

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

OAKTREE CAPITAL MANAGEMENT, LLC,
and TBR PROPERTY, LLC, a SINGLE EMPLOYER,
d/b/a TURTLE BAY RESORT
and BENCHMARK HOSPITALITY, INC.

and

Cases 37-CA-6601-1
37-CA-6642-1
37-CA-6669-1
37-CA-6691-1
37-CA-6730-1
37-CA-6753-1
37-CA-6756-1
37-CA-6768-1
37-CA-6816-1
37-CA-6826-1
37-CA-6827-1
37-CA-6835-1
37-CA-6840-1
37-CA-6875-1
37-CA-6877-1
37-CA-6878-1

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**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS**

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enfd. 188 F.2d 362 (3d Cir. 1951) 2

Washington Fruit and Produce Co., 343 NLRB No. 125 (2004) 13, 14

I. INTRODUCTION ¹

Beginning in 2004, as the Administrative Law Judge (“ALJ”) correctly found, Respondents committed a long string of unfair labor practices culminating in the unlawful termination of employee Mark Feltman, the unlawful suspension of employee Tim Barron, and the unlawful discipline of employee Jeannie Martinson. In addition, the ALJ also correctly found that Respondents violated the Act by, among other things, restricting the Union’s access to Turtle Bay Resort thereby preventing the Union from performing its duties as exclusive collective bargaining representative, failing to provide presumptively relevant information to the Union, maintaining unlawful work rules, engaging in unlawful surveillance of employees engaged in protected activity, and illegally threatening closure of its facility.

In response to the ALJ’s decision, Respondents have filed 349 exceptions, the great majority of which are improper under Section 102.46(b) of the Board’s Rules and Regulations in that they do not specifically set forth the questions of procedure, fact, law or policy to which exception is taken and/or they contain argument or are composed solely of argument. Respondents also have filed a 173 page brief in support of their exceptions that flagrantly violates the 175 page limit set by the Associate Executive Secretary in this case through the use of more than 20 pages of single-spaced text.² It

¹ The Administrative Law Judge is referred to herein as “ALJ.” References to the ALJ’s decision are noted as “ALJD” followed by the line and page number(s). References to the transcript are noted by “Tr.” followed by the volume and page number(s). References to the General Counsel’s exhibits are noted as “GC” followed by the exhibit number. References to Respondents’ Exhibits are noted as “R” followed by the exhibit number. Respondents’ Brief in Support of Exceptions to ALJD is referred to herein as “RBS” followed by the page number(s).

² Section 102.46(j) of the Board’s Rules and Regulations states in pertinent part that Exceptions “shall be double spaced” In December 2006, Counsel for the

would be nearly impossible, as well as unproductive, to offer a specific response to each of Respondents' improper and baseless exceptions. Instead, Respondents' exceptions are grouped by topic area and addressed generally. Respondents' Exceptions are nothing more than an incoherent, often misleading, attempt to create a smokescreen regarding its numerous unfair labor practices and they should be rejected in their entirety by the Board.³

II. THE ALJ'S CREDIBILITY FINDINGS

Respondents specifically except to a number of the ALJ's credibility findings.⁴ Also, a large number of Respondents' Exceptions are based on the ALJ's findings of fact, which were fully supported by the record and involved credibility determinations. "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *D & F Industries, Inc.*, 339 NLRB No. 73 (2003) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)).

General Counsel filed a Motion to Strike Respondents' Exceptions and Brief in Support of Exceptions to ALJ Decision, which is still pending before the Board. Many of Respondents' Exceptions are pure argument and lack any factual or legal support. Such exceptions are improper and should be rejected as set forth in the pending Motion to Strike. The improper exceptions, included throughout Respondents' Brief in Support and too numerous to list, are not specifically addressed herein.

³ Counsel for General Counsel's Brief to the Administrative Law Judge sets forth in detail the facts and the record citations that support the General Counsel's arguments in this case. Counsel for General Counsel's Brief and the facts and citations therein are incorporated by reference.

⁴ See, for example, Respondents' Exceptions 71, 85, 86, 87, 89, 91, 93, 95, 96, 98, 110, 113, 114, 115, 120, 121, 143, 144, 145, 146, 165, 166, 167, 168, 169, 170, 171, 172, 173, 175, 188, 189, 192, 248, 257, 259, 261, 263, 265, 299, 300, 301, 303, 304, 322, 345.

Nevertheless, Respondents base many of their Exceptions on discredited testimony.⁵

Respondents' exceptions to the ALJ's credibility findings and/or Respondents' exceptions that are supported by testimony that the ALJ did not credit should be dismissed.

III. RESPONDENTS' NUMEROUS ALLEGATIONS OF ALJ BIAS SHOULD BE REJECTED IN THEIR ENTIRETY

Throughout their brief, Respondents allege that the ALJ is biased. Respondents have filed a number of exceptions that specifically relate to this alleged "bias."⁶ These exceptions, generally not worthy of response, are unfounded and should be rejected in their entirety.

A number of Respondents' bias-related exceptions concern the ALJ's sanctioning Respondents for not complying with the General Counsel's subpoenas. *See, e.g.*, Exceptions 38-42. Respondents claim that they "produced all of the documents subpoenaed by the General Counsel" and that the ALJ's statement that "[i]n general, the Respondents did not comply with these subpoenas nor did the named persons appear at

⁵ The ALJ specifically discredited the testimony of the following witnesses: Tom Dougher (ALJD 15-16); Nancy Ramos (ALJD 41: 18-20; 42:8); Fred Scalzo (ALJD 25:26); Sonia Evans (ALJD 26:5); Eric Baeseman (ALJD 32:49); Derek Mendivil (ALJD 38:17; 39:2; 39:27); Tonilynne Cano (ALJD 38:38); Rowena Afoa (ALJD 51: 37-38); Roger Corpuz (ALJD 51: 37-38); Tiffany Martines (ALJD 51: 37-38); and Kaleo Delosantos (ALJD 51: 37-38). The ALJ also found that Ramos, Dougher, and the security guards often contradicted each other, leading to a conclusion that these witnesses lacked trustworthiness. (ALJD 8-9). The ALJ explained that the testimony of witnesses who testified in contradiction to his findings was discredited "either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text." (ALJD 8: 21-24).

⁶ These exceptions include Exceptions 10, 11, 13, 14, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 49, 50, 51, 322.

the hearing pursuant to the subpoenas” is simply wrong. (RBS 25-26). Respondents are incorrect, and a clarification of the actual facts is warranted.

The General Counsel issued subpoenas ad testificandum for Benchmark Principal Burt Cabanas (“Cabanas”) and Oaktree Principal Russell Bernard (“Bernard”) which the ALJ enforced on the first day of the hearing. (Tr. 1:79-80). The General Counsel sought to have Cabanas and Bernard testify as the first witnesses, but neither was present to testify. (Tr. 1: 118). Indeed, Bernard and Cabanas *never* appeared to testify in the unfair labor practice proceeding.⁷ Respondents’ Attorney instead offered Mark Porosoff (“Porosoff”), Senior Vice President, Legal, of Oaktree Capital Management, as the proper custodian of records and someone who could testify in lieu of subpoenaed witness Oaktree Principal Bernard. (Tr. 1: 77-78; 81; Tr. 4: 842-44). Also, Respondents’ Attorney argued that the subpoenas duces tecum and ad testificandum of Burt Cabanas should be quashed in part because:

We have offered either Mr. [Abid] Butt and/or Mr. Porosoff to render testimony on these issues rather than bringing to this hearing these senior level executives of the corporation. These individuals would be able to testify as to the information requested I think competently and properly.

(Tr. 1: 80-81). Nevertheless, when Porosoff finally did testify on the eighth day of the hearing, Respondents’ Attorney objected to any questions that were outside the scope of the attorney’s very brief direct examination. (Tr. 8: 1596-97). Respondents subsequently stated: “Respondents called Marc Porosoff as a witness for one purpose, as custodian of

⁷ Respondents admit this on page 26 of their Brief.

records to authenticate a document which was admitted into evidence.” (Respondents’ Motion to Disqualify the Administrative Law Judge filed on October 14, 2005 at 13).⁸

The General Counsel also issued subpoenas duces tecum to Chief of Security Dougher, Turtle Bay Resort, Oaktree Capital Management, and Benchmark Hospitality, Inc. Respondents turned over no documents on the first day of the hearing, despite the fact that the ALJ denied all of Respondents motions to revoke. (Tr. 1: 65). On the second day of the hearing, when the Respondents still had not complied with any of the subpoenas, Counsel for the General Counsel moved for sanctions under *Bannon Mills*, 146 NLRB 611, 614 fn. 4, 633-34 (1964). (Tr. 2: 219-220). The ALJ stated that he was inclined to allow the General Counsel additional latitude with respect to its offer of evidence due to the failure of Respondents to comply with the subpoenas. (Tr. 2: 226-227).

Despite adverse rulings by the ALJ and his order to produce the subpoenaed documents, Respondents did not produce any documents pursuant to the subpoenas until the close of the third day of the hearing. At that time, they only *partially* complied with the subpoena duces tecum to Chief of Security Dougher. (Tr.3: 625). At the end of the sixth day of the hearing, Respondents’ attorney represented that the only matter not complied with for the Dougher subpoena duces tecum was “the tapes or proposed tapes.” (Tr. 6: 1298). Respondents’ attorney claimed that Dougher’s notes had been provided to the General Counsel at an earlier date. This representation was false, however, as the General Counsel had been provided with only one page of Dougher’s apparently copious

⁸ Significantly, Respondents in their Brief actually state that Oaktree Principal Bernard was represented by Porosoff at the hearing. (RBS 26).

notes. (Tr. 6: 1299). The ALJ stated that complete compliance with the subpoena was necessary. (Tr. 6: 1302-1303).

The General Counsel finished presenting his case on July 29, 2005. In the interim between July 29, 2005, and October 18, 2005, Respondents provided the General Counsel with security reports, apparently in response to the subpoena duces tecum to Dougher. On September 22 and September 28, 2005, Respondents produced selected and redacted documents apparently pursuant to the subpoenas duces tecum of Oaktree and Benchmark.

Thus, the ALJ was correct in asserting that “[i]n general, the Respondents did not comply with these subpoenas nor did the named persons appear at the hearing pursuant to the subpoenas.”

IV. THE ALJ CORRECTLY DETERMINED THAT OAKTREE AND TBR PROPERTY ARE A SINGLE EMPLOYER AND OAKTREE AND BENCHMARK ARE JOINT EMPLOYERS

Respondents except to the ALJ’s correct conclusion that Respondents Oaktree and TBR Property are a single employer and that Oaktree and Benchmark are joint employers.⁹ Respondents seek to portray Oaktree as merely an “asset manager” of Turtle Bay Resort operations. (RBS 37). However, under the facts set forth by the ALJ and in Counsel for the General Counsel’s Brief to the ALJ, at pages 45-50, there is ample evidence in the record to support the ALJ’s conclusions.

Respondents attempt to explain away in their brief Vice President of Benchmark and General Manager of Turtle Bay Resort Abid Butt’s admission that Oaktree representative Hy Adelman (“Adelman”), who maintains an office and residence on Turtle Bay grounds, is “the person responsible for the overall resort.” (Tr. 12: 2596,

⁹ Respondents’ Exceptions 52-56.

Butt; Tr. 1: 143, Ramos; RBS 36-37). However, Respondents' attorney, on redirect examination did not touch on this point at all. (Tr. 12: 2644-45). Thus, the record evidence establishes that Oaktree representative Adelman is "the person responsible for the overall resort."

Respondents also argue that there is no evidence that Adelman participated in any negotiations for labor agreements, among other things. (RBS 37). Conveniently, Respondents fail to mention that Russell Bernard, Oaktree's principal, was involved in negotiations. (GC Ex. 63, Santolli Affidavit, pages 6 and 8, Exhibit 4, and Exhibit 5A page 2; Tr. 8: 1677-78, Porosoff). Adelman as the "Owner/Representative" approved an agreement to provide housekeeping supplies to Turtle Bay Resort. (Tr. 12: 2631, Butt; GC Ex. 72). Adelman also had to approve of a lease agreement before Respondent TBR executed the agreement. (GC Ex. 73).¹⁰

In consideration of all the circumstances, as the ALJ properly found, Oaktree and TBR Property are sufficiently integrated to be deemed a single employer. Furthermore, Respondents Benchmark and TBR Property, together with TBR Property's single employer, Oaktree, are joint employers of the employees at Turtle Bay Resort.

¹⁰ Respondents apparently redacted Adelman's name and title from the email.

V. UNFAIR LABOR PRACTICES

A. RESTRICTING THE UNION'S ACCESS TO TURTLE BAY AND PROHIBITING THE COLLECTION OF DUES – COMPLAINT PARAGRAPHS 11, 12, 16, 17, 18, 21, 22

1. *Background*

There is no dispute that the following access provision of the expired collective bargaining agreement continued in full force and effect during the time period involved in this case:

Authorized representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference with the normal conduct of business.

As noted by the ALJ, by not listing the allowed purposes for the Union's visits to the hotel, this access provision is less restrictive than the access provision in *Frontier Hotel & Casino*, 309 NLRB 761 (1992), *enfd. sub nom. Unbelievable, Inc. v. NLRB*, 71 F.3d 1434 (9th Cir. 1995).

2. *Respondents Unlawfully Interfered With and Restrained the Union in Communicating with its Membership*

The ALJ found that “[t]here is no credible evidence that [Union Business Agent Marian] Marsh or other union representatives caused any interference with the Respondents’ normal conduct of business on February 14 and 18, May 24, June 2, 7, 12, 15, 17, and 22, 2004.” (ALJD 48: 39-40; 51: 28-29). The ALJ found that by their conduct on those occasions of telling the union representatives that they were trespassing, by issuing and handing out trespass notices to the union representatives, and/or by evicting the union representatives from Turtle Bay, the Respondents interfered with and restrained the Union in communicating with its membership. (ALJD 48: 41-44). Thus,

the ALJ concluded that because the Respondents' conduct either had the indirect impact on employees of interfering with union-related communications or directly coerced and restrained employees who were engaging in the union activity of conversing with their bargaining representative, Respondents violated Section 8(a)(1) of the Act on each occasion. (ALJD 49: 5-10).

It is difficult to determine from Respondents' brief exactly what Respondents argue in response to these findings of the ALJ. Nevertheless, the ALJ based his decision on witness credibility. Thus, the ALJ's conclusion regarding Respondents' unlawful interference with the Union in communicating with its membership should not be disturbed.

3. *Respondents Violated the Act by Summoning the Police to Evict Union Representatives*

The ALJ found that on February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, 2004, and January 27, 2005, Respondents violated the Act by calling the Honolulu Police Department to assist in evicting the union representatives from Turtle Bay Resort property. (ALJD 49: 12-14). The ALJ found that Respondents failed to provide a credible explanation as to why it was necessary to call the police. (ALJD 49: 18-19). In reaching these conclusions, the ALJ noted that “[t]here is no credible evidence” that Union representatives caused disruptions or interfered with business on the days Respondents summoned the police to Turtle Bay and on the days that Union Business Agents Marian Marsh (“Marsh”) or Claire Shimabukuro (“Shimabukuro”) were issued trespass notices. (ALJD 51: 25-33). The ALJ found that on each occasion the Respondents summoned the police to assist the Respondents in “intimidating, evicting,

interfering with, and restraining a union representative, they violated Section 8(a)(1) of the Act.” (ALJD 49: 34-36).

Respondents argument as to why the ALJ erred on this point is vague and supported by no record cites. (See RBS 119-121). Respondents appear to argue that they only called the police on “rare occasion” and rarely evicted any Union business agents. Respondents claim that they called the police to restore order not to intimidate the Union members or to evict Union business agents. Respondents vague, unsupported, and baseless arguments should be disregarded.

4. *Respondents Violated the Act by Unilaterally Changing the Union’s Access to Turtle Bay Resort*

The ALJ correctly found that Respondents violated Section 8(a)(5) and (1) of the Act by materially, substantially, and significantly changing and interfering with the Union’s access to Turtle Bay on February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, 2004, and January 27, 2005. (ALJD 50: 40-44).

Respondents object to this finding and assert “if there were any unilateral changes, it was the Union and business agents such as Marsh and Shimabukuro who elevated their disruptions to a new plateau on February 12, 2004” (RBS 109; 119-120). Respondents apparently refer in this regard to a protected rally on public grounds near Turtle Bay Resort. (See RBS 110; ALJD 53: 9-23). As the ALJ pointed out in the decision, such rallies are not related to the contractual access provision. Thus, the events that occurred at the February 12, 2004, rally are irrelevant to the question of whether Respondents unilaterally changed the Union’s contractually agreed to access rights to Turtle Bay Resort. (See ALJD 51: 17).

5. *Respondents Violated the Act by Preventing the Union from Collecting Dues at Turtle Bay Resort*

The ALJ properly determined that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing the Union's access to Turtle Bay by preventing the collection of dues at Turtle Bay Resort. (ALJD 52: 31-40). In particular, Ramos's conversation with and letter to Marsh on May 6, 2004, announced a unilateral change to prevent the Union from carrying out its duties of collecting dues. (Tr. 1: 170, Ramos; 4: 776-777, Marsh; GC Ex. 3A). On May 24, 2004, Respondents prevented the Union from collecting dues at Turtle Bay and summoned the police to evict them. (Tr. 9: 1787-1795).

Respondents argue in their brief that the Union had no prior practice of collecting dues on Turtle Bay property. This ignores the fact that the parties had an access provision that specifically permitted the Union access to Turtle Bay property to carry out its duties. Significantly, Human Resources Director Ramos testified that Respondents do not object to the Union's collecting dues on Turtle Bay property. (Tr. 18: 3798-99).

Respondents also argue that the Union was able to collect more dues on May 24, 2004, than on other days. However, Respondents conveniently forget to note that after being prohibited from collecting dues on Turtle Bay Resort property, the Union representatives went out to Kamehameha Highway, on public property across from the entrance to the Resort and far from the hotel itself, to collect dues. (Tr. 9: 1801-2).¹¹ Nevertheless, the

¹¹ Respondents state in their brief that Union Business Agents/Organizers Marian Marsh and Claire Shimabukuro also collected dues on that day, and Business Agents "[Clarence] Baijo and Decoite themselves returned to collecting dues on that same day." (RBS 123). Respondents' assertion is misleading. Respondents' argument improperly suggests that Marsh and Shimabukuro collected dues in Turtle Bay's employee cafeteria and Baijo and Decoite eventually did so too. However, in fact the record shows that Baijo and Decoite collected dues on Kamehameha Highway, far from the hotel itself, because Respondents prohibited them from collecting dues at Turtle Bay Resort. (Tr. 9:

amount of dues collected by the Union does not change the fact that Respondents unilaterally changed the Union's access to Turtle Bay by preventing the collection of dues at Turtle Bay Resort.

6. *Respondents Violated the Act by their Actions on February 12, 2004*

On February 12, 2004, Respondents unlawfully interfered with demonstrators on a public beach next to Turtle Bay Resort who were showing their support for the Union in its ongoing contract negotiations. Based on the credited evidence, the ALJ correctly found that Respondents "actions on February 12 in summoning the police, preventing the demonstrators from going onto a public beach, and evicting the demonstrators . . . violate Section 8(a)(1) of the Act." (ALJD 53: 43-46).

Respondents argue that the Union's activity was not protected, but rather the Union was trespassing on private land. (RBS 124-128). In support of this, Respondents cite the discredited testimony of Chief of Security Dougher. (RBS 125). Respondents also claim that the rally supporters sat down on Turtle Bay's "private property" grassy area for approximately 30 minutes. However, Respondents neglect to mention that this delay was caused by the police (called by Respondents) who would not permit the rally supporters to proceed on the public access to another public beach, Kawela Beach, while the police officers waited for further instructions from their sergeant. (Tr. 5: 912-913, Marsh).

1801-2). There is no evidence in the record as to where Marsh and Shimabukuro were when they collected dues, and Respondents cite no transcript pages.

B. UNLAWFUL SURVEILLANCE – COMPLAINT PARAGRAPHS 13, 14, 15, 19, 20

The ALJ correctly found that Respondents violated Section 8(a)(1) of the Act by engaging in surveillance of protected employee activity on a number of occasions. In particular, the ALJ found Respondents violated Section 8(a)(1) of the Act when: (1) they videotaped rally participants on March 25, 2004, as the demonstrators gathered in front of Turtle Bay Resort and entered the resort grounds (ALJD 54: 33-35); (2) they videotaped rally participants and took pictures of their license plates on April 2 and April 17, 2004 (ALJD 55: 17-19); (3) security guard Clayson Hanohano followed Union Business Agent Marsh around Turtle Bay Resort and followed her into the employee cafeteria as she talked to employees (ALJD 56: 22-23); and (4) they surveilled Union Organizer Kim Harmon (“Harmon”) and Turtle Bay Resort employees while Harmon and the employees were engaged in protected activity (ALJD 57: 12-15). Regarding the incidents of videotaping and picture taking of rally participants and demonstrators, the ALJ found that Respondents did not demonstrate a reasonable basis to anticipate misconduct from the rally participants nor did they provide a solid justification for their actions. (ALJD 54: 23-34; 55: 15-18).

In response to the ALJ’s findings, Respondents argue that their “monitoring activities are reasonable, justified, and legal.” (RBS 139). In support of their argument, Respondents cite *Washington Fruit and Produce Co.*, 343 NLRB No. 125 (2004), and *Saia Motor Freight Line, Inc.*, 333 NLRB No. 87 (2001). The facts of both cases are readily distinguished from the facts of the instant case. In particular, in *Washington Fruit*, the Board agreed with the administrative law judge’s factual finding that the respondents demonstrated legitimate reasons for videotaping the rally. In that case, the

union contacted respondent's president ahead of time and informed him that it was planning "a high-profile event" that consisted of a march from a train station to the front of respondents offices for a rally. The union further informed respondent's president that a large number of people would be marching, including high level union officials.

Washington Fruit, 343 NLRB No. 125 at *47. The judge found that respondents had reason to be concerned about their equipment and the safety of its employees. *Id.* at *3, *51. Given the particular circumstances of that case, the judge concluded, and the Board agreed, "any reasonable person" would have concluded that there was "a sufficiently high level of risk connected to such a demonstration to warrant some level of cover." *Id.*

In *Saia Motor Freight Line*, 333 NLRB No. 87, the Board found no violation where the Respondents established proper justification for taking the photographs. The Board found it significant that the respondent "did not photograph the handbillers when they first arrived at the entrance to its terminal and only did so when it became dissatisfied with [the] efforts of the police to minimize traffic congestion." *Id.* at *2. In the case, the Board cited *F.W. Woolworth*, 310 NLRB 1197 (1993) for "the principle that photographing in the mere belief that 'something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity.'" *Id.* (citation omitted).¹²

In this case, based on the credible evidence, in consideration of all of the circumstances, the ALJ found that Respondents did not demonstrate a reasonable basis to anticipate misconduct from the rally participants and provided no solid justification for its videotaping of them on March 25, 2004, before and as they entered Turtle Bay Resort

¹² On pages 148-149 of their Brief, Respondents cite a number of cases involving "visual surveillance" but not photographing or videotaping. These cases are not on point.

and on April 2 and 17, 2004. Respondents point to the February 12, 2004, rally as an incident that justified its future surveillance. (RBS 146). However, the ALJ found that there was no history of violence with union rallies and the demonstrators on February 12, 2004, did not trespass on Turtle Bay property. (ALJD 25-30).

Respondents offer little to no argument in support of their assertion that they properly surveilled Marsh and Harmon. (See RBS 150). Respondents argue that the surveillance was justified by “the Union agents’ recurring, disruptive behavior.” *Id.* Respondents make the same argument, word for word, that they made to the ALJ. As set forth in the ALJ’s decision, the ALJ rejected this argument “factually and legally.” (ALJD 56). As found by the ALJ, the Respondents have offered “no credible or reasonable basis for this surveillance.” ALJD 56-57.

Accordingly, the ALJ’s findings and conclusions that Respondents violated the Act by unlawfully engaged in surveillance on the dates discussed above should be affirmed by the Board.

C. DISPARAGEMENT AND THREAT – COMPLAINT PARAGRAPH 25

The ALJ correctly determined that Dougher’s disparagement of Union Business Agent Kim Harmon on March 5, 2005, coupled with his threat to discipline any employee who talked to Harmon, had a reasonable tendency to coerce employees or to interfere with their rights under Section 7 of the Act. (ALJD 58: 7-10). On March 5, 2005, Dougher went into a tirade against Harmon in the employee cafeteria in the presence of employees. Dougher threatened to discipline any employee who talked to Harmon and said that the NLRB did not control him and he was not interested in what the NLRB had to say. (Tr. 7: 1476-1478, 1481-1484, Harman; Tr. 7: 1493, Corrigan).

Respondents' Exception 328 pertains to the ALJ's conclusion that Dougher's actions violated the Act. In support of this Exception, Respondents rely heavily on Dougher's version of events, which was discredited by the ALJ. (ALJD 15-16). Once again, Respondents present an improper and misleading version of the facts.¹³ Accordingly, because Respondents have offered no credible evidence in support of this Exception, the ALJ's finding and conclusion that Dougher's actions on March 5, 2005, as set forth in the ALJ Decision, violated the Act should be adopted by the Board.

D. DISCIPLINE OF JEANNIE MARTINSON – COMPLAINT
PARAGRAPH 26

The ALJ properly determined that Respondents' violated Sections 8(a)(1) and (3) of the Act when they disciplined Jeannie Martinson ("Martinson") for her protected concerted activity of using the word "scabs." Respondents except to this conclusion.¹⁴

On May 22, 2004, the day after Respondents' employees went out on a one day strike organized by the Union, Martinson used the word "scabs" while talking to coworkers to describe those who had worked during the strike. (Tr. 2: 347-348, Martinson; Tr. 2:356, Toy). In particular, Martinson said to a coworker, "Oh, looks like we are working with a bunch of scabs." (Tr. 348, Martinson). Martinson was joking with her coworker and they both were laughing in the conversation. (*Id.*) Martinson did not use the word "scabs" in connection with any vulgarity or threats. (Tr. 2:342-344, Martinson; Tr. 2: 356-357, Toy). The alleged victim, Leslie Toy ("Toy") did not feel

¹³ For instance, in Respondents version of events, not supported by the transcript, Business Agent Kim Harmon stealthily "entered a remote management area where she had no justifiable reason to be." (*See* RBS 151). In fact, Harmon was seeking out a manager who said shortly before on that day that he would get a memo for her. (Tr. 1473-1476, Harmon).

¹⁴ *See* Exceptions 186, 187, 336, and 337.

threatened by Martinson's use of the word "scabs." (Tr. 2:359-360, Toy). In fact, Martinson did not direct the use of the word "scabs" to Toy or any other employee. (Tr. 2:347-348, Martinson; 2:356, Toy). Toy did not complain to Respondents' management or to its Human Resources office about Martinson's passing use of the word "scab." Nevertheless, on May 27, 2005, Respondents issued Martinson a written discipline for her May 22, 2005, use of the word "scabs." (Tr. 2:327-330, Ramos; GC Ex. 21).¹⁵

On May 28, 2005, Ramos issued a memo to all employees informing them:

You need to remain respectful of all your fellow employees regardless of differing opinions. Those that chose to participate in the action have a right to do so and their decision to walkout, picket, etc., must not be subject to snide remarks, harassment, and especially no confrontation either on the picket line or at work. Those that chose to work during an action (walkout) have the right to work and their decision to work should also not meet with snide remarks (scab), harassment and confrontation on the picket line and at work. Please be advised that any employee displaying unprofessional conduct towards another employee regardless of their position will be disciplined accordingly.

.....

Lastly, there is no kind way to share with you that we will not tolerate under any circumstances any unprofessional, inappropriate, unethical, lewd, or bullish behavior from anyone. If you are subject to such behavior please notify me immediately.

(GC 22).

In *Nor-Cal Beverage Co*, 330 NLRB 610 (2000), as set forth by the ALJ, "an employer violates Section 8(a)(1) and (3) of the Act when it disciplines an employee for using the word 'scab' in the course of protected activity, and the employee's statement is unaccompanied by any threat or physical gestures or contact." (ALJD 63). In this case,

¹⁵ The disciplinary notice states: "On 5/22/05 you displayed inappropriate, disrespectful, and unjustified behavior toward a fellow employee by calling her a 'SCAB.'" It goes on to state under "potential corrective action should this issue recur": "Decision making leave, or if your behavior is more severe, a suspension/termination." GC Ex. 21.

the ALJ concluded that under all of the circumstances, Martinson was engaged in protected activity when she said to her coworker, “Oh, looks like we are working with a bunch of scabs.” Because Respondents disciplined Martinson for this protected activity, the ALJ concluded Respondents’ discipline of Martinson violated Section 8(a)(1) and (3) of the Act. (ALJD 63: 9-14).

In support of their Exceptions, Respondents claim that Toy felt Martinson’s “scab” conversation was “insulting.” (RBS 93). Apart from being irrelevant, this is simply false. Toy did not so testify and the transcript pages Respondents cite do not support this assertion.¹⁶ Respondents also rely on the testimony of Ramos, whom the ALJ discredited.

Thus, because Respondents have offered no valid argument in support of these Exceptions, the ALJ’s finding and conclusion that Respondents violated the Act by disciplining Martinson for engaging in protected activity should be adopted by the Board.

E. SUSPENSION OF TIM BARRON – COMPLAINT PARAGRAPH 26

The ALJ correctly found that Respondents violated Sections 8(a)(1) and (3) of the Act when they suspended Tim Barron (“Barron”) for five days because he called fellow employee Eric Baeseman (“Baeseman”) a scab in the course of protected activity.

Respondents have filed exceptions to this conclusion.¹⁷

On June 4, 2005, Barron had a conversation with his co-worker Baeseman about the May 21, 2005, one day strike. Barron asked Baeseman whether he had crossed the

¹⁶ In fact, Toy when asked on cross examination a general question about the meaning of the term “scab” and whether she would “consider it an insulting or a derogatory term,” Toy merely responded, “I guess it is insulting.” (Tr. 362-63, Toy).

¹⁷ Respondents’ Exceptions 188, 189, 190, 191, 192, 338, 339. A number of these exceptions (188, 189, 192) concern credibility, see footnote 4, above.

picket line. When Baeseman answered in the affirmative, Barron said, “Did you know that people are going to think of you as a scab?” (Tr. 3:450-451, Barron). Barron went on to ask Baeseman whether he knew that 170 people crossed the picket line, 220 did not cross the line, and only 70 people crossed the line. (Tr. 3:451, Barron). Baeseman replied that he would cross the line if there was another strike, to which Barron responded, “Well, I guess people are going to think of you as a scab.” (Tr. 3:452, Barron). At that point, Baeseman went to make a complaint to the security department. During the interaction between Baeseman and Barron, which lasted only about a minute and a half, there was no violence and no threats, or vulgarity. (Tr. 3:451-453, Barron; 10:2106-2107, Baeseman). Thus, as the ALJ concluded, Barron’s statements were protected.

On June 10, 2005, Dougher suspended Barron pending further investigation based on “circumstances involving a fellow employee.” (Tr. 3: 455, 459, Barron; GC 23). On June 14, 2005, Ramos sent International Organizer for UNITE HERE! International, Laura Moye, a letter upholding Barron’s suspension for his use of the word “scab.” (Tr. 2:334, Ramos; GC 24). Ramos testified that Barron was suspended “because he called the employee a scab and when the employee asked him to stop, he continued to call him a scab.” (Tr. 3: 333-334, Ramos). Thus, as the ALJ concluded, Respondents admitted that they suspended Barron for making those protected statements. In light of these facts, the ALJ properly concluded that Respondents violated Sections 8(a)(1) and (3) of the Act when they suspended Barron for uttering protected statements. *See Nor-Cal Beverage Co*, 330 NLRB 610 (2000).

With no facts or evidence to support their exceptions, Respondents resort to attacking the ALJ's credibility findings and to deeming the ALJ "biased." Respondents also cite the discredited testimony of Baeseman. (RBS 95-98; see ALJD 32:49). Respondents' baseless arguments should be rejected.

F. TERMINATION OF MARK FELTMAN – COMPLAINT PARAGRAPH
26

The ALJ correctly found that Respondents violated Section 8(a)(3) and (1) of the Act in terminating the employment of Mark Feltman ("Feltman"). Respondents have excepted to the ALJ's conclusion.¹⁸ In the fact portion of their brief pertaining to Feltman's unlawful termination, Respondents rely heavily on the testimony of both Derek Mendivil and Mendivil's supervisor and friend Tonilynne Cano. (See RBS 98-104). The ALJ discredited both of these witnesses. (ALJD 38:17; 39:2; 39:27, Mendivil; ALJD 38:38, Cano).

Respondents assert that there was no "motivational link" between Feltman's union activity and his termination. (RBS 165). However, the ALJ found a number of such "motivational links" based on the credited evidence. (ALJD 65-67). In this regard, the ALJ found direct evidence of Union animus by way of comments that Human Resources managers, including Ramos, made directly to Feltman.¹⁹ Respondents do not

¹⁸ Respondents' Exceptions 194-200, 340-349.

¹⁹ In particular, Ramos, surprised to see Feltman wearing an union button said to Feltman, "I thought you signed the antiboycott petition that Roger [Corpuz] was circulating around the hotel." When Feltman said no, Ramos said, "Oh, oh." (Tr. 3:516, Feltman). Human Resources Training Manager, Sandi Grumanis saw Feltman wearing the union button and said "I thought you were [a] more sensible guy, but who am I." (Tr. 3: 517, Feltman).

dispute that these comments were made, but rather characterize them as mere “reactionary statements.” (RBS 166).

Respondents also except to the ALJ’s finding of antiunion animus based on Respondents’ shadowing of union representatives whenever they came on Turtle Bay Property and based on Respondents numerous 8(a)(1) violations. (RBS 166-170). As set forth in this brief, the ALJ properly concluded that Respondents violated the Act by, among other things, shadowing union representatives, summoning the police to assist in evicting the union representatives from Turtle Bay, and surveilling union and protected activities. Thus, Respondents’ exception is without merit.

Respondents except to the ALJ’s conclusion that Feltman was treated differently from similarly situation employees. Respondents attempt to distinguish the facts of the instant case from incidents involving other employees, including one incident where employee David Stone (“Stone”) called Mendivil a “fucking ass” and squirted him with a water gun. For this incident Stone received no discipline. Despite Respondents’ assertions to the contrary, the ALJ properly found that Respondents would not have taken the same action against Feltman in the absence of his protected activity. As explained by the ALJ:

Feltman’s ‘misconduct’ stripped of the Respondents’ unproven and inappropriate characterization, amounts to cursing at a coworker. When Stone called Mendivil the same epithet, and exacerbated the name-calling by shooting Mendivil with a water gun, Stone was not even disciplined. When Delosantos used similar coarse language to a coworker in a threatening manner and in threatening circumstances, she was given a written warning.

ALJD 67: 21-24.

Respondents also claim that they have not shifted explanations in their reasons for terminating Feltman. (RBS 171). Respondents claim that Feltman was terminated in

response to their “zero-tolerance” policy. However, the Corrective Action Notice notifying Feltman of his termination does not list Respondents’ “zero-tolerance” policy as the reason for his termination. (GC Ex. 27).

In the end, Respondents have offered no arguments not squarely addressed by the ALJ. Thus, because Respondents have offered no valid arguments in support of these Exceptions, the ALJ’s finding and conclusion that Respondents violated the Act by terminating Feltman should be upheld.

G. THREAT OF CLOSURE – COMPLAINT PARAGRAPH 25

The ALJ correctly found that the Respondents, through a memorandum dated October 22, 2004 from Turtle Bay Resort General Manager Abid Butt (“Butt”) and distributed to all employees, threatened to close Turtle Bay in retaliation for the employees’ protected concerted activity, and that this threat violated Section 8(a)(1). (ALJD 59). Butt states in the memorandum that due to “low occupancy, we have found it necessary to make adjustments in operational services.” (GC 6). Butt specifically attributes this reduction in “opportunity for you to earn an income” to the Union. (GC 6). Butt goes on to state in the memo that:

Apparently, the union believes that its boycott and picketing of Turtle Bay Resort is going to cause Benchmark to accept the two-year contract demanded by the union big wigs in Washington. Unfortunately for you, your families, and for everyone associated with Turtle Bay, the union has made a terrible mistake. We would rather close the Resort than allow you and your families to be used as hostages.

(GC 6).

Respondents’ filed several exceptions to the ALJ’s conclusion.²⁰ Respondents in their brief claim that Butt’s memo is merely a “factual presentation” stating that if the

²⁰ These include Respondents’ Exceptions 176-178 and 329-331.

business is not there, then sooner or later work hours will decline and there will be “nothing there for everyone to work with.” (RBS 90). According to Respondents, Butt’s statement that “[w]e would rather close the Resort than allow you and your families to be used as hostages” is an “allowable literary exaggerated statement,” rather than a threat, and that “[i]t is implausible that Butt would threaten to or actually close the hotel he was charged with operating.” (RBS 90-91, 156).²¹ Respondents offer no case law in support of their exceptions other than cases distinguished by the ALJ.

It is settled law that an employer’s threats of retaliation in response to protected activities violate Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In this case, as the ALJ found, Butt directly threatened to close Turtle Bay Resort in response to protected activity (the boycott and picketing of Turtle Bay). In doing so, as the ALJ correctly found, the Respondents’ violated Section 8(a)(1) of the Act.

H. RULES AND REGULATIONS – COMPLAINT PARAGRAPH 24

Respondents have filed no specific exceptions to the ALJ’s findings and conclusions regarding Complaint paragraph 24 concerning rules and regulations governing Turtle Bay’s employees. Respondents merely make some vague statements that they “address many of the events set forth by the ALJ in his section entitled ‘Rules and Regulations Governing Turtle Bay’s Employees’ in the “Analysis” section and elsewhere in the brief.” (RBS 64-65). Accordingly, the ALJ’s decision and order finding

²¹ Respondents claim in the Brief that in addition to the Union’s boycott campaign against Turtle Bay Resort, Butt also cited the “fallout from the tragic events of September 11, 2001,” as a cause of “TBR’s precarious financial condition.” (RBS 90). However, Butt did not testify to this and Butt’s October 22, 2004, memorandum makes no reference to September 11, 2001.

that Respondents' handbook rules and regulations violated Section 8(a)(1) of the Act should be adopted by the Board. (*See* ALJD 44-47).

I. REQUESTS FOR INFORMATION – COMPLAINT PARAGRAPHS 7, 8, AND 9

The ALJ correctly found that Respondents violated Section 8(a)(5) and (1) of the Act by unreasonably delaying in the production of information requested by the Union on April 28, 2004, and August 30, 2004, regarding condominiums that Turtle Bay was constructing and by not providing wage information requested by the Union on September 13, 2004. (ALJD 43: 21-25). Respondents have filed exceptions to these conclusions.²²

Respondents do not dispute the relevance of the information requests. Rather, Respondents state that they provided the information regarding the condominiums to the Union shortly after it became available and that they have provided wage information to the Union. However, Respondents' contentions are not supported by the facts. Thus, Butt testified that the condominiums were completed but for the final touches in April or May of 2005, yet Respondents did not respond to the Union's April and August 2004 requests until September 2005. (Tr. 12:2642). Butt also testified that he possessed the same information in April 2004 as he did in September 2005, yet he did not respond to the Union's requests until September 2005. (Tr. 12:2643-2644). Accordingly, the evidence supports the ALJ's conclusion that Respondents' September 14 and 15, 2005, answers to the Union's April 28 and September, 2004, requests for information were untimely and a violation of the Act.

²² See Respondents Exceptions 201 to 203. It is worth noting that Respondents devote to these particular exceptions only a short four line paragraph in their extensive Brief in Support. (*See* RBS 104).

Regarding the wage information requested by the Union on September 13, 2004, Respondents claim only that they have provided this information to the Union. Respondents base this claim on the testimony of Human Resources Director Nancy Ramos, which was discredited by the ALJ due to its vagueness. (RBS 104; ALJD 42:8). In addition, Ramos's testimony failed to establish that Respondents actually sent the information to the Union. (Tr. 18:3769). Thus, the ALJ correctly found that Respondents violated Sections 8(a)(1) and (5) of the Act by not providing to the Union the wage information requested on September 13, 2004.

J. VALIDATION OF UNION REPRESENTATIVES' PARKING AT
TURTLE BAY – COMPLAINT PARAGRAPH 22

Respondents filed a number of exceptions regarding the ALJ's findings and conclusions regarding the validation of Union representatives' parking at Turtle Bay.²³ Respondents' exceptions in this regard are baseless and should be denied.

Counsel for General Counsel filed two exceptions regarding the ALJ's findings concerning the unilateral change in parking validation. In particular, Counsel for the General Counsel excepted to the ALJ's findings: (1) that there was no evidence of the amount the Respondents required union representatives to pay for parking; and (2) that Respondents' unilateral change in parking privileges did not violate Section 8(a)(5) and (1) of the Act. (Counsel for General Counsel's Exceptions 2 and 3). A complete statement of Counsel for General Counsel's basis for these exceptions is set forth in Counsel for the General Counsel's Brief in Support of Limited Exceptions.

²³ Exceptions 183-185, 332-335.

VI. CONCLUSION

It is respectfully submitted that the ALJ's credibility rulings were correctly based on witness demeanor and should not be disturbed, and that the ALJ's findings of facts and conclusions of law were fully supported by the record evidence, exclusive of the Limited Exceptions filed by Counsel for the General Counsel. To this extent, accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT Honolulu, Hawaii, this 1st day of February 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS has this day been served as described below upon the following persons at their last-known address:

1 copy	Daniel T. Berkley, Esq. Gordon & Rees LLP 275 Battery Street, Suite 2000 Embarcadero Center West San Francisco, CA 94111	Via Federal Express
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DATED at Honolulu, Hawaii, this 1st day of February 2007

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