transportation;

(g) Norma Gomez preferred mornings;

(h) Holly Herzman wanted part time nights and weekends, but not Tuesday or Wednesday evenings and only three shifts;

(i) LaTonya Jones, in her second interview indicated that she could not work until after 9 a.m.;

(j) Korzeniewski preferred 7 a.m. to 3 p.m.;

(k) Mark La France said Sundays may be difficult and at the first interview that he was not very flexible with weekdays because of public transportation;

(l) Barbara Maglio said she was only available after 8:45 a.m. in her first interview;

(m) Jolene Maine preferred mornings;

(n) Jonell Pendaruis told the screener she was not available until after 1 p.m. because she was in school and

⁴¹ The availability listed below reflects only the screeners' recollection of applicants' answers on the screens, please see witnesses' individual testimony regarding their answers to screeners' questions.

the screener passed her on (at the first interview, Pendaruis did say she would quit school to work);

(o) Terri Privott indicated that she did not desire to work midnight to 7 a.m.;

(p) Aimee Reyes was unavailable from 9 a.m. to 1 p.m. because she attended school;

(q) Margie Ross was not available Sundays during the first shift;

(r) At the first interview for Varanay it was noted that “would work something out with manager” for flexibility in scheduling;

(s) Carmen Carrasquillo needed to work days from 6 a.m. to 3 or 4 p.m., and was available to work only every other weekend and some holidays; and

(t) Tammy Cohen was available only 3 to 4 evenings/night per week.

Likewise, other applicants were passed on despite scheduling restrictions that were the same or more limited than the discriminatees:

(a) Rosemary Ali was only able to work second shift;

(b) Louis Constantin did not want to work Sundays;

(c) Victor Daniels could not work Monday through Saturday afternoons or Sundays;

(d) Elaine Dasilva needed Tuesdays and Thursdays off;

(e) Andre King wanted part time days, not Sundays, and was held for future consideration until he passed his drivers test and resolved his transportation restrictions;

(f) Victor Mitchell preferred days;

(g) Cassandra Morin wanted Monday through Friday only, 8:30 a.m. to 3 p.m.;

(h) Susan Shapiro was unavailable Monday through Wednesday, 5:30 p.m. to 8:30 p.m. because she had classes;

(i) Myesha Franks available only after 3 p.m., Monday through Friday;

(j) Nicole Gallant wanted only part-time, 30 hours a week, and only after 2:30 p.m.;

(k) Deborah Begin wanted to work only 7 a.m. to 3 p.m.;

(l) Devi Bey did not want to work Sundays;

(m) Elizabeth Burgos wanted to work 7:30 a.m. to 3 p.m., Monday through Friday.;

(n) Tanya Chirsky, could work only Monday through Thursday after 3 p.m. and available Friday, Saturday and Sunday, only up to 30 hours a week total;

(o) Sheila George did not want to work weekends, only some holidays, and wanted only part time work;

(p) Deborah Grady wanted to work 10 a.m. to 4 p.m., but no Sundays;

(q) Audry Lynch preferred the morning shift;

(r) Kate Andreas could only work Thursday evening, Friday afternoon and Saturday and Sunday;

(s) Wesley Primus could not work Tuesdays and Thursdays until 2 p.m.;

(t) Monica Rossi was held to “use if needed” and she could only work Monday through Friday after 5:30 p.m.;

(u) Lisa Salovski did not want to work in the mornings ;

(v) Ramon Ballenilla was available nights only, Monday through Friday, and referred to a second interview;

(w) Kim Pockette preferred to work second or third shift;

(x) Schwerger wanted to work the midnight shift and no Saturdays or Sundays;

(y) Veneziano wanted to work evenings and weekends;

(z) Mike Barns wanted to work anything other than second shifts;

(aa) Enaida Benet was available to work only in the evenings;

(bb) Charles Fray wanted to work only evenings and weekends;

(cc) Josie Planas could only work after 4 p.m., evenings and weekends;

(dd) Calvin Ellerbee wanted to work only evenings or weekends only;

(ee) Jennifer Romanuskas wanted only part-time work, flexible in hours as long as it is after 3 p.m.;

(ff) Elizabeth Carey was available to work only after 2 p.m. up to closing, weekdays, all weekends;

(gg) Brunelli wanted to work part time, but needed “5 on—3 off schedule set one year out.”;

(hh) William Ramos wanted to work to work part time, Monday through Friday after 3 p.m., Saturday and Sunday up to 10 p.m.;

(ii) Martin Pierce was held for future consideration even though screener checked limited hours of availability from 9 to 2 only; and

(jj) Eric Bartley was passed on to an interview even though he attended school Monday and Wednesday from 10 to 6:30 until May.

c. Lack of transportation

Discriminatees were rejected for relying on others or public transportation, although the screener never asked if relying on these forms of transportation to get to work had ever caused work related problems. Blake and Oakley were rejected because they relied on public transportation. Light was rejected because she relied on her mother and sister for transportation. Ramos was rejected because he had to coordinate his transportation with his wife.

However, stranger applicants were not rejected because of transportation issues. Mark LaFrance was hired even though working nights and Sundays might be a problem as he relied on public transportation and it was noted by his first interviewer that he was “not very flexible with weekdays due to public transportation and said he could try and call a friend to drive him if necessary.” Constance Morgan and Michael Demers (WARC) were also hired even though they relied on public transportation which might limit their availability (because of the bus schedule).

Others were passed on in the interview process despite transportation problems, namely, Albert Haxhi could not work beyond 11 p.m. because of lack of transportation at that hour. Andre King was held for future consideration until his transportation was resolved; he was taking his driver’s test in a day.

d. Poor job stability

Three discriminatees were rejected for alleged poor job stability. Thus, D’Agostino, Garcia and Luna were rejected for poor job stability or for not being forthcoming about job history. On the other hand, individuals were hired who had similar “unstable” work history. Namely,

Philip Adamo was unemployed for nearly a year. On Micah Allder's screen, the screener noted "short stays at jobs (1 yr.)," indicating questionable short stays at his jobs. On Huenerberg's screen it was noted that the applicant had not worked for 6 months with no explanation as to why there had been no work. Pipher was hired even though she was at one job for only 5 weeks and out of work for 10 months. Rosemary Ali was hired despite having no previous work history. Elsa Quezada was rejected at the first interview because of inconsistent answers about employment gaps. Victor Mitchell was passed on at the screen even though he had short lengths of employment. Elizabeth Burgos was passed on even though her last job was only 6 months in duration, and her previous job lasted only 1 month. Christopher Brothers had no work in a year and there was no explanation noted on the screen. Anthony Malone was passed on by the screener even though it was noted that he had a few short stays at his previous jobs.

e. Poor grooming habits

Eight discriminatees were rejected for alleged poor grooming habits. Svehlak was rejected because her hair was "messy and not appearing clean." D'Agostino was rejected for dressing inappropriately. However, the screener did not elaborate on her manner of dress. D'Agostino testified that she wore clean presentable clothes that were appropriate. Bob Murgatroy was also rejected for allegedly "smelling" and having poor hygiene. However, he credibly testified that he was freshly showered and shaved before attending the job fair, and was neatly dressed. Other discriminatees were also rejected based on the following notations concerning poor grooming: Michael Doughwright was dressed unprofessionally; Hillman's hair was not combed; Luna wore jeans and a flannel shirt; Ortega was "unkempt"; and Ramos was unshaven and wore dirty clothing.

Stranger applicants, however, were passed on in the interview process despite being unidentified by the screeners as possessing poor grooming habits. Thus, R. Filippone (Engineering) was sloppy and the screener checked poor grooming, but passed him on because "he knew what he was talking about, liked hard work, liked his job and doing what he does." Apparently, former employees who knew and liked their job were not given the same consideration when they appeared to be "sloppy" or "messy" to the screener. Lisa Salovski was held for future consideration even though her first interviewer noted that her grooming was poor and her hair was messy. It was noted at John Fountain's first interview that he smelled like alcohol; this particular odor was not mentioned by the screener.

f. Poor communication

Five discriminatees were rejected for "poor communication," a category which appears to include a variety of factors. Svehlak was rejected for having a monotone voice and because the screener had difficulty drawing out answers from her. Without elaboration, poor communication was checked for Kathy Meccariello, but it is difficult to determine what caused the screener to check this answer. In her testimony, Meccariello possessed excellent communication skills, spoke clearly, and communicated effectively. Castonguay was rejected because the conversation with the screener "did not flow." Hillman and M. Echeandia were rejected for providing one-word answers. Jackson was rejected because the language barrier was too great.

Other nonpredecessor applicants were hired despite the screener or interviewer noting similar characteristics to those listed above. In the interview process, Francis Morris applied for guest relations agent, but was referred by Respondent to Housekeeping after her first interview because of her heavy accent. After her second interview (which form is barely filled out), she was referred to a third interview as a housekeeping supervisor. At her first interview, the interviewer noted that Gladys Quintana did not understand the questions and it was noted that a language barrier was present. A language barrier was noted at the first and second interviews for Haydee Suarez. Tina Poor was held for future consideration, even though it was noted that she "can't speak well." Samone Silva was recommended for a second interview even though she was not talkative. Ramon Ballenilla was recommended to proceed to a second interview despite having difficulty with the English language. Mario Amarel was passed on even though the screener noted it was hard to get information out of the applicant. Eric Bartley was held for future consideration even though he had difficulty answering the interviewer's questions.

g. Poor composure

A number of discriminatees were rejected for poor composure, which appears to include a lack of smiling and eye contact. For instance, Meccariello was rejected for having a "dull

sneer." Colangelo was rejected for being nervous, having an unprofessional demeanor, and joking in the interview. Bender was rejected by the first interviewer for failing to smile, although the screener noted that she had a good smile. Doughwright, Hillman, and Martin were rejected for not smiling. Garcia was rejected for not smiling and slouching in his chair. Giacin was rejected for being timid. Ribiero was rejected for a lack of enthusiasm.

Nonformer employee applicants were passed on or hired despite sharing many of the above characteristics. Dasilva's screener checked that she had "poor composure" but was passed on to a first interview. Nelly Cantelle was passed on to a first interview by a screener who noted that she had no smile and no personality. Audry Lynch was held for future consideration despite the interviewer's concern about her not having a "ready smile" but the screener noted she had "great experience." Steven Sullivan was held for future consideration even though he did not smile. Colleen Pipher was offered employment despite being "very shy." Also, Samone Silva was passed on despite being very shy, nervous and not talkative. Tina Poor was described as not speaking well, but was passed on. Elizabeth Burgos was held for future consideration, even though the second interviewer noted that she seemed like she might be curt when confronted with a problem. The screener noted that Christopher Brothers seemed to be overbearing, yet passed him on for a first interview. Gaylord Womach was held for future consideration even though he never smiled.

h. Reference problems

In addition to the reference issues raised above with regard to Denise Rodriguez and Melissa Gugliotti, two other predecessor that made it though Respondent's interview process were rejected because of bad references. Estella Davila was rejected after receiving a reference from Pat LaBonte about attendance problems. Interestingly, this reference was obtained on February 7, more than 6 days after Davila had received two positive references from other sources on February 1 and 2. Apparently, Respondent kept searching until they found a negative reference as an excuse not to hire Davila. Eric Johnson was subject to another especially rigorous reference check. On January 31, 1997, Johnson received an "excellent" reference from his former supervisor at the Waterbury Four Points. On February 2, 1997, another reference said that because of corporate policy it could not provide references, but it would be positive, Johnson worked many hours and was promoted to shift manager. Despite two good references which already satisfied Respondent's criteria, Respondent sought two more references for Johnson, which were, of course, negative in some way. A chart created by Respondent showing which predecessor employees made it to the reference checking stage, shows that of the four discriminatees who made it to the reference check stage, three were rejected based on an unsatisfactory reference from Kelly Zampano. Also, no other employees were provided with any sort of reference from Zampano, i.e., Respondent did not ask Zampano for references for other food and beverage employees, even though she was asked for Johnson, Gugliotti, and housekeeping employee Rodriguez. Additionally, most of the food and beverage employees were hired based on a reference from "Jerome,"⁴² although for Johnson, the reference from Jerome was not sufficient. Further, Respondent called Pat LaBonte for references for every housekeeping applicant except Rodriguez.

Other applicants were not subjected to such a rigorous reference check. Joanne Dragunoff was hired even though no one reference checked her last job held before applying at the Hotel. Rene Abell was hired after one good reference and one refusal to provide information because of corporate policy, herein a "corporate policy reference." No further reference checks were sought on Abell, unlike Johnson. Lawrence Barone received one reference that indicated he was eligible for rehire and then his positive reference was checked twice. Michelle Braun also got a corporate policy reference and a good reference with no further checks, as did Gina DellaVecchia. Jolene Maine got a corporate policy reference and another could not disclose but if disclosed would be excellent, just like Johnson; however, unlike Johnson, Respondent did not check any further references for Maine.

B. Korzeniewski got a corporate policy reference, one good reference, and one reference that would not provide any information at all. Kelly Lamphear was hired based on two refer-

⁴² Jerome is Jerome Schneider, a manager at the former hotel who was hired by Respondent as the restaurant manager. He only stayed on for a week, and was off the payroll by the second payroll.

ences, one corporate policy reference and one good reference. Ralph Minervini was unable to provide a positive business reference, so instead supplied two positive personal references and was hired. Heather Mundy was hired upon one positive reference and on verification of information reference. Margie Ross was hired after two business references where they had no record of her employment, but then obtained two personal references. Carmen Carrasquillo also was not able to receive positive business references, but received two positive personal references. Tammy Cohen was hired with one reference from a temporary agency, which reference indicated under “guest service skills” that it was inapplicable.

i. Questionable motivation

The following discriminatees were rejected because of “questionable motivation” by the screeners: Oakley, Flammia, Ruegg, M. Echeandia, Buxton, Berdan, Bernado, Bertelson, Castonguay, L. Douthright, M. Doughwright, Giacin, Ortega, Pinho, Ribiero, Salouski, Tavares, and B. Williams. Whether or not an applicant has “questionable motivation” appears to be determined by their answer to the screening question, “Why are you interested in working at this hotel?” At the interview stage, the question was, “What motivates you?” The discriminatees were rejected for answering that they had been working at the Hotel for a time, liked it at the Hotel, liking or needing the money, and needing a job. The screeners characterized a number of the discriminatees as seeming to be “expecting” their job back or “entitled to their job,” which was viewed as a negative. Being motivated by money or a need to work was also viewed as a negative for a number of discriminatees.

Stranger applicants who answered the question the same way as predecessors were not disqualified for having a “questionable motivation.” A number of applicants were hired even though they said they wanted to work at the Hotel or were motivated by the need for a job, the money, proximity to the Hotel, or because friends or family applied.

More specifically, Matthew Cizauskas was hired even though he wanted to work at the Hotel for a job and was motivated by money. Thomas Clifford was hired even though he wanted to work at the Hotel because he lived close to the Hotel. Stacey Constantino answered she would like to work in a hotel and needs a job. Berdell Cooper said because the Hotel was close and it was nice working in air conditioning. Thomas Dougherty, Ralph Minervini, Gladys Quintana, M. Ross, R. Steeves, and Haydee Suarez were all hired even though they all answered during the interview process that they were motivated by money or wanted to work at the Hotel because they needed the money: Dougherty; Minervini; Ross; Suarez; Steeves; and Quintana. C. Morgan, Gladys Quintana, H. Suarez and T. Cohen were hired even though they also answered that they wanted to work at the Hotel because they needed a job or needed to work: Morgan; Suarez; and Cohen. Christine Drachenberg and Norma Gomez were hired even though they answered that they were interested in working at the Hotel because a friend or family member came to apply or recommended the Hotel.

Further, other applicants were passed on despite having questionable motivation. Rosemary Ali “really needed a job.” P. Schwerger was passed on for an interview even though he wanted to work at the Hotel because it was close to his home. Donna Dragon applied because a friend saw an advertisement for the job fair and likes the business. Ramon Ballenilla was passed on despite saying he was interested in the Hotel because he needed a job. Nancy Martinez was held for future consideration even though she had questionable motivation and the screener noted that Martinez may be interested in just getting a job.

j. Unable to perform essential job functions

Discriminatee Kathryn Nicholson was a former laundry employee. Nicholson applied for a housekeeping position with Respondent at the job fair. Nicholson was rejected for being unable to perform essential job functions. In this regard, the screener noted in the comment section that Nicholson was unable to “complete application due to problem with writing; that she enjoyed working in a confined area because she gets flustered under pressure and cannot work in guest rooms.” Nicholson was rejected even though the screener noted that Nicholson stated that she was interested in any other position Respondent thought she could perform.

Respondent offered Nicholson no other position that would address her inability to work out of a confined space. Respondent made no exception for Nicholson’s limitations.⁴³

Respondent, however, hired stranger applicants even though they had limitations on their ability to perform all functions of a position and/or needed assistance to perform their job functions. Particularly, Respondent hired two individuals with special needs from the Waterbury Association for Retarded Citizens (WARC). Thus, Michael Demers was hired as a housekeeper, even though he would need a job coach to help him do his job and could read only “sight” words like caution and stop. Additionally, Respondent did not seem to apply its rigorous hiring standards to the interview process of Matthew Cizauskas, who was hired as a utility worker. The interview forms are barely filled out and Cizauskas had very specific scheduling limitations. Cizauskas could work only part time for 16 to 20 hours per week. He also preferred short shifts of 6 to 7 hours and wanted every other weekend off. Thus, Respondent was willing to make special exceptions for these applicants, but not for a former employee who could only work in confined spaces, like the laundry department.

Although not rejected at the screening level, discriminatee Hasipi is a striking example of an applicant who was rejected in the interview process for purportedly not knowing about an essential function of the applied for job. Hasipi applied for a position as a utility worker (dishwasher) at the job fair. Hasipi was one of the lucky few discriminatees who made it past the screening interview. However, he was not hired after a second interview because he supposedly “did not understand the concept of sanitation.” The second interviewer, G.A. Crea, claimed that Hasipi had no answer to the question “What does the word sanitation mean to you?” This is was curious since Hasipi had answered this question correctly at the first interview by stating, “Sanitation means to keep clean.” The first interviewer found this answer acceptable, and passed him on.

In contrast, Berdell Cooper was hired through the job fair and answered the same question in both interviews that sanitation meant “clean.” Additionally, Edward DeJesus was also hired through the job fair and answered that sanitation means “clean for everything.” Finally, Gladys Quintana was also hired through the job fair and also answered that sanitation meant “clean.” But what is more interesting about Gladys is that she was unable to answer the question at the first interview conducted by G.A. Crea. When asked by Crea “what does the word sanitation mean to you,” the interviewer noted that she did not know what sanitation meant. Crea, however, passed her on. Respondent did not call Crea, its corporate chef, to explain this glaring discrepancy. Thus, three of the four utility workers hired at the job fair answered that sanitation meant simply “clean.” Only Hasipi, a discriminatee with 2 years’ experience as a utility worker/dishwasher, was rejected. Moreover, after the job fair, Hector Diaz was hired as a utility worker on July 15, 1997, after he answered that sanitation meant “clean.”

k. No such position with new employer or lack of interest in job as described

A number of discriminatees were rejected because they applied for jobs that no longer existed with the new employer or existed in combination with other job duties. Many discriminatees expressed a willingness to work other jobs or asked the screener what jobs would be available given their abilities and were rebuffed by the screener. Most notably, Marilyn Rossi applied for switchboard or PBX operator and was told that this position was no longer a separate job, but was part of a combination of duties of the guest relations agent. Rossi did not feel she could handle the front desk duties, but asked the screener if there were any other job she could perform, the screener said no and rejected Rossi. However, Audry Lynch, a stranger applicant applied for guest relations agent, but at the first interview the interviewer noted, “concerned about front desk position, suggest PBX operator.” Obviously, Respondent was contemplating a PBX operator position or was willing to make exceptions or be flexible with applicants other than former employees. Indeed, Respondent’s interview documents show numerous instances of occasions when stranger applicants were guided to other positions more suitable to their skills, personality or available hours of work by Respondent’s screeners and interviewers. This same level of accommodation was not offered to the discriminatees. Of

⁴³ As noted herein, Respondent employed at least four individuals within the housekeeping department who had the specific designation as only laundry employees.

those nonpredecessor employees hired, many were referred to another position by Respondent either to suit the applicant or Respondent. Lawrence Barone applied for security or health club, was screened and interviewed for health club, then security, then referred by Respondent to Culinary Service Assistant and then to Express Service Supervisor, where he was offered a position that he declined. Thomas Clifford applied for security, but after his first interview was referred to another department because he did not have much experience dealing with problem situations. He was then interviewed for an engineering position, possessed only basic maintenance skills, but was nonetheless offered the position. Berdell Cooper applied for security but was interviewed and hired for utility. Frances Morris applied for housekeeping or guest service and was interviewed for future relations agent but after interview was recommended by Respondent for consideration in laundry or housekeeping because of her heavy accent. Morris was ultimately hired as a housekeeper.

Other applicants who were not hired were also given leeway in the interview process. Nelly Cantelle applied for guest relations agent but was referred by Respondent to housekeeping. When Cantelle was not interested in housekeeping, Tejada asked if she would be interested in a full-time or part-time auditor position. Sheila George also applied for guest relations agent and was held for future consideration although it was noted she was better suited for a sales administration role. Susan Lentz applied for guest relations but was held for future consideration in housekeeping. Otto Rothi was referred to a night auditor position after his second interview because he was shy. Salvatore Rinaldi applied for security, but was screened and interviewed for housekeeping. At the second interview it was noted that the interviewer suggested other positions available, but the applicant was not interested.

Barbara Maglio applied for a number of positions, banquet waitstaff, bartender, and a la carte. She was screened for both food service agent and bartender. The screener specifically noted Maglio's 5 years of experience as a waitress and hostess. At the first interview it was favorably noted that Maglio had experience doing many different things and was "willing to do it all." This treatment is in contrast to the treatment Flammia received during the screening process. Like Maglio, Flammia applied for a number of food and beverage positions, but the screener told Flammia it was best to only apply for one. Flammia also expressed a willingness to perform any job and to work her way up from waitress, but instead of receiving a favorable remark, Flammia received a comment that she had a questionable motivation. It was noted that Maglio had 5 years of experience as a waitress and hostess, but Flammia received no such consideration for her over 10-20 years of experience in the field as a waitress and hostess. Likewise, Lois Glenn applied for guest relations/sales and was screened for food service agent where the screener favorably noted Glenn's 13 years of experience in restaurant service. After her first interview, her experience was again positively referenced and it was noted that she was looking for any opening in food service. By contrast, when Flammia told the screener that she was interested in any position and would work her way up to any position and applied for bartender, food server or conference captain, the screener forced Flammia to "choose one."

(I) No hospitality understanding

Although the discriminatees had obviously been working in the hospitality industry for number of years, many of them were found to have had no hospitality understanding. Oakley, Buxton, Giancarli, Bertleson, L. Douthright, Garcia, Hillman, LaVorgna, Martin, Mayshaw, Ortega Pavlik, Ribiero, Tavares, and B. Williams were all rejected for not having hospitality understanding. The screener noted that they had no interest in serving guests or did not mention guests; had no enthusiasm; no service orientation; might be argumentative or unable to react to customer concerns; or were not "in it to please to the guest."

Other applicants were hired despite having characteristics indicating a lack of hospitality understanding. Rene Abell was hired with a note to consider him for the third shift because he was a little "rough" and "may be a little abrupt for guest contact." Heather Mundy's first interviewer said that she was "questionable on personality." Gladys Quintana did not understand the interview question about what hospitality meant to her. Steven Sullivan was held for future consideration even though he did not have a "real hospitality focus." Gaylord Womach as held for future consideration even though he didn't mention guest service or hospitality. John Meehan (security), was held for future consideration even though the screener checked and noted that he had no mention of service to guests.

(2) The job fair as seen through the eyes of the
Yale students

In stark contrast to the perfunctory disqualification of the many experienced predecessor employees, Respondent went out of its way to offer employment to four students from Yale University (only three of whom accepted), who, unbeknownst to Respondent, had previously volunteered to apply for employment with the Hotel and to provide information about that process to the Union. Despite having many of the same qualities for which Respondent routinely disqualified predecessor applicants, i.e., *transportation problems* and *scheduling limitations*, the Yale students were coddled throughout the entire hiring process. Thus, when the position Francis Engler applied for did not seem suitable to his quiet personality, Respondent suggested that he consider another position (night auditor) and ultimately hired him for that position. Joann Lo and Jonathan Zerolnick were given the "correct" answers to the interviewers questions, treatment entirely absent from that given the many discriminatee employees who had been summarily "screened out" on day one of the job fair.

Thus, not being a predecessor certainly assured an applicant, at the very least, special consideration. In this regard, all of the Yale students who applied at the job fair were offered employment even in spite of the fact that each indicated that they would be sharing a car to travel from New Haven to Waterbury (nearly 45 minutes away), had limited availability due to their class schedules at school, and were all graduating from college in May.

(a) Joann Lo

Lo was hired for part-time employment as a health club attendant through the job fair. Lo decided to attend the job fair and apply for a position after speaking with some fellow students who spoke with an organizer for the Union. At the time, Lo was a senior at Yale University and living in New Haven. On January 30, Lo drove herself and four other Yale students and a Yale graduate to the job fair: Francis Engler, Valerie McCrory, Kate Andreas, and Jon Zerolnick. Upon arrival, Lo filled out an application for either the health club attendant or guest relations position. Lo, who had no experience in the hotel industry, decided to apply for the health club attendant job because it seemed the easiest job to do. Lo also brought a resume which she provided to the screener.

At the screening interview, the screener commented that she was happy to see that Lo applied for the health club attendant position because not many people had applied for that job. Then the screener asked if Lo had any training in CPR or first aid and Lo replied that she did not but was willing to learn. The screener also asked if Lo wanted to work part time or full time, and Lo told her part time. After the brief screen, Lo was sent to another room to wait for a "first interview."

At that interview, Lo was interviewed by Barry Asalone, who introduced himself as the manager of Hotel relations. Lo and Asalone discussed Lo's school major and her plans after her graduation in May 1997. Lo explained that she was looking for a job with a nonprofit organization. When Asalone asked her why she wanted to work at the hotel, Lo told him that she needed extra money because working for a nonprofit would not pay much, and she could use a job at the hotel for extra money. Asalone also asked if Lo had been a lifeguard before or trained in CPR, and Lo said no. At the end of the interview, Asalone indicated that she might get a call in the coming week for a second interview.

That evening, Lo received a call for a second interview for the next day. The next day, January 31, Lo went back to the Hotel and interviewed with Bob Cappetta, the general manager of the Hotel. Lo returned to the Hotel with her schoolmates because they had also received second interviews at the Hotel. When Cappetta and Lo sat down for the second interview, Cappetta showed Lo the list of questions he had for her. Cappetta told Lo that they were the same questions as the day before, and he had the piece of paper that Asalone had written on from his interview with Lo the day before. Cappetta said that he was just going to write down some of the same answers Lo had given Asalone because he wanted to have a "real conversation" with Lo and he did not want to go over the same questions again. Cappetta asked Lo about her major and her best and worst qualities. Lo testified without contradiction that Cappetta gave her some of the answers to the questions he asked her.⁴⁴ For example, Cappetta

⁴⁴ Although he was employed by Respondent as the general manager from the opening of the hotel until late fall 1998, Cappetta was not

asked what she would do if she was working in the health club alone, and no guests were present. She replied she would listen to music or flip through a magazine. Cappetta said, "You would clean, right?" She responded, "Of course." Cappetta hinted to her, "You're a self-starter, right?" Lo answered, "Yes, of course."

Cappetta then asked how Lo would describe herself. Lo said she was very responsible and dependable. Cappetta said, "Well, you need to sell yourself at interviews like this. Here's what I would say . . ." and then gave her a list of positive characteristics: friendly, hard working, etc. Lo said, "Yes, I'm all those things." Cappetta then wrote down the characteristics and Lo added that she was trustworthy and that people tell her she has a nice smile.

During this interview, Lo asked Cappetta what the health club attendant position would pay. As Cappetta did not know, he asked some of the other managers, then told Lo that it would probably be about \$6 an hour. Regarding availability, Lo told Cappetta that she could work Monday and Friday evenings and any time on Saturdays and Sundays. She made it clear that she was not available on Tuesdays, Wednesdays or Thursdays. Shortly thereafter, Lo was hired as a part-time health club attendant and put on schedule for about 3 days a week.

(b) *Francis Engler*

Engler, also a senior at Yale University, applied at the job fair with fellow students Lo, Zerolnick, and McCrory. Engler applied for a guest relations agent, but was ultimately hired by Respondent as a night auditor (after Respondent determined that his personality was not suited for a front desk job). Like Lo, Engler also had no experience working in a hotel. Engler was screened by Melissa Oates, the human resource manager for the hotel, who asked Engler general questions about his application and noted the position he was applying for and his previous employment. At the end of the screening interview, Engler was passed along for a first interview.

Engler recalls that at his first interview more specific, interview-like questions were asked. When asked why he wanted to work at the hotel, he told the interviewer that he was trying to make some extra money for college and wanted a job where he could work around people. The interviewer asked Engler what hospitality meant to him and he said making somebody feel comfortable in new surroundings. He was asked about his experience in guest relations, and he answered that he had hosted some conferences in Guatemala where he had worked with tourists. During the interview, Engler was asked if he would be willing to consider another position in the hotel. When Engler said that he would, the interviewer asked him about a night auditor position because Respondent might be full in guest relations.⁴⁵ Engler did not know what a night auditor position was, and was a bit confused, but told her he would be willing to consider whatever position they had open in the hotel.

Engler was called back for a second interview, and drove to the Hotel with Lo, McCrory, and Zerolnick. Tito Tejada, director of accounting, interviewed Engler. Engler testified that Tejada asked the same questions as the first interview and Engler answered the same way. Then Tejada asked Engler if he had any experience in accounting, math, or computers. Engler replied that he did not have any experience in accounting and had not taken a class in math since high school and had only worked on word processors with computers. Tejada replied, "Do you work with computers in school?" Engler said, "Yes, I worked on word processors." Tejada then said, "So you have a lot of experience with computers, right?" Engler supplied the correct answer: "Yes."

When asked when he was available to work, Engler told Tejada that Fridays and Saturdays were best for him, but if there were other days, Engler would consider them. Engler explained that he could consider other days of work, depending on the availability of the car that he used. Engler explained to Tejada that he was sharing a car with other people and had to check on the availability of the car on other days. Tejada replied that Engler might have to be available on Sundays. Engler said that would be all right. Tejada also said that if Engler was hired for the night auditor position, they would have to talk about his grooming. Engler asked what he

meant and Tejada mentioned his hair and his coat (at the time, Engler had long hair in a pony tail and a tweed sports jacket). Engler received the job of part-time night auditor.

Upon reporting for orientation, Engler met with Tejada about the specifics of his new job. Although Engler told Tejada that he would only be able to work Fridays and Saturdays, Tejada did not have a problem with this schedule. Engler also testified that he missed his first scheduled day of work because he did not have a car, and was not admonished over this.

(c) *Jonathan Zerolnick*

Zerolnick went to the job fair with the other Yale students and applied for a position as a food service agent. Zerolnick had some experience as a food server because he had been working at the dining halls throughout college and in restaurants. Along with the application, Zerolnick submitted a resume. Zerolnick was then screened by a woman who asked him questions about his availability and why he wanted to work at the hotel. Zerolnick was available to work Saturdays and Sundays and the occasional Monday or Friday, but not both in the same week.

In response to why he wanted to work there, Zerolnick told the screener something about liking hotels and food service. When asked if transportation was a problem, he said it was not. At the end of the screening interview, Zerolnick was told to go to another room and wait for another interview. While Zerolnick was waiting for the "first interview" Cappetta wandered by and chatted with the Yale students. When Cappetta noticed the group of Yale students sitting together he joked about the fact that they were together, and one of the students replied that they all lived together and drove to the job fair together.

Zerolnick's first interview was with Patrick Roy, who asked a prepared set of questions and wrote down Zerolnick's answers. When Zerolnick did not know the meaning of the term "upselling," Roy supplied the answer and offered several helpful examples. Zerolnick, who could see Roy's notes, noticed that Roy wrote down that Zerolnick knew the definition of upselling. When Roy gave a scenario for a sample customer complaint and asked how Zerolnick would handle such a complaint, Zerolnick answered the question incorrectly; Roy simply replied that his answer was wrong, gave Zerolnick the correct answer and then proceeded to write down what Roy had said as though Zerolnick had given the correct answer.

Zerolnick also remembered that he and Roy had an exchange about the difference between couscous and orzo. At the end of the conversation, Roy wrote down that Zerolnick knew the difference between couscous and orzo, even though during the conversation, Zerolnick had answered incorrectly. Zerolnick said couscous is a grain and orzo is a pasta and Roy corrected Zerolnick and said, no they are both grains.

That night, Zerolnick got a call back for a second interview for the next day with Bob Scheiner, director of food and beverage. At the second interview, Scheiner asked the same questions as Roy had. Zerolnick testified that since he now knew the "right" answers, he simply supplied them. Soon thereafter, Zerolnick received a letter indicating that he was hired.

(d) *Valerie McCrory*

McCrory applied for a food service and guest relations agent's position. At her screening, McCrory was asked if she had any experience in the hotel industry and she said no. The screener noted that she was applying for two positions and asked if she had any experience in guest relations. McCrory said she had no experience in guest relations but had been working at the Yale Cabaret and Yale Fine Dining and Catering. They then discussed the fact that McCrory was a Yale student and discussed other majors. When asked why she wanted to work at the Hotel, McCrory told her screener that she needed extra money. The screener asked about her availability to work and McCrory offered to work weekends. The screener asked when McCrory was graduating from school, and McCrory said, "May," and that she was not sure what she would be doing after graduation.

At her next interview (the "first interview"), the interviewer discussed the fact that McCrory was a Yale student, and asked if she like Yale and what her major was. When asked why she wanted to work at the hotel, McCrory replied that as a senior she needed some extra money before graduating in May. For availability, McCrory again indicated weekends and possibly Friday through Monday. he asked about her experience in food service and she explained the Yale Cabaret and Yale Catering. Regarding transportation to work (New Haven is about 45 minutes by car from Waterbury), McCrory told the interviewer that the students

called to testify by Respondent. Respondent offered no evidence to suggest that Cappetta was not available.

⁴⁵ A night auditor is a person who works in accounting and takes care of balancing the books over the "graveyard" (night) shift, essentially managing the front desk during that shift. Engler had no experience in accounting.

borrowed a car. The interviewer even commented that Yale was “far away” and wondered aloud how McCrory would be able to get to work. The interview ended after about 20 minutes.

McCrory got called back for a second interview, along with her fellow Yale students. At the second interview, McCrory was asked the same exact questions and she answered in a similar manner. McCrory was offered a position as a part-time food service agent in spite of the obvious problems she had with transportation and motivation, but she declined the offer and never worked for Respondent.

(3) Other evidence of antiunion animus at the job fair

In addition to the above testimony concerning the mechanics of the job fair, the Yale students offered credible, un rebutted and clearly unrehearsed testimony concerning certain statements made by Cappetta at the job fair, statements which dramatically reveal Respondent’s true motive in holding a job fair. Lo, Engler, McCrory, and Zerolnick all testified that Cappetta approached them during a break in the interviews and chatted amiably with the group of young, likable students, and then let down his guard.

All four recalled the incident somewhat differently, thus lending weight to the credibility of the witnesses, as the minor differences in each witnesses’ recollection tend to suggest that the testimony was unrehearsed and truthful. The students testified that at some point during their second visit to the hotel for their second interviews (January 31) they were seated together in the “waiting area” between interviews when Cappetta came over to the group and remarked that the interviews seemed pretty easy. Zerolnick responded that the questions sounded “familiar” or that it was strange that they all seemed so “similar.”

Cappetta told the students that Respondent had “to keep the questions the same because we have to keep everything standard.” According to Lo and Zerolnick, Engler then asked what Cappetta meant by “standard.” Cappetta stated that the NLRB was watching them for 3 years, that their counsel had told them to keep everything standard, but that they thought it was a waste of time because they (the interviewers) preferred to have “real conversations” with people. Engler recalled that Cappetta said that that this was some kind of formality that they were going through. While McCrory recalled that Cappetta told them that the questions were so similar because “that’s a procedural reason. We’ve been having some legal problems and we wanted to make sure that there weren’t going to be any problems with the hiring process.” Of course, Cappetta at the time had no way of knowing that these four young students were about to add to Respondent’s growing legal problems with its hiring process in this matter.

F. Post Job Fair Events

1. The terminations of Lo, Engler, and Zerolnick

It is undisputed that Respondent implemented its own personnel policies and its own wage rates when it reopened the Hotel. Included in the personnel policies was a “Personal Appearance Standards.” Among the various rules about wearing jewelry, makeup, and other items, is included the following rule: “only authorized pins, badges, name pins, etc. may be worn on a uniform. You are not permitted to carry portable radios, tape players, pagers, telephones, etc, while you are in uniform unless your position requires them.” It is undisputed that the predecessor employees were allowed to wear union buttons at the Hotel.

a. Termination of Joann Lo

Lo received an offer letter from the hotel on about February 5, which indicated that Lo was to report to the Hotel for training on 15. However, Lo could not make the training, so she called Melissa Oates, human resources director, who told her that she could come in on February 16 instead. After training on February 16, Lo reported to the Hotel on February 17 and 23 to help clean the health club and get it ready for the opening on February 24.

On the day the Hotel opened, Lo was scheduled for a shift beginning at 2 p.m. Lo was told by a coworker in the health club she knew only as “Tara” (the record reveals that her last name is McGaffey), that the uniform for the health club attendant was a white T-shirt that said “Four Points Hotel” worn with blue shorts or pants. Though Lo had worn a plain white T-shirt with black sweat pants, she received a Four Points T-shirt and name tag that day.

Lo generally worked 2 days a week at the hotel. If she worked on a Monday or a Friday, she would begin her shift at 2 p.m. If she worked on a Saturday or Sunday, she began at 6 a.m. For her “uniform” Lo wore the Four Points Hotel T-shirt and either khaki shorts or black sweat

pants. Lo’s supervisor was John Kirwan, guest relations manager. Regarding her dress, Lo told Kirwan that she did not have blue shorts or pants, and Kirwan told her that it was fine for her to wear the khaki shorts or black sweat pants. It appears that although she was not wearing the prescribed uniform for health club attendants, no Hotel manager ever spoke negatively to her about her shorts or black sweatpants.⁴⁶

In addition to the name tag, Lo soon began wearing buttons on her hotel T-shirt, on a number of occasions. On March 13, Lo wore a large green smiley face shamrock button, in the spirit of the upcoming St. Patrick’s Day holiday. Lo wore the button on the opposite side of her name tag, on the right side of her hotel T-shirt. Lo testified without contradiction that as she began work at 2 p.m. she and her coworker on the previous shift, McGaffey, went to Oates’ office to inquire if the hotel would be hiring another person to work in the health club. The conversation lasted about 5 minutes, and although the button was clearly visible, Oates said nothing to Lo about the large green shamrock button she was wearing. This testimony (as was all testimony concerning Oates) was un rebutted, as Respondent failed to call Oates to testify.

Lo asked if, as a worker at the Hotel, she was a member of the Union. Oates told Lo that there was no union, but that if 50 percent of the workers wanted a union then there would be one. Oates told her that there was no union at the hotel currently, and that management was providing everything. She further stated that people did not understand what a union does and doesn’t do, and that union dues come out of employees’ paychecks. As Lo and McGaffey were leaving her office, Oates asked if they both attended Yale; Lo replied that only she did. During the entire conversation between Oates and Lo, Oates never mentioned anything about Lo’s green shamrock button which, by its large size and bright color, would be difficult to avoid noticing on a white T-shirt.⁴⁷ Lo also testified that she saw her immediate supervisor, Kirwan, that evening when he came down to the health club and talked to her for a few minutes.

Lo also wore a button to work on March 29, her next scheduled day of work. On this occasion, Lo wore a small gray button with “Local 217” insignia right above her name tag on the left side of her T-shirt. On this day Lo again saw Oates briefly in the employee cafeteria and spoke with Kirwan in the health club. Neither commented on Lo’s union button.

Lo wore the union button again on March 23, in the same spot right above her name tag on her Four Points T-shirt. Lo said Brian (Griffin), head maintenance man at the hotel and predecessor employee, spoke with Lo. When Griffin asked where she had gotten the pin, Lo told him that it came from someone at Local 217, and asked if Griffin wanted one. Griffin declined and told Lo that he was not a member of Local 217 when he worked at the Hotel previously because “unions are bad for business.” Lo also spoke with Kirwan during that evening in the health club, but he did not say anything about the union button.

On March 30, Lo wore the union button to work again and Lo spoke briefly with Mike Downey, director of housekeeping. Downey did not comment on the button. On March 31, Lo again wore the union button to work. When Lo began work at 2 p.m. she and McGaffey went to the main office behind the front desk to sign for the health club keys. As Lo wanted to ask Kirwan a question about her schedule when she saw Oates, who was in the main office, she asked when Kirwan was coming into work. Oates told her about 3 or 4 p.m., then asked to speak with her in Cappetta’s office.

Oates informed Lo that when she began working at the Hotel she had signed a personal appearance code which said that employees could only wear authorized buttons or pins, that Lo had to have a neat appearance, and that she would have to take off the Local 217 button as it was not authorized. Lo told Oates that she understood what she was saying, but that Lo had worn the button before and no one had ever said anything to her about the button. Oates asked Lo who had seen her wear the button, and Lo named Downey and Kirwan. Oates said that she would check on that, but that Lo would have to take off the button or be sent home for the day, and that if Lo wore the button again she would be terminated. Lo replied that she thought it was her right to wear the button, and refused to take off the button.

⁴⁶ Indeed, Lo testified that another health club attendant, Stacy Constantino, wore gray sweatpants with her Four Points T-shirt. Furthermore, Lo observed other employees not conforming to uniform guidelines—by wearing T-shirts (with rock band’s insignia) to work, and others by failing to wear their name tags.

⁴⁷ Lo specifically testified that she made sure her hair was not covering the button and that she wore her hair in a ponytail when working.

Oates then called Bob Capetta into the office and told him that Lo was refusing to take off the union button and that Oates was going to send Lo home and needed to write a report so Cappetta could witness it. After a few minutes, Oates presented Lo with a two-page written report and asked Lo to read and sign it. Lo was nervous and did not really read the report, but signed it anyway. As she was leaving, Lo again expressed her confusion about being sent home for wearing the union button as she had worn it before without any problem.

Lo worked next on April 5 on a shift which began at 6 a.m. Again Lo wore the union button to work. Upon arriving at work Lo went to the main office to report her hours and to get the health club keys. There she encountered Oates, who told her that she would record Lo's hours. Oates then noticed the union button and told Lo, "The last time you were here I asked you to do something and you refused, I'm only going to ask you once today, will you take off the button?" Lo refused. Oates again took Lo to Cappetta's office. Oates left and then returned about 5 minutes later with a typed report of the incidents (March 31 and on April 5) and asked Lo to sign the report. Lo said she was not comfortable signing the report and that she was nervous on March 31 when she signed the other report. Oates signed the report and then Kirwan came into the office and gave Lo her last paycheck. On the back of the report Oates wrote that Lo had received her last paycheck on that day and asked Lo to sign that statement. Lo signed for the receipt of her paycheck. Lo and Oates discussed the button and Oates asked if Lo would wear a button promoting religion. Lo replied no, but that she worked in a hotel and the button was for hotel workers. During Lo's termination, Oates said, "You were expecting this weren't you, you live with Francis (Engler) right?" Lo did not reply but knew that Engler had been terminated the night before for wearing a union button to the hotel because Lo and Engler were roommates. Like Engler, Lo was also terminated for wearing a union button to work.

b. Engler's termination

Francis Engler was also offered a position at the hotel after attending the job fair, and was offered the position of part-time night auditor. Engler reported for orientation in February and thereafter met with Tito Tejada, director of accounting. During this meeting, Engler and Tejada reviewed Engler's work schedule, which they had briefly discussed during their first interview. When Engler told Tejada that he was only going to be able to work Fridays and Saturdays, Tejada said that schedule would be all right.

Engler was scheduled for computer training with Respondent, but was unable to attend because of conflicts with his personal class schedule and availability of the car he shared with others. In fact, Engler was first scheduled to work on a Saturday, but again was not able to work that day due to the unavailability of the car. On both occasions, Engler left a message for Tejada indicating why he was not able to attend the training or even his first scheduled day of work.⁴⁸

Engler, who went on payroll on February 16, 1997, began working for the Hotel on Fridays and Saturdays, from 11 p.m. to 7 a.m. As night auditor, he would balance the books and attend to customers at the front desk. Engler reported to both Tejada, who was in the office sometimes when Engler started his shift, and Kirwan, the night manager.⁴⁹ As night auditor, Engler did not have a uniform but rather wore what could be termed casual business attire: a button-down shirt with a tie, sports coat, and khaki pants or slacks. Engler testified that the other night auditors dressed similarly (although not always with a sports coat).⁵⁰

On about March 14, Engler wore a green ribbon, about two inches across, tied in a bow near his name tag. Like Lo, who had worn the green shamrock pin, Engler wore the green ribbon in honor of St. Patrick's Day. Because Engler works in the front office, he has contact with different managers as they drop off keys or drop off information for the night audit. On

March 14, Engler remembers having contact with a number of supervisors, more than usual. Engler spoke with Tejada at the beginning of his shift about an audit issue. He also testified to speaking with Kirwan and with Oates, whom Engler specifically remembers because Oates was not normally at the hotel when Engler was working and it was unusual that she was in the office.

Engler also testified that on March 14 he asked Tejada if there was a union at the hotel. Tejada responded, "no, there is no union here, the word 'union' has been wiped clear of this place."⁵¹ None of the managers or supervisors commented on Engler's green ribbon.

On his second day of work that weekend, Saturday, March 15, Engler wore a green shamrock pin to work, about the same size as the Local 217 union button. Engler wore the button, which was a wooden cut-out of a green shamrock on a pin, right near his name tag. No manager said anything to Engler about wearing this green shamrock pin.

The following week Engler wore a Local 217 union button to work. Engler wore the union button in the same place as he had worn the green ribbon and shamrock pin—right near his name tag. At the beginning of his shift, Engler had a conversation with Tejada, who did not comment on the button at that time. Shortly after Engler's shift started, however, Kirwan approached Engler and told him, "Bad, bad, you can't wear the button."⁵² When Engler asked why not, Kirwan stated that it was "solicitation." Engler stated that he did not understand why he could not wear the button because he felt that it made sense to wear the button at the hotel, and Kirwan told Engler to "feel free to refuse" to take the button off. Engler replied that he was going to refuse and asked if that was all right. Kirwan said no, and walked away.

At the end of Engler's shift, Tejada, who was watching him finish up his work, told Engler that since a union did not represent the workers at the hotel there was no reason for Engler to be wearing the union button. Engler replied that he felt that it made sense to wear the button as he worked in a hotel and because the button was for the union. Tejada said that Engler could wear the button in a hotel where he was represented by that union, but that Engler could not wear it at this hotel. When Engler said that he thought he had a right to wear the button, Tejada told him that he would have to take the issue to human resources.

On his next day of work, Engler again wore the union button, but no one said anything to him about the button. The following week when Engler was next scheduled to work, he again wore the union button to work. Kirwan approached Engler and told him that he could not wear the button. Engler explained that he felt they had discussed this before, and that he felt that he had a right to wear the button. Kirwan told Engler that he could *not* wear the button and that Engler had the night off, and would be written up for wearing the button.

During the following week, Engler received a phone call from Oates, who told him that she wanted to meet with him before he returned to work. On about April 2, the two met in Oates' office, where she told Engler that the union button was a violation of the "personal appearance standards," that the union button was "unauthorized," and thus could not be. Engler told her that he did not understand why he could not wear a button for the Hotel workers' union, as he was a hotel worker. Oates replied that it did not have anything to do with it being a union button, but that it was *any* button that was a problem. Engler and Oates then discussed the personal appearance standard and Engler stated that he felt it made sense to wear a union button at work as there was no reason for him not to do so. Oates replied it was not okay for him to wear the button and that she was not going to allow it. Engler replied that this did not have anything to do with him, that he was a good employee and that the button had nothing to do with his work performance. When Oates asked, "You don't believe that being a team player is an important part of your job?" Engler queried what the button had to do with being a team player (Tr. 106). Oates told him that if a manager asks one to take off a button and the employee refuses, "that's not being a team player." Oates then told Engler, who was wearing the button during this meeting, that she would give him one last chance to take it off. When Engler

⁴⁸ Even though it appears that there were problems with the hotel's initial startup due to shortstaffing and inexperienced employees, Engler apparently had no problem receiving special consideration for his schedule. This is in stark contrast to the treatment received by former employees of the Hotel during the screening and interviewing process.

⁴⁹ Kirwan was the manager that Engler had the most contact with. Apparently Kirwan often came to the health club when Lo was working to chat with her.

⁵⁰ Engler also wore a name tag.

⁵¹ Respondent failed to call Tejada to rebut this damaging statement, despite the fact that Tejada clearly is still employed by Respondent at the Waterbury Hotel.

⁵² The transcript incorrectly reflects the testimony as "Pat, Pat, you can't wear the button." The correct testimony was "*Bad, bad*, you can't . . ." (Tr. 101.) Counsel for the General Counsel moved to amend the transcript accordingly and I grant the motion.

refused, Oates told him that she was going to fire Engler, and then brought Kirwan into the office, where they terminated Engler for wearing the union button.

c. Zerolnick's termination

Jonathan Zerolnick, a fourth Yale student offered a job with Respondent from the job fair, was hired as a food service agent (FSA) in early February 1997. At that time, Zerolnick was living with Lo, Engler, and McCrory. Unlike Lo and Engler, however, Zerolnick had previous experience in the food service industry. At his interview on January 30, Zerolnick told the screener and Roy that there were only certain days that he could work—Saturday and Sunday and the occasional Monday or Friday. Zerolnick testified without contradiction that Capetta joked with him and his fellow Yale students that they must have all commuted together to the job fair and referred to the once-popular TV show “Three’s Company.”

By letter dated February 6, Zerolnick was advised that he had obtained a job with Respondent as a part-time FSA, and told to report to work for orientation on February 16. Zerolnick attended the orientation on February 16, then did not work again until February 22, and attended just three of the six training sessions for which he was scheduled.⁵³ Zerolnick credibly testified that the training was conducted by Scheiner, the director of food and beverage; by Karen in the restaurant (undoubtedly Houghtaling, hired on February 12, 1997 as the “assistant restaurant manager,” she also was the one who signed his “Separation/Exit Interview” form; by Eileen in the banquet area (Merritt, whose title was “assistant banquet manager” and who was specifically recruited by Respondent to help open this hotel); and in room service by Susan (probably Haskell, whose title was also “assistant banquet manager” and who worked only 72 hours for Respondent. Zerolnick’s testimony as to who conducted the training and thus appeared to be in charge of the respective departments was borne out by Respondent’s own records.

In late February Zerolnick learned that he had been scheduled to actually begin work as a food service agent at the hotel on a weekend, beginning March 1. However, as he had job interviews out of town that weekend and the next few weekends, on February 26 he went to the hotel and met with Leslie (Roche, the restaurant manager) when he could not locate Karen Houghtaling. Zerolnick asked Roche if he could take some sort of leave of absence because he couldn’t work the next couple of weekends, and that weekends were all that he was able to work to begin with. Roche told him that she wasn’t sure, and that he should ask Houghtaling.

Zerolnick found Houghtaling and asked her if he could take a leave of absence and she told him that she didn’t see why that would be a problem, but to check with human resources. So Zerolnick, while walking upstairs to that department, bumped into Patrick Roy, and asked him if he could get a leave of absence. Roy told him that he didn’t think that there would be a problem, but to check with Melissa Oates.

Zerolnick finally met with Oates and repeated his request for time off. According to Zerolnick’s un rebutted testimony, Oates told him, “Yes, that’s fine,” and mentioned to him that a concern had been raised by Roche and Houghtaling that if he was off the schedule he would have to be taken off of payroll as well and “then it would just be a huge hassle.” But Oates assured him, “No, you’re not going to have to be taken off payroll, you just get taken off the schedule, that’s fine, we’ll find people for this weekend and then when you’re ready to come back on just call your supervisor in the restaurant and you’ll get put back on the schedule.” Then Oates asked about how long he needed and Zerolnick said “probably three to four weeks, hopefully not more than that, and they said okay, just give a call when you’re ready to come back on the schedule.”

Before he left the hotel that afternoon Zerolnick stopped in the employees’ restrooms near the laundry facilities and put up posters with phone numbers for the Union in both the men’s and ladies’ rooms. Then, while standing outside the hotel he chatted briefly with Merritt, who complained to him about the lack of training the new employees had received, and how they weren’t ready for the opening next week.

⁵³ Respondent’s payroll records indicate that Zerolnick worked a total of about 19 hours, beginning with the orientation session of February 16, 1997. Although he was not terminated until early April, his name does not even appear on the second payroll, for the period ending March 14, 1997.

The next few weekends Zerolnick was in Boston and in Washington, DC for job interviews. Zerolnick credibly testified that no one from the hotel ever told him to call in every week to check in with supervision, and that since he was never given a firm date for his return to work, he did not call in either.

The next he heard about his job was a letter dated April 9, 1997, from Respondent, informing him that he had been terminated for “job abandonment.” It is undisputed that no one from Respondent ever called him before simply sending him the termination letter. Although he fully intended to resume working for Respondent, Zerolnick was never offered a chance to explain his plans and never worked again for Respondent.

Finally, while it is clear that Respondent’s personnel handbook (GC Exh. 2) at page 24, requires that “[f]or an initial leave or an extension of any length you must fill out a request through your department head to the Director of Human Resources who will approve it or disapprove it in writing,” it is equally clear that Zerolnick was unaware of this supposed practice and never received from Respondent any such “request form.” In fact, the record indicates that Zerolnick’s absence remained approved until just after Respondent had fired his housemates, Lo and Engler, for their union activities, and then “suddenly” noticed that Zerolnick had “abandoned” his job.

2. Discriminatees’ attempts to apply for employment with Respondent after the job fair

a. Eliza Svehlak’s subsequent attempts to gain employment

In February, Svehlak called the Hotel to see about her application, and was told they were still reviewing them. On March 3, 1997, Svehlak returned to the Hotel and reapplied for a job by filling out another job application and speaking briefly with Roy. While waiting to speak with Roy, Svehlak overheard him tell another applicant that Respondent was only taking applications for housekeeping at that time. Svehlak told Roy that she had worked at this hotel for 12 years, she knew the building well, and had done every job in the housekeeping department. Roy told her that Respondent was only taking applications right now because they have a lot of applications to go through, and if they were interested, they would call her.

The very same day that Svehlak applied for work the second time, March 3, Respondent’s human resource department resumed its “log keeping,” a tracking document exactly like the document created by Barbieri at the job fair. Like the job fair log, the log that was kept by Respondent’s human resource department after Svehlak reapplied only documented the reasons why applicants were rejected and not the positive reasons why other applicants were passed on for interviews or hired.

Svehlak made another attempt to regain her job.⁵⁴ She visited the Hotel a few weeks after her March 3 visit and spoke again with Roy, who asked her if she was seeking full-or part-time employment. Svehlak told Roy that she had been applying for full time but would take part time because she “really needed a job”. Roy then told her that he would “fix” her application (change it to request part time as well as full) and would call her if interested. When Svehlak asked Roy as she was leaving if the old employees were not being rehired because of the Union, Roy told her “no, that’s between management and the Union.” Svehlak, who had devoted 12 years of her life to the Hotel, was never called back.

b. Candida (Cimino) Vадnais’s second attempt to gain employment

After being rejected after a screening at Respondent’s job fair, Vадnais attempted to apply for employment at the end of February. Vадnais called the Hotel and was connected with a woman in personnel. Vадnais told the woman who she was and that she previously worked at the Hotel in the laundry department. The Personnel woman then told her that there were no openings at the Hotel and to call back in another month. As noted above, not only were there positions available, but Respondent was also suffering from high turnover and short-staffing upon opening and in the months following the Hotel opening.

⁵⁴ Svehlak also recalled that in the fall of 1996 she called “one of the owners” of Respondent in Shelton, Connecticut directly in an attempt to keep her job, but her call was not returned.

Vadnais called back about a month later, in mid-March 1997, and was told by someone in personnel that the Hotel was hiring part-time workers and referred Vadnais to the man who was doing the hiring.⁵⁵ Vadnais spoke with Patrick Roy, and again identified herself as a former employee in the laundry department of the Hotel. After Vadnais explained who she was, Roy then told Vadnais that all the positions were all filled. When Vadnais told Roy that the woman in personnel that had connected her to Roy just told her the Hotel was looking for part-time employees, Roy merely said that maybe the woman in personnel made a mistake. In fact, the person who made the mistake was Vadnais; and the mistake was identifying herself as a former employee of the Hotel.

c. Tom Oakley's second attempt to apply upon the recommendation of Kathleen Finnemore

Oakley testified that after he was rejected at the job fair, he kept in touch with an employee who had been hired as a banquet waitress through the job fair, Kathleen Finnemore. Oakley testified that Finnemore told Oakley that the Hotel needed help and to come to the Hotel to fill out an application. Finnemore told Oakley to put Finnemore's name at the top of the application and the banquet manager's name at the top of the application. The manager's name was Eileen. Thus, about a month after the job fair, Oakley returned to the Hotel to apply for employment. Oakley was directed to the human resource office and filled out an application. Oakley turned into the application to the human resource manager, Patrick, and told him that he was a former employee of the Hotel and Finnemore and Eileen recommended that he apply for a position and put their names on the top of the application. Oakley was not screened or interviewed by Roy. Oakley never heard from the Hotel about his application.

Nonetheless, a few weeks later, Oakley was able to work at the Hotel again as a banquet server through a temporary worker agency, Admira. While working as a temp, Oakley met Eileen, the acting banquet manager, the first day he was working at the Hotel. Oakley introduced himself to Eileen as the person Finnemore had recommended for employment and explained that he had filled out an application. Eileen then turned to Oakley and said, "I'm sorry, but we were told not to hire any of the old people back." The conversation ended and Oakley continued to work.

d. Luis Ocasio received no consideration

The record shows that predecessor employee Luis Ocasio, who had not applied at the job fair, applied on April 22, 1997, for dishwasher/utility position. He was screened by Patrick Roy, who found that he had a "Great personality, very polite and eager to work." It is clear from its screening form that Ocasio was willing to work full time, had salary expectation of only \$6 per hour, no restriction on shifts or weekends, and no problems with transportation. There were no negative comments on his screen. Yet, he received no consideration at that time, and was not interviewed or offered a job despite the high degree of turnover taking place.

3. Kathleen Finnemore's experience

Kathleen Finnemore, a former JLM employee who was hired by Respondent through the job fair as an FSA, testified about the working conditions at the Hotel when it reopened under Respondent's management. Finnemore did not support the Union in any public way: she did not attend any of the union rallies, leaflet, join any union committees, or visit the union trailer. At the job fair, in her screen and interviews, Finnemore told the interviewers that she was not available until after 5 p.m. and had a salary expectation of between \$9 and \$11 an hour. Finnemore, the only employee to testify who was actually hired through the job fair process, shed some interesting light on Respondent's all important "happy face" criteria. Finnemore testified that at orientation Bob Scheiner told the new employees that they were hired because of their "A type personalities." Finnemore found this rather amusing, and indicated she did not feel she quite fit that description.

In early February, Finnemore reported to the Hotel where she received her training in the banquet department from Eileen Merritt, who was introduced to her as the manager of banquets. Finnemore testified that the Hotel was very shortstaffed right away, and remained that

way for several weeks. In fact, the Hotel was so shortstaffed that the quality of the product was affected, as Finnemore recalled a particularly disastrous dinner party that went awry due to the shortstaffing. Finnemore was so disgusted with conditions in the banquet department that she simply quit, but Assistant Restaurant Manager Houghtaling (who was in charge of the restaurant) talked her into staying by promising to allow her to work only in the restaurant, with no banquet duties, where she stayed until she resigned permanently. Her testimony was unrebutted.

Finnemore also supported Moye's testimony that the strongest support for the Union came from the banquet department in the Four Points Hotel, and that the "restaurant did not support the Union." Finnemore confirmed that Flammia was known to be one of the strongest union supporters, as she recalled that "Zosh (Flammia) was the person that most people talked to about the Union."

Finnemore confirmed Oakley's testimony as to his post-Job Fair attempts to secure a position with Respondent, as it was Finnemore who suggested to Respondent that it consider him for a job as a conference captain. Finnemore recalled that the conference captain Respondent had hired, Christine (Drachenberg), was having problems with the job, and so she told Merritt that she knew of a qualified candidate, Tom Oakley, who was "very good, very reliable, and knows the job well." Oakley, who had attended the job fair, reapplied for the position the very next day, but was never hired.

4. Use of temps

The evidence revealed that Respondent used a high number of temporary workers in the months following the opening of the Hotel. Respondent's Human Resource Manager Gwen Henderson, also admitted that Respondent was short staffed and utilized temporary workers in the banquet department "quite a few times during '97 and sometime into '98.'" In this regard, Oakley testified that he worked for Respondent as a temporary banquet server worker at least five or six times during those months. Dan Peszek testified that he went to apply at a temp agency that supplied employees to the Hotel. Peszek had worked as a banquet set-up person at the Hotel and after being rejected by Respondent at the job fair, applied through a temp agency, Kelly Services, about 6 months later for a banquet set-up position at the Hotel. Peszek applied at Kelly after seeing a general ad for a banquet set-up person at a local hotel. When he went to Kelly Services he learned that the local hotel was the Waterbury Four Points. In fact, the individuals at Kelly Services told Peszek that his chances for employment looked good because he had prior experience as a banquet set up employee at the very same hotel. However, Peszek was not called for employment at the Hotel.

Thus, immediately following the job fair that Respondent purportedly implemented to find the best hospitality candidates for employment, it was employing temporary employees, sight unseen, to service banquet functions, a part of the Hotel business that was very important and lucrative. In fact, the use of inexperienced temporary employees led to problems in the banquet department. Oakley testified that while working banquet functions, the events were disorganized and that Respondent was using a lot of temp service people that did not know what they were doing. Oakley testified that these temporary employees did not know how to set tables for banquets or carry a sufficient number of dinner plates on a tray. Furthermore, as previously discussed, Finnemore testified that the disorganization in the banquet department was so awful that she quit.

Respondent's use of temporary employees in the banquet department is perhaps best explained by the fact that, as Peszek, Finnemore, and Moye testified, the banquet department was the department where the Union had the most support. Since Respondent hired none of the former banquet servers through the job fair, except for Finnemore, it was forced to staff the banquet functions through temporary agencies.

5. Turnover

Under Respondent's management, especially in the first years, the Hotel experienced an incredible turnover rate. The job fair can only be characterized as a total failure in terms of producing a stable work force. While Barbieri did all she could to evade the facts, Henderson openly acknowledged that the Hotel has had a fairly large employee turnover.

Respondent offered turnover records for the Hotel, apparently in an attempt to show that the job fair was successful. However, a close examination of Respondent's own records reveals

⁵⁵ Vadnais also called the Hotel to inquire if they were hiring because she had just learned from a woman at a temporary employment agency, Temp Plus One, that the Hotel was hiring temporary workers from the agency.

that the numbers simply cannot be reconciled. For example, the “turnover report” for the Waterbury hotel for December 1997 lists a yearend turnover percentage of 75 percent, consistent with Barbieri’s testimony on direct examination. That same report lists a total of 177 employees on payroll at year’s end.⁵⁶ Thus, it can be presumed that to generate a figure of 75 percent annual turnover Respondent relied upon the figures contained within the monthly turnover reports. It can also be presumed that, assuming an accurate monthly and year-end listing of employees terminated (off payroll for whatever reason), a higher figure of employees on payroll at year’s end would generate a *lower* turnover percentage, and vice versa. And therein lies one problem: the payroll records, which list each employee on the payroll in 2-week increments, reveal that only 152 employees were on the payroll at year’s end (See GC Exh. 222). Barbieri was forced to admit that such a discrepancy would affect the turnover rate as reflected in Respondent’s Exhibit 140, the yearend turnover report.

Further, the end-of-year “Master Control” payroll record (GC Exh. 130) listed 197 employees (a third figure) as “active.” Henderson, Respondent’s human relations director at the Hotel, frankly admitted that the yearend master control payroll register contained errors. Barbieri, however, could not bring herself to admit that anything could be wrong with the document: “Well, that doesn’t necessarily mean it’s error. It just means that it didn’t have the information included.”

However, Barbieri was forced to admit that Respondent’s turnover records showed that they contained numerous errors, such as missing or incorrectly transcribed yearend amounts and inaccurate listings of the previous year’s amounts: “they are doing that a little incorrectly”; “the records don’t match up.”

The bottom line is that, since Respondent’s “summaries” are based upon inaccurate data, the most reliable method for evaluating employee turnover in 1997 is derived from a comparison of the first and last payroll records for the year (GC Exh. 196, 222). The first payroll period, for the period ending March 2, 1997, reveals that 107 employees were employed at the Hotel (GC Exh. 196, pp. 1–26). Of these 107, 25 are clearly managers, were offered positions outside of the job fair, and are clearly outside the scope of the bargaining unit: General Manager Capetta, Director of Services Downey, Guest Relations Manager Kirwan, Guest Services Manager Zucker, Director of Room Services Asalone, Reservations Manager Phillips, Housekeeping Manager Hutchins, Director of Food and Beverage Scheiner, Restaurant Managers Roche and Schneider, Executive Chef Portier, sous chefs DeRosa, Heroux and Sabatella, Assistant Restaurant Manager Houghtaling, Catering Sales Manager Bocaccio, Assistant Banquet Managers Haskell and Merritt, Controller Tejada, Human Resources Director Oates, Human Resources Manager Roy, Directors of Sales Dorr and Delauri, Business Transit Manager Pinho, and Director of Engineering Tassiolo.⁵⁷ In addition to the above, there are 11 more employees who would clearly not be considered a part of the bargaining unit: administrative assistant Daigle, income auditor Crotti, accounts receivable Santasiere, accounts payable Thomas, Assistant Human Resources Manager Siddons, the four (4) security employees (Abell, Attenberg, Fischer, and Valdes Jr.) and sales assistants Fricker and Simpson, for a total of 36 individuals outside the bargaining unit. The remaining 71 employees were in the bargaining unit. They were: Michelle Braun, guest service agent (GSA); Joann Dragunoff, GSA; Michelle Lawrence, GSA; Jonelle Pendaruis, GSA; Amiee Reyes, GSA; Celinda Foote, housekeeping supervisor; Louis Martelli, housekeeping supervisor; Carmen Davila, laundry; Cheryl Gagnon, housekeeper; Norma Gomez, housekeeper; LaTonya Jones, housekeeper; Jeanine Martin, housekeeper; Constance Morgan, housekeeper; Frances Morris, housekeeper; Dorothy Nesbeth, laundry; Debra Ouellette, laundry; Colleen Pipher, housekeeper; Margie Ross, house-

⁵⁶ Respondent could not even get the numbers of employees on payroll in consecutive months to match. Thus, while the turnover report for December 1997 lists 177 on payroll at the end of the year, the very next month’s January 1998 (GC Exh. 140), lists 176 employees on the payroll at the end of 1997.

⁵⁷ The job titles of these and all others listed in this brief are gleaned from either their job offer letters from Respondent (R. Exh. 36) or from their designated job description found by their name on the 1997 “master control” list (GC Exh. 130). Of the 25 managers, all but one—Houghtaling—received an offer letter outside of the job fair (see R. Exh. 36).

keeper; Haydee Suarez, housekeeper; Michael Demers, housekeeping Attendant; Mark LaFrance, houseman; Brian Korzeniewski, express service agent (ESA) supervisor; Josia Ross, ESA supervisor; Jason Thompson, ESA; Steve landry (ESA); Joseph Flaherty, cook; Dominic Leo, cook; Earl Wilson, cook; Dorothy Onofrio, kitchen administrative assistant; Micah Allder, utility; Matthew Cizauskas, utility; Berdell Cooper, utility; Eduardo DeJesus, utility; James Mullen, utility; Tina Breton, food service agent (FSA); Heather Briatico, FSA; Carmen Carrasquillo, FSA; Edmund Clark, FSA; Tammy Cohen, FSA; Gina Dellavecchia, FSA; Steven Dostaler, FSA; Christine Drachenberg, conference captain; Kathleen Finnemore, FSA; Benjamin Fournier, room service attendant; Lois Glenn, FSA; Nels Nelson, FSA; Michael Phillips, FSA; Cheryl Russell, FSA; Ronald Steeves, FSA; John Zerolnick, FSA; Robert Corrano, FSA; Steven Maia, food & beverage assistant (FBA); Justyna Matuszczak, FBA; Kimberly Tranberg, FBA; Ellen Falanga, Bartender; Polly Herzman, bartender; Barbara Maglio, FSA; Michelle Varanay, bartender; Nicole Rannazzisi, bartender; Stacey Constantino, health club attendant (HCA); Joann Lo, HCA; Tara McGaffey, HCA; Michael Stanco, HCA; John Christophy, night auditor; Frances Engler, night auditor; Steven Nakano, night auditor; Philip Adamo, engineer I; Brian Griffin, engineer; Ralph Minervini, engineer II; Thomas Clifford, engineer III; and Thomas Dougherty, engineer III.⁵⁸

Moreover, a careful review of the job fair documents entered into the record by Respondent reveals that of the remaining 71 unit positions filled as of the first pay period, nine (9) of these were hired *outside* of the 3-day job fair: Jeanine Martin and Dorothy Nesbeth in housekeeping, ESA Josia Ross, cooks Dominic Leo Jr. and Earl Wilson Jr., FSA Benjamin Fournier, FBA Steven Maia, bartender Ellen Falanga, and health club attendant Tara McGaffey.⁵⁹ Further, job fair applicants Dawkins, Hall and Janet Gugliotti were hired and first appear on Respondent’s second payroll. Thus, it appears that Respondent acquired a total of 65 bargaining unit employees from the job fair, 20 of whom were former hotel employees (Breton, Carrano, Clark, Davila, Dostaler, Finnemore, Flaherty, Foote, Gagnon, Griffin, Gugliotti, Hall, Matuszczak, Mullen, Nelson, Onofrio, Oulette, Ranazzisi, Russell, and Tranberg). None of these 20 supported the Union.

By the very next pay period, a fair number of the new hires were already gone. While the total payroll had grown from 107 to 124 (compare GC Exh. 196 to GC Exh. 197), an examination of the second pay period reveals that 8 of the bargaining unit employees had already left, some of them after only a single shift: Martelli, Jeanine Martin, Korzeniewski, Cohen, Phillips, Russell, Zerolnick, and Rannazzisi, plus nonunit employees Valdes Jr. and Schneider. On the second payroll Respondent had added 22 new unit employees, in addition to the three job fair applicants (Dawkins, Hall, and Janet Gugliotti): Dilger, McGarvey, Pabey, Robertson, Underwood, Widuch, Willie Williams, Bouley, DeLeo, Richard Martin, Baron, Simms, Camp, Gomez, Vanosten, Charest, Engstrom, Guerrette, Clark, Scanlon, Urban, and Grabowski. In fact, while Respondent claimed that it had no special laundry position, the records reveal that Respondent hired two employees specifically designated as “LAU” within days of the second attempt (on March 3, 1997) by Eliza Svehlak, who had worked at the Hotel in the laundry for years, to obtain a housekeeping position: both Dilger and Widuch were hired on March 5 and given laundry positions (see GC Exh. 130, pp. 18, 58; GC Exh. 197, pp. 3, 5),⁶⁰ in addition to the two employees hired initially and given the “laundry” designation: Nesbeth and Oulette.

By year’s end, the payroll had grown to 152 (see GC Exh. 222). Of the 71 unit employees listed above from the first payroll, only 26 were still on the last payroll of 1997: Braun, Pendaruis, Foote, Demers, Gagnon, LaFrance, Flaherty, Onofrio, Cizauskas, Mullen, Carrano, Nelson, Breton, Dellavecchia, Maglio, Drachenberg, Glenn, Davila, Oulette, J. Ross, M. Ross, Griffin, Clifford, Nakano, Adamo, and Dougherty (GC Exh. 222). One of those, Josia Ross, was not from the job fair. Two employees listed in the original payroll, Pipher and Morris, are

⁵⁸ The job titles set forth above are almost all taken from Respondent’s “Master Control” end of the year payroll list, except for Celinda Foote, who was identified by Gwen Henderson, and Brian Griffin, whose title is taken from his offer sheet.

⁵⁹ The hiring records for Maia, McGaffey, Falanga, Leo, Martin, Nesbeth, Wilson, Fournier, and Josia Ross were introduced by counsel for the General Counsel during cross-examination of Barbier.

⁶⁰ Moreover, Respondent hired McGarvey in the housekeeping department over Svehlak on March 6.

not listed in the last payroll of the year (GC Exh. 222). However, they were listed as active on the master control list (GC Exh. 130). It is impossible to tell from the record exactly what their status was at the end of the year. Janet Gugliotti, Cook II, did not go on payroll until the second pay period but was a job fair applicant. Thus, only 26 to 28 unit employees employed by Respondent by the end of 1997, were derived from the job fair. Not that surprisingly, *10 of the those were former employees of the Hotel*: Breton, Carrano, Davila, Flaherty, Foote, Gagnon, Gugliotti, Mullen, Nelson, and Oulette. Thus Respondent went to the time and expense of shutting down the facility, and holding its job fair to net a grand total of 16–18 new employees who would last all of 9-1/2 months at the Hotel.

Contrary to Barbieri's testimony otherwise, the evidence reveals a much higher turnover rate than 75 percent, as is apparent from the master control list (GC Exh. 130) that while 322 individuals have gone on payroll in 1997, less than 30 unit employees employed from the start were still on payroll by year's end. Whatever the true 'turnover rate' at this facility, it greatly exceeds Respondent's figure of 75 percent.

Respondent's own top officials (not to mention its paid experts) admitted the high turnover is to be avoided and costs money. In fact, the evidence reveals that Respondent lost a lot of money that first year, as its net operating income was approximately one half of what had been projected. These financial problems could have been avoided had Respondent granted its hourly work force the same consideration it usually does when it takes over an existing hotel. In sum, the very high turnover of employees at the Hotel lends weight to the proposition that Respondent's conduct made no business sense, and thus was discriminatorily motivated.

The real facts regarding turnover put to rest the fiction that the job fair was some sort of success. There is no rational lawful reason for Respondent to ignore a seasoned and tested hourly work force in favor of the work and expense involved flying managers in from distant locations, advertising, training, and setting up a 3-day job fair, only to secure employees who will last 9 months, other than a carefully devised scheme to avoid the Union. Respondent shut the Hotel down, when even its own paid experts testified that doing so is contrary to industry practice, to hire a new work force. That new work force was filled with inexperienced workers, the vast majority of whom dropped out within months. Moreover, as revealed by the job packets of many of the employees hired shortly after the job fair, it seems undeniable that Respondent lowered its hiring standards immediately following the conclusion of the job fair. Of course, by the first week of February 1997, Respondent had already successfully weeded out the entire group of union supporters, as the great bulk of them had shown up to apply on the first day of the job fair and had been "screened out." These facts reveal that it is highly likely that Respondent simply counted on the fact that the union supporters would be the first to arrive, and Respondent needed simply to stick to its script for a few days and clean house. Then, when a skeleton crew had been picked, Respondent went back to business as usual, and dropped the pretense of hiring applicants based on their "guest services" mentality, as revealed by the documents introduced by counsel for the General Counsel in his cross-examination of Barbieri.

6. Respondent loosened its standards after the job fair

The record reveals that Respondent's strict standards were quickly loosened after the job fair had successfully weeded out the former employees of the hotel. Hospitality to Steven Maia, whose weakest point according to his most recent reference check was "socialization," meant that he "doesn't seem to have a problem dealing with guests" (GC Exh. 198, 2nd interview). Tara McGaffey was motivated by her "dreams" (GC Exh. 199, 1st interview). Falanga, who had negative references (would not rehire; problems with the owner) was motivated by money (GC Exh. 200, 1st interview). Dorothy Nesbeth was "motivated" by the chance to work "close to home" (GC Exh. 203, screen). Barone was motivated by "money" and the chance to "pay off debts" (GC Exh. 206, 1st and 2nd interviews). Grabowski, who lasted a grand total of 4 hours for Respondent, was hired after Sarisky noted his interest in working at the hotel was due to "accessibility" (GC Exh. 207, screen; GC Exh. 130, p. 26).

By March 10, apparently Respondent abandoned any pretense of even following the interview forms Barbieri had so carefully prepared, as evidenced by the great blank spaces in the interview forms for Deleo, a friend of antiunion cook Flaherty (GC Exh. 209). Clark, like many others hired after the job fair, was motivated simply by "money" (GC Exh. 210, 1st and 2nd interviews; see Moss, GC Exh. 212; Ashe, GC Exh. 216). Tom Lee, another 4-hour

employee (see GC Exh. 130, p. 33), was motivated by "opportunities" (GC Exh. 211, screen). Hector Diaz, who was motivated by "life," wanted the utility workers job because "it's a start" (GC Exh. 219). Diaz lasted about 2 weeks (GC Exh. 130, p. 52). Housekeeper Mason was hired in spite of the fact that she was motivated to "make money and would love to work first shift" and was "hesitant about helping guests" (GC Exh. 220, screen).

G. Unit Composition

On July 10, 1995, the Union was certified by the Board as the exclusive collective-bargaining representative of the following group of employees at the Waterbury hotel:

All regular full-time and regular part time employees including receivers, cooks, dishwashers, night cleaners, bartenders, barbacks, banquet servers, banquet set-up, coat room attendants, waiters/waitresses, cocktail servers, bussers, host/hostesses, cashiers, room service employees, front desk clerks, PBX operators, night auditors, reservationists, bellmen, maids, housemen, floormen, laundry employees, inspectresses, maintenance employees and sports complex attendants employed by the Employer at its Waterbury facility; but excluding office clerical employees, gift shop employees, sales employees, and guards, professional employees and supervisors as defined in the Act.

Respondent's hourly positions correspond in large part with the above unit descriptions in effect under JLM. That is, while the names of the positions are different, the hourly positions essentially encompass the same duties and responsibilities of the above-described unit ones. The record reveals that in January 1997, screeners at the job fair utilized a form (R. Exh. 26) which lists the following positions, followed by the number of full- and part-time openings and the estimated pay rate for each: guest relations agent, guest relations supervisor, express service agent, express service supervisor, housekeeping staff and supervisors, health club attendants, security officers, food service agents, bar attendants, culinary service assistants, conference captain, cooks (1st and 2nd), utility workers/cafeteria, kitchen administrative assistant/receiver, and engineering (Class 1 through 4). Job descriptions for these positions were entered into the record (See GC Exh. 136–154). The initial staffing form also listed the following positions: accounting clerks, income auditor, night auditor, catering/sales secretaries, G.M.'s assistant, and administrative assistant. Of this group, only the "Night Auditor" position (see GC Exh. 22) corresponds to the JLM unit description, and thus that position should be included in the unit found appropriate herein.

In addition to the above-named positions which were in effect at the time Respondent began its operations at the Hotel, the record reveals that Respondent has since renamed some of those positions and added (or is in the process of adding) new ones (see GC Exh. 126: "Wage Scale 1998"). Thus, the "Concierge" or "Club Lounge Host/Hostess" position would fall within the unit, as would the "Food and Beverage Assistant" position, which evidently has superseded the Culinary Service Assistant one (GC Exh. 126). The "Café Pronto" host/hostess position would be in the unit (GC Exh. 139). Moreover, it appears that there is also a position of "Shipping and Receiving Clerk" (GC Exh. 144) in the kitchen; this position would also fall within the appropriate unit.⁶¹

With respect to the supervisory positions, the record reveals that the "Housekeeping Supervisor" and "Express Service Supervisor" positions are hourly paid (\$7.50 and \$5 an hour, respectively)⁶² and that neither one possesses true supervisory authority. With respect to these positions, Human Resources Director Henderson admitted that the persons who hold those positions have no authority or ability to hire, screen, interview, fire, or even discipline other employees (Tr. 1118–1120). Respondent presented no evidence in support of its position that the individuals who hold these positions possess true supervisory authority within the meaning of the Act (GC Exh. 148, 165). Moreover, Henderson admitted that the housekeeping supervi-

⁶¹ Based on the record and relevant caselaw, it appears that the following positions are outside the appropriate bargaining unit in this case: security officers, accounting clerks, the income auditor, the catering/sales secretaries, the GM's assistant, the administrative assistant, and human relations assistant.

⁶² The "Express Service Supervisor" now earns a slightly higher rate, of over \$6 an hour, while the "Housekeeping Supervisor" still earns just \$7.50 an hour.

sor performs the duties of the "Inspectress," which was formerly a bargaining unit position (Tr. 1138). It is clear that the burden on establishing supervisory status rests with the party asserting such supervisory status. *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). As Respondent offered no evidence in support of its assertion that the above positions are supervisory and thus excluded from the protection of the Act, the "Express Service Supervisor" and "Housekeeping Supervisor" positions should be found to be within the unit found appropriate herein.

In sum, the appropriate unit should include the following:

All full-time and regular part-time employees, including all guest relations agents, express service agents, express service supervisors, night auditors, housekeeping employees, housekeeping supervisors, desk attendants/health club attendants, food service agents, bar attendants, culinary service assistants/food and beverage assistants, conference captains, concierge/Club Lounge host/hostess, Café Pronto host/hostess, cooks (1st and 2nd), utility workers/caféteria, kitchen administrative assistant/receiver, shipping and receiving clerks, and engineering employees (Class 1 through 4) employed by Respondent at its Waterbury, Connecticut facility; but excluding all other employees, all office clerical employees, gift shop employees, sales employees, and all guards, professional employees and supervisors as defined in the Act.

III. CONCLUSIONS WITH RESPECT TO THE ISSUES RAISED CONCERNING SINGLE-EMPLOYER STATUS AND SUPERVISORY STATUS AND THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondents Constitute a Single Employer

The evidence is overwhelming that Respondents Waterbury Hotel Management LLC, Waterbury Hotel Equity LLC, and New Castle Hotels LLC constitute a single employer. To determine whether two or more entities are sufficiently integrated to be considered a single employer, the Board examines four principal factors: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. Not all of these criteria need be present to establish single-employer status, which ultimately depends on all the circumstances of the case, but a highly significant factor is the absence of an "arm's length relationship found amount unintergrated companies." *Denart Coal Co.*, 315 NLRB 850, 851 (1994); *Herbert Industrial Relations Co.*, 319 NLRB 510, 524 (1995); *Emsing's Supermarket, Inc.*, 284 NLRB 302, 303 (1987), enfd. 872 F.2d 1279, 1289 (7th Cir. 1989).

All the factors to establish single employer are present in this case. Buffam is the president of each corporation, and its chief owner. New Castle set up the other two corporations precisely to own and operate the hotel. The other two corporations have no existence independent of New Castle, which wholly owns them. All labor relations are formulated in the corporate offices of New Castle. New Castle determines wage rates and personnel policies. All key decisions are made by the New Castle corporation. Based on these factors a single-employer relationship is established.

B. Supervisory and Agency Status of Patrick Roy and Eileen Merritt

Respondent denied that Eileen Merritt, its "Assistant Banquet Manager," and Patrick Roy, its "Human Resources Manager," were supervisors and agents within the meaning of the Act, the record evidence strongly suggests otherwise. Both Merritt and Roy are clearly designated as managers and received a salary, both were given and signed Respondent's "Supervisor's Code of Conduct," both received individual offer letters well in advance of the job fair, and both possessed and exercised supervisory authority (see GC Exh. 129: Roy's job description includes the ability to screen applicants, perform numerous duties regarding employee relations and benefits, including union avoidance knowledge, etc.; GC Exh. 131: Merritt's hiring of temporary labor in July 1997 coordinated with Roy), and Roy even screened and interviewed applicants at the job fair. Roy attended management meetings when Human Resources Director Henderson could not. Roy also conducted orientation for new hires and called temp agencies to seek temporary labor.

With respect to Merritt, the record reveals that she assumed the position of assistant banquet manager in early February 1997, a time when Respondent did not even have a "Banquet Manager" either on payroll or on site. Henderson admitted that the banquet manager runs the banquets, and reports directly to the food and beverage director. Henderson admitted that

Merritt reported to Mike Frotten, the food and beverage director. In February, March, and most of April 1997, *there was no banquet manager at the Hotel*. Thus the record clearly demonstrates that Merritt, as the assistant banquet manager, functioned as the de facto banquet manager.⁶³ Respondent offered not one bit of proof to the contrary.

Sheehan, the first manager to appear with the title of "Banquet Manager," did not arrive until April 28, 1997, and resigned after just about 1 month. Henderson even recalled frankly that Sheehan quit because the job "was more than he expected," thus supporting Finnemore's testimony as to the sad state of affairs in the banquet department in the first few months of operations under Respondent. Moreover, Finnemore and Zerolnick credibly testified without contradiction that they received some training in early February from Merritt, who appeared in charge of banquets. Not only did Respondent present Merritt as the person in charge of banquets, the record also reveals that Merritt signed the time sheets for the temporary agency which referred Oakley and that she also signed several termination records for employees as the "Department Manager."

Based upon all of the above undisputed evidence, it cannot be seriously questioned that at all relevant times Merritt and Roy were supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act. See, e.g., *Big John Super Stores*, 232 NLRB 134 (1977).

C. Unfair Labor Practices

1. Respondent violated Section 8(a)(1) by implementing a rule restricting the wearing of union buttons and terminating Lo and Engler

It is undisputed that Respondent terminated Lo and Engler for wearing a union button at work in violation of Respondent's personal appearance dress standards and for "insubordination."

However, an examination of Respondent's personal appearance policy (GC Exh. 18(f)) reveals that the policy as written does not ban the wearing of all items, not even the wearing of buttons. In fact, buttons are not even listed as items that may be regulated: "Only authorized pins, badges, name pins, etc. may be worn on a *uniform*" (emphasis added).

The prohibition cited above is interesting for a number of reasons. Primarily, the ban would only appear to apply to uniformed personnel. Engler, of course, was fired for violating this policy in spite of the fact that he did not wear a uniform. Thus Respondent appears to have applied against Engler a rule which arguably was not even applicable. Next, the prohibition is clearly not absolute: it permits the wearing of "authorized" items. Barbieri even admitted that certain items may be seen in various hotels, such as "safety badges" and the like. The policy thus allows a fair amount of discretion, as it also allows jewelry to be worn.⁶⁴

Barbieri testified that the purpose of the uniform appearance standard is "to have a uniform, consistent, well groomed work force that reflects the customer so that the level of what they see and what they receive in the way of service all measures out to the same high level" (Tr. 2289). Thus Respondent will argue that its uniform standard is reasonably based and has been applied consistently, and thus cannot be found unlawful. Unfortunately for Respondent, however, the credible evidence in this case suggests that, until it saw a union button, Respondent did not apply the standard consistently and fairly, and discriminatorily targeted the union button-wearers for discipline, without a reasonable basis.

As the Board stated in *Floridian Hotel of Tampa*, 137 NLRB 1484, 1486 (1962):

The right of employees to wear union insignia at work has long been recognized as a protected activity. The promulgation of a rule prohibiting the wearing of such buttons constitutes a violation of Section 8(a)(1) in the ab-

⁶³ Moreover, the job description for the banquet manager (GC Exh. 166) clearly describes a supervisory position.

⁶⁴ Even after experiencing problems with the policy which led Respondent to "clarify" its position, in May 1997, Respondent still failed to address the issue of buttons in the policy. Of course, by May 29, 1997, all of the union activists had been safely extinguished from the Hotel.

sence of ‘special circumstances’ showing that such a rule is necessary to maintain production and discipline . . . [T]hat the employees involved come in contact with hotel customers does not constitute such ‘special circumstances’ as to deprive them of their right . . . to wear union buttons at work.

The Board has elaborated on the issue of what constitutes “special circumstances” by observing that:

Since mere contact with customers is not a basis for barring employees from wearing union buttons, it follows that Respondent’s business or employee discipline *had to be affected* by the display of union buttons for it to justify the discharges. Clearly, the vague, general evidence presented by Respondent was not substantial enough to establish either of the latter “special circumstances” warranting removal of the small, innocuously labeled union buttons worn by its employees.”

Eckerd’s Markets, 183 NLRB 337, 338 (1970) (emphasis added). In that case, the Board held that the company failed to meet its burden of establishing the presence of “special circumstances” to justify the ban, as it offered merely a single customer complaint “in a vague and conflicting manner.” *Id.* at 338. Similarly, in this case Respondent offered no concrete examples to support the ban, relying instead upon general testimony from Barbieri and others as to the legitimate purposes behind the creation of the appearance standards form.

In later cases the Board has continued to consider the size of the button itself (*United Parcel Service*, 195 NLRB 441 (1972)), and has also considered whether or not the button ban occurred in a context of other unfair labor practices (*Rooney’s at the Mart*, 247 NLRB 1004, 1013 (1980)). As both the Board and the courts have noted, the critical task in this inquiry is one of striking the proper balance between conflicting rights: the employee’s Section 7 right to express his union preference versus Respondent’s right to enforce a nondiscriminatory work rule in furtherance of a legitimate business purpose. *Pioneer Hotel & Gambling Hall*, 324 NLRB 918, 922 (1997); *NLRB v. Floridian Hotel of Tampa*, 318 F.2d 545 (5th Cir. 1963).

In *Hertz Rent-A-Car*, 297 NLRB 363 (1989), the Board found the employer’s insignia rule unlawful where it prohibited employees from showing their union sympathies.⁶⁵ Hertz argued that it met the Board’s test of “special circumstances” as its employees dealt with the public and needed to maintain a professional image. *Id.* at 365. The judge rejected that defense, noting the general rule that “the pleasure or displeasure of Respondent’s customers does not determine the lawfulness of employee rights under the Act to wear insignia.” 297 NLRB at 367, citing *Howard Johnson Motor Lodge*, 261 NLRB 866 fn. 6 (1982).

The initial point of inquiry must begin with an examination of the button itself, as the Board appears to place significant emphasis on the size and message of the button at issue. The union button in this case is unquestionably small: 1-1/4 inch in diameter, and discrete: it is a light gray button with “Local 217” at the center, surrounded by the words in much smaller print “Hotel and Restaurant Employees, AFL-CIO” (GC Exh. 17). The button is nonconfrontational (unlike

⁶⁵ *Hertz* was appealed to the Sixth Circuit, which remanded the case to the Board because of an absence of a conclusion on whether the company engaged in disparate enforcement of its policy. *Hertz Rent-A-Car*, 305 NLRB 487 (1991). On remand, the Board analyzed the case under the Sixth Circuit’s analysis of insignia law, *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984). Under the “law of the case,” the Board considered the *Burger King* test: an employer can demonstrate “special circumstances” where it can show that (1) it maintains a policy that employees wear only authorized uniforms; (2) it enforces the policy in a consistent and nondiscriminatory fashion; and (3) employees subject to the policy have contact with the public. *Id.* at 487. Applying the law of the case to the facts in *Hertz*, the Board dismissed the case as it disagreed with the judge concerning his disparate enforcement analysis.

the “SCAB” button rejected by the Seventh Circuit in *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (1956)), and is tasteful and likely to “blend in” with an employee’s uniform (unlike the “large, yellow and black campaign button” which, when added to the clear evidence of a conflict between rival groups of employees over the union issue, tipped the balance in favor of the employer in *R. H. Macy & Co. v. NLRB*, 462 F.2d 364, 366–367 (5th Cir. 1972)).

Moreover, Respondent can only prevail if it can show that its policy of preventing the wearing of buttons was evenly applied and enforced. Here, however, both Lo and Engler credibly testified that they each had worn other types of buttons or, in Engler’s case, a shamrock pin and ribbon, and that nothing was said to them by management. In a similar case, the Board recently found, with court approval, that “the manner in which the Respondent dealt with employees wearing union pins, as opposed to employees wearing other ‘unauthorized pins,’ evidences discriminatory enforcement.” *Meijer, Inc.*, 318 NLRB 50, 51 (1995), *enfd.* 130 F.3d 1209 (6th Cir. 1997) (emphasis added). Since Respondent offered no credible proof to rebut Lo’s and Engler’s sincere testimony, it should be found that Respondent simply had no problem with the wearing of unauthorized pins and paraphernalia, until, of course, its employees began wearing buttons to support the Union which had fought for 8 long years to gain a foothold at this hotel. It is no coincidence that Respondent’s disciplinary notices relating to the wearing of unauthorized apparel all postdate the discharges of Lo and Engler.

Finally, Respondent’s bad faith is seen by the fact that it terminate Engler, who wore his own clothes to work, for violating a rule that on its face does not apply to nonuniformed employees, and offered no credible explanation as to just why it sought to apply this rule in this manner. The notation on Engler’s termination letter that he was not a “team player” supports the notion that the real reason he was fired was because he wore a union button, as it does not appear that in any other respect Respondent has expressed concerns about the wearing of buttons.

In sum, Respondent has offered no valid legitimate reason for its enforcement of the button rule at this hotel. It has failed to meet its burden of showing the “special circumstances” required by the Board, and it has failed to apply its policy in a nondiscriminatory manner, targeting the union supporters first and then attempting to bolster its conduct by writing up other employees afterwards. Based upon the above, it is clear that Respondent violated: Section 8(a)(1) and (5) of the Act by promulgating and enforcing the button rule, thus unlawfully restricting employees’ Section 7 rights and unlawfully implementing, without notice to the Union, a rule which concerns terms and conditions of employment; and Section 8(a)(3) and (1) of the Act by terminating Lo and Engler for allegedly violating an unlawful rule.

2. Respondent violated Section 8(a)(3) by terminating Zerolnick

Zerolnick was clearly identified with his fellow Yale students whose support of the Union cost them their jobs. He credibly testified that he was never given a return to work date, and that until he received the April 9, 1997 letter he had no idea that there was a problem with his employment at the hotel. Respondent offered no credible explanation as to why on April 9, just days after it fired Lo and Engler, its human resources department suddenly awakened to find that fellow Yale student and part-timer Zerolnick had failed to check in from his leave of absence. It cannot be questioned that Respondent initially tolerated his leave of absence, as he is clearly off payroll after the first 2 weeks and nothing is done to him until April 9. If, as Respondent’s counsel suggested in her cross-examination of Zerolnick, his leave was “unauthorized” from the start as he failed to fill out some type of leave request form, why then did it take Respondent until April 9 to discover this? The answer is as clear as Respondent’s ill-conceived defense: that it only targeted Zerolnick after experiencing problems with his pro-union housemates.

Under the doctrine of condonation, where an employee commits an act of asserted misconduct which would justify his discharge and the employer, fully cognizant of the act, agrees not to discipline the employee, the employer may not thereafter rely on that misconduct as a basis for discharging the employee. *Virginia Electric & Power Co.*, 262 NLRB 1119, 1126 (1982), citing *NLRB v. Colonial Press, Inc.*, 509 F.2d 850, 854 (8th Cir. 1975). To establish condonation, the evidence must show that the employer intended to continue the employer-employee

relationship notwithstanding the asserted grounds of discharge. *Harry Hoffman & Sons Printing*, 278 NLRB 671 (1986).

Applying these principles to Zerolnick's case, it is clear that Respondent was not only aware of his need for an extended leave of absence well in advance of the April 9, 1997 letter, but approved his request for such leave. His extended leave request only became a problem once Respondent learned the Yale student were intimately involved with the Union. Thus, after having been giving the benefit of special consideration, Zerolnick was summarily discharged. Having no other reason but unlawful animus for terminating Zerolnick, Respondent seized upon the pretextual argument that Zerolnick was on "unauthorized" leave. Insofar as Respondent relied upon a pretextual argument, it remains clear that Respondent failed to meet its burden in establishing that it would have discharged Zerolnick had it not recently observed the Yale students' union sympathies. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Accordingly, it should be found that Respondent violated Section 8(a)(3) and (1) of the Act by terminating Zerolnick on April 9, 1997.

3. Respondent violated Section 8(a)(3) by refusing to hire the predecessor employees

Section 8(a)(3) of the Act bars employment discrimination based on antiunion motivation. Where a violation of Section 8(a)(3) is alleged, the General Counsel bears the burden of proving by a preponderance of the evidence that an employee's union membership, activities or other protected conduct was a substantial motivating factor in an employer's adverse action against that employee. This proof, which normally includes proof of union activities, employer knowledge of those activities, employer antiunion animus, and adverse action against the alleged discriminatee, constitutes the General Counsel's prima facie case. Once the Board has made a prima facie case that an employee's protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to show that it would have taken the same action even absent the protected conduct. *Wright Line*, supra.

Although a successor employer is not obligated to hire its predecessor's employees, the successor may not refuse or fail to hire predecessor employees because of their union membership or in order to avoid the obligations of a successor employer under *NLRB v. Burns Security Services*, 406 U.S. 272, (1972). In *U. S. Marine Corp.*, 293 NLRB 669, 670 (1989), enf. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992), the Board summarized the factors that will establish that a successor violated Section 8(a)(3) by refusing to hire the employees of the predecessor:

[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employee; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine [citations omitted]."

The record in this case makes clear that Respondent engaged in a hiring practice that it does not normally use in similar situations precisely to avoid hiring a majority of its employees from the predecessor. All the factors set forth in *U.S. Marine Corp.* are present in this case. There is substantial evidence of animus towards the Union. Animus was shown by Respondent's unlawful implementation of a rule restricting the wearing of union buttons, and by the unlawful discharges of Lo, Engler, and Zerolnick. Controller Tito Tejada's statement to new employee Francis Engler soon after the opening of the Hotel that the Union had been "wiped clear" from the Hotel showed animus, and revealed that the hiring process had been successful in its purging of the Union from the Hotel. Animus was again shown in the spring of 1997, when former employee Thomas Oakley spoke with Assistant Banquet Manager Eileen Merritt. Oakley had been previously encouraged by Merritt, through a current employee Kathleen Finnemore, to apply for banquet position because of the pressing need for banquet employees. That need was shown by the extensive use of temporary banquet employees during the spring and summer of 1997. However, when Oakley submitted another application to Human Resources Manager Patrick Roy about a month after the job fair, and noted on his application that he was submitting it pursuant to Eileen Merritt's request, he never heard back from Respondent. Several weeks after that incident, when Oakley was working at the facility through a

temporary agency, as he did numerous times in the spring and summer of 1997, he approached Merritt, who was the acting banquet manager at that time, and introduced himself as the person about whom Kathleen Finnemore and Merritt had spoken, and informed her that he had filled out an application. She told him "I'm sorry, but we were told not to hire any of the old people back." Merritt's statement clearly expresses Respondent's animus and unlawful intent to avoid hiring predecessor employees. Moreover, it shows that Respondent was so intent on avoiding predecessor employees that it ignored the needs and requests of its own managers, and was willing to work shortstaffed to do so. This is especially telling for the extensive use of temporary banquet employees after the job fair shows that Respondent's stated goals of hiring the "best hospitality professionals" through its job fair was not taken seriously during the actual operation of the Hotel. If Oakley was good enough to work at the Hotel as a temp, how could he not be good enough to be a regular employee?

The facts show quite simply that Respondent staffed its banquet department with strangers, temporary employees who were not screened or interviewed through New Castle's hiring process, and who were not trained in that special New Castle philosophy and system, rather than hire experienced, competent, predecessor employees who *could* be trained in that system. Why go through the time and expense of hiring temps when an experienced and willing staff was knocking at the door to be hired? Not only did Merritt's statement directly show animus towards the predecessor employees, but the blatant disparity between Respondent's willingness to employ Oakley as a temp, but not as a regular employee points to an unlawful motive.

This is particularly telling since the banquet department was the Union's strongest. . . . Similarly, the way Eliza Svehlak and Candia Vadnais were treated when they reapplied at the Hotel shows that Respondent continued to shun predecessor employees. After contacting the personnel office in February, and being told that they were still reviewing applications, Svehlak returned on March 3, 1997, and she overheard Human Resource Manager Patrick Roy inform two other individuals that Respondent was only taking applications at that time for Housekeeping. He then interviewed those individuals. Meanwhile, she filled out a new application, and waited. When Roy returned, she explained how long she had worked at the Hotel, and how well she knew the building, and how experienced she was in Housekeeping. Roy told her that all they were doing at that time was taking applications, which was not true. He told her they had a lot of applications to go through, and he would call her if they were interested. Roy did not screen or interview Svehlak. His statements were blatantly false in that Respondent was in fact hiring housekeeping employees at that very time. When she called back a month later, Roy lied to her again and said they were only hiring part-time employees, which was not true. When she told him that she would take part time, he said he would note that on her application, which also was not true. What Roy did do, at some point in time, was fill out a screening form for March 3, 1997, which purported to be his screen of Svehlak on that date. Not only does this manipulation of its records show that Respondent had an abnormal purpose in its use of them, but that very day, March 3, the personnel office began once again to keep its job log, a document which emphasized the recording of negatives. There was never any explanation at trial as to why its use had stopped shortly after the job fair, although Respondent was continuing to hire employees. Further, Respondent never explained why it restarted the job log the very day Svehlak reappeared.

Roy's treatment of Candy Vadnais shows that he would simply change his story to predecessor employee applicants in order to get rid of them. Vadnais had been told in February by someone that Respondent was not hiring, which was not true. That person told her to call back in a month. She did, and was told by someone from personnel that they were hiring part-time employees for housekeeping. She was then referred to Roy, spoke with him, and identified herself as a predecessor employee. Roy then told her that they were not hiring part-time employees, and what she had just been told by the woman in personnel was wrong. Thus Roy was brushing off Svehlak by telling her they were only hiring part timers, and brushing off Vadnais by telling her his own personnel employees were wrong—that they were not hiring part timers. Roy thus exhibited the same astonishing abilities shown by Buffam, Chase, and Barbieri at trial to deny as incorrect what Respondent's own employees, as well as their own documents, stated. Roy also showed Respondent's witnesses' remarkable ability to simply make things up as they went along.

The specter of the Union clearly hung over every decision made by Respondent concerning its hiring practices at the Hotel. The record shows that Respondent was preoccupied with

creating documents to support its position in anticipation of litigation. It is un rebutted that General Manager Robert Cappetta informed the Yale students that Respondent's repetitive interview questions were framed in the manner that they were precisely because Respondent expected that the NLRB would be looking over Respondent's shoulder for 3 years. Moreover, Cappetta indicated to the students that he did not take the questions seriously and thought they were a waste of time because the interviewers preferred to have "real conversations" with people. Cappetta's statements clearly indicate that Respondent proceeded in an artificial manner because of the Union. Furthermore, Respondent's so-called job fair log, a document specifically created for use at the Waterbury Job Fair, had no sensible purpose other than to create a defense for anticipated unfair labor practices. The harping on documenting negatives about applicants, as Respondent instructed its screeners and interviewers in their training for the job fair, has no rational business purpose other than to create a pool of rejected applicants who were not predecessor employees, and who were rejected at the job fair, so that Respondent could point to that pool as evidence that it rejected predecessor employees for the same reasons it rejected nonpredecessor applicants.

The creation of a job log which cited only the negative factors as to why applicants were rejected also gave Respondent a tool to use during the job fair to monitor its progress, and ensure that the pool being created was sufficient in each job category to justify rejecting predecessor employees. Moreover, this job log gave Respondent a means of controlling the process so that it could fulfill the goal of ensuring that it did not hire too many predecessor employees. There is simply no reason to only document negatives in the job log if it was to be used for future reference purposes in filling future job openings. There would be nothing on that log which would lead anybody reviewing the log to contact a job applicant for a job. The job log as structured, documenting only the negatives, shows once again that Respondent was creating records in such a way because it clearly expected the Union to file charges, and it expected the NLRB to be examining its hiring process, just as Cappetta described to the Yale students. Its clear expectation that the Union was going to file charges flowed inexorably from the fact that it had already decided that it was not going to hire a majority from the predecessor employees. Once again, as with the interview questions for which Cappetta had such contempt, the unnatural nature of the information recorded in the job log shows that the "tail was wagging the dog." Respondent was creating records for litigation purposes, not for normal business purposes.

Most notably, Respondent's president expressed his personal animosity to the Union in his conversations with William Collins. He blamed the Union for losses he experienced at the Norwalk Holiday Inn. Moreover, Buffam's statements to Collins clearly exposed Buffam's concern about the Union. Given his history with the Union at the Norwalk Holiday Inn, and his legal troubles with unions in Chicago, Buffam, who had placed himself and his various corporations at risk with the financing of the Hotel, was determined not to let the Union put him at a competitive disadvantage with the nonunion hotels in the area. Buffam's asserted lack of concern about the union sympathies of the predecessor employees, and his lack of concern about the labor history at the Hotel, is simply unbelievable. The notion that Respondent's sophisticated and growing enterprise, which specializes in turning around troubled hotels, would have no knowledge or interest in the labor situation at the Hotel cannot be taken seriously.

At the very beginning of 1996, Respondent was formulating its repositioning plans for the Hotel. When the Trustee, Michael Daly, was appointed, Buffam was present at the bankruptcy court seeking the ability to be the manager of that Hotel. When Daly arrived at the Hotel for the first time, Buffam and his cohorts were waiting along with the Hotel's labor counsel, Bud O'Donnell and former owner, Joe Calabrese. O'Donnell informed Daly about the labor situation, and Buffam made his pitch to run the Hotel. That weekend, Respondent had total control of all financial records at the Hotel. The general manager of its Dunkirk facility, Robert Scheiner, who was to become the manager of the Hotel, made a detailed report of the conditions at the Hotel for Gerald Chase. Chase inspected the Hotel for 5 to 6 hours and almost immediately began creating projections of its renovation needs. That summer, Respondent successfully sought to be the company responsible for any renovations at the Hotel. It was present at the facility throughout the summer with regard to the renovations and escorting prospective franchisors. The documents Respondent prepared for prospective lenders and for renovation purposes show knowledge of the facility and its history in minute detail. The notion

that Respondent in its due diligence with regard to this property did not examine the labor situation and its potential exposure to bargaining obligations, as well as potential unfair labor practice liability, when it admittedly would normally examine such facts in performing its due diligence, is patently absurd. Respondent's corporate offices were just down the road in the Naugatuck Valley from the Hotel. The Hotel, which was the largest hotel in the area, was also the only unionized hotel in the area, and was arguably the focus of the longest running labor dispute in the State of Connecticut. The notion that Buffam, who had experienced his own problems with the Union in his dying enterprise at the Norwalk Holiday Inn would not examine the labor situation at the Hotel as it existed in 1996 cannot be believed.

Startling evidence of Respondent's unlawful desire not to hire a majority from the predecessor employees came when Buffam felt it necessary to tell Daly the facts of life, and explain why Respondent would not come onto the Hotel property to interview employees. Buffam explained that he had received advice of counsel, and needed to be concerned about who he hired, and *how* he hired. He explained that there were certain hiring parameters that he could not exceed in order to avoid labor issues. In particular, he was concerned about the immediate postclosing hiring, and the subsequent hiring. Buffam explained that "in this particular situation the tail was wagging the dog." Despite the tortured spin which Buffam tried to put on Daly's testimony, Buffam never explained what he meant by that phrase. The phrase clearly meant that Respondent was not going to act in a normal manner. In the context in which that conversation took place, and in the context of the bubbling labor situation at the Hotel, the inference is inevitable that the tail wagging *this* particular dog was the presence of the Union at the Hotel.

Any attempt by Respondent to argue that Buffam and Respondent were only concerned about hiring too many employees before staffing levels were set is belied by Buffam's reliance to his reliance on advice of counsel. Overstaffing is an operational issue, not a legal one. The meaning of Buffam's message was clear—the presence of the Union was dictating events. Similarly, when Barbieri told Daly that Respondent would not interview at the property, and he asked why, her only explanation was that "he knew why." Of course, in the context of the situation at the Hotel, Daly had no trouble understanding the meaning of her coded message, and he well knew the reason why Respondent was not coming to interview the existing employees—because of the presence of the Union at the Hotel.

It is undisputed in that very time in which Buffam met with Daly to try to get Daly to be more realistic about the hiring process that was going to take place, Respondent had Jay Krupin taking responsibility for dealing with all the interested parties about that process. Further evidence of Respondent's hostility towards unionization was shown by the fact that it had its attorney, Jay Krupin, conduct union avoidance seminars at the Hotel soon after its takeover. In fact, Krupin conducted similar union avoidance seminars in both Cherry Hill and Halifax after the job fairs Respondent conducted at those locations.

Further evidence of Respondent's unlawful intent is shown by the fact that Respondent did not act in accordance with its normal hiring practice. As shown above, Respondent's normal practice is to interview the existing work force when there is an existing work force. It deviated from that practice in this case, as it did in Cherry Hill and Halifax, two unionized locations. The Board will also infer a discriminatory anti-union intent on the part of a new owner when it deviates from its own past hiring practices, or where the employer is unable to provide a credible and rational explanation for its deviation. In *Love's Barbeque No. 62*, 245 NLRB 78, 80 (1979), enfd. in pertinent part 640 F.2d 694 (9th Cir. 1981), the new owner altered its normal hiring procedure by utilizing blind newspaper advertisements that did not identify the restaurant, and by interviewing applicants at a nearby motel rather than at the restaurant itself.⁶⁶ Since the employer could not explain its change in hiring practice, the Board inferred that the employer deviated from past practice in order to avoid hiring the union-represented predecessor work force.

The Board noted in *Love's Barbeque* that it is permissible to infer that an employer deviated from its past hiring practices for an unlawful reason when it advances a false reason for its actions. *Id.* at 79–80. In this case, nothing could be more glaring than the false reason set forth in Respondent's position statements, that it held the job fair because the Hotel had closed. Moreover, Respondent's shifting reasons, as shown by Buffam's denial at trial that closure of

⁶⁶ *Id.* at 79–80.

the Hotel was a factor in the decision to hold a job fair, provide further proof of unlawful intent. *Precision Industries*, 320 NLRB 661 fn. 5 (1996).

Moreover, Buffam, Chase, and Barbieri gave confused and contradictory reasons for Respondent's decisions, providing further support of unlawful motive. *Id.* Similarly, in its last position statement, Respondent argued that the fact that WARN notices had been issued was a factor in its decision to hold a job fair. The defense put forth in that position statement that it needed to recruit from the public, rather than hire the existing work force as was its past practice, because the bankruptcy trustee gave the predecessor employees WARN Act notices, was meritless. The WARN Act was intended to provide employees with notice that a sale or layoff may occur,⁶⁷ by imposing liability on the business owner if it fails to give such notice and a sale or layoff does occur.⁶⁸ Providing a WARN Act notice is simply a prudent business decision, and an employer is not obligated to close or transfer the business or to lay off employees just to be consistent with the WARN Act notice. Moreover, the record showed conclusively that it was Respondent who initially proposed to Prudential that the WARN notices be issued, and Respondent insisted on reviewing those WARN notices before the trustee issued them, and it was Respondent who insisted on closing the Hotel. Advancing such a spurious reason for not hiring the predecessor was part and parcel of Respondent's attempt to portray itself as unable to meet with the existing work force, and supports the inference of unlawful motive. *Precision Industries*, supra.

The evidence is thus overwhelming that Respondent harbored animus towards the Union, and that animus dictated its decision to not interview the existing work force at the Hotel, not to hire the existing work force, and to hold the job fair. In *Precision Industries*, supra, the Board found a violation where the employer adopted employment screening procedures that might have some reasonable business purpose, but where the evidence showed that the employer had chosen the otherwise lawful screening procedures for an unlawful reason. *Id.* at 662.

Without more, a prima facie case of discrimination has been made. Assuming arguendo that Respondent's subjective hiring criteria and interview questions were not per se unlawful, the evidence is overwhelming that Respondent chose to engage in that hiring practice to avoid hiring a majority of its employees from the predecessor work force, and thereby violated Section 8(a)(3) of the Act. *Id.* Once a prima facie case is established that Respondent had an unlawful purpose for its use of the job fair, the burden switches to Respondent to demonstrate for each applicant that the person would not have been hired. *Id.* at 662 fn. 8; *Daufuskie Island Club & Resort, Inc.*, 328 NLRB No. 415. fn. 3 (1999).

Having set up a system in which subjective impressions of screeners and interviewers were the basis for determining who got hired, rather than establishing objective criteria based on normal criteria such as skills and experience, work history, attendance, and similar criteria, Respondent has made it virtually impossible for it to establish a *Wright Line* defense. Respondent has nothing but hearsay statements in the record, all from the job fair, to justify its decision not to hire certain employees. Other than the criteria which it chose to use in this case precisely to weed out a union majority, there is simply nothing in the record to justify not having to make a reinstatement offer to all of the named discriminatees.

A prima facie case is made as well based on the actual conduct of the job fair. In *Monfort of Colorado*, 298 NLRB 73 (1990), enfd. in pertinent part 965 F.2d 1538 (10th Cir. 1992), the Board held that an employer's disparate application of hiring criteria to predecessor employees violated Section 8(a)(3) of the Act. The way the job fair was created, and the way it was conducted, also reveals Respondent's unlawful intent. Barbieri's conscious act of purging experience-related questions from the interview evaluation forms, questions which she acknowledged would have been beneficial for the predecessor employees because the Hotel was by far the largest in that area, showed that she was fine-tuning the system to the detriment of the predecessor employees. Furthermore, the actual conduct of the job fair shows Respondent's discriminatory intent.

The system created by Barbieri enabled Respondent to carefully control the job fair and the flow of applicants. Applicants entered the ballroom and were immediately met by Respondent's greeters, then sent to a table to receive an application. After filling out the application,

Respondent's employees reviewed the application and then provided the applicant with a number. After being screened, the applicant's forms were put into separate piles for those that advanced to interviews, or those who were rejected. Throughout the job fair, Barbieri processed the job fair forms into the job log that was documenting only why applicants were rejected. Thus, from the moment an applicant stepped in the door, Respondent tracked his progress through the job fair process. Barbieri, her managers and her attorney met every night and reviewed the results of the day. Careful review of those results shows that predecessor employees, and particularly those who were union activists and supporters, were treated differently and weeded out in the process.

As detailed above, the evidence overwhelmingly reveals that Respondent's hiring criteria were applied in a manner that systematically screened out the predecessor work force. Discriminatees were rejected based on their responses to questions relating to Respondent's asserted all important criterion of guest hospitality and demeanor, while new employee applicants who provided similar responses were not rejected. Although Respondent claimed that by seeking a guest services or hospitality mindset, it would want employees who would be motivated by doing the job and who would work well with other employees "internal customers," discriminatees were rejected for stating that they wanted to work at the hotel because they liked their job well and enjoyed working with their colleagues.

Likewise, while emphasizing that the successful applicant would show a genuine interest in serving the guest, Respondent rejected discriminatees who specifically mentioned that they wanted to serve guests and other hotel customers, while failing to reject new employee applicants who said they wanted to work at the hotel simply because they had seen the job advertisement in the newspaper or because they wanted a job that was close to home. In addition, although Respondent's hospitality hiring criterion emphasized smiling, discriminatees were rejected for not smiling during their screenings, while several new employee applicants that failed to smile were not rejected. Moreover, discriminatees were rejected for needing scheduling restrictions, while numerous new employee applicants were not rejected and hired in spite of such restrictions. In many cases, new employee applicants who were not rejected had far more restrictive scheduling limitations than discriminatees.

Furthermore, discriminatees were rejected without having been given critical information by the screeners. Thus, discriminatees did not know the job available, its requirements, and most frequently the wage rate. Hence, a number of discriminatees were rejected based on their pay expectations, without having been informed of the wage rate being paid. This directly violated the written instructions given to the screeners to tell applicants the wage rate. The most glaring manner in which a predecessor employee was treated was shown by the case of Zosh Flammia, a union leader and a waitress with over 10 years of experience. When she asked what her wage rate would be in banquets, she was told that a rate had not yet been set. That was untrue, as each screener had been given a list of employee classifications and wage rates. What possible rational (and not unlawful) reason would the screener have for not answering the question correctly? Having given the wrong answer as to what she would like to make, Flammia then got the bum's rush out the door with the rest of the veteran union adherents. She met Tom Oakley on the way, and they met with Robert Cappetta who curiously knew Oakley's name. The very fact that Cappetta knew who Oakley was after his 5-minute screen and bum's rush indicates that Respondent was carefully monitoring the screens as they occurred.

Discriminatees were not asked whether they would like to apply for and perform new jobs or new job functions (where the job they had applied for had been combined with other job functions), or whether they would perform their job in a new fashion, while Respondent readily considered and hired new employee applicants for positions for which they did not apply and for which they had no background. Even discriminatees who asked the screeners if there were any other positions for which they could be considered were not told about other possible positions, while new employee applicants received unsolicited suggestions for alternative positions. For some discriminatees, it appears that their screens were so abbreviated that they were not even asked the questions contained on the screening form.

Respondent's inconsistent application of its hiring procedures is also evident by the fact that some discriminatees' responses were improperly recorded by screeners and interviewers, resulting in their rejection for employment. By contrast, as evidenced by the Yale students' experience, new employee applicants' actual responses were disregarded and instead the

⁶⁷ Congress expressly encouraged employers to provide notices even when the sale or layoff is in the proposal stage. 29 U.S.C. § 2106.

⁶⁸ 29 U.S.C. § 2101(b).

coached “correct” responses provided by the interviewers were recorded on the forms. For many new employee applicants, questions considered so important by Respondent for uncovering guest service orientation were not even asked and the interview forms were not completed. Respondent offered no explanation for its failure to call Cappetta to testify in order to rebut his statement to the Yale students, a group of college kids who would be graduating shortly and had serious transportation problems, but who were all offered employment nonetheless. Cappetta’s statement dramatically reveals that the job fair process was skewed to defeat the employment prospects of the union employees. Unfortunately for Cappetta, who seemed focused on these students, it evidently never crossed his mind that they were there to help the Union. The Yale students were given extraordinary consideration, despite some of the obvious problems in hiring them, such as transportation, scheduling, and their impending graduation. By hiring the Yale students, as well as in Cappetta’s statement to them, Respondent showed that its concerns for staffing were not at all normal. Once again the tail was wagging the dog.

Respondent may attempt to defend its misapplication of its own hiring criteria as random errors, but such an explanation is undermined by two factors: (1) the number of misapplications, which predominantly disadvantaged the discriminatees and (2) the un rebutted statement by Cappetta, Respondent’s top official at the Hotel, indicating that Respondent systematically ignored the screening and interview questions and results.

The fact that some predecessor employees were hired does not change the abundance of evidence of disparate application of hiring criteria to the disadvantage of the majority of predecessor employees. Respondent monitored the job fair process and carefully allowed a minority of predecessor employees to slip through and be hired. The predecessors that were hired were generally either employees who had only worked at the Hotel a short time before the closing and had little involvement in the Union, or were open antiunion employees. It was not an accident that the most notorious antiunion employee, Brian Griffin, who had filed the decertification petition with the Region, Brian Griffin, was hired. It is fascinating to see how Brian Griffin was positively described by his interviewer as a person who “cared about the hotel” and was a “team player.” Clearly, Respondent wanted “team players” and not troublesome union supporters. Not coincidentally, as soon as Yale student Francis Engler began wearing a union button, he was terminated for not being a “team player.” Moreover, the fact that not one open union supporter was hired is especially revealing how effective the controls implemented by Barieri was. In light of all the circumstances, glaring discrepancies cannot be merely coincidental.

For the reasons stated above, Respondent’s use, and misuse of subjective criteria makes it virtually impossible for Respondent to establish a *Wright Line* defense for any employee. Respondent may argue that some employees were not willing to work in the particular classification for which they applied, due to some changes in job duties, such as Marilyn Rossi. However, Respondent narrowed the choice for discriminatees, while expanding the choice for stranger applicants. Any employee such as Rossi should be offered reinstatement to any available position for which she is qualified. Otherwise, Respondent will have profited from its unlawful scheme. Further, the evidence shows that Respondent began utilizing waitstaff exclusively in either the restaurant or the banquet area not long after the opening. Similarly, Respondent’s witnesses admitted that once the Hotel opened, it began to look more narrowly at what skills employees already had. Because Respondent created a situation in which its use of criteria and classifications were so skewed in favor of strangers, and against predecessors, and it has introduced nonhearsay evidence upon which to base a *Wright Line* defense (and even that evidence being tainted), Respondent should be required to make employees whole, and to offer them reinstatement to any position for which they are qualified.

4. The Respondent unilaterally implemented initial working conditions and refused to recognize or bargain with the Union

Section 8(a)(5) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).” In *Burns*, supra, the Court upheld the proposition that a mere change of employers or of ownership of an enterprise did not mean that the new employer had no obligation to bargain with its predecessor’s employees. In the circumstances of that case, and where “the bargaining unit remained unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent,” the court found a duty to bargain on the part of

the new employer. This doctrine was refined in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–45 (1987), with the Court’s holding “that a successor’s obligation to bargain is not limited to a situation where the union in question has been recently certified. Where . . . the union has a rebuttable presumption of majority status, this status continues despite the change in employers and the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by the predecessor.” [At 41, footnote omitted.]

In *Fall River Dyeing*, supra, the court went on to discuss the appropriate approach in determining whether an acquiring company is in fact a successor to the old company. More specifically, where an 8(a)(5) violation is alleged in the context of one employer assuming the operations of a predecessor employer, the General Counsel must demonstrate both the majority or constructive majority status of the union in an appropriate unit, and a “substantial continuity” between the employing enterprises. *Fall River Dyeing*, supra at 43. As stated by the Board in another case involving the takeover of a cleaning operation

The threshold test developed by the Board and approved by the Supreme Court in *Burns* and *Fall River Dyeing* for determining successorship is: (1) whether a majority of the new employer’s work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer. [*Sierra Realty*, supra at 835. Footnoted citations omitted.]

The court in *Fall River Dyeing*, supra at 43, focused on the following criteria in determining whether there exists the requisite “substantial continuity,” namely,

[W]hether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors, and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

The Board has recently dealt with successorship issues in a hotel case, where the new employer engaged in an unlawful scheme to not hire the predecessor employees. In that case, *Daufuskie Island Club & Resort*, supra, the judge found continuity where the employer admitted it would have recognized the union had he hired the predecessor employees. In this case, Buffam admitted he would have recognized the Union, depending on how the pending decertification petition was resolved. The employee job classification were similar to the predecessor, and the work being performed was basically the same. The record in this case makes abundantly clear that the employees were performing the exact same work as was performed by the predecessor, albeit with some merger of duties for particular classifications. Such minor restructuring of job duties did not change the essential nature of the work being performed, which was hotel work. The Hotel continued to serve the public the same services offered by the predecessor, and did so under the same name as the predecessor. Respondent in this case continued operating as a Four Points for at least 2 years. A number of former managers and supervisors of the predecessor were hired, as were a number of unit employees. Thus minor changes in job duties, a subject which in itself a mandatory subject of bargaining, cannot defeat the fact that the Hotel’s operation was fundamentally the same. Based on these factors, Respondent should be found to be a successor of the predecessor. Id. at 418 *Clarion Hotel-Marin*, 279 NLRB 481, 489–490 (1986).

Secondly, turning to the issue of majority status within the above-described unit, [i]t is now well settled that where, as here, an employer is found to have engaged in a discriminatory refusal to hire its predecessor’s employees, the Board infers that all the former employees would have been retained, absent the unlawful discrimination,” *Love’s Barbeque Restaurant No. 62*, supra; *Kallman v. NLRB*, 640 F.2d 1094, 1100–1101, 107 (9th Cir. 1981). Under such circumstances the Board presumes that the union’s majority status would have continued. *State Distributing Co.*, 282 NLRB 1048 (1987). Concerning the inference that former employees would have been retained, see also, e.g., *New Breed Leasing Corp. v. NLRB*, 317 NLRB 1011, 1025 (1995), enfd. 111 F.3d 1460 (9th Cir. 1997); *American Press, Inc. v. NLRB*, 833 F.2d 621, 626 (6th Cir. 1986).

Thus, since Respondent meets the “continuity of the employing enterprise” under *Fall River Dyeing*, supra, and the Union would have continued to enjoy majority status but for the discrimination, Respondent is a *Burns* successor. Accordingly, Respondent also violated

Section 8(a)(5) by refusing to recognize and bargain with the Union. *Daufuskie Club, Inc.*, supra. In addition, where, as here, a successor employer has discriminatorily excluded its predecessor's union-represented employees from employment, the employer loses its normal privilege under *Burns* to unilaterally set its initial employment conditions without first bargaining with the predecessor's incumbent union. *Burns*, supra at 294.

It is undisputed that Respondent has different wages, hours, benefits, and other terms and conditions of employment than the predecessor. Thus, Respondent further violated Section 8(a)(5) by unilaterally implementing its initial working conditions which were different from those in effect under the predecessor, and which relate to wages, hours, and working conditions within the meaning of the Act. *Id.*; *U.S. Marine Corp. v. NLRB*, supra.

As the argument set forth above demonstrates, the preponderance of the evidence establishes that Respondent violated Sections 8(a)(1) and (3) of the Act by failing and refusing to hire the predecessor's unionized employees, and violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union and by unilaterally implementing initial working conditions which were different from those in effect under the predecessor (which were mandatory subjects of bargaining).

CONCLUSIONS OF LAW

1. New Castle Hotels LLC and its subsidiaries, Waterbury Hotel Equity LLC and Waterbury Hotel Management LLC, constitute a single-integrated business and are a single employer within the meaning of the Act and constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 217, Hotel and Restaurant Employees & Bartenders Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. On July 10, 1995, the Union was certified as the exclusive collective-bargaining representative of the employees of J.L.M. Inc., d/b/a Sheraton Hotel Waterbury and from July 10, 1995, to January 1997, the Union was the exclusive collective-bargaining representative of the employees in the following described unit:

All regular full time and regular part time employees including employees performing receiver, cook, dishwasher, night cleaner, bartender, barback, banquet server, banquet set-up, coat room attendant, waiter/waitress, cashier, room service, front desk, PBX operator, night auditor, reservationist, bellman, maid, houseman, floorman, laundry, inspectress, maintenance, and sports complex attendant duties at the Hotel; excluding office clerical employees, gift shop employees, sales employees and guards, professional employees and supervisors as described in the Act.

4. About February 16, 1995, the Trustee was duly certified by the United States Bankruptcy Court, District of Connecticut, as the trustee in bankruptcy of J.L.M. Inc., d/b/a Shearson Hotel Waterbury, with full authority to continue the operations of J.L.M. Inc., d/b/a Sheraton Hotel Waterbury and to exercise all powers necessary to the administration of the Hotel's business. By virtue of the acts and conduct described above, J.L.M. Inc., d/b/a Sheraton Hotel Waterbury and the Trustee were at all material times since February 16, 1996, alter egos and a single employer within the meaning of the Act.

5. Respondent has violated Section 8(a)(1) and (3) of the Act, since about January 28, 1997, by refusing to hire the individuals named in Appendix B to this decision because they joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

6. In January 1997, Respondent purchased the Hotel from Michael J. Daly, Chapter 11 Trustee for the Estate of J.L.M. Inc., d/b/a Sheraton Hotel Waterbury and but for the conduct described in paragraph 5 above, would have employed, as a majority of its employees at the Hotel, individuals who were previously employees of the Trustee.

7. Respondent has continued the employing entity and is a successor to the Trustee of the operation of the Hotel.

8. At all material times since January 1997, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the Unit 69

9. Since about January 1997, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

10. Since about January 1997, Respondent has violated Section 8(a)(1) and (5) of the Act by establishing rates of pay, benefits, hours of work, and other terms and conditions of employment for employees in the unit, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct.

11. Respondent has violated Section 8(a)(1) and (5) of the Act, since about February 1997, by promulgating, maintaining, and enforcing a rule prohibiting employees from wearing union buttons at the Hotel.

12. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging employees Francis Engler on April 2, 1997, Joann Y. Lo on April 7, 1997, and Jonathan D. Zerolnick on April 9, 1997, because they engaged in union activities.

13. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found that Respondent unlawfully discharged Joann Lo, Francis Engler, and Jonathan Zerolnick and further, unlawfully refused to consider for hiring and refused to hire former employees of the Hotel, I shall order that Respondent offer to Joann Lo, Francis Engler, and Jonathan Zerolnick, and the employees listed in appendix B to this decision immediate and full employment, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place. If Respondent does not have sufficient positions available the remaining employees shall be placed on a preferential hiring list. Joann Lo, Francis Engler, and Jonathan Zerolnick and the employees listed in Appendix B shall be made whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On request, the Respondent shall bargain with the Union concerning wages, hours, and other terms and conditions of employment. Furthermore, in order to remedy the Respondent's unlawful unilateral changes, I shall order the Respondent to rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or impasse. As the Seventh Circuit stated in enforcing the Board's decision in *U.S. Marine Corp.*, a remedial measure of this kind not only is "designed to prevent [the Respondent] from taking advantage of its wrongdoing to the detriment of the employees. . . [but a] return to the status quo ante at least allows the bargaining process to get under way." *Supra*, 944 F.2d at 1322-1323. Employees shall be made whole in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, supra.

Respondent shall be ordered, within 14 days from the date of the Order herein, to remove from its files any reference to the unlawful discharges of Joann Lo, Francis Engler, and Jonathan Zerolnick and the unlawful refusal to employ the employees named in appendix B, and

visors, night auditors, housekeeping employees, housekeeping supervisors, desk attendants/health club attendants, food service agents, bar attendants, culinary service assistants/food and beverage assistants, conference captains, concierge/Club Lounge host/hostess, Café Pronto host/hostess, cooks (1st and 2nd), utility workers/cafe/tertia, kitchen administrative assistant/receiver, shipping and receiving clerks, and engineering employees (Classes 1 through 4) employed by Respondent at its Waterbury, Connecticut facility; but excluding all other employees, all office clerical employees, gift shop employees, sales employees, and all guards, professional employees and supervisors as defined in the Act.

⁶⁹ I have found at an earlier point in this decision that the appropriate unit should be: All full-time and regular part time employees, including all guest relations agents, express service agents, express service super-

notify the employees in writing that this has been done and that the discharges and refusals to employ will not be used against them in any way.

Respondent shall be ordered to rescind its rule prohibiting the wearing of union buttons by its employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁰

ORDER

The Respondent, New Castle Hotels LLC, and its subsidiaries, Waterbury Hotel Management LLC and Waterbury Hotel Equity LLC, Waterbury, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of J.L.M. Inc., d/b/a Sheraton Hotel Waterbury and the Trustee, the predecessor employer, because of their union-represented status in the predecessor's operation, or otherwise discriminating against the employees to avoid having to recognize and bargain with the Local 217, Hotel and Restaurant Employees & Bartenders Union, AFL-CIO.

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees, including all guest relations agents, express service agents, express service supervisors, night auditors, housekeeping employees, housekeeping supervisors, desk attendants/health club attendants, food service agents, bar attendants, culinary service assistants/food and beverage assistants, conference captains, concierge/Club Lounge host/hostess, Café Pronto host/hostess, cooks (1st and 2nd), utility workers/cafeteria, kitchen administrative assistant/receiver, shipping and receiving clerks, and engineering employees (Classes 1 through 4) employed by Respondent at its Waterbury, Connecticut facility; but excluding all other employees, all office clerical employees, gift shop employees, sales employees, and all guards, professional employees and supervisors as defined in the Act.

(c) Unilaterally changing wages, hours, and other terms and conditions of employment of unit employees without first giving notice to and bargaining with the Union about these changes.

(d) Unilaterally promulgating, maintaining, and enforcing a rule prohibiting employees from wearing a union button.

(e) Discharging employees because they engage in union or other protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days of this Order, offer to the unit employees of the predecessor, J.L.M. Inc., d/b/a Sheraton Waterbury Hotel and the Trustee, named in appendix B to this decision, who would have been employed by the Respondent but for the illegal discrimination against them, employment at the Hotel, or if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If Respondent does not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list. In addition, make whole, with interest, the following named employees for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to employ them.

(b) Within 14 days of this Order, offer Joann Lo, Francis Engler, and Jonathan Zerolnick immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings or

other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days of this Order, remove from its files any reference to the unlawful refusal to hire any of the employees named in appendix B and any reference to the unlawful discharges of Joann Lo, Francis Engler, and Jonathan Zerolnick, and within 3 days thereafter notify these employees in writing that this has been done and that the unlawful refusal to hire and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) Notify the Union in writing that it recognizes the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and will bargain in with it concerning terms and conditions of employment for employees in the unit.

(g) On the request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to Respondent's takeover of the predecessor J.L.M. Inc., d/b/a Sheraton Hotel Waterbury/Trustee's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from January 28, 1997, until it negotiates in good faith with the Union to agreement or to impasse. Nothing in this Order shall be construed to authorize or require the Respondent to withdraw any improved condition or to result in the employees' loss of any beneficial unilateral change.

(h) Rescind its rule prohibiting the wearing of union buttons by employees.

(i) Within 14 days after service by the Region, post at its Hotel in Waterbury, Connecticut copies of the attached notice marked "Appendix A."⁷¹ Copies of the notice, on forms provided by the Regional Director for Region 34, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 1997.

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

APPENDIX B

Individuals Respondent Refused to Hire

Debbie D'Agostino	Anna Light
Kevin Anderson	Leatha Lipusz
Bella Berdan	Harold Luna
Yolanda Berardo	William Martin
Patricia Blake	Ernest Maysaw
Patricia Bender	Kathy Meccariello

⁷⁰ If 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.

⁷¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Vivian Bertelsen	Robert Murgatroy	Martin Echandia	Denise Rodriguez
Michael Bibeau	Kathryn Nicholson	Carmelo Feliciano	Marilyn Rossi
Nelson Buxton	Thomas Oakley	Zosh Flammia	Steven Ruegg
Thomas Castonguay	Luis Ocasio	Jose Garcia	Patricia Salouski
Lynne Ciacin	Steven Ortega	Steven Giancarli	Larry Schwartz
Sharon Colangelo	Amy Ouellette	Melissa Gugliotti	Eliza Svehlak
Randy Cremasco	Cynthia Pavlik	Hasip Hasipi	Alberto Tavares
Estelle Davila	Louise Pesce	Barbara Hillman	Candida Vadnais
Paul Depecol	Daniel Peszek	Vera Jackson	Caryn Vareika
Mike Doughwright	Sheryl Pinho	Eric Johnson	Susan Vaughn
Linda Doughwright	Reynaldo Ramos	Sylvia Kelley	Eleanor Williams
Sigfredo Echandia	Geilson Ribeiro	Rene LaVorgna	Brenda Williams
Cecilio Echandia	Iris Rasbo/Berengneur	Regina Levesque	Beatrice Saunders