

Pacific Micronesia Corporation d/b/a Dai-Ichi Hotel Saipan Beach and Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation. Cases 37-CA-4926, 37-CA-4927, 37-CA-4944, 37-CA-4945, 37-CA-4946, 37-CA-4951, 37-CA-4962, 37-CA-4978, 37-CA-4998, 37-CA-5208, 37-CA-5248, 37-CA-5270, 37-CA-5287, 37-CA-5299, 37-CA-5311, 37-CA-5319, 37-CA-5325, and 37-CA-5336

April 29, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

This case arises in the context of an organizational campaign conducted by the Charging Party among the employees of the Respondent, which operates a hotel on the island of Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). The General Counsel's complaint alleges that, in response to the Charging Party's campaign, the Respondent committed numerous unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act.¹

In March 1996, the Union lost a Board election, but the election was subsequently set aside and a rerun election held. The Union won the February 1998 second election and was certified as the employees' bargaining representative the following month.² The Respondent, however, refused to bargain with the Union in order to test the certification.³ In June 2000, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the Union's certification and denied enforcement of the Board's bargaining order. *Dai-Ichi Hotel Saipan Beach v. NLRB*, 219 F.3d 661 (D.C. Cir. 2000).

As the General Counsel acknowledges, in light of the court's decision, we must dismiss all the 8(a)(5) allegations of the complaint.⁴ However, a number of other unfair labor practice allegations remain to be decided.

Central among these is the allegation that, beginning after the second election and continuing throughout 1998, the Respondent failed to renew the employment contracts of 39 nonresident employees because of their union activities. For the reasons set forth below, we find that, with three exceptions, the Respondent lawfully

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458 (1998).

³ *Dai-Ichi Hotel Saipan Beach*, 327 NLRB No. 131 (1999) (not included in bound volumes).

⁴ The Board has decided not to seek certiorari. Thus, the court's decision is the law of this case.

failed to renew the employees' contracts for legitimate reasons. We will begin our discussion of this principal issue by summarizing the two decisions that Administrative Law Judge James L. Rose issued in this proceeding.

I. BACKGROUND

A. *The Judge's Initial Decision*

On September 15, 1999, the judge issued his (attached) initial decision in this proceeding.⁵ Applying *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the judge found that the General Counsel had shown that the employees' union activities were a motivating factor in the decision not to renew the contracts in question. The judge reasoned that the element of antiunion animus had been established based on his findings that, both before and after the February 1998 election, the Respondent's supervisors committed numerous violations of Section 8(a)(1), including: interrogating employees concerning their union activities or sympathies; threatening employees with termination or other reprisals because of their union activities; creating the impression that employee activity on behalf of the Union is under surveillance; directing employees not to associate with prounion employees; and informing employees that selecting the Union as their bargaining representative would be futile.⁶ The judge also found that each nonrenewed employee engaged in union activity and that this activity was known at least to the employee's direct supervisor.

The judge concluded, however, that the Respondent met its *Wright Line* burden of showing that the nonresident employees' contracts would not have been renewed even in the absence of their union activity. In this regard, the judge found that the Respondent adduced evidence that it tried to renew the contracts of seven employees but was unable to do so because, in each case, there was a qualified local resident available which the Respondent was required, by CNMI law, to hire. With respect to the remaining employees, the judge found that the Respondent did not renew their contracts because the 1997 severe downturn in the Asian economy had a major impact on the Respondent's operations and required a reduction-in-force. Accordingly, he recommended dis-

⁵ The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs. The General Counsel filed a reply brief.

⁶ Almost all of these violations are uncontested. Specifically, no exceptions were filed to the judge's findings that the remarks of the following supervisors violated Sec. 8(a)(1): Matrasutaro, Ito, Rueda, Malabanan, Borlongan, Clamor, Alarilla, Cruz, Trinidad, and Guerrero.

In addition, no exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) by constructively discharging Ronald Del Rosario.

missal of the complaint insofar as it alleges that the Respondent violated Section 8(a)(3) and (1) by failing to renew the nonresident employees' employment contracts.

B. *The Motion to Reopen*

While the judge's initial decision was pending before the Board on exceptions by both parties, the General Counsel moved to reopen the record in light of newly discovered evidence under Section 102.48(d)(1) of the Board's Rules and Regulations. The General Counsel alleged that Hideo Fujii, a manager of a manpower company that supplied employees to the Respondent, had perjured himself in the initial hearing and had concealed evidence from the General Counsel that the Respondent had schemed to replace prounion Filipino employees with employees from Nepal in order to defeat the Union in the February 1998 election. The General Counsel also alleged that the newly discovered evidence refuted the Respondent's *Wright Line* defense that the judge accepted in recommending dismissal of the 8(a)(3) allegations regarding the Respondent's decision not to renew the employment contracts of the alleged discriminatees.

On November 15, 2000, the Board remanded the case to the judge to determine whether the hearing should be reopened to receive additional testimony from Fujii. On December 12, 2000, the judge decided that the hearing should be reopened under Section 102.48(d)(1) and conducted an additional 10 days of hearing.

C. *The Supplemental Decision*

On July 2, 2001, the judge issued his (attached) supplemental decision in this proceeding.⁷ Based on his assessment of the evidence presented at the reopened hearing, the judge wholly discredited Fujii on all the material allegations of his testimony at the reopened hearing. Thus, the judge concluded that the Respondent did not participate in a scheme to replace Filipino nonresidents with workers from Nepal in order to win the 1998 Board election.

Notwithstanding his complete rejection of the evidence that the hearing was reopened to receive, the judge *sua sponte* reconsidered his initial decision. The judge reaffirmed his initial finding that "the General Counsel made out a strong *prima facie* case that the alleged discriminatees were not renewed because of their known union activity." In addition, the judge reaffirmed his initial finding that "the Respondent demonstrated that a reduction-in-force was necessary due to the economy." The judge

⁷ The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply brief.

No exception was filed to the judge's dismissal of the 8(a)(1) complaint allegation that the employment contracts the Nepali employees were required to sign were unlawful "yellow dog" contracts.

also reaffirmed his initial finding that the Respondent lawfully replaced seven of the alleged discriminatees with local employees pursuant to CNMI law.

However, based exclusively on evidence presented at the initial hearing, the judge modified his initial decision and concluded that the Respondent violated Section 8(a)(3) and (1) by failing to renew the contracts of 28 of the nonresident alleged discriminatees. The judge's rationale for his new conclusion was that the "Respondent kept less senior employees who were not identified as union activists. Seniority, of course, is not dispositive, but all things being equal, as a general practice employers keep the more senior and experienced employee where a reduction in force is necessary."⁸ This "seniority" rationale had not been argued by the General Counsel.

II. ANALYSIS AND CONCLUSIONS

We have carefully considered the judge's initial decision, his supplemental decision, and the record in light of the parties' exceptions and briefs.⁹ We have decided to affirm the judge's rulings, findings,¹⁰ and conclusions,¹¹ as modified by our decision, and to adopt the recommended Order of the supplemental decision, as modified and set forth in full below.¹²

⁸ Under the same seniority rationale, the judge dismissed the complaint allegation that the Respondent unlawfully failed to renew the employment contracts of four other employees. The judge reasoned that these workers were all short-term employees.

⁹ The General Counsel and the Respondent have excepted to the judge's credibility findings in both decisions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹⁰ The General Counsel has excepted to the judge's failure to find certain violations of Sec. 8(a)(1) in his initial decision. We find it unnecessary to pass on these exceptions because the finding of such additional violations would be cumulative to the 8(a)(1) findings to which no exceptions have been filed and would not materially affect the remedy.

The General Counsel correctly asserts in his exceptions that the complaint contains no allegations that certain unilateral changes violated Sec. 8(a)(4). The judge therefore erred in dismissing these non-existent allegations. This inadvertent error does not affect his other findings and rulings.

¹¹ The Respondent excepts to the judge's factual finding that it is undisputed that the Respondent's assistant general manager, Yasuhisa Iwabuchi, attended a meeting with Fujii and Mustafa Issa, the general manager of the Hyatt Regency Hotel. The Respondent asserts that both Iwabuchi and Issa testified that Iwabuchi did not attend a meeting with Fujii and Issa. The record supports the Respondent's assertion. This factual error does not affect the judge's other findings and rulings.

¹² We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container, Inc.*, 325 NLRB 17 (1997); and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also modify the judge's recom-

Specifically, with respect to the judge's supplemental decision, we find, contrary to the General Counsel's contention, that there is no basis for reversing the judge's discrediting of Fujii's testimony. *Standard Dry Wall*, supra.¹³ Accordingly, we affirm the judge's rejection of the allegation that the Respondent participated in an unlawful conspiracy to defeat the Union in the Board election. However, for the reasons set forth below, we find merit in the Respondent's contention that the judge erred in concluding in his supplemental decision that a violation of the Act could be based on the Respondent's failure to select employees for nonrenewal in order of seniority.

Turning to the judge's initial decision, we agree with his findings that the Respondent demonstrated that a reduction-in-force was necessary due to the downturn in the Asian economy and that it was required to replace seven of the alleged discriminatees with available, eligible local employees. With respect to the remaining alleged discriminatees, we find, as discussed below, that except with respect to three employees the Respondent has demonstrated that it would not have renewed their contracts even in the absence of their union activity.

A. The Judge's Seniority Analysis in His Supplemental Decision

In its exceptions, the Respondent contends that the Board should not adopt the judge's supplemental decision for two reasons: (1) the judge lacked the authority to reconsider his initial decision based exclusively on evidence presented at the original hearing; (2) the judge's seniority analysis is legally incorrect. Assuming arguendo that the judge had the authority to reconsider his initial decision, we agree with the Respondent that the judge's rationale for the 8(a)(3) violations that he found is inconsistent with established Board precedent.

At the outset, we observe that the General Counsel did not argue that the retention of less senior nonunion employees over more senior union employees was evidence

mended Order to more closely conform to the violations found. In addition, we do not believe that a broad cease-and-desist order is warranted under the test set forth in *Hickmott Foods*, 242 NLRB 1357 (1979). Finally, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

¹³ In this regard, the General Counsel excepts to the judge's reliance on a withdrawn exhibit (R. Exh. 40) to reject Fujii's testimony and to find that the Respondent directly hired 50 Filipino employees in the 6 months prior to the second election. The judge erred in relying on this exhibit because the Respondent had withdrawn it and it therefore was no longer part of the record. This error does not, however, affect the judge's credibility resolutions or factual findings. When the Respondent withdrew the exhibit, the parties entered into a stipulation, which was accepted into the record. The stipulation supports the judge's findings on the hiring of Filipino employees.

of discrimination. Instead, the General Counsel relied on other bases for his argument that the Respondent selected union activists for nonrenewal in much greater proportion than those employees who had no or minimal union activity. Further, the General Counsel does not endorse the judge's seniority analysis in his exceptions to the judge's supplemental decision. Relying on the discredited testimony of Fujii, the General Counsel's theory of the case is that the Respondent failed to renew the contracts of the alleged discriminatees as part of a scheme to rid itself of Filipino union activists.

Furthermore, and contrary to the judge's analysis, the Board has squarely held that a failure to lay off employees in order of seniority cannot constitute evidence of discriminatory motive in the absence of evidence that seniority has been used in the past. Thus, in *Documation, Inc.*, 263 NLRB 706 (1982), enf. mem. 728 F.2d 780 (11th Cir. 1984), the Board reversed the judge's finding that two employees were discriminatorily selected for inclusion in an otherwise lawful economic layoff, in violation of Section 8(a)(3). The Board found that the judge erred in relying on the fact that the laid-off employees were senior to several others in their department who were retained. "Respondent's officials testified without contradiction that Respondent has not and does not utilize seniority as a basis for selecting employees for layoff. Accordingly, we conclude that Respondent was under no obligation to do so here and its failure to do so cannot be used as evidence of discriminatory motive." 263 NLRB at 706.

Documation was expressly followed by the Board in *Pullman Power Products*, 275 NLRB 765, 767 (1985), where the Board dismissed the complaint allegation that four employees were discriminatorily selected for layoff. The Board stated as follows:

[T]he General Counsel advances the position that seniority of the men should have been a significant factor in the selection process. We disagree because the record does not reveal that seniority had been used in the past for layoff selection. Accordingly, the Respondent was under no obligation to use seniority here and its failure to do so cannot be used as evidence of discriminatory motive on the part of the Respondent. See *Documation, Inc.*, 263 NLRB 706 (1982).

Here, as in *Documation* and *Pullman Power*, there is no evidence that the Respondent has ever before followed seniority in selecting employees for layoffs. Indeed, there is no evidence that the Respondent ever used seniority as a basis for any employment decision. Therefore, under the above-cited precedent, the Respondent was not obligated to follow seniority in selecting an

ployees for nonrenewal, and its failure to do so is not, by itself, evidence of discriminatory motive.¹⁴

Having rejected the rationale in the judge's supplemental decision for finding that the Respondent failed to renew the employment contracts of nonresident employees in violation of Section 8(a)(3), we now turn to the issue of whether the judge correctly recommended dismissal of that complaint allegation in his initial decision.

B. The Judge's Wright Line Analysis in His Initial Decision.

As stated above, in his initial decision, the judge found that the General Counsel had met his *Wright Line* burden of establishing that the employees' union activity was a motivating factor in the decision not to renew their contracts. The judge concluded, however, that the Respondent had shown that it would not have renewed these employees even in the absence of their union activity either because there was a qualified local resident seeking the job or because of the reduction-in-force caused by the Asian economic crisis. The General Counsel excepts to this conclusion.

We agree with the judge that seven of the alleged discriminatees were lawfully not renewed. As the judge found, the Respondent actually attempted to renew these employees' contracts, but was unable to do so because, under CNMI law, it was required to hire qualified local employees. Therefore, as to these seven employees, we find that even assuming that antiunion animus was a motivating factor in the failure to renew their contracts, the Respondent has shown that it would have made the same employment decision even in the absence of their union activity. Accordingly, we shall dismiss the complaint insofar as it alleges that the failure to renew the employment contracts of these seven employees violated Section 8(a)(3).

With respect to the remaining alleged discriminatees, the Respondent introduced substantial evidence showing that, in response to the adverse impact of the slowing Asian economy on its business, the Respondent developed a reorganization plan that included reducing the employee complement. Upper management set the specific numbers for downsizing in each department. The plan was implemented in April 1998¹⁵ and was scheduled to be completed by the end of the year. The Respondent gave the department heads the discretion to determine

¹⁴ Moreover, there is no evidence that the jobs of the alleged discriminatees were skilled to the degree that disregarding experience in the job might suggest a discriminatory motive. Cf. *Kudzu Productions*, 295 NLRB 82, 88 (1989) (employer's disregard of employee's 20-year experience and expertise in motion picture printing evidence of discrimination in layoff from color still print processing position).

¹⁵ All dates are in 1998 unless otherwise indicated.

which employees would not be renewed. However, the department heads were not given the option of proposing changes in the number of employees to be reduced.

The record indicates that the Respondent's generally preferred method for achieving the necessary reductions in each department was to not renew the first contracts arising for renewal after the reduction plan was implemented in April. However, there was also a second method that was sometimes used. In some cases, supervisors waited until the end of the year to achieve the reductions. The Respondent correctly asserts that the pattern of not renewing the first contracts arising for renewal after the plan was implemented or not renewing contracts arising at the end of the year was followed in most of its departments. Specifically, the record shows that, with respect to 29 named discriminatees, the pattern was followed and explains their selection for nonrenewal. Therefore, as to these employees, we find that even assuming that antiunion animus was a motivating factor in the failure to renew their contracts, the Respondent has shown that it would have made the same employment decision in the absence of their union activity. Accordingly, we shall dismiss the complaint insofar as it alleges that the failure to renew the employment contracts of these 29 additional employees violated Section 8(a)(3).

There are three instances, however, where the pattern fails to explain why the contracts of the alleged discriminatees were selected for nonrenewal. We discuss these below.

C. Hermie Coronejo

Before discussing the Respondent's failure to renew the employment contract of Hermie Coronejo, we will first address a separate complaint allegation concerning a misconduct notice he received.

1. June 2 misconduct notice

The complaint alleges that the Respondent violated Section 8(a)(3) and (4) by issuing an employee misconduct notice to Hermie Coronejo on June 2. The judge dismissed this allegation of the complaint, finding that Coronejo's union activity did not immunize him from violating a reasonable company rule against employees' punching other employees' timecards. The General Counsel contends that the judge was mistakenly considering a different disciplinary notice, one that was not alleged as a violation in the complaint. The General Counsel further contends that the record shows that the June 2 notice referenced in the complaint is unlawful. We find merit in these contentions.

The June 2 misconduct notice does not refer to Coronejo's punching another employee's timecard. In-

stead, the misconduct is described as “No help to his position even do there order he go home.”¹⁶ According to Coronejo’s undisputed testimony, the incident giving rise to this notice of misconduct occurred when his shift ended on June 2. He asked, as all employees routinely were required to do at the end of their shift, for permission to leave. Thus, he said to Assistant Executive Chef Imura, “Chef, bye bye.” Another employee, Antonio Rabe, was leaving the shift at the same time and also said “bye” to Imura. Rabe was not a known union activist. Imura started yelling at Coronejo and told him to go home. Imura did not say why he was upset or yelling. Imura did not say anything to Rabe. At the end of the same day, Imura called Coronejo into the chef’s office, handed him the notice of misconduct, and told him to sign it. Coronejo signed the notice, adding “under protest” after his name. Rabe did not receive any notice of misconduct or other discipline.

The judge properly found in his initial decision that the Respondent viewed Coronejo as the employees’ leader in the Union’s effort to organize. Thus, he found that the Respondent knew that Coronejo was the Union’s observer at the first election, was the only employee to attend the hearing on objections to the first election, held organizational meetings in his room at the barracks, passed out union flyers, wore union T-shirts and buttons at the hotel when not on duty, and initiated several petitions relating to working conditions. The judge also found, with no exceptions by the Respondent, that the Respondent engaged in unlawful interrogations and threats concerning employees’ union activity and thus harbored animus toward the employees’ organizational effort. We therefore agree with the judge’s finding that the General Counsel established under *Wright Line* that antiunion sentiment was a motivating factor in the decision to issue a misconduct notice to Coronejo.

Contrary to the judge, however, we find that the Respondent failed to show that it would have issued the misconduct notice to Coronejo even in the absence of his union activity. The judge’s analysis of the Respondent’s defense was not based on the June 2 notice alleged in the complaint and, therefore, is not relevant to the determination of whether the Respondent met its burden under *Wright Line*.

As to the June 2 notice, the Respondent offered no explanation. It did not adduce evidence conflicting with Coronejo’s view of the events giving rise to the notice. Nor did it come forth with evidence pointing to some

other reason for the notice. In addition, there is nothing in the record to explain why Rabe, who was not a known union activist, received no discipline for the same conduct that resulted in Coronejo’s notice. We therefore find that the Respondent failed to rebut the General Counsel’s showing that antiunion animus was a motivating factor in the decision to discipline Coronejo. Accordingly, we conclude that the Respondent violated Section 8(a)(3) and (1) by issuing the June 2 misconduct notice to Coronejo.¹⁷

2. November 23 nonrenewal of employment contract

The complaint alleges that the Respondent violated Section 8(a)(3) and (4) by failing to renew Coronejo’s contract for employment as a cook. The judge dismissed this complaint allegation, finding that although the General Counsel met his initial *Wright Line* burden Coronejo’s situation “is not really different from the others, and as with the others, I conclude that he would not have been renewed had there been no union or other protected activity.” Contrary to the judge, we find that Coronejo’s situation *is* “really different from the others.”

As discussed above, the judge found, and we agree, that Coronejo engaged in more protected activity and did so more notoriously than any other unit employee, that the Respondent knew of that protected activity, and that the Respondent exhibited substantial animus toward it. In addition, the supervisor who had discretion to determine who would not be renewed was the same supervisor who had singled Coronejo out for discriminatory discipline in June. Thus, we conclude that the General Counsel has made a very strong showing that antiunion sentiment was a motivating factor in the decision not to renew Coronejo’s contract. For the reasons stated below, we find that the Respondent failed to show that it would not have renewed his contract even in the absence of his union activity.

In the cooks department, only three cooks were not renewed in the period from April through December. Avelino Meneses was not renewed on April 15. From that date until November 23, 11 cooks were renewed. There were no reductions during this period. On November 23, Coronejo was not renewed. On the same date, two other cooks were renewed. On November 28, Richard Manalang was not renewed. Then, between November 28 and December 31, six cooks were renewed. There were no further reductions.

¹⁶ Nothing in the record discloses the meaning of this phrase. As discussed below, Coronejo believed that the notice referred to his manner of requesting permission to leave his shift. The Respondent did not explain the language in the notice.

¹⁷ We find it unnecessary to pass on the allegation that the Respondent also violated Sec. 8(a)(4) by issuing the June 2 misconduct notice to Coronejo, because the finding of such an additional violation would not materially affect the remedy.

On these facts, the Respondent's pattern defense does not explain why Coronejo's contract was selected for nonrenewal. In the cooks department, only one employee was not renewed in April when the reduction plan went into effect. Eleven others were renewed in the period between April 15 and November 23, the date of Coronejo's nonrenewal. Thus, the reason for Coronejo's selection for nonrenewal was *not* that his was the first contract arising after the plan was implemented.

Nor can Coronejo's selection be explained, as the Respondent urges, by the delay of managers who waited until the last moment to make the reductions. Coronejo's contract came up for renewal in November. Eight employees were renewed after his contract was not renewed. Indeed, two employees were renewed who came up for renewal on the same date as Coronejo. Managerial delay, therefore, does not explain why Coronejo, the acknowledged principal union activist, was not renewed in November when eight other employees were renewed in November and December.

In sum, Coronejo's case does not fit within the pattern the Respondent followed in other instances when implementing the reduction-in-force. Therefore, we find that the Respondent has failed to rebut the General Counsel's showing that antiunion animus was a motivating factor in the Respondent's decision not to renew Coronejo's employment contract. Accordingly, we conclude that the Respondent violated Section 8(a)(3) and (1) by not renewing Coronejo's contract on November 23.¹⁸

D. Rosanna Cayabyab and Luisa Adao

Rosanna Cayabyab and Luisa Adao were in the housekeeping cleaner department. They are among the employees alleged in the complaint to have been discriminatorily nonrenewed in violation of Section 8(a)(3) and (1).

Like Coronejo, however, Cayabyab and Adao stood out from the other alleged discriminatees. There is evidence that each employee had been active in the Union's campaign in the second election. Further, the Respondent does not dispute that it unlawfully interrogated both Cayabyab and Adao about their union sentiments on more than one occasion. Thus, in his initial decision, the judge found that Housekeeping Supervisor Borlongan and Housekeeping Manager Clamor each separately interrogated Cayabyab. The judge further found that Borlongan, Clamor, and Housekeeping Supervisor Alarilla each separately interrogated Adao about her union sentiments. In addition, both Borlongan and Alarilla asked Adao whether her

¹⁸ We find it unnecessary to pass on the allegation that the Respondent also violated Sec. 8(a)(4) by not renewing Coronejo, because the finding of such an additional violation would not materially affect the remedy.

boyfriend, Teodoro Vivera, was a union organizer.

Relying on the singling out of Cayabyab and Adao for unlawful interrogation and the animus shown by the Respondent's other undisputed unlawful conduct, we find that the General Counsel established under *Wright Line* that union activity was a motivating factor in the decision not to renew Cayabyab and Adao. For the reasons stated below, we find that the Respondent failed to show that it would not have renewed their contracts even in the absence of their union activity.

From the April implementation of the Respondent's reduction plan until the end of the year, 30 contracts came up for renewal in the housekeeping cleaner department. In the period from May 22 through November 15, 11 contracts came up for renewal. The first six of these contracts were not renewed. Four of the remaining five were renewed. Then, 19 contracts came up for renewal on December 31. Only six of these were not renewed, including the contracts of Cayabyab and Adao. The contracts of 13 other employees with the same anniversary date as Cayabyab and Adao were renewed.

At first glance, the sequence of nonrenewals in the housekeeping cleaner department appears to fit the general pattern evident in other departments of not renewing the contracts that expired either at the beginning or the end of the relevant period. However, the "pattern" defense fails to explain why Cayabyab and Adao were selected for nonrenewal on the very same day that 13 other employees, with the identical anniversary date, were renewed. The record is silent on that question. The Respondent must be held accountable for this gap in the record because, under the shifting burdens of *Wright Line*, it is the party with the burden of proof.

In sum, the case for unlawful motive is strong in the nonrenewals of the contracts of Cayabyab and Adao. It is undisputed that they were subjected to multiple interrogations. Further, some of the interrogations were conducted by Clamor, the department manager responsible for achieving the prescribed reductions by selecting the contracts that would not be renewed. This course of unlawful conduct, particularly by the selecting official, raises the inference that Cayabyab and Adao's union activity was the reason they were selected for nonrenewal on December 31 when 13 other employees were renewed on the same date. The Respondent's "pattern" defense does not rebut this inference. Accordingly, we conclude that the Respondent violated Section 8(a)(3) and (1) by failing to renew the employment contracts of Rosanna Cayabyab and Luisa Adao.

E. Employee Handbook and Employment Contract Provisions

The Respondent did not except to the judge's finding that it violated Section 8(a)(1) by maintaining certain provisions in its employee handbook that prohibit employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and conditions of employment. The General Counsel contends that the Respondent's employment contracts for nonresident employees contain the same provisions and excepts to the judge's failure to address the language in the contracts. We agree with the General Counsel's contention that the language in the contracts should be addressed.

As indicated above, it is undisputed that the provisions in the employee handbook violate Section 8(a)(1). Further, the Respondent concedes that its employment contracts contain the same provisions. In these circumstances, we conclude that the remedy for the unlawful language in the employee handbook should expressly extend to the Respondent's other employment documents admittedly containing the same language. See *Raley's, Inc.*, 311 NLRB 1244 fn. 2, 1251–1252 (1993) (judge found warranted in requiring that remedy for unlawful rule be coextensive with application of rule). See also *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 (1990) (employer required to rescind portions of rule in employee handbook found unlawful and to post notice of rescission wherever rule was applied).¹⁹

ORDER

The National Labor Relations Board orders that the Respondent, Pacific Micronesia Corporation d/b/a Dai-ichi Hotel Saipan Beach, Saipan, Commonwealth of the Northern Mariana Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their interest in, or activity on behalf of, Hotel Employees & Restaurant Employees, Local 5, AFL–CIO and Commonwealth Labor Federation or any other labor organization.

(b) Threatening employees with termination or other reprisals because of their interest in, or activity on behalf of, the Union or any other labor organization.

(c) Creating the impression that employees' activity on behalf of the Union, or before the Board, is under surveillance.

¹⁹ We find it unnecessary to pass on the complaint allegation that the maintenance of these provisions in the employment contracts independently violates Sec. 8(a)(1). The finding of such an additional violation would not materially affect the remedy.

(d) Directing employees not to associate with employees who are engaged in activity on behalf of the Union.

(e) Informing employees that selecting the Union as their bargaining representative would be futile.

(f) Maintaining provisions in employee handbooks or in employment contracts for nonresident employees that prohibit employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and conditions of employment.

(g) Retaliating against employees for their union activities by curtailing benefits.

(h) Discharging employees because of their interest in, or activity on behalf of, the Union or because they engage in the Board's processes.

(i) Disciplining employees or failing to renew their contracts for employment because of their interest in, or activity on behalf of, the Union.

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

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

(a) Remove from its employee handbook and its employment contracts for nonresident employees provisions prohibiting employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and conditions of employment, and advise the employees in writing that these provisions are no longer being maintained.

(b) Restore the practice of allowing employees to take used flowers from the hotel.

(c) Within 14 days from the date of this Order, offer Loreta Rangamar full reinstatement (consistent with CNMI law) to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Loreta Rangamar whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's supplemental decision.

(e) Within 14 days from the date of this Order, offer Hermie Coronejo, Rosanna Cayabyab, and Luisa Adao employment contracts (consistent with CNMI law).

(f) Make Hermie Coronejo, Rosanna Cayabyab, and Luisa Adao whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's supplemental decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Loreta

Rangamar, the June 2, 1998 warning issued to Hermie Coronejo, and the failure to renew the employment contracts of Hermie Coronejo, Rosanna Cayabyab, and Luisa Adao. Within 3 days thereafter notify the employees in writing that this has been done and that Rangamar's discharge, the June 2, 1998 warning to Coronejo, and the failure to renew the employment contracts of Coronejo, Cayabyab, and Adao will not be used against them in any way.

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

(i) With 14 days after service by the Region, post at its facility on the Island of Saipan, CNMI, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1998.

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

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

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

²⁰ 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."

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees concerning their interest in, or activity on behalf of, Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation or any other labor organization.

WE WILL NOT threaten our employees with termination or other reprisals because of their interest in, or activity on behalf of, the Union or any other labor organization.

WE WILL NOT create the impression that employees' activity on behalf of the Union, or before the Board, is under surveillance.

WE WILL NOT direct our employees not to associate with employees who are engaged in activity on behalf of the Union.

WE WILL NOT inform our employees that selecting the Union as their bargaining representative would be futile.

WE WILL NOT maintain provisions in the employee handbook and in employment contracts for nonresident employees that prohibit employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and conditions of employment.

WE WILL NOT retaliate against our employees for their union activities by curtailing benefits.

WE WILL NOT discharge our employees because of their interest in, or activity on behalf of, the Union or because they engage in the Board's processes.

WE WILL NOT discipline employees or fail to renew their contracts for employment because of their interest in, or activity on behalf of, the Union.

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

WE WILL remove from our employee handbook and our employment contracts for nonresident employees provisions prohibiting employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and condi-

tions of employment, and WE WILL advise the employees in writing that these provisions are no longer being maintained.

WE WILL restore the practice of allowing employees to take used flowers from the hotel.

WE WILL, within 14 days from the date of the Board's Order, offer Loreta Rangamar full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Loreta Rangamar whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Hermie Coronejo, Rosanna Cayabyab, and Luisa Adao employment contracts.

WE WILL make Hermie Coronejo, Rosanna Cayabyab, and Luisa Adao whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Loreta Rangamar, the June 2, 1998 warning to Hermie Coronejo, and the failure to renew the employment contracts of Hermie Coronejo, Rosanna Cayabyab, and Luisa Adao. Within 3 days thereafter, WE WILL notify the employees in writing that this has been done and that Rangamar's discharge, the June 2, 1998 warning to Coronejo, and the failure to renew the employment contracts of Coronejo, Cayabyab, and Adao will not be used against them in any way.

PACIFIC MICRONESIA CORPORATION D/B/A DAI-ICHI HOTEL SAIPAN BEACH

Marilyn O'Rourke, Esq. and *David M. Bigger, Esq.*, for the General Counsel.

Ronald B. Natalie, Esq., of Washington, D.C., and *Stephanie L. Marn, Esq.*, of Honolulu, Hawaii, for the Respondent.

Joseph A. Creitz, Esq., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Saipan, Commonwealth of the Northern Mariana Islands, on various days between April 26 and May 14, 1999, upon the General Counsel's amended consolidated complaint alleging multiple violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that the union certification is invalid and that economic and other considera-

tions caused its failure to renew the employment contracts of the alleged discriminatees.

On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a corporation of the Commonwealth of the Northern Mariana Islands (CNMI) engaged in the operation of a hotel and restaurants on the Island of Saipan. In the conduct of this business, the Respondent annually derives gross revenues in excess of \$500,000 and annually purchases and receives goods and materials directly from points outside the CNMI valued in excess of \$50,000. The Respondent admits and I conclude that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In recent years there has developed on the Island of Saipan an extensive resort hotel industry, catering principally to Japanese and Korean tourists. The Respondent operates one such hotel. It is owned by Japanese interests and most of its managers are Japanese. Most of the low-level supervisors and rank and file employees are Filipinos. Some supervisors and employees are citizens of the CNMI, indeed, CNMI law requires that at least 20 percent of the employees be residents. All alien employees of the Respondent, whether management, supervision, or rank and file, work on 1-year contracts approved by an agency of the CNMI. Under a set of complex regulations employee contracts can be renewed for successive 1-year periods, and typically are. Thus, some employees have many years of service. However, when an employee is up for renewal, if a qualified local resident applies, he or she must be hired. However, in years before the events here almost all the nonresident contract workers were renewed each year.

In 1994, the Union began an organizational campaign among the Respondent's employees, which resulted in an election the Union lost on March 21, 1996. Objections were filed, the election was set aside and there was a rerun election on February 5, 1998, which the Union won by a vote of 131 to 121. The Respondent's objections were overruled by the Regional Director and the Board denied review. *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458 (1998). Thus on March 30, the Union was certified as the employees' bargaining representative.¹

¹ The unit is:

All full-time and regular part-time employees employed by the (Respondent) in the Commonwealth of the Northern Mariana Islands; ex-

To test the Board's certification, the Respondent has refused to bargain with the Union, which was the subject of a previous refusal to bargain complaint against the Respondent, wherein the Board granted summary judgment. *Dai-Ichi Hotel Saipan Beach*, 327 NLRB No. 131 (1998) (not included bound volume). The Respondent appealed this order to the D.C. Circuit of the United States Court of Appeals.² Claiming that the certification was invalid, the Respondent admits that it refused to bargain about changes in terms and conditions of employment alleged in this consolidated complaint: changing its practice of allowing employees to take flower arrangements; transferring cooks; increasing the cost to employees for housing and meals; ceasing to pay service charges obtained from customers' meal coupons; ceasing to provide laundry detergent; ceasing to allow employees to take drinking water; reducing the number of holidays, vacation, and sick days; failing to renew contracts of nonresident workers; and, failing to furnish requested information concerning nonrenewals. Reassigning the cooks and the drinking water allegations are argued not to be violations on the merits.

In addition to the various refusal-to-bargain allegations, the complaint alleges many statements by supervisors and managers to have violated Section 8(a)(1) and that the Respondent's failure to renew the employment contracts of 35 individuals (including Hermie Coronejo who was alleged separately) was violative of Section 8(a)(3). There are also alleged unlawful discharges and other discipline in violation of Section 8(a)(3) and (4). The facts and analysis of each allegation will be treated seriatim below.

B. Analysis and Concluding Findings

1. Refusal to bargain

a. Failure to renew contracts

The principal issue in this matter, alleged as violations of both Section 8(a)(3) and (5), is the Respondent's failure to renew the employment contracts of 35 nonresident workers as they expired on various dates from February 17 to December 31, 1998.³ The Respondent admits that the Union requested, and it refused, to bargain about this issue, arguing that the Union's certification is invalid.

The Respondent also argues (though more in connection with the discrimination theory, *infra*) that the nonrenewals were caused by economic conditions. In general, it is undisputed that in 1997 the Asian economy took a severe downturn, and this had a substantial impact on the resort hotel industry of Saipan. The number of Japanese guests was greatly reduced, and according to the Respondent's assistant general manager, Yasuhisa Iwabuchi, the number of Koreans, which had been about 20 percent, "went down all the way to almost zero. And there is an increase, slight increase, from the beginning of 1999, but then at this time it could be less than five percent." The

Respondent's evidence shows that between February 1997 and February 1998 the hotel lost about \$383,147, whereas its projected losses between February 1998 and February 1999 were \$6,587,973. Therefore, argues the Respondent, a reorganization plan was necessary and this included downsizing the employee complement, as well as taking other cost-cutting steps. Alleged as violations of the Act.

Though the evidence supports the conclusion that as a result of economic conditions cost-cutting was indicated, including reducing the employee complement, it does not follow that the Respondent could implement such actions without bargaining. To the contrary, the decision to lay off employees while continuing to engage in the same business with essentially the same technology, but with fewer employees, is a mandatory subject of bargaining. *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146 (1992).

In dealing with this issue, the Supreme Court distinguished between those decisions "involving a change in the scope and direction of the enterprise" and which were "akin to the decision whether to be in business at all." Such decisions are outside the duty bargain set forth in Sections 8(a)(5) and 8(d). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 (1981), citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

I am satisfied that the decision not to renew the contracts of approximately 69 employees fell within that category of decisions "such as the order of succession of layoffs and recalls" which are an aspect of the employer/employee relationship and which therefore was a mandatory subject of bargaining under the *First National Maintenance* test.

The Respondent's decision to reduce its staff did not involve plant relocation, capital investment nor was time a particularly critical factor, since the nonrenewals continued throughout 1998. The Respondent merely decided that conditions were such that it should reduce its work force, and it left implementation of this to the subjective judgment of first line supervisors. They were not told whom to terminate. They were simply given a number to be met by December 31. This is precisely the type of management decision about which the employees' representative ought to have been given the opportunity to bargain.

In March, the Union wrote requesting the Respondent to bargain about nonrenewals and sought information pertaining to those employees slated for nonrenewal. The Respondent ignored the Union's request for bargaining and for information.

Counsel for the General Counsel acknowledges that as a result of the economic downturn affecting the Saipan hotel industry, "(s)ome layoffs were undoubtedly necessary." Nevertheless, the nonrenewals here were effected without the Respondent having complied with its statutory obligation to bargain with the certified representative of its employees. Accordingly, I conclude that the Respondent violated Section 8(a)(5) and that it should be ordered to offer employment contracts to all employees who were not renewed between February 17, and December 31, 1998, consistent with CNMI law, and make them whole for any loss of wages and other benefits they may have suffered.

cluding all managerial employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

² *Dai-Ichi Hotel Saipan Beach v. NLRB*, 219 F.3d 661 (D.C. Cir. 2000).

³ All dates hereafter are in 1998, unless otherwise indicated.

b. Refusal to furnish information

In its amended answer, the Respondent admitted since March 23, the Union requested the following information:

- (i) The names, wage rates and classifications of employees whose contract was not renewed since January 1, 1991, to the present;
- (ii) The names, wage rates and classifications of employees hired and/or who entered in an initial employment contract with the (Respondent) since January 1, 1992, to the present;
- (iii) The written procedure utilized by the (Respondent) which illustrates how decisions are made regarding whether an employee's contract is renewed; and
- (iv) The person in (Respondent's) management who ultimately decides whether a contract is renewed or not.

While admitting that it has refused to furnish this information, the Respondent denied that such is necessary in order for the Union to perform its duty as the employees' bargaining representative. Principally, however, the Respondent contends that it need not furnish the information because the Union's certification is invalid.

Since the decision not to renew the contracts of bargaining unit employees is a mandatory subject of bargaining, it follows that information relating to that issue is the type of information to which the Union is entitled in order to carry out its function as the employees' bargaining representative. *Ryder Distribution Resources, Inc.*, 302 NLRB 76 (1991). Accordingly, I conclude that by refusing to furnish this information the Respondent violated Section 8(a)(5).

c. Unilateral changes of past practice

By memo dated February 23, the Respondent advised employees that they would not be "allowed to bring-out flowers [sic] intended for restaurant use." The Respondent maintains that this simply stated a long-standing policy and was therefore not a unilateral change.

However, the credible evidence shows that in fact employees were previously allowed to take used flowers, though it appears they first received permission from a supervisor. I find that the past practice was to allow employees to take used flowers and that memo prohibiting such on penalty discipline was a change from past practice.

To be able to have used flowers on occasion is clearly a trivial benefit. It is nevertheless a benefit which employees enjoyed and which the Respondent unilaterally curtailed. I therefore conclude that by doing so without bargaining with the Union, the Respondent violated Section 8(a)(5).

It is also alleged that this change was in retaliation for a majority of the employees having voted in favor of the Union and was thus violative of Section 8(a)(3) and was violative of Section 8(a)(4). While there is insubstantial credible evidence that the Respondent was motivated by employees having participated in the processes of the Board, I do conclude this act was in retaliation for the employees' union activity. The memo was written within days after the second election. No reason was given why the Respondent would deny what had previously been a trivial benefit, or time the announcement when it did.

The only reasonable conclusion is that the Respondent reacted to the employees' union activity.

In paragraph 28(b) it is alleged that on March 15, the Respondent unilaterally transferred cooks from the North Wing Kitchen to the South Wing Kitchen. This is alleged to have been violative of Section 8(a)(5), because the Respondent did not bargain with the Union; Section 8(a)(3) because it discriminated against union supporters, in particular Hermie Coronejo, one of the transferees and the Union's leading supporter among employees; and Section 8(a)(4).

The North Wing Kitchen services four restaurants and the South Wing Kitchen prepares food for the bake shop, two restaurants, and the employees cafeteria. Each of the restaurants offers different ethnic food. Therefore assignment to a particular kitchen means the cook will have to prepare a particular kind of food. This fact is argued by the General Counsel to have constituted an adverse change in working conditions; and by the Respondent as a reason for the transfers—so that cooks could be cross-trained.

No doubt there was such a transfer and the Respondent issued a memo so stating on March 6, nevertheless, the evidence is unpersuasive that the employees had a vested right to working in one kitchen rather than the other or that there were adverse consequences associated with the transfer of any of the cooks.

While the General Counsel argues that never before had there been a transfer of a group of cooks announced by memo, it is undisputed that in fact cooks are transferred between the two kitchens. Indeed Coronejo had been transferred.

Coronejo's testimony concerning the alleged adverse change in working conditions included that he got a meaner supervisor (meaning that the other cooks got a more benevolent one), that his days off were changed, that he lost overtime and that he had to learn to cook different food. If in fact there was a provable loss of income as a result of the transfer, then there would be grounds for finding a violation, but Coronejo's testimony does not tie the loss of overtime to working in one kitchen as opposed to the other. The other matters testified to by Coronejo do not amount to working conditions which are mandatory subjects of bargaining.

In short, the Respondent had a past practice of transferring cooks and a reasonable basis for doing so (cross-training). The transfers did not harm employees in any significant, provable way. Finally, an employer has the right to manage its business, which includes the right to transfer employees from one job to another. Nor is there persuasive evidence that the transfer was effected because employees participated in the Board's processes. I therefore conclude that the General Counsel failed to prove by a preponderance of the credible evidence that the Respondent violated Section 8(a)(3), (4), or (5) by transferring the cooks on March 6.

It is alleged that on April 1, the Respondent unilaterally increased the cost to nonresident employees for housing and meals [from \$35 per month to \$70 per month, par. 28(c)]; ceased paying employees the restaurant service charges obtained from customers' meal coupons [par. 28(d)]; and on January 1, 1999, reduced the number of holidays, and days of vacation and sick leave [paragraph 28(g), which the parties also

seem to agree covers elimination of the annual Christmas party]. It is alleged these unilateral changes were violative of Section 8(a)(5).

On brief, counsel for the Respondent concedes that these changes were made without prior notice to the Union or giving the Union an opportunity to bargain. Counsel concedes that if the Respondent does not prevail in its appeal to the court of appeals, “the Hotel has no defense to the charges based on these changes.”

Given counsel’s admission, and the fact that the items changed clearly are mandatory subjects of bargaining, I conclude that the Respondent violated Section 8(a)(5) as alleged in paragraphs 28(c), (d), and (g) of the complaint.

I further reject the Respondent’s contention that there should be no make-whole remedy for these violations since the changes were instituted for economic reasons. Counsel cites no authority for such a proposition and I know of none. The mere fact that the Respondent was economically better off after committing an unfair labor practice does not negate a full remedy. Nor were these benefit changes so de minimis as to make inappropriate a bargaining order, as argued for by counsel for the Respondent.

In paragraph 28(e) it is alleged that on November 2 the Respondent ceased providing employees with free laundry detergent because employees filed charges or gave testimony under the Act and thus violated Section 8(a)(4); and, because this action was without notice to the Union, or giving the Union an opportunity to bargain, it was violative of Section 8(5).

It is undisputed that prior to November 2, the Respondent furnished each unit employee one box of laundry detergent monthly and required employees to wash their work uniforms. By memo of November 2, the Respondent rescinded this policy, and employees are now required to buy their own detergent. Although this was a fairly minimal benefit (estimated at \$10 per month), it was a regular benefit to employees, was an integral part of their compensation and as such was mandatory subject of bargaining, which the Respondent was not privileged to change unilaterally. By failing to give the Union notice and an opportunity to bargain about discontinuing this benefit, the Respondent violated Section 8(a)(5), as alleged in paragraph 28(e). E.g., *Beverly Enterprises*, 310 NLRB 222 (1993), enfd. in pertinent part 17 F.3d 580 (2d Cir. 1994), where the employer unilaterally eliminated providing free coffee.

There is, however, insufficient credible evidence that the Respondent rescinded its laundry detergent policy because the employees had participated in the Board’s processes, or for other reasons proscribed by Section 8(a)(4). Accordingly, I will recommend dismissal of the 8(a)(4) allegation as to the laundry detergent.

It is alleged in paragraph 28(f) that on November 2, the Respondent ceased permitting employees to take drinking water from the hotel for their personal use. The Respondent does not dispute the facts of this allegation, but maintains that its duty is only to provide drinking water for employees and that it has installed water dispensers in the barracks.

The General Counsel acknowledges that there are water dispensers in the barracks, but notes that the dispensers often run out and then employees must buy their own water (tap water in

Saipan is not potable). Since Coronejo testified that sometimes employees use the furnished water to rinse themselves after showering, such is a waste of a precious resource the cause of the dispensers running dry. Though Coronejo did testify to such a use, there is otherwise no evidence for the Respondent’s argument that rampant nondrinking wastage of water is the reason there is often no drinking water in the barracks. Further, the Respondent’s argument in this respect does not cover employees who do not live in the barracks.

Finally, the method by which the Respondent fulfills its obligation to furnish drinking water for employees is clearly a condition of employment on Saipan and as such is a mandatory subject of bargaining. By changing its policy, the Respondent violated Section 8(a)(5) as alleged.

2. 8(a)(1) violations

a. Statements of supervisors and managers

In paragraphs 7 through 24 of the consolidated complaint, various of the Respondent’s first line supervisors, as well as certain managers, are alleged to have made statements to unit employees primarily in the nature of unlawful interrogation, threats, and the futility of selecting a bargaining representative. Nearly all the witnesses on these issues testified in either Tagalog (the language of the Philippines and that of most of the unit employees as well as many first-line supervisors) or Japanese (the language of most of the managers). However, most of the statements alleged violative of Section 8(a)(1) were in English, typically a second language for both the speaker and recipient. In such cases, while the witness attempted to remember the English words spoken, there is a strong suspicion that they remembered the event in their native language and translated when testifying. In short, I find that the precise English words testified to by either witnesses for the General Counsel or the Respondent are unreliable. Nevertheless, the totality of testimony convinces me that many unlawful statements were made to unit employees in the period preceding the second election.

In a specific defense to many of these allegations, the Respondent contends that each of its supervisors received “TIPS” training, from which I am asked to conclude that they did not commit the unfair labor practices alleged. By this training, various counsel for the Respondent told supervisors they were not to threaten, interrogate, promise benefits to, or engage in surveillance of employees. The fact supervisors and managers may have been informed concerning what constitutes an unfair labor practice does not tend to prove that they did not do so. To the contrary, the tenor and scope of the 8(a)(1) allegations are consistent with admissions of Personnel Manager Peding Sanchez that “The Japanese managers were very much against having the Union come into the Hotel.”

In evaluating the allegations of unlawful interrogation, I am guided by *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); and subsequent cases. E.g., *WestPac Electric, Inc.*, 321 NLRB 1322 (1996) (Chairman Gould and Member Browning specifically not relying on *Rossmore House* and *Sunnyvale*). Noting Section 10(c), it is the Board’s position that interrogation of employees about their union activity is not per se violative of the Act in the absence of promises or threats, but can be violative if the interro-

gation tends to restrain, coerce, or interfere with employees' Section 7 rights when considering all the circumstances. In addition to the specific interrogations here, relevant factors include the intensity of the Respondent's campaign against the Union, the number of supervisors interrogating employees, and the fact that by in large, the employees were contract workers who could be sent home at the end of their contract year.

(1) JULIANO MATRASUTARO

Paragraph 7 alleges that Chief Steward Juliano Matrasutaro interrogated employees in December 1997, and January 1998. On this allegation Teodoro Vivero testified (in halting English because his first language is a dialect different from that of the interpreter) that either in December or January Matrasutaro talked to him about the Union, and asked "if I like Union or not."

Matrasutaro denied that he threatened, interrogated, made promises, or spied on employees and specifically denied that he ever asked Vivero how he would vote in the election. He did not, however, deny the statement attributed to him by Vivero—"if I like Union or not."

As noted above, the credibility of witnesses whose first language is not English is difficult to determine. Nevertheless, I generally credit Vivero and conclude that Matrasutaro made the statement attributed to him, which Matrasutaro did not in fact deny. I conclude that Matrasutaro interrogated Vivero about his position concerning the Union and in the context of this case, was violative of Section 8(a)(1).

(2) YOICHI KAWASAKI

In paragraph 8 and its subparagraphs (a) through (i) it is alleged that Assistant Manager of the Food And Beverage Department Yoichi Kawasaki, committed various violations of Section 8(a)(1):

Elena Almariego testified that Kawasaki told her that "the election is coming in, so the Union cannot help you," to which she replied, "that the Union can help me one hundred percent." I conclude, as argued by the Respondent, that Kawasaki's statement did not suggest the futility of employees selecting the Union—there was, for instance, no implication that the Respondent would not bargain with the Union. I therefore conclude that paragraph 8(a) be dismissed.

Paragraph 8(b) alleges several instances of unlawful interrogation by Kawasaki. Thus Luisito Alonzo testified that in early January Kawasaki asked, "what [sic.] you who will vote for yes." Then later in January, Kawasaki asked him "how's the score in the Claret restaurant, who vote no or yes?"

Minette Floro testified that Kawasaki asked her on a couple occasions who her friends were and in April he asked, "What do you feel about the Union in the hotel." She answered that she believed the Union would help.

Finally, Elena Almariego testified that just before the second election, Kawasaki asked her, "What I'm doing and why I'm supporting the Union?"

Kawasaki denied making these statements, and generally that he interrogated any employee, denials which I do not credit. Rather, I credit Alonzo, Floro, and Almariego and conclude that Kawasaki made the statements attributed to him. In the

context of this case, I conclude that each of these questions by Kawasaki was unlawful interrogation and violative of Section 8(a)(1).

The interrogation alleged in paragraph 8(c) concerns a petition employees had circulated complaining about Chief Cook Danilo Dela Cruz in October. Rangamar testified that Kawasaki told her she had no right to sign the petition, since she was not a cook, and asked her why she had signed the petition. Kawasaki also asked Alonzo why he had signed the petition, since he did not work in the kitchen. The General Counsel argues that these questions were accusatory and therefore violative of the Act. The Respondent maintains they were appropriate, inasmuch as neither Rangamar nor Alonzo was under Dela Cruz's supervision. I agree with the Respondent that Kawasaki's questioning here was not unlawful interrogation.

In October Kawasaki is alleged to have instructed employees to refrain from and rescind their union and/or concerted activities. This alleged to have occurred when Kawasaki questioned Rangamar about the Dela Cruz petition and told her she had "no right to sign the petition" because she was not a cook. And he told her to "erase" her name. While I agree that the question did not rise to the level of unlawful interrogation, to tell an employee to rescind what was clearly protected concerted activity, was unlawful and violative of Section 8(a)(1).

Kawasaki is alleged to have impliedly threatened employees that their annual contracts might not be renewed because of their union or protected activity. Almariego testified that before her contract expired on November 20, Kawasaki asked her if she thought her contract would be renewed. Kawasaki denied having this conversation, and, the Respondent notes, at the time this was supposed to have occurred, Kawasaki was no longer in the Claret restaurant, having been transferred to Banquets. While this fact does not necessarily prove that Kawasaki and Almariego no longer spoke, it is some support for Kawasaki's denial. Beyond that, however, to find the violation alleged would require too much to be implied. I therefore conclude that Kawasaki did not make the threat alleged in paragraph 8(e).

The allegations in paragraphs 8(f) and (g) concern Kawasaki's interrogation of Rangamar on November 18, about having seen her with other employees of the Respondent at the Horiguchi Building, where various federal agencies have offices, including, the Department of Labor (where the Board agents use offices), and the United States District Court.

Though her testimony is somewhat confusing and convoluted, Rangamar testified that Kawasaki started the conversation by asking why "I like helping people," noting that he had seen her and another employee at the Horiguchi Building. He asked who they saw and he also told her he had seen her and Ronaldo Del Rosario at CNMI Labor (a different place). Kawasaki admitted that he had seen Rangamar at the Horiguchi Building, but denied questioning her or Del Rosario about seeing them.

On balance, I credit Rangamar (but not Del Rosario, *infra*) over Kawasaki and conclude that in fact he interrogated her about concerted activities and gave the impression that such were under surveillance. The Respondent thereby violated Section 8(a)(1).

However, it is a stretch to also conclude that investigation of unfair labor practices was under surveillance, as argued by the General Counsel, simply because the Board uses offices in the Horiguchi Building. In fact there are several Federal agencies housed in that building. Board agents use offices of the Department of Labor.

At the hearing the complaint was amended to include a threat by Kawasaki about 5 days after the election wherein he said to Dina Soriano, "Okay, that the Union is Union win—Union win, so I can—I guarantee that reduce staff. Because we have 270 Dai-Ichi staff, and he said we're going to reduce—reduce 70 staff. This—that will be this year, he said."

Kawasaki denied this testimony of Soriano, which denial ought to be credited argues the Respondent because Soriano was not a credible witness and the alleged statement was heard by two General Counsel witnesses, neither of whom testified to this event though testifying about other matters involving Kawasaki. I am persuaded by the Respondent's argument and conclude that Kawasaki did not make the threat attributed to him by Soriano.

(3) HITOSHI ITO

The allegations in paragraph 8(h) (and presumably also par. 8(i)) were amended at the hearing to be attributed to Executive Chef Hitoshi Ito and occurred during an investigatory interview to determine whether Teodoro Vivero would keep his job. According to Vivero, and undenied by Ito or Sanchez, who was also present, Ito twice asked why Vivero was always with Coronejo. He also told Vivero to stay away from Coronejo.

Coronejo was well known to be the leading employee advocate on behalf of the Union's organizational campaign. I therefore conclude that Ito's interrogation of Vivero and admonition to stay away from Coronejo interfered with employees' Section 7 rights as alleged in paragraph 8(h). While Vivero was not a particularly credible witness, his testimony about this was undenied and I therefore find it occurred in substance as he testified.

However, I find nothing in Vivero's testimony which amounts to a threat of unspecified reprisals should Vivero continue to associate with Coronejo. Therefore, I shall recommend that paragraph 8(i) be dismissed.

I reject the Respondent's argument that the allegation as to Ito should be dismissed as time-barred by Section 10(b). Notwithstanding that Ito was not named in the charges, it is clear they cover these events. E.g., *Well-Bred Loaf*, 303 NLRB 1016 (1991).

(4) MAKOTO SAITO

It is alleged in paragraph 9 that Food and Beverage Department Manager Makoto Saito unlawfully interrogated employees in January. This allegation is apparently based on the testimony of Almariego to the effect that on one occasion Saito "reminds me that the election is coming." There is no evidence that in fact Saito ever asked any employee about the union activity. Therefore, I conclude that the General Counsel failed to establish this allegation and I shall recommend that it be dismissed.

(5) LAMBERTO APOSTOL

Paragraph 10 alleges that in January, Chief Cook Lamberto Apostol unlawfully interrogated employees. This is based on the testimony of Maximo Piol who said that in January Apostol "asked me what I'm doing there" when he was passing out union flyers. This occurred in the employee barracks, where Apostol also lived.

Although interrogation of an employee about whether he engaged in union activity is no doubt unlawful, here Apostol observed Piol and in effect stated that Piol should not be passing out such handbills since he was a contract worker. It does not appear from Piol's testimony that in fact Apostol interrogated him about his union activity. Accordingly, I shall recommend that paragraph 10 be dismissed.

(6) RAUL RUEDA

In paragraph 11(a) it is alleged that Raul Rueda, assistant section manager of the food and beverage department, unlawfully interrogated employees on various dates in January and February. In support of this allegation is the testimony of Almariego, who said that in February, after the second election, Rueda "asked me why did I do that to the company." Rueda did not deny asking the question attributed to him; however, the Respondent argues he did not do so because he received TIPS training.

As noted above, I do not believe the TIPS training tends in any way to prove that supervisors did or did not make any particular statement. Thus I conclude that Rueda asked Almariego something along the lines of why she did "that to the company." Implied in this question is Rueda's supposition, at least, that she had voted for the Union; however, the question is devoid of any kind of threat or promise of benefit, and generally is not the sort of interrogation which the Board generally finds unlawful.

Allen Tiquio testified that in January, following a meeting at the barracks in Coronejo's room, Rueda "ask me why I attend the Union meeting." Rueda denied seeing Tiquio at a union meeting (though Rueda lives in the barracks and many meetings were held there), or asking if he attended meetings. On balance, I credit Tiquio over Rueda and conclude he asked the question attributed to him. I further conclude this is the sort of interrogation which the Board finds unlawful. *Perdue Farms*, 323 NLRB 345 (1997).⁴

During the conversation Rueda had with Tiquio noted above, Tiquio testified "he told me the Union cannot help employees. And he told me look at the other hotel like the Grand Hotel, a lot of the employees went home, they were sent back to their home, but did the Union help them?" By this statement, Rueda is alleged to have informed employees in January that selection of the Union would be futile and to have threatened them with nonrenewal. I agree. I credit Tiquio over Rueda, and conclude that this event happened generally as testified to by Tiquio. I conclude that Rueda indicated that selecting the Union would be futile and if employees did so, their contracts might not be

⁴ Alice Figueroa also gave testimony about interrogation by Rueda; however, this apparently occurred prior to the first election and would therefore be barred by Sec. 10(b).

renewed. He thereby violated Section 8(a)(1) as alleged in paragraphs 8(b) and (c).

Similarly, in February Rueda is alleged to have threatened nonrenewal of employment contracts. The substance of this allegation apparently occurred in January when, according to the testimony of Manolo Salvador, Rueda told him “don’t join the Union people because it might affect your renewal.” I credit Salvador over Rueda and conclude that Rueda made the statement attributed to him and it was a threat in violation of Section 8(a)(1).

(7) ROMEO MALABANAN

Paragraph 12 alleged that in late January, assistant chief of the maintenance department Romeo Malabanan threatened employees with discharge or nonrenewal should they select the Union as their bargaining representative. The substance of this allegation is from the testimony of Aguinaldo Naluis. According to Naluis, Malabanan passed by a group of seven maintenance employees and said that “if the Union won, there’s a lot of Filipino that’s going to be removed from their job.” Another of the employees, Norman Gentolia, testified that Malabanan said, “if the Union won, a lot of you were going to be removed.” Malabanan denied making these statements.

Counsel for the Respondent argues that Malabanan’s denial ought to be credited because the General Counsel did not call all the witnesses to Malabanan’s statement, nor ask to whom she did call about the statement, and that Malabanan had taken TIPS training. I conclude these are insufficient reasons to discredit Naluis and Gentolia, both of whom I found believable. I therefore conclude that Malabanan made the statements attributed to him and he thereby threatened employees in violation of Section 8(a)(1) as alleged.

(8) MELBA BORLONGAN

On several occasions in January and February Housekeeping Manager Melba Borlongan is alleged to have unlawfully interrogated employees. Concerning this, Rosanna Cayabyab testified that one day while cleaning a guest room Borlongan came in and said, “there’s going to be changes if we have an Union, and there’s going to be a problem, and they’re going to deduct our salary. There’s going to be Union rallies, that will affect your job, our job . . . she asked me what I’m going to vote.”

Similarly, Luisa Adao testified that Borlongan came into a room she was cleaning and asked, “are we yes or what?” Borlongan also asked Adao whether Teodoro Vivero (Adao’s boyfriend) “is a union organizer.”

The testimony of Cayabyab and Adao is credible, and undenied, though counsel for the Respondent represents that Borlongan was not renewed and is no longer in Saipan. In any event, crediting the General Counsel’s witnesses, I conclude that in fact Borlongan unlawfully interrogated employees as alleged in paragraphs 13(a) and (b).

(9) MYRNA SANTOS

Housekeeping supervisor Myrna Santos is alleged to have unlawfully interrogated employees in December 1997, and January 1998. Cayabyab testified that in December Santos told her “it’s better if we vote for management so we don’t have a lot of problem” and asked Cayabyab “what I’m going to vote”

(the later statement being solicited after she had been shown her affidavit to refresh her recollection). Santos denied asking Cayabyab how she was going to vote, a denial I tend to credit. Santos was a generally credible witness. Though Cayabyab was credible as well, the testimony of unlawful interrogation was not included in her initial recitation of facts and came out only after a torturous refreshing of her recollection. On balance I conclude that Santos did not unlawfully interrogate Cayabyab and I shall recommend that paragraph 14 be dismissed.

(10) EDUARDO MAGALLANES

Chief Engineer Eduardo Magallanes is alleged to have unlawfully interrogated employees on February 1. The substance of this allegation is from the testimony of Rafael Montiflor, not as asserted by the Respondent, from Alfonso Matibag.

Montiflor testified that the morning after he had been visiting friends, Magallanes asked him what had happened to him, that he had received a call from the General Manager who in turn had received four calls about Montiflor because he was “the leader of the Union.” The General Counsel argues that implied in this was unlawful interrogation of Montiflor about his support for the Union. I disagree. I conclude that interrogation must be some kind of a direct question, rather than implied, as argued by the General Counsel. I therefore conclude that paragraph 15 should be dismissed.

(11) FRANCISCA CLAMOR

It is alleged that on two unknown dates between September 12, 1997, and February 5, Housekeeping Manager Francisca Clamor unlawfully interrogated employees. The substance of this allegation is from the testimony of Cayabyab and Adao.

Cayabyab testified that in January, Clamor asked her “what am I going to vote for the election.” Adao testified that prior to the election, Clamor asked her and two other employees “are you going to vote for the Union.”

Clamor denied asking Adao whether she was going to vote for the Union. And again, the Respondent argues her denial must be credited because she attended TIPS meetings. I reject this argument and I conclude that Adao was more credible. I conclude that Clamor asked the questions attributed to her and thereby unlawfully interrogated employees in violation of Section 8(a)(1) as alleged in paragraph 16.

(12) MARITA ALARILLA

Marita Alarilla, a supervisor in the housekeeping department, is alleged to have unlawfully interrogated employees. This is from the testimony of Adao who recounted that about a week before the election, Alarilla asked, “Lusisa, are you yes? As she asked me is Theodoro [sic] going to vote for a yes?” This testimony is unrefuted, again, according to representations by counsel for the Respondent, because Alarilla was not renewed and was not in Saipan. Notwithstanding, I conclude that Adao’s testimony was credible and that Alarilla engaged in unlawful interrogation as alleged in paragraph 17.

(13) IZUMI KINOSHITA

Paragraph 18 alleges that General Manager Izumi Kinoshita unlawfully interrogated employees on February 1. Counsel for the General Counsel argues this allegation is supported by the

testimony of Montiflor who, after the discussion with Magalanes [supra (x)] asked to see Kinoshita. According to Montiflor, he told Kinoshita that he did not understand how it was that Kinoshita got reports that he was the leader of the union movement and he denied to Kinoshita that he was. Kinoshita testified to this meeting, but stated he did not believe he violated instructions not to interrogate employees.

Montiflor did not testify to any direct interrogation by Kinoshita. Nevertheless, the General Counsel argues that Kinoshita impliedly interrogated and created the impression of surveillance (which was not alleged). I conclude that the substance of the meeting initiated by Montiflor did not include unlawful interrogation by Kinoshita and I shall recommend dismissal of paragraph 18.

(14) DANILO DELA CRUZ

In paragraph 19, Chief Cook Danilo Dela Cruz is alleged to have interrogated employees before the second election and threatened them with unspecified reprisals should they choose the Union and, after the election, threatened them with more onerous working conditions and discharge because they selected the Union.

The interrogation allegation in paragraph 19(a) was, according to counsel for the General Counsel, inadvertently attributed to Danilo Dela Cruz rather than to another Chief Cook, Jeffery Cruz. Counsel correctly notes that the Respondent was aware of this error and in fact called Jeffery Cruz as witness to deny the substance of Digna Soriano's testimony that he asked her "what I'm going to vote." I agree that the interrogation by Jeffery Cruz, though not alleged, was fully litigated and that it occurred in substance as testified to by Soriano.

Counsel for the General Counsel did not brief subparagraphs (b) (unspecified reprisals on February 3), (c) (imposition of more onerous working conditions on February 12) or (d) (discharge). I find no evidence to support subparagraphs (c) or (d).

It may be that subparagraph (b) is meant to be supported by the testimony of Coronejo following an OSHA inspection in January or February. Coronejo testified that Dela Cruz saw him talking to the OSHA inspectors and said, "OSHA now, what next?" This statement does not imply a threat of any kind of reprisal. I therefore conclude that the allegations that Dela Cruz violated the Act have not been sustained and I shall recommend that paragraph 19 be dismissed.

(15) YOSHIHARU HIOKI

Yoshiharu Hioki, the assistant manager of the food and beverage department, is alleged to have unlawfully interrogated employees on February 5. Minette Floro testified that the day after the election on February 5, Hioki said to her "Minnie, why you—why you go there in the counting and who's with you in the counting?" This testimony is unrefuted, counsel for the Respondent representing that Hioki is in Japan and was therefore unavailable.

I credit Floro and conclude that Hioki made the statement attributed to him; however, I am not persuaded that such amounted to unlawful interrogation, particularly when one considers that, as Floro testified, Hioki is "not really good in English. His English is crooked." Thus I conclude that Hioki

did talk to Floro about observing the vote count, but that it did not rise to unlawful interrogation and I shall recommend that paragraph 20 be dismissed.

(16) PEDING SANCHEZ

Personnel Manager Peding Sanchez is alleged to have unlawfully interrogated employees in late February and on May 23, to have conditioned "employees' job referrals on their abandoning their union activities."

The interrogation allegation is from Yolanda Perez who testified that shortly after the election when talking to Sanchez in the personnel office about another matter, Sanchez "asked me—she was surprised that I was pro Union" and "she said oh, I didn't know that you were silent supporter for the union." Later Perez testified that Sanchez asked whether she was "into Union." Sanchez testified that she in fact talked to Perez in the elevator, but denied making any of the statements attributed to her.

I found Sanchez a credible and reliable witness. In addition to her positive demeanor, she has good command of English and she gave testimony adverse to the Respondent. The testimony of Perez, on the other hand, was inconsistent, confusing, and generally not very reliable. On balance I credit Sanchez and conclude she did not make the statements Perez said she did and did not unlawfully interrogate Perez as alleged in paragraph 21(a). I shall recommend that paragraph be dismissed.

It is undisputed that Jesus Gomez was not renewed and that on his last day of work (May 18) he met with Sanchez who told him she would help get him a job. She then made a phone call, asked if Gomez would like to work on the neighboring island of Tinnian and when he said yes, gave him a complimentary ferry ticket. Then, according to Gomez, but denied by Sanchez, she said, "no more union."

Again, I found Sanchez credible and I am not persuaded by Gomez. Fundamentally, his story does not make sense. Assuming that somehow Sanchez was in league with the other personnel manager to screen out union activists, after obtaining a job referral for Gomez there would be no purpose to then get an assurance he would not participate in union activity. And if she was, the mere statement attributed to her by Gomez would not have been very effective. There is no basis in this record to conclude that Sanchez would care whether her former employees engaged in union activity when working for another company. I simply do not believe she made the statement Gomez said she did. I shall recommend that paragraph 21(b) be dismissed.

In paragraph 21(c) it is alleged that Sanchez told employees that selecting the Union would be futile. The only testimony in support of this allegation is from Figueroa who said that during company campaign meetings for nonresident contract workers, Sanchez told employees that the Union "cannot help us in any way, even if [sic] our renewals. They are not the ones to decide whether to renew an employee or not." And, "she said that Union cannot really help us."

Figueroa's memory is generally consistent with the written speech given by Sanchez, which in relevant part reads: "Union is not responsible to renew your contract. Nor do they have the authority to decide whether your contract can be renewed or not

. . . Union cannot protect you if your performance is not good and the company decides not to renew your contract. Such a decision is up to the management. Union may negotiate with the management to try and keep the employee. That is all they can do.”

I conclude that the statements made by Sanchez to employees were lawful and that Sanchez did not in fact tell employees that it would be futile to select the Union as their bargaining representative. I therefore shall recommend that paragraph 21(c) be dismissed.

(17) HIROSHI KANNO

Hiroshi Kanno was the Executive Chef until October 1997, and is alleged to have interrogated employees in late September or early October 1998. Counsel for the General Counsel amended the complaint at the hearing to delete this paragraph, and though there was some testimony which might indicate interrogation by Kanno while still an employee, counsel for the General Counsel did not pursue this allegation. Paragraph 22 of the complaint will be dismissed.

(18) JEFFREY CRUZ

The allegation in paragraph 23(a) is based on the testimony of Almariego that sometime after the election Food and Beverage Department Supervisor Jeffrey Cruz asked her if it was true that her picture was in the union magazine.⁵ And Dina Soriano testified that she saw Cruz looking at the picture. Cruz testified that one day he observed employees in the dining area looking at something, so he approached them to see what it was. He saw the magazine and said, “Elena (Almariego), you’re in the picture.”

While this incident is some evidence of Company knowledge of certain employees’ union activity, I do not believe it amounts to unlawful interrogation. The employees, after all, brought the picture to the hotel and were looking at it. The comment by Cruz, regardless of which precise version is accepted, was casual and nonthreatening.

Almariego also testified that about 2 weeks before her renewal in November, Cruz asked if she had signed the petition concerning Dela Cruz. And, according to Almariego, Cruz threatened not to renew her contract because she had signed the petition. Her testimony in this regard: “He asked me if I sign in the petition letter for Dani Dela Cruz, and I said yes. And he told me that I might not renew my paper because the manager asked him—asked him to ask me if I signed in the petition.”

Cruz admitted having asked Almariego if she signed the petition, contending that he did so a good supervisor attempting to find out problems employees had and “address any grievances.” However, he denied Almariego’s assertion that he was asked to find out by his supervisor, Makoto Saito. And, he denied making any kind of threat.

I agree with the Respondent that the denials by Cruz were credible. Since management had received the petition, Saito knew whether or not Almariego was a signatory. Therefore no purpose would be served for him to have Cruz interrogate her.

⁵ The March/April issue of the Union’s magazine (*Catering Industry Employee*) featured a picture of some of the Respondent’s employees following the successful second election.

And, according to Almariego, Cruz “told me that not to lose my hope because he still need me to the Claret because there’s not enough staff . . . he just told me that my performance at work is better and it’s good.”

Given these circumstances, I conclude that Cruz in fact asked Almariego if she had engaged in protected, concerted activity, but that it was nonthreatening and not violative of Section 8(a)(1).

Finally, Digna Soriano testified that about 2 weeks before the election, Cruz “asked me what I’m going to vote,” and she replied, “I’m in the Union side.” Cruz told her, “it’s up to you, you have your own mind, it’s up to you for what you want to vote. And that’s all.” Cruz denied having discussed the Union or the election with Soriano. On this I tend to credit Soriano over Cruz, finding that the event as testified to Soriano is consistent with other actions of Cruz in this matter. I further conclude that telling Soriano that she could make up her own mind did not cure the unlawful interrogation in the total circumstances of this matter. Cruz therefore violated Section 8(a)(1) as alleged in paragraph 23(a).

(19) MAFIE TRINIDAD

Mafie Trinidad was a supervisor in the Food and Beverage Department. She is alleged to have threatened employees that their annual contracts would not be renewed because the Union won the election. This allegation is based on the testimony of Carliza Carlos. According to Carlos, in April Trinidad told her, “. . . that we came here not to join the Union but to work” And later, “I’m sure that your contract will not be renewed because the Union won.” This is undenied.

While the testimony of Floro that Trinidad voted in the election tends to prove she was at the time a rank-and-file employee, the Respondent is not denying the allegation of her supervisory status. Thus, I conclude that Trinidad made a threat of reprisal as alleged in paragraph 24.

(20) ARTHUR GUERRERO

At the hearing, the complaint was amended to allege that Front Desk Supervisor Arthur Guerrero threatened an employee. The facts of this allegation occurred about 2 weeks before the election according to Tiquio, who testified that Guerrero “told me to be careful when I’m attending the meeting because the management might find that I’m attending meetings and they might send me back home.” This statement by Guerrero is undenied; and notwithstanding the friendship between Guerrero and Tiquio, I conclude that Guerrero made a direct threat in violation of Section 8(a)(1) of the Act.

b. Employee handbook and rules of conduct

It is alleged that the Respondent violated Section 8(a)(1) by maintaining the following provisions in its employee handbook:

Confidential Business Information

The protection of confidential business information and trade secrets is vital to the interests and the success of (the Respondent). Such confidential information includes, but is not limited to, the following examples:

Compensation data

Labor relations strategies

Employee Handbook

(e)employees who improperly use or disclose . . . confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do no [sic] actually benefit from the disclosed information.

And, RULES OF CONDUCT:

Violation of any of the Rules of Conduct may subject the Employee to disciplinary action, up to and including termination.

Revealing any information regarding current or past employees, except with (t)he written permission of the Personnel Manager.

Badmouthing or disparaging the (Respondent) or its reputation, its employees, and/or (t)he quality of its service.

No doubt an employer may protect against disclosure of confidential information and no doubt employees have the right to engage in protected concerted activity, which may include discussion among themselves and their bargaining representative about wages and other terms and conditions of employment. To the extent an employer attempts to prohibit employees from discussing matters of mutual concern, including wages and other terms of employment, the employer has interfered with employees' Section 7 rights. However, not everything employees may learn about the employer's business falls within the coverage of terms and conditions of employment.

Absent enforcement, it is difficult here to determine the full reach of the Respondent's proscriptions against employee activity. However, it does appear that the items alleged in the complaint relate to wages, hours, and other terms and conditions of employment and that the Respondent's attempt to prohibit employees from disclosing these matters among themselves or to their bargaining representative is violative of Section 8(a)(1). E.g., *Lafayette Park Hotel*, 326 NLRB 824 (1998).

3. Discriminatory terminations

a. Nonrenewals

As noted above, the principal issue in this case is the Respondent's failure to renew two contracts of 34 nonresident employees (including Hermie Coronejo whose nonrenewal is alleged and treated separately, *infra*) when they came up for renewal from February 17, to December 31. In addition to the general allegation that the Respondent's failure to renew occurred in the context of its refusal to bargain about this subject, it is also alleged that the Respondent specifically did not renew the 34 employees named in the complaint because of their union activity.

Whether the Respondent also violated Section 8(a)(3) in not renewing these 34 employees is governed by the principles set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* denied on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB Transportation Management Corp.*, 462 U.S. 393 (1983).

Under *Wright Line* it is the General Counsel's burden to show that employees' union activity was the motivating cause of the decision not to renew the employees in question. Relevant to this are several elements, such as animus, timing, knowledge, pretext, and, of course, direct evidence that action was taken to discriminate against employees because of their protected activity. Where the General Counsel succeeds in making out a prima facie case of discrimination, then the burden shifts to the Respondent to prove that the same action would have been undertaken in the absence of any protected activity.

Here there are factors from which it can be inferred that the 34 nonresident employees were not renewed because of their union activity. Evidence of animus abounds, notwithstanding that many of the 8(a)(1) allegations were not found. The Respondent began not renewing the 34 shortly after the Union won the second election. Certainly the Respondent knew of the union activity in general, and there is substantial evidence that the specific union activity of each of the 34 was known at least to the individual's direct supervisor (most of whom lived in the barracks and observed employees meeting for organizational purposes). The Respondent gave discretion to the first line supervisors whom not to renew, and allowed these supervisors until the end of 1998 to effect the planned reduction-in-force. Even if management did not know precisely who were union supporters, I infer that in every instance the first line supervisors did. Finally those not renewed were not in all cases the least productive employee in the department. Indeed, several of those not renewed had been finalists for or awarded Employee of the Month.⁶ Finally, the Respondent hired 17 new employees after the election (14 locals and 3 from a manpower agency). In short, it is reasonable to infer that the Respondent's failure to renew the 34 employees named in the complaint was violative of Section 8(a)(3).

However, I conclude that the Respondent met its burden that these individuals would not have been renewed had there been no union activity. Indeed, the General Counsel concedes that the substantial downturn in the Asian economy resulted in a reduced occupancy rate at the hotel and necessitated reducing the work force.

First, the Respondent cutback the number of employees from 359 to 290, including supervisors and managers. It is clear that almost as many employees not alleged to have been discriminated against were not renewed as were listed in the complaint. From this it is difficult to conclude that somehow union supporters were treated disparately. The General Counsel seems to argue that the 35 employees not renewed (including Hermie Coronejo) were all engaged in union activity whereas employees who were renewed did not. There is no proof of this. To the contrary, all nonresidents were renewed, or not, during calendar year 1998. Since the Union received 131 votes, and about 80 percent of the employees are nonresidents, it is fair to infer that nearly 75 or so union supporters were renewed. Pre-

⁶ Counsel for the General Counsel argues that the employee of the month award was discontinued in January in order to discourage union activity. There is no allegation in the complaint to this effect and I will not make findings concerning this assertion.

sumably, of those not renewed the complaint names all who were union supporters, which means that about the same number of those not renewed were not union supporters.

Second, of the 34, the Respondent actually attempted to renew seven but was unable to do so because there was a qualified replacement available for the job which the Respondent was required, by CNMI law, to hire.

On balance I conclude that the 34 nonresident workers were not renewed either because of the reduction-in-force caused by Asian economic situation, or because there was a qualified local seeking the job. In either case, the nonrenewals would have occurred in absence of any union activity. The Respondent did not violate Section 8(a)(3) with regard to renewals, but, as found above, it did violate Section 8(a)(5) in refusing to bargain about this matter.

b. Hermie Coronejo

Hermie Coronejo is a cook who began his employment in December 1993. His renewal date was to be November 28, 1998, however he was selected for nonrenewal. Then, having filed a charge with the U.S. Equal Employment Opportunity Commission, he was given a renewal for 6 months and at the time of the hearing continued to be employed, notwithstanding that he had not been renewed for 1 year in the usual fashion. Counsel for the General Counsel represented that she was informed at the hearing that Coronejo had been given another 6-month contract.

Coronejo was well-known as being the employees' leader in the organizational effort. He was the Union's observer at the first election. He was the only employee to attend the hearing on objections. He held meetings in his room at the barracks, passed out flyers, wore union T-shirts and buttons at the hotel when not on duty, and he initiated several petitions relating to working conditions. He filed charges with OSHA. From the period before the first election in 1996 until after the second, Coronejo engaged in a great deal of union and other protected activity.

It is apparently for this reason that Coronejo's nonrenewal (under normal terms) was alleged as a separate violation of Section 8(a)(3) and (4), rather than putting him with the 34 other union supporters who were not renewed. Coronejo engaged in more protected activity more notoriously than any of the others and he was known to be instrumental in pursuing charges with the Board. Thus, there is a strong prima facie case that he was not renewed in violation of Section 8(a)(3) and (4); however, his situation is not really different from the others, and as with the others, I conclude that he would not have been renewed had there been no union or other protected activity. Notwithstanding Coronejo's union leadership and substantial protected activity, there is no basis to conclude that as to him the Respondent did not sustain its burden where it did sustain its burden as to the others.

It is also alleged that he was issued an employee misconduct notice on June 2, in violation of Section 8(a)(3). The misconduct was Coronejo having punched in another employee's timecard, a fact Coronejo admitted.

Counsel for the General Counsel argues that the "warning is obviously baseless and discriminatory," but did not offer rea-

sons for which such a finding should be made. It is clear, indeed admitted, that Coronejo punched another employee's timecard and that this is a violation of company rules. There is no evidence that punching another employee's timecard is an accepted practice, nor evidence that by being given a warning for having done so Coronejo was treated disparately.

Coronejo's purported reason for punching the other employee's timecard simply does not make sense. He said it was because he was afraid of "the local employee. . . . Because he has a case of illegal possession of firearms." It is unclear whether it was this "local" employee's timecard which he punched, nor is it clear whether he punched the card in when in fact the other employee was not at work. Coronejo testified, "Yes, I punch [sic] him out."

Though the violation of company rules was relatively minor, so was the discipline. In short, the only real basis for concluding that Coronejo was given a warning in violation of Section 8(a)(3) was the fact of his union leadership. Such is insufficient. Engaging in union or protected activity does immunize one from complying with reasonable company rules; and does not prohibit a company from disciplining one for violating those rules. I therefore conclude that Coronejo was not given the written warning in violation of Section 8(a)(3).

c. Loreta Rangamar

Loreta Rangamar is a CNMI local member, who was employed by the Respondent as a cashier from December 1994 until her discharge on December 5, 1998. She was active in the organizational campaign, passing out flyers to employees in the cafeteria, barracks, and hotel parking lot and she attended union meetings at the men's barracks where she was seen by supervisors. Along with Coronejo, with whom she spoke frequently, she initiated the Dela Cruz petition and solicited employees to sign it; and on the night of the second election, Kawasaki said to her, "happy now, you win?"

As noted above, Kawasaki observed Rangamar at the Horiguchi Building, interrogated her about protected concerted activity she was engaged in and gave the impression such was under surveillance. Two weeks later she was discharged by Kawasaki.

The Respondent argues that Rangamar was discharged for cause, "based on absolutely woeful performance and repeated insubordination" (R. Br. at 62). The principal act of misconduct cited by the Respondent was her leaving the cash register unattended and when warned about this by Kawasaki, she shouted at and cursed him. Rangamar admitted this incident except the cursing. However, this event occurred in April 1996—more than 2-1/2 years before her discharge.

In September she asked another employee to punch her in, which he did at 11:01. She arrived at 11:03 and was not paid until her shift began at 11:30 (consistent with the Respondent's policy). This infraction was raised as a reason for terminating her.

In general, the Respondent said she had problems with absences and tardiness, in addition to the 1996 discipline and the timecard incident. A comparison of Rangamar's attendance record with that of two other local employees in her classifica-

tion who were not discharged shows that Rangamar was absent and tardy less often.

Given the staleness of the 1996 discipline, the trivial (and possibly unlawful under the Fair Labor Standards Act) nature of the timecard incident in September, the general and unsupported assertion of her continued poor performance, and the fact that two retained employees in similar circumstances had worse attendance and tardiness records, lead me to conclude that the asserted reasons for discharging Rangamar were bogus. Where the reasons given for discharging an employee are untenable, it can be inferred those reasons are advanced in order to disguise the true motive. And, it can be inferred that the true motive was that which was sought to be hidden—namely the employee's union or protected activity. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

I infer that the Respondent's true motive in discharging Rangamar was her activity on behalf of the Union and her other protected activity, including participating in the Board's processes. The Respondent thereby violated Section 8(a)(3) and (4) of the Act.

d. Ronald Del Rosario

Ronald Del Rosario was a bartender who was active on behalf of the Union, attending meetings, passing out flyers, and wearing a union hat. He protested the bartenders not receiving appropriate pay for a function and he helped circulate the Dela Cruz petition. His contract date was September 10, 1997, so presumably he was renewed on September 10, 1998, notwithstanding the complaint allegations that union supporters were not renewed. He was a strong union supporter who was renewed.

In late October, or early November, he was accused of being involved in an incident the exact nature of which is not clear. It appears the bill given to a customer and the one they paid was different from the order they received, the effect of which was the Respondent netted \$16 instead of \$57. He was called to a meeting with Sanchez and his supervisors. He was shown a receipt, which he acknowledged was in his handwriting, showing "1 O.J.," "2 P.J.," and "1 Coke" whereas the real order was for one bottle of Paul Mason wine, one assorted fruits, and three glasses of port wine. Del Rosario was seen on the security videotape pouring the wine. The essence of the investigation was to determine whether the customers had paid for the wine with Del Rosario ringing up the juice order and pocketing the difference.

Although the Respondent had not firmly determined Del Rosario's guilt in this matter, he was under suspicion and it was this, and the attendant scrutiny, which he claims caused him to quit on January 22, 1999.

The critical event, of course, is the matter of Del Rosario writing a false receipt (docket in the Respondent's terminology). On this Del Rosario testified that he admitted to making a mistake which was caused by the fact that the customers were in a hurry to leave and he was "nervous" and wrote juice instead of wine. I totally discredit Del Rosario's testimony. I do not for a moment believe that he, an experienced bartender, would be nervous because a customer said he was in a hurry.

Such is also inconsistent with his demeanor and his reputation as a "tough guy."

I believe that the Respondent had every reason to scrutinize Del Rosario, and even for managers to suggest he ought to resign. I conclude the events leading to his eventual resignation had nothing to do with the Union, protected activity, or the fact that he may have sought protection from the Board. I conclude that the Respondent did not constructively discharge Del Rosario in violation of the Act. To the contrary, if in fact the Respondent was determined to terminate him for his union activity, his contract would not have been renewed.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement (consistent with CNMI law) to all contract employees whose contracts were not renewed between February 17 and December 31, 1998, and Loretta Rangamar, and make them whole for any lost wages or other benefits they may have suffered in accordance with the formula set forth in *F. W. Woolworth, Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that the Respondent rescind its unilateral changes in working conditions and to bargain with the Union, the certification year to start when the Respondent commences good-faith bargaining.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Pacific Micronesia Corporation d/b/a Dai-ichi Hotel Saipan Beach, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their interest or activity on behalf of the Union or any other labor organization.

(b) Threatening employees with termination or other reprisals because of their interest in or activity on behalf of the Union or any other labor organization.

(c) Creating the impression that employees' activity on behalf of the Union, or before the Board, is under surveillance.

(d) Directing employees not to associate with employees who are engaged in activity on behalf of the Union.

(e) Informing employees that selecting the Union as their bargaining representative would be futile.

(f) Promulgating rules which prohibit employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and conditions of employment.

⁷ 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.

(g) Refusing to bargain with the Union as the duly certified representative of its employees by making unilateral changes in working conditions and by unilaterally engaging in a reduction-in-force.

(h) Retaliating against employees for their union activity by curtailing benefits.

(i) Discharging employees because of their interest in or activity on behalf of the Union or because they engage in the Board's processes.

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

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

(a) Recognize and bargain with Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation, as the duly certified representative of its employees in the following appropriate unit and if agreement is reached, execute a collective-bargaining agreement:

All full-time and regular part-time employees employed by the (Respondent) in the Commonwealth of the Northern Mariana Islands; excluding all managerial employees, professional employees, confidential employees, guards, and supervisors as defined in the Act.

(b) Offer employment contracts to all employees whose contracts were not renewed between February 17 and December 31, 1998, and make them whole for any loss of wages or other benefits, with interest as provided in the remedy section above, they may have suffered as a result of the Respondent having unilaterally failed to renew their contracts without notice to or bargaining with the Union.

(c) Offer reinstatement to Loreta Rangamar to her former job, or if that job no longer exists, to an equivalent position and make her whole for any loss of wages or other benefits she may have suffered as a result of the discrimination against her, with interest as provided in the remedy section, above.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) 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 analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized

representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(g) 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.

(h) The allegations in the consolidated complaint not found to be violations are dismissed.

APPENDIX

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

The National Labor Relations Board has found that we violated 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 interrogate our employees concerning their interest or activity on behalf of the Union or any other labor organization.

WE WILL NOT threaten our employees with termination or other reprisals because of their interest in or activity on behalf of the Union or any other labor organization.

WE WILL NOT create the impression that employee's activity on behalf of the Union, or before the Board is under surveillance.

WE WILL NOT direct our employees not to associate with employees who are engaged in activity on behalf of the Union.

WE WILL NOT inform our employees that selecting the Union as their bargaining representative would be futile.

WE WILL NOT promulgate rules which prohibit employees from discussing among themselves or with their bargaining representative matters relating to wages, hours, and other terms and conditions of employment.

WE WILL NOT refuse to bargain with the Union as the duly certified representative of our employees by making unilateral changes in working conditions and by unilaterally engaging in a reduction-in-force.

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

WE WILL NOT retaliate against our employees for their union activity by curtailing benefits.

WE WILL NOT discharge our employees because of their interest in or activity on behalf of the Union or because they engage in the Board's processes.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employment contracts to all employees whose contracts were not renewed between February 17, and December 31, 1998, and WE WILL make them whole for any wages and other benefits they may have lost as a result of our unilaterally having failed to renew their contracts without notice to or bargaining with the Union.

WE WILL offer Loreta Rangamar immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment and we will make her whole for any loss of wages or other benefits he may have suffered as a result of our discrimination against her, with interest.

WE WILL recognize and bargain with Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation, as the duly certified representative of its employees in the following appropriate unit and, if agreement is reached, execute a collective-bargaining agreement:

All full-time and regular part-time employees employed by the (Respondent) in the Commonwealth of the Northern Mariana Islands; excluding all managerial employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

PACIFIC MICRONESIA CORPORATION D/B/A DAIICHI HOTEL SAIPAN BEACH

Marilyn O'Rourke and *David M. Biggar, Esqs.*, for the General Counsel.

Ronald B. Natalie and *Gregg S. Avitabile, Esqs.*, of Washington, D.C., for the Respondent.

SUPPLEMENTAL DECISION

I. STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This reopened hearing was tried before me at Saipan, Commonwealth of the Northern Mariana Islands (CNMI), between March 12 and 23, 2001, pursuant to the Board's remand decision of November 15, 2000, and my order reopening the record dated December 12, 2000. Counsel for the General Counsel moved to reopen the record to take the testimony of Hideo Fujii who had submitted an affidavit to the effect that he had committed perjury at the first hearing and had hidden material evidence from the General Counsel. Reviewing Fujii's 70-page affidavit, I concluded that if believed, Fujii's testimony might call into question the Respondent's economic defense to its decision not to renew the employment contracts of the alleged discriminatees and might require a different result than I reached initially.

The Respondent operates one of several large resort hotels on the Island of Saipan, which cater primarily to Japanese and

Korean tourists. It is one of a chain owned by Japanese interests and most of its managers are Japanese. Most of the low-level supervisors and rank-and-file employees are Filipinos. CNMI law requires that 20 percent of the employees be local residents. All nonresident employees, whether management, supervisors, or rank and file, work on 1-year contracts approved by an agency of the CNMI. Under a set of complex regulations, employee contracts can be renewed for successive 1-year periods and typically are. In addition to resident and nonresident employees, the Respondent uses employees from one of several manpower agencies on Saipan. In early 1998 the Respondent had a total complement of 359 employees. Pursuant to a reduction-in-force resulting from a downturn in the Asian economy, by the end of 1998 the Respondent had 290 employees.

In 1994, the Union began an organizing campaign among the Respondent's employees, resulting in an election on March 21, 1996, which the Union lost by a vote of 151 to 91. Objections were filed and the election set aside on grounds of third party interference—principally newspaper and TV reports concerning proposed changes in the nonresident employment law. The Board concluded that these reports made holding of a free and fair election impossible. Pursuant to the Board's Decision and Direction of Election of September 24, 1997, a second election was held on February 5, 1998. The Union won this election by a vote of 131 to 121 with 9 challenges. The Respondent's objections were overruled by the Regional Director and the Board declined review. *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458 (1998). Thus, the Union was certified as the employees bargaining representative on March 30, 1998.

To test this certification, the Respondent refused to bargain with the Union. The Board granted summary judgment against the Respondent. *Dai-Ichi Hotel Saipan Beach*, 327 NLRB No. 131 (1999) (not included in bound volumes). The Respondent appealed this decision to the D.C. Circuit of the United States Court of Appeals which, subsequent to my initial decision in this matter, denied enforcement holding that the first election should not have been set aside. *Dai-Ichi Hotel Saipan Beach v. NLRB*, 219 F.3d 661 (D.C. Cir. 2000).

At issue here is the Respondent's decision throughout 1998 not to renew the contracts of 35 nonresident employees (now 39 with an amendment to the consolidated complaint) on their anniversary dates.¹ Though the process is complex, in general, when an employee is up for renewal, the company must contact CNMI authorities and a job vacancy announcement is published. If a qualified local resident applies for the job, it must be awarded to the local and the nonresident must be repatriated. In brief, I concluded that the General Counsel made out a prima facie case that the nonrenewal of these employees was based on their union activity and therefore violative of Section 8(a)(3) of the Act; however, I also concluded that the Respondent met its burden under *Wright Line*, 251

¹ The amended complaint also alleged the unlawful discharge of Loreta Rangamar, and at the hearing, the complaint was amended to allege the unlawful constructive discharge of Ronaldo Del Rosario. I concluded that the discharge of Rangamar was unlawful but the events leading to Del Rosario's resignation were not.

NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), by demonstrating that the downturn in the Asian economy resulting in substantially reduced occupancy necessitated a reduction-in-force. I concluded that the Respondent attempted but could not renew seven employees because a qualified local had applied for the job. As to the others, they were not renewed due to the reduction-in-force. However, I further concluded that by refusing to bargain with the Union concerning the proposed reduction-in-force the Respondent violated Section 8(a)(5). As a result of the circuit court's decision, the refusal to bargain issues are no longer a part of this case.

The General Counsel concedes there was a severe downturn in the Asian economy and initially agreed that some reduction-in-force was necessary, though arguing the particular individuals named in the complaint were chosen because of their union activity and to retaliate against them. Therefore they were not renewed in violation of the Act. In addition, based on the testimony of Fujii, the General Counsel now contends that the Respondent engaged in a conspiracy to hire employees from Nepal, who were thought to be opposed to unions, to replace Filipino employees prior to, and in order to win, the second election. Counsel for the General Counsel no longer agrees that any reduction-in-force was required by the economic conditions of 1998.

Over the course of the 10-day hearing the parties generated a great deal of detail concerning events before the second election relating to these issues, the credibility of Fujii, as well as some matter not particularly relevant.

The General Counsel argues that a conspiracy was hatched in the summer of 1997 between Fujii and the Respondent's then assistant general manager, Yasuhisa Iwabuchi, to replace known union activists (Filipinos) with Nepalese in order to win the second election. The General Counsel's case is based on two factors: the testimony of Fujii and the fact that the Respondent hired 16 Nepalese as manpower employees in December 1997 and January 1998. The General Counsel does not address the fact the Nepalese were employees of a manpower agency and thus ineligible to vote and within 6 months prior to the election only 6 nonresident employees were not renewed, whereas during the same period 50 Filipinos were hired (48 direct and 2 locals).

Further, the Respondent had won the first election handily (151 to 91). While the Respondent actively campaigned prior to the second election, it is difficult to believe that the Respondent would have felt such jeopardy as to engage in the complicated conspiracy argued for by the General Counsel and merely reduce the eligible voters by 16. No doubt a course of action does not have to make sense to be unlawful, however, having some measure of rationality is certainly a factor to be considered in evaluating whether in fact there was an unlawful plan.

II. ANALYSIS AND CONCLUDING FINDINGS

A. *The Undisputed Facts*

Many of the facts in this matter are undisputed, at least in any substantial or material respect. Fujii and Iwabuchi were personal and professional friends. They met frequently at the

hotel and engaged in social activities together—probably less frequently than Fujii contends but more than Iwabuchi does.

At the times material here, Fujii was general manager of Niizeki International of Saipan Company Limited (NIS) which was engaged in construction, real estate development, and management and so forth. He was terminated from this position under very acrimonious circumstances on April 14, 2000. He was also the authorized representative and apparently general manager of Micronesia Manpower Agency (MMA), a subsidiary NIS created in late 1997 primarily to furnish manpower employees to the Respondent. Because of some difficulty with the CNMI government concerning manpower agencies, during the course of the events here, MMA changed its name to Marianas Hotel Service (MHS).

Beginning in about June 1997² Iwabuchi and Fujii discussed the possibility of NIS getting into the manpower business and specifically recruiting employees from Nepal to be used by the Respondent as manpower employees. Iwabuchi testified that he was approached by Fujii about furnishing manpower employees to the Respondent and Iwabuchi was agreeable. The Respondent had been using several locally owned manpower agencies, but Iwabuchi testified that he did not trust them and was interested in using a Japanese-owned firm. Iwabuchi testified that “one of the biggest reasons for using the manpower employees is because of the flexibility.”

It apparently took until early October for MMA to become incorporated. In September, the Respondent and MMA entered into a contract, written in Japanese, which was subsequently dated October 17. Fujii testified that the contract was written in Japanese so that local officials would not understand it. Iwabuchi testified that it was in Japanese because the parties were Japanese. Both testified that it was undated because MMA had not yet been chartered.

In any event, the Respondent and MMA reached an agreement whereby MMA would furnish employees to the Respondent. Subsequently, Iwabuchi and Fujii signed a restaurant concession agreement, the purpose of which was to hide the fact that MMA (now MHS) was really a manpower agency. Iwabuchi testified that neither party intended to honor the agreement. During this period, from mid-1997 through 1998, CNMI officials had placed restrictions on manpower agencies as well as requiring them to post some kind of a \$5000 per employee bond.

On October 10, Thomas Sablan, Secretary, Department of Labor and Immigration, issued a public notice to the effect that “the CNMI Division of Labor will no longer accept either new or renewal nonresident worker applications for manpower companies.” After some meetings with CNMI officials, and the agreement of NIS to guarantee financial support for MMA, the ban was lifted and as to MMA and entry permits were approved for the Nepalese. Apparently, however, the ban on manpower agencies continued and in February 1998 MMA changed its name to MHS. The restaurant concession agreement, as well as Fujii's several visits to CNMI officials, including the governor, were to protect MHS and keep it in business.

² Hereafter all dates are in 1997 unless otherwise indicated.

In early 1997 (and apparently before creating the manpower agency), Fujii had furnished the Respondent either two or four employees from Nepal and two employees from Nepal worked for Fujii's company. Both Fujii and Iwabuchi thought well of the Nepalese employees. In June Iwabuchi and Fujii met with the general manager of the Hyatt hotel in June and he confirmed that Nepalese were good employees. Further, the Nepalese had a reputation of not being union inclined for a variety of reasons.

Thus, Fujii contacted a recruitment agency in Nepal and in late October he, Iwabuchi, along with two other of the Respondent's managers and Iwabuchi's wife, went to Nepal to interview prospective employees. They had numerous interviews over a 5-day period and finally selected 23 or 24 employees whom they offered jobs. Of those who accepted, 15 arrived in Saipan on December 31 and another on January 16, 1998. In addition, three more came on March 10, 1998. They were employees of MMA, hired to work at the Respondent's hotel.

As a condition for employment, each of the Nepalese was required to sign a contract which contains the following language: "Also, during my stay in Saipan, I will not get involved any political parties & will not get involved directly or indirectly in any activities at the place of work against the management."³

In the 6-month period preceding the second election, the Respondent directly hired 50 Filipinos (48 nonresidents and 2 locals).⁴ Also during that period, the Respondent did not renew the contracts of six nonresident employees, apparently all of whom were Filipinos.

Each employee named in the complaint as a discriminatee was a nonresident Filipino. As such, each had a 1-year employment contract which was renewed by the Respondent sometime in 1997—many in November and December, including Hermie Coronejo, the Union's principal inplant organizer. Coronejo was renewed on November 28. That he was not renewed on November 28, 1998, is alleged to be violative of Section 8(a)(3) and (4) of the Act.

B. Disputed Fact Assertions

According to Fujii, in the spring and summer of 1997, Iwabuchi told him that the Respondent intended to win the rerun election by getting rid of Filipino union activists as their contracts expired and replacing them with locals. Then in May or June, again according to Fujii, Iwabuchi began talking about replacing the Filipinos with Nepalese and he asked if Fujii could create a manpower agency to recruit Nepalese for the Respondent. Iwabuchi agreed that he and Fujii discussed NIS creating a manpower agency. However, he denied that he suggested having a manpower agency hire Nepalese employees to

³ This is alleged to be a "yellow dog" contract and violative of Sec. 8(a)(1); however, the Nepalese were employees of MMA/MHS and there is no allegation that MMA/MHS was the alter ego of the Respondent, though Fujii is alleged to have been an agent of the Respondent.

⁴ This is from R. Exh. 40. As part of a posthearing stipulation, the Respondent withdrew R. Exh. 40; however, the facts contained therein are relevant and I believe authentic. Therefore, I will consider this document notwithstanding counsel's stipulation.

replace Filipino union activists in order to win the rerun election.

Fujii testified that in about May, and periodically thereafter, Iwabuchi stated that he intended to get rid of the union activists when their contracts were up for renewal. Specifically, according to Fujii, Iwabuchi stated that he would get rid of Hermie Coronejo, the man leading the union activity. Iwabuchi denied making these and similar statements about not renewing the contracts of union activists or identifying the Fujii employees he thought were active on behalf of the Union.⁵

Fujii testified that in June he received a newspaper article from Iwabuchi about the Hyatt Hotel winning its union election (notwithstanding that said election was in 1995 or 1996) whereupon he called the Hyatt general manager to offer congratulations and to schedule a meeting with him about how this was done. Fujii and his superior, NIS President Seiji Nakamura, met with Mustafa Issa who told them that his predecessor had hired as many locals as possible and had repatriated many Filipinos.

Issa testified that he knew Nakamura socially and he did meet with Nakamura and Fujii to discuss the possibility of NIS forming a cleaning service to be used by the Hyatt. Issa said he would consider it. They also discussed Nepalese employees, with whom Issa was satisfied. He also testified that the first election at the Hyatt was in 1995, before he arrived, and the rerun election in January 1998. His meeting with Nakamura and Fujii took place months before the second election.

Fujii testified that during the Nepal interviews, Iwabuchi told him that he wanted the 23 selected individuals to arrive in Saipan before the second election which he expected to be held in December. And Iwabuchi then wanted a second batch of Nepalese to arrive in February or March 1998. Iwabuchi denied making such statements to Fujii.

C. Fujii's Testimony and Credulity

Based on Fujii's testimony, the General Counsel argues that there was a conspiracy between the Respondent and NIS, through Fujii, whereby Filipino employees, who were known to be the source and strength of the union campaign, would be replaced by Nepalese prior to the second election.

It is undisputed that the Respondent agreed to use Fujii's company as a manpower supplier of Nepalese employees in late 1997 and to that end, Iwabuchi and other managers accompanied Fujii to Nepal in October. And it is undisputed that as a condition of employment, the Nepalese had to sign a contract, which is probably illegal under the Act.

However, I do not credit Fujii's testimony on the substance of what he says Iwabuchi told him about replacing Filipinos with Nepalese so that the Respondent could win the second election. Nor do I credit Fujii's implicit assertion that creating the manpower agency was Iwabuchi's idea. First, Fujii is an admitted perjurer, though how he committed perjury and withheld facts from the General Counsel prior to and at the first hearing is less than clear. He testified that he did so in order to

⁵ I sustained the Respondent's objection to this line of testimony since it was well beyond the scope of the reopened hearing. On special appeal, the Board ordered that I take this testimony by question and answer offer of proof.

protect both his employer and the Respondent. Nevertheless, he admitted that he is willing to lie under oath when he perceives it to his advantage to do so.

Fujii seems to have an agenda which has little to do with developing true facts in this matter and more to do with undermining his former employer, from which he was dismissed following the first hearing under very acrimonious circumstances, including a physical altercation. This has resulted in civil actions by Fujii against NIS. Counsel for the Respondent offered into evidence several unsigned letters written to and received by the Respondent denigrating Fujii's former employer. Fujii denied writing these letters and the General Counsel's objection to their introduction was sustained. I have reconsidered this ruling and now receive them into evidence, not for the substance of the facts asserted in them, but as evidence of Fujii's incredulity. Statements are made in the letters concerning Fujii's alleged perjury and his reporting this to a Board agent which only he (and the Board agent) could have known at the time. For instance, a letter dated and postmarked May 8, 2000, refers to "(p)erjury under oath by NIS General Manager (Fujii) in an N.L.R.B. trial. (*N.L.R.B. vs Daiichi*)." I believe he wrote these letters and that his denying having done so was an attempt to mislead me on what he perceived to be a material issue.

Counsel for the General Counsel recognizes that Fujii has serious credibility problems, but suggests that Iwabuchi does as well and that on balance, Fujii is more believable. I reject this argument. First, irrespective of Iwabuchi's credibility, the General Counsel has the burden of proving the allegations by competent, credible evidence. Relying on Fujii does not meet this test. Further, on material issues, I believe Iwabuchi's denials were more plausible than Fujii's assertions.

The thrust of Fujii's testimony, denied by Iwabuchi, was the plan they hatched beginning in the summer of 1997 to replace Filipinos with Nepalese in order for the Respondent to win the second election. I do not believe this occurred. At the time the Board had not yet decided there should be a second election, though a hearing officer had recommended setting aside the first one based on statements made by third parties. The Respondent had won the first election by a substantial margin. Only three nonresident employees were not renewed between October 1997 and the second election. Iwabuchi knew that the 16 Nepalese hired as manpower employees in December and January would not be allowed to vote. Their presence could not reasonably have affected the results of the second election. Even if, as asserted by the General Counsel, Nepalese had replaced Filipinos before the election, such would have had little effect where the number of eligible votes was in the range of 270. If there had been such a scheme as testified to by Fujii and asserted by the General Counsel, it would follow that the Nepalese would have been direct hires and in much greater numbers and in fact Filipinos would have been replaced.

A large number of Filipinos were actually renewed in November and December (including several of the alleged discriminatees) and, as noted above, in the 6 months prior to the second election, 50 Filipinos were hired.

To like effect, I discredit Fujii's testimony that beginning on July 10, 1997, if not before, Iwabuchi identified to him certain

employees who would not be renewed because of their union activity. Fujii testified that Iwabuchi told him "one of the cooks, a lady cook, who was close to Hermie (Coronejo) was to go upon the expiration of her employment contract. Now I remember, I think her name was Yolanda." The only nonresident employee named Yolanda was cook's helper Yolanda Perez, an alleged discriminatee and identified as a strong union supporter. Her renewal date was November 1 and she was renewed in 1997. Similarly, Fujii testified that Iwabuchi said he would not renew the contracts of Hermie Coronejo (November 28); Elena (Almariego) (November 20); Manuel Manalang (November 9); and Gino (Uson) (December 31). Had Iwabuchi really made the statements about not renewing these employees, given the scheme alleged by the General Counsel, it follows they would not have been renewed in 1997. In fact they were.

D. Concluding Findings

The hearing was reopened to take the testimony of Fujii and to determine whether the credited evidence would undermine the Respondent's economic defense. In brief, the Respondent contends that it did not renew the contracts of the discriminatees because of its decision in March 1998 to downsize its staff due to substantially reduced occupancy resulting from a severe downturn in the Asian economy beginning in late 1997. Initially, counsel for the General Counsel agreed that as a result of the economy some reductions-in-force were necessary, however, they now withdraw that concession arguing that at all material times the Respondent had a plan to replace nonresident Filipinos with Nepalese and the economic defense is invalid as to any discriminatee.

While I disagree with the General Counsel's now theory of the case, and I discredit Fujii on the material substance of his testimony, given the posture of this matter, I deem it permissible and appropriate to reconsider the alleged discrimination of the nonresident contract employees, including the Respondent's economic defense. For the reasons given in my first decision, I conclude that the General Counsel made out a strong prima facie case that the alleged discriminatees were not renewed because of their known union activity. And, as before, I conclude that the Respondent demonstrated that a reduction-in-force was necessary due to the economy. However, on reconsideration, I conclude that the Respondent did not offer persuasive reasons why known union activists were selected for non-renewal instead of less senior employees who were not identified as having participated in union activity. Though economics was the basis for reducing the work force, I conclude that selecting the particular individuals was discriminatory and unlawful. Therefore, as to the discriminatees named below, I conclude that the Respondent did not sustain its burden under *Wright Line*, and that it failed to renew these individuals in violation of Section 8(a)(3) of the Act.

As noted in my initial decision, Iwabuchi devised the plan to reduce the total number of employees to be accomplished by the end of 1998. He left to the department managers whom they would select for nonrenewal. Each of the discriminatees was among the most active on behalf of the Union, not only attending meetings, but passing out flyers, circulating petitions,

and the like. While their specific activism might not have been known to Iwabuchi, I conclude such must have been known to their supervisors, most of whom lived in the employee barracks, and department managers. Although this matter was tried as a kind of class action, and there are similarities, it appears that really each case of nonrenewal is unique principally because of the anniversary date of the employee in question.

The practice of using manpower employees apparently pre-dates the Union's appearance on the scene. Iwabuchi testified that this practice gives flexibility. I further credit Iwabuchi that he was interested in contracting with a Japanese-owned manpower company. Therefore the fact that Iwabuchi agreed to use Fujii's company as a supplier of employees does not imply an unlawful motive.

Further, Fujii's efforts to circumvent CNMI law as to manpower agencies and employees is not attributable to the Respondent. I conclude that at all times, Iwabuchi and Fujii had an arms length business relationship with regard to furnishing employees.

In concluding that the Respondent generally did not sustain its burden under *Wright Line*, that it would not have renewed these individuals even in the absence of their union activity, I rely on the fact that the Respondent kept less senior employees who were not identified as union activists. Seniority, of course, is not dispositive, but all things being equal, as a general practice employers keep the more senior and experienced employee where a reduction-in-force is necessary. I emphasize that the Respondent was not required to do so, but where an employee is let go in favor of one junior, then to sustain its burden under *Wright Line*, the Respondent must come forward with some rational explanation for doing so. Failing that tends to imply that the true motive lies elsewhere and specifically was an unlawful one which the Respondent sought to hide. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Many of the strong union activists were cooks, four of whom were not renewed in 1998: Leo Bagnes, Avelino Meneses, and Hermie Coronejo. Bagnes had more seniority than eight cooks who were renewed, Meneses 20, and Coronejo 12. The Respondent offered no persuasive reason why these employees were not renewed in favor of less senior employees; however, the Respondent did show that it attempted to renew Bagnes but could not do so because there was a qualified local to whom it had to offer the job. I reject the General Counsel's assertion that Bagnes could have been renewed and that the Respondent's reliance on CNMI law in replacing him (and the others named below) was bogus. As to the cooks, I conclude that the Respondent failed to renew Meneses, and Coronejo in violation of Section 8(a)(3) and (4) of the Act, in the case of Coronejo.⁷

Minette Floro, Carliza Carlos, and Loreta Rangamar were cashiers. In my initial decision I found that Rangamar had been discharged in violation of Section 8(a)(3). Floro and Carlos were replaced by locals, thus, I conclude their nonrenewal was not violative of the Act.

Victor Villasin, Maximo Piol, John Floderick Regino, and Ronaldo del Rosario were bartenders and alleged discriminatees. I concluded in my initial decision that del Rosario was not

unlawfully constructively discharged. As to Piol and Regino, however, I conclude that the Respondent did not carry its burden under *Wright Line*. While Piol and Regino had the same seniority as four who were retained, no basis of selection was proffered. Therefore, given that three individuals with less or no union activity were retained, I conclude that in failing to renew Piol and Regino the Respondent violated the Act. The evidence suggests that the Respondent in fact attempted to renew Villasin, but his job was taken by a local resident. Therefore, his nonrenewal was not violative of the Act.

Ramon Delfin was a carpenter who was not renewed. He was replaced by a local and two union activist carpenters were renewed. Both tend to show that the nonrenewal of Delfin was not discriminatory. I conclude that the Respondent did not violate Section 8(a)(3) as to Delfin.

Yolanda Perez was a cooks helper who was selected for nonrenewal on November 1 yet Oliver Abengana, who was not shown to have been engaged in union activity and who had 10 years less seniority than Perez was renewed on November 19. The Respondent did not explain this and I therefore conclude that it did not rebut the prima facie showing that Perez was selected because of her union activity.⁸

Alfonso Matibag was a union activist electrician. He was not renewed on December 31, though he had apparently been renewed on February 24, his anniversary day. In any event, two electricians who had less seniority than Matibag and were not shown to be union activists were retained. I conclude therefore that the Respondent did not meet its burden under *Wright Line* as to Matibag.

Manuel Caisip, Ronaldo Sera Jose, and Gino Uson were front desk clerks whom the Respondent attempted to renew but could not because locals applied for the jobs. I conclude that replacing these three individuals with local residents was not unlawful.

Norman Gentolia was a general maintenance employee who had been an employee of the month. He was not renewed on May 31 while three employees with no union activity, less seniority and no known awards were. I conclude that the Respondent did not meet its burden that he would not have been retained even in the absence of union activity.

Evangeline Jasareno, Helen Mateo Cacayan, Eliza Trinidad, Luisa Adao, and Rosanna Cayabyab were union activist housekeepers, all of whom were relatively senior. The Respondent did not renew their contracts while keeping 17 less senior employees, in the case of Jasareno, 6 in the case of Cacayan, 15 in the case of Trinidad, 7 in the case of Adao and 15 in the case of Cayabyab. No explanation was given why, in effect, the Respondent would discharge these employees and keep people junior to them.

Frumencio Roa and Wilfredo Bobadilla were the only two janitors identified as having been active on behalf of the Union. Roa was not renewed on April 4 and Bobadilla on December 31. Three nonresident employees were renewed on December 31, all having less seniority than Roa. And on December 25 the

⁷ Coronejo testified in a representation hearing.

⁸ In making this finding, I specifically do not rely on Fujii's testimony that Iwabuchi told him Perez was targeted. As noted, I do not credit Fujii.

Respondent hired two manpower employees. No reason was given by the Respondent that it was necessary, as a result of the economic conditions at the time, to rid itself of the two union activists yet hire new employees from a manpower agency. While almost all janitors were manpower employees, such does not rebut the prima facie showing that Roa and Bobadilla were terminated because of their union activity. I conclude that the Respondent violated Section 8(a)(3) by not renewing their contracts.

The waiters not renewed in 1998 allegedly in violation of the Act were: Efren Govina, Jesus Gomez, Arthur Santos, Virginia Lacsina, Benigno Peralta, Grace Rafael, Mauro Sabate, Manuel Manalang, Elena Almariego, Alica Figueroa, Manolo Salvador, Luisito Alonzo, and Digna Soriano. Each of these 13 employees was identified as strong union activists and each had more seniority than nonresidents who were renewed but who were not identified as union supporters. In addition, Almariego had been an employee of the month runnerup. The Respondent offered no reason why it picked union activists not to renew and renewed the contracts of less senior employees who were not actively engaged in the election campaign. Accordingly, I conclude that the Respondent did not rebut the General Counsel's prima facie case and I conclude that these nonrenewals were violative of the Act, except for Lacsina who was replaced by a local resident.

For consideration at the reopened hearing, the General Counsel amended the complaint to include the nonrenewal of three bellhops and one plumber, all having been hired on September 10, 1997, and not renewed on May 13, 1998. The General Counsel stated that they were not included in the original complaint because the Respondent's economic basis for not renewing some employees was accepted. Contending now that "the General Counsel no longer accepts that there was any validity to the economic defense, even in part, as to any of the discriminatees," these individuals were included.

The Respondent moved to dismiss the amendment as to these four individuals citing *Peyton Packing Co.*, 129 NLRB 1358 (1961), and *Jefferson Chemical Co.*, 200 NLRB 992 (1972). These cases essentially held that the Board will not condone litigating matters known to the General Counsel which could have been litigated in a previous case. This is not a situation where the General Counsel seeks to relitigate a previously decided case on a different theory. This matter has not yet been finalized by order of the Board. The hearing was reopened, albeit for a limited purpose, but the essential facts relating to

these individuals were already in the record. I conclude that allowing the amendment is not at odds with *Peyton Packing* or *Jefferson Chemical*.

However, I also disagree with the General Counsel's assertion that the Respondent's economic defense has no validity. And, as to these four alleged discriminatees, I conclude that the Respondent sustained its burden under *Wright Line*. They were all short-term employees. None was replaced by a nonunion activist. Indeed, the two plumbers who were retained were shown to be strong union supporters. I conclude that the Respondent reduced its bellboy and plumber complement for economic reasons and there is no showing that by selecting the four named individuals, it treated them disparately vis-a-vis other employees. Accordingly, that the Respondent did not violate the Act by not renewing the four individuals named in the amendment.

Considering the above findings of fact, conclusions of law, the entire record in this matter and the decision of the Circuit Court in *Dai-Ichi Hotel Saipan Beach v. NLRB*, supra. I recommend the following

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement (consistent with CNMI law) to the following contract employees whose contracts were not renewed between February 5 and December 31, 1998:⁹ Avelino Meneses, Hermie Coronejo, Loreta Rangamar, Maximo Piol, John Floderick Regino, Yolanda Perez, Alfonso Matibag, Manuel Caisip, Ronaldo Sera Jose, Norman Gentolia, Evangeline Jasareno, Helen Mateo Cacayan, Eliza Trinidad, Luisa Adao, Rosanna Cayabyab, Frumencia Roa, Wilfredo Bobadilla, Efren Govina, Jesus Gomez, Benigno Peralta, Arthur Santos, Grace Rafael, Manuel Manalang, Elena Almariego, Alice Figueroa, Mauro Sabate,

⁹ In reviewing the record, I note that not all employees who fit the category of strong union activist and seniority over employees who were renewed were named in the amended complaint—Richard Manalang, Fernando Diamzon, and Flex Nilo, for instance. In addition, counsel for the General Counsel represented that Chito Justiano did not want to be renewed and therefore he was not named in the amended complaint. Only individuals named in the complaint will be included in the remedy.

Manolo Salvador, Digna Soriano, and Lusito Alonzo and make them whole for any lost wages or other benefits they may have suffered in accordance with the formula set forth in *F. W.*

Woolworth Co., 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]