

Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel and Hotel Employees and Restaurant Employees Union Local 814, AFL-CIO. Cases 31-CA-22971 and 31-CA-23902

December 13, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On April 6, 2001, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed cross-exceptions and supporting briefs. The Charging Party also filed an answering brief.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions except as set forth below, and to adopt the recommended Order as modified.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act when it granted retroactive pay increases to three employees in December 1995,³ and when it granted an additional pay increase to one of those employees (Alicia Ojeda) on August 21, 1997, in order to reward and encourage antiunion activity.⁴ The General Counsel and the Charging Party have

¹ On May 24, 2000, the Charging Party filed a motion to dismiss for mootness. Attachments to the motion show that the Respondent is no longer the owner and operator of the hotel where the alleged unfair labor practices occurred, the successor employer and the Charging Party have agreed on the terms of a new collective-bargaining agreement, and the three employees alleged to have received unlawful raises do not work for the successor employer. Thereafter, the Respondent filed an opposition to the Charging Party's motion. While not disputing any of the factual allegations in that motion, the Respondent contended that the unfair labor practices were not mooted by subsequent events. By unpublished order dated July 13, 2001, the Board denied the Charging Party's motion, noting the Respondent's opposition and the fact that the General Counsel neither opposed nor endorsed the motion.

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), enf. 188 F.3d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In adopting the judge's rejection of the Respondent's 10(b) statute of limitations defense as to these increases, we do not rely on his view about the confidential nature of the Respondent's personnel records. We also do not rely on the judge's discussion of the Regional Director's authority to expand the investigation of objections in a related representation case proceeding while certain objections issues were pending before the Board.

⁴ Chairman Hurtgen finds it unnecessary to decide whether the wage increase granted to Alicia Ojeda in August 1997 was unlawful, inas-

excepted to the judge's dismissal of additional allegations of unlawful wage increases. We find it unnecessary to pass on those exceptions, inasmuch as a finding of additional violations would be cumulative and would not affect the remedy.⁵

2. Both the General Counsel and the Charging Party requested the judge to provide a novel make-whole remedy for the alleged unlawful wage increases. The judge denied this request but recommended an affirmative recordkeeping remedy as an alternative. The General Counsel and the Charging Party do not except to the judge's failure to recommend the originally requested remedy. Nor does the Respondent except to the recordkeeping remedy. It is well established, however, that the Board may exercise its remedial discretion even in the absence of exceptions. *WestPac Electric*, 321 NLRB 1322 (1996). In the circumstances of this case, where it is uncontroverted that the Respondent no longer owns and operates the hotel involved here, a new collective-bargaining agreement negotiated by the Union and the successor employer governs the unit employees' wages and benefits, and the three antiunion employees favored with unlawful wage increases no longer work at the hotel, we find no need for either the originally requested make-whole remedy or the affirmative recordkeeping remedy recommended by the judge.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel, Santa Monica, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) from the Order, and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that (app. B) of the administrative law judge.

APPENDIX B

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

much as finding this additional violation would be cumulative and would not affect the remedy.

⁵ We therefore do not adopt the judge's analysis of the Respondent's 10(b) defense to these allegations.

⁶ We therefore do not rely on the judge's analysis of these remedial issues.

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

WE WILL NOT give pay raises or any other form of financial inducement to Art Tolentini, Deborah Mackron, Alicia Ojeda, or any other employee or employees to reward or encourage their initiating or supporting a movement to decertify Hotel Employees and Restaurant Employees Union Local 814, AFL-CIO or any other labor organization.

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

MIRAMAR HOTEL CORPORATION d/b/a
MIRA-MAR SHERATON HOTEL

Ann Cronin-Oizumi, Esq., for the General Counsel.
Joseph E. Herman Esq. (Thelen, Reid & Priest, LLP), of Los Angeles, California, for the Respondent.

Barry S. Jellison and Jonathan E. Davis, Esqs. (Davis, Cowell & Bowe, LLP), of San Francisco, California, for the Charging Party.

DECISION

PART ONE: STATEMENT OF THE CASE(S)

I. IN SUMMARY

TIMOTHY D. NELSON, Administrative Law Judge. I heard the trial of this consolidated unfair labor practice (ULP) prosecution during 11 days of litigation conducted in Los Angeles, California, beginning on November 30, 1998, and ending on June 24, 1999. The prosecution is brought in the name of the Board's General Counsel by the Regional Director for Region 31, against Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel (the Respondent), the operator of a hotel in Santa Monica, California, which also houses restaurants and other food and beverage facilities. The prosecution traces from a "Fourth Amended Charge" filed on December 3, 1997, in Case 31-CA-22971, by Hotel Employees and Restaurant Employees Union Local 814, AFL-CIO (the Union), the incumbent representative of more than 200 hourly paid food and beverage and housekeeping workers at the hotel. All parties were represented by counsel at the trial, and each party filed posttrial briefs through counsel, all of which I have studied.¹

¹ On the Union's requests, the due date for briefs was twice extended, ultimately to August 24, 1999. The Union's and the Respon-

The case has a complex, fragmented, and in some ways topsy-turvy procedural and litigation history.² For one thing, although it started as a ULP prosecution, and has now reverted to that status, for a good part of the meantime an afterthought fragment of a decertification election-objections case (RD objections case) had been uneasily engrafted onto the ULP prosecution, even while the balance of the RD objections case had already been submitted for adjudication to, and was pending before, the National Labor Relations Board itself, in Washington, D.C. Other principal features of the procedural background will be incidentally noted below, and some of those features will be revisited in later sections.

In a complaint that was significantly expanded in midtrial, the Regional Director has alleged that the Respondent violated Section 8(a)(1) of the National Labor Relations Act when it gave various pay raises (charted below) to three named employees during the lengthy pendency of a petition for decertification election in Case 31-RD-1317, a petition seeking an election to determine whether a majority of the Respondent's bargaining unit employees still wanted to be represented by the Union. The RD petition was filed on May 26, 1995, by Art Tolentini, a cashier in a restaurant in the hotel called The Café. An election was eventually conducted on October 1, 1997, and the Union lost the ballot count, but only by a fairly narrow margin.³ The Union filed objections to the election, and a 5-day hearing on objections was subsequently held in May 1998 before a hearing officer designated by the Regional Director to issue a report setting forth his findings and recommendations to the Board. The Union's ULP charge concerning pay raises attacked in this prosecution had by then been under investigation since early December 1997, but the pay raises were not among the objections matters which the Regional Director had ordered to be subjects for evidence taking in the RD objections hearing.

The Union's triggering ULP charge, i.e., the "Fourth Amended Charge" filed on December 3, 1997, stated in material part that, "[w]ithin the past six months, the Employer . . . grant[ed] wage increases to [employees] Deborah Mackron and Alicia Ojeda to reward and encourage anti-union animus." (Like RD petitioner Tolentini, Mackron and Ojeda were cashiers in The Café.) On June 5, 1998, after investigating this charge, the Regional Director issued an original complaint adopting the charge and expanding its reach. In substance, the

dent's briefs were thorough, lucidly argued, and helpful, if not always persuasive.

² Many features of the unfortunately convoluted history—particularly those indicating how fraught these proceedings were with institutional "right-hand/left-hand" problems—are reflected in various formal papers of record, including but not limited to those dealing with developments after I opened the trial record, as collected in ALJ Exhs. 1-15.

³ On November 7, 1997, following postelection proceedings held to resolve challenges, the Regional Director issued a revised tally of ballots indicating that 120 employees had cast valid ballots against continuing representation by the Union, 108 employees had cast valid ballots for continuing representation, and 3 persons had cast ballots under challenges that were not resolved because they could not affect the outcome.

original complaint alleged that the Respondent violated Section 8(a)(1) of the Act when, beginning on May 1, 1996 (about 19 months prior to the Union's charge), and on later dates in 1996 and 1997, it gave a series of pay raises to employees Mackron and Ojeda, allegedly to "reward" them for their role in the movement to decertify the Union and to "encourage" them to continue their support for the Union's ouster.⁴

As a result of developments detailed elsewhere below, the original complaint was expanded by amendments tendered and granted on May 21, 1999, Day Seven of trial proceedings, after the General Counsel had already rested the Government's case-in-chief. Pursuant to these amendments it was now alleged that, for the same unlawful reasons alleged in the original complaint, the Respondent had *also* favored Mackron and Ojeda with pay raises (and hefty one-time retroactive payments) in December 1995, and likewise had unlawfully given a pay raise and retroactive pay at that time to RD petitioner Tolentini. The following chart captures the undisputed particulars of the wage increases now attacked by the General Counsel as amounting to unlawful rewards or inducements to the three workers now in question, with italics used to indicate the pay actions which were first called into question by the midtrial amendments to the complaint:

Tolentini

December 1, 1995: 75 cent hourly raise, plus \$1282.00 retroactive pay

Mackron

December 1, 1995: 50 cent hourly raise, plus \$823.63 retroactive pay;
 May 1, 1996: \$3.00 hourly raise;
 May 1, 1997: 50 cent hourly raise

Ojeda

December 1, 1995: 50 cent hourly raise, plus \$896 retroactive pay;
 June 5, 1996: \$1.00 hourly raise;
 August 21, 1996: \$1.00 hourly raise;

⁴ Both the Union and the Respondent have noted on brief that even though the complaint alleges in a concluding paragraph that the Respondent violated only Sec. 8(a)(1) by giving the pay raises in question, this prosecution is in fact grounded on a "discrimination" theory of violation. The Union further emphasizes (Br. p. 33, fn. 14) that the allegedly unlawful pay raises implicate Sec. 8(a)(3)'s proscriptions, as well, and in any event, that the "raises should be analyzed and scrutinized under Sec. 8(a)(1) and Sec. 8(a)(3)." It strikes me as merely an academic question whether the General Counsel could have or should have alleged that the pay raises also violated Sec. 8(a)(3). But the Union and the Respondent are surely correct in their common central point that this is a case alleging intentional discrimination by the Respondent, i.e., a case which "turns on employer motivation" within the meaning of *Wright Line*. Thus, as I discuss in part two, it is unmistakable that the General Counsel proceeds on a discriminatory-motive theory, the expressly stated central premise of which is that the Respondent's motive for giving the "excessive" and "unjustified" raises to the named employees was to "reward" them for their "antiunion activities," and to "encourage" them to continue those activities. Indeed, for reasons explained in part two, I judge that a discriminatory motive theory of this type is the *only* theory on which the General Counsel might prevail in the unique circumstances of the case.

August 21, 1997: 50 cent hourly raise

As previously noted and as I elaborate in part two, the merits of the complaint pivot on the Respondent's motivations for these pay raises, and, therefore, a *Wright Line* analysis must govern the disposition of those merits. However, the case presents at least two other significant issues, which stand apart from the narrow question whether the Respondent committed unfair labor practices as alleged in the complaint, and these deserve immediate mention in this initial summary:

My original 10(b) decision; the Board's remand: The Respondent's answer to the original complaint raised statute-of-limitations defenses under Section 10(b) of the Act (generally barring any ULP complaint based on a charge filed more than 6 months after the occurrence of the allegedly unlawful act). Pursuant to agreement of the parties and my direction in a pre-trial conference call, the first 2 days of trial, on November 30 and December 1, 1998, were devoted to litigation of facts relevant to the 10(b) defense. I then continued the case, received briefs from the parties on the 10(b) issues, and on December 23, 1998, I issued a Decision and Order dismissing all but one of the counts in the original complaint as barred by Section 10(b).⁵ (A copy of my 10(b) decision is in evidence as ALJ Exh. 3; another copy is attached to this decision as app. A, and is incorporated by reference herein.⁶) The General Counsel promptly took an interim appeal to the Board and filed a brief in support, and the Union and the Respondent submitted their own briefs to the Board. On February 12, 1999, the Board issued an order (ALJ Exh. 9), in which it declined to decide either the merits of the appeal, or the merits of my original 10(b) decision. Instead, the Board,

[Remanded] this proceeding to the judge with the instruction that he conduct the remainder of the hearing, and thereafter issue a Decision and Order with findings of fact and recommended conclusions of law on all issues presented in the case, including the 10(b) issues upon which he has already ruled.

Accordingly, the ensuing 9 days of litigation (in the weeks of May 17, and June 21, 1999), and the expansion of the complaint and other developments noted above and below, all occurred against the background of the Board's February 12 Order and remanding instructions.

Requested "Backpay" Remedy: In both the original complaint and in its trial-amended incarnation, the Regional Director gave notice of the General Counsel's intention to seek an extraordinary remedy for the alleged violations, one which supposes that employees "other than" Mackron, Ojeda, and Tolentini suffered losses for which the Respondent must make

⁵ Specifically, I dismissed all counts except one calling into question a 50-cent pay raise given to Ojeda on August 21, 1997, the only allegedly unlawful increase occurring within 6 months prior to the filing of the Union's "Fourth Amended Charge."

⁶ I adhere to my original 10(b) decision. Necessarily, however, that decision did not address the additional allegations with respect to December 1995 pay raises and retro pay that were later incorporated into the complaint. As I discuss in part two, the additional allegations present different questions under Sec. 10(b) than those I decided with respect to the allegations in the original complaint.

them “whole” by paying them “backpay,” with interest. Over time the General Counsel has offered up three different narrative descriptions of the proposed remedy. One version is found in the original complaint, another (supplementing the first) in the trial-amended complaint, and the third in the General Counsel’s brief. Each new version not only differs textually from the others, but also seems to differ in important substantive ways from the others. But it’s hard to be sure about this: The problem is that in each new written expression of the proposed remedy, the author has resorted to vague and curiously elliptical (even circular) verbal formulations to convey critically important ideas, making it nearly impossible to be certain what the General Counsel intends. In fact, it may be naïve to assume in the first instance that the architects of the proposed remedy even had a specific intention with respect to certain important issues. Moreover, none of the several narrative descriptions of the proposed remedy is susceptible of recapitulation in anything resembling a formula for computation of the backpay said to be owed. Nevertheless, the requested remedy has always been inspired by two basic ideas: (1) The Respondent must “rescind” (by some wholly uncertain means) most or all of the allegedly unlawful pay raises identified by the complaint. (Whether “most” or “all” raises must be “rescinded” depends on which version you pick.) (2) The Respondent must “make whole” the “other bargaining unit employees” by paying backpay to them, in amounts which (as set forth in the complaint pleadings) must be “comparable in proportion” to the raises to the favored three. Moreover, on brief, in what may represent the most significant substantive shift of position, the General Counsel now seems to have made the date on which the Respondent obeys the elusive injunction to “rescind prospectively” the offending pay raises the critical date for purposes of capping what the General Counsel asserts is an ongoing backpay liability to the “other employees.”

II. PROCEDURAL DEVELOPMENTS REVISITED

A. Before and During the Trial

During the preelection pendency of the RD petition, the Union filed a number of charges against the Respondent, none of which resulted in the issuance of a complaint. (The earliest of these, later dismissed, alleged that the Respondent had unlawfully “solicit[ed] . . . employees to file a Decertification Petition.”⁷) Eventually, on September 9, 1997, the Regional Director issued a Decision and Direction of Election, and, as already noted, an election was held among the Respondent’s hotel workers on October 1, 1997, where the Union lost the ballot count. The Union then filed objections. (The Respondent did, too, but the Respondent later withdrew its objections.)

On March 11, 1998, the Regional Director issued a supplemental decision on objections, order directing hearing, and notice of hearing, in which he dismissed 14 enumerated objections filed by the Union and directed an evidentiary hearing on 17 other enumerated objections, none of which involved the pay raises in question, even though the Union’s ULP charge alleging unlawful raises had by then been under investigation

for nearly 6 months. To confuse the issues in this case further, prior to the Regional Director’s March 11 order in the RD case directing a hearing on certain objections, the Union had already withdrawn other of its objections, including one alleging that the Respondent had (“provided employees with favorable job applications and promises of increased wages and backpay in exchange for anti-union support.”⁸) The objections hearing was held before a Regional hearing officer during 5 days in May 1998, beginning on May 4 and ending on May 15.

On June 5, 1998, the Regional Director issued the original complaint and notice of hearing in Case 31–CA–22971, alleging that in and after May 1996, the Respondent had unlawfully rewarded employees Mackron and Ojeda with a series of wage increases. Three weeks later, on June 29, the hearing officer issued his report and recommendations to the Board in the RD objections case. There, the hearing officer recommended that some of the Union’s objections be overruled as lacking in proof and/or legal merit, but that others be sustained as meritorious, and, consequently, that the original election be set aside and a new election be conducted. Thereafter, both the Union and the Respondent filed various exceptions before the Board to the hearing officer’s report and recommendations.

On August 26, 1998, by which point the RD objections case was pending before the Board on the parties’ various exceptions, there occurred a further complicating development having the effect of fragmenting and attenuating the disposition of the RD objections case (and also, arguably, of requiring the litigation of ULP issues raised by the complaint even if they might otherwise be largely barred from prosecution by Sec. 10(b)). Thus, The Regional Director issued a multipurpose document, which I will call for shorthand purposes a “consolidation order,” but which actually was captioned “Second Supplemental Decision on Objections, Order Directing Hearing, Notice of Hearing, and Order Consolidating Cases [31–RD–1317 and 31–CA–22971].” There, the Regional Director “determined,” *sua sponte*, to “treat” the Respondent’s “conduct” (then referring only to wage increases to Mackron and Ojeda in 1996 and 1997 as alleged in the then-pending complaint in Case 31–CA–22971) as raising “additional” objections issues in Case 31–RD–1317. And, pursuant to that determination, the Regional Director ordered that those objections issues were to be “consolidated” with the pending ULP trial for purposes of my hearing and disposition. The Regional Director explained that this action was “required to correct an inadvertent omission from [his] March 11, 1998, Supplemental Decision,” in which he had “neglected to consider” the Respondent’s “conduct” (i.e., the pay raises discovered during his investigation of the ULP case) as possible “objectionable” conduct to be heard in the context of the hearing on objections in the RD case. He further stated that “this [wage-increase] conduct was not specifically alleged as objectionable conduct by the Union in its

⁷ The Union filed this charge on June 7, 1995, in Case 31–CA–21327. The Regional Director dismissed this charge on July 27, 1995.

⁸ See March 11 supplemental decision (GC Exh. 17, p. 3 fn. 2), where the Regional Director noted the Union’s withdrawal, on December 23, 1997, of, *inter alia*, its Objection 1(aa) (attachment to GC Exh. 17, p. ii), stating that the Respondent had “provided employees with favorable job applications and promises of increased wages and backpay in exchange for anti-union support.”

timely filed objections[.]”⁹ And in the light of all this, said the Regional Director in conclusion, “I have determined to exercise my authority to treat the alleged [ULP] conduct as such which may warrant the setting aside of the [RD] election.”

In sum, by the time the Regional Director issued the consolidation order, the Board clearly had primary jurisdiction over the RD objections case, and probably had exclusive jurisdiction over that case. And thus, the Regional Director’s determination to treat the ULP wage increase issues as matters which he still had authority to order be heard and decided by me as “additional objections” in the RD case was, at best, a jurisdictionally dubious exercise,¹⁰ and an inevitably problematic one in any case.¹¹ And for mostly the same reasons, the consolidation order made my own “jurisdiction” over that “additional” fragment of the RD objections case equally dubious and problematic. Indeed, my own nominal jurisdiction over the RD-case was always more theoretical than real, but the hybridizing of the litigation before me nevertheless required me in certain instances to make rulings on relevancy or admissibility or on various procedural questions which might never have come up—or on which I might have ruled differently—if the “case” before me had been exclusively an unfair labor practice prosecution.

However, any question of whether the Regional Director had authority in these particular circumstances to “treat” the ULP issues in this case as “additional” objectionable conduct in the RD case is now a moot question, and the same is true of any related question of whether, or to what extent, I was for a time invested with a kind of “parallel” (or “second-tier”) jurisdiction over an after-included fragment of the RD objections case. The current mootness of these questions is traceable to the General Counsel’s more recent motion (supported by all parties) to “sever and remand” to the Regional Director the fragment of Case 31–RD–1317 nominally pending before me, so that the

⁹ However, as I have noted previously, the Regional Director, in his March 11, 1998 supplemental decision in the objections case, had then stated that the Union had previously withdrawn certain objections, including an objection raising seemingly closely related pay-raise claims, i.e., that the Respondent had “provided employees with favorable job evaluations and promises of increased wages and backpay in exchange for anti-union support.”

¹⁰ The Regional Director did not purport to act pursuant to any authority expressly conferred by the Board’s Rules and Regulations, which do not clearly confer on a Regional Director any “independent” or “continuing” jurisdiction or authority over an RD objections matter currently pending directly before the Board. Rather, the Regional Director relied on the Board’s more generalized descriptions of a regional director’s (and an administrative law judge’s) authority with respect to non-alleged objections matters, as set forth in *White Plains Lincoln Mercury, Inc.*, 288 NLRB 1133 (1988).

¹¹ Among other things, the consolidation order, if properly issued in the first instance, necessarily had the effect of delaying the Board’s disposition of the pending RD-objections case by fragmenting that case into a “two-track” case, with the largest part of the objections case to remain pending before the Board (in limbo, presumably), while leaving the new fragment—the wage increase matters—to somehow work its separate way to the Board some day as a result of a separate ULP hearing before me, following which, according to the Regional Director’s consolidation order, I was to issue my own recommendations to the Board regarding the “additional objections” matters.

Regional Director could conduct a second election in that case. I granted this motion by order dated April 21, 2000. The background leading to this latter development is further discussed in subsection B, *infra*.

As already noted: As a consequence of the Board’s February 12, 1998 Order and remanding instructions, the ensuing litigation addressed the merits of the same counts I had dismissed on 10(b) grounds. Not only that, but the litigation became significantly expanded when, on May 21, 1999, the General Counsel moved to amend the complaint. As previously noted, these amendments reached further back in time, now alleging that the Respondent had also unlawfully favored Mackron and Ojeda with pay raises and retroactive pay in December 1995. These amendments further alleged, pursuant to a new charge filed by the Union on the previous day (in Case 31–CA–23902), that the Respondent had also unlawfully favored Tolentini with a pay boost and retroactive pay in December 1995. After extensive argument, I granted the General Counsel’s motion to amend (without prejudice to the Respondent’s 10(b) defenses), and further trial proceedings were then scheduled to resume on Monday, June 21, 1999, to give the Respondent the time necessary to investigate and prepare a defense to these new allegations.

The May 21, 1999 amendments were themselves prompted by the Union’s and the General Counsel’s belated discovery of certain additional facts relating to “merit” raises given to Mackron, Ojeda, and Tolentini in December 1995. Specifically, as further discussed in part two, the Union had been on notice since February 21, 1996 (and admittedly was aware), that these three employees (and a number of others) had received such merit raises sometime between November 1, 1995, and February 21, 1996 (50 cents each for Mackron and Ojeda; 75 cents for Tolentini).¹² However, this information alone had not caused the Union to suspect that the three employees had been favored with unusually large increases. Rather, what triggered such a suspicion was the Union’s eventual discovery in latter May 1999 that the Respondent had given a rather lengthy “retroactive” effect to the December 1995 merit raises to the three employees, such that Tolentini had received a one-time check for retroactive pay of \$1282, Mackron had gotten a check for \$823, and Ojeda had gotten a check for \$896. The retropay revelations themselves occurred as a result of the Union’s and the General Counsel’s reviews of certain “ER-21” payroll forms for the three employees, which forms the Respondent

¹² As is detailed in my original 10(b) decision (app. A, sec. I): On September 21, 1995, the Union requested the Respondent to furnish, *inter alia*, the “present wage rate” of all bargaining unit employees (Jt. Exh. 1), and on November 1, 1995, the Respondent furnished that data (Jt. Exh. 2). Then, on January 9, 1996, the Union made a second request for “a list of the current wage rates” of all bargaining unit employees (Jt. Exh. 3), and, on February 14, 1996, the Respondent mailed an updated listing (R. Exh. 3) to the Union. A comparison of Jt. Exh. 2 and R. Exh. 3 showed that, sometime between November 1, 1995, and February 21, 1996, Mackron’s and Ojeda’s hourly pay had increased by 50 cents and Tolentini’s hourly pay had increased by 75 cents. The same comparison process showed that other employees, including other cashiers and a number of cooks, had likewise received merit raises during the same period.

had originally disclosed to those parties on March 26, 1999, in response to the General Counsel's and the Union's discovery-at-trial subpoenas. And the March 26 disclosures had themselves occurred pursuant to a preresumption discovery process which I had previously directed to occur by order dated February 17, 1999 (see ALJ Exh.10; see also ALJ Exhs. 11-13), all in the (vain) hope that suchpre-resumption disclosures would permit the trial to be resumed and concluded in the same week, as each party had confidently predicted it would be.¹³

B. Further Board Action on Case 31-RD-1317 and Sequellae

On May 20, 1999, the Board issued a Decision, Order, and Direction of Second Election in Case 31-RD-1317. (A copy is in evidence as ALJ Exh. 14 (A).) The Board issued this decision while trial proceedings in this case were underway in the week of May 17-21, but counsel for the parties and I did not learn of it until after the May 21 adjournment of proceedings. As is implied by the caption, the Board there set aside the original decertification election based on certain objectionable conduct as found by the hearing officer, and directed a new election. The Board "further ordered" in this regard that "this proceeding [i.e., Case 31-RD-1317] is remanded to the Regional Director for Region 31 for action consistent with this Decision, Order, and Direction of Second Election."

The Board's May 20 decision in the RD case indicates that it was issued in response to a series of moving and responsive papers filed with the Board by the Respondent and the Union over the course of the previous 5 months, all having to do primarily with issues surrounding the hearing officer's report and recommendations on objections in Case 31-RD-1317. (The underlying papers to the Board were separately received in evidence in this proceeding as ALJ Exhs. 6(A) through (G) and 7(A) and (B).) The Board's decision, augmented by the referenced exhibits in this case, show as follows: On December 31, 1997 (before I resumed the merits trial and before the Board had issued its February 12, 1999 Order, above, remanding the case to me for further proceedings, and findings and conclusions on the merits), the Respondent submitted a letter to the Board (ALJ Exh. 6(A)) stating in material part: "[T]he Employer hereby respectfully withdraws its Exceptions and Brief in Support of Exceptions to the Hearing Officer's Report and Recommendations, and urges that a second election be directed in accordance with the Hearing Officer's recommendation." In its May 20 decision, the Board treated the Respondent's letter as a motion to withdraw its exceptions, and granted the motion. The Board took note that the Union opposed the Respondent's motion to withdraw exceptions, and that the Union had (1) filed its own request for review of the Regional Director's supplemental decision on objections, and (2) filed a motion to submit newly discovered evidence. (The latter motion then referred particularly to the recently-discovered "retro-pay" evidence appearing on ER-21's associated with Mackron's, Ojeda's, and Tolentini's December 1995 merit raises, i.e., the evidence which eventually led to the General Counsel's May 21 motion

to amend the complaint, above.) The Board denied the Union's request for review as "moot" in the light of its decision to order a new election based on other objectionable conduct found by the hearing officer. The Board also rejected as "untimely" the Union's proffer of the "newly-discovered evidence" in support of an argument that the RD petition should be "dismissed altogether."

The Board's May 20 Decision, Order, and Direction of Second Election was known to the parties and me when the concluding phase of the litigation occurred in the week of June 21-24, 1999. (Not then known, of course, was the Board's subsequent, July 21 Order Denying Motion and Clarifying Decision in Case 31-RD-1317, below.) In the light of the Board's May 20 Order Directing a New Election, I directed the parties at the close of the hearing on June 24, 1999, to show cause in writing on or before the due date for briefs why Case 31-RD-1317 (i.e., the objections fragment nominally before me) should not be severed and remanded to the Regional Director for Region 31. As previously noted, the due date for briefs was twice extended on the Union's motions, ultimately to August 24, 1999.

On July 21, 1999 (before the parties had responded to my show-cause direction), the Board issued an unpublished Order Denying Motion and Clarifying Decision in Case 31-RD-1317. There, the Board responded to the Union's May 28, 1999 Motion for Reconsideration of a Portion of the Board's Decision, specifically to the Union's "request that the Board delete from its [May 20] decision the last sentence in footnote 6, which states "To the extent that the Union is now (in its response to the Employer's motion to withdraw exceptions) urging consideration of that proffered ['newly-discovered'] evidence as grounds for dismissing the [decertification] petition altogether, the request is untimely." Although the Board denied the Union's motion for reconsideration (and the Union's request for deletion of the quoted sentence), the Board took note of the Union's representation in its motion that, in the "consolidated" proceeding before me, "it was attacking the validity of the decertification petition[.]" and that the Union was, therefore, "concerned that the statement in footnote 6 of the Board's May 20 decision may be interpreted as resolving the validity of the petition."

Here, I think it's worth pausing to observe that the Union's representation to the Board that, in the proceeding before me, it was "attacking the validity of the decertification petition," was, at best, a misleadingly incomplete statement, particularly insofar as it implied, contrary to fact, that the "issue" of the validity of the decertification petition was in any sense an "issue" that was *properly* before me for consideration. Thus, it is true that the Union, in a letter to me dated January 4, 1999 (ALJ Exh. 6(D)), argued for the first time that "the [allegedly unlawful] pay increases to Mackron and Ojeda to reward them for their circulation of the RD petition" was not only "an unfair labor practice and objectionable conduct[.]" but "[m]ore importantly, that type of conduct renders the election proceeding a nullity and requires dismissal of the RD petition." (This letter was materially identical in its text to the Union's letter to the Board of the same date [ALJ Exh. 6(C)], making identical arguments in the context of opposing the Respondent's request to withdraw its exceptions to the hearing officer's report on objections

¹³ Before the trial began, the Regional Office had estimated a "2-3 day" trial, and the Union and the Respondent had agreed with this original estimate.

and recommendations for a new election.) In fact, however, the Union's contention that the RD petition must be dismissed, raised for the first time in its letter of January 4, 1999, clearly exceeded the scope of any issues raised by the unfair labor practice complaint (even as later amended on May 21, 1999), because the complaint had never alleged the existence of any prepetition misconduct by the Respondent, only unlawful wage increases occurring during the protracted pendency of the RD petition. Neither did it expand the scope of the issues in the "case" before me that the Regional Director had belatedly ordered a "consolidation" of the issues raised by the complaint for purposes of considering the wage increases as objectionable conduct in Case 31-RD-1317. This is because, whatever else may have been uncertain about the Regional Director's post-complaint consolidation order, it was unmistakably clear from the text of that order that the "objections" issues contemplated by the consolidation order were themselves defined by, and, indeed, were identical to, the issues raised by the complaint.¹⁴ (In fact, counsel for the General Counsel reaffirmed this during various trial colloquies of record.)

Necessarily, therefore, despite the Union's various efforts to shoehorn the petition-dismissal "issue" into either the Board's disposition of the RD objections case (an effort which the Board rejected as untimely), or my own disposition of the hybrid matters before me, it was never before me to judge whether the RD petition itself should be dismissed. At best, the Union's representation to the Board that it was "attacking the validity of the decertification petition" in the proceeding before me was a reflection only of the Union's most wishful thinking about one of the "issues" it *hoped* I might decide in the context of a prosecution which did not, in fact, raise any such issue.¹⁵

As a separate point, I note that in arguing that the Respondent was guilty of unlawful prepetition behavior warranting dismissal of the RD petition, the Union appears to rely on testimony given before me by former Supervisor Ulysses Black in the June 21, 1998 trial session, where he purported to describe in quite summary terms a conversation or conversations with employee Mackron. As I ruled at the time, Black's testimony that Mackron made certain assertions during the supposed conversations was inadmissible hearsay if offered to prove the truth

¹⁴ Thus, the Regional Director stated in his consolidation order (emphasis added): "In the Complaint and Notice of Hearing which issued in related Case 31-CA-22971, this additional conduct is alleged as unfair labor practices in paragraphs 8. (b) and (c), and 9. (b), (c), and (d) therein. *The conduct consists of the grant of wage increases to two unit employees.* Inasmuch as these additional investigative disclosures raise substantial and material factual and legal issues, and are closely related to and *involve the same evidence as certain allegations* set forth in the aforementioned Complaint and Notice of Hearing, I find that the issues raised by these other investigative disclosures can best be resolved by a hearing together with the issues raised in the aforementioned Complaint and Notice of Hearing."

¹⁵ Moreover, the Union's assertions to the Board suggesting otherwise (see ALJ Exh. 14 (B), especially the Union's May 28, 1999 "Motion for Reconsideration of a Portion of the Board's [May 20, 1999] Decision") were not just misleading in their characterizations of matters then pending before me, but they further served to exacerbate the chronic, right-hand/left-hand problems associated with the unfortunate fragmentation of the RD objections case into two different proceedings.

of Mackron's out-of-court assertions, and therefore could not be received as having any tendency to prove that the Respondent was guilty of unlawful prepetition behavior. I further find that Black's summary descriptions of the supposed conversation (or conversations) with Mackron were themselves not deserving of any credence.¹⁶

In response to my end-of-trial direction to show cause in writing why the RD objections fragment before me should not be severed and remanded to the Regional Director, only the Respondent filed papers supporting severance and remand. The Union filed papers in opposition, arguing centrally that the Board's May 20 decision, etc., did *not* moot certain "issues" supposedly raised in the RD-objections fragment case nominally still pending before me. (The Union was apparently referring in particular to the supposed "issue" whether the RD petition should be "dismissed altogether.") The General Counsel's response to the show-cause direction was murkily set forth in a one-sentence footnote to the prosecution brief. *Id.* at p. 3 fn. 2. While the reasoning involved was uncertain, it was at least clear from the footnote that the "General Counsel [had] conclud[ed] that Cases 31-RD-1317 and Cases 31-CA-22971 and 31-CA-23902 should not be severed."

However, the Union and the General Counsel have more recently changed their minds: On April 3, 2000, the General Counsel (echoed by the Union in supporting papers) moved that I now sever Case 31-RD-1317 (i.e., the objections fragment nominally before me) from the outstanding ULP cases, and that I remand the RD case (fragment) to the Regional Director. Specifically, the General Counsel's motion recited that the Union, on March 21, 2000, had filed a "Request to Proceed" in the RD case, and that the severance and remand was now necessary "so the Regional Director for Region 31 . . . may conduct a representation election, *if appropriate*, in Case 31-RD-1317."¹⁷ I

¹⁶ As further noted in part two, Black had been Mackron's immediate supervisor until he was fired by the Respondent in February 1998, and he had maintained a social and dating relationship with her off the job before he was fired. Subpoenaed by the Union in this proceeding, he initially testified in summary terms that he had one or more prepetition conversations with Mackron wherein she supposedly told him, in substance, that she had been in touch with one or more company officials who had coached her about how to get a decertification movement started. Upon the Respondent's objection, I ruled that this testimony was inadmissible hearsay, especially considering that the General Counsel had never alleged nor argued that Mackron was a company "agent," or that she otherwise occupied any status that might allow her (supposed) out-of-court assertions to Black to be treated as nonhearsay "admissions" of a party-opponent. In any case, as further discussed in part two, I found Black to be a decidedly unimpressive witness in many (but not all) respects. And as to this particular issue, I would not credit any part of his (fragmented, shifting, and recklessly-delivered) account which might suggest that Mackron told him (no matter when) that she had schemed with company officials *prior to* the filing of the RD petition.

¹⁷ There can be no doubt that the Board, by its May 20 Decision, Order, and Direction of Second Election, had already determined not only that it was "appropriate" to conduct a second election, but had, indeed, "directed" that the second election be held, and had remanded that case to the Regional Director to do just that. Accordingly, I have no idea what counsel for the General Counsel may have intended by including

granted this unopposed motion by Order dated April 21, 2000, specifically ordering that “Case 31–RD–1317 is remanded to the Regional Director for Region 31 for all further processing and disposition.” Accordingly, by this ultimate severance and remand, if not as a necessary consequence alone of the Board’s May 20, 1999 Decision, Order and Direction of Second Election and its own remand to the Regional Director, any outstanding issues in Case 31–RD–1317, are no longer before me, if, indeed, any such issues were ever properly or genuinely “before” me in the first place.

III. REMAINING SCOPE OF THIS DECISION; SUMMARY OF MY DISPOSITION OF 10(b) ISSUES

In compliance with the Board’s Order and remanding instructions of February 12, 1999, above, I permitted full merits litigation of all matters put into issue by the original complaint and the amended consolidated complaint and the Respondent’s answers thereto. I am further instructed by the Board’s remand to “issue a Decision and Order with findings of fact and recommended conclusions of law on all issues presented in the case, including the 10(b) issues upon which [I have] already ruled.” Based on post-February 12, 1999 developments already noted with respect to the severance and remand of the RD case to the Regional Director, I have construed the Board’s February 12 remanding instructions to me as moot and no longer operative insofar as they may have contemplated that I make recommendations to the Board with respect to the disposition of any “objections” issues in the RD case. However, I construe as still fully operative the Board’s remanding instructions clearly contemplating that my Decision and Order should include a full decision on the merits of the unfair labor practice allegations in this case, and without regard to any judgments I have already made as to the 10(b) timeliness of any of those unfair labor practice allegations. Accordingly, my merits findings, analyses, and recommended Order will occupy most of the balance of this decision.

This litigation has not changed my appreciation or disposition of the 10(b) issues I decided in my original 10(b) decision. Specifically, based on the findings and reasons set forth in that decision, I will adhere to my judgment that the allegedly unlawful raises given to Mackron in May 1996 and May 1997, and the allegedly unlawful raises given to Ojeda in June and August 1996 were barred from prosecution by Section 10(b). Thus, the Union’s charge which called those particular wage increases into question (its “Fourth Amended Charge” in Case 31–CA–22971, dated December 3, 1997), was untimely, and so, too, was the complaint barred by Section 10(b) insofar as it attacked those particular wage increases. (Nevertheless, the complaint’s attack on Ojeda’s 50-cent raise on August 21, 1997, was clearly timely, and was never the subject of the Respondent’s 10(b) defense in any case.)

However, I will reach a different 10(b) judgment with respect to the most remote of the now-alleged violations, specifically the hefty “retroactive” payments given to Mackron, Ojeda, and Tolentini in December 1995 (i.e., those only belat-

the phrase, *if appropriate*, in the above-quoted portion of her motion for severance and remand.

edly discovered by the Union and the General Counsel in latter May, 1999, pursuant to the Respondent’s March 26, 1999, disclosures in response to the prosecuting parties’ trial subpoenas). As I explain further in my concluding analyses, I will judge that those large retropayments were themselves so artfully and misleadingly concealed (moreover, in an ER-21 form not normally made available to the Union in response to requests for the current hourly pay of bargaining unit employees) that the fact of the retropayments was not discoverable earlier by exercise of reasonable diligence on the Union’s part. Accordingly, I will judge that the 10(b) clock on the December 1995 retropayments did not begin to run until March 26, 1999, when the ER-21’s revealing those payments were first made available to the Union (and to the General Counsel). And this means, in turn, however ironically, that the May 21, 1999, amendments to the complaint calling those December 1995 retropayments into question were not barred by Section 10(b), even though Section 10(b) barred allegations as to all other complaint-identified pay raises granted later (except for the 50-cent raise to Ojeda on August 21, 1997).

PART TWO: MERITS FINDINGS AND CONCLUSIONS (IGNORING 10(B) QUESTIONS)

I. INTRODUCTORY DISCUSSIONS

For reorientation purposes, I reiterate that the amended complaint alleges in substance that the Respondent violated Section 8(a)(1) when, on the following dates, it gave the following pay raises to Art Tolentini, Deborah Mackron, and Alicia Ojeda:

Tolentini

December 1, 1995: 75 cent hourly raise, plus \$1,282.80 retroactive pay

Mackron

December 1, 1995: 50 cent hourly raise, plus \$823.63 retroactive pay;

May 1, 1996: \$3.00 hourly raise;

May 1, 1997: 50 cent hourly raise

Ojeda

December 1, 1995: 50 cent hourly raise, plus \$896 retroactive pay;

June 5, 1996: \$1.00 hourly raise;

August 21, 1996: \$1.00 hourly raise;

August 21, 1997: 50 cent hourly raise

Later sections of this part contain my findings of fact and conclusions of law concerning the merits of the allegations in the complaint as amended during the trial. I enter them in accordance with the Board’s remanding instructions even though I have separately judged that all but one of the pay-raise counts in the original complaint are barred from prosecution by Section 10(b) of the Act, the governing statute of limitations. Later sections also contain my findings and conclusions with respect to 10(b) issues which I did not address in my original 10(b) decision, i.e., the impact of Section 10(b) on the December 1995 pay-raise allegations that were first introduced into the case by the midtrial amendments.

I will use section II, next, to establish an analytical framework for my subsequent findings and discussions, focussing

primarily on why and how I think the teachings of *Wright Line* apply to the case. However, in section II, I will also address and dispose of other potential theories or arguments, which the General Counsel has uncertainly introduced into the case.

II. FRAMEWORK FOR ANALYSIS

A. Principal Contentions of the Parties; Presumptive Applicability of *Wright Line*

The issues in the case cannot properly be understood without first identifying the legal theory which animates this prosecution. Although the theory of violation is expressed somewhat indistinctly or equivocally in both the complaint and in the General Counsel's posttrial brief, it remains largely obvious that the critical operating premise of the prosecution is that unlawfully discriminatory motives influenced the Respondent's decisions to give these particular raises to these particular employees. Thus, as I detail below, the General Counsel unmistakably alleged in the complaint, sought to prove at trial, and argued vigorously on brief that the Respondent, wanting to be rid of the Union, and knowing or believing that Tolentini, Mackron, and Ojeda were key figures in the movement to oust the Union, intended the raises to function both as "rewards" for their prior efforts to that end and as inducements to "encourage" them to continue their efforts. The Union has consistently argued a virtually identical motive theory.¹⁸ And the Respondent, likewise seeing its motivations for these raises as the pivotal issue in the case, has denied any unlawful purpose, and has sought to prove instead that each of the raises attacked by the complaint was based on "merit" and related factors, including the wish to retain good help and combat "turnover" among its cashiers.

The language of the complaint alone makes it clear that the General Counsel attacks the various raises to the three employees because they were given for unlawful, union-hostile reasons, and quite particular reasons at that. Thus, paragraph 10 of the amended complaint alleges (consistent with its counterpart in the original complaint) that the Respondent's motive in granting all of the pay raises identified in previous paragraphs was "to encourage Mackron's, Ojeda's and Tolentini's anti-union efforts[.]"¹⁹ Moreover, in her posttrial brief, counsel for

¹⁸ See U. Br. at 3: "The December 1995 retroactive raises to Tolentini, Mackron, and Ojeda were rewards for their activity in the decertification effort, as were the huge wage increases given to Mackron and Ojeda in the summer of 1996. They were given as part of Respondent's unlawful campaign to free itself from having to deal with an increasingly militant union." See also id. at 741-742: "The raises were designed to get them [Mackron, Ojeda and Tolentini] to continue their activity to decertify the Union."

¹⁹ I recognize that par. 10 goes on to state that the Respondent also gave the raises to the favored three "in order to discourage other employees from supporting the Union and/or engaging in union or other concerted activities for the purpose of collective bargaining, mutual aid, or protection." However, in the context of this particular prosecution, I regard this extra verbiage as essentially idle. And the best reason for thus disregarding the added verbiage (clearly asserting that an additional motive for giving the identified pay raises to the three named employees was to "discourage" prounion activities by "other employees") is that this assertion is impossible to square with what the General Counsel has repeatedly (and reasonably) insisted elsewhere—in sub-

stance, that the pay raises in question were intended by the Company to be kept *secret* from the "other employees," who, in fact, did *not* know, and *could not* have known that Mackron, Ojeda, and Tolentini had been favored with the raises in question. Thus, in support of arguments that none of the complaint allegations are time-barred, the General Counsel has repeatedly asserted (correctly, as I read the record) that "[t]here is no evidence that any of [the "other"] unit employees either knew or reasonably could have known about the pay increases granted [to] Mackron, Ojeda, and Tolentini." GC Br., p. 6. See also the General Counsel's (undated) December 1998 briefs to me and (later) to the Board (respectively, ALJ Exh. 1(A), p. 4, and ALJ Exh. 4(A), p. 6) associated exclusively with the 10(b) issue, where the same point is stressed in virtually identical terms.

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²⁰ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affg. *Wright Line* tests.

²¹ 251 NLRB at 1089. See, e.g., *Chicago Tribune Co.*, 300 NLRB 1055 fn. 3 (1990).

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²⁰ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affg. *Wright Line* tests.

²¹ 251 NLRB at 1089. See, e.g., *Chicago Tribune Co.*, 300 NLRB 1055 fn. 3 (1990).

Wright Line analysis but requires one, with due regard for its allocation of burdens.

B. Possible Additional Prosecution Theories

As previously stated the Respondent is the only party who has expressly acknowledged that its motives are the pivotal element in the case, and, therefore, that a *Wright Line* analysis is required. Moreover, there is a studied quality to the General Counsel's silence on the point, seemingly implying a wish to leave wiggle room for arguing quite different theories, including even (perhaps) a theory according to which the Respondent's motives might be irrelevant to the inquiry. Because the General Counsel has been sufficiently blurry and equivocal on these points to leave room for doubt, I deem it necessary, however distracting, to pursue here the possible significance of certain assertions, chiefly those made summarily and inconclusively in the General Counsel's post-trial brief, which may—or may not—have been intended to introduce a different theory from the unlawful motivation theory made explicit throughout this prosecution. As I explain below, I would find no merit to any such extra theory in the circumstances of this case; indeed, I judge that this prosecution would necessarily fail *unless* the General Counsel could establish by a preponderance of the credible evidence that unlawfully discriminatory considerations were “motivating factors” in the pay raises in question.

To start with, I note that the General Counsel, in the context of arguing on brief that none of the counts in the complaint are barred under Section 10(b), has glibly asserted in passing that there exists a class of “bargaining unit employees other than Tolentini, Mackron, and Ojeda . . . who were *denied* pay raises because they did *not oppose the Union* and support Respondent.”²² But the General Counsel does not trouble to identify any record support for this assertion, and I find no such support in any case. Even more important, the assertion of this claim for the first time on brief is offensive to fundamental standards of fairness and due process. The complaint never alleged that the Respondent discriminatorily “denied” pay raises to “other” unit employees, much less did it identify any alleged victims of any such supposed discrimination, still less the timing or other particulars of any such “denials.” Rather, the complaint only alleged, in substance, that the Respondent unlawfully *avored* the three named employees by giving them raises in the amounts alleged in the complaint—amounts, moreover which the General Counsel consistently characterizes by such terms as “blatantly excessive,” “disproportionately large,” and “unjustified.”²³ And because the Respondent was not given any notice in the complaint that it was

²² GC Br. 6; emphasis added. See also *id.* at p. 23 fn. 22, and p. 24 fn. 23, where, in the context of attempting to explain the terms of a proposed order for an extraordinary “backpay” remedy, the General Counsel makes similar assertions in similarly vague and conclusionary terms.

²³ Nor is a claim that other employees were unlawfully denied pay increases implicit in, or merely the obverse of, the allegations which were set forth in the complaint. This is a point which may be largely evident simply from the General Counsel's insistence that the raises given to the three “favored” workers were “disproportionately large,” “blatantly excessive,” and “unjustified.” In any case it is a point to which I will return in my discussion of the appropriate remedy.

being charged with having unlawfully “denied” pay increases to “other” employees, the Respondent cannot be said to have consciously litigated any such claim, much less could it be said that such a claim was either “fully” or “fairly” litigated. Indeed, I find that any such phantom claim was not litigated in any manner whatsoever.

I also recognize that the General Counsel has introduced in conclusionary terms the notion that the wage increases were “inherently destructive” of employee rights, which perhaps might imply an alternative, per se, theory of violation, according to which it need not be proved that union-hostile considerations were a “motivating factor” in the Respondent's decisions to confer the particular wage increases in question.²⁴ Thus, in a phrase tucked into complaint paragraphs which otherwise simply identify the date and the amount of each pay raise in issue, it is alleged that the raises “constitut[ed] a preference in terms and conditions of employment and [were] inherently destructive of the rights guaranteed all employees by Section 7 of the Act.” The same assertion is also made in a single sentence at the conclusion of the General Counsel's arguments on brief, as follows: “Moreover, as Respondent distinguished among employees based upon their participation in antiunion activities when it conferred its *disproportionate* wage increases on Mackron, Ojeda, and Tolentini, Respondent's conduct was inherently destructive of the Section 7 rights of unit employees, as alleged.” (GC Br. at 20; emphasis added.)

It is not at all clear what the General Counsel had in mind in asserting that the wage-increases in question were “inherently destructive” of employee rights.²⁵ In fact, the point is not otherwise pursued or rationalized in the General Counsel's arguments, and nowhere does the General Counsel affirmatively state that the Respondent's motives for the wage increases given to Tolentini, Mackron, and Ojeda were irrelevant. On the contrary, the assertion that the Respondent's “conduct” was “inherently destructive” is made in the same breath with characterizations of the same conduct as “constitut[ing] a *preference* [accorded to the three employees] in terms and conditions of employment” (the complaint) or as a “distin[ction] . . . based upon their participation in antiunion activities” (GC Brief). Thus, considered in context, the *inherently destructive* language seemingly amounts to surplusage from a theoretical standpoint, merely a reiteration in different terms of the General Counsel's overriding contention that the Respondent, influenced by unlawful motives, consciously discriminated in favor of Tolentini, Mackron, and Ojeda when it gave them the “blatantly excessive” and “unjustified” pay raises in question. Accordingly, while I remain in doubt about the General Counsel's reasons for summarily incorporating the words *inherently destructive* into the prosecu-

²⁴ The doctrine in question traces principally from the Supreme Court's decision in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967), and cases cited.

²⁵ Perhaps the best clue as to what the General Counsel may have intended in this regard is contained in a colloquy at trial concerning these same questions (Tr. vol. IV, 386–388), where counsel for the General Counsel seemed to be saying in the end that the expression *inherently destructive* as used in the complaint was only intended to convey the idea that, “in the circumstances of this case,” the alleged violations were “extreme” or especially “serious” violations.

tion, I am persuaded that the invocation of such magic words was not intended to suggest an alternative theory according to which employer motivation was irrelevant.

Regardless of the General Counsel's intentions, however, I judge that the pay raises to Tolentini, Mackron, and Ojeda could not be understood as "inherently destructive" of employees' statutory rights in the *absence* of proof of an unlawfully discriminatory motivation for conferring them. And here I re-emphasize that not only does the General Counsel fail to explain, much less defend, the use of the expression in question, but the record fails to show that any employees other than Mackron, Ojeda, and Tolentini were even aware of the increases given to the three allegedly favored workers. Rather, as I have noted previously, the General Counsel has insisted (correctly, so far as this record shows) that the other workers were not aware of those increases and could not have been so aware. Even more important, as I detail below in section III, everyone agrees that when the Respondent gave the various raises attacked by the complaint, the Respondent and the Union were operating within the term of a binding, 5-year labor agreement which expressly ceded to the Respondent the right, "at its sole discretion," to give "merit" raises to individual employees over and above the "minimum scales" called-for in the union contract. Moreover, as I also detail in section III, this was a contract, which the Union had embraced and had "finalized" with the Respondent with full knowledge that an RD petition had already been filed. Accordingly, by entering into the contract, the Union effectively had waived any right to object to the mere fact that the Respondent might confer discretionary pay raises during the pendency of the RD petition. And unless it could be shown that the Respondent had unlawfully discriminatory motives for giving the particular raises called into question, there was nothing unlawful *per se* (or "inherently destructive") about the Respondent's having given those raises, or any of the many other merit pay raises it handed out during the lengthy pendency of the RD petition which have never been the targets of the complaint.

C. Particular Application of *Wright Line*

Under *Wright Line*, as clarified and restated in more recent decisions, the General Counsel's burden in all cases turning on employer motivation is to establish by a preponderance of the credible evidence that an unlawfully discriminatory consideration (typically, the employer's hostility to a union or to union activities or other protected activities by its employees) was a "motivating factor" in the action of the employer challenged by the complaint.²⁶ If (and only if) such a showing is made, a

²⁶ *Wright Line* used the expression "prima facie showing" (sufficient to support an inference of improper employer motivation) to describe the General Counsel's burden. However, in the aftermath of *Office of Workers' Compensation v. Greenwich Collieries*, 512 U.S. 267 (1994), the Board has effectively disavowed "prima facie showing," and has reaffirmed that the General Counsel's burden requires proof of the "motivating factor" element by a "preponderance" of the evidence. See *Tres Estrellas de Oro*, 329 NLRB 8 (1999) (explicit disavowal of "prima facie showing" formulation; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996) (implicit disavowal). In both cases, the Board took note of the District of Columbia Circuit's observation in *Schauff Inc. v.*

violation may be found even if the credible evidence might show that other, "innocent" motives may also have figured in the employer's actions attacked in the complaint. Rather, even where the employer may be found to have acted from a combination of lawful and unlawful motives, the employer may "escape liability" for the violation only by itself "demonstrating" that it would have taken the same actions without regard to its unlawful motivation.²⁷

Although I am persuaded that this case must be analyzed and decided within the framework of *Wright Line's* teachings and its burden-shifting scheme, I must acknowledge, as the Respondent points out on brief, that this case presents a somewhat novel twist on the conventional paradigm envisioned by *Wright Line* and progeny. Thus, the Board's formulations in *Wright Line* assume that the employer has been charged with having taken discriminatory action *against* an identified employee or group of employees because of their *prounion* activities or other protected activities. But that is not the case here. Rather, here, according to the General Counsel, the "discriminatees" identified in the complaint are "antiunion" employees who were singled out for "excessive" and "unjustified" pay raises because the Respondent wanted to rid itself of the Union and knew or believed that the employees favored with such raises had been promoting the Union's ouster and would continue to do so if given palpable rewards and inducements for doing so. Thus, the only difference between this case and a conventional one raising *Wright Line* issues is that here, the acts of discrimination said to have been "motivated" by the Respondent's wish to rid itself of an unwanted union presence were not acts of discrimination against *prounion* workers, but acts for the benefit of *antiunion* workers, and a quite narrow and particular class of *antiunion* workers at that—confined to three employees believed to be particularly active or influential in starting the decertification movement and keeping it alive during the lengthy pendency of the RD petition.

Taking all of the foregoing into account, I reason that the General Counsel's threshold burden was to establish by a preponderance of the credible evidence that the *antiunion* views and/or activities of the three employees named in the complaint were motivating factors in the Respondent's decisions to give the complaint-identified raises to those particular employees. I will conclude that the credible evidence preponderates in favor of such a finding with respect to all pay raise actions identified

NLRB, 113 F.3d 264 (1997), that "[t]he practical effect of *Greenwich Collieries* . . . may be no more than the abandonment of the term 'prima facie case' to describe the General Counsel's burden." 113 F.3d at 267 fn. 5, further citing *Southwest Merchandising Corp.*, 53 F.3d 1334, 1339-1340 and fn. 8 (D.C. Cir. 1995). ("[I]n the wake of *Greenwich Collieries*, it will no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case.")

²⁷ *Wright Line*, *supra* at 1089. Relatedly, I note that, although counsel for the General Counsel does not expressly acknowledge *Wright Line's* applicability, she neatly echoes *Wright Line's* formulation of the burden which may shift to the employer when she argues on brief (p. 20) that "[t]he Respondent failed to show that its conduct was based on legitimate business reasons and that it would have conferred the exceptionally large raises in issue even if Mackron, Ojeda, and Tolentini had not engaged in their *antiunion* activities."

in the complaint save one—the granting of “merit” raises to the three employees (and others) in December 1995. (In that case, however, I will find that the “super-retroactive” component of those merit raises as applied to the three employees amounted to unlawfully discriminatory favoritism, substantially as alleged in the complaint.) Under *Wright Line*, however, the Respondent might nevertheless “escape liability” for a violation if it could “demonstrate” by a preponderance of the credible evidence that it would have taken the same pay raise actions without regard to the antiunion activities of the three employees. I will conclude that the Respondent failed to carry this latter burden.

D. Issues of “Knowledge” and “Animus”

It is axiomatic that an employer cannot have been “motivated” by an employee’s prouion or (in this case) antiunion activities or sympathies to take action affecting that employee’s status if the employer didn’t know or have a belief about the employee’s activities or sympathies. Indeed, credible evidence of “employer knowledge” is a necessary part of the General Counsel’s burden, and without it, the complaint cannot survive.²⁸ Moreover, proof of the knowledge element is not alone sufficient. Rather, proof of “animus”—usually, but not always, meaning proof of animus “independent” of the allegedly unlawful act itself—is likewise seen as an “essential element” in carrying the General Counsel’s case.²⁹

Here, there is no doubt—and the Respondent effectively so stipulated—that company officials responsible for the pay raises in question knew virtually from the start that Tolentini and Mackron were important figures in getting the decertification movement going. And while there remains a marginal question about “knowledge” as to Ojeda, the question is not *whether* these officials saw Ojeda as a similarly influential figure in the movement, but *when* they first perceived her in that light. (She served as the Respondent’s observer in the election, and the Respondent’s Regional Director of Human Resources Igoa admitted that he and other top managers knew before he asked her to be the company observer that she supported the Union’s ouster.) I will find that responsible company actors knew or (correctly) believed at an early stage in the decertification effort that Ojeda wanted the Union out. This ultimate finding is based on a combination of independent circumstantial evidence, credibility assessments, and adverse inferences, all of which will be best understood only in the light of additional findings. Accordingly I will revisit the matter later. There is no similar reason, however, to defer the disposition of the animus issue. As I explain next, the Board’s adjudications in the RD objections case themselves supply the necessary evidence of animus.

It remains uncertain and debatable what kind of evidence of an employer’s antipathy to union representation will suffice to suggest unlawful employer motive in a given case of alleged discriminatory action. Such questions need not be answered

²⁸ *Stanford Linear Accelerator Center*, 328 NLRB 464, 464 fn. 1 (1999) (“Without this knowledge, there is no basis for finding that there was a prima facie case of discriminatory conduct.”). See also, e.g., *Postal Workers (Postal Service)*, 278 NLRB 751, 752–753 (1986).

²⁹ See, e.g., *Columbian Distribution Services*, 320 NLRB 1068, 1070–1071 (1996).

here, for it is at least well established in the Board’s annals, if not axiomatic, that when an employer commits roughly contemporaneous unfair labor practices independent of the alleged discrimination, this may be relied on to find the requisite animus. And here, the Board’s adoption of the hearing officer’s now-undisputed findings in the RD objections case, made after full litigation,³⁰ can be taken as a Board adjudication that the Respondent was not just guilty of objectionable conduct requiring a new election, but that some of its conduct found objectionable amounted to unfair labor practices proscribed by Section 8(a)(1). In fact, it is clear that two different kinds of misconduct by the Respondent’s agents were found to be objectionable precisely because they were “unlawful.” Specifically, the hearing officer, applying standards for determining whether the conduct at issue violated Section 8(a)(1), found that the Respondent’s agents engaged in the following “unlawful” conduct:

(1) Darren Moll (director of restaurants), Ulysses Black (p.m. manager of the Café) and another “manager” (identified by the hearing officer both as “Schmit” or “Smit”³¹) “treat[ed] pro-union employees in a fashion different than the pro-employer [sic] employees, by limiting the pro-union employee’s [sic] ability to speak with each other, or with uncommitted employees.” This misconduct was further characterized by the hearing officer as “disparate treatment [which was] both objectionable and violative of Section 8(a)(1) of the Act.”³²

(2) Moll, Brian Madlin (a.m. manager of the Cafe) and Betha Soto (executive assistant housekeeper) variously “interrogated” employees about their union activities or sympathies in a manner which was “coercive” within the meaning of Section 8(a)(1)’s proscriptions and the coercion standards declared by the Board in *Rossmore House* and *Sunnyvale Medical Clinic*.³³

It may be that under Section 102.67(f) of the Board’s Rules and Regulations alone, the Respondent would have been barred from seeking to “relitigate” in this unfair labor practice proceeding whether its agents were guilty of the particular conduct, *supra*, which the hearing officer, affirmed by the Board, found was not just “objectionable,” but “unlawful.” Alternatively, it may be that traditional doctrines of *res judicata*, collateral estoppel, or the general desirability of “finality” of adjudication would have barred such relitigation. See, e.g., *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 (1997), and authorities discussed and distinguished. These are questions, however,

³⁰ As noted in part one, following a postelection hearing on certain of the Union’s objections, the hearing officer found that the Respondent engaged in certain objectionable conduct preceding the election held on October 1, 1997, and recommended that the results of the election be set aside. Moreover, although the Respondent initially filed exceptions with the Board to the hearing officer’s findings and recommendations in this regard, the Respondent moved on December 31, 1998, to withdraw those exceptions, and, on May 20, 1999, the Board granted this motion and, based on certain no longer disputed objectionable conduct found by the hearing officer, issued a Decision and Order directing a new election.

³¹ The parties stipulated in this case (GC Exh. 2) that Johan Smit was a “Room Service/Café/Grille Manager from on or about April 3, 1996 to the present.”

³² Hearing Officers Report and Recommendations, p. 31.

³³ *Id.* at 32–35.

which are unnecessary to reach, for the Respondent did not seek to relitigate any of those matters in this proceeding.³⁴ Especially in those circumstances, the Board's affirmation of the hearing officer's findings would at a minimum permit me to "accord persuasive relevance [or] a kind of administrative comity" to those findings for purposes of finding in this case that the Respondent harbored animus against the Union. *Serv-U Stores*, 234 NLRB 1143, 1144 (1978). Nor would it seem to matter for purposes of finding animus that the Board's adjudication that the Respondent was guilty of objectionable conduct amounting to unfair labor practices had a pro forma quality, in that the Respondent had previously withdrawn its exceptions to the hearing officer's findings. In that respect the situation would seem to be fully analogous to that sometimes presented in unfair labor practice cases where, in the absence of exceptions to an administrative law judge's findings of violation after full litigation, the Board will enter pro forma findings of its own that an employer has violated the Act, and will enter an appropriate remedial order. And in that context, the Board has expressly held that even though the pro forma nature of the Board's unfair labor practice findings may "diminish or even negate the precedential value of the rationale" of the decision, the decision still may properly be "considered . . . when determining whether a respondent has demonstrated a proclivity to violate the Act." *Operating Engineers Local 12 (Associated Engineers)*, 270 NLRB 1172, 1173 (1984).

Accordingly, I rely on the Board's adjudications after full litigation in the RD objections case to find that the Respondent committed what amounted to independent unfair labor practices during the preelection campaign, misconduct, which, in turn, supplies the requisite animus in this case.

E. Other Principles Applicable to "Motive" Cases

Whether unlawfully discriminatory considerations were motivating factors in the Respondent's granting of the complaint-listed pay raises is the pivotal question in the case. The record contains a wide and sometimes confusing variety of circumstantial evidence having potential bearing on that question. And while much of the circumstantial evidence is undisputed, even the undisputed items of evidence do not all point in the same direction. However, for introductory purposes I should state that many of my findings as to contested questions are based in part on two well-recognized kinds of adverse inferences, which may be drawn whenever employer motive is the central question. Thus, it is well-established that an unlawful employer motive may be inferred where the employer's stated reasons for the action in question are themselves seen by the trier-of-fact as false or highly dubious in the light of reliable surrounding evidence. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), stating:

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person

accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naïf than is a judge. If he finds that the stated motive . . . is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.

Relatedly, an adverse inference may be drawn regarding the employer's "real" motive where the employer relies on "weak" evidence " (e.g., the testimony of an agent that specific "business" reasons accounted for the allegedly unlawful action) where the employer is in possession of stronger evidence (e.g., relevant business records, or the testimony of other knowledgeable management agents) which would either corroborate or contradict the testimonial claim, but which the employer nevertheless fails to introduce. See, e.g., *Welcome-American Fertilizer Co.*, 169 NLRB 862, 870 (1968): "The failure to produce such evidence 'not only strengthens the probative force of its absence but of itself is clothed with a certain probative force.'" (Citing and quoting from *Paudler v. Paudler*, 185 F.2d 901, 903 (5th Cir. 1951). Accord: *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972), further stating (id. at 1338):

The theory behind the [adverse inference] rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. . . . Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.

See also *International Automated Machines*, 285 NLRB 1122, 1123 (1987), where the Board reaffirmed the "familiar rule . . . that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge."

III. SUPPLEMENTAL BACKGROUND FINDINGS

A. Unique Aspects of the Labor Relations Setting

As I have already found: The Union's longstanding status as the employees' representative came under formal challenge on May 26, 1995, when Art Tolentini, a cashier in a hotel restaurant, called The Café, completed, signed, and filed with the Regional Director a petition for decertification election (RD petition), docketed as Case 31-RD-1317. On October 1, 1997, an election was conducted pursuant to the RD petition. After the RD election, the Regional Director determined that a majority of the employees who cast valid ballots had voted against continuing representation by the Union.

Not long after the RD petition was filed, there occurred two undisputed developments significantly affecting the ongoing labor relationship between the Union and the Respondent: (1) The parties "finalized" (i.e., agreed to become bound to and to implement) a 5-year labor agreement, made retroactively effective to December 1, 1995; and (2) the Union was placed under

³⁴ I left the door open for that possibility. See colloquy, Tr. vol. III, pp.199-210.

International trusteeship. The record is sketchy concerning both developments, however, and it cannot be determined from the available evidence whether the parties' finalizing of the union contract preceded the imposition of the trusteeship, or vice-versa. I set forth below what the record affirmatively shows with respect to both such developments:

On March 31, 1995 (about 2 months before the RD petition was filed), the Union and the Respondent had already reached a "tentative" agreement (expressly made subject to ratification by the Union's membership by April 6, 1995) on terms for a new, 5-year contract to replace a predecessor agreement, which apparently had expired at the end of November 1994.³⁵ However, if any ratification process ever occurred thereafter, it did not happen prior to the declared April 6 deadline, but only at some point after the RD petition was filed.³⁶ In any case, it was not until about a month after the RD petition was filed (i.e., on or about June 26, 1995) that the parties took steps to "finalize" their once-tentative agreement, following which they treated it as mutually binding and effective throughout its stated 5-year term.³⁷ In addition, at some point in June 1995, definitely after the RD petition was filed, a trusteeship was imposed on the Union, and new officers and representatives were appointed to replace those who had previously negotiated the "tentative" agreement.³⁸ (One of the new appointees was lead organizer

³⁵ Human Resources Director Rafael Igoa vaguely testified (on June 23, 1999) that the parties had been bargaining for a new contract since an uncertain date in or before November 1994. It is independently clear that on March 31, 1995, the Union's and the Respondent's representatives signed a contract document (R. Exh. 1) which indicated on its face that it would be made retroactively effective from December 1, 1994, and would continue in effect until November 30, 1999. However, beneath the signatures on the last page of this document was a handwritten notation, initialed by the parties, which stated, "Tentative, subject to ratification by April 6, 1995."

³⁶ The General Counsel represents on brief (p. 3 fn. 3) that "[t]he decertification petition was filed . . . after the parties had reached agreement on a new contract but before it was ratified and executed. Thereafter, the parties signed a new agreement . . . effective from about December 1, 1994 through November 30, 1999." Although these representations are not contradicted by any evidence of record, some of them suggest the existence of facts for which I can find no affirmative support in the record. Thus, there is no direct evidence or testimony from anyone with firsthand knowledge that the Union *did* conduct a ratification vote at some point after the filing of the RD petition, and neither is there any evidence that, after the filing of the RD petition, the parties eventually "signed a new agreement" (as distinct from the process occurring in late June 1995, as vaguely described by Igoa, *below*, when the parties somehow "finalized" the once-"tentative" agreement). In any case, it is clear that the parties did not consider themselves bound to the tentative agreement at any point prior to the filing of the RD petition, and neither, apparently, did the Regional Director regard the tentative agreement as binding on the parties, considering that he did not treat the tentative agreement as sufficient to constitute a "contract bar" to the processing of the RD petition to an election.

³⁷ Igoa further testified (on June 23, 1999) that, on or about June 26, 1995, the parties "finalized" and "start[ed] to implement" the terms set forth in R. Exh. 1, i.e., their once-"tentative" agreement.

³⁸ In my 10(b) decision, I noted that it was uncertain on the record made by that point whether the trusteeship was imposed prior to the filing of the RD petition, or in its wake. It is now clear from the testimony of Tom Walsh, the Union's International Trustee at the time of

Kurt Petersen, who, starting in or around September 1995, took on primary responsibility for mounting a kind of "reorganizing" campaign, among the unit employees, i.e., a campaign to counter the decertification effort.³⁹) To repeat, however, the sequence of these developments remains uncertain. Thus, we don't know whether it was the Union's pretrusteeship representatives who did whatever it took to finalize the once-tentative agreement with the Respondent, or whether, instead, it was the new, trustee-appointed representatives who took these finalizing steps on the Union's behalf.

The wage provisions in article XIX of the new contract (R. Exh. 1, pp. 17-18) are confusing in both their terminology and their intended application. But it is at least clear that the wage provisions contemplated that a two-tier schedule of hourly raises would be paid immediately, and would be made retroactively effective to February 1, 1995. Thus, under the two-tier scheme, one group of employees, confusingly called "minimum wage" employees, would get a 10-cent retroactive raise, while another group, called "non-minimum wage" employees, would get a 30-cent retroactive increase. The parties currently appear to agree—and I find, in any case—that "minimum wage" employees refers to employees already being paid at or above the "minimum scale" provided in the new agreement, and that "non-minimum wage" employees refers to those currently earning less than the minimum "union scales."⁴⁰ The wage provisions also required that an additional 30-cent hourly increase for the "non-minimum wage" (under-"scale") employees would kick-in on December 1, 1995, and that additional 30-cent increases would be given to such "non-minimum wage" workers

this litigation, that the latter was the case—that the Union was placed under International trusteeship (and Walsh was appointed International Trustee) sometime in June 1995. The documentary record also shows now that on June 29, 1995 (apparently soon after the Union and the Respondent had "finalized" their once-"tentative" agreement), Walsh sent a letter (R. Exh. 14) to the Respondent's general manager, Worcester, informing Worcester of his appointment, identifying himself as "empowered to conduct all affairs of Local 814," and identifying four other persons as the Union's "Field Representatives."

³⁹ As noted in my 10(b) decision, Petersen was an employee on the International staff who holds a law degree, and who began functioning in his new position in September 1995, with primary responsibility for servicing the labor agreement with the Respondent and for directing a campaign aimed at convincing the bargaining unit employees to retain the Union as their representative.

⁴⁰ My findings here are consonant with the Union's current interpretation of the two-tier pay increase provisions. See U. Br. at 44. (However, it deserves noting that the Union once seems to have interpreted the provisions as meaning exactly the opposite of what it now concedes they mean. See Jt. Exh. 3.) My findings also appear to be harmonious with Igoa's somewhat cloudy testimony on the subject. In any case, that "non-minimum wage" was intended to mean "under union scale" is suggested by parenthetical handwritten wording on p. 17, which states, "above scale employees shall receive \$0.10 per hour increase." The same interpretation is affirmed in typed language at the top of p. 18, equating "non-minimum wage" with "below the union scale," and further distinguishing "non-minimum wage" from "below the State minimum wage."

on December 1 of each succeeding year, through December 1, 1998.⁴¹

Article IV, section 8 of the new contract (R. Exh. 1, p. 5) allowed the Respondent, at its “sole discretion,” to “pay a superior worker more” than the “minimum scales.” Other provisions in the contract were to similar effect.⁴² Any raise the Respondent gave to a bargaining unit employee earning at or above the minimum scale (or which brought the employee above the governing minimum scale at any given point) was called a “merit” raise. Relatedly, Human Resources Regional Director Igoa testified categorically that merit raises were by definition amounts in excess of those contemplated by the hotel’s operating budget for departments employing bargaining unit workers. Instead, said Igoa, the “budgeted” pay rate for a bargaining unit worker was the pay rate established by the union contract. Consequently, said Igoa, the Respondent’s policy was that any granting of merit raises required not only his own personal approval, but also that of the general manager of the hotel, and the director of the department where the employee worked who was receiving the merit raise.

B. Relevant Company Operations and Hierarchy

At times material to the complaint (roughly coextensive with the nearly 29-month period between the filing of the RD petition and the holding of the election), William Worcester was the Respondent’s general manager, in charge of all hotel operations, and Rafael Igoa was the regional director of human resources. Most of the bargaining unit employees worked either in the housekeeping department or the food and beverage department. We will be concerned primarily with the food and beverage department, which employed more than 100 bargaining unit workers at material times, among them Mackron, Ojeda, and Tolentini, who all worked as cashiers in The Café, one of two restaurants in the hotel. The other restaurant was The Grille, which first opened for business in December 1994.

Michael Dunne, titled food and beverage regional director, headed the food and beverage department until his departure for another job in or about April 1997. As his title implies, Dunne was responsible not only for the operations in the two restaurants, The Café and The Grille, but also for the beverage service in the hotel bars, and the food and drink service conducted during special events held in locations other than the restaurants or the bars, such as banquets or receptions held in ballrooms or suites. Other, subordinate managers with admitted 2(11) supervisory authority stood between Dunne at the top of the food and beverage department and the hourly paid rank-and-file workers in the department. One was Regional Director of Restaurants Darren Moll, who operated immediately beneath Dunne in the

department hierarchy. Working beneath Moll as first-line managers of The Café were Brian Madlin, who functioned primarily as the “AM” (or day-shift) manager of The Café and its room service operations, and Ulysses Black, who (until his discharge, which became final on or about March 6, 1998) performed a similar function as the “PM” manager of The Café. Both Madlin and Black also had some uncertain degree of responsibility on their shifts for the operations of The Grille. Moreover, a third “Café/Grille Manager,” Johan Smit, was hired in early April 1996, and remained in that job throughout the duration of the preelection period. The final known first-line supervisor in the food and beverage department was Griselda Gutierrez, the “assistant manager” of The Grille. Gutierrez had been promoted and transferred to her position in The Grille on October 27, 1994, slightly more than a month before The Grille officially opened for business. Prior to that time, Gutierrez had functioned as a 2(11) supervisor of the cashiers in The Café; and in that position, she did no cashier work herself, and had been treated as outside the bargaining unit.

C. Credibility Digression

I pause to note that of all the management people just named, the Respondent chose to call only two of them, Igoa and Dunne, during its own defensive presentation. Igoa also was called and examined adversely by the prosecuting parties during their own cases-in-chief. Dunne’s testimony dealt chiefly with the \$3 raise given to Mackron in May 1996 and the two, successive, \$1 raises given to Ojeda in June and August 1996. (In substance, and subject to elaboration below, Dunne said he recommended the \$3 raise for Mackron because she threatened to quit unless she got that raise, and he didn’t want to lose her, and that he gave at least the second of the successive \$1 raises to Ojeda to appease her once she discovered that Mackron had gotten the \$3 raise and then demanded a comparable raise herself, and because he didn’t want to lose her, either.) The only other “management” witness we heard from was *former* Manager Ulysses Black, and he appeared as a union-subpoenaed witness who testified adversely to the Respondent’s interests, just as he had during the earlier RD objections hearing. I will have many reasons to doubt certain aspects of the accounts of each of these witnesses. Below, I will record my general impressions regarding Igoa’s and Black’s credibility, leaving the matter of Dunne’s credibility (and that of other witnesses) to incidental discussion in later sections.

From the Respondent’s standpoint, Igoa’s testimony counted the most: He was admittedly a necessary actor in connection with each of the pay raises in question, and it is clear from his testimony and a variety of other record sources that without his affirmative approval, and that of General Manager Worcester, none of these raises could have been given. Moreover, it is clear that Igoa was the prime mover (and not simply an “approver”) with respect to the hefty retroactive paychecks given to Tolentini, Mackron, and Ojeda in December 1995, in connection with the merit raises they received in that month. (Although Igoa asserted that Dunne played an instrumental role in recommending the retroactive pay amounts, Dunne denied this and said he had no knowledge as to why those retro amounts were conferred or how they were calculated.) Igoa was a decid-

⁴¹ I am unable to determine from the contract or the surrounding record whether the parties intended that the other group of employees, those earning at or above scale, would be entitled to 10-cent raises on December 1, 1995, and on December 1 of succeeding years.

⁴² The management-rights clause in the contract (*id.* at p. 3) broadly ceded to the Respondent the right to “grant merit wage or other compensation increases at [its] sole discretion.” Another contract provision, art. XVI, sec. 1 (*id.* at p. 15), further gave the Respondent the “right, at [its] option and discretion,” to pay “year-end bonuses” to certain employees in amounts that “exceed” those year-end bonuses which might otherwise be required by the union contract.

edly unimpressive witness in most respects. His explanations for each of the raises during his initial adverse examinations had an improvised quality; they were delivered in many instances with evident discomfort and confusion, and were sometimes quite self-contradictory, or were contradicted by business records and other reliable evidence. (He had fewer such problems when called for friendly questioning as the Respondent's witness on the next-to-last day of trial, but then he seemed to be trying to adhere to a prescribed "line," and even then his testimony was frequently confusing.) He was evasive and self-contradictory in the face of adverse examination not only about the reasons for the raises but the nature of and frequency of his preelection contacts with Mackron. He showed similar evasion, self-contradiction, and overall coyness when it came to questions such as how and when he and other top managers first learned of Ojeda's support for the campaign against the Union, and why he and the other managers picked Ojeda, rather than some other known antiunion worker, to serve as the company observer in the election. When I examined him seeking clarification of certain aspects of his testimony, I was usually left more confused than enlightened. Many of his assertions and explanations lacked corroboration under circumstances where the Respondent could have been expected to supply the same if what Igoa was saying was true. (For example, the Respondent did not call other managers to testify, such as General Manager Worcester and AM Caf  Manager Madlin, both of whom continued to be in the Respondent's employ during the trial, and both of whom may be presumed to have had firsthand knowledge about many matters relevant to the pay raises attacked by the complaint.) Because of my overall unfavorable impressions of Igoa, I will not credit him except as I specifically indicate below, and I will draw appropriate adverse inferences as to certain important questions of knowledge and overall motivation as further noted below.

As I explain next, Black's reliability is also open to question in many respects, and I will give only very narrow and limited credence to what he had to say as a witness for the prosecution. Worth noting first in this regard is the history of Black's shifting relationship with Mackron: At material times Mackron worked the "PM" shift in The Caf , and Black was her immediate supervisor on that shift until he was fired in early March 1988. Both Mackron and Black acknowledged, however, that their relationship went beyond the workplace—that they were dating one another for some period of time after the RD petition was filed. In fact, both appear to agree that their dating relationship went on for at least 18 months after the RD petition was filed (i.e., through 1996). Beyond that, Black testified that their friendship and "socializ[ing]" away from work continued throughout the preelection period,⁴³ and ended only at some

uncertain later point when they "had a big fight." Although it is not clear when the "big fight" occurred, Mackron's testimony at least makes it fairly clear that their friendship did not really come to an end until sometime in May or June 1998, after Black had been fired, and had then given testimony in the RD objections hearing adverse to the Respondent's (and Mackron's) interests. Mackron states she learned about the latter from newspaper stories published in the aftermath of the objections hearing containing interviews with Black in which Black, in Mackron's words, told a number of "lies." She also states that it was at some point after this that the two encountered one another for the final time, in or near Malibu, at which point Mackron gave Black the finger, a gesture, which marked the last-ever communication of any kind between them.⁴⁴ At least as important in considering the weight to be given to Black's testimony is the shifting nature of Black's relationship with the Respondent. As previously noted Black had been fired in early March 1998. Then, on March 9, 1998, Black had filed a ULP charge with the Regional Director alleging that he had been fired for refusing to participate in unfair labor practices during the preelection period. (His charge was later dismissed as without merit by the Regional Director, and, on appeal, by the office of the General Counsel.) However, his charge was still pending investigation by the Regional Director when he gave testimony adverse to the Respondent as a witness for the Union in the RD objections hearing in May 1998. Insofar as is here relevant, he testified in that hearing that he had maintained a posture of principled resistance to participating in what he thought were illegal, "union-busting" tactics being promoted by the company. He also depicted Mackron in that hearing as little more than a hustler who used her willingness to promote the Union's decertification as a lever to extract undeserved pay raises from the Company. (Indeed, he testified that he had communicated these disapproving views to Mackron on many occasions during their ongoing relationship.) But Black had an obvious interest, considering his then-pending ULP charge, in thus portraying himself as a manager uniquely opposed on ethical grounds to what he saw as unlawful behavior on the Respondent's part. Moreover, considering that he admittedly maintained his off-duty friendship with Mackron throughout the same preelection period, and his dating relationship with her for at least a substantial part of that same period, I am inclined to doubt that he was as disapproving of her and as resistant on grounds of principle to assisting the Company in helping to defeat the Union as he claimed. In addition, although

JUDGE NELSON: Which period did you direct the witness's attention to?

Q. [By Mr. Jellison]: The first, that is a good question, I was directing the question to the period mid 1995 to October of 1997, would that be true for that time period?

A. Yes.

⁴⁴ Black and Mackron agree that their last contact of any kind occurred in Malibu (after the RD hearing, I find from Mackron), at or near riding stables where Mackron kept horses. Black recalled that Mackron gave him the finger in the parking lot of the stables and then walked away. Mackron recalls that she was in her car on the Pacific Coast Highway near the stables when she passed him and flipped him off.

⁴³ I rely on the following examination by Union Counsel Jellison:

Q. Okay. Now during the period from 1995 through 1997, were you friendly with Deborah Mackron?

A. Yes.

Q. Okay, did you work with her?

A. Yes I did.

Q. Okay, did you socialize with her away from work?

A. Yes.

Q. Now at any time—

his ULP charge had been dismissed by the time Black appeared in the trial before me, he had by then become locked in to the claims (all stated in broad and conclusory terms) he had made under oath in affidavits associated with his ULP charge and as a witness in the RD objections hearing. Beyond that, it was evident from his demeanor and his testimonial style in this trial that he was still nursing a grievance over having been fired by the Respondent, and still wanted to get last licks in against the company. Thus he regularly displayed an eagerness to volunteer in sweeping and conclusory terms information damaging to the Respondent (and to Mackron), only to deliver a less damaging and sometimes quite self-contradictory account once he was examined more closely and required to provide foundational and other details. Indeed, by his overall demeanor and style, he struck me as an often reckless witness with an obvious axe to grind; and he left me persuaded that his generalized smears against Mackron and the Company amounted to little more than subjective interpretations posing as recollections, and biased ones at that. Moreover, his testimony in this trial in certain ways contradicted or was at variance with what he had asserted in the RD objections hearing.⁴⁵ (I will place no independent reliance on any feature of Black's testimony in the RD objections hearing.⁴⁶) Nevertheless, I will place limited reliance on certain features in Black's testimony before me (identified specifically in later findings), where he showed not just apparent sincerity, but an ability to describe a specific transaction with a specific individual in convincing detail and with reasonable clarity and consistency.

D. Staffing and Operations in The Café

At all material times, Mackron, Ojeda, and Tolentini were classified by the Respondent on personnel and payroll records as "food and beverage cashiers," and they worked exclusively in The Café. My further findings concerning staffing and operations in The Café are influenced in small ways by the accounts of Mackron, Ojeda, and Tolentini, but they are based primarily on the undisputed testimony of Norma Rodrigez, another cash-

⁴⁵ One principal example was his testimony in the objections hearing that he once "overheard" a conversation occurring in his own "office" between Igoa and Mackron during which Mackron and Igoa "discuss[ed] updates of what is going on" and "who she [had] persuaded and who is not persuaded" with respect to her campaign to oust the Union. (When this supposedly happened is anyone's guess: Black was not normally invited during the RD objections hearing, much less required, to deal with such foundational matters.) He gave no such testimony in the trial before me. In fact, he affirmatively admitted that he had never been able to overhear any conversations between Mackron and Igoa (and/or Worcester) wherein she may have given campaign "updates" to either or both of those managers.

⁴⁶ It is apparent that the hearing officer in the objections case relied in part on Black's testimony to find that that the Respondent "treat[ed] pro-union employees in a fashion different than the pro-employer employees, by limiting the pro-union employee's ability to speak with each other, or with uncommitted employees." My own findings concerning the limits of Black's reliability are in no way intended to second-guess, much less impeach, the hearing officer's findings. Indeed, as I have already indicated, I rely on the hearing officer's findings, as adopted by the Board, for purposes of finding in this case that the Respondent harbored antiunion animus.

ier in The Café, and the one who provided the most coherent account regarding such matters.

The Café is open for business daily from 6:30 a.m. to 11 p.m. It serves breakfasts, lunches, and dinners, and handles room service orders. (The record otherwise shows that The Grille, which, unlike The Café, includes a bar, does not open until late morning, and serves only lunches and dinners.) Five cashiers customarily work in The Café during its 16–17 hours of daily operation, three of them during what may be loosely described as the "day shift," and two on the "night shift." On a typical day, one cashier arrives at 6 a.m. to "open" The Café; one more arrives at 6:30 a.m., to start working on room service breakfast orders, and a third arrives at 7 a.m. The 3-day-shift cashiers finish their staggered shifts between 2 and 4 p.m. One of the 2-night-shift cashiers works from 1:30 to 9:30 p.m. and the other works the 4 p.m. to midnight closing shift. The five employees clearly identified as cashiers in The Café as of December 1995 were Deborah Mackron, Carmen Medina, Alicia Ojeda, Norma Rodrigez, and Art Tolentini. (The record further indicates that two other employees classified as "food and beverage cashiers," Kimberly Butler and Karen Leung, were also employed as of December 1995.⁴⁷ However, I can't determine from the record whether Butler and Leung also worked in The Café, or whether instead they worked as cashiers in The Grille.)

During the largest part of the preelection period, Ojeda shared the day shift with two other cashiers, and worked under Brian Madlin's immediate supervision, while Mackron and Tolentini usually worked the p.m. shifts, under Ulysses Black's immediate supervision. Also worth noting here is that no one had "replaced" Gutierrez when she transferred to the Grille in late October 1994; that is, her unique position as a "cashier-supervisor" who did no cashier work simply disappeared. However, the record vaguely indicates that, over a quite uncertain period of time after Gutierrez transferred, Mackron and Ojeda (the most senior cashiers on their respective shifts) gradually began to take on some of the nonsupervisory tasks which Gutierrez had formerly performed, such as distributing to room servers and restaurant servers the tips received during her shift, according to a prescribed allocation formula.

E. Decertification Activities

1. Early stages

For findings in this subsection I rely chiefly on a blending of credible and harmonious features in the not-entirely-credible testimonial accounts of Mackron, Ojeda, and Tolentini.⁴⁸

⁴⁷ Butler's and Leung's names appear, in addition to the five cashiers previously named, on U. Exh. 25 (at p. 2), which is a union-compiled summary of undisputed data gleaned from personnel and payroll records subpoenaed from the Respondent. As noted elsewhere below, the Respondent asserts that Leung was also the recipient of a raise and a retroactive pay amount in December 1995 comparable to those given to Tolentini, Mackron, and Ojeda.

⁴⁸ Mackron, Ojeda, and Tolentini were each called to testify during the General Counsel's and the Union's presentations of their respective cases-in-chief, and they each appeared pursuant to a subpoena issued by one or both of the prosecuting parties. However, each had previously conferred one or more times with the Respondent's attorney, and Mackron (at least) had given that attorney a copy of the affidavit taken from her by a Board agent during the precomplaint investigation of the

The employee campaign to oust the Union began only shortly before the RD petition was filed. It started among the cashiers in The Café, and Mackron was the sparkplug, even though Tolentini ended up filing the RD petition in his own name. What got Mackron going was her (apparently accurate) belief that under the not-yet finalized contract which the Union and the Respondent had “tentatively” signed on March 31, 1995, she and other cashiers would receive only a 10-cent raise over their current (above-“scale”) hourly pay. Mackron and Ojeda commonly testified, in substance, that they believed that they weren’t getting anything for their union dues and “didn’t need the Union” (Ojeda). According to Tolentini, all of the cashiers had been expressing their “dissatisfaction” with the Union’s representation of them. Mackron also confirmed that all of the cashiers “carried the same amount of animosity . . . towards the Union.”

Mackron did other groundwork on her own. She learned from a friend who worked for the Federal Labor Relations Board that the NLRB had procedures for a getting an incumbent union decertified. She followed up by consulting with one or more persons at the offices of NLRB Region 31. She learned through these inquiries that an employee could file an RD petition, but that it would not be processed unless the RD petitioner could supply the requisite “showing of interest,” i.e., evidence that at least 30 percent of the bargaining unit employees no longer wanted representation by the Union. She learned that one way to supply this showing was to have employees sign a petition stating just that. She also learned that a formal RD petition could not be processed and would be dismissed if filed during the term of a current union contract covering the unit in which a decertification election was sought. She believed in May 1995 that the Union would soon be holding a ratification vote on the “tentative agreement,” which might result in that agreement’s soon going into effect. Consequently, she believed, and communicated this to Tolentini and perhaps others, that there was some urgency to getting an RD petition filed and supported by a showing-of-interest petition.

On or about May 24, Mackron drafted a showing-of-interest petition in English and brought it to work the same afternoon. Tolentini prepared a counterpart version in Spanish, translating the language Mackron had used. Then, while at work the same afternoon and evening, Mackron, perhaps aided by Tolentini, circulated copies of the petition among the workers in The Café and elsewhere. By the time their shift was over, about 60 employees had signed the petition. Ojeda testified that Mackron solicited her signature on the petition, and this suggests that this must have happened early on in Mackron’s shift, at a point when Ojeda was still working her day shift. Moreover, considering Mackron’s account of other sequences described below,

Union’s “Fourth Amended Charge.” Moreover, their interests were in certain obvious ways adverse not only to the Union (they had campaigned for the Union’s ouster, after all) but to the General Counsel (who was taking the position, by then well publicized in all quarters, that the Respondent must somehow “rescind” their pay raises). Each of them struck me as sometimes candid, but more often as coy, evasive, and generally trying to adhere to a common line, roughly the same line maintained by the only witnesses called by the Respondent in its defense, Igoa and Dunne.

this also suggests that Ojeda’s signature must have been one of the first to appear on the showing-of-interest petition. Before Mackron left work at the end of her shift, she turned the petition over to someone else, perhaps to Eduardo Sanchez in housekeeping, and the petition continued to be circulated among and signed by housekeeping and other employees. When Mackron returned to work the following day, upwards of 90 employees had signed the petition. The same afternoon, Mackron and Tolentini went together to the Regional Office with the required showing-of-interest petition in hand. They returned again to the Regional Office the next day so that Tolentini could sign the formal RD petition. Mackron had arranged in advance with Tolentini that Tolentini would sign the RD petition. According to both Tolentini and Mackron, the reason for this arrangement was that Mackron was soon due to be away on vacation. (I don’t find it necessary to determine whether this was the real reason for Tolentini’s becoming the “official” RD petitioner, rather than Mackron herself.)

Igoa admittedly had received information, at or around the time of the RD petition filing, that Mackron had been soliciting signatures on some kind of decertification petition.⁴⁹ He also admittedly believed (as did Food and Beverage Regional Director Dunne, and presumably all other top company officials, including General Manager Worcester) that Mackron was the “catalyst” for the whole movement.

2. Mackron’s ongoing contacts with Igoa during the pendency of the RD petition

Igoa and Mackron also admitted (although grudgingly, and only by stages) that, after the RD petition was filed, the two had several personal discussions relating to the decertification effort, all during Mackron’s worktime, and typically outside the hotel near one of the street entrances. Igoa implied that the encounters occurred only by happenstance, when Mackron would flag him down while he was making his “rounds” through the hotel. And he insisted that each encounter was essentially routine and repetitive in nature—that Mackron would simply ask about the status of the RD petition and why the election was being “held up.” But it was hard to reconcile the notion that the conversations were merely routine with the fact that Igoa saw fit in each case to go outside the hotel with Mackron before conducting them. And Igoa was at his most revealingly uncomfortable and least persuasive in trying to navigate through these waters, as is well exemplified in the following exchanges with counsel for the Union (emphasis added):

[By Mr. Igoa] Because I would—I make rounds and when I make rounds [Mackron would] stop me and ask me. So I would say, okay, let’s walk outside and so we would walk outside.

⁴⁹ Igoa said he learned this from a named representative of the (pre-trusteeship) Union, during “negotiations.” There is no evidence that any “negotiations” were then taking place. (The terms of the union contract had already been worked out by March 31, when the parties “tentatively” signed-off on them.) But perhaps Igoa was simply in error about the precise context in which he had met with the representative and first received word from him of Mackron’s decertification activities.

Q. So you and she would walk outside to discuss this so that other employees wouldn't hear?

A. Because it's something that *pertained between her and me*. I would not discuss in front of other employees any questions that they may have about themselves or about—

Q. Well, this was a question about the election, correct?

A. That's right.

As I discuss below, I think the realities of their relationship were rather different from the picture so faintly and grudgingly sketched by Igoa and Mackron.

There is good reason to start with to doubt that in each such meeting, Mackron and Igoa would merely discuss the "status" of the RD petition—and no more. For one thing, the petition remained in a kind of limbo status throughout all but the final month of its lengthy pendency. Thus, it is implausible that Mackron and Igoa would have to step outside the hotel just so Mackron could ask Igoa, in effect, "Any change in the status of the petition yet?" In fact, Igoa unwittingly contradicted this line when he acknowledged that Mackron herself had told him that she had been the real driving force behind the RD petition-filing, and that the reason Tolentini had signed the RD petition, and not Mackron, was that Mackron would be away on vacation and unavailable. Apparently, therefore, Mackron was not shy about disclosing such details to Igoa, and Igoa was interested enough to hear her out and to recall such details from the witness stand a full 4 years later. Indeed, Mackron's sharing of such information with Igoa suggests that they saw each other as allies in the campaign to decertify the Union, and that it would have been in their mutual interest to use the meetings as a forum to discuss other details of the decertification campaign, such as who favored getting rid of the Union, who did not, and who might be on the fence.

Moreover, that some such ongoing alliance existed between Mackron and Igoa is strongly suggested in a portion of ex-Café Manager Black's testimony, which I found particularly credible. Thus, relying on Black, I further find as follows: The meetings between Mackron and Igoa occurred with considerable frequency, and continued throughout the pendency of the RD petition. (I reject as exaggeration Black's claimed memory that the meetings between Igoa and Mackron occurred on a "daily" basis.) They happened so frequently in June 1995 alone that Black complained to Mackron about her absences from the cashier's podium and the difficulties in covering for her during her frequent parleys with Igoa. Not long after this, still in or around June (the date Black finally settled on), Igoa called Black and told him that Mackron was "helping us with the Union thing and she needs to go off the floor and meet with us, [and that Black should] cover for her or find somebody that will cover." (Igoa's summary denial of such an exchange was unconvincing.)

In the light of all of the foregoing, I infer that there was far more to the Igoa-Mackron relationship than either wanted to admit. The exact nature and dimensions of the relationship can only be matters for speculation, but it seems nearly obvious, particularly in the light of Black's credited testimony, that the

two did not meet frequently simply to review the "status" of the RD petition, as distinguished from the status of the RD campaign. And I deem it not merely speculative but probable on this record that another and more important purpose and function of the meetings from the standpoint of both participants was to share intelligence relating to the progress of the decertification campaign. Moreover, lest there be any doubt about the existence of an ongoing and wholly conscious sense of alliance between the Respondent's top officials and Mackron, those doubts must surely evaporate in the light of the tell-tale events occurring on election day, discussed next.

3. The election day celebration

Here, I jump forward some 29 months, to October 1, 1997, after the election results were out indicating that a majority of employees had voted to decertify the Union: Late that afternoon, Mackron and Ojeda joined a group of managers (Igoa and General Manager Worcester among them) as the latter were celebrating the Union's election loss. Bartender Joseph Jara witnessed the gathering and served drinks to the group. I credit his essentially undisputed testimony about what transpired from his vantage point, as follows:

I remember seeing all the management gather in the patio by the lobby bar. And it was somewhat of a celebration gathering for the outcome of that election. It took—I took my time to approach the table because I became busy with other clients that approached the bar and they wanted to get drinks. [Restaurant Manager] Johan Smit came to the bar and said, Julio, we're waiting for you to come and wait on us.

And I was frustrated and angry because I was expecting him to help me since he was the manager on duty. When I eventually, you know, took care of the customers, I went outside and I asked them what they wanted to drink.

Q. Okay. And who was it that was at this table?

A. Rafael Igoa, Mr. Worcester, Johan Smit, Darren Moll [Regional Director of Restaurants]. I can't remember the name of the controller, the manager of room service. That's probably the only ones I can recollect.

Q. Was Debbie Mackron there?

A. Debbie Mackron and Alicia Ojeda arrived later.

Q. All right. And did you hear any conversation when they arrived?

A. I heard congratulations and I saw shaking hands.

Q. And did Mackron and Ojeda sit at the table with all these managers?

A. Yes, and they had some drinks, yes.

Q. They did drink?

A. Yes.

Mackron's own memory of the celebration differs from Jara's only as to inconsequential details, and she added significant details of her own: She recalled that she was on duty and learned of the celebration from Ojeda, and then went with Ojeda to join the managers. (Seemingly at variance with Jara's memory, she recalls that the gathering was in some kind of conference room adjacent to General Manager Worcester's

office.) She agrees that “they” (the managers) were “celebrating” when she and Ojeda arrived, and it is clear that she and Ojeda joined-in, for she elaborated, “[W]e were all very happy to have won the vote,” and “[W]e were toasting and cheer[ing].” She also recalled that “there was champagne in the room,” even while professing not to recall whether it was champagne that was being served-out during the “toasting.”

From Black (who did not attend the celebratory session), I further find as follows: Later that afternoon or evening, Black, regional director of Restaurants Moll, and Mackron were discussing the event. Mackron quoted Worcester as having made a “champagne toast” to Mackron, in which he said, “[T]his wouldn’t have been possible if it wasn’t for Deborah.” Black reacted with some disbelief, and Mackron turned to Moll for confirmation, saying, “Darren, didn’t it happen?” Moll said, “Yes.” Moll, who was independently shown to have participated in the celebratory event, was certainly capable of making a nonhearsay admission against the Respondent’s interest concerning the event. Accordingly, I treat Moll’s affirmation of Mackron’s story to Black as an admission by Moll that Worcester did, indeed, propose a champagne toast to Mackron in the quoted terms.⁵⁰

4. Respective campaign roles of the three employees in question; company knowledge

By all accounts, including her own, Mackron played the most visible and aggressive ongoing role in promoting the Union’s decertification throughout the pendency of the RD petition. Igoa and Dunne admittedly knew that she played such an ongoing leadership role. Igoa and other managers also clearly knew that Tolentini had been the RD petition-filer, and also knew that Mackron had been the moving force behind it. However, it appears that Tolentini’s most distinct role in the anti-union campaign was to file and sign the RD petition, and that he played no particularly visible or active ongoing campaign role thereafter. (He so testified; the prosecuting parties made no attempt to show otherwise; and prosecution witness Julio Valera affirmatively testified that he never saw Tolentini engage in any ongoing anti-union campaigning.)

As stated earlier, Ojeda signed the original showing-of-interest petition when Mackron presented it to her, and Ojeda was picked to be the Respondent’s election observer some 29 months later. Further, Igoa admitted that Ojeda wouldn’t have been asked to be the company’s observer if her opposition to representation by the Union had not already been known to the company. If there is an important controversy about where Ojeda stood in the Respondent’s eyes, it concerns when company officials *first* became aware that she wanted the Union out. (Igoa ultimately claimed, in substance, that this management knowledge was not acquired until some point after September 9, 1997, when the Regional Director directed that an election be conducted on October 1.) For reasons summarized below, I deem it probable on this record that company officials knew from the start that Ojeda opposed the Union.

⁵⁰ In so finding, I also note that the Respondent did not invite Igoa to testify about the celebration, and of course Worcester never made any appearance in the trial, nor did any of the other manager-celebrants named by witness Jara.

Before getting into the controversy any further, it’s worth recording what is affirmatively known about Ojeda’s preelection role in the decertification campaign: Ojeda was called adversely during the Union’s side of the prosecution’s case-in-chief. She broadly denied having actively campaigned among her fellow workers to vote against the Union. But Ojeda generally appeared to be making overly technical distinctions between “campaigning” against the Union, on the one hand, and telling employees how she personally “felt” about the decertification issue, on the other. And she seemed to be referring to the entire preelection period when she stated that she would tell other employees how she felt “if they asked.” She cautiously acknowledged, moreover, that she did some affirmative campaigning during the last 2 weeks before the election. Thus, she admittedly wore a hand-made button on her work outfit during that period indicating her antipathy to the Union (a button with word *Union* on it, but with a diagonal slash overshadowing the word). Overall, Ojeda presented as a witness who had been well prepared for the questions posed by counsel for both of the prosecuting parties. Moreover, some of her assertions were so obviously designed to help the Respondent’s case but at the same time so improbable as to provide ample basis for doubting her overall candor. (A good example was her testimony that even though Igoa had asked—and she had agreed—to serve as the Company’s observer in the election, she didn’t think Igoa was aware of her antiunion stance when he asked her to perform this service.)

Other employees called by the prosecuting parties confirmed that Ojeda took an active and visible antiunion role in the final 2 weeks or so before the election. However, their credible accounts, offered from different individual vantage points, harmoniously indicate that Ojeda was more active, aggressive, and visible in her antiunion campaigning during this period than Ojeda’s self-depiction suggested. Thus, cashier Elizabeth Fernandez, who worked on the day shift with Ojeda in the final 3 months before the election, credibly testified that in September, Ojeda emerged from Café Manager Brian Madlin’s office with a number of antiunion buttons (the same kind as the one Ojeda admittedly wore), and, with Madlin standing next to her, handed out the buttons to a number of her coworkers in The Café. To similar effect, but with different details in each case, see the accounts of Grille bartender Julio Valera,⁵¹ and Café cashier Norma Rodriguez.⁵²

⁵¹ On examination by counsel for the General Counsel, Valera recalled one instance in the final 2 weeks before the election when Ojeda, in the presence of Café Manager Madlin and several other workers, objected to the fact that the Union was sending organizers to the employees’ homes. He further testified as follows on examination by the Union’s counsel:

Q. Okay. And how about Ojeda, did you hear any more comments other than the ones you’ve already testified to from Ojeda?

A. No.

⁵² Examination by union counsel:

Q. Okay. Now, when you testified about comments that you heard Alicia Ojeda make, you said that you thought you had heard comments from her about the union some 20 or 30 times. Tell us what kinds of comments that you heard from Alicia Ojeda on these occasions?

The prosecuting parties placed some importance on trying to establish that Ojeda was not just one of many opposed to the Union, but that she was akin to or next only to Mackron in terms of her *early* visibility and the extent of her antiunion campaign activity. Their emphasis on such matters was ultimately aimed at providing a plausible (unlawful) motive for the Respondent's having picked Ojeda for special pay-raises throughout the pendency of the RD petition, i.e., for explaining why Ojeda would be seen in the Respondent's eyes as having *unique* importance to the antiunion campaign, and not just as one more of many employees who wanted the Union out. While the prosecuting parties' emphasis on making a record to support this specific motive theory is understandable, a number of related points deserve emphasis: First, as is evident from the accounts of Valera and Rodriguez noted above, some prosecution witnesses contradicted any suggestion that Ojeda was *from the start* an active and visible antiunion campaigner. In addition, although I generally discouraged the prosecuting parties from merely proving antiunion activities engaged in by Ojeda (or by anyone else) which were not likely to have been known to company supervisors or managers, their lack of success in making Ojeda out to be as early and as visible a campaigner against the Union as Mackron cannot be fully explained away simply as the result of my trial rulings rejecting their (shabbily conclusionary and shifting) offers of proof concerning what witness Carmen Medina might have to say on the subject. Thus, the only offer of proof made in connection with Medina's appearance as the General Counsel's witness during the prosecution case-in-chief was not made by counsel for the General Counsel (who never even asked Medina about Ojeda's antiunion activities), but by counsel for the Union, and it was an especially vague and uninspiring offer.⁵³ The only other offers were made

A. She would just tell us that the union was no good. We would get a lot better benefits through the hotel than having a union and that they just basically wanted our money too.

Q. And do you recall the time period during which Ojeda made these comments?

A. This was in September of 1997.

Q. Were other employees around when she made these comments to you?

A. Yes.

Q. And were any supervisors around when she made these comments to you?

A. No.

⁵³ Thus, after counsel for the General Counsel concluded her direct examination of Medina without asking her about any activities by Ojeda, counsel for the Union represented that Medina was prepared to testify that,

the primary persons who objected to the Union were Debbie Mackron and Alicia Ojeda. That Alicia was not as strongly antiunion as Mackron and the comments that she made were not the same sort as Mackron made in the sense of saying losers, and thieves, etc, but she would say why, pay dues to the Union, do it yourself. That Ojeda would make antiunion comments, a couple of times a day but not everyday. That Alicia wore a Union button that had been crossed out so that it was a nonunion button. And that would end my offer of proof.

Although the offer as a whole was unacceptably conclusionary in nature, I note specifically that it contained no representation as to the time period Medina would supposedly be describing, and that there was

when Medina was brought back as the General Counsel's witness at the "rebuttal" stage, and then, even while the offers remained largely conclusionary, the more important reason for rejecting the offers at that point was that the proffered testimony of Medina did not, in fact, tend to "rebut" any evidence or claims made during the Respondent's presentation of its defensive case, but merely amounted to an untimely attempt to beef-up the prosecution case-in-chief.⁵⁴ Moreover, had witness Medina actually given testimony consistent with one or more of the offers of proof, it was likely to have amounted in large part to "opinion" testimony. In addition, even if (as was never clear from the offers-of-proof) Medina had relevant firsthand knowledge, her testimony would not necessarily have permitted a finding that Ojeda played a uniquely visible or significant campaign role at an early stage in the pendency of the RD petition. Finally, as I further discuss below, this record provides an independent basis for concluding that Ojeda's unique antiunion importance in the Respondent's eyes had less to do with the extent or visibility of her early campaign activities than it did with other special features of her status.

Without regard to whether or not Ojeda was as visible and active a campaigner as Mackron, or when she first became thus visible, I think the credible record makes it probable that Igoa and other top officials had early knowledge of Ojeda's support for the decertification movement. Listed next are the principal

never any doubt that Ojeda was a visible antiunion campaigner at least during the final 2 weeks or so before the election.

⁵⁴ This was the General Counsel's offer of proof when Medina was recalled for purported "rebuttal" testimony:

If permitted to testify on this subject, Carmen Medina would testify that at the time the petition was being circulated, the decertification petition, Alicia Ojeda told Carmen that [the] union only wanted the dues of employees and that the hotel would provide employees with whatever they needed. In addition, Ms. Medina would testify that, beginning with the period during which the decertification petition was being circulated among employees until the election itself, Alicia Ojeda, like Debby Mackron, repeatedly made it clear to everyone, to employees, that she was against the union. In addition, during the—during this period, Ms. Ojeda, like Ms. Mackron, was extremely active in talking against the union and Alicia Ojeda was one of the first employees to put on an anti-union button. Specifically, during the election campaign, Ms. Ojeda told employees that the union was bad, greedy, and stupid. This is my offer of proof.

Counsel for the Union then proposed to supplement the General Counsel's offer, as follows:

My offer of proof, in addition to that made by the General Counsel, would be that the witness would testify, if she were permitted to answer these questions, that during the summer of 1995 Alicia Ojeda, Deborah Mackron and Art Tolentini took the lead in signing people up on the decertification petition. She would further testify that on one occasion Alicia and Brian Madlin, while the witness was in the room service area, encourage[d] employees to vote against the union.

Particularly in connection with union counsel's reference to a purported transaction involving Ojeda's activity in the presence of Manager Brian Madlin, I note first that that the proffered testimony clearly introduced a "new" element, and that this testimony clearly would have been receivable under my general ground rules if it had been sought to be elicited when Medina was originally called during the prosecution case-in-chief.

facts and considerations which, taken as an integrated whole, add up in my view to proof by a preponderance that company officials knew about Ojeda's antiunion views from the start.

1. Ojeda's having signed the original showing-of-interest petition was clearly known to both Mackron and Tolentini, because they brought the completed petition to the Regional Office to support the RD petition. Moreover, anyone who signed the showing-of-interest petition after Ojeda did would be similarly aware. Indeed, Ojeda had no difficulty affirming the truth of union counsel's suggestion that, "once a person signed [the showing-of-interest] petition, it was pretty well known who was on which side of the campaign." And I have already inferred for reasons stated earlier that Ojeda must have been one of the early signers of the showing-of-interest petition. Accordingly, her antiunion sentiments can be presumed to have been widely known among the rather large group of employees who saw the petition while it was in circulation.

2. Igoa and Mackron met frequently and privately in the aftermath of the RD petition filing. They both had a common interest in getting rid of the Union, and thus a reason to form an alliance to help ensure that outcome. Igoa told Black that Mackron was "helping" the Company. The most obvious way that Mackron could "help" the Company (and advance her own wish to get rid of the Union) would be to supply ongoing intelligence about how many and which employees supported the decertification effort, and how many and which did not. Mackron may not have known the exact answer to the latter question, but she surely had a pretty good handle on the former one. Indeed, when it came to the cashiers she could confidently state that *all* of them "carried the same amount of animosity . . . towards the Union" as she did. It is probable, therefore, that she would have revealed early on to Igoa that Ojeda was among the original supporters of the decertification effort. And see, e.g., *Dr. Frederick Davidowitz*, 277 NLRB 1046, 1049 (1985).

3. As further discussed in succeeding sections, Ojeda, Mackron, and Tolentini were clearly the common beneficiaries of extraordinarily large and apparently unprecedented retro pay checks in connection with their merit raises in December 1995, retro pay amounts that the Respondent has not credibly explained. And the same adjectives and observations are just as appropriately applied, if not more so, to the additional and substantially larger pay raises given to both Ojeda and Mackron during the remaining course of the preelection period. It's hard to explain Ojeda's inclusion in this select group *except* in terms of her antiunion posture.

4. Igoa was impossibly vague, often self-contradictory, and palpably uncomfortable and insincere when asked to answer the related questions *why* Ojeda was picked to be the Company's observer, and *how* and *when* he and other company officials first became aware of Ojeda's antiunion stance. Pressed on the latter point, he initially answered, "yeah" when Union counsel asked him whether this occurred "a couple of months [or] three months" after he first learned of Mackron's activities. However, he quickly backpedaled from this affirmation, now saying that he only learned of Ojeda's stance in September 1997, at about the same time that company officials decided to ask Ojeda to be the Company's observer. But he persistently and studiously "[did] not recall" when pressed to identify how, when

and from whom he had learned this. However, he admitted that when he used this formulation, it wasn't intended to be a denial of any given suggestion, only uncertainty. Igoa had no difficulty recalling distinctly how, when, and through whom he first learned that Mackron was soliciting signatures to support an RD petition. His studied vagueness when it came to similar questions about Ojeda was, to say the least, unconvincing. He was similarly vague, self-contradictory, and unconvincing when pressed about the meeting where it was decided to ask Ojeda to be the election observer: He first said that General Manager Worcester and Food and Beverage Regional Director Dunne were present. However, Dunne was no longer employed at the hotel in September 1997, and Igoa, seemingly realizing this, soon said he was not sure if Dunne was at this meeting. The Respondent never called Worcester as a witness, and in the circumstances, I infer that Worcester's truthful answers to the same questions would be unfavorable to the Respondent. More than that, I infer from all of the foregoing that Igoa was clumsily trying to conceal an inconvenient truth—that he and other company officials knew all along, probably from Mackron if from no other source, that Ojeda was a strong supporter of the movement to oust the Union.

Relatedly, responsible company officials had reason to believe that Ojeda would be an influential figure in shaping the views of her fellow workers. Next to Mackron, she was the most senior cashier in The Café, and, because she and Mackron normally worked on different shifts, Ojeda would be the most senior cashier working on her own shift. Moreover, Igoa and Dunne admittedly regarded each as playing a "lead" role on their respective shifts, and admittedly treated them as something of a matched pair, deserving of roughly equal hourly pay at any given time. Accordingly, from the Respondent's standpoint, Ojeda's importance in the antiunion campaign—and a reason for favoring her with uniquely generous pay raises during the campaign—could have had less to do with the degree and visibility of her antiunion campaign *activity* throughout the pendency of the RD petition than with her unique status as the senior cashier on her shift, one who, if kept happy with her pay, could be expected to play an especially influential role in getting her coworkers to support the Union's ouster.⁵⁵

F. Mackron's August 1995 Memo Requesting Pay Raises for Cashiers

On or about August 9, 1995, Mackron presented a typed memorandum bearing that date to Food and Beverage Regional

⁵⁵ Mackron suggested another plausible set of reasons why Ojeda might be seen as a uniquely influential figure in the decertification drive, her *Latina* ethnicity and her fluency in Spanish in a bargaining unit work force overwhelmingly made up of Spanish surnamed workers. Thus, asked why she thought Ojeda, rather than herself, was picked to be the Respondent's election observer, Mackron stated, "I think it was a Spanish thing. She knew who—you know, because we have a lot of employees that speak Spanish, and I don't." Moreover, considering that I have inferred that Mackron and Igoa were engaged in ongoing information sharing and strategizing, I don't think Mackron was merely speculating when she ventured this suggestion, but was probably reporting as opinion what Igoa had told her in fact. In any case, if Mackron was speculating in this regard, I would regard it as a particularly informed kind of speculation.

Director Dunne. The memo, crisply professional in both its appearance and its narrative style, was addressed to both Igoa and Dunne. Its stated subject was “Job Responsibilities and Wage Inequities.” Although it purported to be from the “Cashiers,” no one had signed it. In material part, this is what the memo said:

The Cashiers of the Café and Room Service would like to bring to your attention a situation in which we believe there are inequities between job responsibilities and compensation.

The Cashiers have the following job responsibilities [listing nine enumerated elements of the cashier’s job, starting with “Hostess” and ranging through various other roles and responsibilities].

....

To our knowledge, the Grille Hosts’ only job responsibility is seating people with menus.

The Grille Hosts receive \$8.50 per hour. The Cashiers receive between \$7.70 and \$8.50 per hour and perform more duties. It would seem that the position with the greater job responsibilities is receiving lessor [*sic*] or at best comparable compensation than the position with fewer job responsibilities.

We request that you investigate this case of job and wage inequity and take corrective actions. We believe that the greater job responsibilities of the Cashier position deserve recognition in the form of higher wage rates. The minimum wage rate for a cashier should be \$8.50 per hour with more senior level Cashiers earning higher rates of compensation based upon their knowledge and performance. We further request that you evaluate each Cashier’s compensation separately and adjust it accordingly.

Thank you for your consideration.

[no signature]

Mackron testified that she alone authored and typed out the memo. Although I have doubts about this, and will continue to wonder whether she and Igoa cooked it up together, I will assume for all purposes that Mackron was, indeed, the sole author and preparer of the memo.

When Mackron presented this memo, it had been approximately 20 months since she had last been considered for and given a merit raise. Thus, in December 1993 she had received a 40-cent merit raise which had brought her up to \$8.40 per hour. Moreover, when Mackron presented this memo, the new union contract had already been finalized and had begun to be implemented. In Mackron’s case, this meant that she was entitled to another 10-cent raise, retroactive to February 1, 1995, making her effective pay rate between February and December 1995 \$8.50 per hour. Moreover, when Mackron presented this memo in August 1995, the only other change in her status as it had existed since February 1995 was that by then Human Resources Regional Director Igoa and Food and Beverage Regional Director Dunne were both admittedly aware of her role as the “catalyst” in the decertification drive.

As we shall see in the next section, about 4 months later, in December 1995, the Respondent gave merit pay raises to three of the cashiers which brought them up to the “minimum” \$8.50/hr. rate proposed in Mackron’s memo, and gave pay raises to the two most “senior” cashiers (Mackron and Ojeda), which brought them both up to \$9/hr. In fact, the only cashiers who did not receive merit raises in December 1995 were two very recent hires, i.e., two who were not even on the payroll in early August 1995, when Mackron presented her memo to Dunne.

IV. DECEMBER 1995 MERIT RAISES AND RETROACTIVE PAY

A. Introduction; General Setting as of December 1995

Here we confront the most remote of all the alleged violations, the ones first called into question by the mid-trial amendments to the complaint. At issue are the following pay raises and associated retroactive payments:

Tolentini

December 1, 1995: 75 cents hourly raise, plus \$1282 retroactive pay;

Mackron

December 1, 1995: 50 cents hourly raise, plus \$823.63 retroactive pay;

Ojeda

December 1, 1995: 50 cents hourly raise, plus \$896 retroactive pay.

As previously discussed, the complaint alleges and the General Counsel maintains that the above merit raises and retro-payments had an unlawful purpose—to reward the three cashiers for their antiunion activities and to encourage them to pursue such activities. The Respondent denies that any such motivations tainted these raises and payments, and, primarily through Igoa, it has explained these pay actions as having been based exclusively on nondiscriminatory, “business” considerations. The Respondent also asserts as an independent defense that these pay actions are barred from prosecution by Section 10(b). My findings below will bear on both the motive issue and the 10(b) issue.

It helps to recall with respect to both issues that by December 1995, the union contract (as embodied in R. Exh. 1) had been in effect and under implementation for more than five months. As found previously, the new agreement, once finalized in late June 1995, called for an immediate hourly pay raise, to be made retroactively effective to February 1, 1995. Igoa stated in response to a leading question by the Respondent’s counsel that there was some delay in implementing this first raise due under the contract. However, Igoa also testified that all bargaining unit employees had received the contract-required raises and retro-pay by December 1995, and he further acknowledged that the December 1995 merit raises given to Tolentini (75 cents), Mackron (50 cents), and Ojeda (50 cents) were conferred on top of all other raises and retroactive pay those employees had already received or were owed under the union contract.

1. What the Union knew all along

I begin by revisiting some matters about which I made findings in my original 10(b) decision: By mid-February 1996, the Respondent had furnished the Union with two, successive compilations of bargaining unit employee wage data, each furnished in response to the Union's written request for such information. One compilation (Jt. Exh. 2) was effectively a snapshot showing each employee's hourly pay rate as of on or shortly before November 1, 1995, when the Respondent mailed the first compilation to the Union. The other (R. Exh. 3) was a similar snapshot depiction of each employee's hourly rate as of about 3-1/2 months later, i.e., on or shortly before February 14, 1996, the date the Respondent mailed the second compilation to the Union.

Kurt Petersen was the union agent who reviewed and compared these successively furnished wage snapshots. He admittedly believed based on various reports that Tolentini, Mackron, and Ojeda were key actors in the decertification movement. For this reason he had paid special attention to the pay data relating to these employees. These data enabled him to determine that each had received a "merit" raise in the amounts previously indicated (75 cents for Tolentini; 50 cents for Mackron, and 50 cents for Ojeda).⁵⁶ He admittedly concluded, however, that the amounts of the merit raises to the three antiunion workers did not suggest that they had been the beneficiaries of any particular wage-favoritism. In reaching this judgment, Petersen admittedly had similarly reviewed and compared the successive wage-data snapshots to ascertain whether other bargaining unit employees had received merit raises during the November 1–February 14 period in question, and if so, in what amounts. He was able to discern that a number of other employees had received merit raises in that period, and he determined that the amounts of those raises were not significantly different from the amounts received by Tolentini, Mackron, or Ojeda.

In fact, wage data in the Union's hands by mid-February 1996 (i.e., Jt. Exh. 2 and R. Exh. 3) showed that two other cashiers besides Tolentini, Mackron, and Ojeda had also recently gotten merit raises. These were Karen Leung (75 cents) and Carmen (Rodas) Medina (40 cents). Moreover, the same data indicated that at least three cooks were given merit raises in the same period, as follows: Alejo Guzman (60 cents), Enrique Loza (90 cents), and Rolando Bautista (70 cents).⁵⁷ In fact, in and after late February 1996, there were only two things of any current significance that the Union did *not* know about merit raises conferred in the preceding 3-1/2 months: The Union did not know the exact "effective date" of the recent merit raises,

⁵⁶ In making comparisons, Petersen had accounted for "contract" raises which had also kicked in by then, and thus he was able to detect how much of any indicated increase in pay was attributable to a "merit" raise.

⁵⁷ In fact, a comparison of Jt. Exh. 2 with R. Exh. 3 shows in cook Bautista's case a total \$1 increase. However U. Exh. 25, compiled in 1999 from different records, indicates that only 70 cents of that total was a merit raise, and I rely on the latter exhibit for this number. However, with respect to all other employees previously named, the merit raise data on U. Exh. 25 tallies with the wage-increase data extractable from comparing Jt. Exh. 2 and R. Exh. 3.

and the Union did not know that the particular merit raises to Tolentini, Mackron, and Ojeda had been given an unusually lengthy retroactive effect. That is, the Union did not know that the Respondent had not merely made the raises "effective" as of the end of the immediately preceding pay period (which would yield only a trifling amount of "retropay"), but had actually made them effective on dates 10–11 months earlier, with the result that each of the three had received a large, one-time retro paycheck. I will sometimes refer below to this particular phenomenon as giving "super-retroactive effect" to the pay raises, and I will usually refer to the one-time retro payments in question as "super retro pay."

2. The ER-21 forms revealing the super retro pay to Tolentini, Mackron, and Ojeda

Whenever the Respondent takes action causing a change in an employee's pay or job status, the Company's business routine is to record the action, together with related details, on a "Personnel Transaction Form," more commonly called an "ER-21" form. One copy of the ER-21 goes into the employee's personnel file, which also contains copies of supervisory evaluations and other typical papers. When a merit raise is the subject of an ER-21, the business routine—and the form itself—requires the approval signatures of Igoa, General Manager Worcester, and the Regional Director of the Department in question (Dunne, in the case of merit raises for food and beverage employees).

On December 6, 1995, Igoa signed ER-21 forms for Tolentini (GC Exh. 15), Mackron (U. Exh. 4), and Ojeda (U. Exh. 12) reflecting that he had authorized merit raises for the three employees. A box on the form called for the "effective date [of] this action." In all three cases the date "12-1-95" was typed in this box. However, this was wholly misleading, for in another, unlabeled box, there appeared the handwritten word "retro" adjacent to a handwritten dollar amount (\$1282.80 on Tolentini's form, \$822.63 on Mackron's, and \$896 on Ojeda's) which was far too large to be consistent with an "effective date" of December 1, 1995.

As found above, the Union had been on notice and in fact aware since late February 1996 that these merit raises had been given, and had likewise been aware that two other cashiers, Leung and Medina, had also received recent merit raises, as had at least three cooks, Guzman, Bautista, and Loza. However, the Union was not actually in possession of ER-21s and other personnel-file paperwork revealing the actual super retro pay amounts given in connection with these raises until on and after March 26, 1999, when the Respondent, complying with the prosecuting parties' discovery-at-trial subpoenas, gave both the Union and the General Counsel full access to the personnel files of all bargaining unit employees employed in and after January 1994. These records were brought into the Regional Office on March 26, and Petersen and counsel for the General Counsel Cronin-Oizumi combed through the records for several days. Petersen himself copied upwards of 500 documents from those files, such as ER-21s and employee evaluation forms. (He actually made three copies of each such document, one for himself, one for the General Counsel, and one for the Respondent.) Petersen later used the information from the copied records to prepare a detailed, multipage chart, received into evi-

dence as Union Exhibit 25, which summarizes undisputed information gleaned from the ER-21s and other records. However, Petersen had already prepared Union Exhibit 25 before he noticed that the “retro” payments to Tolentini, Mackron, and Ojeda did not correspond to the “effective date” recorded on their ER-21s. Consequently, that exhibit did not include any such retroactive pay data—only the amounts of the merit raises which the three employees (and others) began receiving in December 1995.

It was only through a regrettably belated reinspection of the ER-21s for Tolentini, Mackron, and Ojeda that the Union—and, in turn, the General Counsel—became aware that there existed a rather significant discrepancy between the December 1 “effective date” as recorded on the ER-21 form and the actual amount given to each employee in the form of “retro pay.” Again, the discrepancy lay in the fact that the retro pay amounts that Igoa authorized on December 6 to be given to the three employees “effective” December 1 were each way too large to be explainable as merely reflecting a 5-day retroactive catchup payment. Igoa acknowledged this when questioned from the bench on the subject on May 19, 1999. Indeed, he implicitly conceded that the merit raises for the three employees had *not* been made “effective” on December 1, 1995, no matter what the form said. Nevertheless, when first examined on May 19, Igoa was at a loss to explain these discrepancies.

When the trial resumed more than a month later (i.e., in the week of June 21, 1999, following the May 21 amendments to the complaint), Igoa now had explanations for how these retro amounts had been calculated. He confirmed that the merit raises for the three employees had not been made “effective” on December 1, 1995, but had actually been made retroactively effective to a far earlier date (in Mackron’s case a full 11 months earlier, back to January 1, 1995; in Tolentini’s and Ojeda’s cases, a full 10 months earlier, back to February 1, 1995). He also now had an explanation for *why* the merit raises had been given such lengthy retroactive effect. His broad answer to the Why question was that the merit raises would have been given to these employees on or before the earlier effective dates had it not been for some ongoing ambiguity in the Union’s position (or a disagreement between the parties—it’s not clear which) as to how the negotiated raises under the union contract might be applied to employees who, like the three in question, were already earning more than “union scale.”

3. Merit raises given to other food and beverage cashiers

Other details surrounding the December 1995 merit raises to the three allegedly favored workers also emerged as a result of the subpoena-discovery process. The best way to present all related details now of record is to recapitulate them in a chart, which I have done below. This chart captures what the undisputed record affirmatively shows about what happened to all seven of the food and beverage cashiers working as of December 1995. The data pertaining to Leung, Rodrigez and Butler come from Union Exhibit 25.⁵⁸ The data pertaining to the other four cashiers come from their respective ER-21s, and are har-

monious with data on Union Exhibit 25. Cashiers are listed in order of seniority or “Sheraton Service Date.” All listed raises were formally made “effective” December 1. As indicated on the chart, a significant question exists as to whether Leung received super retro pay, and I will revisit that question in the next subsection.

Name	Hire Date	Raise Amt.	New Rate	Super retro pay
Mackron	7/21/92	.50	\$ 9.00	\$ 823.63
Ojeda	8/21/92	.50	9.00	896.00
Medina	12/9/92	.40	8.50	None
Leung	9/14/94	.75	8.50	[?]
Tolentini	9/26/94	.75	8.50	1282.80
Rodriguez	8/14/95	None	[no info]	None
Butler	10/23/95	None	[no info]	None

4. Did anyone else get super retro pay in December 1995?

As related above, when Igoa returned to the witness stand on June 23, 1999, he was able to recall particulars concerning the super retro payments to Tolentini, Mackron, and Ojeda, which had eluded him when first examined about these matters on May 19. In the meantime, as he explained, he had discovered two company records (R. Exhs. 18 and 19) indicating that the Respondent had given super retroactive effect to the merit raises received by a total of eight bargaining unit employees, four cashiers and four cooks. Respondent’s Exhibit 18 is captioned “Retro pay,” and it contains a date stamp of “Dec 11 1995.” It amounts to a list purporting to show that four cashiers, Leung, Tolentini, Ojeda, and Mackron (listed in that order), each received super retro pay in December 1995, and how their retro pay amounts were calculated in each case. (In Leung’s case, it indicates that her retro pay was the largest of the four amounts, \$1370.62.) Although resembling a worksheet in layout, it contains no handwriting, only typed entries. Respondent’s Exhibit 19 is a counterpart document listing cooks who also supposedly received super retro pay in December 1995. It bears the same caption and date stamp, and follows the same format as Respondent’s Exhibit 18. It was Respondent’s Exhibit 18, said Igoa, which caused him to remember that in December 1995 he had also authorized a super retro payment to cashier Karen Leung, who was already known to have received a 75-cent merit raise at that time. Not only that, based on Respondent’s Exhibit 19, Igoa now recalled that he had also authorized super retro payments to be made to four cooks at that time. These were Rolando Bautista (already known to have received a 70-cent merit raise); Enrique Loza (already known to have received a 90-cent merit raise) plus Charlotta Linde and Jose Luis Orosco (two former employees who had not been accounted for in U. Exh. 25 because that chart only recorded data associated with employees who were still employed at the hotel in April–May 1999, when Petersen put the chart together.⁵⁹) Both exhibits were received into evidence without

⁵⁸ The relevant ER-21s for Leung, Rodrigez, and Butler were not tendered into evidence, leaving some gaps in information.

⁵⁹ While Linde’s name appears on Jt. Exh. 2, the Respondent’s November 1, 1995 wage-data submission to the Union, her name does not appear on R. Exh. 3, the counterpart submission furnished on February 14, 1996. This is a good indication that she left sometime in between the two dates.

objection after Igoa somewhat summarily described their provenance.

The Respondent relies on these newly-discovered records—the same ones said to have awakened Igoa’s dormant memories—when it asserts that Tolentini, Mackron, and Ojeda were only three out of a total of eight bargaining unit workers whose merit raises in December 1995 were given super-retroactive effect. But the reliability of these exhibits as proof of the facts they purport to record is in serious doubt. I find for the following reasons that the records are unreliable for that purpose, and so, too, are Igoa’s belatedly recovered memories that employees other than Tolentini, Mackron, and Ojeda received super retropayments.

One set of reliability problems has to do with the unusual provenance and the unusually belated discovery of the two “Retropay” lists in question. Igoa stated that these lists did not come from the employees’ personnel files or from other records maintained at the hotel, but from the Respondent’s records-storage facility in Encino. Igoa said that the two lists were discovered during the 1-month trial recess between May 21 and June 21, 1999. He implied that he had forgotten about their existence until they are-emerged from the Encino facility. But he did not explain the methodology used to recover the documents, nor did he indicate who did the searching yielding their convenient discovery. Thus, we do not know whether, for example, he called for a truckload of old records to be shipped to the hotel and then to be pored through by himself or others until the fortuitous discovery of the lists; or whether, instead, he had a memory that these retro pay lists existed, and thus was able to make a more pinpointed search. We do know, however, that in a recent certified letter to the Union’s Petersen dated February 12, 1999 (U. Exh. 26), responding to the Union’s prior information request, Igoa had effectively denied the existence of any such lists. Thus, he stated in pertinent part as follows:

No list exists of all employees who have received any merit pay increase or decrease. Information regarding merit pay increases are [sic] contained in [an] employee’s personnel file. Arrangements could be made to have their files reviewed.

Moreover, the late discovered exhibits in question would have been responsive to, but had not been produced in response to, the trial subpoenas which had yielded the production in late March 1999 of the “personnel files,” supposedly the only repositories of records showing merit pay raises. Accordingly, if the exhibits in question, amounting to lists of employees who had received merit raises in December 1995, were indeed due-course business records, in existence since December 1995, I wonder why they weren’t discovered in the course of responding to the Union’s prior information requests, or to the Union’s and the General Counsel’s trial subpoenas.

Another problem has to do with the irregular appearance of the exhibits. The data on Respondent’s Exhibit 18 purporting to show retropay calculations for Leung are superimposed over what appears to be a preprinted “Miramar Sheraton” logo and letterhead. (Only the names of and calculations associated with Tolentini, Ojeda, and Mackron appear in the space beneath the logo and letterhead.) A similar irregularity appears on the Re-

spondent’s Exhibit 19 listing for the cooks. (There, the data for Charlotta Linde is superimposed over the logo and letterhead.) The Respondent made no attempt to explain these irregularities, and it is difficult to envision how these superimpositions could happen in the ordinary course of preparing a genuine business record.

Another problem is that I would have to rely on Igoa’s word alone to explain the circumstances under which the exhibits were prepared, and by whom. Igoa stated perfunctorily that they had been originally prepared in December 1995 by the Respondent’s then-“paymaster,” Marisa Cruz, pursuant to his own instructions. (Cruz no longer worked for the Respondent when this case was tried, and no one called her to the witness stand.) But there is nothing on the face of the exhibits independently indicating that Cruz was the preparer. In fact, there is nothing on the face of the exhibits indicating that the retropayments had actually been *paid* to the employees listed thereon. Thus, to find that listed employees (other than Tolentini, Mackron, and Ojeda) received super retropay, I would again be required to take Igoa’s word for it.

But why should I take Igoa’s word for it, based on these late discovered records, that super retropayments had been given to five bargaining unit employees other than Tolentini, Mackron, and Ojeda? If this were true then surely there must have existed some *other* record that would have corroborated this. One obvious source of corroboration would be the ER-21s for these other five employees, because we know independently that the ER-21s for Tolentini, Mackron, and Ojeda, *did* contain affirmative entries confirming that they had received the super retro payment amounts set forth on Respondent’s Exhibit 18. Another likely source would be payroll check stubs, or their printed-out electronic database equivalents, reflecting the issuance of one-time retrochecks to Leung and the four cooks in the amounts stated on Respondent’s Exhibits 18 and 19. Nevertheless, no such corroborative records were tendered by the Respondent.

Relatedly, and just as telling in my estimation, is that Igoa admitted that the ER-21s for the four cooks listed on Respondent’s Exhibit 19 did *not* contain any indication that the merit raises for those cooks had been given any super retroactive effect. In fact, the applicable ER-21s for two of those cooks, Loza and Bautista, were tendered into evidence by the Union,⁶⁰ and they contain no indication of any super retroactivity. And it was only after these union exhibits had been received that Igoa conceded that the ER-21s for the other two cooks listed on Respondent’s Exhibit 19 were likewise devoid of any indication that their merit raises had been given super-retroactive effect. These circumstances raise grave doubts about the reliability of Respondent’s Exhibit 19 as a basis for asserting that any cooks received super retropay in December 1995. Indeed, Respondent’s Exhibit 19, amounts to “weak” evidence on the point as the D.C. Circuit used that expression in its discussion of the adverse inference rule in the *Gyrodyne* case, *supra*, 459

⁶⁰ For Loza, see U. Exhs. 27, 28, and 29. (Chronologically, 29 was in fact, the first in the series of three ER-21s associated with Loza’s December 1995 raises to have been prepared; 28 was the second, and 27 was the third in the chronology.) For Bautista, see U. Exh. 30.

F.2d at 1336–1338. And the fact that the Respondent did not introduce any stronger evidence of the purported super retro payments to the four listed cooks (such as confirming ER-21s or other payroll records) can arguably be taken as an indication that the purported facts indicated on Respondent’s Exhibit 19 are not just of dubious reliability, but are untrue. *Gyrodyn*, supra. But the adverse inference issue need not be reached in this instance because Igoa affirmatively admitted that the ER-21s for the four cooks listed on Respondent’s Exhibit 19 did *not* corroborate the latter exhibit. In any case, considering all of the foregoing, I find that the Respondent has not reliably established that the cooks listed on Respondent’s Exhibit 19 were given super retro pay in connection with their merit raises in December 1995.

Similar, but not identical considerations cause me to conclude that Respondent’s Exhibit 18, purportedly showing that the merit raise undisputedly given to cashier Leung was given super retroactive effect, cannot be relied on for such a finding. In that case, however, unlike that of the four cooks, the record is silent about what Leung’s ER-21 (indicating her December 1995 merit raise) does or does not show concerning the super retroactivity issue. This is because no party introduced Leung’s ER-21, even though Leung’s ER-21 was equally available to all parties before Igoa’s June 23 reappearance as the Respondent’s witness, and, indeed, had been produced for a second time to the Union by the Respondent on the morning preceding Igoa’s June 23 reappearance. Thus, it is clear from colloquy among counsel in the May 21 trial session, and from Petersen’s testimony the same day, that the General Counsel and the Union had both been given access on and after March 26, 1999, to the ER-21s for all of the food and beverage cashiers. Moreover, preceding the June 21 trial resumption, the Union had issued a new subpoena to the Respondent and the Respondent had petitioned to revoke this new subpoena. (See ALJ Exh. 15.) This new subpoena sought, inter alia, the production for the second time of certain records, which the Respondent had previously disclosed pursuant to earlier subpoenas, including “personnel files of Art Tolentini and all other food and beverage cashiers employed at any time from February 1, 1995 through August 31, 1997.” (During on-the-record argument in the June 21 session concerning the petition to revoke, union counsel stated that his principal purpose in re-subpoenaing the personnel files for all of the food and beverage cashiers was to have them available for cross-examination of Igoa, when, as expected, the Respondent would call Igoa to explain, among other things, the super retro payments to Tolentini, Mackron, and Ojeda.) I denied the Respondent’s petition to revoke and the Respondent then agreed to bring the re-subpoenaed personnel files to the hearing site the next morning, June 22. There is no doubt that the records were produced the next morning; indeed, at the close of proceedings on June 21, I had directed a delay in the opening of the June 22 session to enable the prosecuting parties to study the resubpoenaed records. Accordingly, lacking any other indications to the contrary, I must assume that Leung’s ER-21 was not only available to the Respondent for purposes of possibly corroborating Respondent’s Exhibit 18, but that it was also readily available to the Union and the General Counsel for purposes of possibly impeaching Respondent’s Exhibit 18.

Although it’s mildly frustrating to be the only trial participant who does *not* know what Leung’s ER-21 does or does not show with respect to the super retroquestion, I don’t think I need to reopen the record to get an answer. However, as I discuss next, neither will adverse inferences get me very far in answering the question. The question more squarely presented in this instance than previously is this: Should any particular party suffer an adverse inference for failing to introduce into evidence a document, Leung’s ER-21, which was in the hearing room and clearly available to all parties? The answer is surely debatable. On the one hand, the Respondent’s failure to produce a document having a potential for corroborating the claim that Leung received super retro pay might by itself warrant the inference that the document would contradict—or at least fail to corroborate—the claim. On the other hand, Leung’s ER-21, or a copy of it, was also fully available to—and in fact in the possession of—the Union and the General Counsel, both of which parties had an obvious interest in making the contents of that ER-21 a matter of record if its contents contradicted or failed to corroborate the same claim. (Indeed, the Union had done just that when it came to assertions that super retroactive effect had also been given to the merit raises received by the four cooks listed on R. Exh. 19.) However, considering that the Board’s general policy in “equally-available” *witness* situations is that neither party should suffer an adverse inference for failure to call the “missing” witness.⁶¹ I am inclined to a similar approach in this equally available *document* situation. Thus, the only inference I am willing to draw in this instance is that Leung’s ER-21, if disclosed, would not have materially enhanced the position of any party nor undermined the position of any party.

Where does this leave us in terms of the underlying question whether Leung did or did not receive super retro pay? I think it leaves us with only one item of evidence, Respondent’s Exhibit 18, as a possible basis for finding that Leung was the beneficiary of a super retro payment. I judge that Respondent’s Exhibit 18, standing alone, is unreliable for that purpose. This judgment is based on all the other considerations discussed above which call into question the regularity and reliability of both Respondent’s Exhibits 18 and 19.

The question I set out to answer in this subsection was, did anyone else get super retro pay in December 1995? Considering all of the foregoing, my answer is no. Put differently, I find that while Tolentini, Mackron, and Ojeda received super retro payments in connection with their December 1995 merit raises, there is no reliable evidence that the merit raises given to cashier Leung and to cooks Guzman, Lopez, and Bautista in December 1995 were similarly made super retroactive.

D. Analyses, Supplemental Findings, and Conclusions

1. Expanded and updated chart

With many explanations behind me, most of my previous findings may now be usefully recapitulated in the form of an expanded chart, set forth below. This one shows a new entry for Leung, and this one adds to the list the three cooks who also were shown to have received merit raises at the same time. (Data concerning the cooks is derived from U. Exh. 25.)

⁶¹ *International Automated Machines*, supra, 285 NLRB at 1123.

Name	Hire Date	Raise Amt.	New Rate	Super retropay
<i>Cashiers</i>				
Mackron	7/21/92	.50	\$ 9.00	\$ 823.63
Ojeda	8/21/92	.50	9.00	896.00
Medina	12/9/92	.40	8.50	None
Leung	9/14/94	.75	8.50	[No reliable proof]
Tolentini	9/26/94	.75	8.50	1282.80
Rodriguez	8/14/95	None	[no info]	None
Butler	10/23/95	None	[no info]	None
<i>Cooks</i>				
Guzman	1/18/80	.60	\$12.80	[No reliable proof]
Loza	12/3/92	.90	11.50	[No reliable proof]
Bautista	6/2/93	.70	11.00	[No reliable proof]

The complaint does not merely attack the fact that the Respondent gave super retroactive effect to Tolentini's, Mackron's, and Ojeda's merit raises. It also alleges that the Respondent acted unlawfully simply by giving merit raises to the three cashiers. I judge that these two phenomena must be considered as severable for purposes of both a merits analysis and a 10(b) analysis. As I discuss further below, it is relatively easy to understand in the light of the charted evidence why the General Counsel maintains that the Respondent violated the Act when it gave super retropay to the three employees in connection with their merit raises. What is far more difficult to understand in the light of the foregoing findings is how the General Counsel can maintain that the Respondent also violated the Act when it gave the merit raises themselves to the three allegedly favored workers.⁶²

2. The merit pay raises themselves

a. Statutory merits

To find that the Respondent acted unlawfully when it gave merit raises to Tolentini, Mackron, and Ojeda in December 1995 would require a threshold finding that the three employees were "favored" by the action. In the context of this prosecution, I deem it a largely dispositive fact that Tolentini, Mackron, and Ojeda were not the only employees to have gotten a merit raise in December 1995; in fact, they were not even the only *cashiers* to have gotten a merit raise. Rather, two other cashiers, Medina and Leung, also received such raises, in amounts not radically different from those received by the three cashiers alleged to have been the targets of discriminatory "favoritism." Not only that, at least three cooks also received merit raises in comparably large amounts at the same time. Accordingly, the merit raises handed out in December 1995 were not given uniquely to the three workers in question, but to a total of eight workers, no others of whom are alleged to have been the objects of discriminatory favoritism. Neither the General Counsel nor the Union has tried on brief to reconcile these plainly inconvenient facts with the theory underlying this prosecution, and to me their silence speaks volumes. It is virtually impossible to reconcile these facts with the prosecution theory. Accordingly, I

⁶² One reason the General Counsel's position on this matter is difficult to understand is that counsel for the General Counsel has not acknowledged the issue on brief, much less declared a position.

would dismiss the complaint insofar as it alleges that the merit raises themselves were unlawfully conferred.

It might be tempting—on the basis of a record made in the course of litigating a narrower and different theory—for the General Counsel and/or the Union now to advance a new theory of violation according to which the merit raises to all *eight* recipients (or at least to cashiers other than the three in question) were unlawful. However, I have detected no such argument from either of the prosecuting parties, and even if they had made one, I would reject it for the following reasons: First, while there remain blurry edges to the theory of prosecution, the General Counsel never alleged or argued anything resembling such a broadened and shifted claim. Nor was this from want of evidence: The Union had known about or been on notice of the existence of all December 1995 merit raises since late February 1996, and this information was clearly available to the General Counsel during the precomplaint investigation into the Union's triggering charge, the "Fourth Amended Charge" of December 3, 1997. In fact, additional evidence of the same merit raises (the ER-21s in employees' personnel files) had been made available to the prosecuting parties in and after late March 1999, as part of the trial subpoena-compliance process. Yet even well after this, when the General Counsel moved on May 21, 1999, to amend the complaint to attack the December 1995 raises and retropay to Mackron and Ojeda (and Tolentini, as well), there was no hint of a claim that the merit raises to the other five workers were in any way unlawful. In sum, if any such claim were advanced now, it would deserve dismissal because it would necessarily be a claim as to which the Respondent had no notice, and therefore a claim, which could not be said to have been either "fairly" or "fully" litigated.

b. Impact of Section 10(b)

The same long-known facts just cited as evidence that the prosecution never intended to or did call *all* of the December 1995 merit raises into question are facts, which would independently damn any such contention to dismissal on 10(b) grounds. The Union knew all along that all of these merit raises had been handed out sometime between November 1, 1995, and February 14, 1996, but it did not file any charge calling them into question—at least no timely charge calling them into question. (In fact, the Union much later came to believe that cooks had also been the beneficiaries of unlawful raises; and filed a charge to that effect. But this charge was later dismissed, and it is not at all clear in the first place that this charge was linked to the December 1995 merit raises given to cooks Guzman Bautista, and Lopez.⁶³)

⁶³ These are the details: On November 16, 1998 (roughly a year after filing the triggering charge in this case, the fourth amended charge in Case 31-CA-22971), Petersen filed a new charge, docketed as Case 31-CA-23610 (R. Exh. 12), alleging in material part that the Respondent had "provid[ed] preferential treatment and raises to employees [admittedly intended to refer to certain cooks] to assure that they remain against the union or to attempt to persuade them to be anti-union." The Regional Director dismissed this charge on December 29, 1998, while this trial was in recess. R. Exh. 12-A. The Union then appealed, and the office of the General Counsel denied this appeal on February

Returning to what the complaint clearly does allege, these same facts and circumstances are also 10(b) dispositive of the amended complaint insofar as it attacks the merit raises to Tolentini, Mackron, and Ojeda. Where the fact of the merit raises to the three had been known to the Union since late February 1996, and had never been the subject of a charge, Section 10(b) clearly bars the General Counsel's attempt, by the device of the May 21, 1999 amendments to the complaint, to resurrect these raises as prosecutable violations.

3. The super retropayments

The lengthy retroactive effect given to Tolentini's, Mackron's, and Ojeda's merit raises present quite different questions, both on the merits and in terms of the impact of Section 10(b).

a. Statutory merits

The substantial, one-time retropayments were given to three employees (and only to those three employees, so far as this record reliably shows) who I have found were known or believed by Igoa and other top company managers to be important figures in the decertification movement. This apparently unique favoritism when it came to super retropay, considered against the background of antiunion animus, was enough to have satisfied the General Counsel's *Wright Line* burden of showing unlawfully motivated discrimination. In addition, as I discuss below, the Respondent's proof, offered primarily through Igoa, fell far short of satisfying the Respondent's own *Wright Line* burden of "demonstrating" that the three employees would have been given the same treatment even absent their antiunion views or activities. Indeed, as should soon become evident, Igoa's attempts to explain the super retropayments to the three employees in nondiscriminatory terms were themselves so lamentably confused, inconsistent, uncorroborated, and improbable in the light of other facts as to constitute yet additional, affirmative evidence of unlawful motivation. *Shattuck Denn Mining Corp.*, supra.

At the risk of imparting a greater coherency and consistency to Igoa's explanations than Igoa himself managed to do, I will here attempt to tease out the principal elements lying within his meandering and confused narrations: First, he broadly asserted that the super retropayments to the three cashiers were intended to make up for the Respondent's failure to give them merit raises far earlier. Relatedly, he broadly asserted that the only reason the Respondent did not give them merit raises far earlier was because there had been some ongoing ambiguity in the Union's position (or perhaps an ongoing disagreement between the parties) as to how much the cashiers were entitled to in "contract" raises under the new labor agreement as "finalized" in late June 1995. More specifically still, Igoa's explanations incorporated the following supplemental claims: (1) Ever since the beginning of "negotiations" with the Union for a new contract in or before November 1994, the Respondent had been unsure whether the Union expected the "30-cent" raise to apply

to the already above-"scale" cashiers (and others), or instead, expected only the "10-cent" raise to apply to these already above-"scale" employees. (2) As a consequence, throughout the 13 months or so until December 1995, the Respondent (Igoa, for practical purposes) had made it a policy not to evaluate or consider *any* workers for merit raises, and in fact had given out no merit raises during that period. (3) But for this unusual state of affairs, the three employees in question would have received merit raises by *no later than* February 1, 1995. Why that date? Because, said Igoa, it was likewise the retroactively effective date for the first of the nonmerit raises due under the new contract. (Igoa never explained exactly why he thought the two phenomena should have some correspondence. To me, the pairing seems strained, at best, and probably arbitrary.⁶⁴) In any case, (4) when Igoa calculated the retropay amounts due to Tolentini and Ojeda, February 1, 1995, became the "effective date." Then why the selection of January 1, 1995, as the "effective date" for calculating Mackron's retropayment? Because, according to Igoa, (5) Mackron was a special case. She had gone for more than a year without any merit raise, and, but for the confusion, probably would have been evaluated and given a merit raise sometime in November–December 1994. Why November–December 1994? Because (6) she had last been evaluated and given a merit raise in December 1993, and (7) the policy and practice was to wait a year from the last merit raise before considering the employee for another one. Then why not make the December 1994 date the retroactively effective date for purposes of computing Mackron's retropay? Because, in Igoa's words, (8) "We just decided, well, we will give it as [of] 1/1/95. We did not want to go beyond 1/1/95."

When Igoa used the pronoun "we," he was apparently referring to himself and Food and Beverage Regional Director Dunne, who, according to Igoa, was intimately involved both in proposing the raises to the three in question *and* in determining how much retroactive effect to give to them. Significantly, however, Dunne stated that he had nothing at all to do with the retropay decisions and thus had no idea how or why the retropay amounts to Mackron, et al., were arrived at. Accordingly, I infer that it was based on Igoa's discretionary judgments alone that Tolentini, Mackron, and Ojeda were favored with hefty one-time retroactive paychecks.⁶⁵ Beyond that, I note that the Respondent made no attempt to prove that there was precedent for thus giving super-retroactive effect to a discretionary, "merit" raise, as distinguished from a raise due under a union contract expressly providing for such retroactive effect. On the contrary, it seems inherent in the nature of Igoa's explanations that these actions were without historical precedent.

⁶⁴ The retropay for the initial raise under the union contract should have been paid when the parties finalized the contract in late June 1995. The Company was free under the union contract to give merit raises any time it wanted to.

⁶⁵ Although Dunne denied any knowledge concerning the super retropayments to the three cashiers in question, he somewhat summarily and indistinctly affirmed that he had recommended to Igoa that they receive merit raises in December 1995. I doubt that he played more than a ministerial role even with respect to the latter. Igoa clearly seems to have been the moving party.

11, 1999. Id. In fact, it appears from the letter from the office of the General Counsel denying the appeal that raises to "two employees" (cooks, as Petersen acknowledged) were at issue. What remains wholly uncertain is whether the raises in question were the December 1995 raises, or raises conferred at some later point.

Even when I examine Igoa's explanations on their own terms, I am left with the strong impression that they were merely improvised after-the-fact. Remember, all of the foregoing points were advanced by Igoa to explain why he waited until December 1995 to give merit raises which he claims the three would have received at some indefinite earlier point but for ambiguity in the Union's "position" about which level of "contract" raise would apply to "above-scale" workers. And my first observation in this regard is that Igoa was essentially incoherent in identifying the nature of the supposed ambiguity or conflict in question, even though he was himself a participant in the negotiations associated with the new contract, and therefore it's hard to see why he would have had so much trouble describing the problem. It's especially hard to discern from Igoa's hazy accounts exactly what was the nature of the dilemma which supposedly had tied the Respondent's hands when it came to conferring merit raises; and it's doubly hard to understand why the Respondent would even have allowed its own hands to be tied for 13 or more months of the supposed merit-raise "freeze." Beyond these difficulties, Igoa's explanations raise yet additional questions for which the Respondent has provided no clear answer, as follows:

First, it is hard to understand how the Union could even have had a "position" as early as October–November 1994 about a matter of interpretation or application of a wage provision in a contract about which the parties did not even reach "tentative" agreement until March 31, 1995. Thus, it's hard to swallow Igoa's claim that there had existed a freeze on merit raises as early as October–November 1994, or even as early as December 1994, when, under normal company practice, Mackron would have been *eligible* for consideration for another merit raise, but in fact had not been considered for a merit raise. And if, as I judge, Igoa's explanations do not plausibly explain why Mackron had been bypassed for merit-raise consideration in December 1994, then the more natural explanation for her bypassing at that time is that she was not then considered to be such a superior worker as to warrant such a raise.

Second, if the Respondent's concern over some ongoing ambiguity in the Union's position had caused the Respondent to withhold merit raises from deserving employees from October–November 1994 until December 1995, what, if anything, happened in December 1995 to allay this supposedly longstanding concern? What caused Igoa in December 1995 to lift the supposed freeze on merit raises? The Respondent presented no evidence that some ambiguity in the Union's position had been cleared up by then. In fact, the record affirmatively suggests that questions concerning the application of the murky pay-raise provisions in the union contract continued to dog the parties for months thereafter.⁶⁶ Accordingly, we can rule out the possibility that the December timing of the merit raises might be explained by some resolution of the supposed longstanding "issue" about "contract-raise" questions. In fact, in Igoa's only stab at explaining why he chose December 1, 1995, as a common date to give merit raises to the three employees (and others) he stated in substance that this was consistent with prior patterns and practices, i.e., that "December" marked a typical

point when employees would be considered for merit raises. However, Igoa and Dunne both later agreed that the Respondent's typical historical practice when it came to merit raises was to wait a year since an employee's last merit raise before considering the employee for a new one. Moreover, when pressed on his initial assertion, Igoa could think of no historical precedent for giving merit raises in December to a group of employees, and the Respondent introduced no other evidence to corroborate this assertion.

Third, if the Respondent had been intentionally delaying giving *any* merit raises during the 13 months preceding December 1995, then why didn't the other cashiers who also received merit raises in December 1995 get super retro-payments, too? Here, Igoa's answers were, at best, half-baked and confusingly circular in nature, and they ultimately proved too much. Thus, to justify the special treatment for Mackron and Ojeda, Igoa cited the "lead" responsibilities they supposedly had assumed after Gutierrez transferred to The Grille in October 1994—responsibilities, which the other cashiers supposedly had not been obliged to shoulder. As discussed in the next Section, dealing with additional raises to Mackron and Ojeda during the remainder of the preelection period, I have concluded that their supposed "lead" responsibilities have always been overstated and that the Respondent's defense linked to such considerations amounted to disingenuous, post facto rationalization. But here it is enough to observe that the invocation of Mackron's and Ojeda's supposed "lead" status only makes it more curious that Tolentini was the only other cashier shown to have been selected to receive a super retro-payment. Certainly, there is no reason on this record to suppose that Tolentini had shouldered any distinctive responsibilities or was otherwise seen by company managers as a "superior" performer. In fact, the evidence is to the contrary: In a performance appraisal which preceded Tolentini's merit raise by only 2 weeks (U. Exh. 24, dated November 19, 1995), Café Manager Brian Madlin had given Tolentini only a "standard" rating "score," and his only narrative comment had been that Tolentini "Must reduce Tardiness." (Significantly, Igoa testified elsewhere that an employee receiving a "standard" rating would not normally be considered for a "merit" raise.) Moreover, from a seniority standpoint, Tolentini stood fifth in a line of seven cashiers. He was nearly 2 years less senior than Medina, whose own merit raise was not given super retroactive effect. In addition, Medina's numerical "score" on her own recent evaluation was higher than Tolentini's, although it still fell within the "standard" range. (See U. Exh. 25.) (Separately, Igoa's explanation for why Medina's December 1995 merit raise was *not* given super-retroactive effect was hopelessly confused or, to the extent it was marginally comprehensible, hopelessly tail-chasing in character.) In sum, the inclusion of Tolentini among the select few whose merit raises were given super-retroactive effect makes it dubious that "special responsibilities" or "superior" performance had anything at all to do with the Respondent's (Igoa's) reasons for selecting *any* of the three cashiers for super retro-pay. And if satisfaction of those criteria did not genuinely account for the grouping together of the three employees for super retro-pay purposes, what other criterion or criteria *did* account for the Respondent's selection of those particular three workers for

⁶⁶ See, e.g., Jt. Exh. 3.

super retropay? On this record, the only other obvious basis for grouping the three for these purposes was their apparent importance in the decertification movement.

Finally, if Igoa's testimonial explanations for the super retropayments bore any significant resemblance to any underlying reality, I wonder why he signed ER-21s for the three employees indicating (quite falsely) that "12-1-95" was the common "effective date" for their merit raises. Remember, he insists that he had really intended all along to make these merit raises effective far earlier—February 1, 1995, in the cases of Tolentini and Ojeda, and January 1, 1995, in Mackron's case. In the circumstances I can only infer that by adopting the December 1 "effective date" for ER-21 purposes, he was trying to disguise his real intentions by leaving a false paper trail, should the paperwork ever be examined.

Accordingly, recast in *Wright Line* terms, these are my ultimate findings and conclusions of law with respect to the merits of the complaint insofar as it attacks the super retropayments: The perceived importance of Tolentini, Mackron, and Ojeda to the movement to oust the Union were unlawful motivating factors in the Respondent's decision to give super-retroactive effect to their merit raises in December 1995. The Respondent has not demonstrated that it would have given them that same favorable treatment even in the absence of their antiunion views or activities. Therefore the Respondent must be found to have violated the Act substantially as alleged in the complaint.

b. Impact of Section 10(b)

Consistent with caselaw reviewed in my original 10(b) decision, I start by recognizing that the 10(b) clock did not begin to run on the super retropayments of December 1995 until such point as the Union could be said to have been on actual or constructive "notice" that the Respondent had given them to the three employees in question. There is no doubt that the Union and the General Counsel had actual "notice" of these facts by no later than March 26, 1999, when the Respondent turned over to the prosecuting parties the personnel files for the three employees (among hundreds of others) which contained the ER-21s, which, in turn, contained "retropay" amounts from which the prosecuting parties could have inferred (and eventually did infer) that the merit raises to the three employees had been given super-retroactive effect.⁶⁷ But the critical question in dispute is whether the Union can be said to have had "constructive" notice of these facts at a significantly earlier point. Expressed in its simplest form, the question is this: Did the Union have constructive notice of the super retropayments at *any* point more than 6 months before December 3, 1997, when it filed the triggering charge herein? If so, it would not matter exactly

⁶⁷ The prosecuting parties may not have had actual subjective *awareness* of the super retropayments until some point closer to the resumption of this trial on May 17, 1999. However, actual "awareness" is not the same as "actual notice." And it is clear, as counsel for the General Counsel acknowledged during the trial, that the super retropay inferable from the ER-21s was "there to be seen" from the first point the ER-21s were made available to the prosecuting parties, i.e., March 26, 1999. With the latter fact being paramount in my thinking, I would find that March 26, 1999, clearly marked a point of "actual notice," and not just "constructive notice."

when the Union *first* had constructive notice, the dispositive fact requiring dismissal of the complaint on 10(b) grounds would be that the charge was filed more than 6 months after the Union had acquired such notice. As discussed next, there is no evidentiary basis for finding that the Union had constructive notice at any point prior to March 26, 1999, the same date the Union was put on actual notice of the tell-tale entries on the ER-21s.

Under the governing caselaw, the Union may be found to have had constructive notice of any now-complained-of action of the Respondent from the first point at which the Union could have discovered the action by exercising "reasonable diligence." Obviously, a union cannot be charged with failure to exercise "reasonable diligence" in the discovery of a fact which it lacked the "means to discover" in the first place. By parity of reasoning, however, if the Union possessed the means to discover the action at some significantly earlier point, then its failure to take advantage of that means may be a critical consideration in a judgment that the Union failed to exercise "reasonable diligence." The Respondent, with the same standard in mind, contends that the Union has been on constructive notice of the super retropayments virtually from the point they were first given to the three employees, because at all times it had the "means to discover" these payments—that is, the statutory right to request information which, if it had been exercised within the first 6 months after the payments were made, would have yielded evidence of their existence in plenty of time to file a 10(b) timely charge. More specifically, the Respondent argues that just as it was open to the Union to use information requests to discover the hourly pay rates of bargaining unit employees at any given time (a right which the Union clearly had not been shy about exercising), the Union could have used the same information-request process to gain access to the personnel files of the three employees and, in turn, to discover the ER-21s which disclosed the super retropayments. For the following reasons, I am not persuaded by the analogies sought to be drawn by the Respondent.

The Respondent's contentions dubiously suppose at the threshold that "reasonable diligence" required the Union to do two seemingly quite unreasonable things: (1) to anticipate, somehow, that the Respondent might use the device of giving super retroactive effect to an otherwise known and unremarkable merit raise as a means of "rewarding" or "encouraging" antiunion activity; and then (2) to demand a look at all personnel records which might conceivably disclose that such a device had been employed by the company. (Considering that proof of discriminatory "favoritism" almost necessarily requires comparisons of the treatment given to the suspect employees with the treatment given to other employees, it's hard to see how anything short of a "shotgun" approach, i.e., a blanket request for production of all bargaining unit employees' personnel files, would permit the union to prove—or to rule out—the particular possibility in question.) As I see it, however, it would have required the trained imagination of a master sleuth—or the fevered imaginings of a paranoid personality—to have anticipated that possibility. "Reasonable diligence" cannot reasonably be interpreted to require the Union to maintain or exercise any such extreme level of suspicious imagination or hypervigi-

lance. In addition, even in the wholly unlikely event that the Union had considered the possibility that the Respondent would use the super retropay device to reward the suspect three cashiers, it also would have been reasonable for the Union to suppose that if the company had done some such thing it probably would have covered its tracks, thus making it a probable waste of time even to ask for blanket production of the personnel records. And, in fact, I have found it likely that just such a tracks-covering reason explains why the ER-21s for Tolentini, Mackron, and Ojeda signed by Igoa recited (falsely) that “12-1-95” was the “effective date” of their merit raises.

Equally dubious is the Respondent’s implicit proposal that, just as the Union had a routine statutory right to obtain periodic information about the hourly rates being paid to bargaining unit employees, it also had a routine right to demand production of the unit employees’ personnel files. I think this proposition not only stands on legally shaky ground, but that its interposition in the known circumstances of this case was especially unconvincing, even hypocritical.

It is well established, of course, that the Act confers on a union with established 9(a) representative status a “presumptive” right to request and receive periodic “bargaining unit wage information” from the employer, i.e., a right to receive such information without being required to make any particular showing of relevance or special need. See, e.g., *Bryant & Stratton Business Institute*, 321 NLRB 1007 fn. 4 (1996), and authorities cited. The record clearly shows that the Union, at least after it began operating under International trusteeship, exercised that right frequently. Indeed, the existence of that presumptive right, and the fact that the Respondent had complied whenever the Union had asked for the current wage rates of the employees in the bargaining unit, were clearly important interlocking considerations driving my original 10(b) decision dismissing the original complaint’s attacks on all but the most recent of the several *subsequent* pay raises given to Mackron and Ojeda.

However, it is the wage *information* (as distinguished from any particular company record), which the employer is presumptively obliged by the Act to furnish on the union’s request. And as I read the caselaw, a union’s presumptive right to wage information does not inevitably carry with it a presumptive corollary right to demand production of employee personnel files or particular records within those files simply because those files or records might contain information about employees’ wages. To begin with, there exists no “absolute rule” under which “a union’s interests in arguably relevant information must always predominate over all other interest, however legitimate.” *Detroit Edison v. NLRB*, 440 U.S. 301, 318 (1979). On the contrary, “The duty to supply information . . . turns upon ‘the circumstances of the particular case.’ . . . [A]nd much the same may be said for the type of disclosure that will satisfy that duty.” *Id.* at 314–315; citations omitted. (See also *Id.* at 318 fn. 14 and cases cited.) Indeed, especially sensitive questions arise when union access to individual personnel files or records is at issue. *Id.* at 318 fn. 16, and authorities cited and discussed. And in “personnel-file” cases, it is reasonably clear that a union does *not* enjoy any presumptive right of access. Rather, such a right is found to exist only on the basis of a

showing of particular need for a more particular purpose than merely getting an update on bargaining unit employees’ current pay rates, such as for investigating or processing a grievance. And even then the right is found to exist only after balancing the Union’s particular needs against any competing legitimate interests, such as employee privacy or confidentiality. *Id.* at 318–319.

The foregoing distinctions strike me as critical for these purposes: It was at best highly doubtful that the Union would have had statutory backing in the hypothetical event it had insisted that the Respondent produce personnel files or records. A demand for such access required a special showing of need on the Union’s part, and the only “need” the Union might have cited was its mere suspicion that the Respondent might be giving special payoffs or rewards to the suspect three—a suspicion, moreover, which had not been supported by the Union’s examination of pay-rate compilations already received from the Respondent. In the circumstances, I can hardly find that the Union’s “failure” to make a statutorily dubious demand for such personnel-file access nevertheless amounted to a lapse of “reasonable diligence.” Moreover (and in significant contrast to the facts and issues presented in my original 10(b) decision), the Union’s failure to make a more timely discovery of the super retropayments had nothing to do with any failure on its part to make a more timely request for wage *information*, i.e., the current hourly pay rates of each bargaining unit employee. Such a conventional request obviously would not have yielded (indeed, did not yield) the necessary evidence that the known merit raises to the suspect three employees had been given super retroactive effect.

Finally, the Respondent’s arguments necessarily require us to suppose that if the Union had only sought production of the employee’s personnel files, the Respondent would have readily produced the same. Apparently, we are asked to indulge this supposition because the record affirmatively shows that, historically, the Respondent complied when the Union made wage-information requests calling only for the current hourly pay rates of each bargaining unit employee. But for reasons already thoroughly discussed, the Respondent would have had no obvious statutory defense if it had refused to supply such “presumptively” relevant information. By contrast, we cannot assume that the Respondent would have been as readily accommodating if the Union had made a demand not cloaked with any presumption of statutory entitlement, i.e., a demand for production of personnel files.

Moreover, the supposition we are asked to indulge is undermined significantly by other facts. Thus in the only case of record where the Union was specifically shown to have sought access to an employee’s personnel file (that is, the only instance preceding the opening of this trial), it did so ancillary to a grievance-arbitration process, and then only for the limited purpose of verifying that a record of disciplinary action had been expunged from the employee-grievant’s file, as an arbitrator had ordered. And even in that instance, the accounts of Petersen and Igoa harmoniously indicate that the Respondent granted such access only at the urging of a Board agent, as part of an informal charge-adjustment process. And even then, the resulting disclosure meeting quickly broke up in acrimony

when Petersen demanded that bargaining unit employees on the Union's grievance committee other than himself and the affected grievant be allowed to examine the personnel file in question, and Igoa refused this demand. Given this history, I cannot suppose, nor was the Union required to suppose, that the Respondent would have readily accommodated any request for blanket access to personnel files simply for purposes of testing the Union's suspicion that the three employees in question might have been the beneficiaries of some unique kind of pay-favoritism.

Accordingly, I conclude as a matter of law that the complaint is not barred by Section 10(b) insofar as it calls into question the super retropayments given to Tolentini, Mackron, and Ojeda in December 1995.

V. SUBSEQUENT PAY RAISES TO MACKRON AND OJEDA

A. In 1996

Here we are concerned with a \$3 hourly raise to Mackron made effective on May 1, 1996, and two, successive \$1 raises given to Ojeda, the first made effective on June 5, 1996, and the second on August 21, 1996. I have already determined that all three of these 1996 raises were barred from prosecution by Section 10(b), and I adhere to that decision. Were it not for the time-bar, however, I would conclude, based on the findings and considerations set forth below, that each of these raises was unlawfully conferred.

1. Mackron's \$3 raise

On May 6, 1996, Igoa signed an ER-21 (U. Exh. 6) authorizing a \$3-merit raise for Mackron, to be made retroactively effective to May 1. (Dunne and Worcester also signed the ER-21, but their signatures are undated.) Six months earlier, in December 1995, Mackron had received a 50-cent merit raise, plus a hefty retro paycheck. The "December 1995" raise (effectively a January 1995 raise) had elevated her pay by about 6 percent, to \$9 per hour. As a consequence of the new, \$3 raise authorized by Igoa on May 6, Mackron's pay had jumped another 33-1/3 percent, to \$12. In sum, within a period of 6 months, the Respondent had raised Mackron's hourly pay by about 40 percent—a whopping amount by any measure.

According to the ER-21, the occasion for Mackron's \$3 raise was a "Performance Review." However, the performance evaluation rationalizing this action (U. Exh. 7) was only prepared after the fact, on May 11, and it was signed only by Dunne, not by either Madlin or Black, Mackron's immediate supervisors in The Café, depending on which shift she was working. Igoa and Dunne both testified that company policy and normal practice was to wait a full year before considering an employee for another merit raise, and that the normal sequence was evaluation first, raise second—not vice-versa. Igoa couldn't recall ever having previously (or since) authorized a merit raise as large as \$3 per hour (nor even as large as \$1 per hour) much less a \$3 raise given within 6 months of an earlier merit raise. It is quite apparent, therefore, that Mackron's \$3 raise was given under irregular and unprecedented circumstances, just as had been the case with her super retro pay 6 months earlier.

In Igoa's first appearance on the witness stand (when called and examined adversely by the Union), this is how he tried to explain why a nonroutine approach had been followed with respect to Mackron's \$3 raise:

A. It was discussed [between Igoa and Dunne, as Igoa later stated] that Ms. Mackron would be taking over the responsibility of the p.m. shift [in The Café]. And that they [meaning Dunne, apparently] wanted to increase her \$3 based on her performance and based on the responsibility that she was going to have and at the same time the amount of turnover that we were having with cashiers. We were also going through the process of opening the Grille, the restaurant, the Grille. And Griselda [Gutierrez] . . . the cashier supervisor, was to move over to the Grille as an assistant manager.

This explanation proved to be essentially fanciful insofar as it implied that Gutierrez' transfer to the new position in The Grille (and Mackron's supposed assumption of "responsibility [for] the p.m. shift") was either about to happen when the \$3 raise was conferred, or had happened only recently. In fact, Gutierrez had transferred to the Grille in October 1994, more than 18 months earlier. Moreover, this explanation proved to involve gross overstatement insofar as it suggested that Mackron (or Ojeda) had been obliged to "take over the responsibility" previously shouldered in The Café by Cashier Supervisor Gutierrez. (The record shows that Gutierrez prepared and signed performance appraisals for the cashiers, and that she did no cashier work herself.) At best, the Respondent's entirely hazy and indeterminate showings as to what "responsibilities" *did* devolve to either Mackron or Ojeda after Gutierrez moved to The Grille suggested only that one or two wholly routine nonsupervisory functions may have gradually accreted to Mackron's traditional job as a cashier.⁶⁸ (Even less distinct on the record are any accretions to Ojeda's job that may have been occasioned by Gutierrez' transfer.) But these weaknesses merely obscure a more fundamental set of problems with Igoa's rationalizations: Any "responsibilities" (such as they were) which either Mackron or Ojeda may have taken on in the aftermath of Gutierrez' transfer had apparently been acquired long before May 1996. Thus any such responsibilities obviously were known to Igoa and Dunne—and presumably had been taken into account by them—when they gave Mackron (and Ojeda) a 50-cent-per-hour-merit raise in December 1995. In addition, there was no mention of any such added responsibilities in the "Performance Evaluation" prepared by Dunne after Igoa had already authorized the \$3 raise to Mackron. Moreover, to the extent Mackron or Ojeda had acquired some added responsibilities since October 1994, Igoa apparently had not deemed the responsibilities significant enough to warrant

⁶⁸ Thus, as previously noted, at some uncertain point, Mackron began distributing the tips to the table and room servers at the end of a shift. This might arguably be seen as a "lead" responsibility. The only other arguably "lead" role she may have played was in working out break schedules for the room and restaurant servers. Both functions were entirely routine and nondiscretionary in nature. Mackron further acknowledged that other cashiers would perform these functions on occasion.

mention on *any* of the several ER-21s associated with the various raises they received during the protracted preelection period. Still less had Igoa deemed their jobs to have changed so materially as to warrant a job reclassification. Mackron (and Ojeda) continued at all material times to be classified as “food and beverage cashiers,” period.

Another problem with Igoa’s initial explanations concerning Mackron’s \$3 raise was that they omitted a development which clearly was far more important in explaining both the amount and the timing of that raise—Mackron had demanded a \$3 raise and had threatened to “quit” if she didn’t get it. At least this was Dunne’s explanation, and Mackron acknowledged much the same thing. (Igoa eventually did, too, but only after pretending in his initial explanations that Dunne’s “recommendations” and a mutual recognition that Mackron would be taking on increased “responsibilities” alone accounted for the raise.) Igoa and Dunne further testified in rough harmony that the pre-raise negotiations had taken place only between Mackron and Dunne, with Igoa becoming involved only after Dunne himself “decided” to give Mackron the demanded \$3 raise rather than lose the supposedly unique “strengths” which Mackron brought to her performance of the cashier’s job. For reasons that will soon become more clear, I doubt that Igoa remained out of the loop until Dunne had already made up his own mind to confer the raise. (Particularly in the light of Black’s credited testimony, below, I think that virtually the opposite was the case.) But I have little difficulty accepting that Mackron’s threat to quit—and the Respondent’s desire to keep her on the job at all costs—were the critical factors causing Igoa to authorize her \$3 raise. However, the question yet to be answered is *why* Mackron’s continued employment was deemed so important to the Respondent that Igoa would knuckle under to her latest pay demand. Given the unprecedented size and timing of the raise alone, I find it especially hard to believe the reason proffered by Igoa and Dunne—Mackron’s “increased responsibilities,” whatever they were. Moreover, there is no evidence that Dunne or Igoa had done any market survey to determine if cashiers in comparable positions elsewhere were earning as much as \$12 an hour. Indeed, so far as this record shows, if Mackron had demanded a \$5 per hour raise, Igoa (and Dunne) would have capitulated just as readily as they did to her \$3 demand. Rather, considering every finding I have made so far in this decision, I think that Mackron’s critical role in the movement to oust the Union far easier explains why Igoa deemed it worth the expense to appease Mackron’s latest wage demand.

Lending further weight to the foregoing interpretations is Ulysses Black’s plausible testimony concerning a closely related set of incidents which occurred, I find, only shortly before Igoa authorized the \$3 raise for Mackron. Specifically, I credit the following passages in Black’s testimony, in which he describes what happened after Mackron had returned to The Café after having met with Igoa to discuss her demand for the raise:

Q. Okay, and when she came back did she tell you anything about the meeting between her and Igoa?

A. She told me, she came back and she wasn’t particularly happy with the amount that she discussed.

Q. Okay, and was anything further said between you and her at that time?

A. No.

Q. Okay, and sometime later that day then did Mr. Igoa appear?

A. Yes, and she was still in my office at that time and Mr. Igoa was walking through the area.

Q. And what happened?

A. She just [said], in one of her outbursts, that she wasn’t happy with the amount and she wasn’t going to follow through, she said “I will just walk away from this Union thing, I will walk away from it.”

Q. And what, if anything, did Mr. Igoa say?

A. He said, “I thought we discussed this, calm down, lets talk about it[,]” and they went into my office.”

Q. And where did you go?

A. I then left.

Q. Okay, did you hear what was said between Mackron and Igoa in your office?

A. No.

Q. Okay. And at some point later then that day did you have any conversation with Mackron, any further conversation about what she and Igoa talked about?

A. I can’t remember.

Q. And either that day or shortly thereafter did you have any conversation with Mr. Igoa about the subject matter?

A. He mentioned that she was—

JUDGE NELSON: The question asks for a yes or a no.

THE WITNESS: Yes, yes, I am sorry.

Q. [BY MR. JELLISON]: And where did that conversation take place?

A. It happened in front of the Room Service door leading in from the Lobby.

Q. Okay, and was anybody present besides you and Mr. Igoa?

A. No.

Q. And tell us what he said and what you said in that conversation?

A. He said he wasn’t happy with, he wasn’t happy with Deborah in regards to her actions helping them with the Union, he wasn’t happy with their choice.

Q. And did he say anything further?

A. No.

Q. Did you say anything?

A. I just said “[Y]ou picked a *beaute* [*sic*],” or something to that extent [*sic*].

Q. When you said that did he say anything?

A. “I guess we are stuck with her now.”

Q. Okay.

JUDGE NELSON: Excuse me, just so I can understand, where was your conversation with Mr. Igoa?

THE WITNESS: It was coming through, there is a little hallway which goes in between from Room Service to the Lobby and should I tell you how we came about to be together or?

JUDGE NELSON: I do want to pursue that but I just want to understand the setting, was this conversation [with] Mr. Igoa the same day that he took her into your office to have a conversation with her?

THE WITNESS: Do you know frankly I can't remember if it was the same day or a day or two later, but it was in very close the same time period.

JUDGE NELSON: All right, and you can tell me what you remember about how you happened to meet up with Mr. Igoa at that time?

THE WITNESS: He was out there responding to a problem that Deborah was having with another employee, either she was trying to coax the person to be antiunion or it was some type of an outburst and he had to go up there to calm things down. And shortly after speaking with her and the other employee he then complained to me about his choice, she was a little aggressive in her manner to solicit people, she would go overboard and it worried him. He mentioned the fact that it is really not a good choice we have here helping us with this Union thing. And I said "[W]ell you really picked a [beaut]," and he said "[W]ell we are stuck with her."

Again, Black's account of these incidents makes vivid what otherwise seems probable on this record: If Mackron's "merits" as a cashier had been the only factor entering into Igoa's decision whether or not to accede to her demand for a \$3 raise, he wouldn't have capitulated. Rather, it apparently took Mackron's express threat to "walk away from this Union thing" to bring Igoa around to Mackron's point of view, i.e., to convince him that she was now entitled to a \$3 raise beyond that which he had given her 6 months earlier.

2. Ojeda's two raises of \$1 each

On June 8, Igoa filled out by hand and signed an ER-21 authorizing a \$1 raise for Ojeda, to be effective June 5. Again, Igoa wrote "Performance Review" as being the nominal occasion for the raise. Seven months earlier Igoa had raised Ojeda's pay by 50 cent, bringing her to \$9 per hour, equal to Mackron's new pay level at that time. The early June raise brought Ojeda to \$10 per hour, a significant raise in itself, but nevertheless two dollars short of what Mackron had been earning since early May, as a result of her own \$3 raise. Like the \$3 raise to Mackron, the \$1 raise given to Ojeda in June 1996 was quite inconsistent with the Respondent's past practice of waiting a year since an employee's last evaluation and merit raise (if any) before considering the employee for another merit raise. Even ignoring that anomaly, it might be presumed at least that once Ojeda received her June 1996 merit raise, she would not be eligible for consideration for *another* merit raise until June 1997. And in fact Igoa expressly confirmed this when he wrote on Ojeda's ER-21 of June 8, "Next Review: 6/5/97." Strikingly, however, less than 4 months later, on August 28, Igoa signed another ER-21 for Ojeda, authorizing an additional \$1 raise for her, now bringing her to \$11 per hour. Three merit raises totaling \$2.50 conferred in an 8-month period was an extraordinary amount in itself, with only Mackron's recent experience for "precedent." I see no need to dwell further on the irregularities and the other departures from historical practice, which are

almost facially apparent in the foregoing review. It remains to examine the Respondent's explanations.

Igoa claims to have relied solely on Dunne's recommendations when he authorized the two successive \$1 raises to Ojeda. Dunne, too, states, that the raises were conferred on his own say-so. Dunne's version of the background circumstances is distinctly different from Ojeda's version. Dunne testified, in substance, that he spontaneously decided in June to give Ojeda a \$1 raise, in recognition of her "performance" and special "responsibilities" in The Café, and that he did not speak with her before recommending this raise to Igoa. He states that he decided to give her an additional \$1 raise in August only after she confronted him, told him she had learned that Mackron had gotten a \$3 raise, and felt that she was entitled to one, too, and threatened to quit if she were not brought up to par with Mackron Ojeda, by contrast, denied ever having even learned prior to the RD election that Mackron had been given a \$3 raise, much less having mentioned any such thing to Dunne. Also contrary to Dunne, she testified that she received her \$1 raise in June only after having first approached Dunne and asked him for a raise of more than \$1. She stated that she accepted Dunne's offer of a \$1 raise only grudgingly, and that she specifically advised him that she would be approaching him again, in August, to ask for a greater amount.

I find it both impossible and unnecessary to resolve these conflicting accounts. Indeed, any resolution as between and among Dunne, Igoa, and Ojeda would have a fictional quality in the end: It would assume that at least one of the witnesses was being truthful at some point. In fact, as I watched and listened to each of them, my strongest impression was that they were each trying to hide as much about this background as possible. However, whatever the underlying truth, it strikes me as significant that both Dunne and Igoa seemingly believed (or perhaps simply feared) that Ojeda had become aware that Mackron had received a huge pay raise, and was likely to make an embarrassing fuss about this if not appeased with pay raises of her own. I also regard it as significant that both versions tend to show an overweening wish on the part of Dunne and Igoa to pacify Ojeda rather than simply tell her to move on if she didn't like her pay. Again, for reasons already discussed in Mackron's case, it is simply incredible in the end that Ojeda's supposedly increased "responsibilities" in The Café could have alone caused the Respondent to give her pay raises in such unprecedentedly large amounts and within such an unprecedentedly abbreviated period of time. In addition, Igoa's and Dunne's explanations for the two 1996 raises to Ojeda make it reasonably clear that these raises would not have been conferred had it not been for the prior decision to give Mackron a \$3 raise in accordance with Mackron's demands. In fact, the relationship of the initial, \$3 raise to Mackron to the subsequent raises to Ojeda appears to have been essentially the same as the relationship between a falling domino and the domino standing next in the line of fall. I have already found that Mackron's \$3 raise was unlawfully conferred; I can reasonably infer as well either that the same reasons figured in Ojeda's successive raises, or that Ojeda's raises were conferred to buy her silence about Mackron's unlawful raise. Which of these two possibilities

more fully accounts for Ojeda's raises is a purely academic question; either reason would make the action unlawful.

B. In 1997

The last of the raises to Mackron and Ojeda attacked by the complaint elevated their pay by another 50 cents per hour. Mackron's raise became effective on May 1, 1997; Ojeda's became effective on August 21, 1997. I found in my original 10(b) decision that Mackron's May 1997 raise was barred from prosecution by Section 10(b), but that Ojeda's August 1997 raise clearly was not time barred.

I recognize that these final hourly increases, seen as isolated phenomena, would not necessarily raise any eyebrows. They were awarded a full year after each employee's most recent merit raise. Moreover, the 50 cents amount was not grossly different from merit raises given to other employees, as revealed on Union's Exhibit 25. (For example, on August 14, 1997, cashier Norma Rodriguez received a 30-cent-merit raise, bringing her to \$8.80 per hour.) But Mackron's and Ojeda's final raises cannot be considered in isolation. Mackron's final raise brought her pay to \$12.50 per hour. Ojeda's final raise brought her to \$11.50 per hour. They both had been earning \$8.50 per hour when the RD petition was filed. The Respondent had raised Mackron's hourly pay by a total of \$4 within the 18-month period starting in December 1995, when she received the first of the raises in question (plus a substantial retroactive paycheck), and ending in May 1997, when she received the last such raise. This amounted to a net pay boost of about 47 percent within an 18-month timespan. The Respondent had likewise boosted Ojeda's pay significantly, by approximately 35 percent within only a slightly longer timespan. Again, the Respondent failed to introduce any evidence suggesting that one or more other employees had received comparably huge raises during the same preelection period. All of these circumstances, considered against the background of antiunion animus, cause me to infer, once again, that unlawful antiunion considerations were motivating factors in the decisions to grant these final raises to Mackron and Ojeda.

The Respondent was no more successful in these instances than it was in prior instances in carrying its own burden under *Wright Line*. In fact, Igoa made no distinct attempt to explain the particular reasons informing the decisions to grant either of these 1997 raises, nor did Dunne, who apparently had already left the Respondent's employ before either of these raises was conferred. I am presumably invited to find that the extra "responsibilities" (whatever they were) supposedly shouldered by Mackron and Ojeda since Gutierrez' October 1994 transfer to The Grille would have alone accounted for the final raises. I am no more impressed by such ephemeral claims in these instances than I was in connection with the earlier raises, and I see no need to repeat the facts and the analyses, which have influenced this judgment.

VI. THE REMEDY

A. Introduction

I have found on the merits that all of the pay actions challenged by the amended complaint violated Section 8(a)(1) except for the raises given to the three employees in December

1995. I have further found, however, that the only actions not barred from prosecution by Section 10(b) were the super retropayments to the three employees in December 1995 and the final pay raise to Ojeda on August 21, 1997. Accordingly, the recommended cease-and-desist and records-availability orders I arrive at below will speak to those violations in particular. However, my recommended remedy would be no different even if I had not partially dismissed the complaint on Section 10(b) grounds.

Before I briefly explain the reasoning which informs my recommended remedy, I must first address and explain my reasons for rejecting the General Counsel's and the Union's common requests for a quite different and extraordinary remedy, one under which "all other employees in the bargaining unit" must be made "whole" for "losses" the prosecuting parties presume they have "suffered" as a result of the Respondent's unfair labor practices. Thus, as elaborated below, the General Counsel seeks a remedy for the pay-raise violations which requires the Respondent to "rescind" in some never-clearly-defined manner the unlawful raises to the favored three employees, and further to "make-whole" a class of "other" unit employees (meaning "all other employees in the bargaining unit" with respect to all but one pay raise) by paying them "backpay" in some amount. Moreover, the General Counsel asserts that the backpay owed to the other employees will continue to grow until such time as the Respondent does whatever it is supposed to do to "rescind" the offending raises. As I will illustrate below, the General Counsel's evolving attempts to describe the proposed remedy have been marked by certain evident inconsistencies of approach. However, what has been even more remarkable about each of these successive descriptions is their consistent reliance on verbal formulations so woolly and convoluted as to make it virtually impossible to be sure what the envisioned remedy contemplates and how it is supposed to work. Moreover, I will conclude that mere artlessness of expression is not really what stands in the way of comprehending the proposed remedy; rather, the real problem is that the General Counsel's vision of the remedy has itself been too vaporous and shifting to admit of any intelligible or coherent formulation. The incoherence of the General Counsel's proposed remedy and the clouded prosecutorial vision, which informs it would be reasons enough to reject it. However, as I see it, there is yet a more fundamental problem: In the context of this prosecution, the "rescission" of the unlawful raises and backpay to "other employees" sought by the General Counsel are not really "remedial" devices at all, but are, at bottom, merely punitive in conception, and therefore are beyond the Board's statutory power to impose.

I will amplify on each point below, starting with an analysis of each of the General Counsel's evolving descriptions of the proposed remedy as tendered at three key junctures in this litigation—first in the complaint, next in the amended complaint, and finally on brief, in the form of a proposed Board Order.

B. The Remedy as Various Described by the General Counsel

1. In the original and amended complaints

In the original complaint, when the only raises under attack were those given to Mackron and Ojeda in 1996 and 1997, the special-remedy paragraph stated as follows (emphasis added):

WHEREFORE . . . the General Counsel seeks an Order requiring that the Respondent *promptly rescind* the wage increases awarded Ojeda and Mackron described above, and *make whole all other employees in the Unit* by awarding them *comparable, retroactive* wage increases for the time period *from May 1, 1996, through* the effective date of the *rescission* of the wage increases for Mackron and Ojeda. The retroactive wage increases should be *comparable in proportion* to those awarded Mackron and Ojeda.

It was evident from colloquy of record on day 1 of trial proceedings that the architects of this proposed remedy had little idea what it might concretely entail. Certainly, no attempt had been made to compute an ultimate, dollar “number” to propose to the Respondent for possible case-settlement purposes. In fact, it is reasonably clear that no attempt had been made even to reduce these vaguely-stated remedy demands to something resembling a *formula* by which it could be determined how much money it would take to make each of the other employees in the bargaining unit “whole” for the alleged violations, i.e., a formula which might more clearly illuminate the shadowy notions of “awarding retroactive wage increases to all other employees in the Unit” which “should be comparable in proportion to those awarded to Mackron and Ojeda.” Indeed, those responsible for the proposed remedy had not yet come up with answers to other questions critically affecting “compliance” and settlement possibilities. Thus, the colloquy indicates that the General Counsel was unable to define what *steps*, exactly, the Respondent was expected to take to comply with the injunction to “promptly rescind the wage increases”—an injunction of critical significance under the proposed remedy because it was only by such a “rescission” that the Respondent’s ongoing “backpay” liability to “other employees” could be capped. Indeed, the General Counsel could not even identify in specific, “cent-per-hour” terms *how much* of Mackron’s and Ojeda’s hourly pay was supposed to be “rescinded.” Moreover, bringing into even sharper relief the ambiguities and impracticalities inhering in the idea of “rescinding” a series of pay raises given to two workers over a two-year period, the General Counsel had not yet arrived at an answer to an even more provocative question: What could “promptly rescind the wage increases” *possibly* mean as applied to *Ojeda*, who had quit the Respondent’s employ long before this case came to trial? Rather, counsel for the General Counsel was obliged to rebuff all such inquiries by declaring woodenly that any such questions “will be determined after litigation . . . [as] a compliance matter.” Not surprisingly, the General Counsel’s routine taking of a “no-position” position when it came to nuts-and-bolts compliance questions under the requested remedy had a rather profound tendency to confound, if not to foreclose, any possibility of meaningful settlement discussions.

When the complaint was amended and expanded on May 21, 1999, to attack the December 1995 merit raises and retroactive payments to Mackron, Ojeda, and Tolentini, an additional remedy paragraph was incorporated, a paragraph addressed to those particular alleged violations alone, as follows (emphasis added):

WHEREFORE . . . as part of the remedy for the unfair labor practices alleged in new subparagraphs 8A, 9A and 9B, the General Counsel seeks an Order requiring that Respondent promptly *make whole all other cashiers employed in Respondent’s Café* and in the bargaining unit (other than Mackron Ojeda, and Tolentini) by awarding *said cashiers* wage increases and retroactive increases for [a] period from December 1, 1995, until the date on which Respondent pays such comparable wage and retroactive increases to *said cashiers*. Said increases *should be comparable in proportion* to those awarded Mackron, Ojeda and Tolentini *on or about December 1, 1995*.

Again, the latter paragraph was specifically intended to address the December 1995 pay actions affecting the three employees, but not to supersede the original remedy pleading associated with the subsequent pay raises given to Mackron and Ojeda. Accordingly, the complaint as amended contains both of the remedy pleadings quoted above, each one focussing on different sets of pay actions.

Of course there is an abiding uncertainty common to each of the foregoing paragraphs insofar as they invoke the notion of “retroactive increases” which are to be “comparable in proportion” to those given to the favored employees. But other features of the remedies as expressed in the amended complaint are remarkable less for their ambiguity than for their seemingly arbitrary inconsistencies and other anomalous qualities. Thus, as I parse the remedy proposed in the amended complaint for the December 1995 pay actions, the formulation appears to differ in the following significant ways from the formulation of the remedy proposed for the subsequent raises to Mackron and Ojeda in 1996 and 1997: First, unlike the remedy for the latter raises, the remedy for the December 1995 pay actions does not speak of “rescinding” the raises and retropay given to the favored three employees. Second, although the merit raises given to the favored three in December 1995 had been made retroactively effective to dates 10 to 11 months earlier (Tolentini and Ojeda’s to February 1, 1995, Mackron’s to January 1, 1995), the General Counsel’s proposed “backpay” remedy for these violations requires “comparable-in-proportion” raises to other cashiers to be made retroactively effective only to December 1, 1995. Third, and especially significant in terms of the scope of the requested “make-whole” remedy for the December 1995 pay actions, it appears that the class of beneficiaries of any such remedy would be confined simply to “cashiers employed in the Respondent’s Café (other than Mackron, Ojeda, and Tolentini),” and not to “all other employees in the Unit,” as provided in the remedy proposed for the 1996–1997 raises to Mackron and Ojeda. (Nevertheless, the bewildering syntax of this pleading leaves some room for doubt about even this.⁶⁹) Fourth, it

⁶⁹ The beneficiary class is identified in the supplemental remedy paragraph as “all other cashiers employed in Respondent’s Café *and in the bargaining unit*.” And this phrase—particularly the italicized words—might be construed, as again broadening the beneficiary class to “all other employees in the bargaining unit.” However, the more restrictive phrase *said cashiers* repeatedly appears thereafter, and, considering that overall context, perhaps the best way to understand the syntactically awkward formulation of this remedy is to construe the

still remains quite unclear *why* the General Counsel sought backpay for “cashiers-only” for purposes of remedying the December 1995 pay actions, while seeking backpay for the vastly broader class of “all other employees in the Unit” for purposes of remedying the later pay raises to Mackron and Ojeda.

Finally, and perhaps most critically baffling of all, are the seeming inconsistencies of approach when it comes to the question of what the Respondent must do to put a cap on what the General Counsel sees as its ongoing liability for the different increments of “backpay” supposedly owed under the different “make-whole” remedies. In fact, depending on which pay action you asked about, you could receive radically different answers from the remedy pleadings in the amended complaint. Thus, it seems clear enough that the General Counsel envisions that the date on which the Respondent obeys the injunction to “promptly rescind” the 1996 and 1997 raises given to Mackron and Ojeda will be the capping or cutoff date for purposes of the Respondent’s backpay liability to “all other employees in the Unit” for those particular raises. (Here the hardest thing to understand is what the General Counsel envisions the Respondent must do, exactly, to “rescind” the 1996 and 1997 raises in question.) However, to cap its liability for the December 1995 pay actions, the Respondent must first give “comparable wage and retroactive increases” to the “other cashiers.” And here, by contrast, the hardest thing to understand is what the General Counsel means, exactly, by “comparable wage and retroactive increases.” (Nor does it contribute any additional illumination to restate this ephemeral notion as “comparable *in proportion to*” the offending pay actions.)

2. Proposed Board Order in the General Counsel’s brief

By the conclusion of this trial, the only thing that was reasonably clear about the extraordinary remedies so vaguely and unevenly described in two different paragraphs of the amended complaint was that the authors of the proposed remedy either had not devoted much thought to what the Respondent would have to do to comply, or, having thought long and hard, hadn’t come up with any answers—at least none they cared to make public. Indeed, as far as I could tell, counsel for the General Counsel and those for whom she spoke were wholly unable (and not just unwilling) to answer questions critically affecting what the Respondent was supposed to do under the General Counsel’s proposed remedy, and, in turn, the calculations of any backpay supposedly due to “other employees” under the two, quite different “make whole” provisions set forth in the amended complaint. Accordingly, in the hope of getting the

words *and in the bargaining unit* as simply an artless attempt to convey that “all other cashiers employed in Respondent’s Café” referred to persons working as “bargaining unit cashiers” in The Café, as distinguished from supervisors or managers who might also perform “cashier” work in The Café. Alternatively, if, indeed, the author of this pleading was not merely being artless in this regard, but instead somehow intended by this remedy pleading to leave wiggle room to seek “backpay” for employees *other than* “cashiers in the Café” as a remedy for the December 1995 pay actions, such an intention was so artfully obscured as to be invisible—and independently deplorable for its coyness of expression.

responsible parties to think more concretely about the proposed remedy, I requested at the conclusion of the trial that the General Counsel and the Union spell out exactly what affirmative remedial action they expected the Respondent to take—moreover, to spell it out in the form of a coherent Board Order, one which could pass muster against attack for vagueness, or for giving virtually limitless discretion to a compliance officer. Both prosecuting parties honored that request in their briefs. The Board orders proposed by the General Counsel and the Union are in certain respects quite similar, but in at least two important respects (as noted in subsec. C, below) are fundamentally different in approach.

As I show below by repeating critical passages from the General Counsel’s submission, the latest version is more lengthy and more clumsily worded than in any previous expression. It is also so studded with footnotes and incidental comments and qualifiers that it mocks the Board-order format which it pretends to observe. Worse, while it contains some faintly familiar ideas, it introduces so many novel elements and formulations as to amount to an essentially different set of remedial demands from those made previously. Worse still, while the General Counsel’s proposed order eliminates one ambiguity pervading previous versions (it scraps the ambiguous notion of “retroactive wage increases” to other employees which must be “comparable in proportion to” the raises given to the favored workers) it does so only by seizing arbitrarily on the date and the amount of the “highest” raise given to any of the three favored employees at various points as the measures of how much money should be paid to other employees to make them “whole.” Thus, when it comes to remedying the allegedly unlawful December 1995 pay raises and retroactive payments, the General Counsel has selected the 75-cent hourly pay raise to Tolentini and the \$1282.80 retro pay he received—and not the lesser raises and retro pay amounts then received by Mackron and Ojeda—as the base numbers for calculating the retroactive pay raises and one-time retro paychecks the Respondent is said to owe to the other cashiers in The Café (and only to the other cashiers). Similarly, under the General Counsel’s proposed scheme, Mackron’s \$3 raise becomes the hourly amount owed to “all other employees in the bargaining unit” starting as of May 1, 1996; and Mackron’s 50-cent raise on May 1, 1997, becomes retroactively tacked-on to the backpay to be paid to all other unit employees as of May 1, 1997.

Worst of all, the General Counsel’s proposed remedial order continues to mumble indistinctly when it comes to one of the most important abiding questions of all: What can or must the Respondent do to stop the backpay clock from continuing to tick away? As we shall see, the proposed order pretends to address this question by introducing a wholly new concept, that of a “prospective rescind[ing]” of the offending pay raises. However, the new concept remains a baffling one, for “prospective rescission” is hardly a self-defining expression, and the footnote which purports to clarify the concept is itself a study in obscurantism and evasion.

These are the opening passages of the “affirmative action” section of the Order the General Counsel asks the Board to sign, together with the footnote which purports to clarify what “rescind prospectively” means:

[The Respondent shall] take the following affirmative action:

1. Rescind prospectively: [fn. 20]]

(a) the wage increases awarded employees Deborah Mackron, Alicia Ojeda, and Art Tolentini on or about December 1, 1995;

(b) the wage increases awarded Mackron on or about May 1, 1996, and on or about May 1, 1997;

(c) the wage increases awarded Ojeda on or about June 5, 1996, on or about August 21, 1996, and on or about August 21, 1997.

....

[fn. 20 text] By analogy, in cases involving unlawful unilateral increases in employee benefits, the Board does not routinely order retroactive rescission, but orders revocation only if the union so requests. [“E.g.” citations to unilateral-change-in-“benefits” cases are omitted.]

Before turning to the “make-whole” provisions of the Order proffered by the General Counsel, we need to pause to pursue some threshold questions of definition that will have critical significance to the make-whole provisions: Do you understand now what the General Counsel means by “rescind prospectively?” Neither do I. Equally important, do you understand any more clearly what *action* the Respondent is supposed to take to accomplish this “prospective rescission?” Me neither. And can you tell when or under what conditions the Respondent must perform whatever act or acts are contemplated by the notion of “prospective rescission?” Nor can I, except by making an assumption about what the General Counsel intended by inconclusively invoking the “analogy” in the quoted footnote. The main question for investigation is this: Why did the General Counsel proffer an analogy to the Board’s unexceptionable practice in “cases involving unlawful unilateral increases in benefits of leaving it to the union’s option whether or not the employer must “rescind” such benefits? Does the General Counsel mean to suggest in this case—which does not allege or otherwise “involve” any unlawful unilateral changes or other “bargaining” violations under Section 8(a)(5)—that no “rescission” of the offending wage increases will be necessary unless the Union “so requests?” Seemingly so, otherwise footnote 20 is not just obscure in its apparent attempt to clarify a remedial point, but is entirely devoid of any significance to the discussion. (However, if that’s what was intended, why was the General Counsel so obviously unwilling to say so in plain English?) And even assuming in any case that it would take the Union’s “request” to trigger a duty on the Respondent’s part to “rescind” the offending pay raises, we have come back round the circle to the question which the General Counsel has unworthily sidestepped in each new expression of the proposed remedy, namely: What *action*, exactly, would the Respondent be required to take to “rescind” the raises in question, assuming that the Union were to “request” that it do so? (Below I will ask a more interesting question still: What happens under the General Counsel’s proffered order if the Union does *not* “so re-

quest?”) In short, we are still left in doubt about what “rescind” means when referring to raises—indeed, a series of raises—already conferred; and we are left even more baffled as to what “rescind” could mean in Ojeda’s case, given her ex-employee status.

It may be asked why any of the questions posed here (with more to follow) need to be answered now, instead of being “deferred to compliance,” as the General Counsel clearly would prefer. To start with, it matters because the General Counsel has recommended that the Board issue an admittedly unprecedented form of remedial Order, one which, moreover, the General Counsel has described in significantly different terms over the course of this litigation, and one whose very meaning and basic mechanics remain in significant doubt—even, apparently, in the minds of its creators. To sign off on the form of Board Order most recently proposed by the General Counsel without having clearer answers to such questions beforehand would be like buying the proverbial pig in a poke. The answers sought here (and below) also matter profoundly to notions of fairness and due process in the administration of the Act. If the Board signed the proffered Order, a compliance officer would have no guidance whatsoever from the murky text of the order, and thus virtually unlimited discretion to answer any of these questions any way she/he chose. Thus, to take an especially pertinent example, if this Order were adopted, one of the many important compliance questions would necessarily be what the Respondent can or must do to cap its ongoing liability for “backpay.” As I discuss next, it’s not hard to find in the text of the proffered order a superficial answer to this question: Ongoing backpay liability will not be capped until whatever date the Respondent takes whatever “prospective-rescission” action the General Counsel wants it to take. However, the real difficulties are in determining what this duty of “prospective rescission” entails—especially if, as it appears, the General Counsel intends it to be only a “conditional” duty, one triggered only by a “request” of the Union.

Set forth below are the “make-whole” provisions of the Order the General Counsel urges the Board to embrace, provisions which incidentally make it clear that it is only by “rescinding” the unlawful pay raises “prospectively” that the Respondent will have stopped the backpay clock from continuing to tick on. (In each case below, the italics are my own, and I have omitted footnotes appended by the General Counsel, which are irrelevant for these purposes.)

The first provision identifies the basis for computing the backpay owed to “other cashiers” (and to other cashiers alone) to remedy the December 1995 pay raises and retroactive payments given in varying amounts to the three favored workers. This provision states:

2. Make whole all food and beverage *cashiers other than* Mackron, Ojeda, and Tolentini by paying each such employee:

(a) an amount equal to the \$1282.80 retroactive payment awarded Tolentini on or about December 1, 1995, with interest, through the effective date on which Respondent rescinds prospectively the 1995–1997 wage increases granted Mackron, Ojeda and Tolentini.

The next example defines the backpay obligation supposedly owed to a far broader class of putative backpay recipients to remedy the \$3 raise to Mackron of May 1, 1996, and the 50-cent additional raises both she and Ojeda received in 1997:

3. Make whole *all employees in the bargaining unit* other than Mackron, Ojeda, and Tolentini by paying each bargaining unit employee:

(a) an amount equal to the \$3 per hour wage increase awarded Mackron on or about May 1, 1996, with interest *through the effective date on which Respondent rescinds prospectively* the 1995-1997 wage increases awarded Mackron, Ojeda and Tolentini, and

(b) an amount equal to the \$.50 per hour wage increase awarded Mackron on or about May 1, 1997, with interest, *through the effective date on which Respondent rescinds prospectively* the 1995-1997 wage increases awarded Mackron, Ojeda and Tolentini *or, alternatively*, an amount equal to the \$.50 per hour wage increase awarded Ojeda on or about August 21, 1997, with interest, *through the effective date on which Respondent rescinds prospectively* the 1995-1997 wage increases awarded Mackron, Ojeda and Tolentini.

By now, the key elements of the General Counsel's ultimate approach to the extraordinary remedy should be apparent, even if the meaning of or reasoning behind some of those elements remains elusive: Significantly, the highest raise or retroactive payment "awarded" to any of the three at any given point becomes the arbitrarily-selected measure of the ongoing *rate* of the backpay said to be owed and continuing to accrue to "all other employees in the bargaining unit." Again, it is clear that under the proposed order, the Respondent's act of "rescinding prospectively" all of these raises (whatever that means) will be the only act which will put a cap on the Respondent's ongoing backpay liability.

With all this in mind, let us now return to key questions raised earlier, and to the General Counsel's answers, to the extent they are discernible. But this time let's focus on the practical implications of those apparent answers: Does the General Counsel contemplate under this proposed order that the Respondent will operate under a duty to "rescind prospectively" any given offending raise if the Union "so requests?" Apparently so, if the footnote 20 "analogy" was genuinely intended to clarify what is meant by "rescind prospectively." And if this is so, one necessary implication is that the injunction to "rescind prospectively" becomes only a conditional one, one triggered only if the Union exercises the option to "so request." Again, however, if this is so, we still don't know what the Respondent is supposed to *do* to honor such a request. But we haven't even gotten yet to perhaps the most difficult questions of all lurking beneath the General Counsel's proposed order: What happens if the Union does *not* "so request?" Specifically, what happens to the Respondent's backpay liability for, say, Mackron's \$3 raise if the Union elects not to "request" that it be "rescinded?" The apparent answer under the proposed order is as simple as it is odd—the Respondent's backpay obligation to "all [other] employees in the bargaining unit" continues to grow at the rate of

\$3 dollars for every hour worked by all other employees since May 1, 1996 (with an additional 50-cent per hour to be tacked-on as of May 1, 1997), plus interest. . . . Forever.

If the head-scratching oddity of this idea alone does not justify rejecting the proposed order, consider the further practical implications of the scheme: If the Respondent's duty to "rescind prospectively" is only a conditional one, depending on what the Union wants (as in the case of "union-option" remedies for unilateral-change-in-benefits violations), but if the *act* of "rescinding prospectively" is used at the same time to define the point at which the Respondent's backpay liability becomes capped, this necessarily leaves the Union in the position of being able to engineer it so that the Respondent's ongoing backpay liability can *never* be capped. All the Union need "do" to keep the backpay mounting is to do nothing, i.e. refrain from "requesting" the Respondent to "rescind" the various unlawful raises. Indeed, it's almost impossible to envision a situation in which the Union, armed with that kind of power, would choose to "request" that the Respondent take a "rescission" action which, under the General Counsel's proposed Order, would effectively kill the golden goose. In my view, this is an absurd outcome. And even though the General Counsel may not have envisioned precisely such an outcome, I remain at a loss to understand what the architects of this proposed order *did* envision as a backpay-capping event that would avoid such an outcome.⁷⁰ And frankly, I doubt that those speaking for the General Counsel ever had anything clearly in mind when, in the ultimate formulation of the extraordinary remedial request, they not only introduced the novelty that the Respondent must "rescind" the offending raises "prospectively" (apparently meaning "upon the Union's request"), but also made the date of such a rescission the effective date on which the backpay cash-register would stop ringing.

Summing up: The General Counsel effectively foreclosed any possibility of meaningful settlement discussions by insisting from the beginning that any settlement required the Respondent to submit to and comply with an extraordinary backpay remedy which the General Counsel nevertheless was unable to express in other than Delphic terms. In fact, the General Counsel has at various stages advanced significantly different terms for compliance, none of them susceptible of retranslation into anything like a formula through which the demanded backpay might be calculated. The General Counsel's proposed order is not a prescription for remedying proven violations and

⁷⁰ What *other* act or event might the General Counsel have envisioned as working to cap the supposed backpay liability? There is no answer in the proposed order, but one possibility comes to mind: Assuming that the Respondent somehow could determine what the General Counsel means by "rescind," the Respondent's own "unilateral rescinding" of the offending raises might conceivably do the job. But the General Counsel probably wouldn't buy that approach, especially not if we take seriously the "analogy" to "unilateral-change-in-benefits" remedies invoked in the General Counsel's fn. 20, above. Thus, it's hard to see how the same General Counsel who, for remedy purposes, sees a compelling remedial analogy between the violations in this case and the violations in a "unilateral-change" case, could accept the notion that the Respondent could cap its ongoing backpay liability by itself acting unilaterally to "rescind" the offending raises.

for otherwise promoting the health and well-being of policies embedded in the Act; it is simply an open-ended invitation to arbitrary government action. In the next subsection I will explain why I deem it unnecessary for “remedy” purposes to order the Respondent to pay “backpay” to “other employees.” But even if I were wrong in that judgment, I would still find that a “make-whole” remedy would be inappropriate to impose in the unique circumstances of this case, where the General Counsel has never been able to tell the Respondent in any concrete terms, much less *consistent* concrete terms, what it must do to remedy the alleged violations—or, equally important, what steps the Respondent could take to put a cap on its supposedly ongoing backpay liability. I regard it as fundamentally offensive to notions of fairness and due process—and, not least, contrary to the Board’s own policies strongly encouraging voluntary settlements before trial—for the General Counsel to bring a respondent to trial without being able to identify with reasonable clarity what the respondent could do to avoid the trial. It is doubly offensive that even with the benefit of the passage of more than a year after issuing the original complaint, the General Counsel’s proposed remedial order still suffers terminally from opacity of intention.

C. The Union’s Proposed Board Order

On brief, the Union has proposed an order for a “monetary remedy” which is in many ways similar to the General Counsel’s proposed order, particularly insofar as it uses the highest unlawful raise or retroactive payment conferred at any given point as the measure of the backpay necessary to make “other” workers “whole.”⁷¹ However, in a significant departure from the General Counsel’s proposed remedy for the December 1995 pay actions (i.e., backpay for “cashiers-only”), the Union’s proposed order envisions a unitwide backpay order (i.e., backpay to “all employees represented by Local 814 other than Mackron, Ojeda, and Tolentini”). Finally, in an even more radical departure from the General Counsel’s position, the Union’s proposed order does not call for any “rescinding” of any of the unlawfully-conferred pay raises, “prospectively” or otherwise. (Necessarily, therefore, under the Union’s scheme, any unilateral “rescission” of the unlawful raises by the Respondent would not work to cap the Respondent’s ongoing backpay liability.) Rather, the Union’s own proposed Order envisions a wholly different backpay-capping event, one supposed to emerge as a result of some future collective-bargaining process. Thus, by way of representative example, under the Union’s Order the Respondent would “remedy” the \$3 raise to Mackron by,

Mak[ing] whole all employees represented by Local 814 other than Mackron, Ojeda and Tolentini by paying each

⁷¹ Thus, like the General Counsel, the Union seizes on the 75-cent hourly pay raise to Tolentini and the \$1282.80 retro pay he received as the basis for “making whole” “other” unit employees for the December 1995 pay actions affecting the favored three. Likewise, under the Union’s scheme, Mackron’s \$3 raise on May 1, 1996, becomes the measure of backpay accruing to other employees (“all” of them) on and after that date, and Mackron’s 50-cent raise on May 1, 1997, is to be remedied by an additional 50-cent raise to “all” other bargaining unit employees to be made retroactive to the latter date.”

such employee . . . an amount equal \$3.00 per hour wage increase . . . with interest, effective as of May 1, 1996 *and continuing until Respondent and Local 814 reach agreement on the terms of a new collective bargaining agreement or until a bona fide impasse is reached on wage rates in negotiations for a new collective bargaining agreement.* [Emphasis added.]

To the extent the Union’s proposed remedy is similar to the General Counsel’s, I have already indicated why I disagree. Neither do the departures by the Union from the General Counsel’s position strike me as steps in a better direction. The Union posits that the Respondent’s backpay liability will remain ongoing until the Union and the Respondent shall have reached either agreement on a “new collective bargaining agreement,” or “impasse” on wage rates in the context of bargaining for a “new collective-bargaining agreement.” What is lacking in the Union’s brief is any defense of this “agreement or impasse” provision as an appropriate device for capping a supposed “backpay” obligation arising from bribes and payoffs made by the Respondent to a tiny minority of antiunion workers. Especially in the absence of defense or explication, the future-bargaining linkage proposed by the Union seems entirely arbitrary.

D. A “Make-Whole” Remedy is Unnecessary and Inappropriate to Remedy the Violations

While the Act gives the Board broad discretion when it comes to fashioning remedies for unfair labor practices, the operative word is “remedies,” and Board orders, which are merely “punitive” in character, will be struck down for that reason. *Republic Steel Corp.*, 311 U.S. 7, 11–12 (1940), and authorities cited (1940). See also *Auto Workers v. Russell*, 356 U.S. 634, 643 (1958); *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961). Moreover, any monetary remedy ordered by the Board must be “tailored to the actual, compensable injuries suffered.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). As discussed below, I think the Board would overreach its statutory powers if it were to embrace even the concept of a “make-whole” order in the proven circumstances of this case.

Neither the General Counsel nor the Union claims to have discovered precedent for the make-whole order they commonly seek, albeit in differing terms. And virtually all of the cases they cite in their briefs as collaterally instructive are plainly inapposite to this case. (The General Counsel’s “argument” on brief in support of the proposed Board Order consists of four assertive sentences, each followed by case citation. But each of the assertions is so blandly unremarkable in content, so inconclusive in significance, and so peripheral to the questions at issue that no case citations would have been necessary.⁷²)

⁷² Essentially everything the General Counsel has to say in defense of the Board Order proposed on brief is set forth in the following passages of the government brief (pp. 21–22; emphasis added):

The Board has fashioned substantial equitable remedies in response to a variety of situations and violations, including those involving harm created by an employer’s discriminatory conferral of improved wages and benefits upon employees. See, e.g., *B&D Plastics*, 302 NLRB 245 (1991) (Board ordered new election); *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1283 (1979) (Board issued bargaining order). The Board has order [sic] the payment of wage increases as part of its

However, the Union cites one case on brief, *Rubatex Corp.*, 235 NLRB 833 (1978), as “a case with facts remarkably close to those presented here,” and the Union further implies that the remedy ordered in that case is not meaningfully different from the remedy sought by both prosecuting parties in this case.⁷³ I disagree on both counts. This case is materially distinguishable on its facts from *Rubatex* for substantially the same reasons explained by the Board in *Eby-Brown Co., L.P.*, 328 NLRB 496 (1999) (explaining “Amended Remedy” and distinguishing *Rubatex*). Significantly, in *Eby-Brown*, the Board rejected a *Rubatex*-influenced remedy recommended by the administrative law judge which was to some extent similar in approach to that of the prosecuting parties herein, and the Board substituted instead a remedial order which is a far cry from what is sought in this case by the General Counsel and the Union. Moreover, *Eby-Brown* (which, incidentally, is *not* invoked by either the Union or the General Counsel) is itself critically distinguishable in legal context and significance from this case: There, the complaint alleged and the Board found that the employer had unlawfully “den[ie]d bonuses, or grant[ed] reduced bonuses to [three identified workers] because of their union support and activities.” Here, as I discuss next, the situation is materially different.

As noted in section I.B., above, the General Counsel has asserted in passing remarks on brief that there exists a class of “bargaining unit employees other than Tolentini, Mackron, and Ojeda . . . who were *denied* pay raises because they did *not oppose the Union* and support Respondent.” It’s hard to start with to make any sense of this awkwardly inverted and negativized assertion, doubly so when you recall that the General Counsel otherwise insists over and over again that Mackron, Ojeda, or Tolentini received their pay raise “rewards” because of their *uniquely* important roles in the decertification campaign—not just because they “opposed the Union and supported Respondent.” Moreover, trying to harmonize the General Counsel’s contentions and express them in more affirmative terms leads to strangely sterile—indeed, tautological—results. For example: “The Respondent unlawfully denied pay raises to everyone who did not behave as Mackron, Ojeda, or Tolentini did.” (Or, “The Respondent unlawfully denied pay raises to everyone who was not Mackron, Ojeda, or Tolentini.”) More important, the complaint never alleged that any employees were unlawfully “denied” a pay raise; much less that they were denied a raise “because they did not oppose the Union and

support Respondent.” (Still less did the complaint allege that anyone was denied a raise because s/he “supported the Union.”) Moreover, the General Counsel has not troubled to identify any evidence of record which might show that there existed a class of workers who were “denied” pay increases because they did *not* “oppose the Union or support Respondent”—an imagined class which the General Counsel apparently equates with *any* workers who did not *receive* the “huge,” “disproportionately large,” “blatantly excessive” and “unjustified” increases which the General Counsel contends *were* given for discriminatory reasons to Mackron, Ojeda, and Tolentini because of their unique importance. In fact, there is no evidence of record that might support the General Counsel’s assertion that there existed a class of employees (never mind which employees) who *would* have received the “unjustified” wage increases in question *but for* their failure to “oppose the Union and support Respondent.” Indeed, the General Counsel’s rhetoric, emphasizing the “excessive” and “unjustified” nature of the raises given to the favored three because of their uniquely visible and important roles in the antiunion movement makes it hard to take seriously the notion that the Respondent would nevertheless have given raises in these same “blatantly excessive” amounts to *anyone* else, much less to *all* the other employees who met the far less rigorous criteria of being workers “who did not oppose the Union and support Respondent.”⁷⁴ Rather, in the end, it appears that the General Counsel grounds all such assertions on nothing more than a kind of reflexive and reality-blind *presumption*—that for every payoff or bribe to any of the three workers said to be the most active and influential in the antiunion movement, it follows necessarily that every other employee in the bargaining unit somehow suffered a “loss” in the same amount for which s/he must be “made whole.” There is no basis in common experience to presume such a thing, and so, as presumptions go, this one would have to be understood in a different light, as something closer to an arbitrary legal fiction. In any case, I regard it as especially inappropriate to examine such notions any further where, as here, the General Counsel never alleged that the Respondent was guilty of pay discrimination *against* any other employee or employees.

I have already noted how essentially empty of useful content is the General Counsel’s inconclusive “argument” in support of the extraordinary and unprecedented make-whole remedy The Union’s arguments for such a remedy are also largely substance-free, relying as they do on familiar nonsequiturs and conclusionary, circular, and unconvincing formulations. Thus, purporting to explain the assertion that “a monetary remedy is *necessary to reverse the discrimination practiced by the [Re-*

backpay orders. *E.M. Krovitz, Inc.*, 238 NLRB 82, 86 (1978); *Davis Food City*, 198 NLRB 94, 99 (1972). Moreover, the Board has awarded backpay after an employer stated that a wage increase, which was withdrawn legally, was not granted because of a union’s organizational activities. [I don’t understand the sentence either, much less its potential significance to the argument.] *Sun Chemical Corp.*, 226 NLB [sic] 646 (1976). The Board has also ordered employers that have closed their operations illegally to reopen their facility and reinstate their discharged employees. See *Serv-U Stores*, 225 NLRB 37 (1976).

Accordingly, in the circumstances herein, the General Counsel urges that the following order be issued to remedy Respondent’s violations of the Act.

⁷³ The General Counsel’s brief contains no mention of *Rubatex*.

⁷⁴ It is a significant inconsistency for purposes of this remedy discussion that the class-description employed by the General Counsel in the quoted passage (“bargaining unit employees other than Tolentini, Mackron, and Ojeda . . . who were denied pay raises because they did not oppose the Union and support Respondent”) is quite different from and cannot possibly be coextensive with the class of “all other employees in the bargaining unit” who are to be “made whole” under the General Counsel’s proposed backpay scheme for remedying the 1996 and 1997 raises to Mackron and Ojeda. For surely, there must be many among that backpay-beneficiary class who *did* “oppose the Union and support Respondent.”

spondent],” the Union simply reasserts without further explication that “the remaining employees were *discriminated against* by failing to receive the equivalent merit raises.” (U. Br. at 65; emphasis added.)⁷⁵ I have already addressed the crippling defects in such assertions, and therefore I won’t repeat myself here.

The Union also implicitly invokes “deterrence” as a basis for ordering a “monetary remedy,” stating (Id. at 55): “Without a monetary remedy there is no incentive for an employer to comply with the terms of the National Labor Relations Act.” This argument deserves brief additional discussion: An order having substantial “monetary” impact on the Respondent surely would have a tendency to deter the Respondent from giving bribes or payoffs to selected antiunion employees in the future. But that would be true of all fines or other monetary “penalties,” and, therefore, it is not sufficient justification that the “monetary remedy” would have a tendency to deter future unlawful action. See *Republic Steel Corp.*, supra (311 U.S. at 12):

[I]t is not enough to justify the Board’s [remedial] requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

There is much reason to believe on this record that the “make-whole” remedy envisioned (however vaguely or inconsistently) by the prosecuting parties was born out of a belief that a “mere” cease-and-desist order (see last footnote) could have little or no value in deterring violations such as those found in this case, and that the only effective way to prevent repetitions of the same kinds of violations in the future would be to hit the Respondent hard in the pocketbook with a “back-pay” order—and never mind that the Union never charged, the General Counsel never alleged, and no one ever proved that any other employees had ever suffered any identifiable monetary “losses” as a consequence of the Respondent’s misconduct. To me, this makes the proposed remedy not merely extraordinary, but essentially punitive in its conception, and rejectable for that very reason.

E. Concluding Discussion; Recommended Order

The prosecuting parties, particularly the Union, surely overstate the case when they posit the existence of only two remedial alternatives—either a “mere” cease-and-desist-order, or an order for “affirmative-action” featuring backpay to other employees. As I see it, the remedial choices are not at all that stark. Neither is any affirmative-action order short of a backpay order without deterrent effect. Thus, my recommended remedy

⁷⁵ See also *id.* at 55, where the Union states in an essentially tail-chasing passage:

If only a cease and desist order is issued, Respondent will have gained the fruits from its unlawful conduct and will not be required to undertake any action which would effectively remedy its unfair labor practice. Orders limited to mere cease and desist orders do not effectuate the policies of the Act because they encourage employers to engage in such conduct since there is no effective remedy.

includes not just a cease-and-desist order, but an order requiring the Respondent affirmatively to preserve all payroll and related records and to make such records available to the Regional Director upon the latter’s request, for a period deemed reasonable by the Regional Director but not to exceed 2 years from the date the Respondent unmistakably agrees to comply. And presumably, by thus giving the Regional Director such ongoing oversight of the Respondent’s pay practices, the Respondent would be significantly inhibited from engaging in the kinds of rank pay favoritism which I have found occurred in this case.

Accordingly, on these foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁶

ORDER

The Respondent, Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel, Santa Monica, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving pay raises or any other form of financial inducement to Art Tolentini, Deborah Mackron, or to any other employee or employees to reward or encourage their initiating or supporting a movement to decertify Hotel Employees and Restaurant Employees Union Local 814, AFL–CIO or any other labor organization.

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

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

(a) For a period deemed reasonable by the Regional Director but not to exceed 2 years from the date the Respondent unmistakably agrees to comply with this Order, 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 necessary to monitor the Respondent’s compliance with this Order.

(b) Within 14 days after service by the Region, post at its hotel in Santa Monica, California, copies in English and Spanish of the attached notice marked “Appendix B.”⁷⁷ The copies of the notice to be posted shall be on forms provided by the Regional Director for Region 31. Immediately after they are received from the Regional Director, they shall be signed by the Respondent’s authorized representative and posted and maintained by the Respondent for 60 consecutive days in conspicuous places, including all places where notices to employees are

⁷⁶ 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.

⁷⁷ 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.”

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 printed in English and Spanish to all current employees and former employees employed by the Respondent at any time since December 1, 1995.

(c) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

Ann Cronin-Oizumi, Esq., for the General Counsel.
Joseph E. Herman and Melissa L. Goulet, Esqs. (Morgan, Lewis & Bockius), of Los Angeles, California, for the Respondent-Employer.
Jonathan E. Davis, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party-Union.

DECISION AND ORDER PARTIALLY DISMISSING COMPLAINT

PRELIMINARY STATEMENT OF THE CASE; ITS UNIQUE PROCEDURAL HISTORY; THE 10(b) ISSUE IT RAISES AT THE THRESHOLD

TIMOTHY D. NELSON, Administrative Law Judge. At the heart of both of the cases (Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel and Hotel Employees and Restaurant Employees Union Local 814, AFL-CIO and Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel and Hotel Employees and Restaurant Employees Union Local 814, AFL-CIO and Art Tolentini, Petitioner. Cases 31-CA-22971 and 31-RD-1317) is the claim, set forth in the General Counsel's complaint in Case 31-CA-22971 that Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act when, over the course of the 29-month pendency of the decertification election-petition in Case 31-RD-1317, it granted a series of wage increases to two voting unit employees, Deborah Mackron and Alicia Ojeda, "in order to encourage [their] anti-union efforts, and in order to discourage other employees from supporting the Union and/or engaging in union or other [protected] concerted activities." As further described below, I conducted a 2-day hearing in Los Angeles, California, on November 30 and December 1, 1998, during which the merits of the complaint were not litigated, only the facts relevant to the Respondent's 10(b) defense.

The Union in question is Hotel Employees and Restaurant Employees Union Local 814, AFL-CIO, the historical representative of a unit of some 250 hotel and food and beverage service workers employed at the Respondent's Santa Monica hotel and restaurant facility. The decertification election in question was held on October 1, 1977, pursuant to a petition

filed on May 26, 1995, by Art Tolentini, a voting unit employee. Following postelection proceedings held to resolve challenges, the Regional Director for Region 31 issued a revised tally of ballots indicating that 120 employees had cast valid ballots against continuing representation by the Union, 108 employees had cast valid ballots for continuing representation, and 3 persons had cast ballots under challenges that were not resolved because they could not affect the outcome.¹

These cases also involve a unique and confusing series of procedural developments culminating in the post-complaint consolidation of the issues raised by the complaint with the election-objections case in Case-31-RD-1317, a case that had been transferred to the Board months prior to the issuance of the Regional Director's consolidation order. The relevant background is as follows:

In the immediate aftermath of the election, the Union had filed a number of objections to alleged preelection misconduct by the Respondent, none of which concerned the wage-increase issue that is the subject of these cases. (As elaborated in subsequent findings, the Union did not become aware of the wage increases given to Mackron and Ojeda until sometime in late November 1997, and the Union did not make the increases the subject of an unfair labor practice charge in Case 31-CA-22971 until December 3, 1997.) On March 11, 1998, following an administrative investigation into the Union's objections, and during the pendency of the separate investigation into the Union's wage-increase charges, the Regional Director issued a Supplemental Decision on Objections, Order Directing Hearing, and Notice of Hearing, ordering that a hearing be conducted on 17 enumerated objections, none of them involving wage-increase issues. A hearing officer designated by the Regional Director thereafter conducted a 5-day hearing in May 1998, and on June 29, 1998, issued a report and recommendations to the Board, recommending that some of the Union's objections be overruled but that certain others be sustained, and that the election be set aside based on the latter. Both the Union and the Respondent took exceptions to various aspects of these recommendations, and those matters are now pending before the Board. None of those issues is before me for consideration.

On June 5, 1998, during the interval between the closing of the objections hearing in Case 31-RD-1317 and the issuance of the Hearing Officers Report and Recommendations, the Regional Director issued a complaint and notice of hearing in Case 31-CA-22971, alleging that the wage increases given to Mackron and Ojeda during the preelection period violated Sections 8(a)(3) and (1). More than 2 months later, however, on August 26, 1998, by which point the election-objections proceedings were now pending before the Board, the Regional Director issued a Second Supplemental Decision on Objections, Order Directing Hearing, Notice of Hearing, and Order Consolidating [the instant] Cases. In pertinent part, the Regional Director said therein as follows:

This Second Supplemental Decision on Objections is required to correct an inadvertent omission from my March 11, 1998 Supplemental Decision [supra]. In the lat-

¹ *Hearing Officer's Report and Recommendations* respecting objections, Case 31-RD-1317, dated June 29, 1998.

ter, I neglected to consider certain conduct of the Employer, the grant of a wage increase [sic], which I learned of during the investigation of the related fourth amended unfair labor practice charge filed by the Union on December 3, 1997, in Case 31-CA-22971. Although this conduct was not specifically alleged as objectionable conduct by the Union in its timely filed objections, in the interests of making certain that employees exercise their franchise in free and informed manner, I have determined to exercise my authority and treat the alleged conduct as such which may warrant the setting aside of the election. *White Plains Lincoln Mercury, Inc.* 288 NLRB 1133, 1137 (1998).

.....

In the Complaint and Notice of Hearing which issued in related Case 31-CA-22971, this additional conduct is alleged as unfair labor practices in paragraphs 8(b) and (c), and 9(b), (c), and (d) therein. The conduct consists of the grant of wage increases to two unit employees. Inasmuch as these additional investigative disclosures raise substantial and material factual and legal issues, and are closely related to and involve the same evidence as certain allegations set forth in the aforementioned Complaint and Notice of Hearing, I find that the issues raised by these other investigative disclosures can best be resolved by a hearing together with the issues raised in the aforementioned Complaint and Notice of Hearing.

.....

IT IS HEREBY ORDERED that a hearing be held concerning the allegations described supra. . . . IT IS FURTHER HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that the allegations described supra in connection with "Other Investigative Disclosures," be consolidated with Case No. 31-CA-22971 for the purposes of hearing, ruling and decision by a duly designated administrative law judge². . . and that thereafter, Case 31-RD-1317 be transferred to and continued before the Board in Washington, D.C.³

² In purporting to act pursuant to Sec. 102.33 of the Board's Rules and Regulations, it appears that the Regional Director had specifically in mind either or both of the following subsections of Sec. 102.33: Subsec. (4)(c): "The Regional Director may, prior to hearing, exercise the powers in paragraph (a)(2) and (4) of this section with respect to proceedings pending in his Region." Subsec. 4(d): "Motions to consolidate or sever proceedings after issuance of complaint shall be filed as provided in s 102.24 and ruled upon as provided in s 102.25, except that the Regional Director may consolidate or sever proceedings prior to hearing upon his own motion. Rulings by the administrative law judge upon motions to consolidate or sever may be appealed to the Board as provided in Section 102.26."

³ In a footnote, the Regional Director advised that "[t]his direction of Hearing is subject to special permission to appeal in accordance with Section 102.69(1)(1) and 102.65(c) of the Board's Rules and Regulations." So far as this record shows, the Respondent did not seek special permission from the Board to appeal from the Regional Director's consolidated hearing order.

Notwithstanding this, however, my own jurisdiction to hear and decide the "objections" question (i.e., whether the alleged unfair labor

practices would, if committed, amount to misconduct warranting the setting aside of the election) may depend on whether the Regional Director had jurisdiction in the first instance to order a consolidation (on August 26, 1998) of this unfair labor practice proceeding with an objections case that had arguably escaped the Regional Director's jurisdiction 2 months earlier, following the issuance (on June 29, 1998) of the Hearing Officer's Report and Recommendations to the Board.

In sum, the Regional Director's post-complaint consolidation of the wage-increase issue with an election-objections proceeding has placed the objections case in a jurisdictionally uneasy posture, with the largest part of it currently pending before the Board on exceptions to a number of objections issues litigated in the May 1998 hearing,⁴ and a relatively smaller part of it nominally under my own jurisdiction as to an issue that was not raised or litigated in the already-concluded objections hearing.

Setting aside these procedural anomalies for the moment, it remains clear that, absent the applicability of some special legal doctrine warranting a "tolling" of the governing statute of limitations, all but one of the substantive counts alleged in the instant complaint are facially vulnerable to dismissal for untimely prosecution, because all but one of those counts are based on a charge filed more than 6 months after the alleged misconduct attacked in those counts. Thus, as previously noted, the instant complaint, issued by the Regional Director on June 5, 1998, is based on the Union's "Fourth Amended charge" in Case 31-CA-22971, filed on December 3, 1997. (All other, previously filed charges in that case were either dismissed or withdrawn.⁵)

practices would, if committed, amount to misconduct warranting the setting aside of the election) may depend on whether the Regional Director had jurisdiction in the first instance to order a consolidation (on August 26, 1998) of this unfair labor practice proceeding with an objections case that had arguably escaped the Regional Director's jurisdiction 2 months earlier, following the issuance (on June 29, 1998) of the Hearing Officer's Report and Recommendations to the Board.

⁴ In his June 29, 1998 Report and Recommendations to the Board, the hearing officer recommended that some of the Union's objections be overruled but that certain others be sustained, and that the election be set aside based on the latter. Both the Union and the Respondent took exceptions to various aspects of these recommendations, and those matters are still pending before the Board. None of those issues is before me for consideration

⁵ The Union's original charge in Case 31-CA-22971 was filed on September 26, 1997; it alleged that the Respondent had committed a variety of 8(a)(1) violations "[w]ithin the past six months[.]" none of them related thematically or substantively to the wage-increase charge it made in its December 3, 1997 Fourth Amended charge. (The same is true of the First-Amended, Second-Amended, and Third-Amended charges discussed below.) It filed the First Amended charge on October 15, 1997, the Second Amended charge on October 22, 1997, and the Third Amended charge on October 27, 1997. (In each case, the Union "incorporated by reference" the elements in its previous charge(s) before adding new claims not contained in earlier versions.) On January 7, 1998, the Regional Director issued two separate letters pertaining to the pending original, First amended, and Second Amended charges: In one (R. Exh. 6, p. 3, inadvertently misdated January 7, 1997), the Regional Director advised the parties that the Union had withdrawn with his approval that portion of the original, First Amended, and Second Amended charge alleging that the Respondent violated the Act by videotaping Union organizers. In the other (R. Exh. 6, p. 6) the Regional Director notified the parties that he was dismissing the balance of the original, First Amended, and Second Amended charges. On February 18, 1998, the Regional Director further notified the parties by letter (R. Exh. 6, p.3) that he was refusing to issue a complaint on a new matter raised in the Union's Third Amended charge, alleging that the Respondent's agents had challenged Union supporters to fight during "captive-audience" meetings and had made other threats during Union meetings. On March 27, 1998, the Office of the General Counsel denied the Union's appeal from the Regional Director's (January 7,

The December 3 charge alleged pertinently that “[w]ithin the past six months, the Employer . . . grant[ed] wage increases to Deborah Mackron and Alicia Ojeda to reward and encourage anti-union animus.” However the complaint does not limit itself to attacking wage increases occurring within the 6-month period preceding this charge; rather it calls into question certain wage-increases admittedly given to those employees as remotely as 19 months prior to the charge, in the case of Mackron, and 18 months prior to the charge, in the case of Ojeda.

Specifically, the complaint attacks each of the following hourly wage increases given to Mackron and Ojeda as having been conferred to “encourage [their] anti-union efforts, and in order to discourage other employees from supporting the Union and/or engaging in union or other [protected] concerted activities[.]” all in violation of Section 8(a)(3) and (1) of the Act:

Mackron (pars. 8(b) and (c)): \$3.00 on May 1, 1996; 50 cent on May 1, 1997.

Ojeda (pars. 9(b) through (d)): \$1.00 on June 5, 1996; \$1.00 on August 21, 1996; 50 cent on August 21, 1997

The Respondent’s answer denies that its granting of the various increases to Mackron and Ojeda was in any way unlawful, but the Respondent further avers as an affirmative defense that “the complaint is barred in whole or in part by the six-month statute of limitations set forth in Section 10(b) of the Act,” and must be dismissed in whole or in part for that reason alone.

In part as a result of my pre-trial direction, and in part as a result of the illness of counsel for the General Counsel, the facts bearing on the Respondent’s 10(b) defense were the only facts that were litigated in a hearing I conducted in Los Angeles, California, on November 30 and December 1, 1998, at the conclusion of which I directed the parties to submit briefs on the 10(b) issue by December 14, 1998,⁶ and directed that additional proceedings on remaining issues would begin on January 4, 1999.⁷ The 10(b) question is the only one I address in this decision.

After considering the parties’ briefs, and based on the facts and the reasoning set forth below, I judge that the complaint is barred by Section 10(b) except insofar as it attacks the most recent of the wage increases in question, that given to Ojeda on August 21, 1977. Accordingly, I will dismiss all other counts in

1998) refusal to issue complaint as to the nonwithdrawn portions of the Union’s original, First Amended, and Second Amended Charges.

⁶ On the Union’s unopposed written request, I subsequently extended the deadline for receipt of 10(b) briefs to close of business on December 15, 1998. All parties (save RD Petitioner Tolentini, who did not appear in the proceedings despite prior notice) filed briefs on or before the extended, December 15 deadline.

⁷ During prehearing conference calls with the parties, I directed a bifurcation of the litigation previously scheduled (by the Regional Director) to begin on Monday, November 30 and to continue on consecutive days thereafter: After opening the record, the parties would first litigate all facts deemed to be relevant to the 10(b) issue, to be followed by arguments and a ruling on the 10(b) issue, to be followed immediately by the litigation of the merits of any alleged unfair labor practices that might survive 10(b) scrutiny. The (originally unplanned-for) adjournment of further proceedings to January 4, 1999, was necessitated by the fact that counsel for the General Counsel, due to illness, became unable to proceed beyond the 10(b) litigation stage.

the complaint, leaving to further proceedings all questions relating to the impact of this dismissal on the appropriate scope of litigation.

I. FACTS RELEVANT TO THE 10(b) ISSUE

At the time of the decertification election on October 1, 1997, the Union had represented the Respondent’s bargaining unit employees for at least 50 years.⁸ The most recent labor agreement between the parties became effective on December 1, 1994, and is due by its terms to terminate on November 30, 1999. Article VIII of the labor agreement, dealing generally with arbitration procedures, provides, at section 6, that “[i]n no event shall the Employer be liable to the Employee for in excess of sixty (60) days of backpay for any claims, including adjustment of wages, hours or any other benefit except vacation claims.” At a minimum, the provision appears to limit backpay for claims that the employee has not received the proper contractual pay rate to a period of 60 days prior to the making of the claim, no matter how long the employer may have been paying the employee at the incorrect contractual rate.⁹ Accordingly, the provision would appear to require a certain vigilance on the both the employee’s and the Union’s part to ensure that potential grievances over improperly low pay rates be discovered and filed promptly, to avoid running afoul of the 60-day backpay limitation provision.

Although the precise timing is uncertain, the Union had been placed under International trusteeship at some point before—or perhaps soon after—May 26, 1995, when Tolentini filed the petition for decertification election, and all of its former officers had been suspended from their jobs. Thus, during all or nearly all of the attenuated preelection period, the Union was operated under the direction of an International trustee, Tom Walsh. Early on in that same period, however, starting some-

⁸ The agreed-on unit is described as follows:

Included: Full time and regular part-time bartenders, kitchen, banquet, food and beverage, service, and extra employees employed by the Employer at its Santa Monica, California facility, including employees in the job classifications listed on Schedule A of the most recent collective bargaining agreement between the Union and the Employer.

Excluded: Office clerical employees, and all other employees, guards, and supervisors as defined in the Act.

⁹ This interpretation is not seriously disturbed by the generalized testimony of Union Agent Petersen that, in certain grievance cases alleging wrongful discharge or other wrongful adverse action against an employee, arbitrators have, in fact, awarded more than 60 days of backpay to employees found to have been the victims of such adverse actions. However, Petersen eventually made it clear, during examination from the bench, that none of these grievance-cases had been grounded in a simple claim that the Respondent had failed to pay an employee at the contractually-prescribed rate. Indeed, see this exchange:

JUDGE NELSON: Somebody comes to you and says I am suppose[d] to be getting \$8.95 and hour and for the past six months I have only been getting \$8.50, you grieve?

THE WITNESS: Right.

JUDGE NELSON: Does the sixty day back pay c[ause] in that circumstance as you construe the contract, limit your recover to sixty days?

THE WITNESS: It very well could, yes.

time in September 1995, Kurt Petersen, an employee on the International staff who holds a law degree, was designated "Lead Organizer" for the Union, and was soon assigned to take over the day-to-day servicing of the labor agreement with the Respondent, including responsibility for contract-enforcement matters, and to conduct a campaign aimed at convincing the Respondent's bargaining unit employees to retain the Union as their representative.¹⁰ Petersen, assisted by other staff organizers for the Union, and by an in-house organizing committee of the Respondent's employees, conducted many meetings with employees for these purposes during the preelection period, and the wages they were receiving were among the many subjects addressed in these meetings. In addition, Petersen admittedly spent increasing time visiting the Respondent's facility and talking with the employees as the October 1, 1997 election date drew near.

As I summarize next, starting in September 1995, soon after the arrival of Walsh and Petersen on the scene, the Union initiated what proved eventually to be an extensive series of periodic requests for information from the Respondent concerning such matters as the identity of employees in the bargaining unit, their wages, addresses, social security and telephone numbers, hours of work, and other terms and conditions of their employment. Most of the pertinent, information-related correspondence is contained in the Joint Exhibit (J. Exh.) file; however, Respondent's Exhibits (R. Exhs.) 3 and 4 (respectively, the Respondent's February 14, 1996 and November 14, 1997 wage-information responses) are significant supplements to the correspondence in the joint exhibit file.¹¹ The joint exhibit file contains a total of 30 items of information-related correspondence exchanged by the parties not only during the preelection period, but well beyond it, ending with the Respondent's November 3 and 5, 1998 responses (J. Exhs. 29 and 30) to the Union's (Petersen's) most recent request (J. Exh. 28, dated October 23, 1998) for a "[l]ist of all bargaining unit employees [including "all part-time or on call workers"] listed alphabetically by last name, that includes . . . full name, current classification, company seniority date, current address and telephone number [and] current wage rate." It also bears noting at the outset that the General Counsel has not charged the Respondent with having unlawfully refused to furnish any of the information involved in any of the Union's many information requests during the above-described period, nor would the record support such a finding.

The first such request of record was made early in the preelection period, on September 21, 1995 (J. Exh.1). On that

¹⁰ Petersen's testimony clearly indicates that he was appointed for these purposes in September 1995; however he further testified that it was not until "December" 1995 that he began visiting the hotel on a regular basis, increasing gradually to visits on a daily basis in the month before the election.

¹¹ General Counsel's Exhibit (GC Exh.) 4 is a duplicate of J. Exh. 6. It should be noted moreover, that GC Exh. 3, while appearing to be a duplicate of J. Exh. 2 (the Respondent's 7-page response on November 1, 1995 to the Union's September 21, 1995 wage-information request, the latter received as J. Exh.1) is an incomplete version of J. Exh. 2, containing only the last 4 pages of what was actually a 7-page compilation.

date, Walsh wrote to the Respondent's general manager, Bill Worcester, advising of his appointment as International trustee, and further requesting "the following information for *all employees covered by the collective bargaining agreement*" (emphasis in original):

full name: Social Security Number: last known address:
present wage rate: job classification: job title [sic]; present supervisor; current work hours scheduled; department; and job status, such as full-time, part-time, etc.

On November 1, 1995, Worcester replied in writing (J. Exh.2), enclosing what Worcester described in his cover letter as "the information requested regarding our employees covered by the collective bargaining agreement[.]" The enclosure consisted of a seven-page, closely spaced listing of names, addresses, job titles, wage rates, and other information.

On January 9, 1996, the Union (Walsh) made a new written request (J. Exh. 3, addressed to Rafael Igoa, the Respondent's personnel regional director) for a "list of the current wage rates for all Miramar Sheraton employees represented by Local 814."¹² On February 14, 1996, Igoa mailed the requested listing to Petersen's attention (R. Exh. 3) but it was not delivered to the Union until February 21.

As previously noted, the Union had requested the information disclosed in Respondent's Exhibit 3 as being relevant to a pending grievance over the Respondent's alleged failure (on December 1, 1995) to confer a contractually mandated pay increase of 30-cent per hour to all of its "non-minimum wage employees." However, when Petersen received this Respondent's Exhibit 3 listing, he admittedly reviewed it "carefully" with another purpose in mind, as well—to ascertain whether petitioner Tolentini and other employees known to him to be supportive of the decertification effort might have been the beneficiaries of any wage-favoritism. (To make this determination, Petersen compared the wage-data on R. Exh. 3 with the wage-data contained in J. Exh. 2, which the Respondent had furnished about 2-1/2 months earlier. Notably, his study for this purpose included focusing on the wages being paid to Mackron and Ojeda, because he had "heard reports" that both of them were being "given freer [rein] to talk with employees . . . against the Union."¹³ After making this review, however, Peter-

¹² This request was made at the conclusion of a letter that was otherwise devoted to clarifying the Union's position as to a pending grievance over the Respondent's alleged failure (on December 1, 1995) to confer a contractually mandated pay increase of 30 cent per hour to its "non-minimum wage employees." This request also avers that lead organizer Petersen had already made such a request "by facsimile on December 29, 1995." However the said facsimile, if it ever existed, is not of record, and the quoted assertion is thus hearsay, to which I ascribe no evidentiary weight. I likewise accord no weight to any other such representations in the Union's correspondence that are not independently established in the record. Indeed, I received each item of correspondence comprising the J. Exh. file as simply being what it purported to be, i.e., a true copy of the communication, mailed on or about the date indicated, and received in due course by the addressee; and I specifically noted that the items of correspondence were not being received as evidence of the truth of any assertion contained therein.

¹³ Petersen clearly and repeatedly testified—during examination by both the Respondent's counsel and counsel for the General Counsel—

sen judged that there was no basis in the wage-data shown on R. Exh. 3 for any such claim of favoritism.)

Over the course of the next 20 months or so, the Union made a large number and variety of requests for information about the bargaining unit employees other than their wage rates, such as for updated listings of their names, addresses, telephone numbers, social security numbers, job classifications, hours of work, eligibility under the Respondent's medical insurance plan, and other data.¹⁴ In addition, the Union notified the Respondent in March 1996 that the Union had "received reports from employees that the hotel may be in violation of state and federal health and safety regulations, wage and hour regulations, and collective bargaining provisions in [its] restaurants, room service, kitchen, lobby and bell area, laundry and house-keeping," and that, "[b]ased on this concern . . . the Union [intended] effective immediately [to have] its "representatives . . . review the work conditions of bargaining unit employees . . . in the above listed work areas . . . during hotel operating hours."¹⁵

Despite these aggressive pursuits of other kinds of bargaining unit information, however, more than 20 months elapsed before the Union made its next request for bargaining unit wage information. Thus, according to Petersen's testimony, the Union made a request sometime in "October" 1997, after the October 1 election, for another listing of the current wage rates of all bargaining unit employees.¹⁶ On November 14, 1997, the Respondent mailed the requested list (R. Exh. 4) to the Union.

Petersen explained at one point in his testimony (and the Union's attorney emphasizes this explanation on brief¹⁷) that his particular reason for making the request leading to the Respondent's November 14, 1997 wage disclosures was as follows (my emphasis):

The decertification election had taken place on the first of October, shortly after that election there was significant confusion among our members as to what the status of the Union was. *We sent the letter to see whether or not the Company was still going to comply with the contract and in particular to see whether they were going to give those thirty cent raises in December* of, you know, a month or two away.

Based on considerations noted below, I judge that the italicized portion of Petersen's explanations amounts to an unreliable embellishment, intended to obscure the fact that the Union's October 1997 wage-data request had nothing to do with any suspicion that the Respondent was then in breach of any obligations under the labor agreement. Indeed, I judge that the request was motivated by little more than a desire (a) to make a politi-

that his review of R. Exh. 3 in February 1996 included study of both Mackron's and Ojeda's wages for signs of wage favoritism. In the circumstances, I gave scant weight to his implicitly inconsistent testimony elsewhere that he did not become aware of any antiunion sentiments on Ojeda's part until sometime in the latter part of 1996

¹⁴ See J. Exh. 10-25.

¹⁵ See J. Exhs. 9, dated March 23, 1996.

¹⁶ The exact timing and form of this request are not of record; none of the exhibits contains any documentation of such a request occurring in or around October-November 1997.

¹⁷ U. Br. at pp. 7-8.

cal statement, and (b) a wish to secure data that would permit the Union once again to ascertain whether any of the supposed prodecertification employees had been favored with pay increases.

First in this regard, it is obvious that the October 1997 request could not (and, in the event, did not) yield any information about the Respondent's intentions respecting the 30-cent wage increase, which was not due until December 1977. Moreover, during later testimony on examination from the bench, Petersen acknowledged that the October 1997 information request was not "linked to any pending grievance or suspicion of misconduct" on the Respondent's part, but instead, was based primarily on the Union's desire to "assure our members . . . that the Union was still there."¹⁸ Accordingly, Petersen's attempt to suggest that the Union was motivated by a contract-enforcement concern when it made the October 1997 wage-data request is unpersuasive. Indeed, I regard that feature of his explanation as merely reflecting a clumsy attempt on his part to remain consistent with his claims elsewhere that the Union's information requests were always grounded in some kind of specific report or complaint from an employee, or a specific pending grievance, and that the Union did not engage in random, spontaneous "witch hunts."¹⁹ Finally, Petersen's explana-

¹⁸ Thus,

THE WITNESS: In the letter or the letters that we sent during late 1995, early 1996, which we received the February 14th list, that was actually directed or involved a grievance that we had filed asserting that the Company had not, had violated the contract by not providing those thirty cent raises so I needed that list to look at the November—

JUDGE NELSON: That was triggered by a specific [increase] that at least some people weren't getting?

THE [WITNESS]: That is right.

JUDGE NELSON: Is the same true of the request that eventually led to Respondent's Exhibit No. 4, the November 1997 list?

THE WITNESS: Yes, the November 1997 list, the reason why we, or I requested that was because the election had occurred on October 1st, there was significant concern among our bargaining unit members because of what they were hearing that the Company was not going to honor the contract, that the Union somehow automatically was going to leave, so we wanted to send that letter in order to assure our members and ourselves, although we knew it, that the Union was still there and to put the Company on notice that we were expecting them to come, you know, to comply with this request and also pay the wage increases that were due to employees in the month of December, and I think—

JUDGE NELSON: Okay, in that instance it wasn't linked to any pending grievance or suspicion of misconduct?

THE WITNESS: No, in that instance it was coming out of the decertification election and the confusion that ensued and the concerns of our members from that confusion.

¹⁹ The Union's and the General Counsel's position on the 10(b) issue involves in part the claim that, although the Union *could have* requested wage data from the Respondent during the 20-month period when it failed to do so, the Union had *no reason* to make such requests during that period, and, therefore, it cannot be charged with a lack of "due diligence" for such failure during that period. I simply note here that this claim is undermined by the fact that the Union had no particular "reason" for making the October 1997 request, either—other than to make a political point, and, as I discuss below, to ascertain (belatedly)

tions are to a large extent undermined by his admission, described next, about the *use* to which he actually put the wage-information furnished by the Respondent on November 14, 1997.

Thus, Petersen testified that, after receiving this Respondent's Exhibit 4 list, he studied it with some care, and compared it to the wage data he had received in February 1996 (R. Exh. 3, above) to ascertain whether any of the employees known to favor the decertification effort (including Mackron and Ojeda) had received any unusual pay increases in the roughly 20-month interval that had by then elapsed. And it was in the course of making this comparative study, according to Petersen, that he determined that Mackron and Ojeda had received larger increases during that protracted interval than anyone else in the bargaining unit. He then prepared another chart (GC Exh. 8), recapitulating the fruits of these comparisons, and furnished it to the Union's attorneys, with authorization to file an unfair labor practice charge, which Union attorney Davis did, on December 3, 1997, as the "Fourth Amended" charge in this case.²⁰ As previously noted, that charge alleged in material part that "[w]ithin the past six months, the Employer . . . grant[ed] wage increases to Deborah Mackron and Alicia Ojeda to reward and encourage anti-union animus." As previously noted, that charge, in turn, became the trigger for the June 6, 1998 complaint issued by the Regional Director in the name of the General Counsel, who expanded the charge to attack wage increases conferred on Mackron and Ojeda well outside the 6-month period addressed by the charge.

II. ANALYSIS AND CONCLUSIONS; ORDER; FURTHER DIRECTIONS

A. General Principles

Section 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Here, the complaint calls into question a number of wage increases given to Mackron and Ojeda well beyond the 6-month period preceding the Union's December 3, 1997 charge. Indeed, only Ojeda's August 21, 1997 wage increase of 50 cents per hour fell within the 10(b) period. Accordingly, absent some special "tolling" circumstances, the complaint is barred by Section 10(b) insofar as it attacks all but one of the wage increases.

In *U.S. v. Kubrick*, 444 U.S. 111, 116 (1979), the Supreme Court stated pertinently as follows:

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Car-*

whether any employees who favored the Union's ouster might have been the beneficiaries of extraordinary wage increases.

²⁰ Petersen testified that, in authorizing the filing of the charge, he relied exclusively on the information he had gleaned from comparing pay rates disclosed in the Respondent's February 1996 wage-information response (R. Exh. 3) and those disclosed in the Respondent's November 1997 wage information response (R. Exh. 4). He further affirmed that he had received no other information that caused him to believe that Mackron and Ojeda were the objects of wage-favoritism.

penner, 101 U.S. 135, 139, 25 L.Ed. 807 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322, n. 14, 92 S.Ct. 455, 464, n. 14, 30 L.Ed.2d 468 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965), 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945); *Missouri K. & T. R. Co. v. Harriman*, 227 U.S. 657, 672, 33 S.Ct. 397, 401, 57 L.Ed. 690 (1913); *Bell v. Morrison*, 1 Pet. 351, 360, 7 L.Ed. 174 (1828). Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell v. Haverhill*, 155 U.S. 610, 617, 39 L.Ed. 280 (1895); *Bell v. Morrison*, *supra*, at 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136, 58 S.Ct. 785, 790, 82 L.Ed. 1224 (1938).

Moreover, as the 10th Circuit noted in *State of Colorado v. Western Paving Corp.*, 833 F.2d 867, 873 (1987),

Because of their mechanical application, "statutes of limitation result in hardship to plaintiffs in some cases." *Steele v. United States*, 599 F.2d 823, 828 (7th Cir.1979). However, "alleviation of that hardship is a matter of policy for the Congress." *Kaltreider Const., Inc. v. United States*, 303 F.2d 366, 368-69 (3d Cir.), cert. denied, 371 U.S. 877, 83 S.Ct. 148, 9 L.Ed.2d 114 (1962). Once Congress, or some state legislative body, has determined what is a sufficient period for bringing a claim, the courts should refuse to hear the claim after that time has passed. "Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Dayco Corp.*, 523 F.2d at 394. Plaintiffs should not be allowed to argue that no logical reason exists for applying the statute to their case. After all, "[s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 [64

S.Ct. 582, 88 L.Ed. 788]. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They present a public policy about the privilege to litigate. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) (footnote omitted). Legislatures enact a statute of limitations to apply to all cases covered by the statute. As the legislature is the one to make such policy decisions, the only decision for the courts is whether the claim is within the coverage of the statute.

Nevertheless, the Board, like the courts, has recognized that, under certain exceptional conditions, the statute of limitations will not begin to run until some point after the act or event which is the subject of the complaint. One notable exception occurs when the party asserting the 10(b) defense has engaged in “fraudulent” (or “intentional”) concealment” of the material facts underlying the alleged unfair labor practice. See *Browne & Sharpe Mfg. Co.*, 312 NLRB 444 (1993), embracing “the equitable doctrine set forth in *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946), under which, as the Board noted, “if a party ‘has been injured by fraud and ‘remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.’”

However, in urging that the Union’s charge was timely under Section 10(b), neither the General Counsel nor the Union relies on claims of fraudulent concealment. Indeed, the Union urges that the fraudulent concealment doctrine it is not “applicable” herein. Moreover, as noted by the Respondent, this doctrine would appear to be completely unavailing to the prosecuting parties, where, as here, there is no evidence of any intentional concealment on the Respondent’s part of the wages being paid to employees Mackron and Ojeda at any given time. Rather, the prosecuting parties rely instead on a different, and equally well-recognized, doctrine of equitable tolling, i.e., that set forth in, e.g., *R.G. Burns Electric*, 326 NLRB 440 (1998), where the Board, citing *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), reiterated that “the 10(b) period commences running when the charging party either knows of the unfair labor practice or would have ‘discovered’ it in the exercise of ‘reasonable diligence,’” adding that “notice for the purpose of the 10(b) limitation period may be found even in the absence of actual knowledge if a charging party has failed to exercise reasonable diligence[.]”²¹

While the exact interplay between the “fraudulent concealment” doctrine and other principles of equitable tolling is

²¹ See, e.g., *SAS Electrical Services*, 323 NLRB 1239, 1253 fn. 30 (1997) (10(b) period starts running when the charging party has “actual or constructive” notice of the respondent’s allegedly unlawful acts. And see *Dodds v. Cigna Securities*, 12 F.3d 346, 350 (2d Cir. 1993), where, in the context of a Federal securities fraud case, the circuit court noted that “equitable tolling will stay the running of the statute of limitations only so long as the plaintiff has ‘exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud.’” [Citations omitted.]

a subject of some confusion in the caselaw,²² I will assume for all purposes below that the “actual or constructive knowledge” standard governs the disposition of the 10(b) issue herein. Specifically, I will assume at the threshold that the Union was not aware of any of the wage increases given to Mackron and Ojeda until the point in late November 1997 when Petersen acknowledges that he became so aware, i.e., when he reviewed the wage data on Respondent’s Exhibit 4 and compared it with the counterpart data in Respondent’s Exhibit 3, the Respondent’s February 14, 1996 wage compilations.²³ Accordingly, the question to be discussed below may be properly framed in the following terms: Did the Union’s late November 1997 discovery-in-fact of the wage increases given to Mackron and Ojeda constitute the first moment when the Union, by the exercise of reasonable diligence, *could have* discovered those increases? For reasons discussed below, I judge that the answer to this question is clearly No.

B. Application of the Constructive Knowledge Standard

The record clearly shows that the Union has frequently requested and obtained bargaining unit wage information from the Respondent. The Union made its first such request on September 19, 1995 (J. Exh. 1), and the Respondent furnished the information on November 1, 1995 (J. Exh. 2). It made its second such request only a few months later, on January 9, 1996 (J. Exh.3), and received a new compilation from the Respondent on February 19, 1996 (R. Exh. 3). However, roughly 20 months then elapsed (during which period the Union made numerous other requests for other types of bargaining unit information) before it made the October 1997 request, the one that yielded the new wage compilation from the Respondent that resulted in the Union’s filing of the December 3, 1997 charge.

I regard the Union’s failure during the 20-month period to make more timely requests for wage data as largely dispositive of the 10(b) issue. The Supreme Court pertinently held long ago that if a party “ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[.]” and “[w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led.” *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (citations omitted).²⁴ Indeed, the Board recognized and applied this “constructive knowledge” doctrine in *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), stating (*id.* at 192–193):

²² See discussion in *Cada v. Baxter Healthcare Systems*, 920 F.2d 446, 450. (1990), cert. denied 501 U.S. 1261 (1991) cited with apparent approval in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 184 (1984).

²³ The Respondent argues that the evidence is insufficient to establish that the Union was *unaware in fact* of the wage increases now in question at the time they were conferred. However, on this record, I will assume that Petersen testified truthfully when he denied any such awareness prior to receiving R. Exh. 4 in late November 1997.

²⁴ See also *Dodds v. Cigna Securities*, *supra*, 12 F.3d at 350: “As we said in *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir.1983), “[T]he means of knowledge are the same thing in effect as knowledge itself.” (quoting *Wood v. Carpenter*, *supra*, 101 U.S. at 143).

In view of the Union's failure to exercise reasonable diligence by which it should have become aware, long before the filing of the charge in this case, of the Respondent's policy vis-a-vis prejourneymen, we find that Section 10(b) bars recovery as to any employees who were hired as prejourneymen. . . . Had the Union made any effort to enforce the union-security provisions, it would have become aware that the Respondent was hiring employees without providing fringe benefits and without paying contract wages. Accordingly, we agree with the judge that recovery for the journeymen and utility workers is limited to the 6-month period preceding the filing of the charge. *Farmingdale Iron Works*, supra. We conclude that the Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance. While a union is not required to aggressively police its contracts aggressively [sic] in order to meet the reasonable diligence standard, it cannot with impugntly [sic] ignore an employer or a unit, as the Union in this case did, and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes.

Here, as in *Moeller*, supra, the Union is properly chargeable with constructive knowledge of the wage increase facts, which it could have discovered far earlier through more timely information requests. Thus, it clearly possessed the "means to discover" the allegedly excessive increases in a far more timely way, but neglected to avail itself of that opportunity during the 20-month period between mid-February 1996, when it received Respondent's Exhibit 3, and October 1997, when, in the aftermath of the decertification election, it made a new wage-information request.²⁵ However, having allowed 20 months thus to elapse, the Union necessarily ran the risk that any suspicious wage increases it might discover at the end of that period would have been conferred more than 6 months earlier.

The General Counsel and the Union both suggest that, to hold the Union to a "duty" to have discovered the wage increases in a more timely fashion would lead to undesirable consequences. Thus, the General Counsel argues that, under the "means of discovery" standard suggested above, "the

²⁵ The Union and the General Counsel, seeking to avoid the application of the *Moeller* rule herein, have gone to great lengths to establish that the Union was not like the union in *Moeller*, in that it was a conspicuous presence at the Respondent's facility during the protracted preelection period, and in many other respects acted aggressively to "police its contract" during that period. However, these arguments involve a non sequitur: It does not follow that the Union exercised "due diligence" when it came to pursuing information bearing on its ongoing suspicions of wage-favoritism simply because it may have exercised diligence in fulfilling other aspects of its representative function. Neither can it be assumed from *Moeller* that the only time a union will be found to have "constructive knowledge" of facts which it could have discovered in a more timely fashion by the exercise of due diligence will be when the union proves to have been as lax and indifferent to its representative function as was the union in *Moeller*.

Union could have satisfied Section 10(b) only if it had a practice of requesting wage information from Respondent twice each year." (In fact, as I note below, the Union did, indeed, display "such a practice" prior to the 20-month period in question.) And the Union expresses a similar argument; strikingly, however, it is couched in terms of a concern for an employer's interests. Thus, the Union argues that "such a finding would result in employers being routinely fly specked by information requests from unions on any and all matters that could implicate violations of the contract, Federal labor law or other employment related matters. The burden of complying with such requests for employers can not be underestimated."

Both arguments have a hollow—even a hypocritical—quality in the context of this case: First, it is clear that the Union was not at all shy about making repeated wage-data requests within a relatively short period of time. (Its first two such requests were spaced less than 4 months apart, on September 21, 1995 (J. Exh. 1) and again on January 9, 1996 (J. Exh. 2). Moreover, the record clearly shows that, with respect to categories of bargaining unit information other than wage data, the Union made three, essentially identical requests within 12 months.²⁶ Clearly, therefore, the Union cannot be said to have had the Respondent's interests in mind when it refrained during the 20-month interval from asking it for updated wage information.

Rather, in the end, two facts stand out in relief: First, the Union, although suspicious since at least January 1996 that employees supposed to favor the Union's decertification, including Mackron and Ojeda, might be the objects of wage-increase favoritism, simply dropped such inquiries after Petersen determined that the first set of the Respondent's wage-disclosures (J. Exh. 2 and R. Exh. 3) could not support that suspicion. Then, 20 months later—without any additional basis for suspecting anew that prodecertification employees were being favored with excessive wage increases, and only after failing to gain a majority vote from employees in the October 1, 1997 election—the Union nevertheless decided to pursue its original suspicions once more, this time obtaining the information which triggered its December 3, 1997 charge. Thus, I conclude in the circumstances not only that the Union could have gathered the same information in a far more timely fashion, but that the exercise of reasonable diligence required it to make such earlier inquiries, or face the necessary consequence that any claim as to wage increases made more than 6 months prior to the charge would be dismissed as barred by Section 10(b).

Accordingly, acting pursuant to my authority as described in Section 102.35(8) of the Board's Rules and Regulations, I enter the following

²⁶ See and compare the following exhibits: J. Exh. 10 (March 5, 1997 request for a "list of all bargaining unit employees, listed alphabetically by last name, that includes full name, classification, company seniority date, current address, and telephone number"); J. Exh. 24 (August 26, 1997 request for essentially the same categories of information); and J. Exh. 26 (February 26, 1998 request for essentially the same categories of information).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

ORDER

The complaint is dismissed insofar as it alleges that the Respondent unlawfully granted wage increases to employee Deborah Mackron on May 1, 1996, and May 1, 1997, and is further dismissed insofar as it alleges that the Respondent unlawfully granted wage increases to employee Alicia Ojeda on June 5 and August 21, 1996.²⁷

²⁷ Any appeal from this Order is subject to the provisions of Sec. 102.26 of the Board's Rules and Regulation, requiring special permission of the Board.

This Order does not affect the continuing viability of the complaint insofar as it alleges that the Respondent unlawfully granted a wage increase to employee Ojeda on August 21, 1997.

FURTHER DIRECTIONS: At or prior to the hearing scheduled to resume on January 4, 1999, the parties shall make any motions or arguments bearing on the proper scope of litigation in the light of the foregoing Order, including but not limited to the questions whether, or to what extent, the "objections" case is properly before me.