UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CHICAGO HOTEL MASTER LESSEE, LLC,
AND SAGE HOSPITALITY RESOURCES,
LLC, A SINGLE INTEGRATED ENTERPRISE,
SINGLE EMPLOYER AND/OR JOINT EMPLOYERS, D/B/A
THE BLACKSTONE, A RENAISSANCE HOTEL

and

Cases 13-CA-45089
13-CA-45159
13-CA-45313
13-CA-45361
13-CA-45401

UNITE HERE, LOCAL 1

and

ERIN KOLODZIEJ
Party-in-Interest

Kevin McCormick and J. Edward Castillo, Esqs., of Chicago Illinois, for the General Counsel
*Norman Buchsbaum and Louis Cannon, Jr., Esqs., o*f Baltimore, Md., for the Respondent
*N. Elizabeth Reynolds (Allison, Slutsky and Kennedy, P. C.), o*f Chicago, Illinois, for the Charging Party

DECISION

Statement of the Case

Mark Carissimi, Administrative Law Judge. This case was tried in Chicago Illinois, on October 4-9 2009; November 4-5, 2009; January 13-15 and January 20-22, 2010; and February 23-24, 2010. On September 9, 2009, a third order consolidating cases, third amended consolidated complaint and notice of hearing issued against Chicago Hotel Master Lessee, LLC and Sage Hospitality Resources, LLC a single integrated enterprise, single employer and/or joint employers, the d/b/a The Blackstone, A Renaissance Hotel, herein referred to as the Respondent based on charges and amended charges filed by Unite Here, Local 1, herein referred to as the Union.[1]

[1] The charge in Case 13-CA-45089 was filed by the Union on January 20, 2009, the first amended charge was filed on January 29, 2009 and the second amended charge was filed on July 22, 2009. The charge in Case 13-CA-45159 was filed by the Union on March 4, 2009 and an amended charge was filed on July 22, 2009. The charge in

Continued

As finally amended during the hearing, the third amended consolidated complaint (herein the complaint) alleges that the Respondent violated Section 8(a)(1) of the Act by, within the material time, maintaining overly broad work rules in its employee handbook entitled "Confidentiality", "Media Requests for Information", and "Solicitation". It also alleges that on or about December 10, 2008, the Respondent "wrongfully quoted Board law in a memorandum to employees in order to encourage or assist employees in filing a decertification petition" (GC Exh. 93). It further alleges that on December 18, 2008 and January 23, 2009, Respondent, by Steven Serdar, at a meeting for employees, discriminatorily permitted an employee to speak in support of a decertification petition while stopping employees supporting the Union from speaking out. It further alleges that on or about January 27, 2009, the Respondent, by Steven Serdar, encouraged and assisted employees in the circulation of a decertification petition. Finally, the complaint alleges that on or about January 28, 2009, the Respondent, by Michael Devries, impliedly threatened employees with discharge due to their union activities in violation of Section 8(a)(1) of the Act.

The complaint also alleges that the Respondent delayed in furnishing the Union with the following information; "a summary plan description for each plan offered and the cost for the employee and the employer if any," from December 8, 2008 until April 15, 2009 in violation of Section 8(a)(5) and (1) of the Act. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act in February 2009 by directly dealing with employees to arrange for collections for money owed for health care premiums and by unilaterally changing its existing health care plan for employees on or about April 1, 2009. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act on June 15, 2009, by unilaterally eliminating the room service department and cafeteria positions, and transferring room service and cafeteria attendant work to other departments. The complaint also alleges that on June 15, 2009, the Respondent unilaterally laid off employees Meghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon and Nayeli Gomez in violation of Section 8(a)(5) and (1) of the Act.

The complaint also alleges that on June 15, 2009 Respondent laid off the 14 employees named above in violation of Section 8(a)(3) and (1) of the Act.[2] The complaint further alleges that since June 15, 2009, the Respondent failed and refused to recall the above named employees, except for Padilla, Guerrero, Merthol, and Robinson, in violation of Section 8(a)(3) and (1) of the Act.

The Amendments to the Complaint

At the hearing on January 13, 2010, I granted Counsel for the General Counsel's motion to amend the third amended consolidated complaint with respect to the remedy sought in this case.

Case 13-CA-45313 was filed by the Union on May 22, 2009, an amended charge was filed on July 16, 2009, and the second amended charge was filed on July 27, 2009. The charge in Case 13-CA-45361 was filed by the Union on June 18, 2009. The charge in Case 13-CA-45401 was filed by the Union on July 13, 2009, and an amended charge was filed on August 3, 2009.

[2] The complaint initially alleged that one employee, whose name was unknown to the Regional Director, was also laid off on that date in violation of Section 8(a)(5) (3) and (1) of the Act, but that allegation was withdrawn during the hearing.

The amendment seeks to add, as part of the remedy, compound interest computed on a quarterly basis for any monetary amounts owed to employees and/or any benefit funds (GC Exh. 91). I also granted the General Counsel's motion to withdraw paragraph X(a) of the third amended consolidated complaint that alleged the Respondent, by Delisa Ross, impliedly threatened employees with discharge due to their union activities (GC Exh. 92) . Counsel for the General Counsel also withdrew, with my approval, the related allegation that Delisa Ross was a supervisor within the meaning of the Act.

On January 6, 2010, Counsel for the General Counsel filed another motion to amend the third amended consolidated complaint (GC Exh. 93). This motion sought to amend the consolidated complaint in three respects. First, the motion sought to add as paragraph IX(b) the following allegation:

> On or about December 10, 2008, Respondent, wrongfully quoted Board law in a memorandum to employees in order to encourage or assist employees in filing a decertification petition as follows:
>
> > Prior to negotiating a union contract we must follow a National Labor Relations Board (NLRB) ruling:
> > Under the NLRB's ruling, the workers in or at any company have forty-five (45) days from the date the Official Notices are posted to file with the NLRB office closest to them-in our case in Chicago-and if thirty percent (30%) approx 70 Associates back that filing, the NLRB will conduct a secret ballot election. . .

In this motion, the General Counsel next sought to amend paragraph X(b) to read as follows:

> On or about December 18, 2008 and January 23, 2009 by Steven Serdar, at meetings for employees discriminatorily permitted an employee to speak in support of a decertification petition while stopping employees supporting the Union from speaking out.

The amendment added the allegation regarding December 18, 2008, as the allegation regarding January 23, 2009, was already in the complaint.

Finally, the motion sought to have paragraph XII(a) read as follows:

> In about February through April, 2009, Respondent, without notice to the Union, dealt directly with its employees by letter and meeting with them individually to arrange collections for money owed for health care premiums.

This amendment only adds the additional time period "through April" to the allegation already in the complaint.

The Respondent filed an opposition to the motion to amend the complaint and also filed a motion to dismiss paragraph X(b) (R. Exhs.180 and 180b). The Respondent's Counsel also orally argued the motion at the hearing on January 13, 2010. With respect to the proposed amendment adding paragraph IX(a), the Respondent first argued that the amendment was barred

by Section 10(b) of the Act. The Respondent also argued that the proposed amendment does not allege unlawful activity.

The Respondent's motion to dismiss was directed to the allegation noted above at X(b) of the proposed amendment, alleging that the Respondent, through Steve Serdar, discriminatorily permitted an employee to speak in support of a decertification petition while stopping employees supporting the Union from speaking. (The Respondent's written motion refers to paragraph X(c), but this allegation was renumbered to X(b) after the allegation regarding DeLisa Ross was withdrawn and the complaint paragraphs were renumbered in the proposed amendment.)

At the hearing on January 13, 2010, I granted Counsel for the General Counsel's motion to amend the complaint. Counsel for the General Counsel filed his motion to amend before he rested his case and before the Respondent had called any witnesses. Section 102.17 of the Board's Rules and Regulations permit complaint amendments upon terms that may be just. The amendments to the complaint sought by Counsel for the General Counsel are sufficiently related to the existing allegations so that the Respondent is not prejudiced by permitting the amendments. The Board's policy is to permit amendments under these circumstances. See *Payless Drug Stores,* 313 NLRB 1220 (1994).

With respect to the Respondent's 10(b) argument regarding the new allegation in paragraph IX(b), the added allegation claims that Respondent unlawfully encouraged and assisted employees in filing a decertification petition by the above noted portion of its December 10, 2008 posting. The charge in 13-CA-450891, filed on January 19, 2009, specifically alleged that the Respondent violated Section 8(a)(1) of the Act by encouraging and assisting employees in the filing of a decertification petition (GC Exh. 1(c)). In order to be considered timely for purposes of Section 10(b) the complaint allegation must be closely related to a charge allegation and must have occurred less than 6 months before the charge was filed. *Kamal Corp.*, 354 NLRB No. 16, sl. op at 3 (2009); *Old Dominion Freight Line,* 331 NLRB 111 (2000); and *Redd-I, Inc.,* 290 NLRB 1115, 1116 (1988). The complaint allegation added in IX(b) clearly meets both of these requirements and is thus timely under Section 10(b). With respect to the Respondent's argument that the proposed amendment does not allege unlawful conduct, I indicated at the hearing that I would make a decision on the merits of the allegation in this decision, after giving all parties an opportunity to brief the issue.

The allegation added in the present paragraph X(b) of the complaint asserts that on December 18, 2008, Steven Serdar discriminatorily permitted an employee to speak in support of a decertification petition while stopping Union supporters from speaking. The complaint already alleged that Serdar had engaged in such conduct on January 23, 2009. Thus, this allegation is obviously closely related to an allegation that was already in the complaint. Finally, the amendment to paragraph XII (a) merely added that the conduct alleged to be unlawful extended from February through April 2009.

Since the General Counsel's motion to amend the complaint was made before the Respondent called any witnesses, I find that it caused no prejudice. I specifically indicated when I granted the General Counsel's motion at the hearing that I would give Respondent's Counsel additional time to prepare to respond to these allegations.

On January 13, 2010, I also denied Respondent's motion to dismiss paragraph 10(b) of the complaint. Respondent argued that even crediting the General Counsel's own witnesses the allegations of the complaint were not sustained. In denying the Respondent's motion I noted that the Board's policy in addressing motions to dismiss is to consider the complaint allegations in a light most favorable to the General Counsel. In this regard, I must adopt all factual allegations as true and consider whether the General Counsel could prove facts that would support a finding of an unfair labor practice. *Detroit Newspapers,* 330 NLRB 524, 529, fn. 7 (2000). Viewed under this standard, I again determined that I was obligated to give the General Counsel and Charging Party an opportunity to brief the issue. In denying the motion to dismiss, however, I specifically noted that this action had no bearing on my ultimate conclusion regarding this issue.

On March 11, 2010, I issued an Order (ALJ Exh.1) that admitted as an exhibit the Respondent's answer to the amendments allowed on January 13, 2010, that was e-filed on February 2, 2010. (ALJ Exh. 2)

The Respondent's answer denied the material allegations of the complaint and raised certain affirmative defenses which will be discussed below. On the entire record, including my observation of the demeanor of the witnesses[3], and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party,[4] I make the following:

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[3] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *Jerry Ryce Builders,* 352 NLRB 1262, fn. 2 (2008), citing *NLRB v. Universal Camera Corp.,* 179 F. 2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U. S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007)

[4] On April 21, 2010, I issued an Order denying the Respondent's motion to reject the General Counsel's brief as untimely filed. Thereafter, Counsel for the General Counsel filed a motion to correct their brief dated April 22, 2010. The Charging Party filed a response to the General Counsel's motion dated April 27, 2010. Counsel for the Respondent also filed a motion to correct their brief and a motion to correct transcript dated April 28, 2010. The substance of the Respondent's motion to correct transcript was attached as an appendix to the Respondent's original brief. Counsel for the Charging Party then filed a motion to strike extra-record materials from the Respondent's brief and a response to the Respondent's motion to correct its brief, dated May 4, 2010. Counsel for the Respondent filed an opposition to the Charging Party's motion to strike extra record materials from the Respondent's brief and a motion, in the alternative, to reopen the record, dated May 5, 2010. The Respondent's filing had two affidavits attached.

On May 11, 2010, I issued in Order indicating that I would consider the motion to correct the General Counse's brief, the Charging Party's reply thereto and the Respondent's motion to correct its brief and to correct the transcript. I denied both of the Charging Party's motions dated May 4, 2010. I denied the Respondent's alternative motion to reopen the record and have not considered the affidavits attached to the motion. In my Order I indicated I would decide this case based on the record evidence admitted at the hearing and the briefs as corrected. I indicated that there is no provision in Section 102.42 for the filing of answering or reply briefs before an Administrative Law Judge. Accordingly, I indicated I would not consider any further arguments made by Counsel in this case and that none should be filed. After the issuance of my May 11, 2010 Order, I received the General Counsel's partial opposition to Respondent's motion to correct its brief dated May 10, 2010. Consistent with my May 11, 2010, Order I have not considered this document. I also received a letter from Respondent's Counsel dated May 12, 2010, requesting that I place the two affidavits referred to above in a rejected exhibit file. I deny that request. I grant, in part, the Respondent's unopposed motion to correct the transcript. Because of the number of corrections they are attached as Appendix 2 to this decision.

Findings of Fact

I. Jurisdiction

The Chicago Hotel Master Lessee, LLC (Chicago Hotel), a corporation, operates a hotel at its facility in Chicago, Illinois, where it annually derives gross revenues in excess of $500,000 and purchases and receives at its Chicago, Illinois facility goods valued in excess of $50,000 directly from points outside the State of Illinois. Chicago Hotel admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sage Hospitality Resources, LLC (Sage), Corp. operates a hotel and restaurant at its facility in Chicago, Illinois where it annually derives gross revenues in excess of $500,000 and purchases and receives at its Chicago facility goods valued in excess of $50,000 directly from points outside the State of Illinois. Sage admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background and Overview

The Respondent operates the Blackstone Hotel and a restaurant, Mercat a la Planxa, (Mercat) at its facility in Chicago, Illinois. The Blackstone and Mercat opened for business in March 2008. On October 25, 2005, prior to the redevelopment of the hotel facility, Respondent Sage entered into a neutrality agreement with the Union (R. Exh. 30). This agreement required Respondent Sage to take a neutral position with respect to any attempt by the Union to organize its employees.

The Union began to organize the employees employed at the Respondent's hotel and restaurant in October, 2008. According to the credible testimony of former room service employee Meghan Courtney, interested employees met with union representatives on October 22, 2009, October 29, and in early November, 2009, to discuss organizing the Respondent's hotel and restaurant employees. At the third meeting, union representatives gave authorization cards to employees and asked them to solicit other employees to sign the cards. Courtney executed a card and solicited approximately 10 other employees to sign cards.

After the Union obtained signed cards from a majority of the employees, it presented a written demand for recognition to the Respondent. Pursuant to the card check procedure contained in the neutrality agreement, on December 2, 2008, an impartial arbitrator determined that the Union had a majority of signed authorization cards in the agreed-upon unit. On December 3, 2008, the

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[5] The parties entered into the following stipulation: "For purposes of these proceedings, Chicago Hotel Master Lessee, LLC and Sage Hospitality Resources, LLC, are a single integrated enterprise, single employer and/or joint employers." (G.C. Exh. 2). I approved the stipulation as there is no evidence to the contrary. In this decision I refer to both entities collectively as the Respondent. Sage Hospitality Resources is referred to as Respondent Sage.

Respondent recognized the Union as the collective-bargaining representative of the employees in the following unit:

> All regular full-time and regular part-time hotel service, housekeeping, guest services, food and beverage, and laundry employees (including room cleaners, house persons, bell persons, telephone operators, kitchen employees, servers, bussers, bartenders, cashiers, hosts, concierges, laundry workers, front desk, and recreational employees) employed by the Employer at its facility currently located at 636 South Michigan Avenue, Chicago, Illinois but excluding all secretarial, office clerical, sales, and maintenance employees and all managers, supervisors, and guards as defined in the National Labor Relations Act.
>
> There are approximately 208 employees in the unit (GC Exh. 13).

After the Union was recognized on December 2, 2008, it prepared a flyer announcing its recognition which included two photographs of employees who were members of the Union's organizing committee (GC Ex. 6). Among the employees whose picture appeared on the flyer were: Sam Canty, Louis Hurtado, Carlos Zhicay, Deidre Auld, Tiffani Standfield, Lamar Johnson, Shannon Patalano, Kara Royal, Geovani Calle, Shalanda Holloway-Robinson, Diamond Thang, Nora Reyes, Zhimin Ye, Jose Padilla, Eloy Marin, Annie Clontz, Li Xia,and Estella Payan. Courtney testified that on December 2 and 3, 2008 she distributed approximately 12 of these flyers in the employees' locker room. (Tr. 53-55). Clontz passed out approximately 75 flyers in the employee locker room and in the cafeteria during the week of December 3, 2008. Clontz testified that supervisors ate in the cafeteria and that she observed Michael DeVries, an admitted supervisor, eating at one of the tables where the flyers had been placed. (Tr. 275-276) Any second flyer was prepared by the Union urging employees to attend a meeting scheduled for December 19, 2008, to discuss issues for the upcoming negotiations. This flyer contained only pictures of Courtney and Clontz (GC Exh 7). Courtney passed out about 30 of these flyers in the locker room and Clontz distributed about 50 in the same location.

On December 10, 2008, a memo from Shakir Hussain, the general manager of the Blackstone Hotel, and Steve Serdar, the general manager of the Mercat restaurant, to all employees (CP Exh. 2) was posted in the employee cafeteria and by the two time clocks used by unit employees. The memo stated:

> The purpose of this notice is to bring you up to date as to what is happening with respect to the question of Union representation at The Blackstone, Mercat & Starbucks.
>
> As all of you know the hotel and Local 1/UNITE HERE have been under a neutrality agreement since opening of the hotel. On December 2, 2008 there was a process called a card check that was held here at the hotel with an arbitrator. The Union had 140 cards, which was the majority. That means that under the neutrality agreement the hotel recognized Local 1 and will start negotiations.
>
> Prior to negotiating a union contract we must follow a National Labor Relations Board (NLRB) ruling:

> **Under the NLRB's ruling, the workers in or at any company have forty-five (45) days from the day the Official Notices are posted to file a petition with the NLRB office closest to them-in our case in Chicago-and if thirty percent (30%) approx (**sic**) 70 Associates back that filing, the NLRB will conduct a secret ballot election, and both the union and the employer have the right to express their views about the subject of whether there should be a union here, so long as the expression of those opinions is lawful and does not threaten any employee's rights.** (Bold in original)

So with that said, the Union and The Blackstone and SRG have asked the NLRB's Regional Office in Chicago to prepare the official notices. We have asked that these notices be prepared in the four (4) languages that most Associates read, write and speak-English, Spanish, Mandarin and Cantonese.

> **These Notices will be posted for forty-five (45) days as required. If no petition is filed, then both the Union and the Company will conclude that you are satisfied that we shall continue to negotiate with the Union. If a petition is filed, the Government will run a secret ballot election during which you will be able to vote "yes" or "no" on the subject of the union's representation. Once an election has been conducted, we will abide by the results of the election and respect your wishes.** (Bold in original)

In the coming weeks, we will do whatever is appropriate and reasonable to answer any questions you may have, and we will make every effort to make sure your managers and supervisors are aware of what the rules and what your rights are during this period of time.

Please feel free to talk to us or to any of your managers or Human Resources if you have any questions.

Respondent's witness Heather Urban testified regarding the reason for posting this notice. Urban is the director of human resources at the Pittsburgh Renaissance hotel which is managed by Respondent Sage. In February 2008 Urban was assigned by Respondent Sage to assist in establishing a human resources office at the Blackstone. In December 2008 she was directed to return to the Blackstone by Respondent Sage to discuss with the managers at that location the process that occurs after a card check, because she had experience in that area. The record reflects that the Pittsburgh Renaissance hotel recognized a union after a card check. Urban was present at the Blackstone from December 8 to December 12, 2008. Urban testified that the Respondent requested that the *Dana* notices be translated into Spanish and Mandarin Chinese. The Respondent was informed by the Regional Office that translated copies of the notice would not be received until approximately December 17 or 18, 2008. After receiving that information the Respondent posted the above noted memorandum on December 10, 2008, in areas where notices to employees are normally posted, such as the employee cafeteria. Urban indicated that the notices were posted because waiting until December 17 or 18 "was entirely too much time in the management's mind to allow nothing to be discussed until those notices arrived." (Tr. 1737)

There is no evidence that the Respondent had received any questions from employees regarding the voluntary recognition process or the procedure to decertify the Union before it posted its notice. At the hearing, decertification petitioner Erin Kolodziej testified that the Respondent's December 10 memo gave her the idea to start a decertification petition (Tr. 1201).

On December 10, 2008, Henry Tamarin, the Union's president, sent the following information request to the Respondent's attorney and chief negotiator, Norman Buchsbaum, requesting that the information be provided as soon as possible after the end of the calendar year.

> A list of all workers currently employed in the bargaining or employee during fiscal year ending in 2008 including:
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> Name
> Social Security number
> Department
> Departmental Classification
> Date of hire
> Date employee began present job classification
> Rate of pay
> Whether the employer is making deductions for dependent health care coverage
> List (A, B or C)
> Home address
> Home phone number
> Race
> Sex
> Marital status
> Gross pay for FYE 2008
> For all employees report total amount paid by employer for calendar year 2008
> For employees receiving gratuity, report total declared gratuity by calendar year ending 2008
> For all employees, report total hours pay for calendar 2008
> Number of vacation days taken by employee and paid by employer for FYE 2008
>
> In addition please provide the following information:
> 1. A list of all employees on family medical leave.
> 2. A copy of any employee handbooks and/or written rules.
> 3. Any policies and information about parking pay discounts for employees.
> 4. A list of employees' health insurance selection and level of coverage (i. e. Single, plus one, family); a Summary Plan Description for each plan offered and the cost for the employee and the employer, if any.
> 5. Information on 401 K participation (i.e. Current contribution level, current employer contribution and total contributions for 2008) a description of the plan offered.
>
> The Union reserves the right to make additional information requests during the negotiation process. (GC Exh. 10)

On December 15, 2008 Buchsbaum responded by a letter indicating that, since the Union's request, in part, sought information through the end of 2008, the information would be furnished to the Union sometime in early January (GC Exh. 12).

On December 11, 2008, Tamarin sent the following letter to Buchsbaum:

> Now that the Union has been recognized as the bargaining representative for the Blackstone employees, we look forward to productive negotiations. Before we reach a full collective-bargaining agreement, things will come up that require that we bargain together before management takes action. An example is layoffs. If management feels the need to reduce the work force any further, either now or in the future, please notify us. We want to negotiate appropriate staffing levels to avoid undue workloads. We will also want to negotiate the rules for order of layoffs, recall rights and the order of recall. This is just one example. Please notify the Union of any other changes in rules, policies or procedures affecting the terms and conditions of employment for Blackstone workers so the Union and the worker's bargaining committee (or specific affected workers) can address to propose changes through negotiations. (GC Exh. 11)

On December 12, 2008, Buchsbaum responded to Tamarin's December 11, 2008 letter by fax and letter. Buchsbaum indicated that he did not share Tamarin's view as to what the Respondent's recognition of the Union required during the period of bargaining. He indicated that since there was an existing set of arrangements at the Respondent, although the Respondent had recognized the Union, the Respondent would "continue to follow the existing policies and practices until such time as we reach an agreement or impasse with Local 1 in our negotiations. Should we wish to make any changes from what the Company's policies and practices have been, we will, of course, consult with the Union as we desire to have a good and productive working relationship with Local 1 and it would not only be the correct thing to do but, in my judgment, the best approach to take". (R. Exh. 11.)

On December 17, 2008, the Regional Director for Region 13 sent voluntary recognition notices to Sharon Wavrek, the human resources director of the Blackstone, pursuant to the Board's decision in *Dana Corp*., 351 NLRB 434 (2007), (herein referred to as the *Dana* notice). (CP Exh. 15) The Regional Director's letter advised that the notices should be posted where notices to employees are customarily posted for 45 consecutive days. There were copies of the notice in English, Spanish and Mandarin.

The notice indicates that it is an official government notice and contains the seal of the National Labor Relations Board. The notice indicates in relevant part that:

> On December 3, 2008, your Employer, The Blackstone, a Renaissance hotel, recognized UNITE HERE, Local 1, as the unit employees' exclusive bargaining representative based on evidence indicating the majority of employees in the following bargaining unit desire its representation:
>
> (unit description omitted)
>
> All employees, including those who previously signed cards in support of the

> Union, have the right to a secret ballot election conducted by the National Labor Relations Board to determine whether a majority of the voting employees wish to be represented by the Union, another union or no union at all, as provided below. Within 45 days from the date of the posting of this notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not unit employees wish to be represented by the Union. Within the same 45 day period, a representation petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board to determine whether or not unit employees wish to be represented by another union.
>
> Any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures.
>
> If no petition is filed within 45 days from the date of the posting of this notice, then the Union's status as the unit employees' exclusive bargaining representative will not be subject to challenge for a reasonable period of time to permit the Union and your Employer an opportunity to negotiate a collective-bargaining agreement.

The notice indicated that if employees were interested in filing a petition or receiving more information they should contact the Regional Office at the two telephone numbers listed on the notice. It also indicated that additional information was available at the NLRB's website. (CP Exh. 15)

Wavrek testified that the Respondent received the *Dana* notice on December 18, 2008 and it was posted throughout the facility on December 19.[6]

On December 18, 2008 the Respondent held six mandatory departmental meetings in order to inform employees about the posting of the *Dana* notice. The General Counsel alleges that at these meetings the Respondent, through Steven Serdar, unlawfully permitted an employee to speak in support of a decertification petition, while stopping employees who supported the union from speaking.

On Friday, January 23, 2009 the Respondent held a mandatory meeting for all unit employees during which Serdar discussed the *Dana* notice that had been posted at the facility. The General Counsel claims that at this meeting Serdar unlawfully permitted an employee to speak in support of the decertification petition, while stopping employees who supported the union from speaking.

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[6] Wavrek testified that the Respondent had initially received a *Dana* notice dated December 15, 2009. This notice contained only the Region's main telephone number and not the telephone number of the Board Agent assigned to the case. This notice was not posted by the Respondent. Rather, the Respondent requested the Region to send another notice with both phone numbers listed. Accordingly, the Region sent the revised notice on December 17, 2009.

In the days following that meeting employees continued to solicit signatures in support of a decertification petition. The General Counsel claims in the complaint that Serdar unlawfully assisted in circulating the petition on or about January 27, 2009.

On January 30, 2009 a decertification petition was filed in Case 13-RD-2606 by employee Erin Kolodziej (CP Exh. 16). On March 27, 2009 the Regional Director for Region 13 dismissed the petition. The Regional Director found that the Employer had unlawfully assisted in obtaining the showing interest in support of the petition. The Regional Director also found that because petition circulators did not accurately represent the reason for the petition, the showing of interest was numerically insufficient (CP Exh. 17). On August 27, 2009 the Board denied the Employers Request for Review of the Regional Director's decision. The Board, however, relied only on the Regional Director's finding that the Employer unlawfully assisted with the circulation of the petition. The Board also noted that the petition may be subject to reinstatement after final disposition of the instant unfair labor practice proceeding. Accordingly, the Board directed that the RD Petitioner be made a party in interest in the instant case solely for the purpose of receiving final notification of the outcome of the instant case. (CP Exh. 18).

The parties' first bargaining session took place on January 26, 2009. Meetings were also held on February 24, April 22 and 23rd, May 28 and June 10, July 21 and August 10, 2009. During the bargaining, among other topics, the parties discussed health insurance for employees and the closure of departments. The Respondent provided certain information to the Union, but, as noted above, there is an issue as to whether all of the information was provided in a timely fashion. While they continued to bargain, the parties had not reached an agreement on a collective- bargaining agreement by the time of the closing of the hearing.

Concurrent with the ongoing bargaining, in February 2009, the Respondent issued a memo to employees who were in arrears in their payment of health insurance premiums informing them that they were responsible for becoming current or risk having their insurance canceled. During March 2009, the Respondent's supervisors, including Serdar, met with employees to discuss the necessity for them to become current in their payments and the options available for them to do so. On April 1, 2009, the Respondent implemented its new health insurance plans for unit employees.

On June 15, 2009, without giving notice or an opportunity to bargain to the Union, the Respondent notified affected room service employees that it was closing the room service department as of that date. The employees in that department were informed that their positions were being eliminated and that they were permanently laid off. They were also informed that they could apply for other available positions at the Respondent's facility. On June 15, 2009 the Respondent also laid off two cafeteria attendants and three other employees. Several of the laid off employees did apply for jobs with the Respondent and some had been rehired by the close of the hearing.

The Alleged Violations of Section 8(a)(1) of the Act

The Handbook Rules

Paragraph IX of the complaint alleges that during the period to relevant to the complaint, the Respondent, by its employee handbook, has maintained the following overly broad work rules:

> (i) Confidentiality: During the course of employment with Sage, you may have access to confidential information relating to the operation of the hotel a fellow associate or guest. Knowledge of confidential information is a trust to be honored. Confidential information is not to be divulged to anyone under any circumstance.
>
> (ii) Media Requests for Information: Requests from television, newspaper or radio reporters for information about the hotel or its guests, operations or activities are to be referred to the General Manager. Associates are not to discuss any hotel matters with the media.
>
> (iii) Solicitation: Associates are not permitted to solicit or distribute literature to non-associates on the hotel's premises.

The Associate handbook of Sage Hospitality Resources, dated February 2006, contained the three rules quoted above (GC Exh. 3).

In late March 2009, Respondent revised its solicitation rule by issuing the following "Notice To Associates" signed by Rob Cartwright, General Manager and Steve Serdar, Director of Food and Beverage Operations.

> This Notice is to inform all associates that The Blackstone is revising its solicitation rule. It has come to our attention that a sentence in that rule might render the policy too broad and restrictive, as it may have been construed by some associates to prohibit discussion with respect to wages, terms and conditions of employment, as well as associates' right to organize under Federal law, as mentioned below.
>
> The version of the solicitation rule contained in the current Associate Handbook is no longer applicable and has been revoked. Any discipline stemming from the old rule has been permanently removed. The new rule, effective immediately, is as follows:
>
> **<u>Solicitation</u>**
>
> Associates are not permitted to solicit during working time, in selling areas, in guest service areas or in the aisles, escalators and elevators interconnecting selling areas and/or guest service areas. An associate may not solicit another associate during the latter's worktime.
>
> Associates are not permitted to distribute literature during working time or in working areas. Associates may not post personal notices on Hotel bulletin boards.

Non-associates must not solicit or distribute literature on the Hotel's premises.

Working time does not include meal, break or rest periods or other specified times during the work shift when associates are not engaged in performing their work tasks.

If you have any questions regarding the above change to the Hotel's solicitation rule, please direct those questions to Human Resources. (R.Exh. 54)

On April 8, 2009 the Respondent issued the following "Notice to Associates" signed by Cartwright and Serdar revising its policies regarding confidentiality, media requests and access by off duty employees.

This notice is to inform all associates that The Blackstone is revising its policies with respect to Confidentiality and Media Requests. This notice also refers to the off-duty access rule, which the Hotel revised late last year. It has come to our attention that those rules as maintained were too broad and restrictive, as they may have been construed by some associates to prohibit discussion with respect to wages, terms and conditions of employment, as well as your right to organize under federal law, as mentioned below.

The versions of the below rules contained in the current Associate Handbook are no longer applicable and have been revoked. Any discipline stemming from the old rules has been permanently removed. The new rules, effective immediately, are as follows:

Confidentiality

During the course of your employment with Sage, you may have access to confidential and proprietary information relating to the operation of the Hotel, including its business dealings and guests. Knowledge of confidential information is a trust to be honored. Confidential information is not to be divulged to anyone under any circumstances

Nothing in this rule is designed to permit you from discussing the terms and conditions of your and your fellow associates' employment with anyone.

Media Requests for Information

Only the General Manager or designee of the General Manager is permitted to speak on behalf of the Hotel regarding the hotel's official position regarding any matter. If you receive any such request from the media outlet, you must refer that request the General Manager. Nothing in this rule prevents you from speaking to the media regarding your employment with The Blackstone Hotel.

Off-Duty Access

Sage policy prohibits off-duty associates from patronizing or entering the Hotel's restaurant or bar area. This policy is in place in order to avoid both crowding of limited hotel space and the possibility of awkward or uncomfortable interactions with Hotel guests by Hotel Associates. For the same reason, off-duty associates are prohibited from entering function or meeting rooms as well as guest rooms.

> Off-duty associates are prohibited, for insurance and safety purposes, from loitering in non-public work areas, such as the kitchen. Off-duty associates are required to exit the associate cafeteria if the cafeteria is near capacity and there are associates on rest break or meal break waiting to use the facility.
>
> If you have any questions regarding the above changes to the Hotel's work rules, please direct those questions to Sharon Wavrek, Director of Human Resources. (R. Exh. 55)

After the revised policies were posted, however, the confidentiality policy set forth in the 2006 employee handbook was contained in "Pre-shift Topics" sheets that were distributed to servers during the week of June 12, 2009. In this document the old rule was reproduced verbatim except "restaurant" was substituted for "hotel" (CP Exhibit 23). At the preshift meetings, which were attended by from 9 to 20 employees, the rule was read to employees by managers. In addition managers, including admitted supervisor Jude Le Bourhis, reaffirmed the substance of the stated rule to employees. (Tr. 352, 555-556)

The General Counsel and the Charging him Party allege that the rules set forth in the employee handbook regarding confidentiality, media requests for information, and solicitation are overly broad and, on their face, violate Section 8 (a)(1) of theAct. Accordingly, the General Counsel and Charging Party seek a cease-and-desist order, the rescission of the rules and the posting of a notice regarding this allegation of the complaint.

The Respondent does not dispute the claim that the rules contained in the Respondent Sage 2006 handbook and maintained through at least April of 2009 at the Blackstone regarding confidentiality, media requests for information and solicitation were overbroad. The Respondent contends, however that the employees have been notified in writing that the alleged unlawful provisions of the employee handbook have been rescinded and that new lawful policies regarding confidentiality, media requests for information and solicitation have been posted throughout its facility. Under these circumstances, the Respondent contends that there is no necessity for the finding of a violation of the Act and a remedial order and notice. In support of its argument, the Respondent relies on the Board's decision in *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978) and its progeny.

In determining whether work rules are facially overbroad, the Board held in *Lafayette Park Hotel,* 326 NLRB 824 (1998) enfd. mem. 203 F. 3d 52 (D.C. Cir. 1999):

> The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. Id. at 825.

With respect to the confidentiality rule contained in the Respondent's 2006 handbook, confidential information includes information regarding other employees and cannot be divulged anyone under any circumstance. In *Flamingo Hilton-Laughlin,* 330 NLRB 287 (1999) the Board found a rule that stated "employees will not reveal confidential information regarding our customers, fellow employees or hotel business" to be overbroad. In so finding, the Board

majority noted that the rule specifically prohibited employees from revealing confidential information about other employees. Similarly, in *University Medical Center*, 335 NLRB 1318 (2001) the Board found a rule that prohibited "release or disclosure of confidential information concerning patients or employees" to violate Section 8(a)(1) of the Act. The Board, relying on *Flamingo Hilton-Laughlin,* found a rule unlawful "because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages which they might reasonably perceive to be within the scope of the broadly stated category of 'confidential information' about employees." 335 NLRB at 1322. Accord, *Double Eagle Hotel & Casino,* 341 NLRB 112 (2004).

In *Longs Drug Stores California*, Inc. 347 NLRB 500 (2006) the Board found unlawful a rule that provided, inter alia: " [L]isted below are examples of conduct that may result in disciplinary action … unauthorized disclosure of confidential information regarding customers, employees, or the business of the Company." In reaching its decision, the Board relied on *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). In that case the Board noted that in determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation. Under this standard, the first inquiry is called whether the work rule explicitly restricts activities protected by Section 7. If so the rule is unlawful. If the rule does not explicitly restrict activity protected by Section 7, a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

I find that in the instant case, within the broad definition of confidential information regarding a "fellow associate", employees could reasonably perceive that the rule precluded them from discussing information concerning conditions of employment, including wages. This finding is consistent with the Board's policy as stated above. Accordingly, I find the confidentiality rule contained in the Respondent's handbook to be overbroad and unlawful.

With respect to the "Media Requests for Information" section of the employee handbook, this rule prohibits employees from discussing any "hotel matters with the media."

In *Pilot Development Southwest d/b/a/ Hacienda de Salud-Espanola,* 317 NLRB 962 (1995) the Board held:

> As a general proposition, Section 7 of the Act protects employee communications to the public directly related to an ongoing labor dispute, so long as those communications are 'a part of and related to the ongoing labor dispute.' *Allied Aviation Serv. Co. of New Jersey,* 248 NLRB 229, 231 (1980) enfd. 636 F. 2d 1210 (3d Cir. 1980). Employees do not 'lose their protection under the mutual aid or protection clause [of Section 7 of the Act] when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.' *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). More specifically, the protection of Section 7 of the Act encompasses employee communications about labor disputes with newspaper reporters. *Roure Bertrand DuPont,* 271 NLRB 443 fn. 1 (1984)

> See also *Automobile Club of Michigan v. NLRB,* 610 F. 2d 438 (6 Cir. (1979)); *Community Hospital of Roanoke Valley v. NLRB,* 538 F. 2d 607, 610 (4th Cir. 1976).

When viewed under this standard, it is clear that the Respondent's rule unduly restricts the exercise of legitimate Section 7 rights and is therefore unlawful.

The solicitation rule contained in the Respondent's handbook broadly prohibits employees from soliciting or disturbing literature or to nonemployees on the hotel's premises. This rule is also overbroad and facially unlawful. In *UCSF Stanford Health Care*, 335 NLRB 488, 535-536 (2001) the Board found that the employer's rule banning solicitation and distribution to nonemployees anywhere on its property was facially invalid. In making this finding the Board relied on its decision in *NCR Corp.*, 313 NLRB 574, (1993). In that case the Board indicated:

> The right of employees to distribute union literature during nonwork time and in nonwork areas is not limited to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of a labor organizations.

Accordingly, on the basis of the above I find that the rule contained in the Respondent's handbook is unlawful.

I now turn to the Respondent's argument that it has effectively repudiated its overly broad work rules, thus obviating the necessity of finding violations of Section 8(a)(1) of the Act and a remedial order and notice. In *Passavant Memorial Hospital,* supra, at 138-139, the Board stated that under certain circumstances an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. To be effective the repudiation must be "timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct." In addition, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. Finally, the repudiation should give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights. See also *Intermet Stevensville,* 350 NLRB 1349, 1350 fn. 6, 1382-1383 (2007); *River's Bend Health,* 350 NLRB 184, 193 (2007).

I find that, under all the circumstances, the revisions to the overbroad handbook rules do not comport with the standards of *Passavant* sufficiently to eliminate the necessity of a finding of a violation in a remedial order and notice. In the first instance, during that period that it was attempting to repudiate the overbroad rules, as described in detail herein, it was engaging in other unlawful conduct in violation of Section 8(a)(5) and (1) involving a delay in providing relevant and necessary information and the unilateral implementation of new health care plans. Thus the attempted repudiation did not occur in an atmosphere free from other proscribed illegal conduct. Equally important, the Respondent failed to meet the requirement that it not engage in any proscribed conduct after its attempt to repudiate its earlier unlawful conduct. As set forth later herein, after revising its unlawful work rules, the Respondent committed additional violations of the Act. These violations included the unilateral closure of its room service departments and the layoff of 14 employees without giving notice to or bargaining with the

Union in violation of Section 8(a)(5) and (1) of the Act and the discriminatory refusal to rehire an employee in violation of Section 8(a)(3) and (1). Although of far lesser importance the Respondent reaffirmed the unlawful confidentiality rule at employee meetings held during the week of June 12, 2009. I also note that the Respondent's posted revisions of the work rules at issue did not assure employees that it would not interfere with their Section 7 rights in the future. Such an assurance would have been hollow because the fact is that after the revisions to its unlawful rules, the Respondent continued to interfere with the Section 7 rights of its employees. Accordingly, I find that the rules regarding confidentiality, media requests for information and solicitation that were maintained through March and April, 2009 violate Section 8(a)(1) of the Act and I will enter an appropriate remedial order and notice with respect to this issue.

The December 10, 2008, memo

As amended at the hearing, the General Counsel amended the complaint by adding paragraph IX(b) which alleges that "On or about December 10, 2008, Respondent, wrongfully quoted Board law in **a** memorandum to employees in order to discourage or assist employees in filing a decertification petition as follows:

Prior to negotiating a union contract we must follow a National Labor Relations Board (NLRB) ruling:

> Under the NLRB's ruling, the workers in or at any company have forty-five (45) days from the date the Official Notices are posted to file with the NLRB office closest to them-in our case in Chicago-and if thirty percent (30%) approx 70 Associates back that filing, the NLRB will conduct a secret ballot election…

It is undisputed that on December 10, 2008, the Respondent posted the memo referred to above in its entirety in places where notices to employees are customarily posted.

The General Counsel asserts that in *Dana Corp.,* 351 NLRB 434 (2007) the Board modified its recognition-bar doctrine and held that an employer's voluntary recognition of a labor organization does not bar a decertification petition or a rival union petition that is filed within 45 days of the notice of recognition. General Counsel argues that the *Dana* decision did not in any way limit the parties from negotiating or signing a collective-bargaining agreement after recognition. General Counsel contends that the Respondent's December 10, 2008, memo to employees misstates Board law by stating that prior to negotiating a contract with the union, it must follow the Board's ruling and allow for the 45 day posting. General Counsel contends that by misinforming the employees that it would have to allow for the 45 day posting period to expire before it was able to negotiate a contract with the Union, the Respondent undermined the employees' image of their bargaining representative and thus encouraged and assisted employees in filing a decertification petition.

In addition to the argument advanced by the General Counsel, the Charging Party also asserts that the December 10 memo unlawfully assisted the decertification process by offering unsolicited information about the requirements for such a petition.

In defense, the Respondent contends that its December 10, 2008 memo was protected by Section 8(c) of the Act. (Respondent's brief, pgs. 146 -149). The Respondent also contends that

its December 10, 2008 memo did not misstate Board law and that, even if the memo contained a misstatement of law, it was immaterial and insufficient to have any effect on the decertification petition. Finally, the Respondent argues that the Board's policy regarding misrepresentations in election proceedings supports a finding that the December 10, 2008, memo did not violate the Act. (Respondent's brief, pgs. 11-12, 136-140)

I find that the Respondent's memo of December 10, 2008, does in fact contain a misstatement of Board law in that it states that "Prior to negotiating a union contract we must follow a National Labor Relations Board (NLRB) ruling;" followed by its interpretation of the requirements of the Board's *Dana* decision. A fair reading of the memo indicates that prior to negotiating a contract with the Union, the Respondent must allow for the 45 day posting period contemplated by the *Dana* decision. I do not read the Board's *Dana* decision as limiting when an employer and a voluntarily recognized union may negotiate or sign a collective bargaining agreement. Rather, by establishing a window period during which a valid petition can be filed, it deals with the issue of whether voluntary recognition and any resulting contract will bar a petition for an election.

In *Dana* the Board held at 434:

> In order to achieve a "finer balance" (citation omitted) of interests that better protects employees' free choice, we herein modify the Board's recognition-bar doctrine and hold that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed.

The Board further noted at 442:

> [A]though our modification of the recognition bar delays the onset of an insulated period In order to assure protection of employee free choice, it does not otherwise deny the advantages of incumbency to the recognized union and those employees who support it. The employer's obligation to bargain with the Union attaches immediately. For instance, during this 45 day period, the union can begin its representation of employees, its processing of their grievances, and its bargaining with the employer for a first contract.
>
> [E]ven if a decertification or rival union petition is filed during the window period, this will not require or permit the employer to withdraw from bargaining or from executing a contract with the incumbent union; (citations omitted) and during the pre-election period, the recognized union will have the advantaged position of an incumbent.

It is clear that the Respondent's December 10, 2008, memo misstated the effect of the *Dana* decision on the collective bargaining process with a recognized union. It is also clear that the Respondent did not post its memo in response to any questions that were raised by

employees, but rather because it did not want to wait until December 17, 2008, to communicate with its employees about the decertification process. Finally, this memo had the effect of causing the RD petitioner to start the circulation of her petition. I find, under all the circumstances, that the Respondent's December 10, 2008, memo unlawfully encouraged the decertification process in violation of Section 8(a)(1) of the Act.

In *Process Supply*, 300 NLRB 756 (1990) the Board found that an employer violated Section 8(a)(1) by sponsoring and assisting in the circulation of a decertification petition. In that case, the employer posted on a bulletin board a letter from its attorney indicating in detail the manner in which a decertification petition should be prepared. The day after this letter was posted, an employee circulated a petition seeking to oust the union. The petition was circulated during work time with the knowledge of management officials.

In finding that the employer's conduct to be unlawful, the Board noted at 758:

> The law is clear that an employer must stay out of any effort to decertify an incumbent union. After all, the employer is duty-bound to bargain in good faith with that union. Although an employer may answer specific inquiries regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such petition where the employees would reasonably believe that it is sponsoring or instigating the petition. Such unlawful assistance includes plantin the seed for the circulation and filing of a petition, providing assistance in it wording, typing, or filing with the Board, and knowingly permitting its circulation in work time. (Citations omitted)

Applying this standard, the Board found that the posting of the letter where there was no prior evidence of employee disaffection, planted the seed of the decertification effort. The circulation of the petition during work time with employer knowledge was also relied on by the Board in making its finding.

In several other cases the Board has taken a dim view regarding an employer's involvement in instigating or encouraging a decertification petition. In *Armored Transport, Inc.* 339 NLRB 374 (2003) the Board found an employer unlawfully solicited a decertification petition in violation of Section 8(a)(1) of the Act. In its decision the Board noted at 377:

> The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions and may not threaten employees in order to secure their support for such petitions. An employer may not provide more than ministerial aid in the preparation or filing of the petition. The decision regarding decertification responsibility to prepare and file a decertification petition belongs solely to the employees. 'Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in the activity, either to instigate or to facilitate it.' *Harding Glass Co.,* 316 NLRB 985, 991 (1995), and cases cited therein.

In *Wire Products Mfg. Corp*., 326 NLRB 625 (1998), an employer posted an accurate letter regarding decertification together with an attachment setting forth the purported disadvantages of union representation together with a sample petition for decertifying the union.

The Board found that the letter and the attachment, when considered in the context of the employer's other unfair labor practices, constituted unlawful encouragement to the employees to decertify the Union. The Board noted that this situation was different than those where the employer merely set forth objective information detailing the manner in which employees could decertify a union in response to employee questions. Id. at 626-627. The Board has held that if an employer's involvement with a decertification petition is limited to providing accurate information in response to employee questions without threats or promises, such conduct is lawful. *Rose-Terminix Extermination Co.,* 315 NLRB 1283 1287-1288 (1995); *Amer-Cal Indus*., 274 NLRB 1046, 1051 (1985) and cases cited therein.

In the instant case, the Respondent, on its own initiative, posted misleading information regarding the Board's decertification process regarding a voluntarily recognized union. Under all the circumstances of this case and based on the case law discussed above, I find that the Respondent's posting of the December 10, 2008, memo planted the seed for the circulation of the RD petition and thus unlawfully encouraged the filing of the decertification petition in violation of Section 8(a)(1) of the Act. I do not find that the Board's decision in *Dana* requires a different result. In my view, the *Dana* decision did not materially alter the Board's policy, expressed above, regarding the limited input that an employer may have into the decertification process.

I do not agree with the Respondent's contention that the Board's decision in *Lee Lumber and Building Material Corp*., 306 NLRB 408 (1992) privileges its conduct in posting the December 10, 2008, memo. In *Lee Lumber* the employer's secretary-treasurer, Baumgarten called a meeting to answer questions raised by employees regarding the future of the employer's profit-sharing plan. Baumgarten informed the employees that he could not make any threats or promises and told employees that he wanted to answer any questions they might have. Most of the questions were about the profit-sharing plan. When employees asked what steps they could take to vote the union out, Baumgarten gave the employees general information about the filing of decertification petitions and the location of the Board's office. Immediately afterwards, the employees began the decertification process. In finding that Baumgarten's speech did not constitute unlawful encouragement of the decertification process, the Board noted that Baumgarten called a meeting in response to questions that had been asked by employees about the continuation of the profit sharing program. He gave accurate information about the union's attempt to replace profit-sharing with the union's pension plan. When the employees asked what steps to take to remove the union, Baumgarten replied with general information about the decertification process. In finding that Baumgarten's statements did not constitute unlawful encouragement of the decertification, the Board noted that under Section 8(c) an employer may lawfully furnish accurate information, especially in response to employee's questions, if it does so without making threats or promises of benefits.

In the instant case, the Respondent's December 10, 2008, memo was not in response to employee questions and critical information contained within it was inaccurate. Under these circumstances I do not find it appropriate to rely on *Lee Lumber* to dismiss this allegation.

The Respondent also relies on *Exxell/Atmos, Inc., v. NLRB*, 147 F. 3d 972 (D.C. Cir. (1998) denying enf. 323 NLRB 884 (1997) in support of its position that its December 10, 2008, memo did not unlawfully encourage the decertification petition. It is well settled that it is the duty of an administrative law judge to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by courts of appeals. *Los Angeles*

*New Hos*pital, 244 NLRB 960, 962, fn. 4, enfd. 640 F. 2d 1017 (9th Cir. 1981); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963) enfd. in part 331 F. 2d 176 (8th Cir. 1964). With due deference to the District of Columbia Circuit Court of Appeals, I am constrained from applying the rationale of the decision in *Exxell/Atmos*, supra, to this case. I note, moreover, the underlying Board decision, which I am required to follow, supports finding the Respondent's posting of its December 10, 2008, memo to be unlawful.

I find the other cases relied on by the Respondent to be inapposite. Importantly, none of these cases deal with the Board's policy regarding employer instigation of decertification petitions. In *Baptist Medical Center/Health Midwest*, 338 NLRB 346 (2002) the employer on April 7, 2000, distributed to its employees a memo indicating that government subpoenas were on the rise with respect to investigations by the U.S. Justice Department of health care facilities. The memo requested employees to notify the employer if they received a subpoena or were contacted by an investigator. The memo advised employees of their rights to decline to talk to a government investigator and of their right to seek the advice of an attorney. The employer offered to pay such attorney's fees. At the time the memo issued, the Board's General Counsel had issued a complaint against the employer and objections to an election were pending. On April 20, 2000, after the union had filed a charge alleging that the April 7 memo violated Section 8(a)(1) of the Act in interfering with the right of employees to have access to the processes of the Board, the employer distributed a second memo. This memo indicated:

1. You are free to talk to an NLRB investigator if you wish to do so.
2. You are under no obligation to notify me if an NLRB investigator contacts you.
3. You will not be disciplined for failing to notify me if an NLRB investigator contacts you.
4. If you choose to talk to an NLRB investigator, tell the truth.

The Board found that the April 7 and April 20 memos, when considered together, failed to establish that they unlawfully impeded employees access to the Board, and therefore found no violation of Section 8(a)(1) of the Act.

Relying on the rationale expressed in *Baptist Memorial*, the Respondent contends that the official Board *Dana* notice posted on December 19, 2008, cured any defect that existed in the Respondent's December 10, 2008 posting. I do not agree. In the first instance, as I have indicated, Board policy regarding employer involvement in the instigation of decertification petitions has been strict and I do not believe that the *Dana* decision lessens those restrictions. Moreover, in *Baptist Memorial*, the April 20 memo explicitly and accurately indicated in unequivocal terms the rights of employees to cooperate with an NLRB investigator. In the instant case, a fair reading of the Board's *Dana* notice would not dispel the misleading statement in the Respondents notice that "prior to negotiating a union contract", it would have to await the expiration of the 45 day window period prescribed by the *Dana* decision.

The Respondent also relies on In *Galloway School Lines, Inc*. 308 NLRB 33 (1992). There the Board found no violation of Section 8(a)(1) of the Act when an attorney for the employer, in a speech to non-unit employees, misstated Board procedures by making statements that made it appear that a test of certification case can take longer to process than it actually does. In the instant case, the misstatement was communicated directly to unit employees. It

involved an unsolicited and incorrect statement regarding the decertification process as it applies to a newly recognized, incumbent union. I find the applicable precedent to be the body of law regarding employer involvement in the instigation of decertification petitions that I have discussed above.

The Respondent's reliance upon *Midland National Life Insurance Co*., 263 NLRB 127 (1982) is not germane to the unfair labor practice allegation regarding the Respondent's December 10, 2008 memo in the instant case. In *Midland National,* the Board indicated it would not set aside elections on the basis of misleading campaign statements by the parties. Here, the issue is whether a misstatement of law in an unsolicited employer posting regarding the decertification process of an incumbent union unlawfully encourages such a petition in violation of Section 8(a)(1) of the Act. Once again, the cases most directly applicable to the issue lead me to the conclusion that the Respondent's conduct in posting its December 10, 2008, memo planted the seed for the circulation of the decertification petition and was unlawful.

The Meetings of December 18, 2008 and January 23, 2009

As amended at the hearing (GC Exh. 93) the General Counsel alleges that on December 18, 2008, and January 23, 2009, the Respondent, by Steven Serdar, at meetings for employees, discriminatorily permitted an employee to speak in support of a decertification petition, while stopping employees supporting the Union from speaking out.

A. The December 18, 2008, meetings

Former employees Meghan Courtney and Allen Lane testified regarding meetings held December 18, 2008, on behalf of the General Counsel. In addition, when called as an adverse witness by the General Counsel, Wavrek also testified about employee meetings held on that date. Finally, the General Counsel relies on an e-mail sent by Heather Urban to corporate officials of the Respondent, including some located in the corporate headquarters of Sage Hospitality, summarizing the meetings held on that date.

The record establishes that the Respondent held a series of 6 mandatory departmental meetings on December 18, 2009 to discuss the *Dana* notices that were to be posted. The schedule for these meetings was as follows:

9 a.m.	banquets
10 a.m.	kitchen/stewarding
11 a.m.	housekeeping
1 p.m.	front desk
2 pm.	room service
3 p.m.	Mercat/Starbucks

Courtney testified that on December 18, 2008, at 2 p.m. she attended a mandatory meeting for room service employees. Hussain, Serdar, Wavrek, Urban were present for the Respondent. In addition to Courtney, several other room service employees were also present at the meeting. Serdar indicated that he wished to speak to employees about the *Dana* notice. According to Courtney, Serdar stated "we really want you to understand that it is your right as an American to have a secret ballot vote, and we really want you to exercise your rights".. Serdar

further stated that during the first 45 days of the posting you can have a petition to ask for vote. He passed out a copy of a *Dana* notice to the employees but indicated that it was not the "right one" and that he would post the "right one" when it was received. (Tr. 79-80).

Lane testified that he attended a meeting conducted by the Respondent for kitchen staff employees in mid-December 2008. He indicated that there were more than 20 employees present at the meeting and it was held in the morning. He testified that Hussain, Serdar and Wavrek were present. He also testified that another female, who he thought was a lawyer, was present as was a translator. According to Lane, Hussain spoke about the Union and said a petition could be started. Serdar stated the Union was trying to come into the hotel and if anybody was against the Union they could start a petition or they could sign a petition that was already circulating. Wavrek stated that a petition could be started and that "Erin" already had one. Lane testified that Erin Kolodziej spoke near the end of the meeting and said that she had a petition and if anybody wanted to sign that they could see her after the meeting. (Tr. 471-473)

When called as an adverse witness, Wavrek testified that the kitchen/stewarding department (at times referred to as the culinary/stewarding department) meeting was held at 10 a.m. on the morning of December 18, 2008. Wavrek testified that at this meeting, employee Erin Kolodiziej stated that she had done research on the *Dana* issue and encouraged other employees to do so as well. Kolodiziej stated at the meeting that she had a petition ready and that if anyone wanted to sign it, to come see her (Tr. 904-905).

Wavrek also testified that at the 2 p.m. December 18, 2008, room service meeting Courtney and Clontz spoke about the Employee Free Choice Act and one of them stated "it would be better once we have the Employee Free Choice Act". Serdar told them this was not the place for this discussion that the purpose was to provide information about the *Dana* notices. (Tr. 1038) Courtney and Clontz then stopped talking.

Urban's e-mail of December 19 (GC Exh. 31) indicates the following regarding meetings held with kitchen and room service employees on December 18, 2008:

> 10:00 -am -Culinary/stewarding -Also a good meeting. There was one associate in the meeting who stood up and announced to the associates that is important for them to do research and visit the Local one website, as well as the union fact website, then she went on to say that she had already contacted the NLRB and has a petition ready and if anyone wanted to sign it to come and see her. She wanted to stay through the Housekeeping meeting and we told her that she could not but that she was more than welcome to talk to any associates she wanted.
>
> 2:00- pm- Room Service-Very interesting meeting. Not a large department but two of the associates were very vocal and very unprofessional. Steve and Shakir started explaining what the Dana II Notice was and one associate said "you and I both know that if that petition gets signed, you are decertifying the Union". Steve said what I'm telling you is what the notice is and if there is a petition you will have the opportunity for a secret ballot vote. Then she called him a liar. Steve said I am not sure what I have lied about I am only telling you what the law says. The other associate then started talking about the Employees (sic) Freedom of Choice Act and that if it were passed the Dana II Notice would be null and void. Shakir and Steve both said this is not [the] forum to discuss the

Employees Freedom Act (sic) and she would not stop and again she was told this is not the forum to discuss her political views. I then chimed in and said Sage and the Blackstone feel that we need to communicate to our associates prior to posting a Federal notice on our walls. The two associates then said "when will we have a mandatory meeting to discuss our views", Steve replied the union has been talking with you since March, you have already been talking about your views. They went onto say you and I both know that this could be arbitrated for years, Steve and I both said we do not know that. I then said I don't understand what you are saying "who would arbitrate the decision to have a secret ballot vote." She kept saying I don't know I will research it and bring it to you on Monday.

Serdar, Wavrek, Urban and Kolodziej testified on behalf of the Respondent regarding the December 18, 2008, meeting. Kolodziej testified that she attended the departmental meeting for kitchen employees on December 18, 2008. According to Kolodziej, Serdar informed employees that the Union had been "certified" and had asked the Hotel to post a notice regarding the *Dana* "ruling". Serdar read aloud from the *Dana* notice but said there was a wrong number on it and stated the Hotel would post the notice as soon as the Labor Board gave him copies of the notice with the correct phone number. She recalls Hussain stating that whether or not employees wanted a union, it was up to them to make a decision. Kolodziej testified that one of the managers invited questions. She raised her hand and was called on. She told employees that she had done some research and intended to circulate a petition to decertify the Union and if employees had questions they could speak to her afterwards. Kolodziej testified that Sharon Baker, a cafeteria attendant, also raised her hand to speak and was called on. Baker indicated that she too had done her research and that she supported the union. After the meeting Kolodziej asked Wavrek if she could sit in on the rest of the departmental meetings because she wanted to let other employees know that she was intending to circulate a petition. Wavarek told her that she could not come to other departmental meetings.

Serdar testified that he attended all 6 of the departmental meeting held on December 18, 2008, along with Hussain, Urban and Wavrek. Serdar indicated that the format of each meeting was the same. Hussain welcomed the employees and gave a brief description of the reason for the meeting. In this regard, Hussain stated that they were going to review the *Dana* notice with the employees and informed them that it would be posted in languages that they would be comfortable with. Serdar had a copy of the *Dana* notice sent by the Region, without the specific phone number of the Board Agent assigned to the case, and read through the substantive part of the notice. He then asked if there were any questions that he could answer. Serdar testified that at the departmental meeting for kitchen employees, after he opened the meeting for questions, Kolodziej raised her hand and he called on her. Kolodziej stated that she had done research and was starting a petition and that if anyone wanted to see her, she was available. Serdar then called on another employee, Sharon Baker, who indicated that she had also done research, and was concerned about insurance because of some health issues regarding her family. She indicated that she felt the union insurance benefits were strong. Serdar denied that he stated at this meeting that a decertification petition could be started and that employees could sign the petition that Erin Kolodziej was already circulating. He also denied that Hussain or Wavrek stated that a petition could be started.

Serdar also testified regarding the room service meeting that was held in the afternoon of December 18. According to Serdar, after Hussain and he made their opening statements referred

to above, Clontz and Courtney stood up and one of them said this was illegal and the Respondent should not be having this kind of communication regarding the *Dana* notice. Serdar recalled that Clontz made mention of the Employee Free Choice Act and that she felt it was illegal for the Respondent to have this meeting. Serdar stated that Hussain said that if they did not have anything to say directly regarding the *Dana* notice this was not the form to discuss the "pros and cons" of the Union and, if they had nothing else to say, they could be seated. Serdar testified that he agreed with Hussain and stated that they should keep the subject to the *Dana* notice, that this was not a debate. Clontz and Courtney then sat down.

Wavrek also testified as a Respondent witness regarding the culinary/stewarding department meeting held on December 18. She indicated that Hussain opened the meeting and that Serdar read the *Dana* notice to employees. Serdar then asked if there were any questions. Kolodziej stood up and stated that she had done research, including visiting the websites of the NLRB and Unite/Here, and she encouraged others to do the same. She stated that she had a petition and if anyone was interested in signing it, they could see her later. Employee Sharon Baker also spoke at the meeting. She indicated she also had done her research and spoke favorably regarding the Union's medical benefits. No one from management stopped her from speaking. After the meeting finished, Kolodziej asked Wavrek if she could attend the other meetings that were scheduled. Wavrek spoke to Urban and they decided that Kolodziej should not be permitted to attend the other meetings and Wavrek so informed her. Wavrek denied saying at this meeting that a petition could be started. She also denied that Serdar or Hussain made such a statement. Finally, she denied saying that if employees wanted to, they could sign a petition that was already circulating and that Erin Kolodziej had such a petition.

With respect to the 2 p.m. room service meeting, Wavrek testified that after Serdar read the *Dana* notice, Clontz and Courtney stood up and one of them stated that if the Employee Free Choice Act passed, the *Dana* notice would not be valid. She recalled Courtney and Clontz saying they were going to get more information and bring it back. At that point, Hussain said that it was time to move on, that they were there to talk about the *Dana* notice and answer questions that employees had. During Wavrek's cross-examination, it was established that in her affidavit given to the Regional Office during the investigation of the RD petition, Wavrek indicated that after reading the *Dana* notice, Serdar stated that employees have a right to a secret ballot election and then opened the floor for questions. In this affidavit, Wavrek indicated that Serdar was the individual who told Clontz and Courtney that this was not the place for the discussion they were attempting to have, but at the hearing Wavrek testified that her present recollection was that Hussain was the individual who made that statement. (Tr. 2042-2043)

With respect to the culinary/stewarding meeting held at 10 a.m. on December 18, Urban testified that Serdar indicated that the Respondent would be posting a *Dana* notice that they expected to receive by the end of the day but he wanted to go over the notice with employees. After reading the text of the notice, Serdar asked for comments or questions and an employee stood up and said that she had done her research and had been to the Union's website and everyone else should do their own research. She stated that she had a petition and if anybody wanted to see her about it they could. Urban later learned that the employee's name was Erin Kolodziej. After that another employee, who Urban knew to be a cafeteria attendant, stood up and said that she had also done her research and that she wanted to have the Union. Urban denied that any managers present at that meeting said that a petition could be started. She also denied that

Serdar and Wavrek stated that if employees wanted to they could sign the petition that was already circulating and that Erin Kolodziej had such a petition.

Regarding the room service meeting held in the afternoon of December 18, Urban testified consistently with her report of the meeting set forth in her e-mail of December 19 referred to above. She testified that Clontz and Courtney appeared angry when they were debating the Dana notice with Serdar and that Courtney called Serdar a liar. (Tr. 1868-1869).

There is no material dispute regarding what occurred at the culinary/stewarding (kitchen employee) meeting held on December 18. I find that at this meeting Serdar read the substance of the *Dana* notice to employees and indicated to them that such notices would be posted as soon as the Respondent received a version of the notice with a corrected phone number. When Serdar asked if there were any questions regarding the notice, Kolodziej raised her hand and he called on her. Kolodiez stated that she had done research including reviewing the Union's website and she encouraged other employees to also do research. She indicated that she had contacted the NLRB and had a petition to decertify the Union. She indicated that if employees had any questions they could speak to her afterwards. Employee Sharon Baker was also recognized by Serdar and stated that she too had done her research and she supported the Union.[7]

I credit the mutually corroborative testimony of Serdar, Wavrek and Urban regarding the room service meeting held on December 18. The testimony is supported by the detailed notes that Urban prepared the day after the meeting.[8] I find that at the room service meeting held at 2 p.m. on December 18, after Serdar read the substantive part of the *Dana* notice, Courtney and Clontz stood up and Clontz stated that if a 'petition gets signed, you will be decertifying the Union.' Serdar replied that he was only explaining what the notice was and that if a petition was filed, employees would have an opportunity for a secret ballot election. Courtney stated that he was a liar. Serdar replied that he was not sure what he had lied about since he was only telling employees 'what the law says.' Either Courtney or Clontz then stated that if the Employee Freedom of Choice Act passed, the *Dana* notice would be null and void. At that point Hussain both indicated that this was not the forum to have a political discussion. Either Courtney or Clontz then asked when they would have a mandatory meeting to discuss their views. Serdar replied that the Union had been talking to them since March and 'you have already been talking about your views.' Either Courtney or Clontz then said "you and I both know that this could be

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[7] The testimony of General Counsel witness Allen Lane is consistent with my finding regarding what Erin Kolodziej stated at the meeting. His testimony regarding statements by Hussain and Serdar that a petition could be started is, I believe, based on his understanding of the opening statement of Hussain and what Serdar read from the *Dana* notice. The thrust of the *Dana* notice is to inform employees of their right to file a decertification petition. The only discrepancy in Lane's testimony and that of Respondent's witnesses is in regards to issues that are not material as they are not alleged in the complaint. I do not credit the portion of Lane's testimony indicating that Wavrek stated that a petition could be started and Erin already had one. None of Respondent's witnesses, including Wavrek, testified that Wavrek made any statements to the assembled employees during this meeting. I believe Lane's recollection was faulty in this one respect.

[8] Neither Courtney nor Clontz testified about the issues raised in the amended complaint allegation regarding December 18 at the hearing. I note the complaint was amended to include an allegation regarding the December 18 meetings after they had testified. Courtney testified briefly about the meeting generally. To the extent her testimony conflicts with that of the Respondent's witnesses, I do not credit it. The Respondent's witnesses testified in a detailed and generally consistent manner regarding the entire meeting.

arbitrated for years" Serdar and Urban replied that they did not know that. Urban then stated she did not understand what they were saying regarding arbitration. Either Courtney or Clontz then said that she would research it and bring it on Monday. At that point the discussion ceased.

I find that the Respondent did not discriminatorily permit employees opposed to the Union to speak while precluding employees who supported the Union from doing so. At the morning meeting, after Kolodziej indicated she had done done research and was circulating a petition to decertify the Union, Baker indicated she had also done her research and was a supporter of the Union. No one attempted to stop her from expressing her support for the Union. At the room service meeting, Courtney and Clontz were permitted to express their views in opposition to Serdar's reading of the *Dana* notice. When Courtney and Clontz referred to legislation that, in their view would nullify the effect of the *Dana* decision, Hussain indicated that this meeting was not a forum for political discussion. After Hussain's statement, however, Courtney and Clontz continued to express additional opinions about the election process. Neither Hussain nor Serdar attempted to again restrict their speech. The record indicates no discipline was imposed on either employee after this meeting. I find that both prounion employees and employees opposed to the Union had an opportunity to express their views on December 18, 2008. I find that Respondent's attempt to limit the comments of Courtney and Clontz regarding proposed legislation is not discriminatory conduct toward prounion employees that is violative of Section 8 (a)(1) of the Act.

I find the case relied on by the General Counsel to be distinguishable. In *Blue Bird Body Co*., 251 NLRB 1481 (1980) the Board found that the employer violated Section 8(a)(1) of the Act by permitting and encouraging antiunion employees to engage in campaigning when they working, while informing union adherents that they had no right to solicit on working time. In that case, the discrimination against prounion employees was somewhat pervasive and was sustained over a period of time. I similarly find the cases relied upon by the Charging Party to be distinguishable. *Register-Guard* 351 NLRB 1110 (2007); *RAI Research Corp*. 257 NLRB 918 934 (1981) enfd. 688 F. 2d 816 (2d Cir. 1982) and *Caterpillar Inc.* 321 NLRB 1178, 1181 (1996) also involved the clear and sustained application of a discriminatory policy toward union supporters.

B. The January 23, 2009, meeting

On January 23, 2009, the Respondent held a mandatory meeting for unit employees in a ballroom on the fourth floor of the facility.[9] There were approximately 125 employees present. The meeting was a quarterly review meeting normally held by the Respondent. Present for the Respondent were Hussein, Serdar, Wavrek, Urban and Robin Beal Saldana, the Blackstone's comptroller. Courtney Wagner, a nonsupervisory sales associate, was also present. The above-named individuals were facing the assembled group of employees. Speakers used a hand-held microphone to address employees. The meeting began by Hussein advising employees that the

[9] A multitude of witnesses testified about this meeting. Meghan Courtney, Annie Clontz and Deidre Auld, a current employee of the Respondent who testified pursuant to a subpoena, testified on behalf of the General Counsel. Banquet Cook Kimberly Whitlock, Kolodziej, Serdar, Urban and Wavrek testified for the Respondent. Despite the number of witnesses, there are few material variances with respect to the testimony relating to the complaint allegations.

Hotel had moved up in the rankings that Sage Hospitality maintained for its hotels. In this regard he made mention made of guest satisfaction scores, which are guest prepared evaluations. The Comptroller reviewed sales and revenues. A videotape was played demonstrating the highlights of the Hotel's first year of operation. Serdar mentioned that Esquire magazine had named the Mercat one of the top new 15 restaurants of the year. Serdar then asked if employees were aware of the *Dana* notices that were posted. When no one responded, Serdar held up the *Dana* notice. He reminded employees that they had had meetings about this on December 18. According to the uncontroverted testimony of Clontz, Serdar reminded employees of their right as an American citizen to sign a petition and have a secret ballot election. He referred to the Respondent as being in a boxing match with its arms tied behind its back. He said because the Respondent could not tell employees what its opinion on the Union was, it was as if it could not fight.[10] (Tr. 280, 281) Serdar asked if anyone had any questions since some time had gone by since the December meetings regarding the *Dana* notice.

Several employees either raised their hands or stood up. Kolodziej, who was sitting at a table close to where Serdar was standing, was one of the employees who had raised her hand. Serdar motioned for her to come up to the front of the room and he gave her the microphone that he had.[11] He asked standing employees to sit down, saying that he would get to them. Kolodziej took the microphone and faced the assembled employees. Kolodziej stated she did not think that a card check was a fair way of choosing the union. She indicated that everybody should sign the petition in order to have a secret ballot vote. She stated that employees should do research regarding the union because it wasn't everything that union supporters had said. She referred to the notices that had been posted throughout the facility and said that 30 percent of the staff had to sign a petition in order to have a secret ballot election. She indicated that if people were interested they could sign up with her and there would also be other petitions going around for employees to sign.

Serdar then walked over to where one of the employees who had raised her hand, Jeanette Nava, was seated and handed the microphone to her. Nava indicated that she had worked at a union health clinic and employees had not been treated well and she also indicated that she thought the insurance at the Hotel was good.

Serdar next handed the microphone to employee Sharon Baker. Baker indicated that her husband was sick and needed better insurance and that's why she was supporting the Union. Serdar then gave the microphone to employee Dierdre Auld. Auld indicated that she was interested in the Union because it could offer a better health insurance plan than was presently offered.

Serdar finally gave the microphone to employee Annie Clontz. Clontz indicated that she was on the bargaining committee and was passionate about the Union. She indicated that this was an important opportunity to better the workplace. She stated this was not just about you and

[10] I credit Clontz's testimony regarding these statements. Serdar did not specifically deny making such a statement, nor did any of the other Respondent witnesses specifically deny such a statement was made.

[11] I do not credit Kolodziej's testimony that, before Serdar finished speaking, she walked up to him and took the microphone from his hand without first being called on to speak. None of the other witnesses who testified regarding the meeting corroborated her testimony in this respect.

me, when Serdar whispered to her "let's keep it to the *Dana*" and gestured for her to give the microphone back. Clontz returned the microphone. (Tr. 284) Serdar then told the assembled employees that they were not going to have a back and forth between pro and antiunion views. No other employees were invited to speak after this exchange.

I find that Serdar's conduct at the January 23, 2000 meeting did not violate the Act. Both prounion and antiunion employees were given an opportunity to speak. In fact, more prounion employees spoke at this meeting. Serdar's interruption of Clontz is insufficient to establish an unlawful discrimination toward union supporters. As I indicated above, the Board has found clear instances of a discriminatory application of policies differentiating between prounion and antiunion employees to be unlawful. The degree of interference here, the interruption of Clontz's statement, is insufficient to establish a violation of the Act.

For the reasons expressed above, I do not find that the Respondent discriminatorily prohibited prounion employees from speaking at the December 18, 2008, and January 23, 2009, meetings. Accordingly I shall dismiss these allegations of the complaint.

The Alleged Supervisory Assistance in the Circulation of the Decertification Petition

The General Counsel alleges in X(b) of the Complaint that on or about January 27, 2009, Respondent, by Steven Serdar, at Respondent's facility, encouraged and assisted employees in the circulation of a decertification petition.

Former employee Allen Lane testified that he worked at the Respondent as a steward, primarily washing dishes. On January 27, 2009 at approximately 11 a.m. he was working in the second-floor kitchen of the hotel. Cook Geovanny Zhunio was also working in his area. Lane testified that he saw Serdar and an employee who worked as a bartender named Jenny, whose last name Lane did not know, in the kitchen.[12] Serdar and Jenny were speaking to Zhunio. Lane heard Serdar asked Zhunio whether he "wanted to sign up to be part of the voting process to say whether he wanted the union or not" (Tr. 476).

According to Lane, Serdar and Jenny then approached him and Serdar asked him if he wanted to be part of the voting process (Tr. 476). Lane responded that he did. Jenny then handed Lane a clipboard with a sheet of paper on it that had a place for a name and a date. Jenny told him all he had to do was to sign this. Lane testified that he signed and dated the document. At the hearing Lane identified his signature on a document that states at the top of it "The undersigned employees of The Blackstone, a Renaissance Hotel, wish the National Labor Relations Board to hold a secret ballot election for UNITE HERE, Local 1 as the unit employee's (sic) exclusive representative." The other signatures on the document were redacted by Counsel for the General Counsel. (GC Exh. 4) The document that Lane signed was submitted as part of the showing of interest to the Regional Office in support of the decertification petition filed in Case 13-RD-2606.

[12] The record establishes that current employee Jennifer Monce has worked as a bartender in the Mercat restaurant since April 2008. In January 2009, she was the only bartender named Jenny employed at the Mercat. (Tr. 1267)

At the hearing, Monce testified that she vaguely knew Lane, but did not testify regarding soliciting him to sign the RD petition. Serdar denied asking him to sign the petition.

I credit Lane's testimony regarding this incident. There is no doubt that Lane signed the showing of interest for the decertification petition since his signature appears on it. His testimony regarding the manner in which he and Zhunio were solicited was detailed and clear. The straightforward nature of his testimony and his demeanor convinces me that he truthfully and accurately testified regarding this incident. Serdar's demeanor when testifying regarding this incident was not impressive and his denial was not corroborated by Monce. In view of my credibility determination, I find that Serdar solicited Zhunio and Lane to sign the showing of interest for the decertification petition in Case 13-RD-2606. It is clear that a supervisor solicitation of signatures for decertification petition violates Section 8(a)(1) of the Act. *Sociedad Espanola De Auxilio Mutuo y Beneficia de P.R.*, 342 NLRB 458, 459 (2004); *Fritz Companies, Inc.*, 330 NLRB 1296, 1300 (2000). Accordingly, I find that the Respondent, through Serdar, violated Section 8(a)(1) of the Act by soliciting employees Zhunio and Lane to sign the showing of interest for the decertification petition.

Geovani Calle[13] testified, through a Spanish interpreter, that at the end of January 2009, he was at work on the third-floor kitchen with an employee named Viviana, whose last name he did not know. According to Calle, Serdar and a woman who appeared to be carrying a notebook approached Calle. Calle did not know the woman. Serdar asked Calle if he wanted to sign the petition. Calle understood the petition was to "take the union out." Calle replied no. (Tr. 509). As Serdar began to speak to Viviana, Calle recalled that Courtney walked into the kitchen area. Serdar asked her if she needed anything and when she said no, Serdar told her to go back to work. Courtney left the area. Serdar then asked Viviana if she understood the petition and wanted to sign it. According to Calle, Viviana looked afraid and looked at him, Calle responded "no" and Viviana also said "no." (Tr. 510-511) Calle testified that he heard Serdar ask two other employees who were working in the area, whose first names are Junior and Santiago, if they wanted to sign the petition, but both replied no. Calle testified he could hear the conversation but could not observe it because there was a wall between his work area and the other two employees. (Tr. 511-512.) Calle indicated that after speaking to Junior and Santiago, Serdar and the woman with him went to the pastry area of the kitchen, but Calle could not hear or see what they were doing.

Courtney testified that in late January 2009 at around noon she walked into the room service kitchen on the third floor of the hotel and encountered Serdar speaking to Viviana Rangel, a prep cook. Courtney heard Serdar say "are you sure, I really think you should, it doesn't mean anything, it is only for a vote." (Tr. 85). Courtney also observed employees Geovani Calle and Fanny Zhunio in the area where Serdar was speaking. When Serdar saw Courtney he became upset and told her to go back to her work area. Courtney replied that " this is my work area, but it is too late because I already heard you." (Tr. 89) Courtney then left the kitchen area and went into the room service office. A couple of minutes later Courtney again saw Serdar in the room service office. Courtney told him, "Steve, you might as well stop because

[13] At the time of his testimony on October 7, 2009, Calle had been permanently laid off by the Respondent on June 15, 2009. At some point after his testimony, Calle was reemployed by the Respondent.

wherever you go in the hotel, somebody's going to hear you." Serdar replied to Courtney that maybe she should worry about her job and maybe she would be okay (Tr. 90).[14]

Monce testified that on January 27 or 28, 2009, before the start of her shift, she was in the 3rd floor kitchen getting fruit and juice to mix with drinks. She wanted to find out if employees in the kitchen with interest and signing a decertification petition that she had with her. Monce testified that she was speaking to an employee whose first name is Viviana about her petition, but that Viviana did not seem to understand English very well. When Monce saw Serdar come into the kitchen area, she asked him if he would explain what was on the *Dana* notice to Viviana. Serdar replied that he would be happy to do so. Monce testified that Serdar told Viviana that the posters you have seen throughout the Hotel say "there is a union coming in, or there is a vote. If a certain number of people wanted to sign up for this, it's not asking you to pick either way how you feel about something. It just means that you have a choice to vote one way or the other how you feel about something." (Tr. 1246)

Monce testified that while she and Serdar were speaking to Viviana, another employee named Geovani was present. Monce did not know his last name. After Serdar finished speaking, Geovani came over to Viviana and told her not to listen. A few seconds later Courtney came into the kitchen and told Serdar that she knew what he was doing, and she would get him fired because what he was doing was illegal. Serdar asked her if she had any business in the area. When Courtney repeated her admonitions, Serdar said that if there is no reason to be here, I suggest you go back to your work area. Courtney then left.

Monce denied that she was carrying a yellow legal pad at the time. She denied that she asked any employees to sign anything in Serdar's presence on this occasion. She also denied that Serdar asked any employees to sign anything. Monce admitted that Serdar does not speak Spanish.

Serdar testified that on January 27, 2009 as he walked into the third floor kitchen he observed Monce speaking to an employee. Monce gestured for Serdar to come over. Monce told Serdar that she needed some help in explaining the *Dana* notice and asked if he could describe it. According to Serdar, he asked Viviana Rangel if she knew what the *Dana* notice was. At that moment, Courtney came into the kitchen area and stated that she had heard him talking, that he could not do that, it was against the law and she was going to get him fired. Serdar asked Courtney if she had any reason to be in that area. When she replied that she did not, Serdar told her that if she didn't have a reason to be there, to go back to her work area. Courtney then left. While Serdar was speaking to Courtney, Geovani Calle came over and grabbed Viviana by her arm and they walked away. At the hearing, Serdar specifically denied that he asked Viviana Rangel or Geovani Calle if they would sign a petition. He also specifically denied that he asked Junior and Santiago to sign a petition.

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[14] The time and date of this incident is established by Courtney's testimony that she spoke to Wavrek and Urban about Serdar's conduct at approximately 1 p.m., shortly after the incident occurred (Tr. 90-91).Wavrek and Urban confirmed that Courtney spoke to them about this in the afternoon on January 27, 2009 (Tr. 1780-1781, 2047).

I credit the testimony of Calle and Courtney regarding this incident. Calle testified consistently on both direct and cross-examination. His demeanor reflected an earnest effort to accurately convey the events. I do not agree with Respondent's argument in its brief that Calle should not be credited because he testified with the aid of a translator at the hearing about statements made to him in English by Serdar. As the summary of Calle's testimony noted above indicates, statements Serdar made were simple and direct and I have no doubt that Calle understood the language used. Courtney's testimony corroborates Calle's in critical respects. Her demeanor while testifying reflected confidence in her recollection. In addition, the fact that she immediately complained to Wavrek and Urban about Serdar's conduct further enhances her credibility. I doubt she would make such an accusation without a factual basis for it.

I find the testimony of Monce and Serdar to be implausible regarding the circumstances of Monce's solicitation of Rangel. According to their version of this incident, Monce was attempting to explain the *Dana* notice to Rangel when she asked Serdar, a non-Spanish-speaking supervisor, to assist her. Since Monce was soliciting employees to sign a decertification petition, she clearly had an understanding of the process set forth in the *Dana* notice. In addition, Lane's credited testimony, that Serdar and Monce were soliciting employees to sign the showing of interest for the decertification petition earlier that morning in the second-floor kitchen further detracts from the credibility of Serdar and Monce. Another reason for my disbelief of Serdar's testimony is that the record establishes that the Respondent's approach to the decertification petition was "extremely proactive." This is established by Urban's December 19, 2008 e-mail to various Respondent managers, including Serdar, regarding the December 18, 2008, meetings the Respondent held regarding the posting of the Dana notice. In the e-mail Urban wrote "In my opinion, the Blackstone will get the signatures they need for a secret ballot election. It is imperative that we be extremely proactive." (GC Exh. 31, p. 2) I find that Serdar's actions on January 27, 2009, were in furtherance of that admonition.

Based on the credited testimony, I find that on January 27, 2009 Serdar solicited employees to sign the showing of interest for the decertification petition. By this conduct the Respondent violated Section 8(a)(1) of the Act.

The Alleged Implied Threat to Discharge Employees on January 28, 2009

The complaint alleges in paragraph X(d) that on or about January 28, 2009, Respondent, by Mike Devries, at the Respondent's facility, impliedly threatened its employees with discharge due to their union activities.

Courtney testified that in late January, 2009, she had a conversation with Devries in the cafeteria. Devries approached Courtney and said that he did not think that "you guys understand what you're doing". DeVries said "you need to understand this is a business." DeVries indicated that he did not care, because "my guys have a contract when they walk in the door." Courtney replied that if he did not care, then why were they discussing it? Devries indicated he did not think that "you should risk your job over something that might not ever happen". (Tr. 93).

Devries testified that he was the director of engineering at the Blackstone. He supervises eight employees who are covered under a contract between the Respondent and the IUOE, Local 399. According to Devries, in late January 2009 he got into an elevator with Courtney, a

cafeteria attendant named Sharon and a cook from the Mercat, whose name Devries did not know. From the way they were dressed, DeVries assumed the three employees were not working. When they pressed the elevator button for the fourth floor, Devries asked them why they were going there. Sharon said that they were going to get the cook's name off the list. Devries assumed they were going to see Erin Kolodziej, who worked on the fourth floor, because there had been "talk" of her having a petition involving a vote on the union (Tr. 1634-1635). Devries asked the employees if they were working and they replied that they were not. Devries told them that employees were not allowed in work areas when they were not on the clock. The employees responded by saying they would then just go back downstairs.

Approximately a half hour later Devries saw Courtney in the cafeteria. Devries testified he had a friendly working relationship with Courtney. Devries testified that he spoke to Courtney about the risk she was taking by attempting to do things the wrong way by breaking the rules. DeVries told her "She was risking her privilege to possibly get a union contract in this hotel, and that she was going to break the rules of the Hotel, she was going to probably lose her job, and that if she loses her job she loses the fight for the union to get into this hotel" (Tr. 1636) At one point in the conversation, Devries recalled Courtney asking him why he cared so much. Devries concluded their conversation by stating "We have a business to run in this hotel. And whether or not the union was trying to get in here or not, we still have to run this business, you still have to operate this hotel as an employee of the hotel, and you have to live under its rules." (Tr. 1637). He specifically denied saying that he did not think Courtney should risk her job over something that might not happen.

To the extent there is a conflict in the testimony of Courtney and Devries, I credit Devries. His testimony is far more detailed and his demeanor while testifying exhibited a clear recollection of the event. Based on Devries' credited testimony, I find that in the context of his prior discussion with Courtney in the elevator, Devries was informing Courtney that she could be subject to discipline for entering work areas while not on duty and speaking to employees during working time. I do not find, under the circumstances, that Devries' statement to Courtney in the cafeteria impliedly threatened to discharge employees for engaging in union activities and I therefore dismiss that allegation of the complaint. See *U-Haul Company of California,* 347 NLRB 375, 379 (2006); *Naomi Knitting Plant*, 328 NLRB 1279, 1290 (1999).

The Alleged Violations of Section 8(a)(5) and (1) of the Act Regarding: Unilateral Implementation of Health Insurance Plans; Direct Dealing with Employees Regarding Payment of Health Insurance Premiums and Delay in Furnishing Information.

Facts

The Implementation of Health Insurance Plans

At the time of the Union's voluntary recognition in December 2008, the Respondent offered health insurance to its employees through the Aetna Insurance Co. There were 3 plans. One provided 100 percent coverage with no deductible; the second was a 90/10 plan that would pay 90 percent of covered expenses and the third was an 80/20 plan that would pay 80 percent of covered expenses. (GC Exhibit 16) (CP Exhibit 27)

Julie Bengston testified that she has been the vice president of people resources for Respondent Sage since 2005. Prior to that, she had worked in various human resources positions with Respondent Sage. Bengston is responsible for administering benefits for all of the 54 hotels that Respondent Sage owns or operates in the United States. Bengston is part of a committee that determines benefit decisions for Respondent Sage. Presently, in addition to Bengston, this committee includes Karsten Riggs, senior vice president of people resources; Courtney Fisher, the senior vice president of financial services; and president and CEO, Walter Eisenberg. The committee also has a representative from Respondent Sage's insurance broker.

Bengston testified that since 2004 the plan year for Respondent Sage runs from April 1 through March 31. The committee begins to review the new premium rates submitted by its health insurance carrier in late December or early January. Respondent Sage's primary health insurance carrier is Aetna. Aetna insures the employees at 52 of the hotels that Respondent Sage operates. The only exceptions are the Renaissance Hotel in Providence, Rhode Island and the Renaissance Hotel in Pittsburgh, Pennsylvania.[15] These two hotels, however, have the same plan year. The committee's discussions revolve around the premiums and the number and type of plans that Respondent Sage will offer in the upcoming year.

Respondent Sage has offered the following plans to employees since at least the time of the Blackstone opened in Spring 2008: medical; dental; vision; accidental death and dismemberment; life insurance; flexible spending plans and short-term disability insurance. The accidental death and life insurance plans are paid for by Respondent Sage. The dental plan is wholly paid by the employee. The other insurance plan are partially paid by Respondent Sage and partially paid by the employee.

After the committee decides the number and type of insurance plans it will offer and the amount of the premium it will pay, it determines the dates for open enrollment, during which employees decide which health plan, if any, they wish to participate in. Respondent Sage notifies the individual hotels of those dates by an e-mail directed to the human resources director. Respondent Sage creates a power point presentation that includes a summary of the plans offered and can be printed out and given to employees. Respondent Sage also prepares a sample flyer that individual hotels can use to communicate to employees the dates of open enrollment period. According to Bengston, Respondent Sage's strategy is to provide consistent benefits nationwide. She also indicated that Respondent Sage gets a discount because of the large number of participants.

Specifically with respect to the plan year beginning April 1, 2009, Bengston testified that in early February 2009 the benefits committee decided to make changes to the existing health care plans. (Tr. 1707) The number of plans was reduced from three to two. The two plans offered were an 80/20 and a 70/30 plan. Bengston testified that the benefits committee also decided the

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[15] Blue Cross has been the health insurance provider for the Renaissance Hotel in Providence Rhode Island since it opened approximately 4 years ago. Employees at that Hotel unrepresented. Bengston testified that the Renaissance Hotel in Pittsburgh Pennsylvania initially was covered by Aetna, but that changed approximately 3 years ago. At that time UPMC became the health insurance provider. At present certain employees of that hotel are represented by a labor union. According to Bengston, Aetna did not have a sufficient network to meet the needs of employees in Providence or Pittsburgh.

percentage of the premium that Sage would pay and the percentage the employee would pay. Bengston testified that the open enrollment period for all of Respondent Sage's hotels, including the Blackstone, began on February 23, 2009 and continued until approximately March 11, 2009. The first e-mail from Respondent Sage to the individual hotels announcing the dates for the open enrollment process were sent on February 5 or February 6. A more lengthy e-mail was sent a week later regarding the open enrollment process.

Wavrek testified that by mid-February 2009 she received approximately four e-mails from Bengston, including the power point presentation, notifying her of the health plans that Respondent Sage was offering for the 2009-2010 plan year (Tr. 2015, 2016). The power point presentation that Wavrek received from Respondent Sage is entitled "Sage Hospitality Resources 2009 Associates Benefits Program." (CP Exh. 27.) At the Blackstone, the power point presentation was not shown to employees on a screen but rather was printed in booklet form. Wavrek and her assistant Elsa Osequera used these booklets to review the new health plans with employees if they had questions. Wavrek testified that only if employees asked for a copy of the booklet, would it be given to them (Tr. 1031, 1032). The booklet contains detailed information regarding the plans for the upcoming year. It indicated that Respondent Sage would offer two medical plans instead of three; the percentage of premiums that Respondent Sage would pay for each plan; a 2009-10 plan design summary; and the cost to the employee for each plan per pay period. Wavrek testified that other booklets, prepared by Aetna for the medical and dental plans for the upcoming plan year, were given to all employees.

Wavrek testified that she announced to all employees on February 17 or 18, 2009, that the benefits enrollment open house would be held on February 27, 2009. Wavrek followed this up with a February 25 e-mail to all of the Blackstone's managers announcing the annual enrollment open house would be held on February 27, 2009 (R. Exh. 17). Managers were directed to post the e-mail so that all employees would be notified. The e-mail stated:

> Annual Enrollment is upon us! This is when all full-time associates may add, cancel or make any changes to their benefits. Effective date of all changes is 4/1/09. This year, every full-time associate must complete an enrollment form- even if they are choosing to waive benefits.
>
> On this Friday, February 27, the Human Resources Department (a.k.a. Elsa and Sharon) will host an open house from 1:00 p.m.- 4p.m. Please join us in the Chicago/Alton room located on the concourse level. We will have all the information and materials needed to assist you in making the right choice regarding your benefit plan.
>
> If you are not available this Friday, please stop by the HR office for your packet of information. Else and I will be able to answer any questions that you have. We must have everyone's enrollment form no later than March 11.

On March 5 and March 10, Osequera sent e-mails to all individuals at the Blackstone with an e-mail address reminding them that all full-time associates had to submit a benefit enrollment form by March 11, 2009 (GC Exh. 32). The record contains several examples of benefit enrollment forms that were executed during the open enrollment period. (GC Exhs.33-41). On April 1, 2009, the new insurance plans went into effect.

The record contains an exhibit entitled "Sage Hospitality Resources, Plan Designs and Premiums: 4/1/09 Effective Date" (GC Exh. 42). It is a summary plan description listing the three plans from the 2008-2009 plan year and the two plans for the 2009-2010 plan year. Wavsrek testified it prepared by Respondent Sage's corporate office. She had not seen the document until November 3, 2009, the day before she testified on this issue when it was shown to her by Respondent's counsel (Tr. 919-920). The record does not indicate when this document was prepared. There is no evidence this document was ever submitted to the Union.

The Payment of Health Insurance Premiums

In February 2009, the Respondent changed its payroll system at the Blackstone. When this occurred, it was discovered that some unit employees had not had sufficient money in their biweekly checks to pay for the full deduction of their portion of the health insurance premiums and thus those deductions had not been made. Apparently, for some employees, taking this deduction would have put their actual earnings below the minimum wage level. The record establishes that the Respondent made such deductions only from hourly earnings and not from tip income. Accordingly, a substantial number of unit employees were in arrears regarding payment for their health insurance premiums.[16]

When the situation was discovered, Wavrek discussed the matter with the Blackstone's comptroller and the corporate office of Respondent Sage. A memo was devised to notify employees of their delinquency along, with an accompanying form which would authorize "catch up" deductions for health insurance premium. To that end, on February 26, 2009, Serdar issued a memo to all unit employees who had an outstanding balance regarding their contributions for their health insurance entitled "Catch up Payment of Health Insurance Premiums" (GC Exhs. 43-49). This memo indicated:

> As you know, when you elect to purchase health insurance, you are responsible to pay your portion of the premium for those health insurance benefits. In most cases, health premiums are deducted from associates' paychecks. There are some circumstances that may result in nonpayment of premiums through payroll, including missing paychecks for non-paid time off, or having a paycheck that does not reflect enough earnings to allow for health insurance deduction to be taken. You are responsible for checking your paycheck stub to ensure that premiums are deducted and that you do not fall into arrears on your premiums.
>
> You are receiving this notice because you have a remaining balance to be paid for your health insurance premiums from October 2008 through to present. You may pay your back- premiums via payroll deduction or personal check/money order. Please make arrangements with your HR or accounting office immediately to bring your account current.

[16] GC Exh. 61 establishes that approximately 32 employees in the Mercat restaurant were delinquent in their payments.

> The total balance to be paid is:
>
> **This balance must be paid in its entirety by March 31, 2009 or your insurance will be canceled retroactively to January 31, 2009. In addition, you will not be allowed re-entry into the Sage health plans during this year's open enrollment period. The next time you will be eligible to join a plan is the next year's open enrollment period or at the occurrence of a qualified, life changing event (as defined by the IRS).** (Bold in the original)

The form that accompanied the letter was entitled "Health Insurance Premium Catch-U Deduction Authorization ". The form contained a signature and date line and stated:

> In order to pay my outstanding balance of $_____ for my health insurance premiums, I agree to have additional deductions taken from the next_____ paychecks in the amount of $_____.
>
> These additional amounts would be taken from the paychecks has stated unless the deductions bring the wages paid per hour below the minimum wage.

The record establishes that either Serdar or other supervisors met with employees and handed them the memo and authorization form. Serdar testified that he explained to the employees he met with the repayment options. In March and early April a number of employees executed the deduction authorizations. Some employees agreed to have additional deductions taken out of their checks and others agreed to write checks or money orders to pay the balance (GC Exhibits 27, 50-60). It is undisputed that the Union was not given notice of this issue and an opportunity to bargain about it. It is also undisputed that union representatives were not present when supervisors presented employees with the notice of delinquent payment and discussed repayment options.

Serdar testified without contradiction that no employees had their insurance coverage canceled because of a failure to pay past due premiums and that there was approximately $10,000 in insurance premiums owed by employees.

The Bargaining Meetings and the Requests for Information

While the Respondent was going through the process of implementing new insurance plans for 2009, the parties were preparing for their first collective-bargaining meeting. According to Pionek, on approximately January 19, 2009, the Respondent furnished some of the information to the Union that it had requested in its December 10, 2008 information request noted above. (Tr. 782) The information provided to the Union included employee names, department, departmental classification, hire date, the date the employee began, their present job description, their rate of pay, and whether there were deductions for dependent health care. The last column was entitled "List A, B, or C". Under this heading next to individual employee names were listed "none, self, Spouse, Children and Domestic Partner." (GC Exh. 13). The information submitted by the Respondent did not include a summary plan description for each insurance plan the Respondent offered and the cost for the employee and the employer. This

information was requested in numbered paragraph 4 of the Union's December 10, 2008, information request.

On January 26, 2009 the parties had their first collective-bargaining meeting. Present for the Respondent were Buchsbaum, Hussein, Serdar, Wavrek, and Urban. Present for the Union were president Henry Tamarin; Gia Pionek, the Union's legal analyst; and representatives Jo Marie Agriesti, Angel Castillo, and Marie Levendis. Also present were employees Megan Roche, Meghan Courtney, Annie Clontz, Sam Canty, Zhimin Yi, Derrick White, Sharon Baker and Kara Royal. At the first meeting that Union presented the Respondent with its initial contract proposal and Tamarin reviewed the proposal with the Respondent. The Union's proposal sought to have the Respondent participate in the Union's Health and Welfare Trust in order to provide health insurance to employees. (R. Exh.13, p. 30-32)

At the hearing Tamarin testified that the Union's opening proposal was not identical to the existing citywide contract in terms of rights and economics, in that it was of a "higher standard in terms of language and economics" (Tr. 712-713) Courtney recalled Tamarin stating that the Union's proposal was different than the citywide contract and could be construed as tougher. (Tr. 182) Clontz indicated that Tamarin said that the initial proposal was in response to how the Respondent was treating its employees. (Tr. 314) During the review of the proposals, Buchsbaum indicated that the Respondent had no intention of participating in the Union's health care fund and pension fund. Tamarin replied by stating in effect that he did not know who Sage thought they were by coming to Chicago and opening a hotel and not agreeing to the citywide contract.[17] The parties agreed to meet again on February 24.

The parties met again on February 24, 2009. Present were the same union representatives as had attended the first meeting. Courtney, Clontz and some other employees were also present. Present for the employer were Buchsbaum, Wavrek, Urban, Serdar and the Blackstone's acting general manager, Bradley Robinette. At this meeting the Respondent presented its initial contract proposal. (R. Exhibit 14) With respect to employee insurance, the Respondent's proposal provided in Article 28-Insurance Benefits, as follows, in relevant part:

> The Employer will provide health and welfare benefits, for regular full-time employees on the basis it currently provides, with any increases in premiums being divided as presently done. For individual coverage the Employer will pay eighty percent (80%) of the premium and the individual employee paying twenty percent (20%) of the premium during the employee's first five years of service. Two years after the effective date of this Agreement, the Employer will pay the full premium for individual coverage upon an employee attaining four (4) years of service.
>
> For dependent coverage (e.g. Employee plus spouse, employee plus dependent children, or for family coverage), the Employer shall pay eighty percent (80%), with the employee paying per cent (20%) of the premium. For employees whose seniority entitles them to individual coverage at no cost, the cost of such

[17] Serdar, Wavrek and Urban testified that Tamarin made such a statement. Tamarin did not deny making such a statement when called on rebuttal. Accordingly, I credit the Respondent's witnesses on this point.

> individual coverage, shall not be included in the 20% of the premium for dependent coverage if they choose to offer such coverage. Employee payments for health insurance will be deducted from their paychecks on a pre--tax basis. The Employer Shall have the right to change the insurance carrier, from time to time, with written advance notice to the Union, provide the benefit schedule with any new carrier is substantially similar.

According to the credited testimony of Tamarin and Pionek, both of them raised the issue of the Union's information request at this meeting. They indicated that they could not tell what the information meant under the heading "A, B and C" in the material that the Respondent had submitted. Buchsbaum indicated that he would find out what that meant. Tamarin also indicated that the Union had not received other information that it asked for in its December 10 request. Tamarin specifically indicated that the Union had not received a summary plan description, the cost to the employee and to the employer, and the level of coverage provided. Buchsbaum replied that he would follow up on these matters. (Tr. 625-626.) Pionek's testimony corroborates that Tamarin again requested such information (Tr. 76). Both Tamarin and Pionek denied that at this meeting Buchsbaum stated that the Respondent's health insurance plan would terminate on March 31, 2009 and a new plan would go into effect on April 1, 2009. (Tr. 627-628; 787-789) Courtney also did not recall Buchsbaum making such a statement. (Tr. 186) Clontz testified on direct examination that Buchsbaum did not announce at the February 24, 2009, that the Respondent was going to change the health insurance policy (Tr. 290). She indicated that she learned of the change in health insurance in early March when she was given a packet with new insurance information by her supervisor. On cross-examination, she reiterated that there was no discussion of the health insurance plan changing at that meeting. She testified that she only recalled Buchsbaum saying that the current plan went through March 31. (Tr. 320)

At this meeting Tamarin asked Buchsbaum whether the employer had seasonal layoffs. Buchsbaum replied that he did not think so but he would get back to him. Tamarin testified that he stated that the Union did not like to "share the poverty". He explained this by saying that is an expression that he has used to describe a system that the Union did not favor. He explained that in such a system an employer, rather than laying off a junior person and maximizing the hours of a senior person, reduces hours for all employees regardless of seniority. Tamarin indicated that in the Union's view "nobody can make a living" under this system (Tr. 2252).

Bradley Robinette testified that he has been the senior vice president of operations for Respondent Sage since July, 2008. From February 4, 2009, to March 5, 2009, he served as the acting general manager of the Blackstone. He was present at the negotiation session held on February 24, 2009. Robinette testified that at this meeting Buchsbaum told Tamarin that the Respondent did not wish to participate in the Union's health and welfare and pension plan but rather wished to have its own plan. Buchsbaum indicated that Sage had recently reached an agreement in Pittsburgh with another local of Unite/Here, which included Sage's health plan. According to Robinette, Buchsbaum said that the Respondent's regular cycle of annual renewal on health benefits would take place on March 31. Buchsbaum indicated that the plans and the rates employees pay could possibly change at that time. Robinette indicated that Tamarin did not specifically respond to this statement.

Serdar testified that at this meeting Buchsbaum indicated that it was Sage's policy to review and renew its insurance program, and that it would be doing that in March. According to

Serdar, Tamarin replied that he was not interested in the Respondent's insurance program as the Union had its own.

Urban testified that at the February 24, 2009, meeting the parties discussed the Respondent's proposal. Urban testified that the Respondent informed the Union that the Blackstone's health care plan would be up for renewal in March and there would be some changes to the health care plan. According to Urban, Tamarin responded "I don't care about your health care, we want our health care and that's what we'll get" (Tr. 1788) Urban specifically denied that Tamarin asked for a copy of summary plan descriptions at the meeting. (Tr. 1790)

Wavrek also testified that the parties reviewed the Respondent's proposal at the meeting. She testified that Buchsbaum told the Union that "there were changes coming up, that we were in our open enrollment." (Tr. 2051) Wavrek indicated that near the end of the meeting she asked whether the Respondent should provide the current benefit information that was effective through March 31, 2009, or whether the Union wanted information regarding the plan beginning April 1, 2009. According to Wavrek, Buchsbaum also stated that there was a difference in the programs and asked the Union which information it requested, because it would be different. According to Wavrek, no one from the Union responded to the statements. (Tr. 1902-1903.)

Tamarin and Pionek were called as rebuttal witnesses by the General Counsel. Both denied that Buchsbaum informed the Union at the February 24 meeting that the Respondent was in an open enrollment period for health insurance. They also both denied that Wavrek asked the Union whether its request for health insurance information was for the current plans that were in effect or for the plans that were going into effect on April 1. (Tr. 2250-2251; Tr. 2268-2269) Angel Castillo, an organizer for the Unite Here International Union was also called as a rebuttal witness by the General Counsel. He testified that he attended all of the bargaining sessions. Specifically with respect to the February 24 meeting, he testified that Buchsbaum did not notify the Union that it was Respondent Sage's policy to review its health insurance program each spring. He further testified that Buchsbaum did not notify the Union that the health insurance plans were expiring on March 31, 2009 or that the level of coverage would be changing on April 1. He further denied that Wavrek asked the Union whether its request for health insurance information was for the current plan or the plans that were going into effect on April 1. (Tr. 287-2289.)

To the extent there is conflicting testimony between the General Counsel's witnesses and the Respondent's witnesses regarding notification of the upcoming health care plan changes at the February 24, 2009 meeting, I credit the testimony of the General Counsel's witnesses. In the first instance, I note that Tamarin, Pionek, Courtney and Castillo testified consistently on both direct and cross-examination that Buchsbaum did not state at that meeting that the Respondent's health care plan would terminate on March 31 and a new plan would go into effect on April 1, 2009. Clontz testified on direct and cross-examination that Buchsbaum did not state that there would be any changes to the health insurance plan. On cross-examination she recalled that Buchsbaum said only that the current plan went through March 31. I do not find that testimony to be particularly significant, since it does not reflect that there was notification regarding an upcoming change. However, based on the record as a whole, I do not credit the testimony of Clontz on this point.

I find it implausible that if Buchsbaum had told the Union representatives that the health insurance plans would change on April 1, that the Union representatives would have remained mute, as the Respondent's witnesses claimed. The Union had requested health insurance information on December 10, 2008 and had not yet received any of the information it sought, except for the incomplete response of January 19, 2009. If they had been told of upcoming changes in health insurance, I do not believe they would have remained silent in the face of such information. I also note that Buchsbaum's March 20, 2009, letter supports the testimony of the General Counsel's witnesses regarding the February 24, 2009, meeting. In this letter Buchsbaum states in part:

> The Hotel's first year of operation under the health care plan in place, will, of course, expire on March 31, 2009 and the insurance carrier, Aetna, has provided new and higher rates for participation than in the past.

There is no mention made in his letter of having previously informed the Union of changes to the insurance plans at the February 24 meeting. It strikes me that if such notice had been given, Buchsbaum would have referred to it in his letter. In this connection, in his letter he specifically responded to questions that had arisen in other areas at that meeting.

The Respondent's witnesses testified obliquely that some kind of notice of a change in insurance was given at this meeting, although there are variances in the testimony. Robinette claimed that Buchsbaum said the Respondent's regular cycle of annual renewal on health benefits would take place on March 31 and that the plans and the rates employees pay could possibly change at that time (Tr. 1645). Serdar testified only that Buchsbaum indicated it was Sage's policy to review and renew the insurance program and that it would be doing so in March. Urban testified that Buchsbaum stated the Blackstone's health care plan was up for renewal in March. Wavrek testified that Buchsbaum stated that "there were changes coming up, that we were in our open enrollment"" (Tr. 2051) I note that Wavrek's testimony that she asked the Union whether it was requesting information about the old health care plan or the new plan, was not corroborated by any of the Respondent's witnesses. I find the testimony of the Respondent's witnesses to be equivocal and without the certainty that is necessary to resolve the disputed testimony in their favor. Their demeanor also reflected the equivocal nature of their testimony on this point

Based on the credited testimony, I find that at the February 24, 2009 meeting the Union was not given notice of the changes in its health care insurance that the Respondent had already planned to make and was in the process of implementing, I also find that Tamarin reiterated his request for the information regarding health insurance that was contained in his December 10, 2008, letter and that Buchsbaum stated that he would follow up in providing this information.

On March 16, 2009, Pionek sent the following letter to Buchsbaum by fax (GC Exh. 14):

> In reviewing the information that we received from you, we do not find a description of the health insurance plan. We did receive a spread sheet indicating "deductions for dependent health care", and "List A, B, or C"; however, there is no explanation of what either column means. Please send the following
>
> A description of A, B, and C

> The overall cost of each plan to the employer and employee
> A description of the health care coverage for each category
>
> Please contact Henry Tamarin if you have any questions.

Buchsbaum replied to Tamarin by a letter dated March 20, 2009, that was sent by e-mail on the same date (GC Exh. 15). Buchsbaum indicated that the purpose of the letter was to respond to a number of questions and requests for information made by Tamarin during the last collective-bargaining session on February 24, 2009 and Pionek's letter of March 16, 2009. In his letter, Buchsbaum responded regarding subcontracting; employment applications; banquet department scheduling, vacations and pregnancy under the FMLA. The letter also responded to inquiries regarding layoffs and seniority as follows;

> 4. Layoffs. You asked whether there were any individual associates on a temporary layoff. There are no individuals on a temporary layoff and because of the relatively short length of the Hotel's being in actual operations, there is no real meaningful past practice in this area. Although the Hotel has not used layoff situations, there have been reductions in force where personnel are actually separated, and that has been done in the culinary area.
>
> 5. Seniority in its role in scheduling associates. As noted above, during slow business times the department managers attempt to schedule Associates so they have a rough equivalence in the numbers, hours and shifts. Since The Blackstone has been in operation from his levy more than a year, relative seniority is very slight at this juncture. The exception to this is in the Bank would Department, as discussed above where there is a weekly rotation based on effect of alphabetical last name.

Buchsbaum's letter also indicated:

> I think that the above responds to the questions you posed during the February 24, 2009, bargaining session. With respect to the questions contained in Ms. Pionek's letter to me of March 16, 2009, I asked for more explicit description of what you are seeking under A, B, and C, in an e-mail to Ms. Pionek.[18] We are giving you overall costs to each option to the Employer and the associate. The description of the health care coverage for each category is rather bulky, and I

[18] On March 20, 2009, Buchsbaum's administrative assistant sent an e-mail to Pionek that stated "In your letter of March 16, 2009 to Mr. Buchsbaum, your first bullet point mentions 'A description of A, B, and C." I am at a loss as to what that entails. Can you provide me with more information? We have all other information ready, but are trying to decipher what ' A, B, and C' stands for. Any help you can provide will be most appreciated. Thank you." The Union did not respond to this e-mail. On March 23, 2009, Buchsbaum's administrative assistant sent another e-mail to Pionek. This e-mail indicates "We e-mailed an updated spreadsheet to Mr. Tamarin on Friday, March 20th. On that spreadsheet, the title on the column marked 'List A, B, or C,' was changed to 'Who is covered by plan.' We are hoping that takes care of what you were looking for in that respect. Does that answer your first question? I believe Mr. Buchsbaum wrote to Mr. Tamarin explaining the remainder of your questions, but the first question was a little unclear to all of us. Please advise if that is what you were looking for in question 1." The Union did not respond to this e-mail.

> will either send a benefit enrollment kit to you under separate cover, or, if you can wait until we are together on the 7th in Chicago, I will hand it to you at that time.

The Hotel's first year of operation under the health care plan in place, will, of course, expire on March 31, 2009 and the insurance carrier, Aetna, has provided new and higher rates for participation than in the past.

Attached to Buchsbaum's e-mail was a summary plan description for Respondent's new 80 percent plan and 70 percent plan provided by Aetna, effective April 1, 2009. Also attached was a list of unit employees that reflected whether the employee had deductions for dependent health care and who is covered by a plan (i.e. self, spouse children and none). There was, however, no information regarding costs to the employee or the Respondent in this attachment.

On March 24, 2009 Buchsbaum sent two e-mails to Tamarin. Attached to the first e-mail (GC Exh. 16) was a benefits enrollment form for the three health insurance plans that Respondent Sage offered for plan year 2008-2009 and a summary plan description for the 100 percent, 90 percent and 80 percent plans that Respondent Sage provided through Aetna for the 2008-2009 plan year. The attachment also included a one page summary of the three health insurance plans that indicate the cost to the employee of each plan per paycheck for the following enrollment options: associate; associate/child(ren); associate/spouse and family. The attachment also included a summary plan description of the Respondents dental plan provided through Aetna with information regarding their associate cost per paycheck. Finally, a benefits summary for all of the benefits provided by Sage was included. The second e-mail (GC Exh. 17) included an attachment that contained more information regarding Sage benefit plans. This attachment included information regarding flexible spending plans, life insurance and the employee assistance plan. There was no information submitted regarding the Respondent's costs for medical health insurance premiums.

On April 7, 2009, the parties had another collective-bargaining meeting. The only evidence in the record regarding this meeting is testimony from Tamarin on cross-examination indicating that at this meeting the Union did not ask to stay the already effectuated change in its health insurance plans or stay the new rates that had gone into effect (Tr. 695).

On April 15, 2009, Buchsbaum sent a letter to Tamarin by e-mail with an attachment (GC Exh. 18). The letter states in relevant part:

> In response to your request concerning health care coverage among the bargaining unit personnel the Hotel has prepared the attached, which, hopefully, will be responsive to your inquiries. From what I sent to you last month, if you make a comparison with these numbers, you should see the differences in the cost of the health care.

The attachment is a list of unit employees indicating for the 2009-2010 plan year, which plan type they are participating in, a description of the plan and the employee coverage rate, which reflects the cost to the employee. While the attachment reflects a column for Employer coverage there is no information contained in that column.

According to the uncontroverted testimony of Tamarin and Pionek, at the collective-bargaining meeting held on April 22, 2009, Pionek asked for a complete version of the list of unit employees that had been submitted to the Union, as the information on the right hand side under employer coverage appeared to be cut off. Buchsbaum stated that the Union must have retrieved the information from its computer incorrectly. Pionek checked and determined that the information had printed out correctly. At the meeting held on April 23, 2009, Tamarin informed Buchsbaum that there had been no error in printing the document, rather the document was incomplete. Buchsbaum said he would follow-up. Buchsbaum did not provide the corrected information indicating the cost to the Respondent for each employee who had insurance for the 2009-2010 plan year implemented on April 1, 2009, until July 21, 2009. (GC Exh. 19) The Respondent never did provide information indicating the cost to the Respondent for each employee who had insurance for the 2008-2009 plan year.

On April 22, 2009, Tamarin received a report from an employee that employees were beginning to get statements regarding money owed by them for health insurance premiums. This was the first notification Tamarin had received of this issue. At the meeting held on April 22, Tamarin asked the Respondent's representatives what would happen if an employee did not have enough money in a paycheck to pay the co-pay for insurance premiums. Serdar responded that if there was not enough money in the paycheck to make the contribution the employee would get a statement and benefits would be cut off if the employee did not continue to make the appropriate payments.

Analysis

The Delay in Furnishing and the Failure to Provide Information

The General Counsel and the Charging Party contend that the Respondent unreasonably delayed in providing requested information regarding: a list of employees health insurance selection and level of coverage (i.e. Single, plus one, family); a summary plan description for each plan offered and the costs for the employee and the employer, if any. Both parties also contend that the Respondent never did provide the Respondent's costs for the 2008-2009 health care plans.[19] The Respondent contends that the delay in furnishing information did not violate the Act because the Union did not have any interest in the Respondent's health insurance plan.The Respondent also contends that any delay was inadvertent. For the reasons expressed below, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably

[19] While the complaint only alleges a delay in furnishing information, the failure of the Respondent provide, at all, its costs for the 2008-2009 health care plans is obviously closely related to the allegation that it unreasonably delayed in providing necessary and relevant information. The Board has long held that it may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Hi-Tech Cable Corp*., 318 NLRB 280, 280 (1995), enfd. in part 128 F. 3d 271 (5th Cir. 1997); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F. 2d 130 (2d Cir. 1990). See also *Airborne Freight Corp*., 343 NLRB 580, 581 (2004). In addition to the close relationship to the complaint allegation, the issue of the Respondent's failure to provide information regarding its costs for the 2008-2009 health care plans was fully litigated. Not only were Tamarin and Pionek cross-examined about the Union's information request, but the Respondent questioned Wavrek about the Union's information request and the Respondent's response thereto. It would be incongruous to address the Respondent's failure to provide information in a timely manner and not address its failure to provide information at all. Accordingly, I find that it is appropriate to make a finding regarding this issue.

delaying in providing requested information and failing to provide a portion of the requested information.

It is clearly established that an employer is obligated to provide the collective-bargaining representative of its employees, on request, with information that is necessary and relevant to the union's function as the collective-bargaining representative. Relevancy is determined by a broad discovery type standard and it is necessary only to establish the probability that the information sought would be useful to the union carrying out its statutory duties. *NLRB v. Acme Industrial Co.,* 385 U. S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U. S. 149 (1956).

The Board has held that information regarding health insurance for unit employees is presumptively relevant. *Honda of Hayward,* 314 NLRB 443 (1994); *Ideal Corrugated Box Corp.* 291 NLRB 247, 248 (1988). In the instant case the information sought by the Union is the type of information the Board has determined must be furnished upon request.

The Board has also held that an employer's unreasonable delay in furnishing information "is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Woodland Clinic*, 331 NLRB 735, 736 (2000) citing *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). See also *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1129, 1134 (2007).

In the instant case, as noted above, the Union first requested information regarding the level of coverage for unit employees, a summary plan description and the employee and employer costs regarding the Respondent's health care plan on December 10, 2008. On December 15, 2008 Buchsbaum responded that information would be provided in early January. On January 19, 2009 the only health insurance information provided by the employer was whether there were deductions for health insurance. The January 19, 2009 submission by the Respondent did not include a summary plan description for each plan the Respondent offered nor did it have cost information. As I have found above, on February 24, 2009, Tamarin specifically reiterated a request for the information contained in his December 10, 2008 letter.

On March 16, 2009, Pionek sent a letter to Buchsbaum indicating that the Union had not received a description of the health care plan. Her letter specifically requested a description of the health care coverage for each employee and the overall cost of each plan to the employer and employee. On March 20, 2009, Buchsbaum sent an e-mail that, for the first time, informed the Union that the Blackstone's health care plan would expire on March 31, 2009 and that Aetna had provided new and higher rates for participation. Attached to the e-mail was a summary plan description for Respondent's new 80 percent plan and 70 percent plan, provided by Aetna that was effective April 1, 2009. Also attached was a list of unit employees indicating whether the employee had deductions for dependent health care and was covered by a plan (i.e. self, spouse children or none). There is no information regarding the cost to the employee or to the Respondent in this attachment.

On March 24, 2009, Buchsbaum, by e-mail, finally provided a summary plan description for the 100 percent, 90 percent and 80 percent plans that Respondent Sage provided through Aetna for the 2008-2009 plan year that was set to expire on March 31, 2009. The attachment also included a one-page summary of the three health insurance plans and indicated the cost of each plan per paycheck for the following enrollment options: associate; associate/child(ren);

associate/spouse and family. The attachment also included a summary plan description of the Respondent's dental plan with information regarding employee cost per paycheck.

On April 15, 2009, Buchsbaum, by e-mail, sent Tamarin a list of employees reflecting, for the 2009-2010 plan year, the type of plan they were participating in, a description of the plan and the employee coverage rate, which reflects the cost to the employee. This e-mail did not contain information reflecting the cost to the Respondent for the coverage. At the meeting held on April 23, 2009 Tamarin informed Buchsbaum that the information that Buchsbaum had submitted did not contain information regarding the Respondent,s cost of coverage. The Respondent did not provide the corrected information reflecting the cost to the Respondent for each employee who had insurance for the 2009-2010 plan year until July 21, 2009. The Respondent never provided its cost of the coverage for the 2008-2009 health care plans.

The record contains no explanation for the Respondent's delay in furnishing the requested information regarding the health insurance of unit employees. Rather, the Respondent argues that because the Union was not interested in agreeing to the Respondent's health care plan, any delay in providing information did not violate Section 8(a)(5) of the Act.

I find the Respondent's conduct in failing to produce the presumptively relevant information regarding health insurance for unit employees in a timely manner, and its failure to produce some of the information all, to violate Section 8(a)(5) and (1) of the Act. The Respondent did not provide any meaningful information pursuant to the Union's request originally made on December 10, 2008 until March 20, 2009 when it furnished information regarding its 2008-2009 plans that were going to expire a week later, but did not include information regarding the Respondent's cost for that coverage. Thus, the Respondent delayed in even partially complying with the Union's request for over 3 months.

On April 15, 2009 the Respondent submitted some of the requested information regarding the 2009-2010 plans, but did not provide the information regarding the Respondent's cost for providing the coverage. That information was not furnished until July 21, 2009. The Respondent never provided information regarding its share of the cost of coverage for the 2008-2009 plans. In summary, the Respondent delayed in complying with the Union's request for information for a 3 to 7 month period and never furnished part of the requested information.

The Board has consistently found that such delays in providing relevant information, without a legitimate explanation, to be violative of the Section 8(a)(5) of the Act. *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part, 432 F. 3d 69 (1st Cir. 2005) (three month delay); *Bundy Corp*., 292 NLRB 671 1989 (two and a half month delay); *Woodland Clinic*, supra, at 737 (seven-week delay).

I do not agree with Respondent that *AFC Industries, LLC,* 347 NLRB 1040 (2006) supports a finding that it did not violate the Act with regard to its delay in providing information. In that case the union, after two months of negotiations and three days before the employer implemented its final offer after declaring impasse, submitted an extensive request for information regarding health and welfare benefits. The employer provided the information three and a half months after the request. The Board found that the Union's request for information was "purely tactical submitted solely for purposes of delay" Id. at 1043. The Board found that the information request was an attempt to forestall the implementation of a lawful impasse. The

Board also noted that because the union did not show any interest in post implementation bargaining, there did not appear to be any urgency in providing the information.

I find this case to be clearly distinguishable from the instant one. Here, the request for information was made before bargaining began for a first contract. Obviously, the request for information did not involve an attempt to forestall the implementation of a final offer after a lawful impasse. There is no merit to the Respondent's argument that it had no obligation to provide the requested information in a timely manner, because the Union was seeking to have the Respondent participate in the Union's health and welfare plan. As noted above, the Supreme Court has held that it is necessary only to establish the probability that the information sought would be useful to a union in carrying out its statutory duties. *NLRB v. Acme Industrial. Co.,* supra, and *NLRB v. Truitt Manufacturing Co*., supra. Certainly, it is useful to a newly recognized union to know the nature of the health insurance the employer is providing to the employees the union represents. Clearly, such information allows a union to more intelligently bargain over the important issue of health insurance. To accept the Respondent's argument would permit an employer to refuse to provide relevant information regarding the health insurance of unit employees anytime a union seeks to obtain insurance coverage that differs from the employer's proposal. There is no support in Board law for such a radical proposition.

On the basis of the above, I find that the Respondent unreasonably delayed in providing relevant information to the Union regarding the health insurance of unit employees and, with respect to the Respondent's cost of coverage for the 2008-2009 plan, has failed to provide any information. By such conduct, the Respondent has violated Section 8(a)(5) and (1) of the Act.

The Implementation of the New Insurance Plans

It is well settled that health insurance benefits for unit employees is a mandatory subject of bargaining. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.* 404 U. S. 157 (1971); *Larry Geweke Ford,* 344 NLRB 628 (2005). Generally, an employer's unilateral change in a mandatory subject of bargaining, such as health benefits, without giving the union notice and a meaningful opportunity to bargain about the change, violates Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U. S. 736 (1961); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001); *Pioneer Press*, 297 NLRB 972, 976 (1990).

In the instant case, the General Counsel and the Charging Party contend that the Respondent unilaterally implemented new health insurance plans on April 1, 2009, without giving the Union notice and an opportunity to bargain over those changes. They further argue that the Union was presented with a fait accompli in this matter, as employees had been notified of the changes that the Respondent had decided to make, prior to the Union receiving any notification.

The Respondent argues that the changes to the health insurance plans were part of a longstanding companywide past practice and consequently were not subject to the duty to bargain. Alternatively, the Respondent argues that the Union had sufficient notice of the changes and failed to request bargaining thereby privileging the Respondent's unilateral implementation.

Respondent Sage's corporate benefits committee began to meet in late December 2008 or early January 2009 to determine the benefit plans it would offer to the 54 hotels that Respondent

Sage operates in United States, including the Blackstone. In early February 2009 the benefits committee of Respondent Sage had concluded its review and had decided to significantly change its health care plans by reducing the number it offered from three to two. The plan which provided for 100 percent coverage with no deductible and the 90/10 plan which paid 90 percent of covered expenses were eliminated. Respondent Sage decided to continue to offer a 80/20 plan and a new 70/30 plan. At this time the benefits committee also decided the percentage of the premiums that Respondent Sage would pay for each of the plans. In early February, 2009, the benefits committee decided that the open enrollment period for all of Respondent Sage's hotels, including the Blackstone, would begin on February 23, 2009 and continue until approximately March 11, 2009. All of the decisions regarding the new health insurance plans were made by February 5 or 6, 2009, when Respondent Sage sent e-mails to the individual hotels, including the Blackstone, regarding the open enrollment process.

By mid-February, 2009, Wavrek, at the Blackstone, had received approximately 4 e-mails regarding the implementation of the new insurance program. One of these e-mails included the "Sage Hospitality Resources 2009 Associates benefit program" that contained a summary of the two plans offered, the percentage of premiums that Respondent Sage would pay for each plan and the cost to employees for each pay period for each plan. On February 17 or 18, 2009, Wavrek announced to all of the Blackstone's employees that a benefits enrollment open house would be held on February 27, 2009 and that detailed information regarding the new plans would be available to employees at that time. The open enrollment period went ahead as scheduled and employees made an election regarding which plan, if any, they wanted to participate in. The new plans became effective on April 1, 2009.

As I have found above, there was no notice given to the Union, at the bargaining meeting held on February 24, 2009, of the changes in health insurance the Respondent had decided to implement. The first notification that the Union received was Buchsbaum's letter submitted by e-mail on March 20, 2009, in which he indicated that the present health care plans were expiring on March 31, 2009 and that Aetna had provided new and higher rates for participants. An attachment to the e-mail contained a summary plan description for the two plans that were offered for the 2009-2010 plan year. However, there was no information attached regarding the cost to the Respondent or to the employees. As noted above the new plans went into effect on April 1, 2009.

It is clear that Respondent Sage began the process of deciding what plans it would offer and the cost of those plans by early January 2009 and had concluded the decision-making process by early February, 2009. The Respondent did not give any notice to the Union regarding the content of the new plans until March 20, 2009 shortly before they were implemented on April 1, 2009. The Respondent did, however, provide the details of the new plans to unit employees beginning on February 17, 2009. Employees had to choose which plan to participate in March 11, 2009. This was, of course, before the Union had received any notification from the Respondent as to the existence of the new plans.

The evidence in this case establishes that the Respondent unilaterally selected new health insurance plans, with different benefit levels and different premium payments, without giving notice and an opportunity to bargain to the Union. The Board has consistently found that unilateral changes to health care plans, when an employer retains substantial discretion regarding the content of the plan, to violate Section 8(a)(5) and (1) of the Act. *Larry Geweke Ford,* supra;

Mid-Continent Concrete, supra; *Dynatron/Blondo Corp.,* 323 NLRB 1263, 1265 (1997); *Brannan Sand and Gravel Co.,* 314 NLRB 282 (1994) and *Garrett Flexible Products, Inc*. 276 NLRB 704 (1985). The Board has held that the fact that an employer provides health insurance on a companywide basis for its employees, which it revisits annually, does not relieve it of the obligation to bargain over health insurance for employees in a bargaining unit represented by a union. *Larry Geweke Ford*, supra; *Mid-Continent Concrete*, supra.

I do not agree with Respondent that the Board's decision in *Saint Gobain Abrasives*, *Inc.*, 343 NLRB 542 (2004), enfd. 426 F. 3d 455 (1st Cir. 2005) supports its position in this case. In that case the parties began bargaining for a first contract in February 2002. The employer first proposed bargaining on the issue of 2003 medical insurance for unit employees on August 29, 2002. At that time, the employer notified the union that the employees' existing coverage was scheduled to expire on January 1, 2003 and that reenrollment for the new plans had to be completed by November 30, 2002. On September 9, 2002, the union informed the employer that it was not interested in interim bargaining on insurance but rather wanted to reach an agreement on the entire contract. Thereafter, the parties discussed the issue of health insurance at several bargaining meetings and exchanged several proposals on the subject. By November 15, 2002, neither party was willing to compromise and the employer announced its intention to implement its proposal. Id. at pgs. 557-559. In finding that the employer did not violate Section 8(a)(5) and (1) of the Act, the Board specifically noted that the parties were at an impasse on November 15, 2002, when the employer announced its intention to implement its final interim health insurance proposal. Obviously, this case is far different from the situation that was present in *Saint Gobain Abrasives*. In that case, the union was given substantial advance notice of the expiration of the existing health care plans and substantial bargaining occurred prior to the date that employees had to reenroll in the new plans. In the instant case, the Respondent failed to give any notice that new health care plans would go into effect until March 20, 2009, approximately 12 days before their implementation. Here, the Respondent presented the health care changes to the Union as a fait accompli.

In *Brannan Sand and Gravel Co.,* supra, the Board considered a case in which the costs and benefits of an employer's health care plan were reviewed and adjusted annually. In that case, the employer's health insurance representative provided it with comparative costs of selected alternative health care plans on December 1, 1991. A month later the employer received information from the insurance representative outlining a variety of proposals designed to minimize increased costs for health insurance plans in 1992. On January 13, 1992, the employer informed the union that was considering several changes to its health insurance plan including increasing deductibles, copayments and the amount of the employee's contribution. The parties agreed to meet again in April. Thereafter, the employer and its insurance representative worked out the details of adjustments to the existing health care plan. In a memo to employees dated March 1, 1992, the employer announced that there would be changes to the existing health care plan regarding the required deductible payments, copayments and employee contributions. The employer also announced meetings on March 17 and March 19 to explain the plan to employees. A copy of the employer's March 1 memo was faxed to the Union on March 6. The union did not respond to the information contained in the memo until the bargaining session held on April 16, 1992, when it questioned why the changes had not been negotiated. Under the circumstances, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in health care plan. In so finding, the Board found that the employer did not satisfy the obligation to provide the union with timely notice and a meaningful opportunity

bargain over the change in health care benefits. The Board found that the employer presented the changes as a *fait accompli*. The Board noted that by the time the union was informed of the changes the employer had already announced them to the employees.[20]

In the instant case, Respondent Sage, after deliberating during the month of January, 2009, had reached a final decision as to what health insurance plans would offer and the costs of those plans by early February 2009. It notified employees of these changes during February of 2009, and by March 11, 2009, had completed the enrollment process. It was only after that process was complete that the Union was notified on March 20, 2009, that new plans would be implemented on April 1, 2009 and was given descriptions of those plans. It is clear that the notice given to the Union was too short to provide for meaningful bargaining and that the Respondent had no intention of changing its mind prior to the implementation of its new health care plans. Under the circumstances, there is no merit to the Respondent's argument that the Union waived its right to bargain over the changes implemented to health insurance plans on April 1, 2009, by not demanding bargaining after receiving the belated notice. *Brannan Sand and Gravel Co*., supra; *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017 (1982), enfd. 722 F. 2d 1120 (3d Cir. 1983).

On the basis of the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in its health care plan regarding benefits and rates on April 1, 2009.

The Collection of Unpaid Employee Health Insurance Premiums

The General Counsel and the Charging Party contend that by failing to notify and bargain with the Union regarding the collection of unpaid employee health insurance premiums and dealing directly with employees regarding this issue, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent contends that meeting with employees to arrange for the payment of unpaid health insurance premiums does not constitute a mandatory subject of bargaining. Alternatively, the Respondent contends that, if its action with regard to the collection of those premiums is deemed to constitute a mandatory subject of bargaining, the Respondent's action did

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[20] In its decision in *Brannan Sand and Gravel Co*., supra, the Board distinguished its decision in *Stone Container Corporation*, 313 NLRB 336 (1993). The Board noted that in *Stone Container*, the employer notified the union in March that it could not afford to give employees the annual April wage increase. In *Stone Container Corporation,* the Board found that the employer made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal regarding the April wage increase and did not raise the issue again during negotiations. The Board noted that the annual April wage review was a discrete event that just happened to occur while negotiations were in progress and concluded that the employer satisfied its bargaining obligation regarding the wage increase and was not required to refrain from implementing the change until an overall impasse had occurred. In *Brannan Sand and Gravel Company*, the Board noted that, unlike the situation in *Stone Container*, the employer did not satisfy its obligation to provide the union with timely notice and an opportunity to bargain. It is for that reason that *Stone Container*, relied on by the Respondent herein, does not support its position. In the instant case, the Respondent did not provide the Union with adequate notice and an opportunity to bargain about the health insurance changes it implemented on April 1, 2009. I also find the Respondent's reliance on *Nabors Alaska Drilling, Inc*. 341 NLRB 610 (2004) to be misplaced. In that case, the employer engaged in good faith bargaining before implementing revisions to its health insurance plan.

not constitute a "material substantial and significant" change in working conditions. In this regard, the Respondent contends that establishing a method to collect insurance premiums was merely procedural and imposed no new obligations on employees which required bargaining. In support of this argument, the Respondent argues that this case is akin to situations where the Board has found that employers did not have an obligation to negotiate over procedural modifications regarding the manner by which employees keep track of hours worked. See *Rust Craft Broadcasting, Inc*., 225 NLRB 327 (1976); *Civil Service Employees Association, Inc.* 311 NLRB 6 (1993); and Goren Printing Co., 280 NLRB 1120 (1986).

As noted above in February 2009 the Respondent discovered that approximately 32 unit employees in the Mercat restaurant had not had sufficient amounts deducted from their paychecks to pay the full amount of their health insurance premiums. Consequently, on February 26, 2009 Serdar issued a memo to all employees who had an outstanding balance in their health insurance premiums. This memo notified the employee of the amount of the outstanding balance for their health insurance premiums and advised the employee that payment of this amount could be made by payroll deduction or personal check or money order (GC Exhs. 43-49). This memo specifically advised employees that:

> This balance must be paid in its entirety by March 31, 2009 or your insurance will be canceled retroactively to January 31, 2009. In addition you will not be allowed reentry into the Sage health plans during these years open enrollment period. The next time you will be eligible to join a plan is the next years open enrollment period or at the occurrence of a qualified, life changing event (as defined by the IRS).

The record establishes that Serdar and other supervisors met individually with the affected employees, gave them the memo and the accompanying authorization forms, and discussed payment options. In March and early April, 2009, a number of employees executed the authorizations and either agreed to additional deductions or agreed to write a check or money order to pay the balance owed. It is undisputed that the Union was not advised by the Respondent of the arrearage issue prior to the Respondent meeting with unit employees. No employees have had their insurance coverage canceled because of failure to pay past due premiums and there was approximately $10,000 still owed by employees for insurance premiums at the time of the hearing.

As noted above, it is clear that the provision of health insurance benefits to unit employees is a mandatory subject of bargaining. *Pittsburgh Plate Glass*, supra*; Larry Geweke Ford*, supra; *Mid-Continent Concrete*, supra. The Board has also found that directly dealing with employees regarding insurance premium increases, and the choice of paying an increased premium or dropping health insurance coverage, violates Section 8(a)(5) and (1) of the Act. *European Parts Exchange, Inc.* 270 NLRB 1244 (1984).

In the instant case, however, the Respondent did not increase the premium amounts but rather sought to recover what was already owed**.** In doing so, however, it informed employees that if they did not pay the amounts owed, their insurance would be canceled retroactively and they would be barred for participation in the insurance plan for the upcoming year. While the obligation to pay insurance premiums existed, the notification of the obligation to pay those premiums threatened employees with debarment from participation in the health care plans for

failing to make those payments by a specified date. Through this action the Respondent was unilaterally establishing new substantive terms for eligibility in its health care plans. The Respondent did so by dealing directly with employees, rather than the recognized bargaining agent. The fact that the Respondent did not actually cancel the insurance coverage of any its employees does not render the conduct lawful. The unilateral promulgation of such a policy, even without actual enforcement, is sufficient to establish a violation of the Act.

I do not agree with Respondent's position that this is a procedural change similar to that privileged by the Board in *Rust Craft Broadcasting*, supra, and its progeny. In *Rust Craft Broadcasting*, the employer, without notice to the Union, installed time clocks which unit employees were required to use to record their time at work. Previously the employees were required to manually record their working time. The Board found that the employer did not violate Section 8(a)(5) of the Act by unilaterally instituting a more dependable method of enforcing its rule regarding recording working time. The Board concluded that the change in the way of recording work was not a "material, substantial and significant" change from its prior practice and thus did not require bargaining.

In the instant case, while the obligation to pay health insurance premiums existed, the requirement to do so or be barred from participation in the plan for one year was a substantive change. By establishing a new substantive condition of employment and by directly dealing with the employees themselves regarding this change, the Respondent acted in derogation of its obligation to deal with the Union regarding terms and conditions of employment. In making this finding, I rely on the Board's decision in *Brimar Corp*., 334 NLRB 1035 (2001). In that case the employer had existing production quotas. The employer unilaterally began to require that employees sign a "workstation form" that set forth certain production requirements and recited, that by signing the form, the employee knowledged that he or she understood what was expected of them regarding production. The Board noted that while the production quotas had already existed, the written acknowledgment requirement was new and substantive. In the Board's view the employer's action in imposing a new substantive condition of employment and dealing directly with employees in doing so, violated the Act. Accordingly, on the basis of the above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees over newly established terms and conditions of employment regarding the payment of unpaid health insurance premiums.

The Elimination of the Room Service Department and Two Cafeteria Attendant Positions and the Layoff of 14 Employees

The Facts

Prior to the Respondent's closure of its room service department, the elimination of two cafeteria attendant positions and the layoff of 14 employees on June 15, 2009, the parties had collective-bargaining meetings on May 28, 2009, and June 10, 2009. The testimony of Tamarin, Pionek, Courtney and Clontz is uncontroverted regarding these meetings and I credit it. At the May 28, 2009, meeting the Union proposed to the Respondent a contract provision that is contained in the Union's citywide agreement with other hotels in Chicago. The clause (GC Exh. 26) provides:

Section 42. Closing Of Rooms Or Department

> In the event the Employer shall permanently close a room or department, the Employer shall give notice to the Union and the employees four (4) weeks before said closing, or in lieu of such notice, pay four (4) weeks wages. The Employer shall attempt to provide classification employment to such displaced employees, and, if provided, no notice need be given nor payment made.

The Respondent, through Buchsbaum, made a counterproposal that provided for 2 weeks notice or 2 weeks pay. Buchsbaum indicated that 4 weeks notice was too long. He indicated he was concerned that some employees may say negative things about the Respondent if that much notice was given. No notice was given to the Union regarding the impending closure of the room service department or the elimination of cafeteria attendant positions at this meeting.

On June 10, 2009, Tamarin again sought to have the Respondent agree to the Union's proposed Section 42. At this meeting Tamarin stated that when an employer makes changes of the type contemplated by this proposal it was done with advance planning and forethought. He said that the Union should have sufficient notice to bargain about such an important issue. Buchsbaum proposed certain hypothetical situations to Tamarin and asked whether he thought Section 42 would apply in various situations. Tamarin responded to the various scenarios posed. Buchsbaum indicated the Respondent would not agree to the Union's proposal and the Respondent maintained its position regarding 2 weeks notice or 2 weeks pay. Again, there was no notice given to the Union at this meeting regarding the closure of the room service department and the permanent layoff of all of the employees or the elimination of the cafeteria attendant positions.

On June 15, 2009, at 11 a.m. the Respondent convened a meeting for room service employees. Serdar, Wavrek and Donnie Mincey, the room service manager, were present for the Respondent. According to Courtney's credible testimony and the notes of the meeting prepared by Wavrek, Serdar informed the assembled employees that due to economics, the Respondent had decided to eliminate room service and therefore their positions were eliminated and they were being permanently laid off. Serdar indicated that Wavrek had a packet of information that included a list of positions that the employees were welcome to apply for. The packet of documents (GC Exh. 5) that Wavrek gave to employees included pay and benefits information. It also included a document entitled "Opportunity Knocks" that listed the following positions the room service employees could apply for at the Blackstone: on-call room attendant (housekeeping); guest services supervisor (front office); night auditor (3rd shift); bell person (flexible hours); delighted to serve attendant (flexible hours); group housing coordinator (flexible hours) and host/hostess. It also included the following positions at the Essex Inn, another hotel in Chicago operated by Respondent Sage: part-time lifeguard; front desk associate; and housekeeping house person. At the end of the meeting, Serdar asked the employees if they would clean out their lockers and they were then escorted from the building.

There were nine employees in the room service department who were laid off on June 15, 2009. There were two servers, Meghan Courtney and Renée Walker; [21] four room service operators, Nayeli Gomez, Iesha Pompey, Christopher Witherspoon, and Tina Young Robinson;

[21] Room service server Annie Clontz was terminated on June 11, 2007. There are no complaint allegations regarding her termination.

and three cooks, Geovani Calle, Jose Guerrero, and Lamar Johnson (GC Exh. 65). The room service supervisor, Delisa Ross, was also laid off on that date. The room service manager, Donnie Mincey, was asked to stay on for 2 weeks to aid in the transition (GC Exh. 65).

Also on June 15, 2009, the Respondent decided to lay off two cafeteria employees, Sharon Baker and Francois Marthol, and assign their duties to employees in the steward department of the Mercat restaurant. On the same date the Respondent also laid off stewards Jeffrey Hill and Miquel Padilla and cook Laura Salgado.[22] The layoff notices for Hill and Salgado reflect their layoffs were for lack of work. (GC Exhibits 70 and 71) The record does not indicate how these five employees were notified of their layoff.

After the Respondent notified the employees of the closure of the room service department, on or about June 15, 2009, Tamarin received a phone call from Buchsbaum advising him that the room service department had been absorbed into the Mercat restaurant. (Tr. 702) At the trial, when asked by his Counsel why the Respondent did not discuss the decision to close the room service department prior to June 15, 2009, with the Union, Serdar responded "I was told in discussions with our corporate offices that the reason for that would be, was that they were too concerned about some sort of outbreak of concern and they felt it would be best to just communicate it in that fashion." (Tr. 1359).

Serdar was the Respondent's principal witness regarding the reasons for the Respondent's closure of its room service department and a permanent layoff of its employees, the permanent layoff of the two cafeteria employees, and the layoff of the three other employees Serdar testified that when the Blackstone opened in March 2008, the room service department reported to the general manager of the hotel. He indicated that he was assigned responsibility for the room service department in January 2009. Serdar reports directly to Peter Karpinski, the COO of Respondent Sage. According to Serdar, room service was transferred to him because it was losing money dramatically, costs were out of control and it was not properly managed. Serdar indicated that in order to be a Marriott Renaissance Hotel, a hotel must provide room service within certain parameters, such as the hours of operation. Serdar testified that in early 2009, Marriott relaxed the hours of room service operation for the Blackstone by indicating that it could close at 11:00 PM rather than continue serving until 3:00 a.m. At present the hours of operation for room service are from 6:30 a.m. to 11:00 a.m. and from 2:00 p.m. until 11:00 p.m.

Serdar testified that from January to March 2009, he was engaged in helping to develop other restaurant properties operated by Respondent Sage and was often away from the Blackstone. In March 2009, he began to consider that consolidation of room service functions into the Mercat restaurant would save costs. In his view, the employees in the room service department could be laid off and their duties could be performed by existing Mercat employees. Also, he felt that additional savings could be made in eliminating duplication by having only one menu, consolidating the purchase of food and having all food prepared in the restaurant kitchen. Serdar testified that the room service operation was very labor-intensive and that the amount of business fluctuated greatly. He indicated that normally a manager, cook, cashier and two servers

[22] Although Hill and Padilla performed some dishwashing duties for room service, and Salgado may have performed some prep cook work for room service, they were not specifically assigned to that department. (GC Exhs, 13 and 99).

would be on duty on a given shift and that some days there would be three deliveries and on other days up to 25.

With respect to the employee cafeteria, Serdar testified that the Blackstone provides an employee cafeteria as a benefit to its employees. The cafeteria attendants removed trays, wiped down tables and cleaned floors in the cafeteria. In his view, these duties could easily be performed by the stewarding department, thereby eliminating the need for the two cafeteria attendants. Serdar did not testify regarding the specific reason for the layoffs of stewards Hill and Padilla and cook Salgado.[23]

Serdar testified that in early May 2009 he spoke to Karpinski about consolidating room service into the Mercat (Tr. 1518). The record does not indicate, however, precisely when the decision to close the room service department was made. Robin Saldana (formerly Beal), the Blackstone's comptroller from July 16, 2007 until January 22, 2010, testified that Serdar spoke to her sometime in May 2009 about consolidating the room service department into the restaurant operation and the work of the cafeteria attendants into the stewarding department. According to Saldana, Serdar asked her what the expected savings would be if he made those changes. She testified that, at that time, she estimated the annual savings to be $500,000 a year and expressed that view to Serdar (Tr. 2112-2113). Saldana indicated that in May 2009, she also participated in discussions with Karpinski and Alice Walterspiel, the vice president of the luxury division of Respondent Sage, about the financial aspects of the planned consolidation.

Wavrek testified that while she played no role in the decision to close room service, she was involved in providing information to Serdar regarding room service operations. In the beginning of May 2009, Serdar told her he was putting together a proposal regarding the elimination of room service and consolidating it into the restaurant operation. He asked her to put together a spread sheet listing all of the employees along with the pertinent information relating to the elimination of these jobs such as dates of hire, race and sex of the employees in the department. A series of e-mails exchanged between Wavrek and Carmen Lo Turco, the corporate director of human resources for the boutique division of Respondent Sage, on May 26 and May 27, 2009 establishes that the Respondent was considering the possibility that it would eliminate two of the three then existing room service servers, Courtney, Clontz and Walker, and that the remaining server would be transferred to Mercat (GC Exh.63). Wavrek testified that these e-mails reflected discussions that were occurring at that time regarding seniority and performance in determining if one server would stay. She indicated that the final decision, however, was to eliminate the entire department. (Tr. 959-960.)

The record establishes that since June 15, 2009, all room service functions are performed directly from the Mercat restaurant. In this connection, all of the food is prepared in the restaurant kitchen. Mercat servers are assigned to perform room service functions on a rotational basis. There is always one server assigned to room service and at times there are two, depending upon the volume of business. Restaurant stewards perform stewarding functions for room service, such as washing dishes. Immediately after the transfer of functions, Mercat hosts took room service orders. In approximately September 2009, this duty was reassigned to

[23] Shortly after being laid off, Padilla was rehired as a bus person. Cafeteria attendant Marthol was also rehired by the Respondent at some time prior to the opening of this hearing in October 2009.

the server on room service duty. If the server is making a delivery, room service calls are transferred to the Mercat host. Managers on duty in the restaurant supervise room service operations. The purchasing the food for both room service and the restaurant is now performed only by one individual as is the purchase of beverages. In addition all food storage is now consolidated into one area.

In support of its defense to the allegations of the complaint regarding the closure of the room service department and elimination of cafeteria attendant physicians, the Respondent introduced into evidence three summaries prepared by Saldana. R. Exh. 58 purports to show the cost differences in the original room service model (pre-June 15, 2009) and the revised room service model (post-June 15, 2009). R. Exh. 20 purports to show the differences between the original cafeteria model (pre-June 15, 2009) and the revised cafeteria model (post-June 15, 2009). Saldana testified she prepared these documents in August or September 2009 based upon the Respondent's profit and loss statement. According to Saldana, the purpose of the summaries was to determine if the underlying assumptions of the Respondent regarding the savings to be gained by these actions were accurate.

The summary for the room service department (R. Exh. 58) covers the period from January through July 2009. Both models show the expenses under the original model through June 2009. Thus, the only month where comparison can be made between the two models is July 2009. The exhibit indicates that for the original room service model, the cost of food was estimated to be 30 percent of the total room service revenue, the management costs were attributed to one manager, and the labor costs for kitchen cooks were based on one cook per shift. With regard to the revised room service model, Saldana determined that room service generated 12.2 percent of the entire food service revenue of the Blackstone. Saldana then calculated 12.2 percent of the management expenses at the restaurant to come up with a figure for management expense in the revised model.[24] A review of R. Exh. 58 for the month of July 2009 reflects the following:

Original room service model

total room service revenue	$19,529
cost of food	$ 5,859
management	$ 3,077
kitchen utility	$ 1,465
kitchen cooks	$11,160
room service cashiers/servers	$16,500
total room service food labor	$32,202
payroll taxes and employee benefits	$ 8,050

[24] The revised room service model summary also contained the following explanation in footnotes: Room Service food is being produced off of the Mercat line eliminating the need for separate Room Service cooks. An additional shift was added to the Mercat morning and evening schedule to help run orders, eliminating the need for a full room service staff. The 15% savings in cost of sales of food after June was due to less waste.

supplies	$ 450
room service food profit	-$ 27,032

Revised room service model

Total room service revenue	$19,529
cost of food	$ 5,078
management	$ 2,383
kitchen utility	$ 1,465
kitchen cooks	$ 2,929
Mercat server	$ 3,794
room service cashiers/servers	
total room service food labor	$10,571
payroll taxes and employee benefits	$ 2,643
supplies	$ 450
Room service food profit	$ 788

The summary for the cafeteria (R. Exh. 20) reflects the following for July 2009:

Original cafeteria model

cost of food	$14,725
cafeteria attendant	$ 7,242
kitchen utility	$ 3,621
kitchen cooks	$ 3,720
total cafeteria food labor	$14,582
payroll taxes and employee benefits	$ 3,646
total cafeteria expense	$32,953

Revised cafeteria model

cost of food	$14,725
cafeteria attendant	
kitchen utility	$ 3,621
kitchen cooks	$ 3,720
total cafeteria food labor	$ 7,341
Payroll taxes and employee benefits	$ 1,835
Total cafeteria expense	$23,901

Saldana testified that R. Exh. 190 is a summary prepared regarding the labor costs associated with the room service department and the cafeteria attendants for the period from January 1, 2009 to July 10, 2009. She testified it she prepared it based on payroll records that were also introduced at the hearing. (R. Exh.190) For the individuals listed on the document it contains the total payroll amounts paid for the period indicated above; the total health insurance premiums paid by the Respondent; the cost of workers compensation insurance; and payroll taxes. For the individuals listed on the exhibit the total cost to the Respondent for the period noted above is $260,561.89. I note, however, that this document includes payroll information for an individual named Jay Jones. There is no other evidence in the case to establish that prior to June 15, 2009, Jones worked in the room service department or was a cafeteria attendant. The costs associated with Jones amount to $16,762.77. The document also includes payroll information for Miquel Padilla reflecting costs amounting to $13,181.21. The record does not indicate the amount of work he performed for either room service or as a cafeteria attendant. More importantly, this exhibit does not show, however, the costs associated with the employees who are presently performing room service work, unlike R Exhs. 20 and 58. Accordingly, I find this exhibit is of limited probative value in assessing the economic ramifications of the Respondent's closure of the room service department and the accompanying layoffs and the layoffs of the two cafeteria attendants.

Analysis

The Section 8(a)(5) and (1) Allegation Regarding the Closure of the Room Service Department

The General Counsel and the Charging Party contend that by unilaterally closing the room service department and laying off those employees, without giving the Union notice and an opportunity to bargain, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent contends that the closure of its room service department was an entrepreneurial decision and thus it had no obligation to give notice and bargain regarding this decision. In support of its position the Respondent relies on the Supreme Court's decision in *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981) and other cases where an entrepreneurial decision was found to be exempt from a bargaining obligation.

I find that the Respondent had an obligation to give notice and an opportunity to bargain to the Union regarding its decision to close the room service department and layoff the room service employees and therefore I find that its failure to do so violates Section 8(a)(5) and (1) of the Act. I do not find the consolidation of the Respondent's room service operations cafeteria into the hotel restaurant and the assignment of that work to restaurant employees to be the type of entrepreneurial decision that the Respondent is privileged to make unilaterally.

In *First National Maintenance Corp. v. NLRB,* supra, the employer provided cleaning and related services for commercial customers. It supplied a labor force in return for reimbursement of its labor costs and the payment of a set management fee. The employer hired personnel separately for each customer and did not transfer employees between locations. Because of a dispute over the size of its fee, the employer cancelled the contract to provide services for one of its customers. The employer failed to bargain with the Union representing its employees at that site about the decision to terminate its contract and the consequent layoff of the employees at that

site. The Supreme Court acknowledged the employer's decision had a direct impact on employment since jobs were eliminated. Id. at 677. The Court held, however, that the employer's decision to cancel the contract had as its focus only the economic profitability of the contract with its customer, a concern wholly apart from the employment relationship under the facts of the case. The Court found that "this decision, involving a change in the scope and direction of the enterprise, is akin to the decision to be in business at all" and was " not in {itself} primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. " Id. At 677, citing *Fibreboard Corp. v. NLRB,* 379 U. S. 203, at 223 (1964) (Steward*,* J. concurring). Accordingly, the Court found that the employer's decision to partially close its business was outside of the bargaining obligation imposed by Section 8(a)(5) and Section 8(d). The Court noted, however, that there are "other management decisions such as the order of succession of layoffs and recalls, production quotas and work rules" that are almost exclusively an aspect of the relationship between the employer and the employee. Id. at 677 and thus constitute bargainable matters.

Since *First National Maintenance Corp.* the Board has found that the decision by an employer to consolidate its operations and lay off employees to be a bargainable matter in several cases. In *Holmes and Narver*, 309 NLRB 146 (1992) the Board considered a case in which the employer reduced its motor pool operation from three divisions to two. This resulted in the motor pool needing fewer employees and thus nine employees were laid off and the remaining employees performed additional duties. The Board found that the employer's decision to combine jobs, reassign work and lay off employees was a mandatory subject of bargaining and that the employer had unlawfully failed to bargain with the Union over that decision. The Board noted that it was "dealing with layoffs are made in connection with the decision to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments." Id. at 147. The Board found that such a decision did not involve a change in the scope and direction of the enterprise, which the Supreme Court found was not a mandatory subject of bargaining in *First National Maintenance*.

In deciding *Holmes and Narver*, the Board noted that it was not necessary to apply its decision in *Dubuque Packing Co.* 303 NLRB 386 (1991*)* which was devised for plant relocations, which potentially involve complicated capital changes to plant facilities. Rather, the Board noted that, similar to the subcontracting involved in *Fibreboard Corp*., the employer's decision did not involve capital investment but did involve labor cost considerations on a core subject of bargaining and was clearly amenable to bargaining. Regarding amenability to bargaining, the Board noted that, in addition to wage and benefit bargaining, there are other bargainable, cost saving alternatives to downsizing, such as modified work rules, nonpaid vacations, restricted over time, job sharing, shortened workweek and reassignment of work and job classifications. *Holmes and Narver*, supra, at 147. The Board noted that the layoffs were a mandatory subject of bargaining because they were integral to decision involving a traditional bargaining subject of the "assignment of work among potentially eligible groups within the plant" citing *Fibreboard,* 379 U.S. at 324 (Steward, J. concurring). The Board found that the layoffs were the "direct outcome of the decision to reassign work so that the same amount of work would be done by fewer employees." *Holmes and Narver,* supra, at 148. Accordingly, the Board found that the decision to lay off employees was a " traditional subject of bargaining, properly deemed a mandatory subject without the necessity of inquiries into the impact on labor costs or the Union's ability to grant wage and benefit concessions." Id. at 148.

In *Westinghouse Electric Corp*., 313 NLRB 452 (1993,) enfd. 46 F. 3d 1126 (4th Cir. 1995) cert. denied 514 U. S. 1037 (1995) the employer closed a calibration laboratory (the West lab) at its facility and transferred the work performed there to another more modern and efficient laboratory (the East lab) located at the same site. The employer laid off the four employees employed at the West lab. Applying its decision in *Holmes and Narver,* the Board found that the employer violated Section 8(a)(5) and (1) of the Act by the failure to bargain over its decision to transfer the work and lay off the employees. In so finding, the Board noted "it bears reiterating that the statutory obligation to bargain never requires that an employer agree to whatever the bargaining representative seeks or that it forgo efforts to achieve greater efficiencies. Doubtless it is desirable, from an employer's point of view, to speed up production and perform the same work with fewer employees. Clearly, the Respondent could save money by having all of the calibration laboratory work performed by fewer employees working in a single laboratory. The Act simply requires that such predominantly employee-focused decisions be negotiated with the bargaining representative." Id at fn. 4.

In *Contech Division*, *SPX Corp*., 333 NLRB 875 (2001) the Board found that the employer violated Section 8(a)(5) and (1) of the Act by suspending operations at its plant #3 and laying off the employees without giving the union notice and an opportunity to bargain. In that case, the employer moved the work and the equipment from the closed facility to plant #1, which was located at the same site, and performed the same work with fewer employees. The Board rejected the employer's argument that under *First National Maintenance Corp.*, supra, and *Dubuque Packing Co.* supra, it had no obligation to engage in decision bargaining with the union. Rather, the Board relied on its decisions in *Holmes and Narver*, supra; *Westinghouse Electric Corp*. and *Kajima Engineering*, 331 NLRB 1604, 1619-1620 (2000) in finding that the decision to suspend operations in plant #3, lay off the employees, and transfer the work to plant #1, was in order to reduce labor costs and was a mandatory subject of bargaining.[25] Similarly, in *Bob Townsend/Colerain Ford*, 351 NLRB 1079, 1081-1083 (2007) the Board found that the decision to lay off employees in order to reduce labor costs was a mandatory subject of bargaining. Because the employer acted unilaterally implementing a policy of layoffs, the Board found the employer violated Section 8(a) (5) and (1) of the Act. In *Cook DuPage Transportation Co.* 354 NLRB No. 31 (2009) the Board again found that an employer's unilateral decision to lay off employees for economic reasons violated Section 8(a)(5) and (1) of the Act.

In *Racetrack Food Services, Inc.* 353 NLRB No. 76 (2008) the Board found that the employer violated Section 8(a)(5) and (1) of the Act by closing its restaurant and bar two nights a week without giving the union notice and an opportunity to bargain. The Board found that the elimination of the shifts had a substantial and material affect on the entire unit. The Board further found that by eliminating the two shifts the employer did not make a basic change in the nature and scope of its food service operations that excused its duty to bargain. Id. at sl. op. p.14.

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[25] In *Contech Division, SPX Corporation,* 337 NLRB 439 (2002), the Board vacated its earlier order because the parties resolved the case through a non-Board settlement. In its supplemental order, the Board cited its decision in *Caterpillar, Inc*. 332 NLRB 1116 (2000). *Caterpillar* holds that when a case settles after a published decision and the Board vacates its previous order because of the settlement, the original decision may be cited as controlling precedent with respect to the legal analysis. Accordingly, it is appropriate to apply the Board's original decision in *Contech Division, SPX Corp*. in the instant case.

Applying these principles to the instant case, it is clear that the Respondent has not made a change that has significantly altered the scope and direction of its business. After June 15, 2009, it still provided room service to guests at the hotel. Some of the Respondent's unit restaurant employees are performing the same work, in essentially the same manner, as the employees they supplanted. In order to save costs, the Respondent eliminated a separate room service operation, and laid off those employees and assigned the work of those employees to unit employees who work in the Respondent's restaurant.

The Union could not have been more insistent in its position that the Respondent honor its bargaining obligation with respect to the closure of departments and the layoff of employees. Tamarin's December 11, 2008, letter to Buchsbaum specifically apprised the Respondent that the Union expected it to bargain over such changes. In addition, the Union proposed a contract clause during negotiations specifically dealing with the issue of the closure of departments and the layoff of employees.

The evidence in this case establishes that the primary consideration behind the Respondent's decision was a reduction in labor costs. A review of Respondent Exhs.20 and 58 establishes that labor costs are by far the most significant component of the savings incurred by virtue of the consolidation. Indeed, the other savings were fairly minimal in comparison. The Respondent did not undertake any significant capital expenditures in effectuating the consolidation of the work. As the Board has made clear in the cases discussed above, merely transferring the work of employees to another group of employees is a matter clearly amenable to collective-bargaining. In the instant case, by acting unilaterally, the Respondent foreclosed the possibility of considering any alternatives to the layoffs it made.

In a case such as the instant one, which does not involve the application of the *Dubuque Packing* test used to determine whether a decision involving a plant relocation is a mandatory subject of bargaining, testimony regarding whether a union could offer labor cost concessions that would have changed the employer's decision is of minimal probative value. See *Holmes and Narver*, supra, at 148. However, at the hearing, in order to permit the Respondent to develop a full record, I allowed Respondent's counsel to delve into this area. In this connection, Serdar testified regarding what he perceived as the Union's inability to grant any concessions that would have altered the Respondent's position. On cross-examination, however, when asked whether certain scenarios would have addressed the Respondent's financial concerns regarding the operation of the room service department, Serdar admitted that he did not know if such proposals would have made a difference (Tr. 1587-1588). That is the crux of the matter. Since the Respondent did not give the Union an opportunity to bargain, one cannot know what might have transpired if such bargaining had occurred. Of course, the obligation to bargain does not require an employer to reach agreement with a union or forgo efforts to operate more efficiently. All that is required is that an employer gives good faith consideration to whatever proposals the union may make. The critical point is, as the Board made clear in *Westinghouse Electric Corp.,* supra, that such "fundamentally employee-focused decisions be negotiated with the bargaining representative." Id. at fn. 4.

I find *AG Communications Systems Corp.*, 350 NLRB 168 (2007), affd. 563 F.3d 418 (9th Cir. 2009), relied on by the Respondent, to be distinguishable from the instant case. In *AG Communications,* Lucent and AG were both engaged in the manufacture, sale and installation of telephone switching equipment. In 2003 Lucent employed a bargaining unit of approximately

2700 telephone equipment installers represented by the CWA and AG employed a bargaining unit of approximately 250 telephone equipment installer's represented by the IBEW. In February of 2003 Lucent completed the purchase of AG. In July 2003 Lucent notified the IBEW that the telephone installers employed by AG would be integrated into a single operational group with the installers employed by Lucent. Lucent further informed the IBEW that as of August 1, 2003, all the telephone installers would be represented by the CWA in a single bargaining unit. After the purchase Lucent initiated efforts to completely integrate AG operations into its corporate structure.

The Board found Lucent's decision to purchase AG in its entirety, close AG operations and completely integrate all aspects of the two companies, including the two bargaining units, was a core entrepreneurial decision exempt from bargaining under *First National Maintenance*. In its decision the Board emphasized that when labor costs underlie an employer's management decision, the decision is particularly amenable to the collective-bargaining process. The Board found that in *AG Communications* Lucent's integration decision was not motivated by a desire to reduce labor costs associated with the telephone equipment installers. The two units were merged, no layoffs occurred, and there was no evidence that labor costs were lowered under the consolidation. The Board found that the integration was motivated by desire to increase profitability by merging duplicate corporate departments and supply a different type of telephone switching equipment to a new set of customers. It further noted that the integration process in all large scale organizational restructuring conducted by joint teams of managers from each company and that requiring bargaining over the integration decision would place a significant burden on the reorganization. The Board found the burden on the conduct of the employer's business outweighed any benefits to be gained by bargaining with the IBEW over the employer's decision to integrate the Lucent and AG bargaining units.

As noted above, the evidence in this case establishes that the primary consideration behind the Respondent's decision to emanate the room service department was a reduction in labor costs. Certainly no corporate reorganization occurred and the Respondent did not undertake any significant capital expenditures in effectuating the consolidation of the room service department functions into the restaurant.

Finally, in its brief the Respondent also relies on the decision of an Administrative Law Judge in *Embarq Corp.,* JD (SF)-10-09, which is presently pending before the Board. (Respondent's brief pgs. 89-91) Board law is clear that an administrative law judge's decision pending before the Board is not binding authority. *St. Vincent Medical Center*, 338 NLRB 888 (2003), remanded on other grounds, 460 3F. 3d 909 (9th Cir. 2006).

For the reasons set forth above, I find that the Respondent's refusal to bargain over the decision to eliminate the room service department, transfer the work of room service department to other unit employees and lay off room service employees Meghan Courtney, Geovani Calle, Renee Walker, Jose Guerrero, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon and Nayeli Gomez violated Section 8(a)(5) and (1) of the Act.

The Layoff of the Five Other Employees on June 15, 2009

In addition to the layoff of the nine room service employees on June 15, 2009, the General Counsel contends that the layoff of cafeteria attendants Baker and Marthol, stewards

Hill and Padilla and cook Salgado on that date, without bargaining with the Union, violates Section 8(a)(5) and (1) of the Act.

The Respondent does not contend that the layoff of these employees was privileged as an entrepreneurial decision by *First National Maintenance*. Respondent defends the claim that these layoffs violated Section 8(a)(5) and (1) of the Act by arguing that the layoffs were consistent with its past practice of conducting layoffs and that the Union acquiesced in the Respondent's decision to lay these employees off.

With respect to the two cafeteria attendants, Baker and Marthol, the evidence is clear that they were laid off in order to reduce labor costs and their duties were reassigned to other bargaining unit employees in the stewarding department. As the discussion in the preceding section makes clear, the Board has held that the layoff of employees as a result of combining jobs and reassigning work is a mandatory subject of bargaining. *Holmes and Narver*, supra; *Westinghouse*, supra; and *Contech Division*, SPX Corp.

With respect to employees Hill, Padilla and Salgado, the Respondent advanced no specific reasons for their layoff at the hearing. The layoff notices given to Hill and Salgado stated that they were laid off due to lack of work. In *Alpha Associates*, 344 NLRB 782, at 785 (2005) the Board noted:

> It is axiomatic that an employer's decision to lay off employees is a mandatory subject of bargaining; thus in the absence of an agreed-upon contractual provision on the subject, an employer is obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of any such layoff. See *Farina Corp*., 310 NLRB 318, 320 (1993). That an employer's determination to layoff employees is motivated by economic considerations does not relieve an employer of its bargaining obligation.

In *Alpha* the Board noted that only when an employer demonstrates "economic exigencies" that compel immediate action can its obligation to notify and bargain with the union prior to implementing its decision be excused. There is no evidence in the instant case that the layoff of these employees was motivated by the type of unforeseen occurrence that required the company to take immediate action.

The Respondent's claim that it has an established past practice of conducting layoffs is not supported by the record. The record indicates that in November 2008 a room service and a prep cook were permanently laid off. At the hearing the Respondent did not give the reason for these permanent layoffs. Wavrek testified that the employees laid off were the two cooks with the least seniority. The only other relevant evidence regarding the Respondent's practice regarding its policy regarding layoffs appears in a letter Buchsbaum sent to Tamarin on March 20, 2009. The applicable portion of this letter indicated;

> Layoffs. You asked whether there were any individual associates on temporary layoff. There are no individuals on a temporary layoff and because of the relatively short length of the Hotel's being in actual operations, there is no real meaningful past practice in this area. Although

> the Hotel has not had layoff situations, there had been reductions in force where personnel are actually separated, and that has been done in the culinary area.

The permanent layoff of two cooks in November 2008 for unknown reasons does not establish a practice of layoffs. In March, 2009, before the commencement of the instant litigation, the Respondent's chief labor counsel, Buchsbaum, indicated to the Union that there was no real meaningful past practice in the area of layoffs as the Hotel had not encountered layoff situations. He further indicated that the reductions in force that occurred in the culinary area were actually separations. If it was a layoff, one layoff does not establish a practice. The Board has noted that as many as three prior layoffs for varying reasons did not establish a consistent practice that privileged an employer to act unilaterally with respect to layoffs. See *Tri-Tech Services, Inc*., 340 NLRB 894, 895 (2003) and *Taino Paper Co*., 290 NLRB 975, 978 (1988). Finally, the Board has held that even when an employer had a consistent past policy of laying employees off, after a bargaining obligation is established, it is no longer free to act unilaterally but must give notice and bargain with the collective-bargaining representative. *Bob Townsend/Colerain* Ford, 351 NLRB 1079, 1083 (2007); *Adair Standish Corp*., 292 NLRB 890 (1989).

The Respondent next argues that statements Tamarin made at a bargaining meeting on February 24, 2009, indicate that the Union acquiesced in the layoff of employees on June 15, 2009. At that meeting in response to Tamarin asking if the Respondent had seasonal layoffs, Buchsbaum replied that he did not think so that he would give back to him. Tamarin stated that the Union did not like to "share the poverty." He explained that statement by indicating that the Union prefers the layoff of junior employees, rather than a reduction for all employees regardless of seniority. I do not find that Tamarin's generalized statement amounts to acquiescence in the layoff that occurred in June 2009. Tamarin's letter to Buchsbaum on December 12, 2008 specifically indicated that the Union desired notice and opportunity to bargain about layoffs. The letter indicated that the Union wanted to negotiate not only the rules for the order of layoff, but also recall rights and the order of recall. It is undisputed that the Union did not receive any advance notice of the layoffs the Respondent conducted on June 15, 2009. Under the circumstances, Tamarin's statement of February 24, 2009 cannot be construed as consent to the Respondent taking unilateral action with respect to the layoff of employees Baker, Marthol, Hill, Padilla and Salgado.

I find the instant case to be distinguishable from the *Knoxville News Sentinel Co.*, 327 NLRB 718 (1999), which the Respondent relies on to support its position. In that case, the union filed a grievance regarding the employer's assignment of special publication work to unit employees. The employer agreed with the union's position and indicated it would no longer consider such work to be unit work. The employer also agreed to bargain over the effects of this action on unit employees. The union did not request bargaining over this issue. Thereafter, pursuant to a charge filed by the union, the General Counsel claimed that the employer unilaterally altered the scope of the bargaining unit by removing special publications work in violation of Section 8(a)(5) of the Act. In finding no violation, the Board found that the union had consented to the employer's action by settling the grievance involving the performance of special publications work by the unit and in not requesting bargaining over the removal of such work from the unit when the employer offered to do so. In *Knoxville News Sentinel* the facts clearly indicated consent by the Union to the employer's action. In the instant case, the

Respondent gave no advance notice of the layoffs and consequently did not offer to bargain over the layoffs that occurred.

Accordingly, for the reasons expressed above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off the five employees named above on June 15, 2009, without giving the Union notice and an opportunity to bargain.

The Section 8(a)(3) and (1) Allegation Regarding the Layoffs Conducted on June 15, 2009

The General Counsel and Charging Party contend that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off the fourteen named employees noted above on June 15, 2009, in retaliation for the union activity of some of those employees. The Respondent argues that it laid off the employees at issue for legitimate economic reasons and not because of any discriminatory motivation based upon the union activity of some of the laid-off employees.

Generally, the Board applies the test set forth in *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F. 2d 899 (1st Cir. 1981) cert. denied 455 U. S. 99 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 395 (1983), in deciding cases turning on employer motivation. Under the *Wright Line* test, to prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra, at 1089.

The Board has recognized, however, that when the General Counsel advances a theory that employees were laid off or discharged in mass in order to retaliate against the union sympathies of some employees and to dissuade others from supporting the union, it is not necessary to demonstrate that the employer knew of the individual union sympathies of each of the employees before it took such action. Rather, the General Counsel must show that the employer had general knowledge of its employees' union activities, and took the adverse action to retaliate against the known supporters and to discourage other employees from engaging in union activity. *Guille Steel Products Co., Inc*., 303 NLRB 537, fn.1 (1991); *Davis Supermarkets*, Inc. 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993) This is the theory advanced by the General Counsel and the Charging Party in the instant case.

The record establishes that only a few of the employees laid off on June 14, 2009 engaged in union activity. Of the employees named in the complaint, Courtney was the most active in terms of her support for the union. In this connection, she signed a union card and solicited approximately 10 other employees to also execute cards. Her picture appeared on a flyer that the Union prepared after it was recognized on December 2, 2008, and she passed out approximately 12 of these flyers in the employee locker room. Shortly thereafter, she also appeared on a second flyer with Clontz and passed out approximately 30 of them in the employee locker room. She was a member of the Union's bargaining committee and openly expressed her views supporting the Union at a meeting held on December 18, 2008. She also

observed Serdar soliciting employees to sign a decertification petition on January 27, 2009, and complained to Wavrek about it. Her union activity was overt and clearly known to the Respondent.

Geovani Calle signed a union card, solicited five or six other employees to sign cards, attended five or six union meetings and his picture appeared in the first union flyer. On January 27, 2009 he refused Serdar's entreaties to sign a decertification petition and urged employee Viviana Rangel to also refuse to sign. By this latter conduct his support for the Union was known to the Respondent.

Sharon Baker spoke in favor of the Union's insurance plan at the December 18, 2008 and January 23, 2009 meetings and was also a member of the Union's bargaining committee. I find therefore that the Respondent was aware of her support for the Union.

Lamar Johnson appeared on the first union flyer that was passed out in the employee locker rooms. However, there is no direct evidence of any of the Respondent's supervisors being present in the employee locker room during the distribution of the first flyer. I am unwilling to infer that based on this one flyer, the Respondent had knowledge of Johnson's support for the Union in a facility with over 200 unit employees. Similarly, Renee Walker signed a union card but there is no evidence of the Respondent's knowledge of her support for the Union, prior to her testimony at hearing.

As set forth in detail above, the Respondent was unlawfully involved in the instigation of a decertification petition and solicited employees to sign that petition. Thus, there is some, evidence of animus toward the Union. I note, however, that there were no unlawful threats, interrogations or surveillance of employees' union activities.

In determining an employer's motive in mass layoff or discharge cases the Board has given great consideration to the timing of the adverse action in relation to the advent of union activity. In *Birch Run Welding & Fabricating, Inc*. 269 NLRB 756 (1984) enfd. 761 F. 2d 1175 (6th Cir. 1985) the Board and the court both noted that the timing of the mass layoff was strongly indicative of an unlawful motive. In that case, on the morning of the layoffs, the employer's president had told the employees that the company wanted to avoid further layoffs despite a difficult economy. Later that morning the employer became aware of the union's organizing campaign. By the end of that day the employer had laid off 13 employees including 6 who were suspected of prounion sympathies. Both the Board and the court found that the employer's asserted economic reasons for the layoff were pretextual given the unexplained timing of the layoffs shortly after gaining knowledge of union activities. Similarly, in *Guille Steel Products*, supra, the employer discharged 29 employees in January of 1989 in the midst of an organizing campaign that had begun in November 1988. The Board found that the timing of these terminations strongly suggested the employer had an unlawful motive. 303 NLRB at 543. In *Davis Supermarkets*, supra, the Board found that the employer discharged six employees a month after an organizing campaign began in order to thwart the campaign.

The cases relied on by the General Counsel and the Charging Party involved organizing campaigns where the circumstances made it clear that the employer's motivation in engaging in a mass layoff or discharge was to thwart the campaign. In the instant case, the timing of the layoffs does not support the claim of discriminatory motivation. The layoffs occurred six months after

the Union had been voluntarily recognized and the parties were involved in negotiations. Serdar testified that he first considered the consolidation of room service functions into the Mercat in March 2009 and first spoke to Wavrek and Saldana about it in early May 2009. After obtaining information from Saldana and Wavrek, Serdar then spoke to Karpinski about the plan. The fact that Respondent was considering the closure of the room service department during this time and what, if any, employees would be retained is corroborated by the e-mails exchange between Wavrek and the corporate offices of Respondent Sage on May 26 and 27, 2009. This type of deliberation over a period of time does not suggest a discriminatory motive, but rather nondiscriminatory economic considerations.

The principal consideration in determining the motivation of an employer in taking adverse action against employees is whether the reasons advanced by the employer are legitimate or pretextual. An examination of all the evidence in this case convinces me that the Respondent's layoff of employees on June 15, 2009 was not based on discriminatory motives violative of Section 8(a)(3) and (1) of the Act, but rather was based on nondiscriminatory economic considerations. As noted above, Serdar testified that the decision to eliminate the room service department and consolidate its operations into the Mercat emanated from him and was based on the desire to reduce costs. He similarly testified that the elimination of the two cafeteria attendance was also motivated by a desire to reduce costs. Saldana testified that Serdar spoke to her in May 2009 about consolidating the room service department into the Mercat and the cafeteria attendant functions into the stewarding department. At that time she expressed the opinion that the annual savings in those actions could amount to approximately $500,000 a year. The testimony of certain Serdar and Saldana regarding this conversation is mutually corroborative and uncontroverted and therefore I credit it. Saldana also credibly testified that she was involved in conversations with Karpinski about the potential cost savings before the decision to eliminate the room service department and the two cafeteria attendant positions was effectuated.

Serdar testified that when room service operated as a separate department, on each shift there was generally a manager, a line cook in at least two servers. The number of guests served during a shift could very between as little as 3 or as many as 25. Courtney and Auld confirmed that prior to the changes instituted on June 15, 2009, room service servers could spend approximately half their time during the shift waiting for orders. Serdar further testified that the Mercat restaurant servers and cooks were busy throughout their shift. After the closure of the room service department on June 15, 2009, all room service functions are performed from the Mercat kitchen. The restaurant cooks all room service food. Restaurant servers perform room service functions on a rotating basis. Room service operators are no longer necessary because orders are taken either by the server on duty or a Mercat host. It is apparent that the nature of the consolidation would substantially reduce labor costs in that the Respondent was providing the same services with fewer employees. The absorption of the cafeteria attendant duties into the stewarding department also served to reduce labor costs.

A summary based on the Respondent's profit and loss statement establishes that for the month of July 2009, after the consolidation of room service into the Mercat, the Respondent realized a savings of $27,840 (R.Exh. 58). The only nonlabor cost reduction was a reduction in the cost of food by $800. The only evidence of actual savings introduced at the hearing was for the month of July 2009. However, if the circumstances remained the same, projected over the course of a year the cost savings achieved through the elimination of the room service

department could amount to approximately $333, 000. The elimination of the two cafeteria attendants amounted to a savings of $9052 for July 2009, all of which were attributable to labor costs. (R. Exh. 20). Again, projected over the course of the year this could amount to a labor cost-saving of a proximately $108,000. Both of these measures combined could save the Respondent approximately $440,000 00 a year. While the exact amount may be somewhat uncertain, it is clear that substantial labor cost savings could result from the elimination of the room service department and the two cafeteria attendant positions. I am convinced that the Respondent had nondiscriminatory economic reasons for the layoff of the 14 employees on June 15, 2009. I find therefore that the Respondent would have taken this action even in the absence of the union activities of some of the employees in these departments. As noted above, the amount of work Hill, Padilla and Salgado performed for these two departments is unclear. It is clear, however, that there is no evidence that any of these employees were union supporters. Since I do not find that the Respondent laid off room service employees and the two cafeteria attendants to rid itself of the known union supporters, the evidence certainly does not support a finding that the layoffs of Hill, Padilla and Salgado were discriminatory. Accordingly I find that the 14 employees laid off on June 15, 2009 were not laid off in violation of Section 8(a)(3) and (1) of the Act.[26]

The Alleged Refusal to Recall the Employees Laid Off on June 15, 2009, in Violation of Section 8 (a)(3) of the Act

Paragraphs XI (b) an (c) of the complaint alleges that the Respondent refused to recall 10 of the employees laid off on June 15, 2009, in violation of Section 8(a)(3) and (1) of the Act. [27] The General Counsel and Charging Party specifically contend that Courtney, Walker, Calle Baker, and Johnson, who were engaged in union activity and applied for new positions after their layoff, were discriminatorily denied reemployment. The General Counsel and Charging Party further contend that the remainder of the laid off employees alleged in the complaint (Hill, Salgado, Pompey, Witherspoon and Gomez) were also discriminatorily denied reemployment because of their association with the known union supporters in room service and the cafeteria (GC's brief, pgs. 47-48).

The Respondent contends that its failure to recall any of the employees laid off on June 15, 2009, was not based on a discriminatory motive and therefore not violative of Section 8(a)(3) and (1) of the Act.

In Horizon *Contract Glazing, Inc*., 353 NLRB No. 16 (2008) a case involving an alleged refusal to recall an employee in violation of Section 8(a)(3) and (1), the Board applied the analysis it uses to determine refusal to hire cases set forth in *FES,* 331 NLRB 9 (2000) supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2000). In FES the Board indicated that in order to establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, supra, establish the following;

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[26] This finding, of course, has no effect on my finding that the 14 employees were laid off in violation of Section 8(a)(5) and (1) of the Act and the remedy I will provide for that violation.

[27] The complaint does not allege that Padilla, Guerrero, Merthol and Robinson were refused recall in violation of Section 8 (a) (3) and (1) of the Act.

> (1) [T]hat the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual were applied as a pretext for discrimination, and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have
>
> hired them for that reason even in the absence of their union support or activity. *FES,* 333 NLRB at p.12 (footnotes omitted).

In the instant case, the room service department employees who were present when the June 15, 2009, layoffs were announced were given a document entitled "Opportunity Knocks" (GC Exhibit 5) which listed the following positions that employees could apply for at the Blackstone: on-call room attendant (housekeeping), guest services supervisor (front office); night auditor (3rd shift); bell person (flexible hours); delighted to serve attendant (flexible hours); group housing coordinator (flexible hours) and host/hostess. This document also indicated that the following positions were available at the Essex Inn, another hotel in Chicago operated by Respondent Sage: part-time lifeguard; front desk associate; and housekeeping house person.

The record establishes that on June 15, 2009, Tina Young Robinson was transferred from her position as an overnight room service operator to position as telephone operator at the Blackstone (Tr. 999). Although laid off from his position as a steward on June 15, 2009, Miquel Padilla was placed in a position as a busser in the Mercat restaurant within a week (Tr. 1001). Room service cook José Guerrero was reemployed as a cook in the restaurant in July 2009. The record also indicates that employees Marthol, Geovani Calle, and Witherspoon were reemployed by the Respondent at various times prior to the close of the hearing.

In deciding this allegation of the complaint, I will first address the attempts to be reemployed by laid-off employees who were supporters of the Union. From June 16, 2009 through September 2009 Courtenay applied for the following positions at the Respondent: bell person; housekeeping house person; Mercat host; front desk associate; Mercat bartender; concierge; on-call room attendant; night auditor; Mercat server; Mercat busser; assistant banquet manager; and Mercat food runner (Tr. 98-116; GC Exhs.87 and 23). She was not hired by the Respondent in any of these positions.

Courtney's testimony regarding her efforts to be reemployed at the Respondent is uncontroverted and I credit it in its entirety. Courtney testified that on June 23, 2009, pursuant to a posting by the Respondent on Craig's list, Courtenay went to an "open call" for a host position at the Blackstone. Serdar briefly appeared in the interview room and spoke to Courtney but he did not participate in the interview. Courtney's interview was with the chief host who told her

that she would pass along the information regarding the interview to Serdar (Tr. 103-104). On June 25, 2009, Courtney spoke to Kate Halvey, the front office manager, and set up an interview for a bell person position. The interview was conducted on July 1, 2009, with Halvey and Matt Balsik, a hotel manager. Halvey told Courtney that she should hear about her application within a week. On July 6, 2009 Courtney received a phone call from Katie Clas, a Mercat manager. Clas told Courtney that Serdar had asked her to call. Clas informed Courtney that the Respondent had decided not to hire any hosts. Courtney called Halvey on July 8 and a couple of days after that to check on the bell person job. She never received a return phone call but later received a rejection e-mail for that position, as she did with all of the other positions that she had applied for.

The applications that Courtney filed contained a resume with her experience and qualifications (Tr. 109). The Respondent had hired Courtney as a room service server and had employed her in that position for approximately one and a half years and presumably it was familiar with her qualifications and experience. Her resume, of course, listed her experience as a room service server at the Blackstone. It also indicated she had worked as a host, a room service server and cashier in the Courtyard by Marriott in downtown Chicago from October 2006 to September 2007. She also previously worked as a host, waitress and bartender at the Raccoon River Brewing Co. in Des Moines, Iowa.

The record establishes that on June 16, 2006, the Respondent hired five waiters in the Mercat; four more were hired in August 2009 and one was hired in September 2009. (GC Exh. 90). Even though Courtney was told on July 6, 2009 that the Respondent was not hiring any hosts, the Respondent, in fact, hired a new host/cashier on July 7, 2009. It also hired additional employees in that position on July 27, September 5, September 7 and September 9, 2009 (GC Exh. 90)

Applying the factors set forth in *Wright Line* and *FES* the General Counsel has established a prima facie case with respect to Courtney. As found above, Courtney was a known union supporter and there is evidence of the Respondent's animus toward the Union. In addition, the evidence reflects that the Respondent hired waiters and host/cashiers Courtney had experience an training with respect to both those positions.

Turning to the Respondent's defense, the Respondent contends that Courtney did not have sufficient experience to be employed as a server at upscale restaurants such as the Mercat. The Respondent points to the testimony of Serdar that the Respondent seeks to hire individuals as servers at the Mercat who have "fine dining or white tablecloth dining experience" (Tr. 1379). Deirdre Auld was a room service server at the Blackstone before she transferred to the Mercat as a waiter. Auld testified that her prior experience included work as a server in a restaurant in North Carolina that had an extensive wine list and, in her opinion, would be considered a high-quality restaurant. (Tr. 418-419). There is no evidence regarding nature of the restaurant that Courtney worked at in Des Moines, Iowa. The Respondent produced no evidence, however, regarding the background or experience of the 10 servers it hired during the period from June to September 2009, when Courtney was seeking to be reemployed. Thus, the fact that Auld's previous experience as a server may have been at a restaurant of higher quality than that of Courtney is not dispositive. As *FES*, supra, makes clear if the Respondent asserts that an applicant was not qualified for the position or that others who were hired had superior qualifications, it is the Respondent's burden to establish that. Since the qualifications of the other

10 servers hired are unknown, I find that Respondent has not met its burden of showing that it would not have hired Courtney as a server even in the absence of her union activity.

With respect to the host/cashier position, the Respondent produced no evidence to establish that Courtney was not qualified for that position. Courtney had prior experience as a host and cashier at a Courtyard by Marriott in downtown Chicago. There is no evidence that the position she applied for at the Respondent was any different or that her previous experience did not qualify her for the position. In addition, there is no evidence regarding the qualifications of the five host/cashiers who were hired during the period of time that Courtney was seeking reemployment. It is the Respondent's burden to produce such evidence. Finally, Courtney was informed that the Respondent was not going to hire a hostess/cashier on July 6, 2009, but, in fact, one was hired on July 7, 2009. Giving Courtney misleading information about a position she applied for suggests a discriminatory motive.

The Respondent additionally contends that Courtney's "argumentative behavior"" also serves as a justification for not recalling her. (Respondent's brief, pgs. 120-121). I note that none of the Respondent's witnesses testified that this was the reason for the refusal to rehire Courtney despite the many applications that she had filed. It appears therefore that this argument is a post hoc rationalization advanced by Counsel. Nevertheless, I will address it. The Respondent contends that there are two incidents that justify its refusal to recall Courtney. The first is the meeting on December 18, 2008 where the Serdar invited employee questions regarding the *Dana* notice. During a heated debate between Courtney, Clontz, Serdar, and Hussain, Courtney called Serdar a liar. The second incident occurred on January 27, 2009 when Courtney confronted Serdar while he was soliciting employees' signatures on the decertification petition. On this occasion, Courtney accused Serdar of violating the law and threatened to get him fired because of his involvement with the decertification petition.

In support of its argument, the Respondent relies principally on *Cardinal Home Products, Inc.*, 338 NLRB 1004 (2003). There, the Board found that although the General Counsel had established a prima facie case of discriminatory failure to recall employee Thomas, the employer established a valid *Wright Line* defense. The Board found that the argumentative and combative relationship between Thomas and his immediate supervisor was a legitimate basis for refusing to recall Thomas. Id. at 1020-1021. I find that *Cardinal Home Products* is distinguishable because the arguments that Thomas had with his supervisor, Davis, did not occur during times when Thomas was engaged in protected activity.

The first incident that Respondent points to regarding Courtney's "argumentative behavior" occurred during an exercise of Courtney's Section 7 rights and the second was provoked by conduct by Serdar which I have found to constitute an unfair labor practice. Whether an employee engages in misconduct during protected activity sufficient to deprive them of the protection of the Act depends on a balancing of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Diamler Chrysler Corp*., 344 NLRB 1324, 1329 (2005) and cases cited therein.

The Respondent called the December 18, 2008, departmental meetings and set the agenda. Respondent invited questions from employees regarding the posting of the *Dana* notice.

Courtney called Serdar a liar during a heated exchange between Clontz, herself, Serdar and Hussein regarding the *Dana* notice. Her statement was not accompanied by any profanity. No disciplinary action was taken against her at the time, not even a verbal counseling. The Board has noted that "although employees are permitted some leeway for impulsive behavior when engaged in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994). While I do not find that the Respondent's actions with respect to the meetings held on December 18, 2008, constitute an unfair labor practice, I also do not find that Courtney's exchange with Serdar and Hussein is a sufficient basis to justify refusing to recall her. It is within the leeway accorded employees for impulsive behavior while they are engaged in activity protected by Section 7. The second incident on January 27, 2009 again was not accompanied by any profanity and was provoked by Serdar's conduct in unlawfully soliciting signatures for the decertification petition. Accordingly, on the basis of the foregoing, I find that the evidence supports the conclusion that the Respondent refused to rehire Courtney in violation of Section 8(a)(3) and (1) of the Act.

Geovani Calle testified that he went to the Blackstone approximately four days after he was laid off and spoke to "Chef Mike" who told him that there was an opportunity for work in the Mercat kitchen. "Chef Mike" told Calle that he would call him but did not. Approximately two weeks later Calle went to the Blackstone and again spoke to "Chef Mike", who said that work was available as a line or banquet cook and promised to call Calle. When Calle did not hear from "Chef Mike", he spoke to him again and was told that there was no work available. (Tr. 519- 524). On September 25, 2007, Calle sent a letter to Wavrek indicating his interest in employment at the Respondent. His letter was sent in response to Wavrek's letter of September 15, 2009, which inquired as to his interest in employment Blackstone. Calle was reemployed by the Blackstone at some point in October 2009, after he testified at the hearing on October 7, 2009. The record reflects that José Guerrero, a room service cook who was laid off on June 15, 2009, was reemployed by the Respondent as a cafeteria/banquet cook in July 2009. The Respondent also hired two new cooks on July 21 and August 13, 2009 (GC Exh. 90)

As set forth above, Geovani Calle was a known union supporter. The only evidence of its attempts at reemployment prior to September 25, 2007, are his contacts with "Chef Mike." "Chef Mike" is not alleged to be a supervisor within the meaning of Section 2 (11) of the Act and there is insufficient record evidence to establish that he is in fact a statutory supervisor. The record does not indicate the role of "Chef Mike" in the hiring process of the Respondent. I am unwilling to infer, under these circumstances, that Calle's conversation with "Chef Mike" were communicated to Serdar, Wavrek or any other Respondent supervisor with clear authority to hire. After Calle's written expression of interest in employment and after his adverse testimony against the Respondent, he was reemployed in October 2009. Accordingly, I find the evidence insufficient to establish that the Respondent refused to recall or rehire Geovani Calle in violation of Section 8(a)(3) and (1) of the Act.

Sharon Baker was a known union supporter who did not testify at the hearing. After her layoff on June 15, 2009, the only evidence of her applying for work at the Respondent was her letter of September 17, 2009, to Wavrek indicating that she was willing to work at "whateverjob is available." (GC Exh. 82). The record establishes that in July 2009 the Respondent hired Marthol, the other former cafeteria attendant, who was not a known union supporter. There is no evidence that Baker sought employment before September 17, 2009 and no evidence that the Respondent hired any individuals after that date. The list of employees hired in unit positions

introduced into evidence at the hearing has as its last entry individuals hired on September 14, 2009 (GC Exh. 90). Accordingly, I find that the evidence does not establish that the Respondent refused to recall or rehire Baker for reasons that are violative of Section 8(a)(3) and (1) of the Act.

Renee Walker signed a union card but there is no evidence that the Respondent had knowledge of her union support prior to her testimony at the hearing on October 7, 2008. Lamar Johnson was pictured on the first union flyer distributed in the employee locker room in early December 2008. As I have noted above, I am unwilling to attribute knowledge of Johnson's union support to the Respondent based only on his photograph appearing in that first flyer. Accordingly, since there is no evidence that the Respondent knew of the union activities of Walker or Johnson prior to October 7, 2009, I find that the General Counsel did not establish a prima facie case that they were refused recall or rehire in violation of Section 8(a)(3) and (1) of the Act.

With respect to the remaining employees laid off on June 15, 2009 I am unwilling to subscribe to the theory of the General Counsel that the mere fact that Hill, Salgado, Pompey, Witherspoon and Gomez worked with known union supporters was the basis for the Respondent's failure to recall or rehire them. There is no evidence that any of these employees engaged in union activity. While I have found that the Respondent did refuse to rehire Courtney in violation of Section 8(a)(3) and (1) of that Act, she was by far the most ardent Union supporter of the employees laid off on June 15, 2009. As noted above, by the close of the hearing, the Respondent had reemployed Calle, a known union supporter, and Witherspoon. Under all the circumstances, I find that the evidence is insufficient to establish that the Respondent failed to recall these employees because of a discriminatory motive. Accordingly, I find that the Respondent did not refuse to recall Hill, Salgado, Pompey, Witherspoon or Gomez in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. By maintaining overly broad rules through April, 2009, regarding confidentiality, media requests for information and solicitation, the Respondent has violated Section 8(a)(1) of the Act.

2. By posting a memo on December 10, 2008, that unlawfully encouraged the filing of a decertification petition the Respondent has violated Section 8(a)(1) of the Act.

3. By soliciting employees to sign a petition to decertify the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. The Union is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

> All regular full-time and regular part-time hotel service, housekeeping, guest services, food and beverage, and laundry employees (including room cleaners, house persons, bell persons, telephone operators, kitchen employees, servers, bussers, bartenders, cashiers, hosts, concierges, laundry workers, front desk, and recreational employees) employed by the Employer at its facility currently located

at 636 Michigan Avenue, Chicago, Illinois but excluding all secretarial, office clerical, sales, and maintenance employees and all managers, supervisors, and guards as defined in the National Labor Relations Act.

5. By delaying the provision of and failing to provide relevant and necessary information requested by the Union concerning bargaining unit employees' health benefits the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By unilaterally changing its health care plan benefits and employee contributions for health plan coverage for unit employees the Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By unilaterally establishing terms and conditions of employment regarding the payment of health insurance premiums and by bypassing the Union and dealing directly with employees over this issue the Respondent has violated Section 8(a)(5) and (1) of the Act.

8. By refusing to bargain with the Union about a decision to transfer work performed by room service department employees and cafeteria attendants to employees employed in the Mercat restaurant the Respondent has violated Section 8(a)(5) and (1) of the Act.

9. By refusing to bargain with the Union regarding the layoffs of employees Meghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon, and Nayeli Gomez the Respondent has violated Section 8(a)(5) and (1) of the Act.

10. By discriminatorily refusing to rehire employee Meghan Courtney, the Respondent has violated Section 8(a)(3) and (1) of the Act.

11. The above violations are unfair labor practices within the meaning of the Act.

12. The Respondent has not otherwise violated the Act.

Remedy

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

I shall order the Respondent to post a notice to employees in Spanish and Mandarin as well as in English. The record reflects that a number of unit employees are more conversant with those languages than with English. In such circumstances, the Board's policy is to post the notice in multiple languages. *Alstyle Apparel*, 351 NLRB 1287, at 1288 (2007) In addition, in the instant case, the *Dana* notice was posted in all three languages so that it is appropriate to also post this notice in the same languages.

The Respondent must provide to the Union with information for both the 2008-2009 and 2009- 2010 health care plans with respect to the Union's request for a list of employees' health insurance coverage and level of coverage, a summary plan description for each plan offered and

the cost for the employee and the employer, to the extent that such information has not already been provided.

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its 2009-2010 health care plan benefits and employee contribution rates for unit employees, it is required to restore the status quo ante by, upon request by the Union, returning to its 2008-2009 health care plan with its costs and benefits. *Larry Geweke Ford,* 344 NLRB 628, 629 (2005); *Mid-Continent Concrete,* 336 NLRB 258, 262 (2001). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from the unilateral implementation of the 2009-2010 health care plans. The reimbursement to employees shall be computed as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). However, the Respondent will be permitted to litigate in compliance whether it would be impossible or unduly or unfairly burdensome to restore the 2008-2009 health care plans. See *Larry Geweke Ford,* supra, at 629.

Since the Respondent has violated Section 8 (a) (5) and (1) of the Act by bypassing the Union and dealing directly with employees over newly established terms and conditions of employment regarding the payment of health insurance premiums, the Respondent must restore its procedure of collecting health insurance premiums from employees paychecks and void any "Health Insurance Premium Catch-Up Deduction Authorization" forms that employees signed to pay health insurance premiums they owed. In addition, the Respondent shall reimburse employees for any money they paid pursuant to the execution of such forms. The reimbursement to employees shall be computed as prescribed in *Ogle Protection Service,* supra, and *New Horizons* for *the Retarded*, supra.

Since the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about a decision to transfer bargaining unit work and to lay off unit employees the Respondent must offer Meaghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, François Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon, and Nayeli Gomez, who were laid off pursuant to its unlawful unilateral action, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. If necessary to fulfill its reinstatement obligation, the Respondent shall reopen its room service department. See *Westinghouse Electric. Corp*. 313 NLRB 452, at 454 (1993).The Respondent shall also make whole these employees for any loss of earnings and other benefits suffered as a result of its unlawful unilateral action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since the Respondent unlawfully refused to rehire Meghan Courtney in violation of Section 8(a)(3) and (1) of the Act, in addition to making her whole for any loss of pay or other benefits she may have suffered by reason of the discrimination against her in the manner set forth in the preceding paragraph, the Respondent must remove from its files any reference to its unlawful refusal to rehire Courtney and to notify her in writing that this has been done and that the refusal to rehire her will not be used against her in any way.

I deny the General Counsel,s request for compound interest computed on a quarterly basis for any backpay. The Board has recently indicated that it is not prepared at this time to deviate from its current practice of assessing simple interest. *Atlas Refinery, Inc*., 354 NLRB No.120, at fn. 9 (2010).

I also deny the Charging Party's request that the notice should be read aloud by an agent of the NLRB at a mandatory meeting of all bargaining unit employees. It has not been established that the Board's traditional remedies, including the posting of the notice in English, Spanish and Mandarin, are insufficient to address the violations found in this case. See *Alstyle Apparel,* supra, and *Chinese Daily News*, 346 NLRB 906, 909 (2006), enfd. 224 Fed. Appx. 6 D.C. Cir. 2007).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Chicago Hotel Master Lessee, LLC, and Sage Hospitality Resources, LLC, A Single Integrated Enterprise, Single Employer and/or Joint Employers d/b/a The Blacks tone, A Renaissance Hotel, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad rules entitled entitled "Confidentiality", "Media Requests for Information", and "Solicitation" in its employee handbook.

(b) Sponsoring a decertification petition by posting a memo encouraging a decertification effort.

(c) Encouraging and assisting in the circulation of a decertification petition by supervisory involvement in the solicitation of signatures for a decertification petition.

(d) Delaying provision of and failing to provide relevant and necessary information requested by the Union concerning bargaining unit employees' health benefits. The bargaining unit is:

> All regular full-time and regular part-time hotel service, housekeeping, guest services, food and beverage, and laundry employees (including room cleaners, house persons, bell persons, telephone operators, kitchen employees servers bussers, bartenders, cashiers, post concierges, laundry workers, front desk, and recreational employees) employed by the Employer at its facility currently located at 636 Michigan Avenue Chicago, Illinois but excluding all secretarial, office clerical, sales, and

[28] 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.

maintenance employees and all managers, supervisors, and guards as defined in the National Labor Relations Act.

(e) Refusing to bargain with the Union regarding health care plan benefits and rates.

(f) Implementing new health care plans without bargaining with the Union.

(g) Requesting employees to execute agreements requiring them to pay an outstanding balance in health insurance premiums without providing the Union with prior notice and the opportunity to bargain.

(h) Refusing to bargain with the Union regarding a decision to close the room service department and to transfer work performed by room service department employees and cafeteria attendants to employees employed in the Mercat restaurant.

(i) Refusing to bargain with the Union about a decision to lay off unit employees.

(j) Refusing to rehire or otherwise discriminating against any employee for engaging in union activity.

(k) 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) Rescind the work rules entitled "Confidentiality", "Media Requests for Information", and "Solicitation" and remove them from its employee handbook and notify employees in writing that they are no longer being maintained; to the extent it is already not done so.

(b) Provide to the Union all of the information it requested in its December 10, 2008, request regarding a list of employees health insurance and level of coverage, a summary plan description for each health care plan offered and the cost for the employee and the Respondent, to the extent it has not already done so.

(c) Upon request, bargain in good faith with the Union over changes to health care plan benefits and rates.

(d) Upon request by the Union, rescind the changes to the Respondent's 2009-2010 health insurance benefits and premiums and restore the insurance furnished under the 2008-2009 health care plans that were in existence prior to the change.

(e) Make employees whole for all increased cost to them for health insurance benefits in excess of their cost under the 2008-2009 health care plans, including the cost of the health insurance premiums and the expenses incurred as a result of the change in insurance plans, with interest.

(f) Notify and, on request, bargain with the Union, regarding collecting money from employees to pay for an outstanding balance for insurance premiums.

(g) Restore the procedure of collecting health insurance premiums from employees' paychecks and void any "Health Insurance Premium Catch-Up Deduction Authorization" forms that employees executed to pay an outstanding balance for insurance premiums.

(h) Make employees whole for any money they paid for health insurance premiums pursuant to any "Health Insurance Premium Catch-Up Deduction Authorization" they may have executed, with interest.

(i) Upon request, bargain with the Union in good faith about the decision to eliminate the room service department and to transfer work performed by room service department employees and cafeteria attendants to employees employed in the Mercat restaurant.

(j) Upon request, bargain with the Union in good faith, about the decision to lay off the 14 employees who were laid off on June 15, 2009.

(k) Within 14 days from the date of the Board's Order, offer employees Meghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon, and Nayeli Gomez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, reopening, if necessary, the room service department, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(l) Make Meghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol , Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon, and Nayeli Gomez whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them in the manner set forth in the remedy section of the decision.

(m) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to rehire a Meghan Courtney and within 3 days thereafter notify her in writing that this has been done and that the refusal to rehire will not be used against her in any way.

(n) 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.

(o) Within 14 days after service by the Region, post at its facility in Chicago Illinois, copies of the attached notice marked "Appendix 1"[29] in English, Spanish and Mandarin. Copies of the notice, on forms provided by the Regional Director for Region13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2008.

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

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

Dated, Washington, D.C., June 29, 2010

_____
Mark Carissimi
Administrative Law Judge

[29] 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."

APPENDIX 1

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain overly broad rules entitled "Confidentiality", "Media Requests for Information", and "Solicitation" in our employee handbook.

WE WILL NOT sponsor a decertification petition by posting a memo encouraging a decertification effort.

WE WILL NOT encourage and assist in the circulation of a decertification petition by supervisory involvement in the solicitation of signatures for a decertification petition.

WE WILL NOT delay provision of and fail to provide relevant and necessary information requested by the Union, as the exclusive bargaining representative of the employees in the following appropriate unit, concerning unit employees' health care benefits:

> All regular full-time and regular part-time hotel service, housekeeping, guest services, food and beverage, and laundry employees (including room cleaners, house persons, bell persons, telephone operators, kitchen employees, servers, bussers, bartenders, cashiers, hosts, concierges, laundry workers, front desk and recreational employees) employed by the Employer at its facility currently located at 636 South Michigan Ave., Chicago, IL, but excluding all secretarial employees, sales and maintenance employees, office clerical employees, professional employees managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union regarding health care plan benefits and rates.

WE WILL NOT implement new health care plans without bargaining with the Union.

WE WILL NOT request employees to execute agreements requiring them to pay an outstanding balance of health insurance premiums without providing the Union with prior notice and the opportunity bargain.

WE WILL NOT refuse to bargain with the Union regarding a decision to close the room service department and transfer work performed by room service department employees and cafeteria attendants to employees employed in the Mercat restaurant.

WE WILL NOT refuse to bargain with the Union about a decision to lay off unit employees.

WE WILL NOT refuse to hire or otherwise discriminate against employees for engaging in union activity.

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

WE WILL rescind the work rules entitled “Confidentiality”, “Media Requests for Information” and "Solicitation” and remove them from our employee handbook and notify employees in writing that they are no longer being maintained, to the extent we have not already done so.

WE WILL provide to the Union all of the information requested in its December 10, 2008, request regarding a list of employees’ health insurance selection and level of coverage, a summary plan description for each health care plan offered and the cost for the employee and the Employer.

WE WILL, upon request, bargain in good faith with the Union over changes to health care plan benefits and rates.

WE WILL, upon request by the Union, rescind the changes to the 2009-2010 health insurance benefits and premiums and restore the insurance furnished under the 2008-2009 health care plans that were in existence prior to the change.

WE WILL make employees whole for all increased costs to them for health insurance benefits in excess of their cost under the 2008-2009 health care plans, including the cost of the health insurance premiums and the expenses incurred as a result of the change in insurance plans, with interest.

WE WILL notify and, on request, bargain with the Union regarding a procedure for collecting money from employees to pay for an outstanding balance for health insurance premiums.

WE WILL restore the procedure of collecting health insurance premiums from employees’ paychecks and void any “Health Insurance Premium Catch-Up Deduction Authorization” forms that employees executed to pay an outstanding balance for insurance premiums.

WE WILL make employees whole for any money they paid for health insurance premiums pursuant to any “Health Insurance Premium Catch-Up Deduction Authorization” forms they may have executed, with interest.

WE WILL, upon request, bargain with the Union in good faith about the decision to lay off employees Meghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon, and Nayeli Gomez on June 15, 2009.

WE WILL, within 14 days from the date of this Order, offer employees Meghan Courtney Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon and Nayeli Gomez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, reopening, if necessary, the room service department, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Meghan Courtney, Geovani Calle, Renee Walker, Sharon Baker, Jeff Hill, Laura Salgado, Miquel Padilla, Jose Guerrero, Francois Marthol, Lamar Johnson, Iesha Pompey, Tina Robinson, Chris Witherspoon and Nayeli Gomez whole for any loss of earnings and other benefits suffered as a result of our unlawful action against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to rehire Meghan Courtney and WE WILL within 3 days thereafter notify her in writing that this has been done and that the refusal to rehire her will not be used against her in any way.

CHICAGO HOTEL MASTER LESSEE, LLC, AND SAGE HOSPITALITY RESOURCES, LLC, A SINGLE INTEGRATED ENTERPRISE, SINGLE EMPLOYER AND/OR JOINT EMPLOYERS, D/B/A. THE BLACKSTONE, A RENAISSANCE HOTEL

(Employer)

Dated _____ By _____

(Representative) (Title)

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

209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604
Hours: 8:30 a.m. to 5 p.m.
312-353-7570.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170.